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ANNOTATED

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VOL. 36

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CASES REPORTED

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TABLE OF ANNOTATIONS

(Alphabetically Arranged)

APPEARING IN VOLS. 1 TO 36 INCLUSIVE.

SMITH v. DARLING.

(Annotated.)

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, J.J., May 1, 1917.

LIMITATION OF ACTIONS (§ II M—95)—REDEMPTION OF MORTGAGE—DISABILITIES.

The disability sections of the Limitations Act (R.S.O. 1914, ch. 75), do not apply to an action to redeem a mortgage.

[*Faulds* v. *Harper*, 11 Can. S.C.R. 639; 9 A.R. (Ont.) 537, referred to; 32 D.L.R. 307, 36 O.L.R. 587, reversing 9 O.W.N. 385, affirmed. See annotation following case.]

Statement.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 32 D.L.R. 307, 36 O.L.R. 587, reversing the judgment at the trial in favour of the plaintiff. Affirmed.

The plaintiff's action was to redeem mortgaged land and the Statute of Limitations was pleaded in defence. It was admitted that the statute barred the action unless the plaintiff was relieved by the provisions of sec. 40 of the Real Property Limitations Act, R.S.O. (1914), ch. 75, which was the only question to be decided on the appeal.

A. B. Cunningham, for appellant.

J. A. Jackson, for respondent Darling.

J. L. Whiting, K.C., for respondents Toner.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—The case has been very elaborately considered in the Courts below and I do not find it necessary to deal with the arguments at any length.

The appellant admits that unless he is relieved by the provisions of sec. 40 of the Limitations Act because of his disability his claim is barred by the Act. I agree with the conclusion at which the Judges of the Appellate Division unanimously arrived that we ought to follow the decision in *Faulds* v. *Harper*, 9 A.R. (Ont.), 537, to the effect that the disability clauses of the Real Property Limitation Act do not apply to actions of redemption. This decision followed the English cases of *Kinsman* v. *Rouse*, 17 Ch. D. 104, and *Forster* v. *Patterson*, 17 Ch. D.

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132, construing the Imperial Act which for material purposes cannot be distinguished from the Ontario statute.

If the Chief Justice of Ontario had been content to rest his judgment upon the authority of this case it would have been unnecessary to say more, but in the course of his lengthy reasons he denies one of the grounds on which *Faulds* v. *Harper* 9, A.R. (Ont.), 537, is supported, viz., that an action to redeem is not an action to recover land.

He says: "It is true that a suit to redeem has been decided to be a suit to recover land." He does not refer us to any case in which it was so decided and I myself know of none. Reference is made indeed to an *obiter dictum* of Strong, J., in *Faulds* v. *Harper*, 11 Can. S.C.R. 639, to the effect that the House of Lords having decided in *Pugh* v. *Heath*, 6 Q.B.D. 345, 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land, it follows *a fortiori* that a redemption suit is also an action or suit for the recovery of land.

I desire to speak with the greatest respect of the distinguished Chief Justice who presided for so long over this Court, but the dictum cannot of course carry the same weight as a considered judgment in point. I do not understand how there can be any *sequitur*.

The action of foreclosure is different from the action to redeem in that by the former the mortgagee, who has the land merely as security for his debt, claims in default of payment to be adjudged the owner of the land. The action to redeem on the contrary supposes that the mortgagor is the owner of the property and seeks on payment of the amount of the debt for which it is security to have it discharged of the encumbrance.

I agree with the view expressed by Jessel, M.R., in *Kinsman* v. *Rouse*, 17 Ch. D. 104, that an action to redeem is not, properly speaking, an action to recover land. Perhaps as Burton, J., said in *Faulds* v. *Harper*, *supra*, a suit to redeem may be in a sense a suit to recover land. It is not an ordinary action to recover land within the meaning of the Limitations Act.

The appeal should be dismissed and as I cannot see that the case admits of any doubt the respondents are entitled to their costs both here and in the Courts below.

Davies, J.

DAVIES, J.—I concur with Anglin, J.

IDINGTON, J. (dissenting):—The question raised herein is whether an infant entitled to redeem and recover mortgaged lands may be barred by the mortgagee's possession for 10 years which possibly had begun to run the day after the infant's birth.

It is stoutly maintained in argument and indeed seems to have been held in the Court below, that such has been the state of law in Ontario, at least ever since the Real Property Limitation Amendment Act, 1874, came into force.

I cannot entertain that view as ever having been correct. I need not, as will presently appear, for the purposes of this case, go so far as this rejection, which I express of such view, may imply.

Inasmuch, however, as the respondent's contention is that the Real Property Limitation Act, as it stood in the R.S.O. of 1897, is what should govern the rights of the parties herein and alleged to be in substance and effect identical with the like Act as it stood in R.S.O. 1877, which was passed upon by the Court of Appeal for Ontario in 1883 in the case of *Faulds* v. *Harper*, 9 A.R. (Ont.), 537, adversely to the view I hold, I may be permitted to suggest in a few sentences the line of thought which followed up should demonstrate the fundamental error of that decision and the argument now rested thereon.

That Court was dealing with the amending Act of 1874 above referred to, which did not come into force till July 1, 1877, by which time the legislature had passed, on the 2nd March, 1877, the bill for bringing into force the R.S.O. of that year then contemplated save as to the incorporation therein of the legislation of that session.

None of that legislation, so far as I can see, dealt with what we are concerned with herein.

The legislature had thus provided, before the amending Act came into force at all, for its consolidation and hence for a declaration of the law as contained therein and in the prior relevant Acts thus to be substituted by the consolidation.

Much, I think too much, was made then and is yet of the provision of the Act expressing its purpose, when introducing and providing for enforcing the consolidation as to the latter not being new law.

It seems to me that the gist of the whole sec. 10 so providing, and which reads as follows:—

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10. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation, and as declaratory, of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted

is in the words "as declaratory of."

True, the official proclamation was not issued till December 31, 1877. Yet I think the foregoing facts must be considered as relevant to a finding of the actual intentions of the legislature.

Again, the amending Act itself, by sec. 15 thereof, provided that the Acts so amended should be construed as in force therewith unless so far as inconsistent with the amending Act.

When almost the whole purpose of the amending Act was to shorten the limitation period, as the recital shews, I fail to see why we should find anything inconsistent in reading sec. 5 thereof as if it had been (using the very words of sec. 15) "substituted in such statute," *i. e.*, the Consolidated Statutes of Upper Canada of 1859, for sec. 45 thereof, which had been in the case of *Hall* v. *Caldwell* 7 U.C.L.J. 42, 8 U.C.L.J. 93, so interpreted in the Court of Error and Appeal in accord with what is now urged by appellant as applicable herein.

Be all that as it may, I think the revision of 1877, construed as Courts are bound by above quoted sec. 10 to construe it, as declaratory of the law, should be read as it stands, and so read I see no difficulty in appellant's way.

I may also point out that the clear opinion of this Court in same *Faulds*' case, 11 Can. S.C.R. 639, was against the construction adopted by the Court of Appeal for Ontario, although that opinion was perhaps not necessary for the reversal which was granted by the judgment of this Court.

The opinion thus expressed has generally been referred to as an *obiter dictum*, but the more carefully one reads the judgment, he is driven to doubt it was not in the last analysis necessary to form such an opinion to maintain the judgment of reversal at all.

Moreover, the decision in *Heath* v. *Pugh*, 6 Q.B.D. 345, 7 App. Cas. 235, seems to have been relied upon for the opinion so expressed, and conclusively to establish the proposition that a suit for foreclosure is an action to recover lands within the meaning of the words used in the first section of the English Limitations Act, and in the Ontario Act so far as copied therefrom. Hence I think the correlative suit for redemption must likewise be so held.

As I suggested in argument, I am of the opinion that this case should be decided upon the Limitations Act, being 10 Edw. VII., ch. 34, passed March 10, 1910, long before the time had run for respondents to have acquired by possession any title in or right to bar appellant's remedy to recover the lands in question by virtue of any statutory limitation.

That Act was an independent piece of legislation which specifically repealed, by sec. 60 thereof, all the former Acts bearing in the slightest upon what is in question herein.

As I could not get any answer from counsel for respondent explaining why this statute should not govern, save that the revision of 1897, was in force when possession by his client began to run, I imagine there is no other answer.

I do not think it is a statute of limitation which happened to exist at any time before the title acquired by possession has extinguished that of him claiming, or at all events, barred or taken away his right of recovery, which can be made applicable and enforceable, but only a statute of limitations which either bars the remedy or extinguishes the title of him adversely affected by possession.

Clearly that of 1910 can alone be so depended on by the appellant or respondent, as defining and settling their relative rights.

Then the exception given therein in favour of such persons suffering disability as appellant was, whose rights are saved by sec. 40 of said Act, which was that in truth which was consolidated in the R.S.O. 1914, and by sec. 40 thereof, exactly the same (except two words not capable of altering the sense) would seem to me to be almost too clear for argument had we not actual proof of much argument in and about same by means only, however, of harking back to something repealed.

The said sec. 40, relating, as it expressly does, to the period of ten years or five years (as the case may be) herein limited, I am unable to see how there should be any doubt in regard to the construction of the Act if allowed to stand upon its plain reading without confusing it with other Acts it repealed, and other things which place no limitations upon the language used.

And when, by the revision and consolidation which took place four years later, this Act was consolidated with others in R.S.O.

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1914, its adoption in its entirety was such as made of it a continuous uniform statutory definition of the relation of the parties hereto, from the time when that period of time brought in question thereby first began to run, up to the date of the bringing of this action.

Indeed, as already pointed out, virtually all prior Acts on the subject consolidated in ch. 133, R.S.O. 1897, except one section not bearing on what we have to deal with, had stood repealed for 4 years.

Again, if we consider the scope and purpose of the Act as a piece of independent and all comprehensive legislation on the subject, and we find it providing, as it does by sec. 24, for the common case of mortgage and other charges on land being barred by ten years after a present right to receive the money had accrued to some person capable of giving a discharge for or release of the same, thus obviously guarding the rights of infants, idiots and lunatics, it puzzles me to understand why the same classes as mortgagors or those who claimed under mortgagors, should intentionally be excluded from the like protection. I am clear it never was so conceived by the legislature.

Certainly there is in the frame of the Act and the language used in the parts involved herein, no resemblance between either of these Acts and that upon which the late Sir George Jessel or Bacon, V.C., proceeded in the respective decisions given by either of them and so much relied upon.

There was more of something akin to analogy between the amending Act which the Court of Appeal for Ontario chose to act upon and the English Act. But why should that trouble us now? Why seek to rest a judgment herein upon the confusion of the past, obviously a possible means of injustice, when the legislature has made all clear and a possible source of injustice has been eliminated?

This is one of many case wherein English judicial authority must be examined closely in relation to the Act construed in order to see, that the Act professing to deal with the same kind of subject matter as our own legislature may have dealt with, is in truth the same, and its purposes expressed in the same language.

The English decisions on analogous Acts may be most instructive, and no lawyer here should pass them idly by, but often they proceed as in the case before us upon an Act so differently framed

that we cannot say they are in such cases authorities we are bound to follow, but rather may say are to be discarded, when found likely to confuse our thought and perpetuate injustice.

I think the appeal should be allowed with costs here and in the Appellate Division as against respondent Darling who should also bear the costs of the Toners.

There is a doubt in my mind as to the exact meaning of the formal judgment as it stands, and, rather than add to the confusion, I think, if the parties cannot agree as to the result flowing from the foregoing result, they should be left to speak to the minutes.

Duff, J.

DUFF, J.:—The single question involved in this appeal can be stated and discussed without reference to any of the facts which have given rise to the litigation. The question is this—do the disability clauses of the Limitations Act (Ont.), ch. 75, R.S.O. 1914, (sec. 40 *et seq.*), apply in the cases provided for by secs. 20, 21 and 22, relating to the time limit on actions of redemption brought by a mortgagor against a mortgagee who has obtained the possession or the receipt of the profits of some part of the land or the receipt of any rent comprised in his mortgage.

I propose first to consider the provisions of the statute as it now stands in their bearing upon this question, that is to say of Part 1. The leading enactment is sec. 5, which I quote in full:—

> No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same. 10 Edw. VII. c. 34, s. 5.

Sec. 6 contains a series of provisions laying down the rule for determining in each of the classes of cases dealt with, when the right to make an entry or distress or bring an action to recover land or rent shall for the purposes of the Act be deemed to have "accrued"; the point of time, that is to say, from which the statutory period is to run in these cases in which, including of course all the cases falling within sec. 5, the time limit is calculated from the accrual of the right.

These provisions of sec. 6 obviously are of no assistance for determining the effect or for dictating the application of sec. 20 or the two succeeding sections, 21 and 22; that is so because the

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time limit fixed by these sections upon the mortgagor's action for redemption in the particular case dealt with, namely, where the mortgagee is in possession of the mortgaged property in whole or in part, is calculated not from the time at which the right to bring an action for redemption accrues to the mortgagor, but from the time when the mortgagee has obtained possession; *Re Metropolis and Counties Building Society*, [1911] 1 Ch. 698, at 706-7; and it may be added that although it is not difficult to bring a mortgagee's action of ejectment, or a mortgagee's action for foreclosure within the third sub-section of sec. 6, in order to determine the time of the accrual of his right within the meaning of sec. 5, it is not easy to find in any of the provisions of sec. 6 language which appears to contemplate a mortgagor's action for redemption.

Sec. 20 and the complementary provisions contained in secs. 21 and 22 are substantive provisions not organically related to secs. 5 and 6, and not depending for their operation upon the ascertainment, through statutory definition or otherwise, of the time when the mortgagor's right to bring an action of redemption "accrues."

Turning now to sec. 40, that section provides, speaking broadly, that where a disability exists at the date when the right to bring an action to recover land or rent accrues at the expiry of the period of 10 years or 5 years, limited in the preceding sections, the period shall be extended to the end of a further 5 years or until the time when such disability shall have ceased, whichever happened first.

The application of this section involves the determination of the time when the right in question accrues; the section is dealing with periods of limitation calculated from that point of time; it connects itself naturally with secs. 5 and 6 and fits in with them and it is perfectly obvious that it was framed with direct reference to them.

It is impossible to affirm any such thing as to its relations with sec. 20. I do not say that it is altogether a misnomer to describe an action of redemption against a mortgagee in possession, as an action for recovery of land. I am inclined to think that from the language used in *Heath* v. *Pugh*, 6 Q.B.D. 345, at 352, by Lindley, J. (he is alluded to by Lord Selborne in appeal as a Judge "especially familiar with equity"), he would have thought it was

not. It is nevertheless true, that Sir George Jessel had no hesitation in declaring that "action for recovery of land" is not an apt description of an action for redemption, the mortgagee being in possession, *Kinsman* v. *Rouse*, 17 Ch. D. 104, and Lord St. Leonards appears to have held the same view. But the most formidable difficulty in the way of connecting sec. 40 with sec. 20, arises from the circumstances already mentioned, that sec. 40 contemplates a period of limitation calculated from the date of accrual of the right of action, while the time limit laid down by sec. 20 for actions of redemption, is determined by reference to a date which has no necessary relation to the accrual of the right to commence the action. In order to meet this difficulty and to make sec. 40 applicable to cases arising under sec. 20, it is necessary to read the words in sec. 40: "time at which the right . . . to bring an action . . . first accrues as herein mentioned," as the equivalent of "time from which the periods of limitation herein provided for, begin to run, as herein mentioned." I think such a construction could not be supported. There is nothing in sec. 20 or sec. 40 either in language or substance which justifies the importing into sec. 20 of a qualification based on sec. 40. That section and the succeeding sections find their natural and, I think, their full effect when they are applied to cases arising under secs. 5 and 6 and to any other cases, if there be such, where the period of limitation begins to run from the date of the accrual of the right of action.

I conclude, therefore, that the statute as it now stands, when due effect is given the structure of the relevant sections, read as a whole, gives no support to the appellant's claim. I should not have found it necessary to examine the history of the legislation, but I have, however, attentively considered the discussion of the subject in the judgment of the Chief Justice of Ontario, which shews very clearly that such an examination would afford confirmatory grounds for the view at which I have arrived.

As to *Faulds* v. *Harper*, 9 A.R. (Ont.), 537, I have only to repeat that the question upon which we have to pass is still unsolved, after one has reached the conclusion that an action for redemption against a mortgagee in possession may for some purposes, be considered an action for the recovery of land. I should be disposed indeed to think it is so within the meaning of

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sec. 16 of the Limitations Act, the question, as I have said, is whether it is an action to recover land within the meaning of sec. 40 of the Limitations Act, and that is a question which must, to my thinking, be decided, as I have already said, with reference to the enactments of the statute read as a whole.

ANGLIN, J.:—The material facts of this case are fully stated in the judgment below, 32 D.L.R. 307, 36 O.L.R. 587. All the authorities bearing upon the important question which it presents —whether the disabilities sections of the Real Property Limitations Act of Ontario are applicable to "actions to redeem"—are there so fully, and, if I may say so with respect, so ably discussed by the Chief Justice of Ontario, that any further detailed reference to them would be supererogatory. It is perhaps needless to add that they have, however, been carefully examined and fully considered.

I agree with the Chief Justice that the opinion expressed by Strong and Henry, JJ., in *Faulds* v. *Harper*, 11 Can. S.C.R. 639, that the disabilities sections apply to actions of redemption —must be regarded as obiter. Mr. Justice Strong, with whom Ritchie, C.J., Fournier and Taschereau, JJ., concurred, certainly disposed of that appeal on the ground, which had been taken by Spragge, C.J.O., in the Court of Appeal, 9 A.R. (Ont.) 537, that the possession of the defendant was not that of a mortgagee but that of a fraudulent purchaser, and that the case was therefore not within the purview of the section of the statute which limits the time for bringing an action to redeem. There is no English decision upon the question presented which binds us—*Kinsman* v. *Rouse*, 17 Ch. D. 104, and *Forster* v. *Patterson*, 17 Ch. D. 132, the two authorities relied upon by the appellant, having been decisions of single Judges. Nor is there any such well established line of authority in the Province of Ontario as it would be undesirable that we should disturb. The view which prevailed in the Upper Canada Court of Error and Appeal in *Hall* v. *Caldwell* 8 U.C.L.J. 93, was not accepted by the Ontario Court of Appeal in *Faulds* v. *Harper*, 9 A.R. (Ont.) 537, where the majority of the Court approved and accepted the decisions in *Kinsman* v. *Rouse*, 17 Ch. D. 104, and *Forster* v. *Patterson*, 17 Ch. D. 132, overruling a Divisional Court which had declined to follow them, 2 O.R. 405. The view of the Court of Appeal was not accepted in this Court

by Strong and Henry, JJ., who preferred that of the Court of Error and Appeal in *Hall* v. *Caldwell*, 8 U.C.L.J. 93. The question may, therefore, be regarded as quite open, if not *res integra*, in this Court.

I should here state that there was no material difference between the terms and the collocation of the material sections in ch. 108 of the R.S.O. 1877, with which the Courts dealt in *Faulds* v. *Harper*, *supra*, and the corresponding terms and collocation in the Consolidated Statutes of 1859, ch. 88, upon which *Hall* v. *Caldwell*, *supra*, had been decided. In both statutes the disabilities sections followed the section dealing with actions to redeem, and the "as aforesaid" in sec. 43 of 1877 was substantially the equivalent of the "hereinbefore mentioned." in sec. 45 of 1859. As now, in neither statute did the section dealing with actions to redeem contain any reference to disabilities.

Courts of equity, applying the provisions of the statute of 21 Jac., 1 ch. 16, to redemption suits in equity by analogy held plaintiffs therein to be entitled by a like analogy to the benefit of the disabilities section of that Act. *Beckford* v. *Wade*, 17 Ves. 87, at 99; *Cook* v. *Arnham*, 3 P. Wms. 283, at 287, note (*w*). But suits in equity were brought directly within the Imperial Limitations statute, 3 & 4 Wm. IV., ch. 27, by sec. 24 thereof, and they were likewise expressly provided for in section 32 of the Upper Canada statute, 4 Wm. IV., ch. 1, which was carried into the Consolidated Statutes of 1859 as sec. 31 of ch. 88 and continued in the Ontario revision of 1877 as sec. 29 of ch. 108. This section was dropped from the revision of 1887, presumably because thought unnecessary after the introduction of the Judicature Act of 1881. Suits for redemption, specially provided for by sec. 28 of the Imperial Act of 3 & 4 Wm. IV., and by sec. 36 of the Upper Canada statute, 4 Wm. IV., ch. 1, are still explicitly covered in like terms by sec. 20 of the present Ontario statute. Since the statute of Wm. IV., it has not been necessary or permissible to deal with them by analogy as was formerly the practice in equity. The period of limitation to which they are subject and any qualifications upon it must be found within the statute.

The history of the Ontario statute under consideration is by no means conclusive upon the question before us. It rather presents different aspects according to the mode of looking at it,

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one or other of which lends colour to the contention of either party. The collocation of the sections in the Act of 1874 (ch. 16), and the use of the phrase "hereinbefore limited" in the disabilities section (No. 5) thereof made it very clear (as it had been under the Act of 4 Wm. IV., ch. 1) that that section was not meant to apply to the subsequent section dealing with actions of redemption (No. 8). The order of the sections was changed, however, in the revision of 1877, the redemption section (No. 19) being then placed before the disabilities section (No. 43) and the words "as aforesaid" replacing the words "hereinbefore limited" in the latter—a restoration of the collocation of the Consolidated Statutes of 1859 on which *Hall* v. *Caldwell*, 8 U.C.L.J. 93, had been decided. That this change might give rise to some uncertainty apparently occurred to the revisors of 1887, because, while they maintained the order of 1877, they substituted for the words, "as aforesaid," in sec. 43, the words "as in sections 4, 5 and 6 mentioned," thus putting it beyond question that sec. 43 was intended to apply only to cases within the three sections so enumerated and not to "actions to redeem" specially dealt with by sec. 19. No change was made in the revision of 1897. A new Act was passed in 1910 (ch. 34) preparatory to the revision of 1914. In view of the terms in which the commission of the revisors was couched (R.S.O. 1914, Vo. III, p. cxxxvii.) and of the fact that the Limitations Act was introduced and enacted in 1910 not as part of a revision, but as a separate Act, that statute cannot, I think, be regarded as subject to sec. 9 (1) of the Act respecting the Revised Statutes of 1914, (3 & 4 Geo. V., ch. 2), but must be treated as new legislation. In the first of the disabilities sections of this Act (40) the words "as herein mentioned" were substituted for the words of sec. 43 of the Acts of 1887 and 1897, "as in sections 4, 5 and 6 mentioned," the collocation of the sections being left unchanged. The Revised Statute of 1914, ch. 75, is identical with the Act of 1910. Any uncertainty in the application of the disabilities sections caused by the change in the order of sections made in 1877, which had been so carefully counteracted in 1887, was thus unnecessarily and, I cannot but think, unfortunately revived. If any section which should have been included was omitted from the enumeration it might have been added.

Without suggesting that there was sufficient ground for such

uncertainty, I am, with great respect, unable, in view of the explicit provision of clause (i) of sec. 29 of the Interpretation Act, (R.S.O. ch. 1), to assent to the view expressed by the Chief Justice of Ontario that "the words 'as herein mentioned'" in sec. 40 of the Act of 1910 are "the equivalent of the words of the sections in the Revised Statutes of 1887 and 1897 which correspond to section 40, 'as in sections 4, 5 and 6 mentioned.'"

I have made this resume of the history of the legislation under consideration in order that it may be understood that the effect of the various changes has not been overlooked.

But apart altogether from and notwithstanding their history and the collocation of the sections in question in the Act of 1910 and the R.S.O. of 1914, ch. 75, I find in the terms of sec. 40 itself, cogent internal evidence of its inapplicability to sec. 20—the section dealing with "actions to redeem." The subject matter of sec. 40, as appears in its introductory terms, is a limitation period computed from

the time at which the right of any person to make an entry or distress or to bring an action to recover any land or rent first accrues.

It enables such a proceeding to be instituted

at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability or died, whichever of those two events first happened.

Sec. 5 prescribes the period within which the right to "make an entry or distress or bring an action to recover any land or rent," shall be exercisable, and sec. 6 defines when that right shall be deemed "to have first accrued." The identity of the language used in sec. 40 with that found in secs. 5 and 6 is most significant.

Sec. 20, on the other hand, deals with a period of limitation reckoned not from the time of the first accrual of the right of action to redeem, but from another and usually an entirely different date, namely, "the time at which the mortgagee obtained the possession or receipt of the profits in any land or the receipt of any rent comprised in his mortgage," which it fixes as that from which the period of limitation upon the right of the mortgagor, or any person claiming through him, to bring an action to redeem shall be computed.

The equitable right to sue for redemption accrues as soon as non-fulfilment of the condition or proviso for defeasance has made the estate of the mortgagee absolute at law. It is not from the date of that first accrual of the right to bring an action to redeem

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that the prescriptive period runs under sec. 20, but from that of obtaining possession or receipt of the profits of the land. The right of redemption, when that occurs, may not be in, "the person to whom such right first accrued." Yet it is from the cesser of his disability or his death that the 5 years' period under sec. 43 is to be reckoned. These are the incongruous features which seem to me to afford practically conclusive evidence that the provisions of sec. 40 were not intended to be applicable to the case specially dealt with by sec. 20. Sec. 43, as Sir George Jessel said in *Kinsman* v. *Rouse*, 17 Ch. D. 104, "evidently refers to cases of ordinary ownership, where the rightful owner has been dispossessed." Sec. 20, on the other hand, deals with cases where a mortgagee has taken the possession to which the terms of his deed entitled him. To quote the Chief Justice of Ontario:—

> The words, "as herein mentioned," in sec. 40 (*i.e.*, of the Revised Statutes of 1914), it will be observed, apply to the time at which "the right of any person to make an entry or distress or to bring an action to recover any land or rent first accrues." That is a matter dealt with by sec. 6, which defines the time at which the right first accrues in various cases, none of them being the case of a mortgagor seeking to redeem, and it is, I think, to these provisions that section 40 refers. The mortgage sections do not define the time at which the right to redeem shall be deemed to have first accrued, but the provision is that the action shall not be brought but within ten years next after the time at which the mortgagee obtained possession or receipt of the profits of the land.

Although, as was pointed out by Sir John Beverley Robinson in *Hall* v. *Caldwell*, 8 U.C.L.J. 93, the sole apparent object of making the special provision for mortgagors' actions to redeem, now found in sec. 20, was to settle the time from which the prescriptive period governing them should be computed (see comment of Patterson, J.A., in *Faulds* v. *Harper*, 9 A.R. (Ont.) 537, at pp. 556-7), and although such actions, especially when the mortgagee is in possession after default, should be regarded as actions to recover lands, the fact that the statute makes such a special and essentially different provision for them takes them out of the operation of sections 5 and 6.

Because the terms in which it is couched in my opinion as clearly preclude its application to cases within sec. 20 as they make obvious its reference to cases within secs. 5 and 6, I respectfully concur in the conclusion of the Appellate Division that the disabilities sec. (40) with the ancillary secs. 41 and 42, does not apply to actions to redeem. But for the respect which I entertain

for the eminent Judges of this Court and of the former Court of Error and Appeal of Upper Canada who held contrary opinions, I should have reached this conclusion without much hesitation.

Appeal dismissed.

Annotation—Limitation of actions for redemption.

1. PRIOR TO 1833.

A mortgagor's right to redeem will not be barred by lapse of time so long as he remains in possession, but it may be barred if he is out of possession. Conversely, if a mortgagee has obtained possession, his right to foreclose will not be barred by lapse of time so long as he remains in possession, but if he is out of possession his right to foreclose or to bring an action for possession may be barred by lapse of time.

In England, prior to 1833, there was no statute limiting the time within which a mortgagor out of possession might sue for redemption or within which a mortgagee out of possession might sue for foreclosure. There was, however, a statute limiting the time within which a mortgagee might bring an action for possession of the mortgaged land, for by 21 Jac. I, ch. 16, sec. 1, it was enacted that no entry should be made into any lands, but within 20 years after the right or title to the same should accrue. This statute was held to apply only to claims which were recognized in a Court of law, and to have no application to a purely equitable claim for instance that of a mortgagor to redeem after his estate in the lands had been forfeited by his default in payment of the mortgage money.

The Court of Chancery, however, applied the statute by analogy. "For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is the meaning of the common phrase, that a Court of equity acts by analogy to the Statute of Limitations, the meaning being, that where the suit in equity corresponds with an action at law which is included in the words of the statute, a Court of equity adopts the enactment of the statute as its own rule of procedure. But, if any proceeding in equity be included within the words of the statute, there a Court of equity, like a Court of law, acts in obedience to the statute." *Knox* v. *Gye* (1872), L.R. 5 H.L. 656, Lord Westbury at p. 674.

Thus, by analogy to the statute of James, the rule became established in Chancery, as stated by Lord Hardwicke in Anon (1746), 3 Atk. 313, "that after 20 years' possession of the mortgagee, he should not be disturbed, or otherwise it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account; which would be a great hardship." See also *Bonney* v. *Ridgard* (1784), 1 Cox's Cases in Ch. 145, at p. 149; *Barron* v. *Martin* (1815), 19 Ves. 327. Conversely the Court of Chancery would not entertain a suit for foreclosure after the lapse of the period of 20 years which would operate as a bar to a common law action for recovery of possession of the land.

Similarly, by analogy to the statute, if the mortgagor was prevented from asserting his claim by reason of any of the impediments mentioned in the statute, namely, imprisonment, infancy, coverture, unsoundness of mind, or being beyond the seas (not having absconded), a period of 10 years after the

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removal of the impediment was allowed to him. A very slight act on the part of the mortgagee, acknowledging the title of the mortgagor, was sufficient to take the case out of the statute. The case was also taken out of the statute by the mortgagor's remaining in possession of part of the mortgaged lands. 2 Wh. & T., L.C. in Eq., 6th ed., pp. 1219, 1220.

2. THE STATUTES OF 1833 AND 1874.

The statute of James, so far as it was applied by analogy or otherwise to claims to real property, was superseded in England by the Real Property Limitation Act of 1833 (3 & 4 Wm. IV., ch. 27) and in Upper Canada by a similar statute of 1834 (4 Wm. IV, ch. 1). The general period of limitation stated in these statutes was 20 years, but in 1874 by 37 & 38 Vict. ch. 57 (operative from the 1st of January, 1879) the period under the English statute was reduced to 12 years, and in the same year by 38 Vict. ch. 16 (operative with some exceptions from the 1st of July, 1876) the period in Ontario was reduced to 10 years.

These statutes contain provisions specifically relating to suits for redemption but before those provisions are discussed it will be advantageous to refer to some of the provisions which affect proceedings by a mortgagee for possession or for foreclosure or sale.

3. ACTION TO RECOVER LAND.

The statute of 1833 contained no provision specially applicable to a suit for foreclosure *eo nomine* by a mortgagee out of possession, but they provided in general terms that no person should "make an entry" or "bring an action to recover any land" after the statutory period. This general provision, originally enacted by sec. 2 of the statute of 1833, was superseded by sec. 1 of the statute of 1874 which reduced the limitation period from 20 to 12 years, and the corresponding provision in Ontario is the Limitations Act (R.S.O. 1914, ch. 75), sec. 5, as follows:—

> 5. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if such right did not accrue to any person through whom he claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing the same.

Sec. 6 defines in detail the point of time at which in various circumstances the right to make an entry or distress or to bring an action shall be deemed to have first accrued within the meaning of sec. 5. Sec. 7 makes special provision as to the effect upon a future estate of the fact that the person entitled to the particular estate upon which the future estate is expectant is out of possession. Secs. 6 and 7 do not require further comment here.

After some conflict of opinion, it was held that a suit for foreclosure or sale was a proceeding to recover land within the meaning of the statute. *Wrixon* v. *Vize* (1842), 3 Dr. & War. 104; *Harlock* v. *Ashberry* (1882), 19 Ch.D. 539; *Fletcher* v. *Rodden* (1882), 1 O.R. 155; *Heath* v. *Pugh* (1882), 7 App. Cas. 235, 16 R.C. 389; *Trust and Loan Co.* v. *Stevenson* (1892), 20 A.R. (Ont.) 66, at 79-80.

The statute of 1833 also contained a provision (sec. 40) limiting the time within which an action might be brought to recover any sum of money secured by any mortgage or lien or otherwise charged upon or payable out of

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land or rent. By sec. 8 of the statute of 1874 the limitation period was reduced from 20 to 12 years. The corresponding provision in Ontario is R.S.O. 1914, ch. 75, sec. 24.

As the provision just mentioned was confined to an action to recover money, an additional and explanatory statute—7 Wm. IV., & 1 Vict., ch. 28—was passed in England "for the purpose of preserving in the mortgagee the right to make an entry and bring an ejectment to recover the lands." *Chinnery* v. *Evans* (1864), 11 H.L.C. 115, at 133. This explanatory statute was superseded by sec. 9 of the statute of 1874 (which reduced the limitation period from 20 to 12 years). The corresponding provision in Ontario is R.S.O. 1914, ch. 75, sec. 23, as follows:—

> 23. Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued.

A payment under this section must be a payment by a person liable to pay as mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery* v. *Evans* (1864), 11 H.L.C. 115, A payment of rent made by a tenant of the mortgaged property to the mortgagee pursuant to a notice by the mortgagee requiring the rent to be paid to him is not such a payment. *Harlock* v. *Ashberry* (1882), 19 Ch.D. 539. But a payment made by any person "concerned to answer the debt," or by a person who under the mortgage contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the redemption of the mortgage, is a sufficient payment. A payment by the principal debtor was held sufficient to create a new starting point as against a surety. *Lewin* v. *Wilson* (1886), 11 App. Cas. 639, at 644, 646. So a payment is sufficient if made by a person who has become bound to the debtor to pay (*e.g.*, a transferee of the equity who is bound as between himself and the transferor to pay), notwithstanding that such transferee has himself transferred the equity to a third person. *Trust and Loan Co.* v. *Stevenson* (1892), 20 A.R. (Ont.) 66.

4. FORECLOSURE GIVES NEW STARTING POINT.

In *Heath* v. *Pugh* (1881), 6 Q.B.D. 345, 16 R.C. 376, it was held by the Court of Appeal (Lord Selborne, A.C., Baggallay and Brett, L.JJ.) reversing the judgment of the Common Pleas Division (Lord Coleridge, C. J., and Lindley, J.), that the effect of an order of foreclosure absolute obtained by a legal mortgagee is to vest the ownership of and beneficial title to the mortgaged land for the first time in the mortgagee, so that an action, brought within 20 years next after the order of foreclosure, by the mortgagee to recover possession of the land was not barred by the Statutes of Limitations (3 & 4 Wm. IV, ch. 27 and 1 Vict. ch. 28), although more than 20 years had elapsed since the legal estate in the land had been conveyed to the mortgagee and since the last payment of principal or interest secured by the mortgage. This decision was affirmed by the House of Lords (Earl Cairns, Lord O'Hagan, Lord Blackburn and Lord Watson) *sub nomine Pugh* v. *Heath* (1882), 7 App. Cas. 235, 16 R.C. 389, and in effect is a decision that since the passing of the Judicature Acts an action for foreclosure is an action to recover land (but not an action to recover possession of land: *Wood* v. *Wheaten* (1882), 22 Ch.D. 281).

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From a theoretical point of view the correctness of the decision in *Pugh* v. *Heath* is open to question, because a suit for foreclosure was, prior to the Judicature Acts, not a proceeding *in rem* for the purpose of recovering the land but was merely a suit *in personam* brought by the mortgagee (the legal owner) for the purpose of depriving the mortgagor of the equitable right to redeem. The effect of the Judicature Acts, it is submitted, was merely to confer upon one Court the jurisdiction formerly possessed by different Courts and not to change the character of the rights which might be claimed by suit or action. The Judges of the Common Pleas Division were therefore logical in holding that the suit for foreclosure did not confer upon the mortgagee any title to the land which he did not possess before; that the action for possession was the first proceeding brought by the mortgagee to recover the land, and that as it was not brought within the statutory period, the mortgagee was barred. Practically, however, the result of such a decision was almost grotesque, as it would have deprived the mortgagee of the whole benefit of the foreclosure proceedings which had been brought to a successful conclusion in the year immediately preceding that in which the action for possession was commenced. A similar case will not often arise because the mortgagee now has the right to claim foreclosure and possession in the same action. Formerly he would have had to sue in equity for foreclosure and to bring an action at law for possession although he might have pursued his different remedies concurrently.

5. DISABILITIES CLAUSE IN CASE OF ACTION TO RECOVER LAND.

In the statute of 1833 the general 20-year period of limitation of entry or action was subject to an extension (in favour of a person who was under disability or some one claiming under him) for a further period of 12 years after such person ceased to be under disability or died, whichever of those two events first happened (sec. 16), provided that the entry must be made or the action brought within 40 years of the time when the right first accrued (sec. 17), and that additional time should not be allowed for the disabilities of successive claimants (sec. 18). These provisions were superseded by secs. 3, 5 and 9 of the statute of 1874 (which reduced the additional period allowed for disability from 10 to 6 years, and reduced the ultimate limitation of 40 years to 30 years), and the corresponding provisions in Ontario are R.S.O. 1914, ch. 75, secs. 40, 41 and 42, as follows:—

> 40. If at the time at which the right of any person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under any of the disabilities hereinafter mentioned (that is to say) infancy, idiocy, lunacy or unsoundness of mind, then such person, or the person claiming through him, notwithstanding that the period of ten years or five years (as the case may be) hereinbefore limited has expired, may make an entry or a distress, or bring an action, to recover such land or rent at any time within five years next after the time at which the person to whom such right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

The corresponding section of the English Act of 1874 (sec. 3) specifies "coverture" as one of the disabilities provided for. The Ontario statute was changed in this respect by 38 Vict., ch. 16. *Hicks* v. *Williams* (1888), 15 O.R. 228.

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A disability arising after the right has accrued will not prevent the time from running. *Murray v. Watkins* (1890), 62 L.T. 796.

41. No entry, distress or action, shall be made or brought by any person, who, at the time at which his right to make any entry or distress, or to bring an action to recover any land or rent first accrued was under any of the disabilities hereinbefore mentioned or by any person claiming through him, but within twenty years next after the time at which such right first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such twenty years, or although the term of five years from the time at which he ceased to be under any such disability, or died, may not have expired.

If a person is under one disability when his right first accrues and then falls under another disability before the removal of the first, his right may be enforced after the removal of the second, provided it be within the ultimate limitation of 20 years. *Burrows* v. *Ellison* (1871), L.R., 6 Ex. 128.

42. Where any person is under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent first accrues, and departs this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the period of ten years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, first accrued or the period of five years next after the time at which such person died, shall be allowed by reason of any disability of any other person.

6. MORTGAGOR OUT OF POSSESSION.

See 28 of the statute of 1833 contained a provision specially applicable to the case of a mortgagor being out of possession. This provision was superseded in England by sec. 7 of the statute of 1874 (reducing the limitation period from 20 to 12 years), and the corresponding provision in Ontario is R.S.O. 1914, ch. 75, sec. 20, as follows:—

20. Where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action to redeem the mortgage, but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, has been given to the mortgagor or to some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him, and in such case no such action shall be brought, but within ten years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

7. DISABILITIES CLAUSE NOT APPLICABLE TO SUIT FOR REDEMPTION.

It was held by Jessel, M.R., in *Kinsman* v. *Rouse* (1881), 17 Ch.D. 104, that the time within which a mortgagor might sue for redemption was not to be extended by reason of his being under any disability. The disabilities provision (R.S.O. 1914, ch. 75, sec. 40, *supra*) saves the right of any person "to bring an action to recover any land" if such person is under disability, but, as Jessel, M.R., pointed out, an action to redeem is not, properly speaking,

Annotation. "an action to recover land," and the section evidently refers to cases of ordinary ownership, where the rightful owner has been dispossessed. Sec. 20 contains no qualification of the rights of the mortgagee as against the mortgagor and there is no reason for extending the disabilities provision to the case of a mortgagor.

The same result was reached in *Forster* v. *Patterson* (1881), 17 Ch.D. 132, by Bacon, V.C., who laid emphasis on the order in which the sections are arranged. In the English statute the section relating to actions by a mortgagor *follows* the disabilities section, and Bacon, V.C., considered it clear that one is not at liberty to read into the special section relating to mortgagors, a qualification derived from an earlier and more general section. In the English statute (37 & 38 Vict., ch. 57, similar in arrangement to 3 & 4 Wm. IV., ch. 27) the matter is made more plain because the disabilities section begins: "If at the time at which the right of any person to make an entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued as aforesaid"—thus referring back to the earlier sections. The Upper Canadian statute, 4 W. IV., ch. 1, is similar in arrangement and wording to the English statute.

In C.S.U.C. 1859, ch. 88, sec. 45, the similar expression "as hereinbefore mentioned" is used, and in R.S.O. (1877), ch. 108, sec. 43 "as aforesaid," but inasmuch as the section relating to actions by mortgagors precedes the disabilities section, the application of the latter section to the former is not excluded by the expressions quoted. In R.S.O. (1887), ch. 111, sec. 43, and R.S.O. (1897), ch. 33, sec. 43, the reference is made quite specific by the expression "as in sections 4, 5 and 6 mentioned," so that the application of the disabilities section to the redemption section is excluded, unless a suit for redemption should be held to be an "action to recover land," contrary to the opinion of Jessel, M.R., in *Kinsman* v. *Rouse, supra.* In 10 Edw. VII., ch. 34, sec. 40, and R.S.O. (1914), ch. 75, sec. 40, the more general expression "as herein mentioned" is substituted for the specific reference to the earlier sections, but it was held in the principal case of *Smith* v. *Darling* that no change in meaning was intended.

In *Faulds* v. *Harper*, a Divisional Court (1883, 2 O.R. 405) held that the disabilities section (R.S.O. 1877, ch. 108. sec. 43) applied to a suit for redemption, the case of *Hall* v. *Caldwell*, (1861), 7 U.C.L.J., O.S. 42, 8 U.C.L.J., O.S. 93, in the Court of Error and Appeal being followed in preference to *Kinsman* v. *Rouse, supra,* and *Forster* v. *Patterson, supra.* This decision was, however, reversed by the Court of Appeal (1884, 9 A.R. (Ont.) 537). See especially the remarks of Patterson, J.A., at pp. 554 ff. with regard to the case of *Hall* v. *Caldwell*, and with regard to the effect of the changes of wording made in the successive revisions of the statutes. On appeal to the Supreme Court of Canada the judgment of the Court of Appeal was in turn reversed (1886, 11 Can. S.C.R. 639), the decision being based chiefly on the ground that the action was virtually to impeach a purchase by a trustee for sale and that therefore the Statute of Limitations had no application. Strong, J., at p. 655, says:—

> "I think it well, however, to add that if I had to choose between the decisions in *Caldwell* v. *Hall*, and those in *Kinsman* v. *Rouse* and *Forster* v. *Patterson*, I should certainly have agreed with the learned Judges of the Divisional Court; for the reason that since the two cases in 17 Chancery Division were decided, the House of Lords has held in *Pugh* v.

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Heath, 7 App. Cas. 235, that a foreclosure suit is an action for the recovery of land. This being so it follows *â fortiori* that a redemption suit is also an action or suit for the recovery of land. And it is impossible, without doing violence to the words of the statute, to hold that the saving of disabilities does not apply to any action or suit, as well in equity as at law, for the recovery of land."

Whether an action for redemption is, or is not, an action to recover land, the dictum of Strong, J., that the disabilities clauses of the statute apply to a suit for redemption has been overruled, and the decision of the Court of Appeal in *Faulds* v. *Harper* has been followed in the principal case of *Smith* v. *Darling*.

8. NATURE OF POSSESSION REQUIRED.

Time will not run against the mortgagor so long as the possession of the mortgagee may be referred to another title and is not adverse. Thus in *Hyde* v. *Dallaway* (1843), 2 Hare 528, a person to whom property was mortgaged by the tenant for life and remainderman, after having been in possession for 6 years without any acknowledgment of the mortgagor's title, purchased the interest of the tenant for life, and then continued in possession for 20 years. It was held that such possession was not adverse during the existence of the life estate so purchased, and that the statute 3 & 4 Wm. IV., ch. 27, sec. 28, was not, therefore, a bar to a suit for redemption by the remainderman or reversioner. See also *Raffety* v. *King* (1836), 1 Keen 601.

In *Faulds* v. *Harper* (1886), 11 Can. S.C.R. 639, an action for foreclosure had been brought and a decree had been made for a sale. The lands were sold pursuant to the decree and were purchased by one Harper, who acted for and in collusion with the mortgagee. Harper then conveyed to the mortgagee, who took possession and thenceforth dealt with the lands as absolute owner. In an action to redeem it was held that as the mortgagee had been in possession not as mortgagee, but as purchaser, the Statute of Limitations did not apply. The action was virtually one to impeach a purchase by a trustee for sale, to which no Statute of Limitations was applicable. See the cases cited by Strong, J., at pp. 647 ff.

Similarly if a mortgagee sells under a power of sale according to the terms of which he is an express trustee of the surplus, the Statutes of Limitation do not apply to an action by the mortgagor to make the mortgagee account for the surplus. *Banner* v. *Beveridge* (1881), 17 Ch.D. 254; *Re Bell, Lake* v. *Bell* (1886), 34 Ch.D. 462; *Biggs* v. *Freehold Loan and Savings Co.* (1899), 26 A.R. (Ont.) 232 (a case under the Short Forms of Mortgages Act), reversed on another point, 1901, 31 Can. S.C.R. 136.

A security for money lent was expressed in the form of a conveyance to the lender on trust to sell. He entered into poss ssion and remained in possession for more than 20 years. His devisees in trust agreed to sell the mortgaged estate for a sum exceeding the amount owing for principal, interest and costs, and conveyed it to the purchaser by a deed in which the trust for sale was recited. It was held that the security was simply a mortgage, that the Statutes of Limitations applied, that the devisees in trust sold as owners in fee and that the mortgagors had no right to the surplus of the purchase money. *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch.D. 284.

If, however, the mortgagee conveys the lands to a purchaser who goes into possession, the mortgagee may set up the possession of the purchaser in addition to his own possession, if any, as mortgagee, so as to bar the mortgagor's claim. *Bright* v. *McMurray* (1882), 1 O.R. 172.

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The possession required by the statute must be the possession of one person, or of several persons claiming one from or under another by conveyance, will or descent. *Doe d. Carter* v. *Barnard* (1849), 13 Q.B. 945, at 952; *Dedford* v. *Boulton* (1878), 25 Gr. 561.

Where the solicitor of a mortgagor paid off the mortgage for his own benefit, but did not take an assignment of the mortgage, it was held that his possession was the possession of his client and that time did not run against the client. *Ward* v. *Carttar* (1865), L.R. 1 Eq. 29.

If actual possession is once obtained by a mortgagee in assertion of his legal right of entry, it need not be maintained continuously for the statutory period. *Kay* v. *Wilson* (1877), 2 A.R. (Ont.) 133. But possession obtained by the mortgagee after the lapse of the statutory period does not cause his title to revive. *Court* v. *Walsh* (1882), 1 O.R. 167.

The words "possession or receipt of the profits" in R.S.O. (1914) ch. 75, sec. 20, *supra*, seem to include the case of a mortgagee receiving rent from a tenant in possession; receipt of such rent by a mortgagee for the statutory period will, it seems, bar the mortgagor's right to redeem. *Ward* v. *Carttar* (1865), L.R. 1 Eq. 29; *Markwick* v. *Hardingham* (1880), 15 Ch.D. 339; 19 Halsbury, Laws of England, p. 149, note (*l*).

9. POSSESSION OF PART OF MORTGAGED LANDS.

The rule which prevailed prior to 3 & 4 Wm. IV., ch. 27, that no lapse of time barred the right of the mortgagor to redeem the whole of the mortgaged lands, if he held possession of part (*Rakestraw* v. *Brewer* (1728), Sel. Cas. Ch. 55, 2 P. Wms., 511) was abolished by sec. 28 of the statute. Hence it has been held that where a mortgagee had been in possession of part of the lands for more than 20 years, the right of the mortgagor to redeem that part was barred, although he held possession of the remainder of the lands. *Kinsman* v. *Rouse* (1881), 17 Ch.D. 104.

On the other hand, if a person has only a partial interest in the equity of redemption, *e.g.*, as tenant, he has a right to pay the whole mortgage debt and receive a conveyance of the mortgaged lands, subject to the rights of redemption of other persons interested in the equity. *Martin* v. *Miles* (1884), 5 O.R. 404, at 416. This principle, that the equity of redemption is an entirety which cannot be redeemed piecemeal or proportionately, has been held to apply even where the person redeeming is entitled only to a share in the equity of redemption and the other persons interested have been barred by the Statute of Limitations. *Faulds* v. *Harper* (1883), 2 O.R. 405, at 411, 11 Can. S.C.R., at pp. 645, 656.

10. WHEN TIME BEGINS TO RUN.

R.S.O. (1914), ch. 75, sec. 20, *supra*, provides that where a mortgagee has obtained possession, the mortgagor shall not bring any action for redemption "but within 10 years next after the time at which the mortgagee obtained such possession." The opinion has been expressed that the general rule that time begins to run from the taking of possession is subject to an exception if the mortgagee takes possession before the mortgage is due. Fisher on Mortgages, 6th ed., sec. 1404, citing *Brown* v. *Cole* (1845), 14 Sim. 427, 18 R.C. 116, says: "Time will not run in the case of a common mortgage until the day of redemption has arrived; for the mortgagor cannot redeem before that day." See also *Wilson* v. *Walton* and *Kirkdale Permanent Building Society* (1903), 19 Times L.R. 408. The proposition just quoted must, however, be accepted with caution. The decision in *Brown* v. *Cole*, was to the effect that a mortgagor

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is not entitled to redeem before the expiration of the time limited for payment of the mortgage debt. The deduction that the statute will commence to run only from the same date appears to be based upon the assumption that the statutory bar can commence to run only from the time when the right first arose, whereas the statute provides for the commencement from the time when the mortgagee obtained possession. *Re Metropolis and Counties Permanent Investment Building Society, Gatfield's* case, [1911] 1 Ch. 698, at 706-7.

11. ACKOWLEDGMENT OF TITLE.

It has already been pointed out that before the passing of 3 & 4 Wm. IV., ch. 27, a slight act or admission, even oral, on the part of the mortgagee, constituted a sufficient acknowledgment of the mortgagor's title so as to preserve his right to redeem. That statute, however, required that the acknowledgment should be in writing signed by the mortgagee or the person claiming through him. See now R.S.O. (1914), ch. 75, sec. 20, *supra*.

The statute requires that the acknowledgment should be made *to* the mortgagor or to some person claiming his estate, or to the agent of such mortgagor or person. *Re Metropolis, etc., Society, Gatfield's Case*, [1911] 1 Ch. 698 at 705.

If a mortgagor is a party to an assignment of the mortgage, this may be a sufficient acknowledgment of his title by the mortgagee. *Batchelor* v. *Middleton*, (1848), 6 Hare 75. But a mere recital of the mortgage and an assignment of it, subject to the equity of redemption, by a deed to which the mortgagor or a person claiming his estate is not a party is not sufficient. The assignee is a person claiming, not the mortgagor's estate, but the mortgagee's estate. *Lucas* v. *Dennison* (1843), 13 Sim. 584. See also *Markwick* v. *Hardingham* (1880), 15 Ch.D. 339.

If a mortgagee has entered into possession, accounts of his receipt of rents are not sufficient acknowledgment, unless they are signed by him and kept for or communicated to the mortgagor or his agent. In *Baker* v. *Welton* (1845), 14 Sim. 426, this question was raised but not decided; see Sugden, Statutes Relating to Real Property, 2nd ed., 117; *Re Alison, Johnson* v. *Mounsey* (1879), 11 Ch.D. 284. 19 Halsbury, Laws of England, 151. A letter written by the mortgagee to the mortgagor intimating that the former is willing to give an account is a sufficient acknowledgment. *Richardson* v. *Younge* (1870), L.R. 10, Eq. 275, L.R. 6 Ch. 478. But a mere admission by the mortgagee that he holds under a mortgage title is not sufficient. *Thompson* v. *Bowyer* (1863), 9 Jur. N.S. 863.

In order that the person to whom an acknowledgment is made should be the agent of the mortgagor, it is sufficient if he has acted or has been treated as such by the person making the acknowledgment. *Trulock* v. *Robey* (1841), 12 Sim. 402. Halsbury, *op. cit.*, 151. *Cf. Re Metropolis, etc., Society, Gatfield's Case*, [1911] 1 Ch. 698, at 705.

On the other hand, an acknowledgment by the agent of the mortgagee is not sufficient. *Richardson* v. *Younge* (1871), L.R. 6 Ch. at 480. But the mortgagee's acknowledgment will bind his lessee. *Ball* v. *Lord Riversdale* (1816), Beatty 550.

It has been said that an acknowledgment given by the mortgagee after the expiration of the statutory period is sufficient. *Stansfield* v. *Hobson*, 1852, 3 De G. M. & G. 620, affirming 16 Beav. 236. The correctness of this construction of the statute has, however, been questioned. *Markwick* v. *Hardingham* (1880), 15 Ch.D. 339; *Sanders* v. *Sanders* (1881), 19 Ch.D. 373, at 379; *Shaw* v. *Coulter* (1905), 11 O.L.R. 630. The words "in the meantime"

Annotation.

in the statute (R.S.O. 1914, ch. 75, sec. 20) would seem to exclude an acknowledgment given after the period has expired. Under sec. 14 (relating to the right to make an entry or distress, or bring an action to recover land or rent), it has been held that an acknowledgment given after the expiration of the statutory period is too late. *McDonald* v. *McIntosh* (1857), 8 U.C.R. 388; *Doe d. Perry* v. *Henderson* (1846), 3 U.C.R. 486.

12. ACKNOWLEDGMENT TO OR BY ONE OF SEVERAL PERSONS.

The statute 3 & 4 Wm. IV., ch. 27, sec. 28, contained provisions as to acknowledgments by one of several mortgagees or to one of several mortgagors. The corresponding provisions in Ontario are R.S.O. (1914), ch. 75, secs. 21 and 22, as follows:—

> 21. Where there are more mortgagors than one, or more persons than one claiming through the mortgagor or mortgagors, such acknowledgment if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons.
>
> 22. Where there are more mortgagees than one, or more persons than one claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the person or persons so signing, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him, or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons as have given such acknowledgment are entitled to a divided part of the land or rent comprised in the mortgage or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which bears the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent bears to the value of the whole of the land or rent comprised in the mortgage.

The provision of sec. 22 that the acknowledgment of one of several mortgagees "shall be effectual only against the party signing the acknowledgment" is directed to the case of several mortgagees where an account taken against one will bind his interest, but not the interest of any other person. The statute has no application to the case of a mortgage to several persons jointly as trustees. In the latter case there must be an acknowledgment by all. *Richardson* v. *Younge* (1871), L.R. 6 Ch. 478.

13. AGAINST WHOM TIME RUNS.

It has been held that the time will run against a person entitled to the equity of redemption in remainder, although the mortgagee enters into possession and the statutory period elapses in the lifetime of the tenant for life. *Harrison* v. *Hollins* (1812), 1 S. & St. 471.

A prior mortgagee in possession acquires a title against both the mortgagor and subsequent mortgagees who are out of possession. *Samuel Johnson & Sons* v. *Brock*, [1907] 2 Ch. 533, *cf. Wakefield and Barnsley Union Bank* v. *Yates*, [1916] 1 Ch. 452.

JOHN DELATRE FALCONBRIDGE.

DOMINION OF CANADA INVESTMENT AND DEBENTURE CO. v. CARSTENS AND BREDT.

SASK.

S. C.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. July 14, 1917.

MORTGAGE (§ III—48)—LIABILITY OF TRANSFEREE—IMPLIED COVENANT.

The implied covenant under sec. 63 of the Land Titles Act (Sask.), of a transferee of land subject to a mortgage, so long as he remains the registered owner, to answer for the mortgage debts, is only applicable where the whole of the mortgaged estate, not merely a portion of it, has been transferred.

[*Montreal Trust Co.* v. *Boggs*, 25 D.L.R. 432, followed.]

Statement.

APPEAL as to costs only, brought by leave of the trial Judge, in an action on an implied covenant in a mortgage under sec. 63 of the Land Titles Act. Reversed.

J. E. Doerr, for appellant; *D. H. Laird*, K.C., for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—Prior to December 24, 1913, Hugo Carstens and Paul M. Bredt were the registered owners of lots 15 to 18 in block 281, Regina. On that date they mortgaged said lots to the plaintiff company, to secure the repayment of $30,000 and interest. The principal of the mortgage money was payable January 1, 1917. On April 30, 1914, Carstens and Bredt executed a transfer of said lots to themselves and their co-defendants in this action in the following interests: Hugo Carstens, five-sixteenths; Paul M. Bredt, two-sixteenths; Annie Erena Miller, four-sixteenths; Walter Gelhorn, five-sixteenths. A certificate of title of the said lots was issued to the four defendants in the said interests, subject to the plaintiffs' mortgage. The mortgage not being paid, the plaintiffs, on July 23, 1915, commenced an action on their mortgage for $2,765.35, being the interest thereon overdue, and they claimed judgment against Carstens and Bredt on their covenant to pay contained in the mortgage, and against all the defendants by virtue of the implied covenant contained in the said transfer as set out in sec. 63 of the Land Titles Act. To this action the defendant Gelhorn filed a defence. Subsequently, the plaintiff company learned that, by an agreement in writing bearing date May 2, 1914, the defendants had agreed, one with the others, to become liable in respect of the plaintiffs' mortgage to the extent of their respective interests in said lots. Thereupon the plaintiffs amended their statement of claim by adding an alternative claim against each of the defendants, limited to an amount corresponding to his interest in the

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land. They also asked for sale and foreclosure, in case default was made in payment.

Before the action came on for trial, Mr. A. L. Gordon, who had a second mortgage on the same lots, had procured a final order of foreclosure under his mortgage, and had obtained a certificate of title of the said lots in his own name, subject to the plaintiffs' mortgage, and the defendants were no longer the registered owners of the land.

As sec. 63 of the Land Titles Act provides that the covenant implied on the part of a transferee in a transfer of land subject to a mortgage, in so far as the mortgagee is concerned, should continue only so long as the transferee remains the registered owner, the plaintiffs evidently came to the conclusion that they could not succeed against Gelhorn, as he was now no longer registered owner of any portion of the mortgaged property. At the trial they discontinued the action in so far as they claimed personal judgment against Gelhorn, but asked for an order for sale. This Gelhorn did not oppose, but asked for his costs of the action. The trial Judge gave the following judgment:—

> As the whole estate of the mortgagors was transferred to defendants I think they were liable under implied covenant. Plaintiff will have costs up to time defendants' title foreclosed. Judgment against Carstens and Bredt and order for sale after four months.

From that disposition of the costs, Gelhorn now appeals to this Court.

With great deference, I am of opinion that it cannot be said that the whole estate of the mortgagors had been transferred.

Prior to the transfer, the mortgagors Carstens and Bredt each owned an undivided one-half interest in the lots. After the transfer, Carstens had still a five-sixteenths and Bredt a two-sixteenths interest.

In *Fredericks* v. *North-West Thresher Co.*, 3 S.L.R. 280 at 285, my brother Newlands, in speaking of the transfer of a homestead when there was an execution registered against the transferor, said:—

> Up to the time of the transfer of this property to the plaintiff it was exempt from seizure. There was no time prior to the transfer when the execution could attach, and after the transfer it ceased to be the debtor's property, so that the execution never did attach.

This, I take it, is a clear holding that the passing of the property in the homestead from the transferor and the vesting of it in the

purchaser are simultaneous acts—I may say one and the same act. A transfer can only divest the transferor of an interest by vesting that interest in someone else. When, therefore, as here, Carstens and Bredt (who each had eight-sixteenths of the property) transfer five-sixteenths and two-sixteenths respectively to themselves, there is no moment of time when these respective interests are not vested in them. In other words, although by the transfer they purport to convey these respective interests to themselves, they were never for a moment divested of these interests. In form they conveyed to themselves and others; in substance they conveyed certain shares and retained in themselves the remainder. I am, therefore, of opinion that it cannot be said that the whole estate of the mortgagors passed under the transfer. There was no passing of the property in the interests retained by them.

This brings us to the question, does sec. 63 of the Land Titles Act apply where the registered owner of mortgaged premises transfers a part only of his interest?

This question came squarely before me in *Montreal Trust Co.* v. *Boggs*, 25 D.L.R. 432, and I there held that the section applied only where there had been a complete parting with all his interest on the part of the transferor. Nothing was presented in argument to cause me to alter the view I there expressed. The implied covenant is that the transferee will pay the mortgage money and interest—not that he will pay a part thereof proportionate to his registered interest—but that he will pay the entire amount due under the mortgage. I cannot see anything in the language of the section to support the argument that the covenant implied is that the transferee will pay a portion only of the mortgage monies and interest. If such had been the intention of the legislature, I would have expected it to say so, and to have made provision as to how the proportionate amount to be paid by the transferee would be arrived at.

As Beck, J., asks in *Great West Lumber Co.* v. *Murrin & Gray*, 32 D.L.R. 485 at 496:—

> Is the portion to be based upon the proportion of quantity or value of the proportion purchased?

In that case the same learned Judge also said:—

> An implied contract is one which the law raises on the ground that in equity and justice the obligation ought to subsist: *Moses* v. *Macferlan*, 2 Burr. 1005; Leake, 6th ed., p. 42.

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Can it be said that equity or justice require a purchaser of an interest in mortgaged property to pay the whole of the mortgage monies and interest? Take, for instance, the facts of the *Boggs* case, 25 D.L.R. 432. There Boggs had mortgaged a quarter-section for $150,000. He then sub-divided the quarter and sold a five-fourteenth interest. The principle governing the liability of the transferee of an undivided interest, in my opinion, must be the same as that applicable to the transferee of an individual portion of the property. Suppose in that case a purchaser had purchased an individual lot valued at $100, and obtained a certificate of title therefor, subject to the mortgage, is it reasonable to suppose that the legislature intended to saddle the purchaser, through the implied covenant, with the payment of the whole mortgage, *i.e.*, $150,000? Neither justice nor equity require that he should do so. Yet that would be the legal right of the mortgagee if the section applied on the sale of a portion of the mortgaged property. To my mind, it is equity to compel a transferee to pay the entire mortgage money only where he has purchased the whole of the mortgaged property, and where—as between himself and his transferor—he should, in good conscience, pay it.

A consideration of the state of the law prior to the enactment throws light, in my opinion, upon the intention of the legislature. Prior to the statutory provision, when a mortgagor conveyed his land subject to a mortgage there was an implied obligation on the part of the purchaser to indemnify the mortgagor against the mortgage debt, but, as there was no privity of contract between the purchaser and the mortgagee, the latter could not sue the purchaser direct unless he obtained from the mortgagor an assignment of his right of indemnity. If he obtained that assignment, he could sue the purchaser: *Malone* v. *Campbell*, 28 Can. S.C.R. 228. But it was always open to a purchaser to shew that by express agreement he was not to indemnify the mortgagor: *British Columbia Loan Co.* v. *Tear* (1893), 23 O.R. 667.

The statute gives the mortgagee the right, so long as the transferor remains the registered owner, of suing him direct, without the necessity of obtaining an assignment of the mortgagor's right of indemnity.

As, in my opinion, the implied covenant is only applicable

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where, as between the transferor and the transferee, the transferee assumes the whole of the mortgaged indebtedness, which, in this case, he did not do, the plaintiffs did not have a good cause of action against Gelhorn when they issued their writ; in which case, upon discontinuing the action, Geihorn became entitled to his costs.

The appeal, in my opinion, should be allowed. *Appeal allowed.*

DEISLER v. U.S. FIDELITY & GUARANTY Co.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and Galliher, JJ.A. June 29, 1917.

1. ASSIGNMENT (§ II—20)—EQUITABLE—CHOSE IN ACTION—RIGHT TO SUE—An assignment of a legal chose in action, arising out of tort, made while litigation is proceeding, and not under the Laws Declaratory Act (B.C.), operates as an equitable assignment, and the action thereon can only be continued in the name of the assignor.

[See annotation, 10 D.L.R. 277.]

2. CONTRACTS (§ II D—152)—BOND—"TO PAY ALL DAMAGES"—INTEREST—COSTS.

A stipulation in a bond "to pay all damages" as may be awarded in an action applies also to an award of interest, but not to costs where the bond is not of indemnity. (Martin, J., *contra.*)

Statement.

APPEAL by defendant from the judgment of Murphy, J., in an action on a bond. Varied.

L. G. McPhillips, K.C., for appellants.

Joseph Martin, K.C., for respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The action was brought upon a bond entered into to secure the damages which might be recovered in an action, at the date of the bond, pending between the present plaintiff and the Spruce Creek Power Co. Ltd. and others for trespass upon a mineral claim. The tort complained of in that action arose independently of contract, and the sum recoverable for damages, if a chose in action at all, was a legal chose in action, and not assignable at law unless under the provisions of the Laws Declaratory Act, and as the provisions of the Act were not complied with, the assignment made by the plaintiff of the right of action after the date of the said bond, but before trial, if effective at all, could only be so by reason of the doctrines of equity.

The principal complaint in this appeal turns upon the said alleged assignment. The appellant's submission is that the plaintiff before judgment in that action assigned all his interest in the said mineral claim and in the result of the action to one Callaghan, and therefore has no status to bring this action against the defendants on the bond.

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Assuming then that the right to damages for said trespass was a legal chose in action, as I think it was, and holding as I do that it was not assignable at common law, the assignment could operate, if at all, only as an equitable assignment. If an equitable assignment, then action upon it by the assignee could only be brought in the name of the assignor, or if the action was pending, as was the case in question, it could only be continued in the name of the assignor. Therefore I think the objection to the status of the plaintiff to recover in that action and to sue on the bond in this action has not been successfully attacked.

The suggestion of fraud in not disclosing the alleged or attempted assignment may be dismissed. There is no evidence of design to suppress the fact, nor does it in my opinion make the slightest difference whether the fact was disclosed or not, holding as I do that the action was properly continued in the name of the plaintiff, and did not affect the legal rights of the plaintiff to carry that action to completion, and to pursue the defendants in this action upon the bond. Whether plaintiff shall hold the moneys recovered for his own use or that of Callaghan does not concern the defendant.

A further ground of appeal was put forward before us by the submission that the bond only stipulated for the payment of damages recovered in said action, whereas the judgment appealed from gives the plaintiff damages, interest and costs. The words of the bond are "shall pay all such damages as may be awarded to the above-named plaintiff," namely, the plaintiff in that action, and in this. The damages awarded were $14,490. Judgment was entered on April 30, 1914, in the former action; and in this action judgment is given for the said sum of $14,490, interest at the legal rate from the date of the entry of that judgment to the date of the writ herein, and costs of the first action.

I think the judgment is right as to the damages and interest. I entertain some doubt with respect to the costs. We have not been referred to any cases which assist me on this point. There are many cases in the books dealing with the right of a party to include costs in his judgment under contracts of indemnity, but I think they are distinguishable from this case. This is not an indemnity contract. It is an agreement by defendants to pay to plaintiff the damages recovered and is not, in any sense, an in-

demnity bond. The defendants agreed to pay the damages recovered in that action and nothing more. At the time the bond was executed the action was pending, and if it had been intended to secure the payment of costs also, one would expect that such a term would have been included in the bond. As to the interest, the law not the contract gives that from the entry of judgment.

The judgment below should be varied. On the main question the appeal fails, but on the minor question it succeeds. There are two events, and the costs should be taxed accordingly.

MARTIN, J.A.:—It is conceded that in general, in bonds of this description, the word "damages" would cover the costs of an action (*vide, e.g., O'Loughlin* v. *Fogarty* (1842), 5 Ir. L.R. 54, 63) but it is submitted that in this case it should in the circumstances be given a more restricted meaning. The condition of the obligation is to "pay all such damages as may be awarded to the abovenamed plaintiff in the said action, and it is recited that the bond was given upon the application of the plaintiff for an interim injunction until the trial of this action" when it was ordered that the defendant (Spruce Creek Power Co.) should "give security to the amount of $25,000 . . . to cover all damages that may be recovered against the defendants or any of them in the abovementioned action." I find myself unable to take the view that because the security was ordered at that time and in that language there should be any restriction of the usual scope of the terms employed; the defendant company evidently considered it of importance to be able to prevent the granting of the injunction, otherwise it would not have given the security, and I have no doubt that it and the present defendant company contemplated the payment of any judgment debt, interest and costs—that might be obtained against the Spruce Creek Co.

As to the objection that the judgment should not have been obtained by the plaintiff because during the course of the litigation he assigned both his interest in the subject matter, the Sunflower Mineral claim, and in the action, to one Callaghan, I do not think it is open to the present defendant company to raise that objection, at least in the absence of any fraud. The bond is conditioned to "pay all such damages as may be awarded" and by the judgment which still stands as a valid one certain contemplated damages have in fact been recovered by and awarded

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to Deisler but have not been paid. The case of *Luning* v. *Milton* (1890), 7 T.L.R. 12, is clearly distinguishable—there, the object contemplated by the surety was the defence of the action, leave being given for that purpose, but that defence was never heard, the trial being frustrated by an interlocutory order for final judgment, made in default of further security being given. We were referred to the remarks of Cottenham, L.C., and Lord Campbell in *Fulham* v. *M'Carthy* (1848), 1 H.L.C. 703, 717, 722, 9 E.R.937, upon misjoinder, and dismissal of bills in equity therefor, and for lack of interest, but there is nothing in them to indicate that such an objection would be entertained after judgment, the Lord Chancellor saying (p. 719) that the misjoinder, "whether taken advantage of at an earlier stage or not, may be taken advantage of at the" hearing.

Martin, J.A.

In the absence of any authority cited to the contrary I am of opinion that the judgment for which the bond was given cannot now be attacked in this way, and therefore the appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I agree with the Chief Justice in dismissing the appeal. *Judgment varied.*

MAN.
C. A.

SWEINSSON v. CHARLESWOOD.

Manitoba Court of Appeal, Perdue, Cameron and Haggart, JJ.A. July 19, 1917.

1. ARBITRATION (§ III—15)—SUMMARY ENFORCEMENT OF AWARD.
An award on an arbitration under sec. 634 of the Municipal Act (Man.) is enforceable summarily, by motion, as a judgment of the Court, under sec. 15 of the Arbitration Act (Man.).

2. APPEAL (§ VII I—385)—REVIEW OF DISCRETION—AWARD—SUMMARY ENFORCEMENT.
An improper exercise of discretion by a Judge to summarily enforce an award is reviewable on appeal.
[Annotation in 3 D.L.R. 778, referred to.]

Statement.

APPEAL from the judgment of Metcalfe, J., dismissing an application under sec. 14 of the Arbitration Act to enforce an award on an arbitration under the Municipal Act, in respect of damages caused to the claimant by the diversion of water. Reversed.

F. Heap, for appellant, claimant.

H. Phillips, K.C., and *A. E. Moore*, for respondent municipality.

Perdue, J.A.

PERDUE, J. A.:—Prior to the motion in question, the municipality moved under sec. 13 (3) of the Arbitration Act to set

aside the award on various grounds. That motion was heard before Mathers, C. J., and dismissed on the ground that it had been made too late, but leave was given to the municipality to make a substantive motion for an extension of time. The motion to extend the time came on for hearing before Mathers, C. J., and was dismissed. See report of case, *Re Sweinsson and Mun. of Charleswood*, 31 D.L.R. 203. The claimant then applied to enforce the award. The motion was heard before Metcalfe, J., who refused it, and the present appeal is brought from the order dismissing the application.

The above sub-sec. 3 requires that all applications, otherwise than by way of appeal to the Court of Appeal, to set aside an award on a submission, shall be by motion to a Judge in Court. By sec. 33 of the Arbitration Act, such provisions of the Act as may be applied to provisions for the settlement of matters by arbitration contained in any statute of the province shall be so applied. Whether the present arbitration was brought under sec. 634 or sec. 684 of the Municipal Act, I think the provisions of the Arbitration Act apply as regards both the setting aside of an award and the enforcing of it. The claimant in the first instance brought an action to recover damages against the municipality in respect of the injury in question. The municipality demurred on the ground that under sec. 634 the claim should be determined by arbitration in the manner set forth in secs. 692 to 710 of the Municipal Act. The claimant thereupon discontinued his action and proceeded to arbitrate under the above sections. The by-law passed by the municipality appointing an arbitrator on its behalf to determine the amount of compensation, if any, to be paid to the claimant, in respect of the claim in question, the notice given to the claimant of such appointment, the appointment by the claimant of his arbitrator, and the appointment by these two arbitrators of an additional arbitrator to act with them, all being in writing, taken together, constitute a submission under the Arbitration Act: see sec. 2. The provisions for settling disputes by arbitration contained in secs. 692-710 of the Municipal Act apply equally to secs. 634 and 684: see sec. 694. Sec. 684 has been in the Act for many years, while sec. 634 was introduced by 9 Edw. VII., ch. 35, sec. 16, and is much more recent. In passing the latter section the legislature explicitly made the arbitration

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provisions of the Municipal Act applicable to it. They were always applicable to sec. 684.

By sec. 15 (3) of the Arbitration Act (R.S.M. 1913, ch. 9), it is enacted that:—

All matters in support of or in objection to the award, which might formerly have been raised or brought forward in any action, suit, motion or proceeding at law or in equity in reference to the award, may be raised and brought forward upon the hearing of the motion.

But the right to bring an action on the award has not been taken away by the Act.

An action is still the proper mode of procedure where the submission is by parol, or where the award ascertains only the amount to be paid and not the liability in law to pay, or where the validity of the award or the right to proceed upon it is so doubtful that leave to enforce it under the Act cannot be obtained. (Russell, 9th ed., p. 322.)

The trial Judge refused the motion to enforce the award as a judgment of the Court only on the ground that the present is a doubtful case. The grounds upon which he regards it as doubtful he states as follows: "I am uncertain as to the effect of sec. 634 of the Municipal Act and I have some doubt as to whether such arbitration comes within the meaning of the Arbitration Act. See interpretation 'Submission'."

With great respect, it appears to me that the grounds stated are not sufficient to justify the refusal of the motion. A Judge hearing the motion is in as good a position to interpret provisions of the statutes referred to as he would be if he were presiding at the trial of an action on the award, and his decision rendered upon the motion is subject to appeal in the same manner as a judgment pronounced at the trial of the action: see sec. 22. The opportunity of appealing to a Court of error, if an action was brought, was a main consideration in inducing the Court to refuse a summary application to enforce or set aside an award in a difficult case, and to leave the question to be dealt with in an action: *Stalworth* v. *Inns*, 13 M & W. 466, 469 (153 E.R. 194). Under the Arbitration Act a motion may be made to a Judge in Court to set aside or enforce the award and on that motion he may deal with all matters in support of or in objection to an award in the same manner as if he were trying an action on the award: sec. 15 (3). The first two grounds for refusing to deal with the award on a motion, set out in the above passage from Russell, do not apply in the present case, and the Judge acted upon the third ground only. He re-

garded the case as a doubtful one, because it involved the interpretation of a section in the Municipal Act and the consideration of the question whether the Arbitration Act applied in this case. He does not intimate that it is otherwise doubtful. With great respect, I think the Judge should have dealt with and disposed of the questions to which he refers, all of which were directly before him on the motion.

It is urged that the refusal of an order to make the award a judgment of the Court of King's Bench was a matter within the discretion of the Judge and that it should not be interfered with by the Court of Appeal. Sec. 22 of the Arbitration Act declares that an appeal shall lie to the Court of Appeal from any order or direction made pursuant to the provisions of the preceding sections. The discretion to be exercised in making or refusing the order under sec. 14 is a judicial one and the party applying to enforce the award should not be put to the expense and inconvenience of an action unless there are sound reasons for so doing. The objections to the validity of the award were stated by counsel for the municipality upon this appeal and argued before this Court. They have been dealt with by my brother Cameron, with whose conclusions I concur. They were argued as fully before the Judge who heard the motion as they could be argued at the trial of an action, and they have again been discussed at great length before this Court. The expenses already incurred in connection with this arbitration are little short of scandalous, and I do not propose, if it can be avoided, to further prolong the litigation and increase the expenses by the costs of an action on the award, and, probably, by the costs of another appeal from the judgment in such action. I think that all the objections to the award fail, and that the only question is whether this Court is precluded from reversing the order appealed from on the ground that it is a matter wholly within the discretion of the Judge who made it.

No doubt, the general rule is, that a Court of Appeal will not interfere in matters of discretion, but it has the power and will interfere where the interests of justice require it: *Davy* v. *Garrett*, 7 Ch. D. 473. In that case the Court of Appeal ordered a statement of claim to be struck out, as embarrassing, although a motion for that purpose had been refused by the Court below.

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In *Jarmain* v. *Chatterton*, 20 Ch. D. 493, the Court of Appeal over-ruled the decision of a single Judge who had refused to commit the defendant for contempt of Court, where the defendant had committed a breach of an order.

In *Crowther* v. *Elgood*, 34 Ch. D. 691, it was held that where a Judge has a discretion, the Court of Appeal ought not to review his exercise of that discretion, unless he has manifestly proceeded on a wrong ground or on an erroneous principle.

Thus, where a Judge made an order under Order XXXVI, r. 26, that the issues in an action should be tried without a jury, on the ground that no sufficient reason had been shown for its being tried by a jury, his decision was over-ruled by the Court of Appeal because he had not exercised his discretion in accordance with the rule: *Re Martin*, 20 Ch. D. 365.

In *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, it was held that where a question arose on orders and rules under the Judicature Act, in matters where Courts or Judges are to exercise a discretion, the House of Lords would be unwilling to disturb the orders made, unless for strong substantial reasons; but the principle on which such orders ought to be made, may furnish those reasons. For further cases on the subject I would refer to the useful summary in 3 D.L.R. 778 *et seq.*

Even if we regard the powers conferred upon a Judge by sec. 14 of the Act as discretionary, the discretion was not, I think, exercised upon a right principle. The intention of secs. 14 and 15 was to provide a summary method of enforcing awards and, at the same time, to give the party opposing the motion the right to take any objection to the award which he might formerly have raised in an action or suit on the award.

I think the intention of the Act is that, where all the necessary material is before the Court, the Judge should deal with the application on the merits and not decline to do so because the motion involves the consideration of a legal question, such as the construction of certain statutory provisions. As I have already pointed out, these provisions could be dealt with as readily and effectively upon the motion as upon the trial of an action, and with the same rights of appeal in case either party is dissatisfied.

Whatever may be urged as to the discretionary nature of the power given by sec. 14, an appeal against an order made under

that section is given by sec. 22. Under sec. 12 of the English Arbitration Act, 1889, which corresponds to our sec. 14, it has been held by the Court of Appeal that an appeal lies to that Court from the decision of a Judge, either refusing or granting an order on an application to enforce an award; *Re Colman & Watson Arbitration*, [1908] 1 K.B. 47. In *Re Frere & Staveley Taylor &c. Arbitration*, [1905] 1 K.B. 366, the objection was taken that the appeal should be to the Divisional Court and effect was given to that objection by the Court of Appeal. It does not concern us which is the proper appellate court in England before which the appeal should be heard. The main thing is that it has been settled by decisions of the Court of Appeal that there is an appeal either to that Court or to a Divisional Court from the order of a Judge made on a motion to enforce the award.

I think the appeal should be allowed and an order be made that the award be entered as a judgment of the Court of King's Bench. The municipality should be ordered to pay the costs of the motion before Metcalfe, J., and of this appeal.

Cameron, J.A.

CAMERON, J.A.:—The Rural Municipality of Charleswood was formed out of a part of the Rur. Mun. of Assiniboia in February, 1913. In 1912 the Mun. of Assiniboia had commenced the construction of a ditch on the west side of lot 31, which was then in Assiniboia but was afterwards in Charleswood when and as formed. The claimant Sweinsson, a market gardener, owned, and still owns, certain lands adjoining this ditch. The work was not completed by Assiniboia, but was continued in 1913 and 1914 by Charleswood, from the point where Assiniboia left it unfinished. It is alleged that the construction of the ditch interfered with the natural flow of the water, which accumulated in the ditch, to which there was no outlet, and overflowed on the claimant's lands, causing damage.

Sweinsson commenced on October 12, 1914, an action against the Municipality of Charleswood to recover damages alleged to have been occasioned by the construction of the ditch. To this action the municipality filed, January 15, 1915, a statement of defence, setting up, amongst other defences, that the work was done pursuant to sec. 634 of the Municipal Act; claiming that the damages, if any, suffered by the plaintiff, ought to be determined in an arbitration as prescribed by said section, and not otherwise,

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and asserting that the action was not mainainable, and that the said section was a bar thereto. Thereupon the action was discontinued.

Subsequently the claimant filed an affidavit pursuant to said sec. 634, setting forth the nature of the damages sustained and the amount claimed by him therefor. Afterwards, on April 12, 1915, he appointed A. Parker his arbitrator under the section. The municipality passed a by-law on April 20, 1915, reciting the above affidavit, and the appointment of Parker under the Municipal Act, in, and by which by-law, pursuant to the statute, George T. Chapman was nominated as its arbitrator "to determine the amount of compensation, if any, to be paid to Gudman Sweinsson" for damages alleged to have been suffered by reason of the construction of the said ditch. On the same day the municipality gave notice in writing of this appointment. Subsequently Parker and Chapman duly appointed W. S. Stevenson third arbitrator.

The 3 arbitrators, so appointed, took evidence at great length, and the award in question was made December 23, 1913, and published January 27, 1916. The recital in the award states that it was made unanimously, but in fact it was signed by Stevenson and Parker only. The amount awarded was $1,110.

On June 2, 1916, a notice of motion was served, returnable before a Judge in Chambers, to make the award a judgment and order of the Court of King's Bench. Subsequently, another notice of motion, dated June 21, 1916, to the same effect, under the Arbitration Act, was served, returnable June 28, 1916.

At the time of the return of the last mentioned notice of motion, a notice of motion on behalf of the Municipality of Charleswood to set aside the award was given, which came on for hearing July 13, 1916. This application was then dismissed as being made too late, under sec. 13 (3) of the Arbitration Act. Subsequently, pursuant to leave reserved, a motion was made to extend the time for appeal, and this was also dismissed on the ground set forth by Mathers, C.J., in *Re Sweinsson* v. *Charleswood*, 31 D.L.R. 203, that the mistake of a solicitor was not a "special circumstance" under sub-sec. 3 aforesaid.

The motion to make the award a judgment and order of the Court was finally heard by Metcalfe, J., who, on February 1,

1917, made an order dismissing the application, holding that the claimant's proper remedy was by action. It is from this order that this appeal is taken.

The main question discussed before us was whether or not the proceedings by arbitration are confined merely to ascertaining the amount of the compensation, leaving the liability of the municipality to pay to be determined thereafter by action.

In England it has been held that, under the provisions of the Public Health Act of 1875, 38 & 39 Vict. ch. 55 (substantially the same as those of the Lands Clauses Consolidation Act 1845), the proper course to be pursued by a person claiming damage as a result of work done thereunder, must be by arbitration, and then by action on the award. In *Brierley Hills Local Board* v. *Pearsall* (1884), 9 App. Cas. 595, Lord Selborne says (p. 601) that under the Lands Clauses Act the company cannot say the arbitrator has no right to go into the questions of which he is the proper judge, because the company denies the right,—

> and, on the other hand, that the company will not be prejudiced if it has good, legal ground for denying all liability because the award will not be conclusive —an action may be brought upon it, and if it turns out that the law is in favour of the company, the company will have the benefit of it.

There are numerous decisions of the English Courts to the like effect, to many of which we were referred.

This decision was cited in *Clemons* v. *St. Andrews* (1896), 11 Man. L.R. 111, by Killam, J. The action there was under sec. 192 of the Assessment Act, R.S.M. 1892, ch. 101, providing for the indemnification of an owner whose lands have been sold for taxes when there are no taxes due, and requiring the amount to be settled by agreement, or, in default of agreement, by arbitration. It was held that the proper course was to have the compensation assessed, and then proceed upon the award of the arbitrators, and that no action could be brought until the amount of the indemnity had been fixed by agreement or arbitration. The statutory provisions there in question are manifestly different from that now before us.

In *Re Northern Counties and Vancouver City*, 8 B.C.R. 338, it was held by Irving, J., that the right to compensation for damage to land injuriously affected by exercise of the powers of the city, cannot be determined by arbitrators appointed under sec. 133 of the Vancouver Incorporation Act, 1900, as their jurisdiction is limited to the finding of the amount of compensation.

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The arbitrators having determined that amount, it would then become necessary for the claimants to establish in an action that there was a liability on the part of the city to pay the compensation to them: p. 341.

Most of the cases cited by Irving, J., were discussed before us; *Read* v. *Victoria &c. R. C.*, 1 H & C. 826; *Beckett* v. *Midland R. Co.* (1866), L.R. 1 C.P. 241; *Pearsall* v. *Brierley Hills Board, supra*, *E. & W. India Docks* v. *Gattke*, 3 Mac. & G. 155. He decided that the award of the arbitrators could not be enforced summarily under sec. 13 of the B.C. Arbitration Act, and that the proper remedy was by action. It is impossible to draw any real distinction between the statutory provisions affecting this case and those governing the case before us, as was admitted on the argument before us by counsel for the claimant.

The subject had been previously discussed by Osler, J., in *Re Colquhoun and Berlin*, 44 U.C.Q.B. 631, at 637, where he points out that the proceedings under the Ontario Railway and Municipal Act are essentially different from those under the English Lands Clauses Consolidation Act.

In the latter no provision is made for trying, on the arbitration or assessment, the right or title of the party claiming compensation, or whether the acts complained of are such as, in point of law, can give rise to a claim for compensation, while the former provide for an appeal on which all questions of law and fact may be reviewed by the Court, and the legality of the award and the merits of the case considered.

The distinction had been previously pointed out by Wilson, J., in *Widder* v. *Buffalo &c. Ry. Co.*, 29 U.C.Q.B. 154, who observed that there was a wide difference in proceedings in arbitration under the English Acts and those under the Ontario statutes.

I do not at all agree (Osler, J., says), with the contention that such an award under the Municipal Act can only be enforced by action on the award. It is, by sec. 385, plainly made subject to the jurisdiction of the Court as an award under the Statute of William III.

Sec. 385 is set out at page 635 of the report, and is substantially the same as our sec. 706.

The provisions of the Lands Clauses Act relative to arbitration are to be found in Russell on Arbitration, p. 472, and those of the Public Health Act, more particularly dealt with in the *Pearsall* case, at p. 480. There is no provision in either statute for an appeal from the award.

By sec. 706 of the Municipal Act every award made under the Act shall be subject to the jurisdiction of the Court of King's Bench as if made on a submission by a bond, or otherwise con-

taining an agreement for making the submission a rule of Court, and in cases under sec. 684 the legality of the award and its merits also shall be considered; and the Court may call for additional evidence, and may increase the amount awarded or otherwise modify the award, as shall seem just. This is a reproduction of the sec. 385 of the Ontario Act before Osler, J., in the *Colquhoun* case. I find no difficulty in holding that this case comes under sec. 684, with which sec. 634 must be read as supplementing its provisions. As a matter of fact sec. 634 came into our Municipal Act at a much later date than sec. 684.

Sec. 33 of the Arbitration Act, R.S.M. 1913, ch. 9, provides:—

> Nothing in this Act shall be taken to repeal or affect any provisions relating to the settlement of any matters by arbitration contained in any statute of this province in force on Nov 1, 1912, but subject thereto such of the provisions of this Act as may be applied in addition to or supplementary to the provisions of any such statute shall be so applied.

Clearly this makes the provisions of the Arbitration Act applicable to awards under the Municipal Act, to the extent that such provisions do not expressly conflict with those set out in the latter Act. That the Arbitration Act does so apply was held by Mathers, C.J., in this case; and in this case also, as already noted, the municipality adopted its provisions in seeking to set aside the award. In *Re Horseshoe Quarry Co.*, 2 O.W.N. 373, the Divisional Court held that the Ontario Arbitration Act applied to the Dominion Railway Act, so as to confer jurisdiction to entertain an application to enforce an award.

The term "submission" is defined in sec. 2 of the Arbitration Act as a written agreement to submit present or future differences to arbitration, and, by sec. 3, it is to have the same effect in all respects as if it had been made a rule of Court. This section, is, apparently, even more inclusive than the sec. 385 of the Ontario Municipal Act referred to by Osler, J., in *Re Colquhoun and Berlin*, *supra*. There is here a sufficient agreement in writing to submit to arbitration on the by-law, and the appointments of the arbitrators all of which are in writing.

> There seems no reason to doubt that, under the Municipal Act, the by-law, and appointments in writing by the parties of the arbitrators constitute a submission to arbitration by consent.

Per Street, J., in *Re Toronto Leader Lane*, 13 P.R. (Ont.) 166, 169. By sec. 4 (*h*) of the Arbitration Act, an award is final and binding subject to secs. 13 and 22. Under sec. 13 (3) all applications

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other than by appeal to set aside an award *shall* be by motion to a Judge in Chambers to be made within the prescribed time. Under sec. 22, which clearly applies, an appeal shall lie to the Court of Appeal from any award in the same manner, and subject to the same rules as an appeal from any rule, order, decision or judgment, rendered, given or pronounced by a single Judge of the Court of King's Bench, and upon such appeal the Court may reverse, alter, or vary the award.

The provision of sec. 706 that the Court shall consider the legality of the award as well as its merits, seems to indicate beyond question that the legislature intended that the arbitrators are to have power to deal with questions of legal liability.

We have, therefore, provisions in the Arbitration Act, under which (1) an application can be made to set aside the award, such application to be made within six weeks, or such further time as may be given, and (2) an application may be made to enter the award as a judgment of the Court, and enforced accordingly. And, by sec. 5 (3) of the Arbitration Act, all matters in support of or in objection to the award, which might have formerly been raised in an action or otherwise at law or in equity, may be raised on such applications. In addition thereto, there is the appeal from the award given by sec. 22 of the same Act, and that given by sec. 706 of the Municipal Act. Upon considering the wide powers of appeal and revision so given to the Courts, there is at once apparent the broad distinction between the legislation affecting this case, and that in England, to be found in the Lands Clauses Act and similar statutes, which have been dealt with by the English Courts. It is a distinction forcibly pointed out by Osler, J., in the *Colquhoun* case between the legislation in Ontario and that in England, and which has been still further accentuated in our legislation. This distinction and the reasoning of Osler, J., were not called to the attention of Irving, J., in the *Vancouver* case. I am of opinion that it was not the intention of the legislature that the claimant should be driven to take an action to enforce the award, but that he is entitled to follow the summary procedure indicated by the Arbitration Act, unless there is shown substantial reason for refusing to allow him to do so.

In Russell on Awards, 9th ed. p. 322, it is stated that "An award might be enforced as of right by action but that—

now, under sec. 12 of the Arbitration Act, 1889, an award may be enforced as a

judgment or order, although the right to bring an action is not thereby taken away. The necessity for an action no longer exists to the same extent as formerly, but an action is still the proper mode of procedure where the submission is by parol, or where the award ascertains only the amount and not the liability in law to pay, or where the validity of the award or the right to proceed upon it is so doubtful that leave to enforce it under the above section cannot be obtained.

Now the submission in this case is, as we have seen, not by parol but in writing and the award fixes not only the amount but also the liability as is plain from a perusal of the document. As to the validity of the award itself there are several suggestions made as to matters that might affect it, such as that the award purports on the face of it to be unamimous while it is in fact signed by two arbitrators only; that it is uncertain in its terms in not clearly fixing the liability to pay on the Municipality of Charleswood; that it gives, as against Charleswood, which was formed about the end of February, 1913, damages incurred in the year 1913; that the arbitrators exceeded their jurisdiction in considering matters coming within sec. 471 of the Municipal Act; that the arbitrators adjudicated upon the question of benefit to the claimant, and that there was not a proper view taken of the work.

It would be absurd if a mere mis-recital in the award, such as that complained of here, were to vitiate the award, and there is direct authority to the contrary. Redman on Arbitration, p. 164, citing *White* v. *Sharp*, 12 M. & W. 712 (152 E.R. 1385). It requires some ingenuity to introduce uncertainty into the award, as is apparent on perusing it throughout; when it seems plain enough. There is no question that it fixes the municipality with liability, and "an order to pay pursuant to an award will be made though there be no direction in the award to pay." See Redman, p. 296; *Baker* v. *Cotterill*, 7 D. & L. 20; *Bowen* v. *Bowen*, 31 L.J.Q.B. 193. It is impossible, for climatic reasons, to hold that part of the damage could, by any possibility, have occurred during that portion of the year 1913 prior to the formation of the Municipality of Charleswood. As for sec. 471 of the Municipal Act it clearly deals with a wholly different matter from that before the arbitrators under sec. 634. As to the fact that arbitrators considered the benefit of the work to the claimant, they had the authority of sec. 684, which, in my opinion, applies. See *Knock* v. *Metropolitan Ry. Co.*, L.R. 4 C.P. 131. It would be singular if the municipality could object on this ground, which was obviously in

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its interest. The objection that there was not a proper view falls when the facts are explained. All these matters seem to me unimportant. There is in them no substantial question to be decided, to use the language of Willes, J., in *Re Newbold and Metropolitan Ry. Co.*, 14 C.B.N.S. 405 (143 E.R. 503), and I see no reason whatever for thinking effect could be given to them at any stage.

With all respect to the Judge, whose order is here appealed from, I must say that the meaning of sec. 634 does not seem to present any great difficulty. It provides that the compensation thereunder is to be fixed by arbitration under secs. 692 to 700, and that no action is to be commenced against the municipality until it has had a reasonable time to pay or to take steps to have the compensation fixed under those sections. It is incumbent upon us here to deal with the construction and meaning of this section and the other enactments referred to affecting the procedure and the rights and liabilities in this matter. The questions so arising can be disposed of now as well as if they were postponed to a trial, and it does appear to me that to refuse to make an order to make the award a rule of Court on the ground of any apparent conflict or uncertainty in the statutory provisions is not such an exercise of judicial discretion as that with which Courts of Appeal refuse as a rule to interfere.

The material before us was closely scrutinized with the object of showing misconduct on the part of the arbitrators in connection with the preparation of the award, and in having it put in proper legal form. For this purpose the services of the solicitor for the claimant were called into requisition. It was not alleged or shown that there was any actual wrong doing, but the fact was dwelt on as throwing suspicion on the transaction. But I can see nothing to justify any belief that there could have been any improper influence exercised. It is all a matter of mere suggestion. In any event, such an objection as this is one that should be taken on motion to set aside the award. Hals. 1, 474. Such a motion was made and failed as already stated.

We were also invited to consider evidence which it is alleged went to show that the claimant was himself responsible for the damage to his own land by having a culvert constructed connecting with the ditch in question. But this is a matter which was before the arbitrators who were in the best position to deal with it.

Evidently they considered the real cause of the overflow was the improper and defective construction of the ditch—a reasonable conclusion.

In this case the municipality moved to set aside the award and failed in its application. It moved to extend the time for that purpose and failed to obtain the extension. It could have appealed, but did not do so. On the application to set aside or on the appeal, everything could have been set up by way of objection that could be set up by way of defence to an action on the award. Moreover, an action commenced by the claimant was discontinued on the municipality setting up sec. 634 as a defence, and as constituting a bar to the action.

I concur in the judgment of Perdue, J., in this matter, which I have read. I think we must set aside the order appealed from, and grant the application to make the award a judgment or order of the Court. I am gratified to arrive at this conclusion, as it is certainly high time that an end should be put to this prolonged and costly litigation. The appellant must have the costs of this appeal and of the Court below. *Appeal allowed.*

BURNETT v. HUTCHINS CAR ROOFING Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. February 19, 1917.

APPEAL (§ II A—35)—FROM EXCHEQUER COURT—PATENT—AMOUNT IN CONTROVERSY.

A judgment of the Exchequer Court overruling an objection to its jurisdiction in a patent controversy is appealable to the Supreme Court of Canada; the "amount in controversy" to entertain the appeal under sec. 82 of the Exchequer Court Act (R.S.C. 1906, ch. 140) may be established from the value of the patent right.

Statement.

MOTION to quash an appeal from the judgment of the Exchequer Court in favour of the plaintiffs (respondents).

Conflicting applications for a patent were filed with the Patent Office by the parties. The defendant started proceedings for arbitration under sec. 20 of the Patent Act and the plaintiffs took action in the Exchequer Court.

To the said action defendant pleaded, *inter alia*, want of jurisdiction which plea was overruled and judgment was given on the merits for the plaintiffs. Defendant appealed and plaintiffs moved to quash on the grounds that the exercise of the power conferred on the Court below by sec. 23 (*a*) was only in substitution of that given to arbitrators by the Patent Act, and the

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judgment of the Court was final and not susceptible of appeal just as that of the arbitrators would be; that the appeal to the Supreme Court allowed by the Exchequer Court Act lies only in cases where a sum of money is demanded; and that it was not shewn that the sum of $500 was in controversy and no leave to appeal had been obtained. As to the last ground the Court held that affidavits filed established the value of the patent in dispute at more than $500.

R.C.H. Cassels, for the motion; *McMaster*, K.C., *contra*.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—Two grounds are presented by Mr. Cassels in support of his motion to quash the above appeal for want of jurisdiction. The first one, as I understand it, is that this Court has no jurisdiction because the Exchequer Court has exclusive jurisdiction without appeal. Sec. 20 of the Patents Act, R.S.C. 1906, ch. 69, in cases of conflicting applications for patents provides that the matter in dispute shall be submitted to arbitration and no provision is made for an appeal. This section of the Act comes from the R.S.C. 1886, ch. 61, sec. 19. The present Exchequer Court Act came into force in 1887 (50 & 51 Vict., ch. 16) and by a later amendment in 54 & 55 Vict., ch. 26, jurisdiction is conferred on the Court in all cases of conflicting applications for any patent of invention.

The contention of Mr. Cassels is that the Exchequer Court has at most concurrent jurisdiction but without appeal as in the case of an application made under sec. 20, Patent Act. He then urges that the Court is *curia designata*.

Sec. 82 of the Exchequer Court Act, R.S.C. ch. 140, provides for an appeal to the Supreme Court by any party dissatisfied with any final judgment of the Exchequer Court where the amount in controversy exceeds $500. In other words, this provides for a review by the Supreme Court of all decisions of the Exchequer Court whatever may be the grounds of such decisions and I see no distinction between the case where the Exchequer Court assumes jurisdiction where it has none, and the case where the Exchequer Court has erred in its appreciation of any matter of law or fact.

The point has come up before this Court where the Court below has denied its own jurisdiction and a party dissatisfied with such judgment has appealed to the Supreme Court to reverse this

view of the Court below and to declare that such lower Court had jurisdiction. In the case of *Ste. Cunégonde* v. *Gougeon*, 25 Can. S.C.R. 78, an appeal had been taken from the Superior Court to the Court of Queen's Bench, and the plaintiff moved to have this appeal quashed for want of jurisdiction, and his motion was granted. The municipality then appealed to the Supreme Court of Canada whereupon plaintiff moved in this Court to have the appeal quashed on the ground that there was no judgment of the Court of Queen's Bench and therefore no appeal lay to the Supreme Court. Sir Henry Strong, who gave the judgment of the Supreme Court, there says that as the Court of Queen's Bench properly refused to entertain jurisdiction, it followed that no appeal would lie to the Supreme Court. It is clear therefore that this Court quashed the appeal because it was of the opinion that the Court of Queen's Bench was correct in holding that it had no jurisdiction and therefore the merits of the appeal could not be considered by the Supreme Court.

In the case of *Beck* v. *Valin*, 40 Can. S.C.R. 523, there was an appeal to this Court from a judgment of the Court of Appeal for Ontario, affirming a judgment of the Divisional Court which sustained the refusal of a Judge in chambers to issue a writ of mandamus. In that case Idington, J., says:—

> The right to assert an appeal against a Court asserting jurisdiction where it has none, is a very common case and I have not the slightest doubt of the right to appeal on the converse ground of failure to assert jurisdiction.

In *Hull Electric Co.* v. *Clement*, 41 Can. S.C.R. 419, a motion was made to affirm the jurisdiction of the Supreme Court to entertain an appeal from the judgment of the King's Bench, which quashed an appeal from the judgment of the Superior Court on the ground that the appeal was incompetent and that it (Court of King's Bench) had no jurisdiction to hear such an appeal. The motion therefore to the Supreme Court raised the question whether this Court could review a judgment of the Court of King's Bench where the latter Court had held it had no jurisdiction. The Court in that case disposed of the appeal by reviewing the propriety of the judgment of the Court of King's Bench in holding it was without jurisdiction. The Chief Justice, concluding his judgment, said there:—

> I would follow *City of Ste. Cunégonde* v. *Gougeon et al.*, 25 Can. S.C.R. 78, where it was held that the Court of Queen's Bench having properly declined to exercise jurisdiction, no appeal lies to this Court.

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Fitzpatrick, C.J.

In short, my view is that under the general power of appeal given from a lower Court to the Supreme Court, if the Court below has quashed an appeal to itself on the ground that it has no jurisdiction and the party dissatisfied with this judgment appeals to the Supreme Court, this Court, on a motion to quash, may affirm the judgment below by granting the order. If the Court below holds it has jurisdiction and proceeds to dispose of the case on its merits, this Court has jurisdiction to review on appeal the decision below and if it is of opinion that the Court below was without jurisdiction, it can so determine without considering anything with respect to the merits of the case.

I am, therefore, of opinion that there is an appeal from a judgment rendered in a patent case where the Court exercises the jurisdiction conferred by sec. 23. The appeal is given by sec. 82 "to any party to any action, suit, cause, matter or other judicial proceeding." These words are broad enough to cover a case of conflicting applications for a patent of invention like this.

The other ground presented by Mr. Cassels is that the amount involved was not shewn to be over $500.

The practice is well settled that in patent cases the value of the patent can be established by affidavit and where the appellant neglects to have this shewn in chambers, he may be penalized by way of costs. This was done in the case of *Dreschel* v. *Auer Light Co.*, 28 Can. S.C.R. 268.

I am, therefore, of the opinion that the motion to quash should be refused, but without costs.

Davies, J.

DAVIES, J.:—Two objections were raised on this motion to our jurisdiction to hear this appeal from the Exchequer Court and, in my opinion, they must both fail.

The judgment of the Exchequer Court proceeds on the ground that jurisdiction to hear and determine the action was vested in that Court. Whether such jurisdiction exists or not can more properly be decided when the merits of the appeal come to be considered. Certainly an appeal lies to this Court from any judgment of the Exchequer Court otherwise appealable under the statute which Court has either improperly assumed jurisdiction or, improperly, expressly decided that such jurisdiction exists.

On the second point, I am of opinion that sec. 82 of the Exchequer Court Act gives a right of appeal to this Court in cases

such as the present. The words of the section "sum or value" clearly indicate that an appeal lies as well from a judgment in an action brought to recover a sum of money as from one brought to establish a claim to property or rights. In the latter cases the "value" of such property or rights claimed and in controversy may be established by affidavits and need not necessarily appear in the record.

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I would dismiss the motion with costs.

IDINGTON, J.:—I think the motion to quash the appeal herein should be dismissed with costs.

Idington, J.

DUFF, J.:—This is a motion to quash an appeal from a judgment delivered by the Judge of the Exchequer Court dismissing an action brought by one of two applicants for a patent. Steps had been taken by one of the applicants to have the controversy determined by resort to the procedure provided by sec. 20 of the Patent Act, when an action was brought by the other applicant in the Exchequer Court under sec. 23*a* of the Exchequer Court Act. Among other pleas the defendants (the appellants) denied the jurisdiction of the Exchequer Court to deal with a controversy in respect of which the procedure prescribed by sec. 20 of the Patent Act is available. The application to the Judge of the Exchequer Court to dismiss the action as brought without jurisdiction was at the suggestion of the Judge turned into an application for a stay of proceedings and this application was eventually dismissed. At the trial judgment was given in favour of the plaintiff.

Duff, J.

The first objection which is now raised is that the jurisdiction of the Exchequer Court in cases of conflicting applications for patents is an exclusive jurisdiction; this is to say, that a judgment of the Exchequer Court given in exercise of this jurisdiction is not appealable.

I do not find it necessary for the purposes of the present motion to consider whether or not in respect of some matters the judgment of the Judge of the Exchequer Court in an action such as that out of which this appeal arises is final in the sense of being non-appealable; that is a question which may be much more conveniently dealt with when the appeal comes on for hearing on the merits. It is sufficient to say in regard to the matter I am now considering that the appellants having denied the jurisdiction of the Exchequer Court to entertain the action and the Judge of the

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Exchequer Court having by entertaining the action and giving judgment affirmed judically that such jurisdiction exists, his decision as a decision on the point of jurisdiction or no jurisdiction is appealable to this Court provided the other conditions of appealability indicated by secs. 82 and 83 are present. *Re Padstow Total Loss and Collision Assur. Assoc.*, 20 Ch.D. 137; *Cornwall* v. *Ottawa and New York Ry. Co.*, 30 D.L.R. 664, 52 Can. S.C.R. 466 (affirmed in 35 D.L.R. 468).

The next objection is that the condition laid down in sec. 82 in the words "action, . . . matter or other judicial proceeding in which the actual amount in controversy exceeds $500" is not fulfilled because, first, the action raises no question with regard to any pecuniary demand by either plaintiff or defendant, and secondly, it is not satisfactorily shewn that the value of the thing in controversy, the right to receive a patent, reaches the sum of $500.

As to the second of these grounds, it is unnecessary to say more than that the affidavits filed taken together with the agreement which is in evidence in the cause are sufficient to dispose of it.

As to the first ground the words "amount in controversy exceeds $500" do undoubtedly point to a controversy in relation to a pecuniary demand or in relation to a sum of money as being the kind of controversy contemplated by sec. 82 (1). I am satisfied, however, that this is not the necessary meaning of these words. The first of the meanings attributable to the word "amount" in the Oxford dictionary is "The sum total to which anything mounts up or reaches" and to construe these words one must ask the question: "Amount of what?" Amount exceeding $500 of course does pointedly indicate that the answer to the question must be amount of money. But the words are not altogether intractable; "exceeding $500" may be read as exceeding $500 in value, in other words, the phrase undoubtedly is susceptible of being paraphrased thus: "in which the sum total of the thing in controversy exceeds the value of $500." That, I say, is a possible construction; and I am far from satisfied that if I had to pass upon this section standing alone this construction ought not to be preferred to that advanced on behalf of the respondent in order to avoid the quite absurd result that the legislature, in conferring jurisdiction on the Ex-

chequer Court with respect to various matters enumerated in sections 19 to 24, provided that it is only in respect of matters mentioned in sec. 83 that an appeal lies to this Court as of right. There is no doubt that the exceptional class of cases intended to be described by the clause "actual amount . . . or value of $500" is co-extensive with the class of cases described in the words of sec. 82, "in which the actual amount in controversy exceeds $500," and by this legislative interpretation supplied by sec. 83 all doubt and difficulty are removed.

Since writing the above I have considered the point and have concluded that there is no solid reason for holding that a judgment pronounced in an action brought under sec. 23*a* is excluded from the operation of sec. 82.

The motion to quash should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I am of the opinion that in exercising the jurisdiction conferred by sec. 23*a* of the Exchequer Court Act, the Exchequer Court acts not as a mere *locum tenens* or substitute for the arbitrators under sec. 20 of the Patent Act, but in the discharge of its ordinary curial functions and that a proceeding under sec. 23*a* is a judicial proceeding in which its judgment is appealable to this Court under secs. 82 *et seq.* of the Exchequer Court Act. Mr. Cassels' forceful argument failed to raise any doubt in my mind on this point.

I am equally clearly of the opinion that the fact that the Judge of the Exchequer Court affirmed his own jurisdiction to deal with the matter in controversy, which was challenged, far from casting doubt on the appealability of his judgment only serves to make it more certain.

As to the value of the matter in controversy the affidavits and the agreement in evidence sufficiently establish that it exceeds the requisite $500.

A construction of sec. 83 which would confine the right of appeal to proceedings in which there is an actual pecuniary demand before the Court, thus excluding most important cases in which the right asserted or the matter in controversy, though not presented in the form of a claim to recover money, far exceeds in value $500 would, in my opinion, be too narrow and would frustrate the purpose of Parliament. Sec. 83 is not happily phrased. "Amount in controversy" is, no doubt, an ill-chosen expression

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calculated to lend colour to the contention of the respondent. But the use of the words by which it is followed, "sum or value," makes it reasonably certain that it is not intended to restrict the right of appeal to cases in which the controversy is as to the right to recover a sum of money. If so, the addition of the words "or value" would be meaningless.

I would dismiss the motion. *Motion dismissed.*

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Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Walsh, JJ. June 19, 1917.

SPECIFIC PERFORMANCE (§ I E—35)—DOUBTFUL TITLE—CAVEAT—REMOVAL. Where a vendor within a reasonable time removes a caveat against the title founded on an agreement imposing burdens on the land he is entitled to specific performance of the agreement of sale.

[*Greer* v. *Clarke*, 27 D.L.R. 699, 9 A.L.R. 533, followed; *Universal Land Co.* v. *Jackson*, 33 D.L.R. 764, referred to.]

Statement.

APPEAL by defendant from the judgment of Simmons, J., without a jury, in favour of plaintiff, with costs, in an action by a vendor against a purchaser for specific performance. Affirmed.

C. F. Adams, for appellant.

Clarke, Carson & Macleod, for respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—Two grounds of defence were set up; (1) misrepresentation and (2) repudiation on the ground of partial absence of title. Only the second ground was argued before us.

By agreement dated March 23, 1910, the Alberta Railway and Irrigation Co. agreed to sell and the Imperial Development Co. agreed to purchase the land in question along with a considerable quantity of other land.

This agreement contained the following restriction to the description of the land:—

> Subject to the exceptions, reservations, provisos and conditions expressed or to be expressed in the original grant thereof from the Crown and also excepting and reserving therefrom all mines and minerals within, upon or under the said land and the right to use and occupy so much of the said land and the surface thereof as the vendors or their assigns may consider necessary for the purpose of effectually working and removing the same and excepting also any portion of said land taken for roads, irrigation works, or public purposes; also excepting and reserving thereout right of way 100 feet wide to be used by the vendors or their assigns for the purpose of irrigation canals or works; said right of way, if taken, to be paid for by the vendors or their assigns in accordance with the value of land and any improvements upon same, said privilege to be exercised by the vendors or their assigns within ten

years from the date of this agreement, and subject to the proviso endorsed on the back hereof.

The endorsed proviso was as follows:—

But, subject to the proviso that the water channels of Kipp or Etzikom Coulees and of Verdigris Coulee as the same are respectively shewn on plans on file in the Department of the Interior at Ottawa shall be deemed to be rivers within the meaning of sec. 7 of the Irrigation Act and no exclusive or other property or interest shall vest in the grantee or purchaser with respect to any stream or other body of water in any such coulee or the land forming the bed or shore thereof, and to the further proviso that the Alberta Railway and Irrigation Co., its successors and assigns shall not be liable for any damage whatsoever caused by the passage of water through or down or the overflowing of water from any portion of said coulees or either of them; subject also to a reservation in favour of the Alberta Railway and Irrigation Co., its successors and assigns to, at all times, use any portion of said coulees or either of them traversing the land herein described for the passage of water from their canal system free from any interruption or interference on the part of the grantee or any person claiming through or under him.

By agreement dated April 20, 1910, the Imperial Development Co. agreed to sell and the defendant agreed to purchase the land in question in this action.

Subject to the reservations, limitations, provisos and conditions expressed in the original grant from the Crown and reserving all mines, minerals, coal or valuable stones on or under the said land.

This agreement also contained the following clause:

The said purchaser hereby accepts the vendor's title to the said land *and the terms of its contract with the railway company*—

there being nowhere, however, in the agreement any other reference to a railway company.

By agreement dated May 28, 1910, the Imperial Development Co. assigned to one Dalziel the money owing to the company by Knott under his agreement to purchase and the lands therein mentioned.

By agreement dated June 9, 1910, Dalziel made a similar assignment to Pugh and this agreement was followed by another dated March 20, 1911, whereby the Imperial Development Co. assigned to Pugh all its rights under the agreement with the railway company and Pugh became personally responsible for the unpaid portion of the purchase money.

By agreement dated September 1, 1915, Pugh covenanted with the railway company as follows:—

That the water channels of Kipp or Etzikom Coulees and of Verdigris as the same are respectively shewn on plans on file in the Department of the Interior at Ottawa shall be deemed to be rivers within the meaning of sec. 7 of the Irrigation Act and no exclusive or other property or interest shall vest

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in the purchaser with respect to any stream or other body of water in any such coulee or the land forming the bed or shore thereof.

That the company, its successors and assigns shall not be liable for any damage whatsoever caused by the passage of water through or down or the overflowing of water from any portion of said coulees or either of them.

And that the company, its successors and assigns shall have full power at all times to use any portion of said coulees or either of them traversing the land herein described for the passage of water from their canal system free from any interruption or interference on the part of the purchaser or any person claiming through or under him.

On or about September 20, 1915, the railway company filed a caveat founded upon the last mentioned agreement; the title to the land then being, as was stated in the caveat in the name of one Naismith, admittedly a bare trustee for the railway company.

The action was commenced on October 22, 1915.

The statement of defence was filed on or about November 13, 1915. Among other defences set up was one to the effect that the plaintiff was not ready, willing or able to give title to the lands, but that the plaintiff's title, such as it was, was not such as the defendant was bound to accept because (amongst other things) the plaintiff's title was subject to a caveat in favour of the Alberta Railway and Irrigation Co. founded on an agreement containing very vexatious and onerous clauses which the plaintiff cannot remove.

We are concerned only in the objection to the plaintiff's title arising out of the agreement upon which the caveat is founded.

That agreement purported to impose burdens on the land relating (*a*) to the channels of certain named coulees; (*b*) the overflow of waters from those coulees; (*c*) the free use of those coulees for the passage of water for irrigation purposes.

It is said on the plaintiff-vendor's behalf that the fact is that these burdens, imposed as they were by the original agreement between the Alberta Railway and Irrigation Co. and the Imperial Development Co., which comprised a considerable quantity of other land, would affect the land in question in this action, if at all, only to a very inconsiderable degree and this seems to be the case; and consequently had this objection to the title not been removed as it eventually was it would probably have come within the equitable rules entitling the vendor to specific performance with an abatement of purchase money.

In addition to this it is, in effect, also said that the plaintiff-vendor supposed that the defendant-purchaser was by the terms

of his agreement of purchase of April 20, 1917, whereby he expressly accepted "the terms of its (his vendor's) agreement with the railway company" bound to accept the title subject to the incumbrance sought to be maintained by the contract on which the caveat was founded—the terms in this respect of these two agreements being in effect the same.

There seems some ground for saying that the defendant was for this reason so bound; but it is unnecessary to decide whether this is so or not, because the plaintiff obtained the removal of the caveat altogether and the plaintiff having acted in good faith throughout the principle applied by this Court in its recent decision in *Greer* v. *Clarke*, 27 D.L.R. 699, 9 A.L.R. 535, is, I think, undoubtedly, applicable here.

In that case, the purchaser, having discovered that the vendor was not the owner of a comparatively small portion of the land, assumed to repudiate the contract on that ground; the vendor who had not previously known of his want of title in this respect promptly acquired title and the Court held that he was entitled to specific performance.

The Court, in so holding, followed the case of *Chamberlain* v. *Lee*, 10 Sim. 444, 59 E.R. 687. That decision does not stand alone; the question is dealt with in Fry on Specific Performance, 5th ed., pp. 664 *et seq.*, where that case and others are referred to.

The decision in *Greer* v. *Clarke*, *supra*, is entirely consistent with the other decisions of this Court noted in *Universal Land Sec. Co.* v. *Jackson*, 33 D.L.R. 764, where exceptions are suggested. The principle is that where there is substantial compliance and the comparatively small defect in complete compliance has arisen without bad faith the Court will permit its being compensated for, or—what is better—where it can be done, by complete compliance within a reasonable time.

Here the vendor offered what is better than compensation, namely, literal fulfilment. It seems to me that the principle ought to be applied with caution where a vendor asks specific performance with compensation; but applied liberally where, within a reasonable time, he actually removes a defect of which, or of whose materiality, he was not aware when entering into the agreement to sell.

The objection to the plaintiff's title was removed by the with-

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drawal of the caveat altogether. This was done before the trial Judge gave his decision, thus perfecting the plaintiff's title.

I think for the reasons indicated that the judgment appealed from is right and, therefore, that the appeal should be dismissed with costs. *Appeal dismissed.*

JOHNSON v. HALIFAX ELECTRIC TRAMWAY Co.

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Nova Scotia Supreme Court, Graham, C.J., and Longley, Harris and Chisholm, JJ. April 28, 1917.

STREET RAILWAYS (§ III B—25)—NEGLIGENCE—RES IPSA LOQUITUR—JERKS AND JOLTS.

A jerk or jolt of a street car while receiving passengers, resulting in a passenger being thrown off and injured while attempting to board the car, is *primâ facie* proof, without more, that the accident was caused by the negligence of the railway company, to which the principle of *res ipsa loquitur* applies.

[See *Imperial Tobacco Co.* v. *Hart* (N.S.), 36 D.L.R. 63.]

Statement.

APPEAL from the judgment of Russell, J., in favour of plaintiff, in an action to recover damages for injuries sustained by plaintiff owing to the sudden starting or lurching ahead of one of the defendant company's cars while plaintiff was in the act of stepping on board of the car, which had stopped at one of the usual stopping places for the purpose of letting off and taking on passengers. Affirmed.

H. Mellish, K.C., for appellant; *C. J. Burchell*, K.C., for respondent.

Graham, C.J.

GRAHAM, C.J.:—The trial Judge in his judgment says:—

The plaintiff, an elderly lady, was boarding the car of the defendant company at the corner of South Park St. and Victoria Road, going south. A passenger had alighted and plaintiff had her left foot on the lower step and her left hand holding the bar or rail at the rear of the car. As she was lifting her right foot to the second step the car jolted, bringing her to her knees and spraining her ankle or foot, as she supposed. In fact the fibia was broken near the lower end and she was 3 months under treatment. She has not completely recovered the use of her limb. Her husband says that she still limps and she complains that she suffers a dull pain and cannot walk into the city and back without feeling the effects of the injury, although the accident occurred in the winter of 1913-14. The plaintiff made no complaint for about 6 months after the event, and the company are handicapped in their defence not knowing what conductor or driver was on the car. But there can be no doubt of the genuineness of the grievance and I fear there is none as to the permanence of the effects. The defendant company could make no defence under the circumstances and the only thing that could be said for them was that it had not been shewn how the accident occurred. But it is clear law that if a barrel should fall from a loft on the head of a passenger along the street no further evidence is necessary to maintain the case of the plaintiff: *Byrne* v. *Boadle* (1863), 2 H. & C. 722. Sir Frederick Pollock (Torts, p.

499) refers to this case as applicable to the permanent occupier of property, but there is no reason why it should be restricted in such a manner, and it would be a very unscientific jurisprudence that would apply a different principle to such a case as the present.

Then he refers to something from Wigmore on Evidence, and a Massachusetts case and continues:—

It is clearly laid down that the fact of the accident is some evidence of negligence to go to the jury. In the absence of any evidence to the contrary the result seems inevitable, yet it is suggested that the jury may still find as they see fit. I have no hesitation in finding for the plaintiff.

I refer to these extracts mainly for the purpose of shewing the impression made on the Judge's mind as to the defendant not calling witnesses. And I agree with him in thinking that it was in good faith that they attempted to discover who the motorman and the conductor, at the time, were in order to obtain their testimony and could not do so. It would have been wise to have put on a witness to prove this as matters have turned out. But I cannot think (because counsel must have been concerned in it) that they brought up persons for this woman to identify knowing they were not the motorman and conductor on that occasion. I am satisfied with the Judge's finding on that matter; and therefore, that they, defendants, were not withholding witnesses who were available to make the matter clear.

In *Byrne* v. *Boadle*, 2 H. & C. 722, in which a barrel of flour fell from a window in defendant's shop on the plaintiff, walking by, on a public street, it is clear that the defendants had witnesses whom they could have called and did not do so. There was in fact a non-suit.

Pollock, C.B., said, p. 723:—

The presumption is that the defendant's servants were engaged in removing the defendant's flour; if they were not, it was competent to the defendant to prove it.

And Bramwell, B., p. 726, says:—

Looking at the matter in a reasonable way, it comes to this: an injury is done to the plaintiff who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury.

And in the judgment Pollock, C.B., says, p. 728:—

It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *primâ facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous.

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And in *Scott* v. *London Etc. Docks Co.*, 3 H. & C. 596, where bags of sugar fell from a warehouse on the plaintiff the majority of the Court held, p. 601:—

There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

Now, must the defendants explain when they had not the means of explanation, and there is an inference to be drawn against them if they do not? I think not.

Lord Chelmsford, sitting in the Judicial Committee, in *Moffat* v. *Bateman* (1869), 6 Moore P.C. (N.S.) 369, (16 E.R. 765) (a case of the defendant carrying the plaintiff, his gardener, in a vehicle which by the kingbolt breaking and the horses thereupon bolting and the carriage being overturned) says, after referring to the case of *Scott* v. *London Docks*, 3 H. & C. 600, upon which the judgment appealed from was founded, p. 380:—

Undoubtedly in that case there was the strongest *primâ facie* presumption of negligence, because it is not in the ordinary course of things that loaded bags should fall out of a warehouse on a person below. But this case is very different. There is nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver and, therefore, no *primâ facie* presumption of negligence having been raised, their Lordships think it was necessary for the plaintiff in the case (the respondent) to give affirmative evidence of there being gross negligence on the part of the appellant occasioning the accident.

Now the breaking of the kingbolt was just as unusual as anything which happened here, but he did not seize hold of that matter to apply the phrase *res ipsa loquitur*.

The case before us is nearer to that one than to the loaded barrel and bags cases falling from windows. I also refer to *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. 652, at 658, 662, 664.

But taking the evidence of the plaintiff herself in this case as it is, is it not the duty of the company to her about to become a passenger, to have the tram car so securely braked that it will not "lurch forward" or "jolt" at the time she is boarding it? My doubt is about that. There is no testimony that this cannot be done so securely as to prevent movement.

I cannot say that this was a mere accident.

In my opinion, without doubt, I think the appeal should be dismissed and with costs.

LONGLEY, J.:—With doubt I concur in the same opinion.

HARRIS, J.:—The Judge in his decision says, that, as no complaint was made by the plaintiff for 6 months after the event, the defendants were handicapped in their defence, not knowing what conductor or driver was on the car.

The plaintiff's counsel puts his case on the ground that the plaintiff was invited to enter a standing or stationary car and that it is unusual for standing cars to suddenly lurch forward and that proof of this unusual occurrence established a *primâ facie* case of negligence and threw the burden on the defendant to explain the occurrence.

He relied upon *Scott* v. *London Docks Co.*, 3 H. & C. 596, at 601, and similar cases. (See judgment of Graham, C.J.)

Fletcher Moulton, L.J., in *Wing* v. *London General Omnibus Co.*, [1909] 2 K.B. at 652, 663, said:—

> Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies when the direct cause of the accident and so much of the surrounding circumstances as was essential to its occurrence were within the sole control and management of the defendants or their servants so that it is not unfair to attribute to them a *primâ facie* responsibility for what happened.

This principle laid down in *Scott* v. *London Docks Co.* is well established. The difficulty is in applying the facts. The cases which seem to be more nearly like this, so far as the facts are concerned, are *Angus* v. *London, Tilbury & Southend. R. Co.*, 22 T.L.R. 222, and *Burke* v. *Manchester &c. R. Co.*, 22 L.T.N.S. 442.

In *Angus* v. *London, Tilbury and Southend R. Co.*, as a train was approaching a railway station at a high rate of speed the brakes were suddenly put on and the train suddenly stopped, and the plaintiff was thrown from his seat and injured. The jury found for the plaintiff and the defendant applied for judgment on the ground that there was no negligence proved, or in the alternative for a new trial. The case was heard by the Court of Appeal consisting of Lord Loreburn, L.C., Vaughan Williams and Stirling, L.JJ. The Lord Chancellor, in delivering the judgment of the Court, said:—

> The plaintiff established a *primâ facie* case of negligence on the part of the defendants by shewing that there was an unusual and violent stopping of the train, which caused him the injury complained of. That was rightly regarded by the learned Judge as *primâ facie* evidence of negligence on the part of the railway company. Nor, indeed, was that questioned by the learned counsel

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for the railway company. Unless rebutted, that was evidence of negligence. In his (the Lord Chancellor's) opinion the defendants had to prove that they were blameless in respect to the cause of the accident.

Beven, on Negligence, p. 144, criticises another part of this decision, but the portion which I have quoted is not included in that criticism.

In *Burke* v. *Manchester, &c., R. Co.*, 22 L.T.N.S. 442, a train in running from one station to another at about 300 yards distance and at the end of which there were two stationary buffers, suddenly jolted against something and caused injury to the plaintiff who was in the train. As soon as the jolt had taken place the train became stationary close to the buffers. Evidence was given that the engine driver ought to bring the train up to the buffers in a way that no jolt ought to be felt. It was held that under the circumstances the mere fact of this accident happening was evidence to go to the jury of negligence on the part of the company.

The Court consisted of Boville, C.J., Keating, Smith, and Brett, JJ., and all the Judges thought, under the circumstances, the rule in *Scott* v. *London Docks Co.*, *supra*, applied.

In *Martin* v. *Second Avenue R.R. Co.*, 3 (App. Div.) N.Y., at p. 450, the Court, in a somewhat similar case to this said:—

> The car having stopped and the passengers being called upon to alight, if in the act of alighting the plaintiff was thrown from the car by a jerk of the car it was necessary for the appellant (defendant) to prove that it was not responsible for the happening of that movement in order to absolve itself from liability. It was not incumbent upon the plaintiff to say what caused the jerk. It was negligence upon the part of the appellant to allow the car to move while the passengers were in the act of alighting.

If the case had remained as it was when the plaintiff left the stand I would have thought it to be perfectly evident that the rule laid down in *Scott* v. *London Docks Co.*, 3 H. & C. 596, applied. The difficulty is created by the evidence of the witness Tobin, called by the plaintiff, and the question is whether his evidence has established that the jolting of the car might have happened from a variety of causes, some of which might have been due to the default of the defendants, and for some of which they might not have been responsible.

It is, I think, not sufficient for the plaintiff to shew that the jolting of the car might have been occasioned by the negligence of the defendants. If there were other causes which also might have produced it, the plaintiff must shew that these did not operate.

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But the speculations of the witness Tobin seem to have been based entirely upon the presence of snow on the ground, and there is no evidence whatever that there was any snow at the time.

Under these circumstances, though not without doubt, I have reached the conclusion that his evidence does not affect the matter and that the burden was thrown on the defendant company of explaining the accident, and, in the absence of such explanation, the trial Judge was right in deciding for the plaintiff.

I would therefore dismiss the appeal with costs.

Chisholm, J.

CHISHOLM, J.:—The plaintiff sustained injuries while boarding a tram of the defendant company; and the sole question for determination is whether there was negligence on the part of the company. I think it is correct to say that it was the duty of the company to stop the car a sufficient length of time to enable the plaintiff in the exercise of due prudence and care to climb upon the platform and enter the tram; and if the servants of the company in charge of and controlling the movements of the tram failed to do so and set the car in motion whilst the plaintiff was climbing the steps leading to the entrance and before she had reached a place of safety, the company was guilty of negligence.

If the lurch or jerk were one of the ordinary incidents of operating the tram, the plaintiff might be expected to be prepared for it. "It is a matter of learning," says Crosby, J., in *Anderson* v. *Boston Elevated R. Co.* (1914), 220 Mass. 28, "that electric cars cannot be run without occasional jerks and jolts, and for injuries to passengers arising from the ordinary sway or lurch and jerk of a car there is no remedy because there is no evidence of negligence." But the plaintiff was thrown down, and to use the language of an eminent Judge, Rugg, C.J., in the case of *Sullivan* v. *Boston Elevated R. Co.* (1916), 224 Mass. 405, "an impetus of such force as to throw the ordinary passenger off his balance is so far contrary to common experience as to warrant an inference of negligence in the management of the car."

I refer also to the following language of Loring, J., in *Work* v. *Boston Elevated R. Co.* (1911), 207 Mass. 447:—

> It is settled that jerks while running, jerks in stopping and starting to let off and take on passengers; jolts in going over frogs or switch points, and lurches in going around curves are among the usual incidents of travel in electric cars which every passenger in them must expect to encounter, and that if a passenger is injured by such a jerk, jolt or lurch, the company i not liable. On the other hand, an electric car can be started and stopped, fo

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example, with a jerk so much more abrupt and so much greater than usual that the motorman can be found guilty of negligence and the company liable. The difference between the two cases is one of degree. The difference being one of degree and one of degree only, it is of necessity a difficult matter in practice to draw the line between these two sets of cases in which opposite results are reached. No general rule can be laid down. Each case must be dealt with as it arises.

It was quite proper to infer negligence on the part of the company from the facts detailed by the plaintiff. It was open to the company to repel the inference of negligence and to establish facts from which a different inference might be drawn. Counsel for the company endeavoured to do so by means of the evidence of Norbert Tobin, one of the witnesses called by plaintiff; but as I read his evidence, Tobin does not establish clearly and definitely facts upon which to enable the Court to say that the accident might as reasonably be attributed to other causes beyond the control of the company as to the negligence of its motorman and conductor.

The governing principles of law in a case like this are clearly stated in Smith on the Law of Negligence (Ind. ed. 1885) p. 245:—

> In actions of negligence (as indeed in all actions) the plaintiff must give some proof of his case beyond a mere scintilla of evidence, and if he does not, it is the duty of the Judge to direct nonsuit. . . . But there is a class of cases in which there has been no direct evidence of any particular act of negligence beyond the mere fact that something unusual has happened, which caused the injury; and upon the maxim or rather phrase *res ipsa loquitur* it has been held that there is evidence of negligence. As the phrase imports there must be something in the facts which speaks for itself, and therefore each case will depend upon its own facts, and it will be difficult to lay down any guiding principles. . . .
>
> If something unusual happens with respect to the defendant's property, or something over which he has no control, which injures the plaintiff, and the natural inference on the evidence is that the unusual occurrence is owing to the defendant's act, the occurrence being unusual, it is said (in the absence of explanation) to speak for itself, that such act was negligent. . . .
>
> It is clear that the cause of the accident must be connected with the defendant either by direct evidence that it is his act, or that it is under his control, before it can be presumed that he has been negligent. It also seems clear that the phrase cannot apply to cases where it is open to doubt whether the plaintiff has not neglected some duty devolving upon him. Where there is no duty upon the plaintiff, or where the duty which he has to perform has been performed by him, it is clear that the negligence of the plaintiff is out of the question and if the accident is connected with the defendant, the question whether the phrase *res ipsa loquitur* applies or not becomes a simple question of common sense.

The plaintiff was not in any default as to any duty devolving upon her; the accident was connected with the operation of the

tram over which the company has control; and the natural inference, in the absence of any sufficient explanation by the defendant, must be that the company's servants were guilty of negligence.

The appeal, in my opinion, should be dismissed with costs.

Appeal dismissed.

IMPERIAL TOBACCO Co. OF CANADA v. HART.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley and Drysdale, JJ. May 9, 1917.

NEGLIGENCE (§ I A—1)—RES IPSA LOQUITUR—FLOODING—OPEN TAP—BURDEN OF PROOF.

Where damage is caused to the goods of a lower tenant by an overflow of water from a tap left open on a floor above, and the defendant has shewn that it has not been caused by any act of his, or of those in his employ, it not being within the normal duties of his employees to use the tap, the presumption as to his *primâ facie* liability, under the rule of *res ipsa loquitur*, is sufficiently rebutted.

[*Johnson* v. *Halifax El. Tram. Co.* (N.S.), 36 D.L.R. 56, referred to.]

Statement.

APPEAL by plaintiff from the judgment of Harris, J., dismissing with costs an action by the plaintiff company for injuries to their goods caused by an overflow of water from defendant's premises on the floor above the warehouse in which plaintiff's goods were stored. Affirmed.

H. Mellish, K.C., for appellant.

C. J. Burchell, K.C., for respondent.

Graham, C.J.

GRAHAM, C.J.:—The defendant has a restaurant on Barrington Street, the kitchen of which is on the storey above the plaintiff's storeroom for their tobacco on Granville Street. In the defendant's kitchen there is a hot water boiler heated by gas, and in the normal use of it the water is heated at the top and it is taken from the top to the taps at the sink and that is the natural and convenient place for obtaining hot water. But there is a pipe and tap at the bottom of the boiler used for drawing off the water when the boiler requires to be cleaned out. That was an exceptional use. However, on May 10, 1915, when in the morning the parties concerned went into the premises it was found that this tap was turned, and water was flowing from the boiler, and to such an extent that it had gone through the ceiling into the plaintiffs' tobacco shop and injured their goods.

I am going to take the finding of facts from the Judge who has most carefully dealt with them, and to my satisfaction, and I could not improve upon his statement. This part of his judgment gives his findings:—

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The question as to how the tap in the hot water boiler came to be open is left shrouded in mystery. If it were an ordinary tap in a sink, or a tap which was in ordinary use, I should find without hesitation that it had been used by one of the staff and carelessly left turned on, and that the defendant was liable, but I cannot so find with regard to this tap because it was not being used and was not likely to be used and there was no reason why it should be used. I see no reason to doubt the evidence of the cook and girls in the kitchen that the tap had not been used by them and the water was not running when they left.

I find, therefore, that when the cook locked the door to the coat room and closed the kitchen that night the tap had not been turned and the water was not running. There is nothing to shew that anyone connected with the premises entered the kitchen after it was closed and before the shop was locked up for the night.

Evidence was given to shew that some water had on a previous occasion leaked through from the kitchen to the plaintiffs' premises and the defendant was warned about it. If the overflow on this last occasion had been due to the same cause as before, that, in view of the notice given defendant, would have been evidence of negligence; but that water came from an entirely different source, and it does not seem to me to afford any help in the present difficulty.

I assume that the phrase *res ipsa loquitur* is applicable to this case, and I assume, therefore, that in the first instance the burden of proof was upon the defendant. The defendant seems to have been aware of its applicability and proceeded to satisfy the burden cast upon him.

The defendant, of course, went into the witness box. The place was usually closed at about 11 o'clock against incoming guests, and at 11.30 o'clock for the night. He was the last person to leave the premises the night before and locked up the store, and this was and could only be in the ordinary course after every one else had gone out. He had one key, and Covey, his head man for ices, had the other. There was a third key but it was not in use nor accessible. He says:—

Q. You don't know whether you left anyone there that night or not? A. I know that all the employees were out. Q. How do you know? A. I saw them go. Q. How do you know; did you take any tally of them? A. No, I asked the last girl if everyone is out. Q. Did you do that this night? A. I don't know; that was the practice, and I have never known it to fail. Q. If some girl said all were out when they were not all out? A. She would lie.

Then he put into the witness box the two cooks who alternately, evening about, had charge of the kitchen, Annie Fitzpatrick and Lizzie Heaton. That evening it was Annie Fitzpatrick who was on duty. It was her duty to put out the lights and lock up the kitchen that night before leaving for home and she did put out the lights and lock up the kitchen. Three others besides her

would be in the kitchen, May Fitzpatrick, Carrie Churchill and Mabel Ledrue. Their duties were washing dishes and trays. But inasmuch as guests cannot be turned out before the hour for closing, the dishes, after a fixed hour, are left over for washing in the morning. These three persons were also put into the witness box. The two sisters, Annie and May Fitzpatrick went out of the shop together; the latter waiting in the store for the former. Mabel Ledrue and Carrie Churchill went away together also and before Annie Fitzpatrick locked up. All of these witnesses would go the cloak room near the kitchen for their hats and clothes, on going home. These four servants were all who in the ordinary course would have occasion to use hot water that evening or frequent the kitchen at all. All swear that they not only did not use that tap that evening, but never did so, and it would be a strange thing, in my opinion, if they did. Some of them did not know of its existence. Furthermore, if the tap were running when they were leaving they would have heard it and it was not running.

The testimony of these witnesses is largely cumulative to displace the others of them as delinquents; and it shows that in the pursuance of the normal duties of the employees to the employer this tap was not opened or left open by them. Wellington Covey, who had the other key, was the person whose duty it was to open the store in the morning. He opened about 7 a.m. and he describes how he found things. The tap had been running and he denies that he had been the cause of it.

I have failed to discover any flaw in the proof of these witnesses.

But it is now suggested in one of the opinions and since the hearing that there would be other servants who should have been called. I think that floor scrubbing servants are suggested although there is no proof elicited by cross-examination as to the way that is managed. My notion is that this work is done in the morning and Covey who opens up would let them in.

Dealing with the phrase *res ipsa loquitur*, in Wigmore on Evidence, vol. 4 (1905), sec. 2509, it is said:—

> It may be added that the particular force and justice of the presumption regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.

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Of course that idea is brought out very forcibly in *Byrne* v. *Boadle*, 2 H. & C. 722. The defendant's employees were concerned in lowering a barrel of flour, but instead of calling them as witnesses they were withheld and a non-suit was asked for. The effect of this rule of evidence is that the burden of proof is in the first instance shifted to the defendant. Presumption of fact arises and he is required to meet it. But whenever a party is required to prove a negative he is only expected to give a reasonable amount of evidence in order to satisfy the burden cast upon him. And when from the nature of the accident there is a presumption of negligence he can only meet it by dealing with the facts which would normally and usually happen. If he is required to meet cases which would only happen if someone had acted in an exceptional, extraordinary or eccentric manner there would be no end to the proof that would be required and he would have to anticipate in order to shift the burden of proof back again to the plaintiff. *Kearney* v. *London & Brighton R. Co.*, L.R. 5 Q.B. 411, 414, Cockburn, C.J. The defendant is not expected to explain it if he cannot do so. He must act reasonably and do his best under the circumstances.

The defendant was not, I think, required to prove that the overflowing was as a fact caused by a third person entering through the fanlight and turning on the tap out of malice. That, on the other hand, is requiring too much from him. It was quite sufficient for him to negative the presumption and to prove the possibility of its being caused in other ways than by the negligence of one of his servants for which he would be responsible. I think he has done this. If the facts proved in the case and with the element of *res ipsa loquitur* in force against him, there is an open question as to whether the accident arose from the negligence of the defendant or his servants or from some other cause and the tribunal of fact finds against the plaintiff, I think that the Court of Appeal ought not to reverse the finding. *Phelps* v. *G. E. Ry. Co.*, 21 L.T.N.S. 443.

In *Palmer* v. *Bateman*, [1908] 2 I.R. 393, the plaintiff was injured by a spout falling from the house which she was passing on the pavement, and the phrase we are dealing with was clearly applicable against the occupant, but the jury having found for the defendant the Court of Appeal did not disturb the finding.

I agree with the trial Judge that this was not a case of a nuisance and that the doctrine of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, does not apply to it.

In my opinion the appeal ought to be dismissed with costs.

LONGLEY, J., concurred.

RUSSELL, J.:—The plaintiff's tobacco was damaged by water from a boiler in the kitchen of the defendant immediately above the plaintiff's wareroom. The boiler was installed after plaintiff had taken his lease from the same landlord under whom the defendant holds. It is of the usual kind used when one tenant holds a flat over another in the same building and is fitted in the usual way with a tap at the bottom a little more than the height of a bucket from the floor for the purpose of emptying the boiler when it is necessary to clean or repair it. In this case it had been used to empty the boiler for the purpose of attaching a heater. Of course it would be possible to draw water from the boiler through the tap for any ordinary purpose, but it was not meant to be used in that way and it is not proved that it ever was so used. The kitchen in which the boiler stood had a door opening outwards with a transom over it, and was fitted on the inside with a Yale lock as well as a padlock, the keys of which were kept on the inside of the door, that is, in the kitchen, near the door. There was a door from the kitchen to the tea-room in which lunches were served, the windows of which looked out on Granville Street. From the tea-room the customers passed through an archway into the store fronting on Barrington Street and thence to the street. There was also a door on Granville Street which could be reached from the kitchen by going down a flight of stairs from the hallway into which the kitchen opened. The boiler being of the ordinary kind and such as could properly be installed in such a place and for such a purpose and yet being under the exclusive control of the defendant, and being a contrivance which would not ordinarily cause damage in the absence of negligence, I think the burden was on the defendant to prove that there had been no negligence for which he could be held responsible.

This is a principle which is more or less involved in at least three cases that have come before the Court during the present term. As one of these is an appeal from my own decision, in *Johnson* v. *Halifax Electric Tram Co.*, 36 D.L.R. 56, I shall en-

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deavour to avoid any argument that could touch upon the application of the principles of law to the facts of that case, but I cannot altogether avoid a discussion of the general principles governing the burden of proof as applied to the cases in which I am bound to express an opinion. The principle has been stated in a work prepared by five of the most learned professors and lecturers of Oxford University every paragraph of which has gone through a critical process of the most searching character, described in one of the prefaces. Every paragraph was in the first instance prepared by a writer who devoted special study to the subject in hand, then submitted to the editor for criticism, then discussed on two different occasions at meetings of all the five authors, then prepared for the press by the editor and finally revised in proof by the editor and author. I think that a proposition of law formulated after such a process of criticism is infinitely more likely to be correctly stated than any that I could extemporize for the purpose from my own reading of the cases. One of the paragraphs that has undergone this process of research and criticisms is as follows:—

> When an object (not being a live animal) is apparently under the control and management of the defendant, and it causes damage to the plaintiff of a kind which in the ordinary course of things does not happen if the person having control or management of similar objects exercises proper care and the defendant is bound to exercise care to prevent it damaging the plaintiff, the damage will be presumed, in the absence of explanation, to have been caused by the defendant's negligence.

The reason for the exception included in parenthesis becomes obvious the moment the cases are considered. One of them was the case of a horse which bolted and thus caused injury to the plaintiff; the other was that of an ox being lawfully driven along the street which passed through the open door of a shop on the side of the street and remained there three-quarters of an hour before it could be expelled, necessarily doing a very considerable damage. In both cases the facts were perfectly consistent with the exercise of reasonable care on the part of the driver, and no presumption could arise from the happening of the accident under such circumstances. The bolting horse and the straying ox each had a volition of its own which was interposed between the authority and control of the defendant and the happening of the event.

Two cases are mentioned in the author's note which I shall

refer to before citing those on which they base their proposition of law. The first of these is *Wakelin* v. *L. & S. W. R. Co.* (1886), L.R. 12 App. Cas. 41. In this case the body of a man was found on the track of a railway where it was crossed by a public path. There was no evidence whatever to show how it came to be there and the House of Lords came to the conclusion, confirming the decision of the Divisional Court and the Court of Appeal, that there was no evidence of negligence to go to the jury. I am unable to see any difference between this case and the case of two teams or carriages or motors colliding on the street, or two vessels on the ocean, or, if it were possible as it is under some conditions, of two trains of cars under different management coming into collision on a railway track. In the absence of some proof there can be no presumption that either of them rather than the other was guilty of the negligence, if any, that caused the accident. So in the case in the House of Lords to which I am referring, there was no more reason for supposing that the train had run down the man than that the man had run up against the train, and that is the ground upon which the case was decided. I should have been inclined to say that such a case did not even come within the terms of the authors' proposition, properly understood. In the ordinary condition of things a swiftly moving train not only generally, but invariably, causes damage to a person who chooses to attempt crossing the track at the same moment that the train is passing over it.

I think that in all the cases that I have suggested it would be fair and reasonable to raise from the facts a presumption that someone had been negligent, and that presumption, it seems to me, ought to have been raised in the other case mentioned by the authors which, in their judgment, cannot be supported. It was the case of a blackboard placed on an easel, supported by pegs which either did not fit the holes into which they were inserted or were not properly driven into the holes, in consequence of which the blackboard fell from the easel and injured one of the pupils. Lord Esher, in giving judgment in this case, which was *Crisp* v. *Thomas* (1890), 63 L.T.N.S. 756, says that in the application of the maxim *res ipsa loquitur*, the Judges have always said that the question depends in each case on its own particular circumstances. I quote:—"The maxim *res ipsa loquitur* depends upon whether the Judge in each particular case can say that the mere fact of a

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thing happening is more consistent with there being negligence than not."

Perhaps so, and perhaps there can be no escape from a condition of things similar to that which it was once said by Selden left the principles of equity to depend on the length of the Chancellor's foot. The authors have endeavoured to formulate a proposition describing in general terms the conditions under which the happening of an accident should be considered as more consistent with there being negligence on the part of the defendant than not. Certainly the reasons given for the decision in this case cannot be considered very satisfactory. The suggestion made by Kay, J., will not bear a moment's examination. "It is not," he says, "a dangerous thing to use a blackboard." Certainly it is not, and that is precisely the reason why when a blackboard is used and an accident occurs in the course of its use, there ought to be a presumption that somebody has done something with respect to it that he ought not to have done or left undone something that he ought to have done. If it were in its nature a dangerous thing there ought not to be any presumption, because dangerous things may be used with ever so much care and yet accidents may happen in the course of their being used. The Judge has obviously confounded the principle that exceptional care is called for in the use of dangerous articles with the principle that where an article is not intrinsically dangerous the fact that it causes damage is, under the conditions described by the authors, *primâ facie* evidence of negligence.

I have examined all the cases cited for the proposition expanded in the paragraph which I have quoted. It seems to me that they abundantly sustain the proposition of the authors. The first case cited as authority for the proposition is *Skinner* v. *London, Brighton and South Coast R. Co.*, 5 Exch. 787, in which a train of the defendant company collided on the track with another train of the same company and Pollock, C.B., charged the jury that the fact of the accident having occurred was in itself *primâ facie* evidence of negligence on the part of the defendants, referring to the ruling of Lord Denman, C.J., in *Carpue* v. *London and Brighton Ry. Co* (1844), 5 Q.B. 747, 751, (114 E.R. 1431). In the course of the argument Alderson, B., distinguished the case of two vehicles belonging to two different persons, where no negligence

could be inferred against either party in the absence of evidence which of them was to blame. "Here," said he, p. 789,—

all three trains belonging to the same company, and whether the accident arose from the trains running at too short intervals or from their improper management by the persons in charge of them or from the servants at the station neglecting to stop the last train in time, the company are equally liable; and it is not necessary for the plaintiff to trace specifically in what the negligence consists, and if the accident arose from some inevitable fatality it is for the defendants to shew it.

Their next case is a case which I have always supposed was the *locus classicus* on the question, *Byrne* v. *Boadle*, 2 H. & C. 722. This is a case in which the plaintiff was walking on a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop and seriously injured him. This was held sufficient *primâ facie* evidence of negligence for the jury to cast on the defendant the onus of proving that the accident was not caused by negligence. In the course of the argument Bramwell, B., makes the point which is also regarded by Mr. Wigmore as one of the grounds on which the presumption is based, p. 727:—

Looking at the matter in a reasonable way it comes to this: an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence. The defendant, who knows how it was caused, does not think fit to tell the jury.

In delivering the judgment of the Court, Pollock, C.B., conceded that there are many accidents from which no presumption of negligence can arise, and proceeds to say that:—

It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *primâ facie* evidence of negligence. . . . and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *primâ facie* evidence of negligence. (p. 727-8.)

In the very careful headnote to the case of *Scott* v. *London Etc. Docks*, 3 H. & C. 596, 600, the reporter's headnote states the principle of the decision as he understands it, saying that:

It was held in the Exchequer Chamber that in an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant the Judge in leaving the case to the jury; but where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

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In this case, the majority of the Court lay down the principle in the words used by the reporter, which are taken from their decision as stated by Erle, J. In the course of the argument Blackburn, J., suggests the reason already mentioned for casting the burden upon the defendant saying:—

There is an old pleading rule, that less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading. Applying that here, is not the fact of the accident sufficient evidence to call upon the defendants to prove that there was no negligence?

At a previous point in the argument he had said, in answer to the citation of Erle, J.'s dictum, in which he had said he did not assent to the doctrine that mere proof of the accident throws upon the defendant the burden of showing the real cause of the accident:

"The question depends on the nature and character of the accident; If a ship goes down in the sea, that is equally consistent with care as with negligence, but if a ship goes down in the dock is not the fact of the accident *primâ facie* evidence of negligence?"

The next case cited by the authors is that of *Briggs* v. *Oliver*, 4 H. & C. 403. In this case the plaintiff, going to the doorway of a house in which the defendant had offices, was pushed out of the way by defendant's servant, who was watching a packing case of his master which was leaning against the wall of the house. The plaintiff fell and the packing case fell on his foot and injured him. There was no evidence as to who placed the packing case against the wall or what caused its fall. The Court held that there was a *primâ facie* case to go to the jury, the fall of the packing case being some evidence that it had been improperly placed against the wall. Pigott, C.B., after stating the established facts that the packing case was the defendant's, that it was reared against his wall, that it appeared that it was under the servant's control, and that it fell without any apparent motive or cause on the plaintiff, distinguished the case of *Cotton* v. *Wood*, 8 C.B. (N.S.) 568, 141 E.R. 1288, and adopted the rule that if the accident was equally consistent with negligence or the opposite, the non-suit was right.

It seems to me that packing cases are not usually found to fall in this way without negligence, and I think therefore that the facts are not consistent equally with there having been any act of negligence or the opposite. I think, too, that we would be over-ruling all the cases if we were to decide otherwise.

Bramwell, B., was of the same opinion:

There is abundant evidence, in my mind, to shew that the defendant was responsible for this packing case. That it was close to his premises, and that

his servant was watching it he does not deny. If, therefore, it was in an unsafe position, he would be liable for the consequences. Is there any evidence of its being in an unsafe position? I think there is. *Res ipsa loquitur*. Do packing cases fall of their own accord when they are placed in this position, if not carelessly placed? Certainly not, and we have no right to assume that any extrinsic circumstances caused this to fall. The same rule appears here as in the flour case, namely, that sacks of flour do not fall of their own accord and so there is a *primâ facie* case of negligence. The substance of this case is that the plaintiff being lawfully where he was, the packing case fell on him, and it follows from the authorities cited that, under these circumstances, it is right for us to say that there is a *primâ facie* case made out and say that it should go to the jury.

I interrupt this quotation in the middle to observe that the learned baron concludes somewhat weakly, as it seems to my mind, that the jury may say that they are not satisfied that there is any negligence. I am unable to see, for my own part, if there is *primâ facie* proof of negligence and nothing is offered to rebut that *primâ facie* evidence, how it can be possible for a jury to say that the defendant has not been guilty of negligence. But I have noticed that the same view was taken in the Massachusetts case cited in my decision at *nisi prius* in *Johnson* v. *Halifax Tram Co.*, 36 D.L.R. 56. Such incidents always occur when a doctrine is in the making as Mr. Wigmore considers that in question here to be.

In *Kearney* v. *L. & B. R. Co.*, L.R. 6 Q.B., 759, the same principle is applied to the case of a brick falling upon the head of the plaintiff while he was passing along the highway under the defendant's railway bridge. The case was put to the jury by the Lord Chief Justice in the Court of Queen's Bench as one for the application of the principle *res ipsa loquitur*. Kelly, C.B., speaking for the Court of Appeal, said he could not do better than refer to the judgment of the Divisional Court. He considered that the brick having fallen out of the bridge without any assignable cause except the slight vibration caused by a passing train was not only evidence but conclusive evidence that it was loose. It was the duty of the defendants from time to time to inspect the bridge and ascertain that the brickwork was in order and all the bricks well secured.

In the case which follows this in the digest of English case law, *Higgs* v. *Maynard*, 12 Jur. N.S. 705, the defendant was possessed of a workshop the windows of which over-looked the yard in which the plaintiff was engaged in the service of his employer. A ladder

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in the defendant's workshop fell through one of the windows and a fragment of the glass in falling injuried the plaintiff's eye. The Judge directed a non-suit on the ground that there was no evidence of negligence on the defendant's part and it was held that the non-suit was right as it had not been shown that the ladder was under the control of the defendant or his servants. The plain inference is that under the facts proved if the ladder had been under the control of the defendant or of the defendant's servants the accident would have been regarded as *primâ facie* evidence of the defendant's negligence.

The facts of the present case, I think, are such, under the authorities which I have been citing, as to throw the burden of disproving negligence upon the defendant. The position of the plaintiff, as tenant of the rooms under those occupied by the defendant is a very precarious one at best, and I think the defendant in such a case should be held to a somewhat strict accountability for the use of the premises above those of the plaintiff. The only question is whether he has fully discharged the burden thrown upon him. The trial Judge has dealt with the case as if the burden was upon the plaintiff to establish negligence, but we nevertheless have the advantage of knowing what his finding would have been had he addressed his mind to the question whether the defendant had disproved negligence to his satisfaction, because he says in his judgment that, "assuming the case to be within the class of cases referred to," that is, cases where the burden of explanation rests upon the defendant, he "does not see how it can be said that there is an absence of explanation by the defendant."

The case on the facts is a very difficult one indeed and I have suffered many fluctuations of opinion after repeated perusals of the evidence. My brother Drysdale has arrived at the conclusion that the tap was or may have been left running by the charwoman who cleaned up the kitchen after the waitresses had left. There is no evidence whatever that the room was cleaned up after the clerks and waitresses had gone home. The evidence is, in fact the other way. The defendant has stated that he was the last to leave at night. I cannot for my own part, feel quite certain that he is correct in making that statement. I have no doubt he thinks he was the last, but I should have liked to know more about his reasons for thinking so, and, on the other hand, in the absence of

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full knowledge and more careful scrutiny, I am not prepared to reject his statement. The trial Judge has accepted it, and that must, I think, be the end of the matter. Assuming that statement to be correct, I do not see how the defendant can be charged with negligence. It is difficult to believe that the tap could have been left running at that time without his hearing it, as it was heard by Covey in the morning the moment he opened the door; and I suppose the conditions were the same in the morning as they would be in the evening. Furthermore, I am not satisfied that it was not possible for the lad who was found on a previous occasion to have crawled or climbed through the transom to have entered with or without some of his companions, lured by the attractions which he knew to exist on the premises. There are so many possibilities consistent with the absence of negligence on the part of the defendant, and so many possibilities of his being correct in the statement which tends to disprove negligence, that I think the Court ought not to disturb the explicit findings of fact by the trial Judge. I therefore agree that the appeal should be dismissed.

Drysdale, J.

DRYSDALE, J. (dissenting):—The damage here was undoubtedly caused by a tap turned on at the bottom of the kitchen boiler and left running for some considerable time. The tap was at the bottom of the boiler and under which a bucket could be placed and not inconvenient for use. This tap was turned on and left running by some one; hence the damage sued for. The kitchen was wholly in charge of defendant and his servants. Some of the employees in the kitchen were a cook and assistants, dish-washers, etc., but the waitresses and employees of the shop and tea-room had access to the kitchen as fully apparently as the cook and her assistants and both by day and night, and when the cook and her assistants left the place at night the door to the kitchen was not locked, but left open to any of the other employees in the tea-room and shop who might choose to enter in the course of their service. The defence here seems to be a suggestion that someone may have improperly entered the place at night or in the early morning by way of a transom over a door and committed a wilful act of destruction, but this theory rests on no support and is, I think, imaginary. This tap was wholly in the care of defendant and his servants and the probability is, I think, very great that some of the servants with access to the kitchen and in the course of the employment carelessly turned it on and left it running. It is argued that

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defendant has accounted for the act of every servant whose duty was in the kitchen or had access to taps in the course of their work, but I am not satisfied this is so. The kitchen girls who were employed, and apparently worked solely in the kitchen, were called, but only these, and when they left on the night of the 10th, access was open to all the other employees in the shop and tea-room (which was still open) and it was quite open to any of them to enter the kitchen and use the taps in the course of their work. A great many of such employees are not accounted for. Common knowledge tells me restaurant floors must be washed up daily and we hear nothing as to this. I do not think defendant has satisfied what I must consider the inference that ought to be drawn from the circumstances, viz., the inference of negligence on the part of defendant's servants whom he entrusted with access to the room in question.

I am of opinion the appeal ought to be allowed and a reference ordered to assess plaintiff's damages. *Appeal dismissed.*

SASK.

S. C.

LYONE v. LONG.

Saskatchewan Supreme Court, Haultain, C.J., and Newlands, Lamont and McKay, JJ. July 14, 1917.

1. MALICIOUS PROSECUTION (§ II A—10)—PROBABLE CAUSE—INQUIRY.
Honest belief in the case after reasonable inquiry as to the true facts and circumstances is sufficient reasonable and probable cause for instituting a criminal prosecution.

[See annotations, 1 D.L.R. 56, 14 D.L.R. 817.]

2. WITNESSES (§ II B—35)—CROSS-EXAMINATION.
A convicting magistrate called as a witness in an action for malicious prosecution to prove certain documents, who has been sworn and examined on other matters, is liable to general cross-examination.

Statement.

APPEAL from the judgment of Elwood, J., dismissing an action for malicious prosecution and false imprisonment, holding that the defendant-respondent had reasonable and probable cause for laying the information. Affirmed.

T. J. Blain, for appellant; *J. F. Bryant*, for respondent.

The judgment of the Court was delivered by

McKay, J.

McKAY, J.:—The action was tried without a jury and was dismissed at the conclusion of the evidence for plaintiff. The grounds of appeal are as follows:—

1. That the learned trial Judge at the trial erroneously allowed the defendant-respondent to cross-examine the convicting magistrate who was called by the plaintiff-appellant for the purpose of proving certain documents, as if the magistrate was called as a witness on behalf of the plaintiff-appel-

lant. 2. That there was ample evidence in support of the plaintiff's claim and the learned Judge's ruling to the contrary was erroneous. 3. That the said judgment was contrary to the evidence and weight of evidence. 4. And upon grounds disclosed in the pleadings, proceedings had and taken herein.

As to the first ground:—

In Phipson on Evidence, 4th ed., at p. 458, the author states as follows:—

Cross-examination. Liability to—when a witness has been intentionally called and sworn by either party, the opposite party has a right, if the examination-in-chief is waived (*R.* v. *Brooke*, 2 Stark R. 472; *Phillips* v. *Eamer*, 1 Esp. 357); or if the counsel changes his mind and asks no questions (88 L.T. Jour. 340, *per* Stephen, J.); or if the examination is closed, to cross-examine him.

The magistrate, Allan McLean, was called by the plaintiff (appellant), and he was duly sworn, and examined at some length by the plaintiff's counsel on matters other than the documents he produced. He was, therefore, in my opinion, according to the above authorities, and the usual practice, liable to cross-examination, and, according to the record, no objection appears to have been made at the time to his being cross-examined.

At 459 of Phipson, 4th ed., in dealing with cases where cross-examination may not be allowed, the author states:—

(1) A witness called merely to produce a document under a subpœna *duces tecum* need not be sworn if the document requires no proof, or is to be proved by other means; and if not sworn (*Summers* v. *Moseley*, 2 Cr. & M. 477; *Perry* v. *Gibson*, 1 A. & E. 48) or unnecessarily sworn (*Rush* v. *Smith*, 1 Cr. M. & R. 94) he cannot be cross-examined. (2) A witness sworn by mistake, either of the counsel or officer of the Court, and whose examination has not substantially begun, is not liable to cross-examination (*Wood* v. *Mackinson*, 2 Moo. & Rob. 273; *Clifford* v. *Hunter*, 3 C. & P. 16; *Reed* v. *James*, 1 Stark. 132). But the mistake must arise from his inability to speak to the transaction, and not from the imprudence of having called him (*Wood* v. *Mackinson*, *supra*); so, where the witness can speak to the transaction, but the counsel changes his mind, and after the witness is sworn, asks no questions, the right to cross-examine remains (88 L.T. Jour. 340, *per* Stephen, J.)

The witness in question, however, does not come within any of the above exceptions.

The other grounds of appeal may be dealt with together.

One of the things the appellant had to prove in this case was the absence of reasonable and probable cause for laying the information, and the following authorities shew how this is to be decided:—

The evidence, which is to determine the question whether there was reasonable and probable cause, must consist of the existing facts or the circumstances under which the prosecution was instituted: *Abrath* v. *North Eastern R. Co.*, 11 Q.B.D. 440 at 450.

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And in the same case at p. 454, Brett, M.R., is reported as follows:—

The Judge had to consider whether the defendants had reasonable and probable cause if the jury should find that the defendants, in prosecuting the plaintiff, had taken reasonable care to inform themselves of the true state of the case, and that they honestly believed the case which they laid before the magistrate.

Applying these principles then to the case under consideration, the trial Judge would have to first consider whether the respondent had taken reasonable care to inform himself of the true state of the case, and whether he honestly believed the case which he laid before the magistrate.

The evidence shews that a fire was started by someone on the morning of December 8, 1916, between 12.55 and 1.55, in a building owned by the respondent and rented and used as a sales shop by the appellant's mother. The appellant's father managed the business carried on in this shop and appellant was employed as a clerk therein. Part of the shop was used as a post office.

The respondent, being notified of the fire, came down to the shop about a quarter to three on the morning of the fire, and examined the place where it had been started and also the shop, and made inquiries of a Mr. Jepp and others to get all the information he could before laying the information. [Extracts from evidence omitted.]

When being asked to give his reasons for coming to the conclusion that the appellant was responsible for the fire he states:—

For the simple reason that there was no one else that had a key for the front store and Jack Lyone's father was away and Jack was the only one of the firm that was there and the fact that the fire or the starting of the fire was laid in the store and with the egg fillers as taken from the shelf going down into the cellar-way. Somebody that knew the store and the newspapers that were taken from the inside wicket of the post office and the fact of the rubbers being purchased and paid for but never turned up.

In addition to the above, respondent stated that before laying the information he was informed that the appellant came down that morning of the fire at 7.30 instead of his usual time from a quarter to eight to a quarter to nine, and went into the shop, passed the telephone and went to where the fire had been started, and when the mounted policeman, who had been in hiding, asked him what he was doing there, he said he came down to 'phone for the doctor, and when the policeman said, "Why didn't you 'phone instead of coming around here?" he (appellant) didn't know.

The defendant-respondent had also been informed by the policeman that the stock of goods and fixtures in the shop were insured for $8,500 and that appellant, who had been in the habit of sleeping with his young brother, slept alone the night of the fire, and that the Lyone family had purchased coal oil on the Saturday night previous to the fire, and again on the Monday afternoon and again on Wednesday about noon, the day of the fire.

The magistrate, Mr. McLean, says that Dr. Ellis (the mayor of the town) was present when the information was laid, at which time there appears to have been some discussion as to who should lay it.

From the above evidence, in my opinion, the respondent did everything that a reasonable man should do to find out the true facts, and had reasonable and probable cause for believing the appellant started the fire. It is to be noted he sent for the police to investigate the matter early in the morning, and he did not lay the information until late in the afternoon, after he had made inquiries, the result of which confirmed his first suspicions that the appellant was the person who started the fire.

Counsel for appellant argued that it was not sufficient for the trial Judge to intimate that the facts upon which he drew his inference were sufficiently indicated by the address of respondent's counsel at the trial, inasmuch as there is no record of the facts the counsel for the respondent indicated in his address to the learned trial Judge at the trial.

I do not think there can be any valid objection to this portion of the trial Judge's judgment; he had already stated:—

> I am satisfied, and find on the evidence, that there was reasonable and probable cause for the defendant laying the information which he laid. There was circumstantial evidence which strongly, in my mind, pointed to the plaintiff.

He had heard the evidence and he made his findings on it and drew his inference therefrom, and, to avoid repetition, he goes on to say:—

> It is not necessary that I should go over them. They were sufficiently indicated by Mr. Bryant in his address to me, and, considering all things, I say there was strong circumstantial evidence which points to the guilt of the accused.

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

Appeal dismissed.

MAN.

C. A.

CRIPPS v. WOESSNER.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A., and Macdonald, J. June 5, 1917.*

1. DEEDS (§ II G—70)—VOLUNTARY CONVEYANCE—UNDUE INFLUENCE — DRUNKENNESS.
A voluntary conveyance, intended as a gift, cannot be set aside on the ground that it was made under the influence of a woman with whom the grantor lived in sexual intimacy, or that he was addicted to drink, without the grantor having independent advice, if it appears that the grantor intelligently understood the nature of the transaction.

2. TRUSTS (§ I D—24)—RESULTING TRUST—GIFT—POWER OF ATTORNEY.
Where a conveyance, intended as a gift, is absolute on its face, a power of attorney to manage the grantor's affairs executed in connection therewith does not necessarily establish a resulting trust.

Statement. APPEAL by plaintiff from a judgment for defendant in an action to set aside a voluntary conveyance. Affirmed.

A. J. Andrews, K.C., and *F. M. Burbidge*, for appellant; *W. H. Trueman*, for respondent.

Howell, C.J.M. HOWELL, C.J.M.:—At the trial the plaintiff swore that the transfer upon which the defendant's title depends was signed by him believing that it was a power of attorney, and he denies that he ever intended to convey the property to her. He further swore that she never asked him, and never tried to induce him to convey the property to her.

The trial Judge found this fact as follows: "Notwithstanding his evidence to the contrary, I have no doubt that the plaintiff had capacity and knowledge of what he was doing, and that he gave the property to the defendant." The evidence of the solicitor and that of the defendant and the witness Munn amply justify this finding.

This is a case, then, where the plaintiff alleged in his pleading and swears at the trial that when he signed the impeached document he had no idea it was a conveyance and he had no intention to convey, and that he had never been asked or induced to convey, and it is found as a fact that when he signed the document he knew it was a conveyance of the land and he intended to convey. The plaintiff comes into Court asking to have the conveyance set aside, and the onus is upon him to establish his case. He cannot merely shew that he executed a voluntary conveyance and then require the Court to set it aside. This is not a case of a plaintiff setting up a voluntary conveyance against the grantor. All the

*Appellant demanded a full bench, and Macdonald, J., of the Court of King's Bench, was called in, taking the place of the late Richards, J.A., who was ill at the time of the argument of the matter.

authorities on the question of onus in such a case are fully reviewed in Underhill on Trusts, 7th ed., at 95.

In *Allcard* v. *Skinner*, 36 Ch.D. 145, Lindley, L.J., at pp. 182, 183, states the law as follows:—

> Courts of equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors. The Courts have always repudiated any such jurisdiction. *Huguenin* v. *Baseley*, 14 Ves. 273, is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.

It seems to me that the plaintiff's case comes within the first part of that quotation and not the latter part. The plaintiff was a man of considerable business experience, but greatly addicted to drunkenness, from which the defendant apparently tried to protect him. To me, the plaintiff's evidence was most unsatisfactory and unreliable.

The appeal must be dismissed with costs.

Perdue, J.A.

PERDUE, J.A.:—The plaintiff alleges in the statement of claim that he made the acquaintance of the defendant in 1912, and that she falsely represented herself to be a single woman; that they became intimate and that defendant having obtained information as to the plaintiff's affairs and property and that he was having trouble with one Mitchell who held a power of attorney from him, formed the design of fraudulently acquiring plaintiff's property and, as incidental to such design, she induced the plaintiff to promise to marry her. The plaintiff, it is alleged, became wholly under the influence of the defendant and a marriage was arranged, but this did not take place because the defendant as it turned out, had a husband still living. It is alleged that prior to the plaintiff learning that the defendant was a married woman, she induced him to revoke the power of attorney to Mitchell and execute one, as he believed, in her favour for the purpose of managing his lands, but that, as he afterwards learned, in place of executing a power of attorney, he executed transfers to the defendant of 5 quarter sections of land, that there was no consideration for the transfer, but the plaintiff executed them wholly because of

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the defendant's representations and promises. It is further alleged that subsequent to the execution of the transfers the plaintiff ascertained that the defendant had been for many years a married woman but that she promised "at once to proceed to Winnipeg and obtain a divorce from the American Consul and would then marry the said plaintiff." This promise she failed to fulfil. The plaintiff then alleges that the aforesaid representations upon which she procured the transfers were wholly fraudulent, that she has had at no time "any honest regard or affection for the plaintiff and never intended to carry out her said promise, and, as the fact is, has not attempted to carry out her said promise." The plaintiff then complains that defendant has not paid the interest and principal falling due upon the mortgages upon the lands and now refuses to re-convey the lands to him. At the trial the plaintiff obtained leave to add three alternative allegations to the following effect: (1) that the plaintiff for some time prior to the execution of the conveyance of the lands had become addicted to drink and that the defendant had obtained undue influence over him and induced him to execute the conveyance; (2) that the defendant obtained the confidence of the plaintiff and procured the conveyance from him without his having independent advice and without consideration; (3) that the conveyance was executed by the plaintiff to enable the defendant to manage the lands for him and that she holds the lands in trust for the plaintiff.

The defendant denies all allegations of fraud and undue influence and claims that the plaintiff fully understood the nature and effect of the documents he signed. She claims that the conveyance of the land was voluntarily made as a gift to her by the plaintiff.

The plaintiff was at one time a farmer and appears to have been successful. He became the owner of 800 acres of land near Virden in this province, subject to certain encumbrances. In 1900 his wife died. He had no children. He put his farms under the management of his brother-in-law, Mitchell, he then entered the employ of a large implement company as salesman and collector. Soon after this he formed drinking habits and became a frequenter of low resorts. About the year 1903, he became acquainted with the defendant. She was then an inmate of a house of ill-fame in this city. Afterwards, she conducted a bawdy house on her own account, but later sank to the position of cook in a

house of similar character. During this period the plaintiff saw her from time to time. The plaintiff lost his position in the implement company through his drinking habits, but received employment from another company and made his headquarters at Saskatoon. In 1911, the defendant went to that city, Plaintiff had a house there and the two commenced to live together as man and wife. The plaintiff conveyed to the defendant his house in Saskatoon. Another house was rented and in this they lived together whenever he was in town. The defendant knew about the plaintiff's property and affairs. The plaintiff got abstracts of the titles to his farms in the fall of 1912. The defendant took these abstracts to Mr. Morton, a solicitor in Saskatoon, and instructed him to prepare transfers of the land from the plaintiff to her. Mr. Morton told defendant to have the plaintiff call and see him. The plaintiff came to Morton's office a few days afterwards. The following is Morton's account of what took place at the interview which followed between himself and the plaintiff:—

Q. He came to your office? A. He told me who he was. Q. Just tell us what he said? A. I asked him if he wished to have this document prepared. Q. What documents did you refer to? A. The transfer of the deeds of land in Manitoba from himself to the defendant. He said he did. I asked him if he understood just what he was doing; that once the land was transferred he could not get it back. The defendant having got the land might leave him. He said he did not care, that he was very fond of her and he wished to give her the land; I talked to him for quite a little while and told him I thought he was foolish and he told me if I did not wish to prepare the documents he would go somewhere else, and if I remember rightly, he mentioned the name of Mr. Milden, a solicitor in Saskatoon.

The plaintiff was told to come in again in 2 or 3 days. He did so and when he called the second time the documents had not been prepared. The plaintiff again insisted that the documents should be prepared and this was done. The plaintiff then executed the transfers. Mr. Morton states that plaintiff was not under the influence of liquor when these interviews took place. Two transfers had been prepared and executed. They were sent to the Land Titles Office for registration but one was returned because the land was under the old system and a statutory deed was required. A deed was prepared, the plaintiff was sent for, he came and executed it and it was sent for registration. The transfer is dated November 13, 1912, and the deed is dated November 30, 1912. These are the conveyances which the plaintiff attacks.

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The case sought to be founded on the alleged promise to marry the plaintiff was not pressed on the argument of the appeal.

Mr. Andrews put the plaintiff's claim to relief in three distinct ways:—1. That the plaintiff believed the documents he signed were powers of attorney; that the plaintiff did in fact sign five powers of attorney at the time and these were unnecessary if the land was conveyed to the defendant; that at the time the plaintiff was in such a condition, physically and mentally, that he was easily deceived. 2. That if the plaintiff signed the conveyances knowing what they were, he did so under the dominating will of the defendant and undue influence was used. 3. That the lands were conveyed to the defendant to enable her to manage them and that there was a resulting trust.

As to the first claim, the evidence shews that the powers of attorney were executed on November 16, three days after the transfers of the land were made. The plaintiff had other property. He had claims against and disputes with his brother-in-law Mitchell, and had other matters to be closed up which were not covered by the mere conveyance of the land. Morton states that the plaintiff gave instructions for the preparation of the powers of attorney and gives what appears to me to be a very lucid and reasonable explanation of why they were signed. In the face of Morton's evidence it is impossible to credit the plaintiff's statement that he thought he was signing powers of attorney instead of transfers. But we find that the plaintiff, 2 or 3 weeks afterwards, signed a statutory deed of one of the farms in favour of the defendant to correct an error in the form of conveyance. It is impossible to believe that he, evidently an intelligent business man, would mistake a statutory deed for a power of attorney. The plaintiff's evidence on the point is very untrustworthy. He states that he did not know the land had been transferred to the defendant until the fall of 1913, but in February of that year, his solicitors wrote to Mitchell stating that the land had changed hands and no longer belonged to the plaintiff (ex. 44). Mitchell knew in February, 1913, that the land was in defendant's name and wrote to plaintiff calling his attention to the fact. In March, 1914, the plaintiff signed a lease of the land. The defendant heard of it and telegraphed to the plaintiff to bring it to her for approval, that otherwise she would not countenance the transaction. He

then had a new lease prepared from the defendant to the tenants and signed by her. This transaction operated as an affirmation of the ownership of the land by the defendant. The plaintiff must fail on the first ground.

We now come to the second claim for relief, that of undue influence. If it were not for the plaintiff's own evidence, I would have been prepared to hold that the defendant had obtained the conveyance of the land by undue influence. He was evidently infatuated with her. She possessed his absolute confidence. He was weakened by dissipation. He wished to marry her and would have done so, were it not for the obstacle of a still existing husband. It is clear to me that she followed him to Saskatoon and that she set to work to strip him of his property, and that when she had accomplished this she threw him over. But how is the Court to give relief on this ground in the face of the plaintiff's own sworn testimony? On his examination for discovery he was asked "Was anything said by Mrs Woessner to you to induce you to sign a transfer of these properties to her?" To this he answered: "No, I do not remember anything being said." This answer was verified and repeated by him at the trial. The following is taken from his cross-examination at the trial:—

Q. She never asked you, you so say here, to transfer this land to her? A. No; she never asked me to transfer them to her. Q. There was no coaxing or wheedling by her to induce you to sign these transfers to her? A. The only land transfers mentioned between me and Mrs. Woessner (were) over my brother-in-law's letters, that she said my brother-in-law would get this land and she said she would get these powers of attorney and make better use of it. Q. And there was nothing said by her to induce you to give her this land? A. Simply through the letters of my brother-in-law and mentioning my brother-in-law getting the land. Q. But all the inducing was in reference to the power of attorney, so she could manage the land for you? A. So she could manage the farm for me. Q. She never tried to influence you, cajole you, persuade you in any way, shape or form, to make her a gift of the land, to be hers out and out? A. No, she never asked me to give her the land out and out; certainly not. Q. She never used any caresses or any influence of any kind, never got you any liquor and——

His Lordship: "Oh, no; he said she used to do her best to sober him up; he has already said that."

Q. And there is nothing of this kind, that I have just mentioned, used by her to charm you into giving this property to her herself? A. No. Q. And nothing like this was used by her to induce you to give this property to her? A. We never mentioned anything about the land only to get this power of attorney to look after my interest in the farms.

He does not remember any conversation with Morton about

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the transfers. Morton's evidence, which I have already quoted, clearly shews that the plaintiff knew what he was doing when he transferred the land to the defendant, that the plaintiff was previously warned of the consequences of so doing, and that he made the conveyance as a voluntary gift to the defendant. I see no reason for doubting the truth of Morton's statements. As far as I can judge he had no personal interest in the matter and merely acted as a solicitor carrying into effect the clear intentions of these two persons. His evidence and that of the plaintiff himself completely dispose of the contention of undue influence. The intention of the plaintiff clearly was to make a gift of the lands to the defendant. There is no evidence to shew that he was not fully aware of what he was doing.

In *Henry* v. *Armstrong*, 18 Ch.D. 668, Kay, J., said:—

> As I understand it, the law is that anybody of full age and sound mind, who has executed a voluntary deed by which he has denuded himself of his own property, is bound by his own act, and if he himself comes to have the deed set aside—especially if he comes a long time afterwards—he must prove some substantial reason why the deed should be set aside.

In *Kekewich* v. *Manning*, 1 DeG. M. & G. 176, 187-188 (42 E.R. 519), Knight Bruce, L.J., observed:—

> It is on legal and equitable principles, we apprehend, clear that a person *sui juris*, acting freely, fairly and with sufficient knowledge, ought to have and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary and howsoever circumstanced.

I would refer to *Toker* v. *Toker*, 31 Beav. 629, 644 (54 E.R. 1283), and *Allcard* v. *Skinner*, 36 Ch.D. 145, 182.

The plaintiff made a voluntary conveyance of the land to the defendant as a gift. If she had continued to live with him I think it is unlikely that he would have impeached it. When she cast him aside he sought to get his property back, and has set up these contradictory grounds as reasons for attacking the gift.

The third ground that there is a resulting trust may be dismissed in a very few words. There is not evidence to support it. A gift was made of the land. In order to enable the defendant to enforce the plaintiff's claims against Mitchell and "to look after his affairs generally" he gave the powers of attorney. They in no way contradict the absolute nature of the conveyances. The authorities cited by counsel for the plaintiff do not apply in view of the conclusions that must be drawn from the evidence.

There is nothing in the evidence to suggest, much less to establish, an illegal consideration for the conveyance.

It is regrettable that the plaintiff was so confiding in and so infatuated with this loose woman as to make over to her absolutely almost all his property. The words used by Lord Nottingham in the old case of *Villers* v. *Beaumont*, 1 Vern. 100 (23 E.R. 342), are peculiarly applicable to this case:—

> If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this Court will not loose the fetters he hath put upon himself, but he must lie down under his own folly.

I think the appeal must be dismissed with costs.

CAMERON, J.A., concurred with PERDUE, J.A. Cameron, J.A.

HAGGART, J.A. (dissenting):—During the course of the argument our attention was called to misstatements which must have been knowingly made by both parties to this suit in the verbal testimony given at the trial. In a suit of this nature between such litigants as we have here, in my opinion, neither party would be likely to have the monopoly of truth-telling. I would consider carefully all the material facts, the relationship of the parties to each other, all the surrounding circumstances, their actions towards each other during their intimacy and the coarse, sordid conduct of the defendant after she had obtained all the plaintiff's money and stripped him of every shred of his property, and in deserting him and concealing her whereabouts to avoid service of process in this suit. I think the chapter of events tells a more truthful and convincing story than the verbal statements of the witnesses given in the box. Haggart, J.A.

15 Hals. at p. 399, discusses the subject of *donors sui juris* in this way:—"*Primâ facie* everyone who is *sui juris* can dispose by way of gift of any property, or of any estate or interest therein, to which he is absolutely entitled. It is on legal and equitable principles clear that a person *sui juris acting freely, fairly, and with sufficient knowledge*, ought to have and has the power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversion, and howsoever circumstanced.

For the above proposition the text-writer cites *Kekewich* v. *Manning* (1851), 1 DeG. M. & G. 176, (42 E.R. 519).

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And again at p. 400, when treating of inferences that may be drawn, and presumptions that exist, in the case of husband and wife, the author says:—"A wife may make a gift of her separate income to her husband, and the gift may be inferred from the circumstances of the case or the conduct of the spouses. The receipt by her husband of such income with her acquiescence, when they are living together, is a strong presumption of gift. There is no presumption, however, of a gift of the wife's capital. *Primâ facie* a husband who takes his wife's separate property is a trustee of it for her, and the burden of proving a gift lies upon him . . . "

And in the case of intoxicated persons, at p. 403, the author says:—"A gift by a person in such a state of intoxication as to be *non compos mentis* is void."

See *Cory* v. *Cory*, 1 Ves. Sen. 19 (27 E.R. 864); *Cooke* v. *Clayworth*, 18 Ves. 12 (34 E.R. 222); *Butler* v. *Mulvihill*, 1 Bli. 137 (4 E.R. 49); *Nagle* v. *Baylor* (1842), 3 Dr. & War. 60.

Stroud, in Vol. III, at pp. 2124-2125, points out the law as regards presumptions in the case of gifts *inter vivos* and testamentary gifts:—

In gifts *inter vivos* a presumption against the gift arises in cases where subsists either of the following relationships: Parent and child; doctor and patient; confessor and penitent; trustee and *cestui que trust;* or guardian and ward. Gifts *inter vivos* brought about by the influence of the superior in any such case will be void, unless the donee proves that the donor was placed "in such a position as would enable him to form an entirely free and unfettered judgment independent altogether of any sort of control": *Archer* v. *Hudson*, 7 Beav. 560 (49 E.R. 1183); *Rhodes* v. *Bate*, 35 L.J. Ch. 267; *Parfitt* v. *Lawless*, 41 L.J.P & M. 70; *Huguenin* v. *Baseley* (1807), 14 Ves. 273 (33 E.R. 526).

Then, speaking of legacies under wills, the author says:—

But the law regarding testamentary gifts is very different. The natural influence of the parent or guardian over the child, the husband over the wife, or the attorney over the client, may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent. There is nothing illegal in the parent or husband pressing his claims on a child or wife, . . . provided that that persuasion stop short of coercion. . . . "The influence which will set aside a will," says Williams, J. (Wms. Exs. 40), "must amount to force and coercion, destroying free agency. . . ."

And Wharton, at p. 870, briefly digests the subject by the following proposition:—

Both a gift and a will may be set aside on the ground of undue influence; but the natural influence, the exertion of which would justify the setting

aside of a gift, may be lawfully exercised to obtain a will or legacy: *Parfitt* v. *Lawless* (1872), L.R. 2 P. & D. 462.

I think, in the case before us, the presumption is against the defendant. She has failed to satisfy the onus that is upon her.

A case frequently referred to and cited as a precedent is *Cooke* v. *Lamotte*, 15 Beav. 234 (51 E.R. 527), where it was held that whenever a person obtains, by voluntary donation, a benefit from another, he is bound, if the transaction be questioned, to prove that the transaction was righteous, and that the donor voluntarily and deliberately did the act, knowing its nature and effect. That the above authority was not confined to cases of attorney and client, parent and child, &c., but was general, see the judgment of Romilly, M.R., at pp. 239 and 240.

I think also in this case that the onus was upon the defendant to shew that the plaintiff had independent advice, and that she has failed to satisfy that onus. Morton, the solicitor, who says he explained the matter to the plaintiff, was retained by the defendant and was paid by her. I think it was clearly his duty, acting for the defendant, to advise the plaintiff that he should get independent advice. The law on this question is discussed in *Irwin* v. *Young*, 28 Gr. 511. This was a case where it was shewn that a voluntary deed had been executed without independent advice, the grantor standing in such a relation to the grantee, as that he was likely to be under her influence. The Court, owing to the peculiar relationship of the parties, set the conveyance aside, although no fraud or moral wrong could be imputed to the grantee; and although it was probable, from all the circumstances of the case, that if the contents and legal effect of the instrument had been fully explained to the grantor by an independent legal adviser, the grantor would still have executed the deed, though probably with some modifications in the details. The relief was granted without costs, however, as no case of actual fraud was established.

Donaldson v. *Donaldson*, 12 Gr. 431, was a case in which the plaintiff was an infirm man, 72 years old, and was induced by his son, with whom he resided and who had great influence with him, to agree in writing to leave to the decision of two referees the terms of his will, and to execute a will in pursuance of their award. A lease to the son was executed at the same time. The son having failed to establish that his father had competent, independent

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advice in the matter, or had entered into the transaction willingly, or without pressure from the son, the Court decreed the lease void, and the will revocable at the pleasure of the plaintiff.

The referees made their award and he made his will in the terms of the award and at the same time executed a lease of certain lands, being a disposition practically of all his property. The will and lease were prepared by a solicitor acting for both parties and he gave no advice to either party but took pains that they each understood the papers before signing them. The plaintiff contended that the will was irrevocable and brought this suit to set aside the will and lease. Mowat, V.-C., in giving judgment, at 435, said that,

> Considering the relations of the parties, and the condition of the plaintiff, it was necessary for the defendant to shew (amongst other things) that the defendant had an independent adviser, one competent to advise him in the matter, and who did give the plaintiff all the advice he needed. . . . I have no doubt that he (the plaintiff) understood the general nature of the papers he executed, and that he was not in a state of mind that rendered him incompetent for the transaction of ordinary business. But between parties situated as these parties were, this is not enough. The defendant was bound to establish that the transaction was entered into willingly and deliberately on the part of the plaintiff, and without pressure from, or influence by, the defendant, as the recipient of the benefit; and these things the defendant has not established.

Want of independent advice is a serious matter. In *Lavin* v. *Lavin*, 27 Gr. 567, a bill was filed to set aside a conveyance from a father—aged 90—to his son. It appeared that at the time of the deed the father resided with a daughter and the son also lived with her and was paying her for the father's board. The father's only means consisted of his interest in the lands in question. Spragge, C., found that no fraud or undue influence was practised on the father, and that he was quite capable of understanding any plain explanation, if given him, of the nature and effect of the instrument; that it had been discussed prior to the execution, and that if every proper explanation had been given and everything had been done which the law requires in such cases, the father would probably have executed the deed; that though the deed may have been read to him, and that though he probably knew that it was a deed to his son, still no proper explanation or advice was made to him as to its nature and effect; that if he had been properly advised he would not have made the conveyance without securing a reasonable provision for himself, and that

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under the circumstances it was an improvident transaction and entered into without proper advice and should be cancelled.

The foregoing view of the law was affirmed by the Court of Appeal in this same case in 7 A.R. (Ont.) 197.

I think the facts disclosed in this case bring it well within the law laid down in *Stuart* v. *Bank of Montreal*, in the judgments of the Supreme Court and of the Privy Council, 41 Can. S.C.R. 516; [1911] A.C. 120.

The transaction in question in that case began by the husband, Mr. Stuart, offering his wife as security to the bank for some further advances which his associates were unwilling to guarantee. These transactions ended in the transfer to the bank of everything Mrs. Stuart possessed, so that in 1904 she was, as the bank was informed by its solicitor, "absolutely cleaned out." The trial Judge dismissed the action with costs, holding, in effect, that Mr. Stuart exerted no undue influence over his wife; that she perfectly understood what she was doing and acted on her own uncontrolled judgment, and that no unfair advantage was taken of her. The Judge was prepared to hold that Mrs. Stuart received ample consideration for what she undertook, though he did not rest his decision on that ground. In the Court of Appeal for Ontario, which consisted of 4 members, two Judges agreed with the trial Judge. The Chief Justice thought that Mrs. Stuart was entitled to relief, but he based his judgment on the case of *Cox* v. *Adams*, 35 Can. S.C.R. 393, which decided, or was supposed to have decided, that no transaction between husband and wife for the benefit of the husband can be upheld unless the wife is shewn to have had independent advice. As the Court was equally divided, the judgment of the Court below was affirmed.

On appeal to the Supreme Court of Canada, which consisted of 5 Judges, one was for dismissing the appeal; the other 4 Judges held that the case was concluded by *Cox* v. *Adams*, and pronounced judgment in favour of the plaintiff.

In the Privy Council the finding of the Supreme Court was affirmed, but they did not rely upon the reasons given in the Supreme Court alone; but took the view that the facts and circumstances of the case were very different from that which commended itself to the trial Judge and the Judges who agreed with him.

Lord Macnaghten, who delivered the judgment of the Court, after setting forth fully the facts and giving verbatim the corres-

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pondence which led up to the execution of the security, said on p. 136:—

The result of these transactions was that Mrs. Stuart surrendered to the bank all her estate, real and personal, . . . and was left without any means of her own. . . . The evidence is clear that in all these transactions Mrs. Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own, nor had she any means of forming an independent judgment, even if she had desired to do so. She was ready to sign anything that her husband asked her to sign and do anything he told her to do.

He refers to the fact that in the evidence of the plaintiff she repudiated the notion that any influence was exerted or any pressure put upon her, or that her husband made any misrepresentation to her. She said she acted of her own free will to relieve her husband in his distress and that she would have scorned to consult any one. She certainly knew that she was incurring liability in order to help her husband and the company in which he was interested. Then he proceeds,—

Her declarations, in the course of her cross-examination, that she acted of her own free will, and not under her husband's influence, merely shew how deep-rooted and how lasting the influence of her husband was.

And on p. 137, he proceeds to say:—

It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is complete. However that may be, it seems to their Lordships that in this case there is enough, according to the recognized doctrine of Courts of equity, to entitle Mrs. Stuart to relief. Unfair advantage of Mrs. Stuart's confidence in her husband was taken by Mr. Stuart.

The foregoing seems to me to be an answer to the position taken by counsel for the defendant when he refers to the evidence of Cripps where he, in substance, denied that the defendant made any misrepresentations or exerted any overpowering influence upon the plaintiff in signing the documents in question.

As I have said before, the Privy Council did not find that the want of independent advice was unimportant, because Lord Macnaghten, towards the close of his judgment, when speaking of the solicitor acting in the *Stuart* case who occupied a similar position to that of Mr. Morton in this case, observes, p. 139:—

Mr. Bruce undertook a duty towards Mrs. Stuart, but he left her in a worse position than she would have been if he had not interfered at all. His course was plain. He ought to have endeavoured to advise the wife and to place her position and the consequence of what she was doing fully and plainly before her. Probably, if not certainly, she would have rejected his intervention. And then he ought to have gone to the husband and insisted

on the wife being separately advised, and if that was an impossibility, owing to the implicit confidence which Mrs. Stuart reposed in her husband, he ought to have retired from the business altogether and told the bank why he did so.

Although the evidence here discloses no overt act of coercion or of fraud on the part of the defendant, I think the plaintiff is right in asking us to consider the relationship of the parties to each other, all the surrounding circumstances and all their actions during their intimacy. The conduct of the defendant after she had denuded the plaintiff of every dollar and of every shred of property throws a strong light upon her motives and shews clearly the exercise of undue influence.

To establish undue influence it is not necessary to prove fraud or deceit or force or compulsion. The co-existence of the intimate relationship that existed between this man and his mistress, the absence of consideration and of independent advice and the fact that the transaction is a gift throws the onus upon the grantee. Undue influence does not import that compulsion or force or fraud is necessary. The words "undue influence" means just what they express.

All the material facts shew clearly to my mind that this defendant dominated the plaintiff with the full purpose of obtaining all his property and that when that purpose was effected she had no further use for him. It is true the evidence given by both plaintiff and defendant shews that she was kind to him; she took care of him and nursed him when he was ill. No doubt this helped her in attaining her object. Had she been cruel to him, cruelty might have defeated that object.

From the surrounding circumstances, the dealings of the parties with each other and the ultimate result, I would draw the foregoing inference, which in my opinion would be more reliable than the words spoken under oath at the trial, and justify the Court in giving the plaintiff the relief he asks for.

I would allow the appeal and enter judgment for the plaintiff.

Macdonald, J.

MACDONALD, J.:—This is an action to set aside a conveyance and transfer of lands conveyed and transferred by the plaintiff to the defendant, on the ground that they were procured by means of fraud, duress and undue influence.

As the action was originally brought the plaintiff sought to set aside the conveyance and transfers on the grounds:—(1) That the defendant falsely and fraudulently represented that she was

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a single woman, and induced the plaintiff so to believe, and that she promised to marry him. (2) That the defendant induced him to execute what he believed, at the time, to be a power of attorney, enabling her to manage his estate and that he subsequently found, instead of being a power of attorney, he had executed a conveyance and a transfer of his lands, and that subsequent to the execution of these documents, the defendant advised him that she was a married woman.

At the trial the plaintiff amended his statement of claim by adding the following paragraphs:—

In the alternative, the plaintiff says that he became addicted to drink, and his will-power became weakened, and the defendant by reason of their intimate relationship and her acts of kindness to him from time to time obtained an undue influence over him, and induced him to execute the said conveyance.

In the further alternative, that the defendant obtained the confidence of the plaintiff, and confidential relationship was established between them, and the defendant procured the said conveyance without the plaintiff having independent advice and without any consideration.

In the further alternative, the conveyance was executed for the purpose of enabling the defendant to manage the said lands for the plaintiff, and the defendant holds the said lands in trust for the plaintiff and not otherwise.

The first ground was practically abandoned at the trial, as the plaintiff well knew the defendant to be a married woman, and she never concealed that fact from him.

In his evidence the plaintiff admits that he knew in the winter of 1911 that the defendant had a husband, and that she gave him to understand she would have to get a divorce before she could get married.

In October, 1911, he gave her his house property in Saskatoon, which she disposed of without consulting him.

The trial Judge found, with respect to the properties now sought to be recovered, that the plaintiff had capacity and knowledge of what he was doing, and that he gave the property to the defendant, but even so, he adds, it may be shewn his action was induced by undue influence.

The donor may shew that confidential relationship existed between the donor and the recipient, and then the law on grounds of public policy pre-

sumes that the gift, even though in fact freely made, was the effect of the influence induced by those relations, and the burthen lies on the recipient to shew that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances: *Morley* v. *Loughnan*, [1893] 1 Ch.D. 736 at 752.

The plaintiff says that when he executed the conveyance and transfer he thought he was executing powers of attorney. Such a thing as a conveyance or transfer did not enter his mind. How then could there have been an undue influence inducing the execution of those documents? Furthermore, the plaintiff says that the defendant never asked him to give her the property, or suggested the execution of such documents, and the defendant says that it was a voluntary act on the part of the plaintiff, without any urging or suggestion on her part, and with the plaintiff's own evidence on this point no other conclusion than that he gave the property to the defendant could be arrived at.

In March, 1914, the plaintiff made a lease of the property in his own name, upon learning which the defendant immediately objected and the plaintiff changed the lease, substituting the defendant's name as lessor. He then knew the defendant's attitude with respect to the properties and recognized her claims.

Certain principles are laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as in the opinion of the Court enabled the donor afterwards to set the gift aside.

First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose.

Second, where the relations between the donor and the donee have at or shortly before the execution of the gift, been such as to raise a presumption that the donee had influence over the donor, in such a case the Court sets aside the voluntary gift unless it is proved that in fact the gift was the spontaneous act of the donor, acting under circumstances which enabled him to exercise an independent will, and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. It cannot be contended that this case comes within either of the above classes.

In view of the plaintiff's own evidence, the gift could not be the result of influence expressly used by the donee for the purpose.

It is urged on behalf of the plaintiff that he became addicted

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to drink, and his will-power became weakened; it is evident that the plaintiff became addicted to drink, and that occasionally he indulged to excess, but there were intervals of sobriety, when he was perfectly capable of transacting business, and on the occasion when he executed the documents conveying the lands to the defendant, Mr. Morton, the solicitor who drew the papers, says that the plaintiff was not under the influence of drink and never on any occasion when he called at his office was he in that condition, and there was nothing to indicate that he was not thoroughly competent to transact business. As an evidence of the deliberate character of his purpose in conveying this land, the plaintiff some time previous to the execution of the documents procured an abstract of the lands and handed them to the defendant, and she called upon Mr. Morton with the abstracts and asked him to prepare the necessary conveyances to herself. Mr. Morton hesitated, and asked her to have the plaintiff call and see him, and a few days afterwards the plaintiff did call, when he was asked if he understood what he was doing, and warned that once the land was transferred he could not get it back, and the possibility of the defendant leaving him, to which the plaintiff replied that he was very fond of her, and wished to give her the land, and persisted in opposition to the advice of this solicitor to give her the land. Even then the conveyances were not prepared as Mr. Morton says he wanted to give him a chance to think it over. At the expiration of 2 or 3 days he again called and asked if the documents were ready, and insisted upon their preparation, and they were then prepared and executed, and forwarded for registration. Up to this time not a word was said about a power of attorney. One of the documents was returned by the officials at the registry office as it did not comply with the forms used in the province, and a new document had to be prepared, when the plaintiff was sent for and executed a further transfer in place of the one that was returned.

Between the time of the execution of the conveyances in the first instance and the executing of the corrected transfer, a power of attorney was executed.

If this were a case calling for independent advice, which I do not think it is, the plaintiff was well advised, and cannot complain of the absence of such independent advice.

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That the donor had confidence in the donee there cannot be any doubt. He expressed sentiments of affection, and a desire to do something for her. "The mere existence of confidence is not enough. Its proved existence would be an ingredient in proving influence, but influence is not to be presumed from the existence of confidence."

The confidence of the plaintiff was that the defendant would continue the relations that had sprung up between them with the possibility of marriage in view, but there was no condition attached to the gift, it was free, voluntary and unsolicited, and I see no reason for differing from the conclusions of the trial Judge, and would therefore dismiss the appeal with costs. *Appeal dismissed.*

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NATIONAL LAND & LOAN Co. v. RAT PORTAGE LUMBER Co. (Annotated.)

Manitoba King's Bench, Mathers, C.J.K.B., August 9, 1917.

1. COMPANIES (§ IV A—40)—AUTHORITY OF DIRECTORS—TRANSFER OF LAND—COVENANT—ULTRA VIRES.

The authority of company directors to execute an assignment of an agreement for the sale of land by the company, and the usual indemnity covenant in connection therewith, may be derived from a by-law passed subsequent to the execution of the assignment. A land trading company having the power to sell land has the implied power to enter into a covenant of that kind.

[*Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566, considered. See annotation 26 D.L.R. 295. See also annotation following this case.]

2. PRINCIPAL AND SURETY (§ I B—13)—DISCHARGE OF SURETY—IMPAIRMENT OF SECURITY.

The dealing with a security by a principal creditor, which does not prejudice the surety in a sense that he suffers pecuniary loss or damage as the reasonably direct or natural result of that act, will not discharge the surety.

[Sec. 26 (r) of the King's Bench Act (R.S.M. 1913, ch. 46), applied; *Blackwood* v. *Percival*, 14 Man. L.R. 216, followed.]

D. H. Laird, K.C., and *A. R. Dysart*, for plaintiffs.

E. Anderson, K.C., and *E. P. Garland*, for defendants.

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MATHERS, C.J.K.B.:—On and prior to May 14, 1912, the Rat Portage Lumber Co., Ltd., was the owner of lots 1 to 7 in block 12 in the townsite of Weyburn. It had up to this time used these lots for the purpose of piling lumber thereon in the prosecution of its business of a lumber company. On that day it entered into an agreement to sell these lands to one W. B. Procter for the sum of $45,000, payable $1,000 upon the execution of the agreement; $14,000 in 30 days from that date and the balance in 2 equal annual instalments of $15,000 each, payable on or before May 14, in the years 1913 and 1914, with interest at 7%. The

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deferred payment of $14,000 was duly made, as was also the $15,000 which fell due on May 14, 1913.

On July 19, 1912, the purchaser, W. B. Procter, entered into an agreement to sell lot 7 to one F. D. Porter, for the sum of $5,000, payable $1,666.66 cash upon the execution of the agreement and the balance in two equal instalments of $1,666.66, payable on April 19, 1913, and January 19, 1914.

On April 16, 1913, W. B. Procter assigned his agreement to the Federal Securities Co., Ltd.

On September 3, 1913, the defendants, the Rat Portage Lumber Co., by an assignment in writing, assigned the agreement of sale entered into between that company and W. B. Procter to the plaintiffs, National Land Co., Ltd., for a consideration of $14,000, and granted, sold, assigned and transferred to the assignees the lands described in the agreement; namely, lots 1 to 7 in block 12, in townsite of Weyburn. In respect of this assignment the plaintiffs paid to the defendants a cheque of $10,000 on September 10, and a further cheque of $1,500 on September 15. They charged the defendants with $103.32, solicitors' fees and, by agreement, retained $2,396.68, pending the payment of taxes for the year 1912, which were then and still are unpaid. The assignment from the defendants to the plaintiffs contained the following covenant:—

> And the said assignor doth further for itself and its successors and assigns covenant, promise and agree to and with the said assignee, its successors and assigns, that in case of default by the purchaser in the payment of any sum or sums of money which shall become due or owing under the said articles of agreement, that he will forthwith on demand well and truly pay, or cause to be paid to the assignee, his heirs, executors, administrators or assigns any sum or sums so in default.

Early in January, 1914, the purchaser of lot 7 from Procter had paid his full purchase money and demanded title. There was no provision in the agreement between the defendants and Procter entitling the latter to a release of any portion of the land agreed to be purchased upon paying a proportion of the purchase money. Procter therefore found himself unable to make title to lot 7, without the consent of the plaintiff company. His only alternative would be to pay the whole balance due under the agreement. On January 12, 1914, Procter wrote the plaintiff company telling them that he desired to obtain a release of lot 7, and asking them to say what proportion of the final payment

they would consider necessary for the release of the lot. Receiving no reply, he, on January 30, wrote to the defendant company enclosing a copy of the letter previously written to the plaintiffs and asking them to look into the delay and advise him as early as possible. On February 2, 1914, the defendant company wrote the plaintiff company, enclosing the letter which they had received from Procter. To this letter there was the following post-script:—

P.S.—We assume that in any event you will make no concession to Mr. Procter until the taxes on this property are paid and the amount which you hold on our account in connection with the purchase of the agreement is paid over to us.

The plaintiff company fixed the sum of $2,000 as the amount for which they would grant a release of lot 7, and upon the payment of that sum, they executed a conveyance of this lot to the purchaser Mr. Procter.

Default was made by Procter in payment of the instalment of $15,000 which fell due on May 14, 1914, and the plaintiffs bring this action upon the covenant above quoted for the amount of such instalment, less the $2,000 paid in respect of lot 7, and accrued interest.

The defences relied upon are: 1. That the transaction between the defendant company and the plaintiff company was an absolute sale without recourse. 2. That if the officers executing the assignment assumed to make the covenant sued upon, they had no authority to bind the company by any such covenant. 3. That if they were authorized to bind the company, such a covenant was *ultra vires*. 4. That the plaintiff company, by releasing lot 7, has so dealt with the property as to debar it from now recovering against the defendant company.

I propose to discuss these defences in the order named.

Dealing with the first defence, none of the officers of either company could recollect exactly what conversation took place while negotiations were being carried on between the defendants and the plaintiffs. W. J. Moran, now on active service, solicitor for the defendants and also one of its directors, and Wilson Bell conducted the negotiations on behalf of the defendants, but to the former was left the details of the bargain. His evidence was not obtained and none of the witnesses examined could recollect any discussion as to this covenant.

The chief business of the plaintiff company was the discounting

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or purchasing of just such agreements of sale, and a covenant by the vendor, such as that contained in this assignment, was always insisted upon by them. They had printed forms of assignment containing this covenant with which they supplied their solicitors. The company's solicitors prepared an assignment in duplicate upon the usual form and also a transfer of the land from the defendant company to the plaintiff company. The assignment and transfer were then sent to Moran on September 3, 1913, for execution by the defendants, and were by him returned to plaintiffs' solicitors on September 4, signed by the president and acting secretary of the defendants and with its corporate seal affixed. In their letter enclosing the assignment for execution, the plaintiffs' solicitors asked to be furnished with evidence of authority to sell the property and execute the assignment, and Moran in his letter returning the documents executed, said: "In order that no question may arise, we will have a special by-law put through by the directors of the company covering this transaction and send you a certified copy of it."

On September 5, plaintiffs' solicitors returned to the defendants' solicitors one copy of the assignment to be executed by Mr. Procter, the purchaser. They procured this to be done, and remailed the assignment executed by Procter to the plaintiffs' solicitors on September 22.

On September 9, Moran wrote the plaintiffs' solicitors enclosing the by-law referred to. It is also stated in that letter that the assignment had been forwarded to Procter for his signature, and it concludes with this sentence: "The Lumber Co. ask us in the meantime to request you to allow the matter to go through and payment to be made, they undertaking as to the correctness of the matter and to execute such further documents as you may require." On the following day the plaintiffs paid over $10,000, and on September 15, $1,500 more, reserving the balance pending the payment of overdue taxes.

After default had been made and the plaintiffs demanded payment from the defendant pursuant to the covenant, neither the company nor its solicitors took the position that it had given no such covenant. The former claimed that the moneys retained to pay taxes were sufficient to pay the arrears and the latter intimated that the release of lot 7 might have changed the position

so far as the defendant was concerned. Neither the company nor its solicitors appear to have been surprised to learn that such a covenant was in existence.

It would be impossible to hold under such circumstances that the officers of the defendant company were not charged with a knowledge of all that the assignment contained, or that they did not intend that the company should be bound by the covenant sued upon. On the contrary, the inference is that, knowing the assignment contained this covenant, they executed it intending that the company should be bound thereby.

Then, had the executing officers authority to bind the company by such a covenant? As already pointed out, the plaintiffs' solicitors, on September 3, asked the defendants' solicitors for evidence of authority to enter into the agreement of sale to Procter and to execute the assignment of the agreement to the plaintiffs. The assignment, for the execution of which the defendants' authority was asked, accompanied this letter, so that the defendants' solicitors knew exactly what document the plaintiffs required to be executed. On the 4th the defendants' solicitors replied that they could procure a special by-law to be put through "covering this transaction" and send the plaintiffs' solicitors a certified copy. At the same time the defendants' solicitors returned the assignment executed by the president and acting secretary under the company's corporate seal. On September 9, the defendants' solicitors enclosed to the plaintiffs' solicitors a certified copy of the following by-law:—

The Rat Portage Lumber Company, Limited. By-law No. 93.

A by-law to authorize the directors of the Rat Portage Lumber Company, Limited, to sell, assign and transfer unto the National Land & Loan Company, Limited, the agreement of sale bearing date the 14th day of May, 1912, and made between the company as vendors and W. B. Procter as purchaser.

Be it enacted by the directors of the Rat Portage Lumber Company, as a by-law of said company, as follows:—

1. That the company do forthwith assign, sell and transfer unto the National Land & Loan Company, the agreement of sale bearing date the 14th day of May, 1912, and made between the company as vendor and W. B. Procter as purchaser, covering Lots 1 to 7 inclusive in Block 12, Townsite of Weyburn, Plan 31899, at and for the consideration of $14,000 cash, and that the president and secretary-treasurer, or assistant secretary, be and they are hereby duly authorized to execute the necessary transfer and assignment and other documents in connection with the matter.

Done and passed and sealed with the corporate seal of the Company this third day of September, 1913.

Corporate seal. D. C. CAMERON, president. WILSON BELL, secretary.

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This by-law purports to have been passed upon September 3, but manifestly it was not passed until after September 4, because on that day the defendants' solicitors wrote promising to have it put through.

Again, it appears from Moran's letter of September 4, that Wilson Bell, the secretary, was not then in the city, but he was present when the by-law was enacted and signed it as secretary.

It is clear, therefore, that the by-law was passed subsequent to the execution of the assignment and was dated back so as to syncronize with the date of that instrument. At the time the by-law was passed the form the assignment was to take and its contents had been settled between the parties. The defendant company then knew exactly what documents it was necessary the defendants should execute to carry the transaction through and their contents. With this information in their possession, the directors passed this by-law authorizing the president and assistant secretary "to execute the necessay transfer and assignments and other documents in connection with the matter." In view of all the circumstances, I think the by-law must be interpreted as conferring upon these officers the authority to make the covenant sued upon.

The third defence is that the covenant was *ultra vires* the defendants. The plaintiffs answer this objection by citing *Bonanza Creek* case, 26 D.L.R. 273, [1916] 1 A.C. 566, as showing that a company incorporated by letters patent under Part One of the Dominion Companies Act, R.S.C. 1906, ch. 79, is a common law company with all the powers of a natural person. That case had to deal with the Ontario Companies Act, but Lord Haldane, at p. 283 of the report, does use language to indicate that, in his opinion, there is no difference in this respect between the two Acts.

A careful reading of the ex-Lord Chancellor's dictum will show that he does not say that the doctrine of *ultra vires* has no application to any company incorporated by letters patent, or that every such company has all the powers of a natural person. What he does say is that

> In the case of a company created by charter, the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity,

and is, therefore, not *ultra vires* although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies. (p. 284).

The Dominion Companies Act, by secs. 34 to 37, provides a means whereby a company incorporated under it may, by a vote of its shareholders representing two-thirds in value of its subscribed stock, obtain supplementary letters patent "extending the powers of the company to such further or other purposes or objects" for which a company may be incorporated. It may be that these provisions should be held to constitute the "statutory restrictions" referred to by Lord Haldane which would deprive this company of the status of a natural person, and limit its powers to those written in the charter. In the view I take of this case it is not necessary to decide this question, because I have come to the conclusion that, even if the defendant company has not the powers of a natural person, the making of this covenant was still within its powers. It was conceded that a company may do anything which is incidental to or consequential upon the thing the legislature has authorized. Here the company had clear power to sell the land which it held in Weyburn. It had power to enter into a binding agreement of sale in respect thereof. It is not contended that it had not power to sell and dispose of this agreement of sale to the plaintiffs.

A trading company, such as the defendant, may, without express power, enter into whatever agreements or covenants are usual in the particular business it is authorized to carry on in connection with any matter in which it is directly interested and which tends to promote its corporate objects. This is the *ratio decidendi* of such cases as *Re West of England Bank*, 14 Ch.D. 317; *Real Estate I. Co.* v. *Metropolitan Building Co.*, 3 O.R. 476, and *Hughes* v. *Northern Electric Co.*, 21 D.L.R. 358, 50 Can. S.C.R. 626.

There is evidence that the defendant company was in urgent need of the money for a specific purpose and gave that as the reason for disposing of the agreement. The interests of the company were evidently promoted by obtaining the money at once rather than waiting until it became due. The assignment was in the form exclusively used by the plaintiffs and there is no evidence that this was not the form in use by other companies doing a like

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business. It is said that the giving or not giving an indemnity covenant was a matter of agreement, but, so far as the plaintiffs are concerned, it was a *sine qua non*. There is certainly nothing from which it could be inferred that the giving of such a covenant by a vendor disposing of his interest in an agreement of sale was unusual. On the contrary, I infer that it was a usual condition insisted upon by the purchaser.

I hold, therefore, that the making of the covenant sued upon was not *ultra vires* the defendant company.

It is next contended that the plaintiffs, by releasing lot 7 at the request of Procter upon payment of $2,000, have discharged the defendants from liability. It is argued that the defendant company's liability was that of a surety and that by this transaction the plaintiffs have so dealt with the security as to discharge it from liability.

The transaction, in substance and in form, was an assignment of a chose-in-action and a conveyance of the security held for the payment thereof to which was superadded an agreement by the vendor to discharge the assigned obligation if the obligor failed to do so. The defendant offered for sale the obligation of Procter to pay $15,000 on May 14, 1915, for which the plaintiffs agreed to pay $14,000, on condition that the defendants would undertake to pay if Procter did not. After the execution of the assignment containing this covenant no doubt the defendants' relationship to the plaintiffs became that of guarantor of Procter's debt, and they were bound not to deal with the security which they held for the payment of that debt to the prejudice of the defendants. The rule of law applicable is contained in sec. 26 (*r*) of the King's Bench Act. It is there said that "giving time to a principal debtor, or dealing with or altering the security held by the principal creditor, shall not of itself discharge a surety or guarantor; in such cases a surety or guarantor shall be entitled to set up such giving of time or dealing with or alteration of the security as a defence, but the same shall be allowed in so far only as it shall be shown that the surety has thereby been prejudiced." Before this enactment the giving of time to the principal debtor without the assent of the surety discharged the surety and the question of whether or not he was thereby prejudiced would not be inquired into. *Rouse* v. *Bradford Banking Co.*, [1894] A.C. 586. But that was

not the rule with respect to the creditor dealing with securities. If whether by his negligence or by his intentional act the creditor released part of the security, the surety was discharged to the extent only that he was prejudiced. To that extent the section of the King's Bench Act is but an affirmance of the common law. *Capel* v. *Butler*, 2 Sim. & St. 457 (57 E.R. 421), and *per* Osler, J.A., *Land Security* v. *Wilson*, 22 A.R. 151, at 160, affirmed 24 Can. S.C.R. 150.

This section of the King's Bench Act was considered by our own Court in *Blackwood* v. *Percival*, 14 Man. L.R. 216, and in *Watson* v. *Bowser*, 16 W.L.R. 505, 509. In the former case the late Bain, J., said at p. 221: "The onus of proving that he has been prejudiced must rest on the surety, and, as I understand the Act, he must show that he has suffered pecuniary loss or damage as the reasonably direct and natural result of the creditor having given the extension of time; and the defence will avail him to the extent of the loss or damage he can prove." This opinion was concurred in by Killam, J., speaking for the full Court.

Mr. Anderson argued that it was sufficient for the surety to show that by the creditor's dealing with the security, he was in any degree prejudiced, and if so his defence was complete. In my opinion that was not the law before the Act, and certainly is not since. The Act expressly provides that granting time or altering the security shall be allowed as a defence "in so far only as it shall be shown that the surety has thereby been prejudiced."

What is the evidence of prejudice to the defendant by the release of lot 7? The evidence is that at the time lot 7 was released $2,000 was its outside value. It was the least valuable of any of the 7 lots, and was not worth more than $2,500 on the basis of the whole property being worth $45,000 at the time it was sold to Procter. Between the date of that agreement and the release of lot 7, the property had very greatly depreciated. It is difficult to see how the defendant could be said to be prejudiced if the full value was received for the property dealt with in the absence of evidence that the salability of the remainder was thereby interfered with, as to which there was none. The defendant did not contend that it could predicate a case of prejudice upon the sale of lot 7 for its full value. What it relied upon as showing prejudice was the evidence of Procter, taken upon commission. He

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says that, having bound himself by covenant to give his purchaser Porter a title to lot 7, he would have been compelled to pay up the whole amount due under the agreement if the plaintiffs had not agreed to accept $2,000. He says at that time he could have raised the money had he been compelled to do so; that in the event of a refusal by the plaintiffs, he would have endeavoured to have made the best bargain he could make, but that it is all a matter of supposition as to what he would have done in the event of a refusal by the plaintiffs to release lot 7 upon reasonable terms.

Such evidence is entirely too problematical on which to base a finding that Procter would have paid off the whole balance of purchase money if the plaintiffs had refused to release this lot. He had some time before conveyed the remaining 6 lots to The Federal Securities Co. and had no further interest in them. As to what he would have done in the event of failure to obtain a release of lot 7, he cannot possibly speak with any degree of certainty. As he says himself, it is "all a matter of supposition." Had it been suggested to the plaintiffs that in the event of their refusal the whole balance would be paid, they probably would have held out, but the probability of this being done did not occur to either them or the defendants. But, even if the evidence went so far as to show that, had the plaintiffs refused Procter's request for a release of lot 7, he would have paid off the whole balance payable under the assigned agreement, it would still, in my opinion, fall short of showing that, in the language of Bain, J., in *Blackwood* v. *Percival*, *supra*, the defendants had because of its release suffered "pecuniary loss or damage as the reasonably direct or natural result" of that act. The value of the security was diminished only to the extent of the value of lot 7, and their liability upon the covenant was diminished to exactly the same extent. There was therefore no "pecuniary loss or damage" as the "reasonably direct or natural result" of the transaction.

Besides all this, there is some evidence that the plaintiffs acted in releasing this lot with the defendants' consent. The correspondence between them at the time shows that the latter knew of the application for a release of lot 7 and were agreeable that the plaintiffs should grant it without payment of the whole balance payable. The only stipulation made was that "no concession" should be made to Procter until the back taxes were

paid. By the "concession" here referred to was meant the release of lot 7. Reading the defendants' letter of February 2, 1914, including the postscript, the fair conclusion is that the defendants had no objection to the "concession" being made provided the back taxes were paid, a very different attitude from that which they now assume.

Under all the circumstances, I think the defendants have failed to show any prejudice and that plaintiffs are entitled to judgment.

There will be judgment for the plaintiff company for $15,910.24 and interest from March 15, 1916, at 7%, and costs of suit.

Judgment for plaintiff.

ANNOTATION—BY C. B. LABATT.

Annotation.

ULTRA VIRES IN ACTIONS ON CORPORATE CONTRACTS—ESTOPPEL.

Annotation.

VI. *Rationale of each of the conflicting doctrines as to the subject of estoppel.*

21. Doctrine under which no estoppel is predicable.

22. Doctrine under which an estoppel is predicable.

I.—Introductory.

1. General statement.—There is virtually no difference of opinion as to the general rule that, as long as an *ultra vires* contract remains executory on both sides, it is not susceptible of enforcement.[1]

The authorities are also in agreement as to the proposition that, in any case to which that general rule applies, the principle of estoppel cannot be invoked for the purpose of enabling a party to the contract to maintain an action upon it.[2]

On the other hand, there is a conflict of views with regard to the question whether that principle is available for such a purpose in a case where the claimant has performed the whole contract, or the divisible part thereof with respect to which recovery is sought. Two diverse theories have been propounded:

(1) That the mere fact of performance by the plaintiff never operates so as to estop the defendant from setting up the defense of *ultra vires*.

(2) That this fact is of itself sufficient to estop the defendant from setting up that defense in whatever respect the contract may have transcended the powers of the corporation.

In the present note it is proposed to review all the English and Canadian cases which have a bearing upon these theories. The American decisions will be cited merely to such an extent as may be necessary for the purpose of indicating the position taken by the various Federal and State Courts, and of throwing additional light upon the limits and rationale of each of the doctrines.

The term "*ultra vires*" in its proper sense "denotes some act or transaction on the part of a corporation which, although not unlawful or contrary to public policy if done or executed by an individual, is yet beyond the legitimate powers of the corporation as they are defined by the statutes under which it is formed, or which are applicable to it, or by its charter or incorporation papers."[3] As an introduction to the present monograph this

[1] Apparently the only case in which the contrary has been maintained is *Harris* v. *Independence Gas Co.* (1907), 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123.

[2] For cases in which this doctrine was explicitly enounced, see *Wilks* v. *Georgia P.R. Co.* (1885), 79 Ala. 180; *Long* v. *Georgia P.R. Co.* (1890), 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706; *Day* v. *Spiral Springs Buggy Co.* (1885), 57 Mich. 146, 58 Am. Rep. 352, 23 N.W. 628; *Pennsylvania, D. & M. Steam Nav. Co.* v. *Dandridge* (1836), 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; *Nassau Bank* v. *Jones* (1884), 95 N.Y. 115, 47 Am. Rep. 14; *Swindell* v. *Bainbridge State Bank*, 3 Ga. App. 364, 60 S.E. 13.

[3] 2 Machen, Corp. sec. 1012. This definition is adopted in 5 Laws of England (Halsbury), p. 285; and *Pennsylvania R. Co.* v. *Minis* (1913), 120 Md. 461, 87 Atl. 1062.

In *Trevor* v. *Whitworth* (1887), L.R. 12 App. Cas. 409, 57 L.J. Ch. N.S. 28, 57 L.T.N.S. 457, 36 Week. Rep. 145, it was remarked by Lord Macnaghten that the principles laid down in *Ashbury R. Carriage & Iron Co.* v. *Riche*

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general explanation of the meaning of *ultra vires* will suffice. But it should be observed that the statement, being quite general, fails to take account of a distinction to which, in a discussion of the applicability of the principle of estoppel to actions brought upon *ultra vires* contracts, a very material importance attaches; that is to say, it does not specifically refer to the fact that a contract may be *ultra vires* by reason either of an express or of an implied prohibition.[1] Some Courts, as will be shewn hereafter, hold that an estoppel can be predicated only where the prohibition is one of the latter description. See secs. 8, 9 and 20, *post*.

2. Principle of estoppel considered with reference to partially performed contracts.—From the universally accepted doctrine that an *ultra vires* contract cannot be enforced while it remains executory, it would seem to be a necessary deduction that, if one of the parties withdraws from the contract after it has been performed on both sides, during a portion of the period which it covers, such withdrawal cannot constitute a cause of action, for the simple reason that the unperformed residue of the contract is executory in its nature. Decisions in accord with the view indicated by this consideration have been rendered not only by Courts which refused to recognize the principle of an estoppel as predicated from the performance of the contract by the claimant,[2] but also by Courts which accept that principle.[3]

3. Effect of the complete execution of ultra vires contracts on both sides. — The doctrine applicable in cases involving contracts

(1875), L.R. 7 H.L. 653, 44 L.J. Exch. N.S. 185, 33 L.T.N.S. 451, 24 Week. Rep. 794, 2 Eng. Rul. Cas. 304, with regard to the limits of the powers of incorporated companies, had been held by the House of Lords to "apply with equal force to companies governed by the Companies Acts and to companies incorporated by special Act of Parliament."

[1] In support of this statement it will be sufficient for our present purposes to quote the following remarks of Lord Cranworth in *Shrewsbury & B.R. Co.* v. *North-Western R. Co.* (1857), 6 H.L. Cas. 113, 10 Eng. Reprint, 1237: "When the legislature constitutes a corporation, it gives to that body *primâ facie* an absolute right of contracting. But this *primâ facie* right does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making; such a contract is said to be *ultra vires*." He also referred to the language used by Parke, B., in *South Yorkshire R. & R.D. Co.* v. *Great Northern R. Co.* (1853), 9 Exch. 75: "Where a corporation is created by an Act of Parliament for particular purposes with special powers, . . . their deed, though under their corporate seal, . . . does not bind them if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments that the deed was *ultra vires;* that is, that the legislature meant that such a deed should not be made."

[2] In *Thomas* v. *West Jersey R. Co.* (1879), 101 U.S. 71, 25 L. ed. 950 (action not maintainable for rent accruing under a lease in respect to a period subsequently to the repudiation of the contract by the defendant); *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* (1884), 130 U.S. 1 (similar decision); *Mallory* v. *Hanaur Oil Works* (1888), 86 Tenn. 598, 8 S.W. 396.

[3] *McNulta* v. *Corn Belt Bank* (1895), 164 Ill. 427, 56 Am. St. Rep. 203, 45 N.E. 954, affirming (1895), 63 Ill. App. 593; *Western Maryland R. Co.* v. *Blue Ridge Hotel Co.* (1905), 102 Md. 307, 2 L.R.A.(N.S.) 87, 111 Am. St. Rep. 362, 62 Atl. 351; *Ogdensburgh & L.C.R. Co.* v. *Vermont & C.R. Co.* (1875), 4 Hun (N.Y.) 268, 6 Thomp. & C. 488.

Annotation. which have been executed on both sides is that "the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it."[1] Hence "where a void contract has been so far executed that property has passed under it and rights have been acquired under it, the Courts will not disturb the possession of such property, or compel restitution of money received under such a contract."[2] This doctrine is apparently a deduction from the principle, "*In pari delicto, potior est conditio possidentis*," which has in point of fact been relied upon as the *ratio decidendi* in many cases involving circumstances of essentially the same character as those in which the doctrine has been invoked.[3]

Considered with special reference to the remedial rights of the corporation itself, this doctrine assumes the form indicated by the following statement: "A corporation acting without authority is not in the position, with the privileges of an infant, to avoid an improvident contract, but in the position and subject to the liabilities and disabilities for a wrongdoer, if it exceeds its authority. It cannot complete a bargain with a third party, which such third party has a right to make, and then rescind the contract, wholly executed, if such contract proves to be an improvident one, and recover back the consideration."[4]

That in cases where the remedial rights of *creditors* are involved the fact of a complete execution on both sides is not treated as a reason for allowing the transaction to stand is indicated by some

[1] *Thomas* v. *West Jersey R. Co.* (1879), 101 U.S. 71, 25 L. ed. 950, citing *Parish* v. *Wheeler* (1860), 22 N.Y. 494.

[2] Principle approved by the Court in *Pennsylvania R. Co.* v. *St. Louis A. & T.H.R. Co.* (1885), 118 U.S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094, but declared not to be applicable to a case in which the contract had been only partially performed. For other cases in which this principle was held to be controlling, see *Cincinnati, H. & D.R. Co.* v. *McKeen* (1894), 12 C.C.A. 14, 24 U.S. App. 218, 64 Fed. 36 (transfer of stock); *Santa Cruz* v. *Wykes* (1913), 120 C.C.A. 485, 202 Fed. 357, affirming (1911), 184 Fed. 752 (sale); *Camden & A.R. Co.* v. *May's Landing & E. H. City R. Co.* (1886), 48 N.J.L. 530, 7 Atl. 523 (lease); *Emmet* v. *Reed* (1853), 8 N.Y. 312 (promissory note had been cancelled and returned after it had been paid in the manner agreed); *Cunningham* v. *Massena Springs & Ft. C.R. Co.* (1892), 63 Hun. 439, 44 N.Y.S.R. 723, 18 N.Y. Supp. 600, affirmed in (1893), 138 N.Y. 614, 33 N.E. 1082 (construction contract).

[3] *National Bank* v. *Stewart* (1882), 107 U.S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778 (loan by national bank on security of its own shares); *Cincinnati, H. & D.R. Co.* v. *McKeen* (1894), 12 C.C.A. 14, 24 U.S. App. 218, 64 Fed. 36 (complete purchase of shares in another company); *Reed's Appeal* (1888), 122 Pa. 565, 16 Atl. 100 (contractor had received in part payment for his work stock for which payment had not been made in money).

In *St. Louis, V. & T.H.R. Co.* v. *Terre Haute & I.R. Co.* (1892), 145 U.S. 393, 408, 36 L. ed. 748, 754, 12 Sup. Ct. Rep. 953, the law was thus laid down: "When the parties are in *pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a Court of law nor a Court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract."

[4] *Attleborough Nat. Bank* v. *Rogers* (1878), 125 Mass. 339 (sale of promissory notes).

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of the decisions relating to the liability of corporations to be placed on the list of contributories in winding up proceedings.[1]

II.—Principle of estoppel considered with reference to the juristic quality of an ultra vires contract.

4. Conflicting views of the Courts—Generally.—It is clear that, if only logical criteria are considered, and no account is taken of such subsidiary elements as expediency, public policy, or abstract justice, the question whether the doctrine of an estoppel against pleading *ultra vires* in an action brought upon the contract of a corporation shall be adopted or not must, in the final analysis, depend upon the nature of the theory which is entertained with respect to the juristic quality of such a contract. There is no doubt that the remarkable want of harmony in the American decisions is in a large measure attributable to the difference of opinion which prevails regarding this primary and fundamental point. It is not disputed that, if *ultra vires* transactions are to be regarded as being illegal, in the ordinary sense of the word, they must be regarded as absolutely "void," consequently not susceptible of enforcement. "There can be no civil right where there is no legal remedy, and there can be no legal remedy for that which is illegal."[2] It is also well established that, except in those instances in which the terms of the statute in question are such as to evince an intention on the part of the legislature that a contract which violates an expressly prohibitory enactment shall not be invalid as between the parties, the quality of such a contract is determined by "the general rule of law, . . . that a contract made in violation of a statute is void; and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover."[3]

Furthermore it is clear from the authorities that the effect of an implied prohibition in regard to the invalidation of a contract is ordinarily deemed to be precisely the same as that of an express prohibition. "Where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect."[4] "The long-established maxim of the

[1] *Royal Bank of India's Case* (1869), L.R. 4 Ch. 252, 19 L.T.N.S. 805, 17 Week. Rep. 359; *Ex parte Liquidators* (1878 : C.A.) L.R. 8 Ch. Div. 679; *General Property Invest. Co.* v. *Matheson* (1888), 16 Sc. Sess. Cas., 4th series, 282.

[2] *Bank of United States* v. *Owens* (1829), 2 Pet. (U.S.) 527, 7 L. ed. 508, quoted in *Tiffany* v. *Boatman's Sav. Inst.* (1873), 18 Wall. (U.S.) 375, 384, 21 L. ed. 868, 869.

"The ordinary rule of law that no person can sue a Court of law or equity upon an illegal contract" was referred to by Brett, L.J., in *Re Cottman* (1881), L.R. 19 Ch. Div. 70, 51 L.J. Ch. N.S. 3, 45 L.T.N.S. 392, 30 Week. Rep. 342.

[3] *Miller* v. *Ammon* (1891), 145 U.S. 421, 426, 36 L. ed. 759, 762, 12 Sup. Ct. Rep. 884.

"Everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever": *Re Cork & Y.R Co.* (1869), L.R. 4 Ch. 748.

[4] *Cope* v. *Rowlands* (1836), 2 Mees. & W. 157, 150 Eng. Reprint, 710, 2 Gale, 231, 6 L.J. Exch. N.S. 63.

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law, '*Ex turpi causa non oritur actio*', is equally applicable where the act or contract is prohibited by statute, either expressly or by implication, as when it is *contra bonos mores*."[1] That this general rule is applicable to the contract of a corporation is agreed by all the authorities.

The decisions also show that, both in the jurisdictions in which the principle of an estoppel, as predicated upon the subsequent conduct of the parties with reference to such a contract, has been rejected, and also in the jurisdictions in which that principle has been adopted, there is virtually no disagreement respecting the doctrine that, if a corporate contract violates an expressly prohibitory clause of the statute or other instrument which defines the powers of the corporation, it is void in such a sense that it cannot be enforced.[2] It is with reference to this rule that the expressly prohibited contracts of corporations have been treated as void in numerous American cases, which for purposes of classification, may be regarded as belonging to two categories; viz., (1) Those in which recovery was denied without any explicit reference to the question whether, in respect to the consequences of performance on the part of the plaintiff, such contracts were distinguishable from merely unauthorized contracts;[3] and (2) Those in which it was laid down that only contracts of the latter description come within the scope of the principle of estoppel.[4]

On the other hand, there is a conflict of views with regard to the question whether the character of "illegality" should be ascribed to corporate transactions which are the subject of that species of implied prohibition which is predicated from the circumstance that the instrument defining its powers does not contain any words which can be construed as authorizing them.

[1] *Seneca County Bank* v. *Lamb* (1858), 26 Barb. (N.Y.) 595.

[2] "There is no principle of law better settled than that a corporation cannot enter into a contract which is expressly prohibited by its charter or by statute. A contract so made is absolutely void. No performance on either side can give it any validity. . . . We do not need to consider when the defence of *ultra vires* may or may not be interposed. The objection here is not that the contract is *ultra vires*, but that it is illegal. While a corporation is held in some States to be estopped from setting up the defence of *ultra vires* by having received the benefits of the contract, the Courts so holding do not apply that principle to cases in which the contract is absolutely void": *Re Grand Union Co.* (1914), 135 C.C.A. 237, 219 Fed. 353.

[3] See, for example, *Root* v. *Godard* (1842), 3 McLean 102, Fed. Cas. No. 12,037; *Stewart* v. *National Union Bank* (1869), 2 Abb. (U.S.) 424, Fed. Cas. No. 13,435; *Branch Bank* v. *Crocheron* (1843), 5 Ala. 250; *New York Firemen's Ins. Co.* v. *Sturges* (1824), 2 Cow. (N.Y.) 664; *Utica Ins. Co.* v. *Kip* (1827), 8 Cow. (N.Y.) 20; *New Hope Delaware Bridge Co.* v. *Poughkeepsie Silk Co.* (1841), 25 Wend. (N.Y.) 648; *Green* v. *Seymour* (1846), 3 Sandf. Ch. (N.Y.) 285; *Bank of Salina* v. *Alvord* (1865), 31 N.Y. 473; *Bank of Chillicothe* v. *Swayne* (1838), 8 Ohio 257, 32 Am. Dec. 707; *Manufacturers' & M. Sav. & L. Co.* v. *Conover* (1862), 5 Phila. (Pa.) 18; *Green* v. *Ashe* (1914), 130 Tenn. 615, 172 S.W. 293.

It may be mentioned that in sec. 12 of the English Companies Act there is an express prohibition against the making of any contract for any object beyond those mentioned in the memorandum of association: *Ashbury R. Carriage & Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 678, 44 L.J. Exch. N.S. 185, 33 L.T.N.S. 451, 14 Week. Rep. 794, 2 Eng. Rul. Cas. 304.

[4] See cases cited in sec. 20, note 2, *post*.

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5. Relation of this disagreement to that which exists as to the doctrine of estoppel.—For the purposes of the discussion in the present monograph, the controverted point mentioned at the end of the preceding section is of the highest importance. That there can be no direct ratification of an "illegal" contract by a corporation any more than by an individual is indisputable.

Of this rule it would seem to be an unavoidable corollary that such a contract cannot be indirectly validated by the operation of an estoppel.[1] The logical connection between the rule and the corollary is reflected in the state of the authorities. On the one hand, the Courts which treat the doctrine of estoppel as being inapplicable in respect of an *ultra vires* contract, because such a contract is illegal, have uniformly taken the position that it cannot be validated either by the assent of the corporation itself, acting in its corporate capacity,[2] or by the expressed will of all the individual shareholders.[3] On the other hand we find numerous

[1] For cases in which this rule was affirmed or recognized with reference to corporate contracts, see *Kent* v. *Quicksilver Min. Co.* (1879), 78 N.Y. 159, 4 Mor. Min. Rep. 47; *Mutual Guaranty F. Ins. Co.* v. *Barker* (1899), 107 Iowa 143, 70 Am. St. Rep. 149, 77 N.W. 868; *Witter* v. *Grand Rapids Flouring Mill Co.* (1891), 78 Wis. 543, 47 N.W. 729.

Some American Courts, however, have not shrunk from the extreme doctrine that even expressly prohibited transactions—a species which cannot by any possible refinement be withdrawn from the "illegal" class—may, by virtue of an estoppel, become in effect enforceable.

[2] "The company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done within the powers vested in it by law. Consequently, a thing which is *ultra vires* and unauthorized is not an act of the company in such a sense as that the consent of the company to that act can be pleaded." Lord Selborne in *Great Eastern R. Co.* v. *Turner* (1872), L.R. 8 Ch. (Eng.) 149.

"A company of this kind, carried on under the statutes, with the limited powers which these statutes confer, can no more by adoption or homologation make a proceeding of this kind legal than they can lawfully enter into the original transaction itself. It is a nullity originally, and the company cannot homologate or adopt a nullity, for that is equally *ultra vires*." Lord Shand in *General Property Invest. Co.* v. *Matheson* (1888), 16 Sc. Sess. Cas., 4th series, 282.

See also *Central Transp. Co.* v. *Pullman's Palace Car Co.* (1890), 139 U.S. 24, 59, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478; *Louisville N.A. & C.R. Co.* v. *Louisville Trust Co.* (1898), 174 U.S. 552; *Central R. & Bkg. Co.* v. *Smith* (1884), 76 Ala. 572, 52 Am. Rep. 353; *Alabama G.S.R. Co.* v. *Loveman Compress Co.* (1916), — Ala. —, 72 So. 311; *National Home Bldg. & L. Asso.* v. *Home Sav. Bank* (1899), 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N.E. 619; *Hermitage Hotel Co.* v. *Dyer* (1911), 125 Tenn. 302, 142 S.W. 1117; *Metropolitan Stock Exch.* v. *Lyndonville Nat. Bank* (1904), 76 Vt. 303, 57 Atl. 101.

[3] "If a company has no power to do a particular thing, undoubtedly that power cannot be added to the company either by the agreement of the shareholders; nor can it be inferred to have been done legally merely from acquiescence or from subsequent delay in questioning the transaction": Lord Westbury in *Re British Provident L. & F. Ins. Soc.* (1883), 9 Jur. N.S. 631.

"If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, 'that is a contract which we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have

Annotation. cases in which American Courts by which the doctrine of estoppel was accepted have held that an *ultra vires* contract may be legalized in one or other of these ways.[1]

Assuming, therefore, that the question whether an estoppel against pleading *ultra vires* can be created in a case where the contract under review was merely unauthorized depends upon whether such a contract is "illegal," we shall proceed to consider the variant theories which have been propounded upon the subject.

6. Doctrine under which ultra vires and illegal contracts are regarded as belonging to the same category.—One view is that the unauthorized transactions of corporations, as well as those which are expressly prohibited, are "illegal" in such a sense that they cannot be

been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing": Lord Cairns in *Ashbury R. Carriage & Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 672, 2 Eng. Rul. Cas. 304. See also the remarks of Lord Chelmsford at p. 675.

"All the shareholders and all the stockholders are entirely different from the corporation, and although the want of a formal resolution which might be required for the exercise of the powers so as to bind the minority would be done away with, in my opinion the assent of all the shareholders cannot make valid, as against the corporation, that which under the Act of Incorporation the corporation has not the power to do": Cotton, L.J., in *Wenlock* v. *River Dee Co.* (1887), L.R. 36 Ch. Div. (Eng.) 674. To the same effect, see the remarks of Bowen, L.J., at p. 686.

"No approval of those who may happen to be directors at the time when the company is formed, or of those who may happen at that time to be all the shareholders in the company, can possibly give it validity, because it is something which the company itself cannot do, and which it cannot be authorized to do either by its then directors or by its then shareholders": *Mann* v. *Edinburgh Northern Tramways Co.* [1893] A.C. 69.

See also *Taylor* v. *Chichester & M.R. Co.* (1867), L.R. 2 Exch. 356; *Chapleo* v. *Brunswick Permanent Bldg. Soc.* (1881), L.R. 6 Q.B. Div. 696, 50 L.J.C.P.N.S. 372, 44 L.T.N.S. 449, 29 Week. Rep. 529, 2 Eng. Rul. Cas. 366; *McCutcheon* v. *Merz Capsule Co.* (1896), 31 L.R.A. 787, 19 C.C.A. 108, 37 U.S. App. 586, 71 Fed. 787.

In Re Phœnix Life Assur. Co. (1862), 2 Johns. & H. 441, 70 Eng. Reprint 1131, 31 L.J. Ch. N.S. 749, 9 Jur. N.S. 15, 7 L.T.N.S. 191, 10 Week. Rep. 816, Page Wood, V.-C., seems to have argued on the assumption that, if the facts had been such as to show full acquiescence on the part of all the shareholders of a life insurance company in the unauthorized extension of its business to marine insurance, the holders of marine insurance policies would have been entitled to prove in respect to them in winding-up proceedings. This theory seems irreconcilable with the other English cases cited above. The same criticism applies to the remarks made with regard to the effect of acquiescence in *Imperial Bank* v. *Bank of Hindustan* (1868), L.R. 6 Eq. 100, 16 Week. Rep. 1107 (Giffard, L.J.), and *Shrewsbury* v. *North Staffordshire R. Co.* (1866), L.R. 1 Eq. 593, 35 L.J. Ch. N.S. 172, 12 Jur. N.S. 631, 13 L.T.N.S. 648, 14 Week. Rep. 220 (Kindersley, V.-C.).

[1] See *Allegheny City* v. *McCurkan* (1850), 14 Pa. 82; *Bissell* v. *Michigan S. & N.I.R. Cos.* (1860), 22 N.Y. 279; *Martin* v. *Niagara Falls Paper Mfg. Co.* (1890), 122 N.Y. 165, 25 N.E. 303; *Western Development & Invest. Co.* v. *Caplinger* (1908), 86 Ark. 287, 110 S.W. 1039; *Wells* v. *Northern Trust Co.* (1902), 195 Ill. 288, 63 N.E. 136; *Sherman Centre Town Co.* v. *Morris* (1890), 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569 ("acquiescence" of corporation referred to as giving contract "validity"); *Butterworth* v. *Kritzer Mill. Co.* (1897), 115 Mich. 1, 72 N.W. 990; *Kraniger* v. *People's Bldg. Soc.* (1895), 60 Minn. 94, 61 N.W. 904; *Western & S.F. Ins. Co.* v. *Murphey* (1916), — Okla. —, 156 Pac. 885; *Miller* v. *Washington Southern R. Co.* (1895), 11 Wash. 414, 39 Pac. 673.

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enforced either directly or indirectly. It was with reference to this doctrine that Selden, J., remarked in a leading New York case that "the real ground upon which the defense of *ultra vires* rests, and the only one upon which it has ever, to any extent, been judicially based, is that the contracts of corporations which are unauthorized by their charters are to be regarded as illegal, and therefore void."[1]

This is the theory which underlies all the cases in which the applicability of the doctrine of estoppel with relation to claims based upon *ultra vires* contracts has been denied, either expressly or by implication.[2]

[1] *Bissell* v. *Michigan S. & N.I.R. Cos.* (1860), 22 N.Y. 285.

[2] In *Hill* v. *Manchester & S. Waterworks* (1831), 2 Barn. & Ad. 545, 109 Eng. Reprint 1245, Lord Tenterden said that no question of *ultra vires* was raised by the pleadings, because, "as framed, they raised no sufficient ground for argument as to illegality."

In *East Anglian R. Co.* v. *Eastern Counties R. Co.* (1851), 11 C.B. 775, 138 Eng. Reprint 680, 21 L.J.C.P.N.S. 23, 16 Jur. N.S. 249, 22 Eng. Rul. Cas. 21, 7 Eng. L. & Eq. Rep. 509, Jervis, Ch. J., in the judgment delivered for the whole Court, spoke of the undertaking in question as being "illegal" because contrary to the Act of Parliament which defined the powers of the defendant company. He also remarked that the undertaking was "not within the scope of the authority of the company as a corporation, and therefore void." In *Macgregor* v. *Dover & D.R. Co.* (1852), 18 Q.B. 618, 118 Eng. Reprint 233, 16 Eng. L. & Eq. Rep. 180, 7 Eng. Ry. & C. Cas. 227, 22 L.J.Q.B.N.S. 69, 17 Jur. 21, the terminology of this case was used in the judgment delivered for the Exchequer Chamber by Alderson, B.

In *Norwich* v. *Norfolk R. Co.* (1855), 4 El. & Bl. 397, 119 Eng. Reprint 149, the only question upon which a difference of opinion developed was as to whether the contract under review was *ultra vires*. That it would be illegal, if determined to be *ultra vires*, was not disputed. Lord Campbell designated it by the expressions, "*ultra vires*," "illegal," and "void." Erle, Ch.J., stated that the question for consideration was "whether this contract was illegal as not authorized by the Act incorporating the defendants' company, and therefore prohibited by that Act." He also laid it down that "a contract for a purpose unconnected with the purpose of incorporation is, or may result in, an application of the funds to a purpose unconnected with the purpose of incorporation, and is therefore held to be prohibited and void."

In *Eastern Counties R. Co.* v. *Hawkes* (1855), 5 H.L. Cas. 331, 10 Eng. Reprint 928, 35 Eng. L. & Eq. Rep. 8, 24 L.J. Ch. N.S. 601, 3 Week. Rep. 609, the point discussed by the House of Lords was merely whether the contract upon which the action was brought was *ultra vires*. Lord Brougham was of the opinion that there was "nothing illegal" in it, the expression "illegal" being clearly used as a synonym of "*ultra vires*." This was the position of the other members of the House also.

In *Atty.-Gen.* v. *Great Eastern R. Co.* (1880), L.R. 5 App. Cas. 473, 22 Eng. Rul. Cas. 114, Lord Watson said (p. 486): "I cannot doubt that the principle by which this House, in the case of the *Ashbury Carriage & Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653, 44 L.J. Exch. N.S. 185, 33 L.T.N.S. 451, 24 Week. Rep. 794, 2 Eng. Rul. Cas. 304, tested the power of a joint stock company registered (with limited liability) under the Companies Act of 1862, applies with equal force to the case of a railway company incorporated by Act of Parliament. That principle in its application to the present case appears to me to be this; that when a railway company has been created for public purposes, the legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication." To the same effect are the remarks of Lord Blackburn (p. 481).

In *Wenlock* v. *River Dee Co.* (1887), L.R. 36 Ch. Div. 674, Bowen, L.J., after referring to the doctrine that "at common law a corporation created

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7. Doctrine under which ultra vires and illegal contracts are differentiated in respect of category, but not of incidents.—According to another doc-

by the King's charter has *primâ facie*, and has been known to have, ever since *Sutton's Hospital* case (1612), 10 Coke 13, the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to," thus contrasted the position of a corporation created by or in pursuance of a statute: "The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had."

In *Re London & N. Ins. Corp.* (1869), L.R. 4 Ch. 682, 21 L.T.N.S. 182, 17 Week. Rep. 751, even a transaction which was invalid merely because it had not been confirmed by the corporation was referred to by Giffard, L.J., as "illegal."

For other cases in which *ultra vires* contracts were expressly declared to belong to the "illegal" category, see *Salomons* v. *Laing* (1850), 12 Beav. 339, 50 Eng. Reprint 1091, 6 Eng. Ry. & C. Cas. 289, 19 L.J. Ch. N.S. 225, 14 Jur. 471; *Shrewsbury & B.R. Co.* v. *London & N.W.R. Co.* (1852), 16 Beav. 441, 51 Eng. Reprint 848; *Re Companies Acts* (1888), L.R. 21 Q.B. Div. 301; *Pearce* v. *Madison & I.R. Co.* (1858), 21 How. (U.S.) 441, 16 L. ed. 184; *Pullman's Palace Car Co.* v. *Central Transp. Co.* (1897), 171 U.S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *Central R. & Bkg. Co.* v. *Smith* (1884), 76 Ala. 572, 52 Am. Rep. 353; *National P. Bank* (1878), 125 Mass. 333, 28 Am. Rep. 235; *Leavitt* v. *Blatchford* (1848), 5 Barb. (N.Y.) 9; *Talmage* v. *Pell* (1852), 7 N.Y. 328; *Simpson* v. *Greenfield Bldg. & Sav. Asso.* (1882), 38 Ohio St. 349 (contract violating express prohibition was designated as "*ultra vires*").

In the following cases *ultra vires* contracts were designated as "void"—a nomenclature which clearly imports that they were assumed to be "illegal": *Simpson* v. *Westminster Palace Hotel Co.* (1860), 8 H.L. Cas. 717, 11 Eng. Reprint 608, 6 Jur. N.S. 985, 2 L.T.N.S. 707; *Sinclair* v. *Brougham*, [1914] A.C. 411, 83 L.J. Ch. N.S. 465, 111 L.T.N.S. 1, 30 Times L.R. 315, 58 Sol. Jo. 302; *Pennsylvania R. Co.* v. *St. Louis, A. & T.H.R. Co.* (1886), 118 U.S. 290, 317, 30 L. ed. 83, 94, 6 Sup. Ct. Rep. 1094; *Pittsburgh, C. & St. L.R. Co.* v. *Keokuk & H. Bridge Co.* (1888), 131 U.S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; *Louisville, N.A. & C.R. Co.* v. *Louisville Trust Co.* (1898), 174 U.S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Wheeler* v. *Home Sav. & State Bank* (1900), 188 Ill. 37, 80 Am. St. Rep. 161, 58 N.E. 598; *Imperial Bldg. Co.* v. *Chicago Open Bd. of Trade* (1908), 238 Ill. 100, 87 N.E. 167; *Brunswick Gaslight Co.* v. *United Gas, Fuel & Light Co.* (1893), 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525; *Crutcher* v. *Nashville Bridge Co.* (1847), 8 Humph. (Tenn.) 403.

In the following cases the defect of power which was predicated on a merely implied prohibition was treated as involving, so far as the liability of claimant to maintain the action, the same consequences as if the prohibition had been express: *New York Firemen Ins. Co.* v. *Ely* (1825), 5 Conn. 560, 13 Am. Dec. 100; *Hood* v. *New York & N.H.R. Co.* (1853), 22 Conn. 502; *Naugatuck R. Co.* v. *Waterbury Button Co* (1856), 24 Conn. 468; *Andrews* v. *Union Mut. F. Ins. Co.* (1854), 37 Me. 256; *Pennsylvania D. & M. Steam Nav. Co.* v. *Dandridge* (1836), 8 Gill. & J. (Md.) 248, 19 Am. Dec. 543; *Abbott* v. *Baltimore & R. Steam Packet Co.* (1850), 1 Md. Ch. 542; *Whittenton Mills* v. *Upton* (1858), 10 Gray (Mass.) 582, 71 Am. Dec. 681; *Bacon* v. *Mississippi Ins. Co.* (1856), 31 Miss. 116; *Life & F. Ins. Co.* v. *Mechanic F. Ins. Co.* (1831), 7 Wend. (N.Y.) 31; *Hodges* v. *Buffalo* (1846), 2 Denio (N.Y.) 110; *Madison, W. & M. Pl. Road Co.* v. *Watertown & P. Pl. Road Co.* (1859), 7 Wis. 59.

In *Clarke* v. *Sarnia Street R. Co.* (1877), 42 U.C.Q.B. 46, it was declared that the cases show "that when acts are spoken of as *ultra vires*, it is not intended that they are prohibited, but merely such as are not within the powers, directly or indirectly, conferred on the corporation." But this statement is plainly inconsistent with the English cases which had already been decided when it was made.

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trine "illegal" and "*ultra vires*" contracts belong to different categories, but are similar in this respect, that the latter, as well as the former, are entirely void. This theory is reflected in the following remarks made by Lord Cairns in a leading case: "I have used the expressions '*extra vires*' and '*ultra vires*.' I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression 'illegality.' In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract."[1] The transaction here under review was, it should be observed, one which contravened an expressly prohibitory clause of the statute under which the company in question had been formed. But for the purposes of a general discussion, this circumstance is immaterial, when we advert to the numerous English cases in which it has been held or assumed that, so far as the applicability of the doctrine of *ultra vires* is concerned, an implied prohibition is the juristic equivalent of an express one.

It is manifest that in this point of view also the operation of an estoppel is wholly excluded. "A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought

[1] *Ashbury R. Carriage & Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 672; 2 Eng. Rul. Cas. 304. It is interesting to find that this theory had been unsuccessfully advanced in an earlier case by the distinguished lawyer who subsequently became Mr. Justice Willes. In *Norwich* v. *Norfolk R. Co.* (1855), 4 El. & Bl. 406, 119 Eng. Reprint 1143, he contended as counsel that there was a "material distinction between contracts illegal because they are forbidden by some law, and contracts which are not illegal, but mere nullities because the party entering into them has not capacity to contract."

A similar point of view seems to be indicated by the following statement made, *arguendo*, by Lord Wensleydale in *Scottish North-Eastern R. Co.* v. *Stewart* (1859), 5 Jur. N.S. 607: "There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except when the statute by which it is created or regulated expressly or by necessary implication prohibit such contract between the parties."

See also the following statement: "In dealing with this branch of the law it is necessary to bear steadily in mind the difference between illegality and *ultra vires*. A transaction which is illegal is forbidden by law. A transaction which is *ultra vires* is precluded by the incompetence of the actor. The act may be a perfectly legal act, but is one which that person cannot do. Upon an illegal transaction no right enforceable in a Court of justice can be maintained. But there is nothing to preclude a party coming into Court, affirming the existence of an *ultra vires* transaction, and pointing to the incompetence of the party to bind himself thereto": Buckley, L.J., in *Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912; C.A.] 2 Ch. (Eng.) 232.

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not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it."[1]

As the Courts which have adopted this theory also take the ground that transactions belonging to both of the differentiated categories are equally void,[2] the distinction seems to be of no practical importance so long as it is considered with reference to the right of action upon the contract itself. There is, however, room for an argument that it may be a material factor in cases where a claimant is seeking relief independently of the contract. Thus, we find the following statement in an English case where an excessive loan was involved: "If the *ultra vires* loan is to be treated as an illegal prohibited transaction, as distinguished from a contract into which the company have no capacity to enter, there is no action at law or in equity by which the lender can recover back moneys which he has paid over in pursuance of the illegal contract. If, on the other hand, the *ultra vires* loan is to be treated merely as something *ultra vires*, and not as an illegal transaction, there is no reason why the lender should not recover the money thus paid from the company, as money received to the use of the lender, by reason of the failure of consideration arising out of the incapacity of the company to borrow, provided always that the dealing by the company with the money has not been such as to shew that, notwithstanding the form of action adopted, the money has really been so dealt with by the company as that, in the interval between the lending of the money and the bringing of the action, the company has increased its borrowing obligations beyond its borrowing powers."[3]

[1] *Central Transp. Co.* v. *Pullman's Palace Car Co.* (1890), 139 U.S. 24, 59, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478.

[2] This is shown by the cases cited in the preceding notes, and by the language used in *Re Wrexham, M. & C.Q.R. Co.*, [1899; C.A.] 1 Ch. 456, 68 L.J. Ch. N.S. 270, 47 Week. Rep. 464, 80 L.T.N.S. 130, 15 Times L.R. 122, 6 Manson 218 (contract invalidated by the want of corporate capacity was described as "*ultra vires*, and therefore null and void"); *Re Birkbeck Permanent Benefit Bldg. Soc.*, [1912; C.A.] 2 Ch. 207, 81 L.J. Ch. N.S. 769, 106 L.T.N.S. 968, 28 Times L.R. 451 (*ultra vires* contract, "though not illegal, is void, and in truth has no existence").

[3] *Re Wrexham, M. & C.Q.R. Co.*, note 3, *supra*. See also *Brougham* v. *Dwyer* (1913), 29 Times L.R. 234, where Lush, J., thus stated the grounds upon which an action for money had and received was maintainable for the recovery of a deposit which had been received by a building society which conducted a banking business: "The defence raised to the action, to which the Judge gave effect, was that this contract, being *ultra vires*, had the same consequences in point of law as if it had been illegal. If it had been illegal, of course the action would not lie, because the Court would not allow a person who was seeking to recover a sum of money to set up as part of his cause of action what was an illegal contract. The Judge took the view that to all intents this contract was an illegal one, and that the plaintiff was suing upon an illegal contract. If it had been so, that would have been a complete answer to the action. When, however, one remembered what *ultra vires* was, that was not the position. The transaction was not a contract only because the building society were unable to enter into it. There was nothing wrong or illegal about it, but, the plaintiffs being incompetent

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But, so far as regards one class of actions, viz., those for money had and received, doctrine thus propounded has been rejected in England by the House of Lords.[1] This decision would probably be deemed controlling also in cases where other kinds of actions not based on the contract are involved.

In spite of the high authority by which this particular species of differentiation is supported, its propriety, even in a narrow, technical point of view, would seem to be open to controversy. The classification which it presupposes is manifestly defective in that it does not make any satisfactory provision for those transactions which are beyond the powers of a corporation by reason of the fact that they are the subject of an express prohibition. The withdrawal of such transactions from the "illegal" category, simply because the party affected by the prohibition is a corporation, seems to be somewhat arbitrary, and is certainly contrary to all analogy. Having regard to the fact that the theory of Lord Cairns was, as has been mentioned above, propounded with relation to an express prohibition, it seems clear that the difficulty which is indicated in this point of view cannot be evaded by the aid of an assumption that the term, "*ultra vires*," connotes only transactions which are impliedly prohibited. Moreover, if we advert to the consideration that the "incapacity" or "incompetency" of a corporation to enter into certain transactions results simply from the circumstance of their having been prohibited, and that the juristic quality of its "illegal" transactions is also predicated from the circumstance, there would seem to be no satisfactory reason for passing over the primary element of the prohibition, and resorting to a classification based upon a secondary and merely verbal distinction. How hard it is to segregate "*ultra vires*" and "illegal" transactions consistently and effectually in any jurisdiction in which they are considered to be equally void is shewn by such a statement as the following, which, it should be observed, occurs in the same opinion of the Supreme Court of the United States as that from which the excerpt last quoted in the text is taken: A contract *ultra vires* is "unlawful and void, not because it is in itself immoral, but because the corporation, by law of its creation, is incapable of making it."[2] Here we have the "incapacity" of the corporation explicitly referred to as affixing the character of "unlawfulness" to the contract,—a doctrinal position which apparently cannot be reconciled with the phraseology of the other passage, except possibly upon the somewhat forced supposition that the words, "ought not" which the Court there uses in affirming the antithesis between "*ultra vires*" and "illegal," are intended to cover merely that category of prohibited contracts which in the latter passage is designated by the expression, "immoral."

to enter into it, it did not exist in point of law. The contract not being illegal, the action was maintainable and the defendant had no defence to it."

[1] *Sinclair* v. *Brougham*, [1914] A.C. 398, 83 L.J. Ch. N.S. 465, 111 L.T.N.S. 1, 30 Times L.R. 315, 58 Sol. Jo. 302.

[2] *Central Transp. Co.* v. *Pullman's Palace Car Co.* (1890), 139 U.S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478.

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8. Doctrine under which ultra vires and illegal contracts are differentiated in respect both of category and incidents.—A third doctrine is that "*ultra vires*" contracts not only belong to a different category from those which are "illegal," but are not void in such a sense that they cannot be vitalized by the subsequent conduct of the parties.

The earliest case in which this doctrine was categorically propounded seems to be one which was decided by the Supreme Court of New York in 1853.[1] But the most frequently cited exposition of the subject is to be found in the following passage in the well-known judgment delivered by Chief Justice Comstock in a leading case of somewhat later date: "But is it true that all contracts of corporations for purposes not embraced in their charters are illegal, in the appropriate sense of that term? This proposition I must deny. Undoubtedly such engagements may have the vices which sometimes infect the contracts of individuals. They may involve a *malum in se* or a *malum prohibitum*, and may be void for any cause which would avoid the contract of a natural person. But where no such vices exist, and the only defect is one of power, the contract cannot be void because it is illegal or immoral. . . . The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but, with the slight exception named,[2] entire there is an entire absence not only of adjudged cases, but of even judicial opinion or *dicta*, for the proposition that mere want of authority renders a contract illegal. Such a proposition seems to me absurd. The words '*ultra vires*' and '*illegality*' represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription made by authority of the board of directors and under the corporate seal, for the building of a church or college or an almshouse, would be clearly *ultra vires*, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be *ultra vires*, but no wrong would be committed and no public interest violated. So a manufacturing corporation may purchase ground for a schoolhouse or a place of worship for the intellectual, religious, and moral improvement of its operatives. It may buy tracts and books of instruction for distribution amongst them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although *ultra vires*, is

[1] *Steam Nav. Co.* v. *Weed*, 17 Barb. (N.Y.) 378, where the right of the plaintiff corporation to recover was affirmed on the ground that "when it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted to question its validity in an action founded upon it."

[2] This refers to the English cases commented upon in sec. 18, notes, 1, 2, *post*.

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not illegal, because dealing in exchange is, in itself, a lawful business, and there is no state policy in restraint of that business."[1]

The theory thus propounded that the illegal contracts of corporations are distinguishable in respect to category and incidents from those which are *ultra vires* has been adopted by a large number of the American Courts. It affords in fact the only available ground upon which, if we exclude from consideration such secondary elements as public policy, the promotion of justice, and the prevention of fraud, the theory of an estoppel against pleading *ultra vires* can logically be defended.[2]

9. Same doctrine further discussed.—An examination of the cases in which the doctrine that there is an essential distinction between an *ultra vires* and an illegal contract, in respect both to category and incidents, has been recognized, shews that the views of virtually all the Courts by which this theory has been adopted are founded, either directly or indirectly, upon the opinion of Chief Justice Comstock from which an extract is given in the preceding section. Nor, so far as the present writer has been able to ascertain, have any material reasons besides those adverted to by him, been subsequently suggested for differentiating to this extent between the two descriptions of contracts. It will be advisable, therefore, to see how far his remarks were justified by the earlier decisions.

While he concedes that, although some "slight foundation" for the doctrine that "*ultra vires*" contracts are "illegal" was

[1] *Bissell* v. *Michigan S. & N.I.R. Cos.* (1860), 22 N.Y. 269. See also p. 274.

In another case decided during the same year, the same Judge used the following language: "In all this I can see nothing unlawful except the want of legal power or right to buy the property. . . . That clause [in the contract under review], considered by itself, involved nothing illegal or even *ultra vires*": *Parrish* v. *Wheeler* (1860), 22 N.Y. 509.

[2] The following are a few out of the scores of cases in which the theory has been explicitly enounced: *Illinois Trust & Sav. Bank* v. *Pacific R. Co.* (1897), 117 Cal. 332, 49 Pac. 197; *Denver F. Ins. Co.* v. *McClelland* (1885), 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771; *State Bd. of Agri.* v. *Citizens' Street R. Co.* (1874), 47 Ind. 407, 17 Am. Rep. 702 (contract "not prohibited" or in violation of any statute); *Wright* v. *Hughes* (1889), 119 Ind. 324, 12 Am. St. Rep. 412, 21 N.E. 907; *Iowa Drug Co.* v. *Souers* (1908), 139 Iowa 72, 19 L.R.A. (N.S.) 115, 117 N.W. 300; *Maryland Trust Co.* v. *National Mechanics' Bank* (1906), 102 Md. 614, 63 Atl. 70; *Coit* v. *Grand Rapids* (1898), 115 Mich. 493, 73 N.W. 811; *Hunt* v. *Hauser Malting Co.* (1903), 90 Minn. 282, 96 N.W. 85; *Prairie Lodge* v. *Smith* (1880), 58 Miss. 301; *York* v. *Farmers' Bank* (1904), 105 Mo. App. 127, 79 S.W. 968 (similar distinction drawn); *Whitehead* v. *American Lamp & Brass Co.* (1905), 70 N.J. Eq. 583, 62 Atl. 554; *Whitney Arms Co.* v. *Barlow* (1875), 63 N.Y. 68, 20 Am. Rep. 504; *Kent* v. *Quicksilver Min. Co.* (1879), 78 N.Y. 186; *Bath Gaslight Co.* v. *Claffy* (1896), 151 N.Y. 34, 36 L.R.A. 664, 45 N.E. 390; *Vought* v. *Eastern Bldg. & L. Assoc.* (1902), 172 N.Y. 508, 92 Am. St. Rep. 761, 65 N.E. 496; *Hutchins* v. *Planters' Nat. Bank* (1901), 128 N.C. 72, 38 S.E. 252; *Union Trust Co.* v. *Mercantile Library Hall Co.* (1899), 189 Pa. 263, 42 Atl. 129; *Luthe* v. *Farmers' Mut. F. Ins. Co.* (1882), 55 Wis. 543, 13 N.W. 490.

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afforded by two English cases,[1] that doctine had been discredited by two other cases of later date.[2]

It is submitted that this assertion was erroneous in more than one respect. In the cases which he assumes to have been discredited, "*ultra vires*" contracts are *explicitly* referred to as "illegal," and the whole of the reasoning in both the judgments is based upon the hypothesis that they were of this nature. Under these circumstances, he was manifestly not warranted in minimizing the significance of these cases by the use of the depreciatory expression, "slight foundation." Furthermore, the judgment in the more recent of those cases was rendered by the Exchequer Chamber, a Court of error, and was, therefore, absolutely binding upon all other tribunals except the House of Lords. If the attention of the learned Chief Justice had been directed to this fact, he would certainly not have stated that the first mentioned of the two cases which were declared by him to have changed the English doctrine had impaired the authority of the earlier ones; for it was decided by the Court of Queen's Bench sitting *en banc*. But, as a matter of fact, all the cases, including the latest, which was decided by the House of Lords, are perfectly harmonious. The language and reasoning of every one of the Judges who participated in the two later cases indicate that they took it for granted that "*ultra vires*" contracts are illegal and void, and that the only question really discussed was whether the contracts actually under review were or were not authorized.

The learned Judge, after having thus explained the English precedents on a footing which exhibited them as being favorable to his own views, deemed himself to be warranted in asserting that "there is an entire absence not only of adjudged cases, but of even judicial dicta, for the proposition that mere want of authority renders a contract illegal." But it is submitted that, even if the English cases are left out of consideration, this statement is erroneous. The reports shew that, before the time when it was made, a "want of authority" of that description which is inferred from the fact that a certain power was not explicitly granted to the corporation in question had, in a much larger number of American cases than he was able to produce in favour of his own theory, been recognized as an element which rendered a contract absolutely void.[3] It is true that, in several of the instances in which this

[1] *East Anglian R. Co.* v. *Eastern Counties R. Co.* (1851), 11 C.B. 775, 138 Eng. Reprint 680, 7 Eng. L. & Eq. Rep. 509, 7 Eng. Ry. & C. Cas. 150, 21 L.J.C.P.N.S. 23, 16 Jur. 249, 22 Eng. Rul. Cas. 21; *Macgregor* v. *Dover & D.R. Co.* (1852; Exch. Ch.), 18 Q.B. 618, 118 Eng. Reprint 233, 16 Eng. L. & Eq. Rep. 180, 22 L.J.Q.B.N.S. 69 (as to these two cases, see sec. 15, note 2, *supra*).

[2] *Norwich* v. *Norfolk R. Co.* (1855), 4 El. & Bl. 397, 119 Eng. Reprint 143, 3 C.L.R. 519, 24 L.J.Q.B.N.S. 105, 1 Jur. N.S. 344; *Eastern Counties R. Co.* v. *Hawkes* (1855), 5 H.L. Cas. 331, 35 Eng. L. & Eq. Rep. 8, 24 L.J. Ch. N.S. 601, 3 Week. Rep. 609 (as to these two cases, see further sec. 15, note 1, *supra*).

[3] Many of the cases cited in sec. 15, note 2, *supra*, as sustaining the theory that *ultra vires* and illegal contracts belong to the same category, were anterior to 1860. As some of these were adverted to in the judgment delivered by

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position was taken, the term "illegal" was not actually used to characterize the transactions in question. But for the purposes of the present discussion, this circumstance is immaterial. From the language of the opinions it is clear that, in all the cases where contracts which were simply unauthorized were declared to be non-enforceable, "illegality" was the ground upon which they were treated as void. The learned Judge would, of course, not have conceded that the decisions which turned upon the effect of expressly prohibitive enactments were precedents unfavourable to his theory. Nevertheless it may reasonably be contended that they are by implication antagonistic to that theory in this respect at least, that the Courts by which they were rendered evidently regarded the expressions "illegal" and "*ultra vires*" as being identical in their connotation.

The only conclusion which it seems possible to draw from the foregoing review of the earlier decisions is that, at the date when the learned Chief Justice made the statement under discussion, there was a very distinct preponderance of authority against his theory. It is impossible to deny that, so far as the American Courts are concerned, the situation is now reversed; that is to say, if preponderance of authority is assumed to be a matter determinable solely by a comparison of the number of the precedents which are consistent or inconsistent with his views. But this method of computation is hardly satisfactory when we are appraising the value of the opinions entertained by Judges who, as expositors of the law, are very far from being of the same standing. Having regard to the high reputation of the Courts which have refused to accept his theory, a commentator seems to be fully warranted in expressing the opinion that their decisions embody the correct doctrine.

A strong, if not conclusive, objection to that theory is that, in the final analysis, it rests upon the conception that, where the enforceability of a prohibited contract is in question, the extent of the remedial rights varies according as the prohibition is express or merely implied. Such a distinction, it is apprehended, has never been recognized except in cases which are concerned with corporate transactions. In all other classes of cases transactions which are impliedly prohibited are assumed to belong, so far as regards the attribute of non-enforceability, to the same category as those which are expressly prohibited. Both kinds of transactions are plainly in violation of law, and consequently "illegal" in the broad sense of that word. Having regard to this consideration, there would seem to be no satisfactory ground upon which they can be segregated, except, perhaps, in the special point of view discussed in sec. 7, *ante*. It is true that, in statutes which do not relate to the powers of corporations, illegal acts are customarily specified by means of prohibitive words. But obviously the adoption of this kind of phraseology is due merely to the nature

Selden, J., in the *Bissell* case, it is not a little remarkable that the Chief Justice should have ignored them. But even the former was, it is apparent, not acquainted with all the American precedents which were available in support of his own views.

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of the subject matter. The reason why prohibitory language is almost invariably employed in such statutes clearly is that they are intended to operate upon individual members of the community who are assumed to enjoy a liberty of action which is complete except in so far as it may be circumscribed by the law, written or unwritten. On the other hand, the scope of that liberty of action which a corporation possesses depends entirely upon the terms of the enactment, general or special, under which it has been organized. There are, accordingly, two ways in which the extent of its powers may appropriately be defined; that is to say, there may be an enumeration either of the things which it may do, or of the things which it may not do. One type of provision declares the will of the legislature by means of an implied prohibition, the other by means of an express prohibition. In view of these obvious considerations, it is difficult to admit that there is any logical basis for the theory that diverse rights and liabilities are created according as the former type of provision or the latter is employed. The scope of both types is identical in so far as they serve to specify the boundaries of the corporate powers. Why should any distinction be predicated between them for the purposes of the doctrine of estoppel? The apparent unreasonableness of such a distinction is accentuated by the fact that it is doubtless in many instances a mere matter of accident whether one type or the other is selected; as, for example, where it is a question of placing restrictions upon the powers of corporations in respect of borrowing money, or insuring property or issuing certain securities.

As a factor bearing upon the character of the incidents which should be ascribed to *ultra vires* contracts, the antithesis, so often emphasized, between such transactions and those which are immoral or contrary to public policy, seems to be wholly irrelevant. Under the general law of contracts, transactions that are impliedly prohibited by statutes constitute, like these which are the subject of this differentiation, one of several distinct descriptions upon which no suit can be maintained. It is clear, therefore, that the antithesis predicated has no tendency whatever to shew that the Courts are warranted in withdrawing such transactions from the "illegal" category. There is a complete *petitio principii* involved in the argument that, because they do not belong to certain specified classes of "illegal" contracts, they are not themselves "illegal."

III. English and Scotch decisions reviewed.

10. Historical summary.—In an early case in which an action of ejectment was brought by a person to whom a mortgage had been executed in excess of their powers by the trustees appointed under a public turnpike Act, it was held that they were not estopped by their deed from insisting that the mortgage was unauthorized.[1] The effect of this decision was recently declared to be that "the doctrine of estoppel was held inapplicable . . . on the ground

[1] *Fairtitle ex dem. Mytton* v. *Gilbert* (1787), 2 T.R. 169, 100 Eng. Reprint 91, 1 Revised Rep. 455, 11 Eng. Rul. Cas. 52.

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that the plaintiffs were a public body with limited powers conferred by statute, and could not exceed those powers.[1] In the case in which this statement was made, the Court went still further and held that the plaintiffs, the vestry of a parish, were neither estopped nor precluded by laches or acquiescence from bringing an action for an injunction to restrain the defendants from using a certain sewer. These two authorities, although they have no explicit bearing upon the question whether an estoppel may be created by the acceptance of the benefits of an *ultra vires* contract, are so broad in scope that they may be construed as negativing by implication any such result, so far as public corporations are concerned.

The reports which cover the period between the date of the earlier of the above-mentioned decisions and the time when the powers of incorporated joint-stock companies began to engage the attention of the Courts contain no definite information regarding the subject considered in this monograph. But having regard to the facts involved, the cases belonging to this period are antagonistic to the theory that an estoppel against pleading a want of power can be predicated from the mere fact of an acceptance of the benefits of a contract.[2]

In the few instances in which the point has been explicitly adverted to by the Courts when dealing with the liabilities of companies organized under special Acts or general statutes, it has been laid down that "no corporate body can be bound by estoppel to do something beyond their powers."[3] This theory, it is clear,

[1] *St. Mary, Islington* v. *Hornsey Urban*, Dist. Council, [1900] 1 Ch. 695.

[2] In *Broughton* v. *Manchester & S. Waterworks* (1819), 3 Barn. & Ald. 1, 106 Eng. Reprint 564, 22 Revised Rep. 278, the ground upon which assumpsit was held not be maintainable on the indorsement of a bill by a trading company was that the contract violated a prohibitory statute.

In *Dickinson* v. *Valpy* (1829), 10 Barn. & C. 128, 109 Eng. Reprint 399, 5 Mann. & R. 126, 8 L.J.K.B. 51, 19 Eng. Rul. Cas. 423, an action brought against a mining company by the indorsee for value of a bill of exchange was held not to be maintainable for the reason that there was no evidence to shew that the company was authorized to draw such a bill. But the company in this instance was apparently unincorporated.

In *Hill* v. *Manchester & S. Waterworks* (1831), 2 Barn. & Ad. 544, 109 Eng. Reprint 1245, Taunton, J., remarked: "A party is estopped by his own recital of a particular fact in a deed, and although there is an exception where fraud or an illegal purpose can be shewn, the pleas here do not bring the case within it."

[3] Fry, L.J., in *British Mut. Bkg. Co.* v. *Charnwood Forest R. Co.* (1887), L.R. 18 Q.B. Div. 719, 56 L.J.Q.B.N.S. 449, 57 L.T.N.S. 833, 35 Week. Rep. 590, 52 J.P. 150. This was one of the grounds upon which it was held that the defendant could not be held liable for loss arising from false and fraudulent representations made by its secretary with regard to the validity of certain debenture stock. Bowen, L.J., observed: "It is said that the secretary was clothed ostensibly with a real or apparent authority to make representations as to the genuineness of the debentures in question; but no action of contract lies for a false representation unless the maker of it or his principal has either contracted that the representation is true, or is estopped from denying that he has done so. In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so? The action against

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One of the consequences of this theory is that, in an action founded on an *ultra vires* contract, the right of recovery cannot be predicated from the fact that, by reason of that which has been done in pursuance of the contract, benefit has accrued to the defendant, or damage has been sustained by the plaintiff.[1] Having

them, therefore, to be maintainable at all, must be an action of tort founded on deceit and fraud."

In *Bishop* v. *Balkis Consol. Co.* (1890), L.R. 25 Q.B. Div. 77, where the question involved was whether the defendant company was so estopped by its secretary's "certification" of a certain transfer of its shares, Vaughan Williams, J., adopted without any expression of doubt as to its correctness, the statement of Fry, L.J., in the above case, although he disagreed with the decision itself. Upon the facts of the case, which are not relevant to the present discussion, the action was held not to be maintainable, both by him and by the Court of Appeal. See (1890) L.R. 25 Q.B. Div. 512. That he was mistaken, however, in considering the case governed by the observations of Bowen and Fry, L.JJ., in the earlier one, was declared by Lindley, L.J., who pointed out that there was "nothing *ultra vires* in the case" before the Court, as there was in that. So far as regards this part of his remarks, he evidently adopted the views of Sir H. Davey (afterwards Lord Davey), who in his argument as counsel thus referred to the earlier case: "The principle of that decision was that neither by contract nor by estoppel can a company be compelled to do that which is *ultra vires*. Looking at the matter on principle, why should a company be bound by estoppel? A company is a legal corporation with certain strictly defined powers. It is difficult to see how they can be bound by estoppel to do that which they could not contract to do. A contract to increase their capital beyond the authorized amount would be illegal, and therefore void."

In *Re Companies Acts* (1888), L.R. 21 Q.B. Div. 302, Cave, J., said: "It is well established that a corporate body cannot be estopped by deed or otherwise from shewing that it had no power to do that which it purports to have done"—citing *Fairtitle ex dem. Mytton* v. *Gilbert* (1787), 2 T.R. 169, 100 Eng. Reprint 91, 1 Revised Rep. 455, 11 Eng. Rul. Cas. 52, note 1, *supra*.

[1] In *Norwich* v. *Norfolk R. Co.* (1855), 4 El. & Bl. 397, 119 Eng. Reprint 143, Erle, J., made the following remarks: "In respect also of the subject matter of the suit, the question in equity is whether the interest of the shareholders is put into hazard to an unreasonable degree beyond what he is presumed to have assented to in subscribing? And, if so, his interest is protected according to equity. At law the question is whether a contract is in a class that is impliedly prohibited, and so void; if it is, whoever is defendant is entitled to unqualified success, and the judgment must be in his favour though he may have knowingly procured the unlawful contract, and have profited by it to the extent of receiving the consideration for the promise which he alleges to be void, or though he may have damaged the plaintiff by his negligence in the performance of that which the plaintiff supposed to be a lawful contract, but which, after judgment for the defendant, he must be taken in law to have known to be unlawful."

In *Ernest v. Nicholls* (1857), 6 H.L. Cas. 401, 10 Eng. Reprint 1351, Lord Wensleydale made the following remarks in a case where one insurance company had taken over the business and accounts of another and received the premiums due to the latter: "It is a captivating argument for a jury, and jurymen are very often misled by it in these cases of joint-stock companies, but it is very likely to produce injustice, that the company has had the benefit of the plaintiff's goods or service or money, whereas, for the purpose of contract, the company exists only in the directors and officers acting by and according to the deed; and by the statute law the

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regard to the facts involved in the cases reviewed in the following section, it is apparent that this doctrine, even when it was not explicitly referred to, must always have been taken for granted by the Courts which decided them.

In one case we find the following statement: "There is no ground whatever for the argument that a contract or instrument which fails in a Court of law by reason of its illegality can nevertheless be enforced in equity, because money has been paid and received in respect of that contract. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but, as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a Court of equity as it is in a Court of law."[1]

An important consequence of the theory adopted by the English Courts is indicated by a decision of the Privy Council to the effect that a railway company which had entered into an agreement beyond its powers, and had consented to a judgment against it in an action brought on that agreement, was nevertheless entitled to impeach both the agreement and the judgment.[2]

From the foregoing statement of the law, and the decisions reviewed in the following section, it is clear that the English authorities are entirely adverse to the application of the principle of estoppel, and that all the instances in which they have been cited by American Courts are simply indicative of a misapprehension with regard to their actual purport.[3]

company is no more liable than a corporation by charter, for the act of one or more of its members, who are distinct persons by law."

Two of the propositions formulated in Brice on Ultra Vires are as follows: LVII. Contracts of this kind are not only objectionable beforehand, but, even if acted upon, they may be repudiated by, and cannot be enforced against, the corporations: p. 183. CCLIV. The mere fact that a corporation has received the consideration of, or otherwise derived advantage from, a contract *ultra vires*, does not involve it in any liability upon such contract: p. 767.

In Lindley on Companies, vol 1, 6th ed., bk. 2, ch. 5, sec. 2, p. 292, the rule is laid down that, "if the directors of a company enter into a contract which is not binding on the company, either upon the ground that the contract is *ultra vires* or upon any other ground, the company is not liable on the contract simply because it has had the benefit thereof."

[1] Giffard, L.J., in *Re Cork & Y.R. Co.* (1869), L.R. 4 Ch. (Eng.) 748. In the same case Lord Hatherley said that a security issued *ultra vires* is "just as void in equity as at law, being contrary altogether to, and absolutely forbidden by, statute."

See also the statement of Buckley, L.J., which is quoted at the end of the following section.

[2] *Great North-West C.R. Co.* v. *Charlebois*, [1899] A.C. (Eng.) 114, 68 L.J.P.C.N.S. 25, 79 L.T.N.S. 35, reversing *Charlebois* v. *Delap* (1896), 26 Can. S.C. 221.

[3] For example, in the leading case of *Whitney Arms Co.* v. *Barlow* (1875), 63 N.Y. 62, 20 Am. Rep. 504, the following decisions are cited: *Ex parte Chippendale* (1853), 4 DeG.M. & G. 19, 43 Eng. Reprint 415, 18 Jur. 710; *Re National Permanent Ben. Bldg. Soc.* (1869), L.R. 5 Ch. (Eng.) 309; *Re Cork & Y.R. Co.*, L.R. 4 Ch. (Eng.) 748, 39 L.J. Ch. N.S. 277, 21 L.T.N.S. 735, 18 Week. Rep. 26; *Fishmongers' Co.* v. *Robertson* (1843), 5 Mann. & G. 131, 134 Eng. Reprint 510, 6 Scott N.R. 56, 12 L.J.C.P.N.S. 185. How unwarrantable was the citation of the first and third of these cases is shewn

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11. Illustrative decisions.—The cases which, either expressly, or by implication, must be regarded as precedents adverse to the theory that a corporation which has received the benefits accruing from the performance of a contract by the other party is estopped from raising the defence of *ultra vires*, are tabulated below with reference to the nature of the particular transactions under review.

Contracts incidental to the conduct of an unauthorized business or undertaking.[1]

in sec. 13, *post*. The actual effect of the second case is stated in sec. 20, note 13, *infra*. The fourth case did not involve an *ultra vires* contract at all, but merely one which was invalid for want of a seal. Owing to a similar mistake as to its purport, it was also cited as an authority on the subject of estoppel in *Hays* v. *Galion Gaslight & Coal Co.* (1876), 29 Ohio St. 330, and *Larwell* v. *Hanover Sav. Fund Soc.* (1883), 40 Ohio St. 274.

Nor is it easy to understand how the Court which decided *North Hudson Mut. Bldg. & L. Assoc.* v. *First Nat. Bank.* (1890), 79 Wis. 31, 11 L.R.A. 845, 47 N.W. 300, could have imagined that the principle of estoppel was embodied in *Shrewsbury & B.R. Co.* v. *London & N.W.R. Co.* (1852), 16 Beav. 441, 51 Eng. Reprint 848. For the actual effect of that case, see sec. 11, note 12, *infra*.

The general statement in *Denver F. Ins. Co.* v. *McClelland* (1885), 9 Colo. 11, 59 Am. Rep. 134, Pac. 771, that the doctrine of estoppel "is supported by the authority of English cases" is so amazingly erroneous that the only apparent way of accounting for it is to assume that the Court had never examined those cases for itself.

The review of the English cases in *Bath Gaslight Co.* v. *Claffy* (1896), 151 N.Y. 24, 36 L.R.A. 664, 45 N.E. 390, although it does not contain any absolute errors similar to those noticed above, is so incomplete as to be misleading with regard to the real state of the authorities.

[1] In *Sinclair* v. *Brougham*, [1914] A.C. 398, 83 L.J.Ch. N.S. 465, 111 L.T.N.S. 1, 30 Times L.R. 315, 58 Sol. Jo. 302, affirming upon this point *Re Birkbeck Permanent Ben. Bldg. Soc.*, [1912] 2 Ch. 183, 81 L.J. Ch. N.S. 769, 106 L.T.N.S. 968, 28 Times L.R. 451, it was held in proceedings for the winding-up of a building society, that it had exceeded its powers in carrying on a banking business, that all contracts made in pursuance in that business were also *ultra vires*, and that for this reason no legal or equitable debts were created by the deposits which it had received while carrying on that business. For an earlier case involving similar contracts, see *Re Bottomgate Industrial Co-op. Soc.* (1892; Q.B. Div.), 65 L.T.N.S. 712, 40 Week. Rep. 139, 56 J.P. 216.

In *Birkbeck Permanent Ben. Bldg. Soc.* v. *Birkbeck* (1913), 29 Times L.R. 218, a certain sum was shewn in the same proceedings to be due as dividends to one who was a customer of the society in the banking business carried on by it, and who occupied offices belonging to it. The liquidator agreed to treat this sum as a set-off against a claim for rent due in respect to the offices. After the above decision had been rendered, the Official Receiver sued for the full amount of the rent. Held, that the agreement with the liquidator was not a defence, because there was no debt due to the defendant from the society at the time when that agreement was made.

In *Re Birkbeck Permanent Ben. Bldg. Soc.*, [1913] 1 Ch. 400, 82 L.J. Ch. N.S. 232, 108 L.T.N.S. 211, 29 Times L.R. 256, 20 Manson 159, it was held in the same proceedings that certain clerks could not prove for the capital value of pensions stipulated to be paid in respect to services rendered while the society was engaged in the banking business.

In *Bateman* v. *Ashton-under-Lyne* (1858), 2 Hurlst. & N. 323, 27 L.J. Exch. N.S. 458, 6 Week. Rep. 829, where the right of an employee to recover for services was disputed on the ground that they had been rendered with respect to an undertaking which was illegal as regards the waterworks company, whose plant, etc., had been purchased by the defendant municipality, three members of the Court held the action to be maintainable for the reason that the undertaking was legal. Bramwell, B., dissented on the ground that it was *ultra vires*.

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Purchase of shares of the corporation itself.[1]
Purchase of shares in another company.[2]
Purchase of the business and assets of another company.[3]
Contracts relating to the amalgamation of companies.[4]

Contracts involving the application of corporate funds. Decisions have been rendered denying the right of action upon a contract to pay money to a landowner in consideration of his abandoning his opposition to the passage of a railway bill;[5] upon a contract to pay money to a member of the House of Lords for his support

[1] In *General Property Invest. Co.* v. *Matheson* (1888), 16 Sc. Sess. Cas., 4th series, 282, 26 Scot. L.R. 185, the transaction was set aside, after ten years, in liquidation proceedings, and the trustees of the deceased vendor were placed on the register.

[2] In *Royal Bank of India's* case (1869), L.R. 4 Ch. 252, 19 L.T.N.S. 805, 17 Week. Rep. 359, affirming (1868), L.R. 7 Eq. 91, 19 L.T.N.S. 444, a banking company, I., advanced money on a deposit of the shares of Company A., and subsequently had them transferred into its own name. It was registered as shareholder, sold some of the shares and received the purchase money, and received the dividends on the rest. In proceedings for the winding-up of Company A., it was held that, although the acts of ownership exercised by Company I. over the shares would not have prevented its repudiating them if the transaction had been *ultra vires*, Company I. was rightly placed on the list of contributories, because the transaction was not *ultra vires*.

In *Ex parte Liquidators* (1878; C.A.), L.R. 8 Ch. Div. 679, where the B.N. Company had, in pursuance of a contract for the purchase of the business of the B.C. Company, whose deed of settlement contained no power to sell it, procured a transfer of all the shares of the B.C. Company and remained registered for several years as a shareholder, it was held that, as the transfer of the shares to the B.N. Company was *ultra vires*, it could not be placed in the list of contributories to the B.C. Company after an order had been made for winding it up

[3] *Ernest* v. *Nicholls* (1857), 6 H.L. Cas. 401, 10 Eng. Reprint 1351, reversing *Re Sea Fire & Life Assur. Co.* (1854), 5 DeG. M. & G. 465, 43 Eng. Reprint 951 (action for money alleged to be due under the contract).

In the *Era Life & F. Assur. Co.'s* case (1862), 1 DeG. J. & S. 29, 46 Eng. Reprint 12, affirming (1862), 2 Johns. & H. 408, 70 Eng. Reprint 1117, the ground upon which the Court of Appeal proceeded was that the Era Company's purchase of another company's business was not *ultra vires*.

[4] In *Balfour* v. *Ernest* (1859), 5 C.B.N.S. 601, 141 Eng. Reprint 242, 28 L.J.C.P.N.S. 170, 5 Jur. N.S. 439, 7 Week. Rep. 207, it was held that an insurance company was not bound by a bill of exchange accepted by its directors on its behalf for a debt incurred by another insurance company, which had been amalgamated with the first, such amalgamation not being authorized by the deed of settlement of the company in whose behalf the bill had been accepted.

In the *Era Assur. Co.* case (1862), 2 Johns & H. 408, 70 Eng. Reprint 1117, where a life and fire assurance society purchased the business of a life assurance company, taking all the assets and undertaking all the liabilities, it was held that the transaction was *ultra vires*; that securities under the seal of the purchasing company, given in carrying out this arrangement to creditors of the selling company, were void; and that such creditors were not entitled to prove against the purchasing company in winding-up proceedings.

[5] *Preston* v. *Liverpool, M. & N. Junction R. Co.* (1856), 5 H.L.Cas. 605, 10 Eng. Reprint, 1037, 25 L.J.Ch. N.S. 421, 2 Jur. N.S. 241, 4 Week. Rep. 383. Compare also *Gage* v. *Newmarket R. Co.* (1852), 18 Q.B. 457, 118 Eng. Reprint 173, 21 L.J.Q.B.N.S. 398, 16 Jur. 1136, 7 Eng. Ry. & C. Cas. 168.

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Contracts for the borrowing of money. The non-enforceability of transactions under this head has been predicated on one or other of the following grounds: (1) that the contract was made by a company which had no power at all to borrow;[7] (2) that the

[1] *Shrewsbury* v. *North Staffordshire R. Co.* (1865), L.R. 1 Eq. (Eng.) 593, 35 L.J. Ch. N.S. 156, 12 Jur. N.S. 63, 13 L.T.N.S. 648, 14 Week. Rep. 220.

[2] In *Mann* v. *Edinburgh Northern Tramways Co.*, [1893] A.C. (Eng.) 69, 62 L.J.P.C.N.S. 74, 1 Reports 86, 68 L.T.N.S. 96, 57 J.P. 245, the defendants were required to account for the sum which remained in their hands after defraying the expenses out of the amount transferred to them for that purpose—a decision which obviously imports that, if that amount had still been in the possession of the company, the defendants could not have recovered it.

[3] *Taylor* v. *Chichester & M.R. Co.* (1867), L.R. 2 Exch. (Eng.) 356 (action brought upon a covenant by which the defendants bound themselves, in the event of a bill then pending in Parliament being passed into an Act, to pay to the plaintiff, within three months next after the passing of the bill, the sum of £2,000).

[4] *East Anglian R. Co.* v. *Eastern Counties R. Co.* (1851), 11 C.B. 775, 138 Eng. Reprint 680, 21 L.J.C.P.N.S. 23, 16 Jur. 249, 22 Eng. Rul. Cas. 21, approved by Lord Cranworth in *Eastern Counties R. Co.* v. *Hawkes* (1855), 5 H.L. Cas. 331, 10 Eng. Reprint 928, 24 L.J. Ch. N.S. 601, 3 Week. Rep. 609.

[5] *Norwich* v. *Norfolk R. Co.* (1855), 4 El. & Bl. 397, 119 Eng. Reprint 143, 3 C.L.R. 519, 24 L.J.Q.B.N.S. 105, 1 Jur. N.S. 344.

[6] *Shrewsbury & B.R. Co.* v. *London & N.W.R. Co.* (1852), 16 Beav. 441, 51 Eng. Reprint 848.

[7] In *Re National Permanent Ben. Bldg. Soc.* (1869), L.R. 5 Ch. (Eng.) 309, the petition for a winding-up order, presented by a person from whom the directors of a benefit building society had borrowed a sum of money for the purpose of advancing it to the members on the security of their shares, was dismissed on the ground that the petitioner had no legal or equitable debt against the company.

In *Blackburn Bldg. Soc.* v. *Cunliffe* (1882; C.A.) L.R. 22 Ch. Div. (Eng.) 61, a benefit building society which had no power to borrow money were permitted by their bankers to overdraw their account to a large amount. Afterwards an agreement was signed by the officers of the society and confirmed by the directors, stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe

contract had no relation to any of the specific purposes for which

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custody, but as a security for the balance from time to time due. In proceedings for winding-up the society, the bankers claimed to retain the deeds as security for the balance of their account. The solicitors on both sides signed an admission that some part of the money overdrawn was applied in payment of members withdrawing from the society, and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property. Held, that the overdrawing of the bankers' account was *ultra vires*, and that the bankers had consequently no lien on the deeds, either under the agreement or by the course of dealing with the society. An appeal from this decision was dismissed in (1884) L.R. 9 App. Cas. 857. The only point presented was as to whether the bankers were entitled to claim to be creditors, and to hold the securities as such in respect to the overdraft, which the appellants contended did not amount to borrowing. The House of Lords decided that allowing the overdraft was equivalent to borrowing.

In *Re Guardian Permanent Ben. Bldg. Soc.* (1882), L.R. 23 Ch. Div. 440, 52 L.J. Ch. N.S. 857, 48 L.T.N.S. 134, 32 Week. Rep. 73, a rule of the society permitted the trustees or directors to borrow money from time to time as occasion might require, and directed that such money should be a first charge on the funds and property of the society. No express limit was prescribed as to the amount of the borrowing. The Court of Appeal held that this rule was invalid, because it purported to give an unlimited power to borrow, and that consequently borrowing was *ultra vires* of the society. But the decision upon this point was reversed in *Murray* v. *Scott* (1884), L.R. 9 App. Cas. (Eng.) 519, 53 L.J. Ch. N.S. 745, 51 L.T.N.S. 462, 33 Week. Rep. 173, on the ground that the power to borrow must be construed as being limited to borrowing for the proper objects of the society. This decision was followed by Neville, J., in a judgment which was approved as a whole, in *Re Birkbeck Permanent Ben. Bldg. Soc.*, [1912] 2 Ch. 183, 81 L.J. Ch. N.S. 769, 106 L.T.N.S. 968, 28 Times L.R. 451, affirmed as to this point in *Sinclair* v. *Brougham*, [1914] A.C. 398, 83 L.J. Ch. N.S. 465, 111 L.T.N.S. 1, 30 Times L.R. 315, 58 Sol. Jo. 302, where the rule of the society in question empowered the directors to borrow to an unlimited extent.

In *Agnew* v. *Murray* (1884), L.R. 9 App. Cas. 519, 53 L.J. Ch. N.S. 745, 51 L.T.N.S. 462, 33 Week. Rep. 173, where the rule under review was held valid, the dictum of Lord Hatherley in *Laing* v. *Reed* (1869), L.R. 5 Ch. (Eng.) 4, 39 L.J. Ch. N.S. 1, 21 L.T.N.S. 773, 18 Week. Rep. 76, 34 J.P. 134, as to the invalidity of a rule purporting to grant an unlimited power of borrowing, was disapproved.

For other cases relating to the situation specified in the text, see *Re Professional, C. & I. Ben. Bldg. Soc.* (1871), L.R. 6 Ch. 661; *Re Companies Act* (1888), L.R. 21 Q.B. Div. 301.

In *Re Victoria Permanent Ben. Bldg. Invest. & Freehold Land Soc.* (1870), L.R. 9 Eq. 605, 39 L.J. Ch. N.S. 628, 22 L.T.N.S. 777, 18 Week. Rep. 967, 34 J.P. 532, the directors of a benefit building society received money on deposit from persons who did not subscribe for shares in the society, and gave to each depositor a book called a "member's deposit book," which contained printed rules purporting to be "rules of the deposit branch," one of which provided that the general rules of the society should be binding on all persons who might make deposits. The society was wound up by the Court, and the advanced shareholders, under an order in the winding-up, redeemed their shares. Held, that the rules of the society, in so far as they authorized borrowing money on deposit, were illegal under the Building Societies Act (6 & 7 Wm. IV. ch. 32), as no limit was fixed to the amount which might be borrowed; and that the depositors were not entitled to have a call made upon the members for the repayment of their deposits. Held, also, that the rules did not authorize the borrowing of money from persons who were not members of the society, and that the depositors were bound by the rules of the society, by which the advanced shareholders who had redeemed their shares were discharged from all connection with the society; and, consequently, on that ground also, the depositors were not entitled to have a call made on the advanced shareholders for the repayment of their deposits.

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the company was authorized to borrow;[1] (3) that the conditions precedent to the exercise of a granted power of borrowing were not fulfilled in the making of the contract;[2] (4) that the amount involved was greater than that which the company was expressly authorized to borrow.[3] From whatever cause the invalidity of

[1] In *Moye* v. *Sparrow* (1870), 18 Week. Rep. (Eng.) 400, 22 L.T.N.S. 154, the right of recovery was denied on the ground that the money in question had not been borrowed for the purpose which alone was authorized by the rules of the society.

In *Re Durham County Permanent Invest. Land & Bldg. Soc.* (1871), L.R. 12 Eq. (Eng.) 516, the first rule of a building society stated that it was organized for certain specified purposes. None of the rules contained any borrowing power, but subsequently they were altered so as to give the directors "power from time to time to borrow, for the purposes of the society, such sums and at such rates of interest and under such terms and conditions as they might think proper and expedient." Held, that the borrowing power thus conferred by this altered rule was strictly limited to the purposes of the society as stated in the first rule, and that persons who had lent money to the directors, which was employed in a loan to another society, could not enforce their claim in the winding-up of the society.

[2] In *Chambers* v. *Manchester & M.R. Co.* (1864), 5 Best & S. 588, 122 Eng. Reprint 951, 33 L.J.Q.B.N.S. 268, 10 Jur. N.S. 700, 10 L.T.N.S. 715, 12 Week. Rep. 980, it was held that no action could be maintained on a bond given for money which had, in contravention of the enabling act of the defendant, been borrowed before its capital had been all subscribed. This decision was approved in *Re Cork & Y.R. Co.* (1869), L.R. 4 Ch. 748, 39 L.J. Ch. N.S. 277, 21 L.T.N.S. 735, 18 Week. Rep. 26, and in *Re Bagnalstown & W.R. Co.* (1870), Ir. Rep. 4 Eq. 525. In the latter case, Christian, L.J., adverted to the invalidity of debentures or other securities issued in violation of restrictive clauses providing that no addition shall be made to the loan capital of a railway company until the whole share capital has been subscribed for and one-half if it actually paid up; or until the undertaking shall have begun to be productive by the opening of the line or of prescribed portions of it.

[3] The general rule with regard to contracts of this description is that "if a company which has exhausted its borrowing powers purports to borrow further money, and thus obtains a supply of money, the loan so contracted is void and *ultra vires*, and the lender has no right of action against the company": Vaughan Williams, L.J., in *Re Wrexham*, M. & C.Q.R. Co., [1899; C.A.] 1 Ch. (Eng.) 455, 68 L.J. Ch. N.S. 270, 47 Week. Rep. 464, 80 L.T.N.S. 130, 15 Times L.R. 122, 6 Manson 218.

In *Wenlock* v. *River Dee Co.* (1883; C.A.), L.R. 36 Ch. Div. (Eng.) 675, note, 685, note, the action was brought by the executors of Lord Wenlock to recover a sum of £173,062 11s. 11d., with interest, alleged to be due from the defendant company in respect of moneys lent to them at various dates between 1870 and 1878 by Lord Wenlock, and secured by certain indentures by which the defendants covenanted to repay the same with interest. The defendants denied that the moneys were received by the company, or borrowed for, or applied in payment of any debts of, or otherwise used for the purposes of, the company, and alleged that at the dates of the several indentures they had no power to borrow or to bind themselves to pay the moneys thereby expressed to be secured, except to the extent authorized by a statute which empowered the company to borrow at interest for the purposes of their acts, upon bond or mortgage of the lands recovered and inclosed by them, or partly upon bond and partly upon such mortgage, a sum not exceeding £25,000, and also a further sum not exceeding £25,000, upon mortgage of their tolls, rates, and duties. At the hearing before the Court of Appeal the company admitted the claim of the plaintiffs for this sum, and such further amount as they could shew had been applied in payment or discharge of any debts or liabilities of the company. See (1883) L.R. 36 Ch. Div. 674. Judgment was given on the footing that this admission defined the extent of the company's liability. On appeal this judgment was

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the contract arises, the lender "is a person who is unable, as against the borrower, to affirm that he holds a debt, either legal or equitable. Neither in a Court of law nor in a Court of equity can he affirm that he is a creditor . . . or entitled to such a right or claim as would support a winding-up petition."[1] In a case which involved the borrowing of a larger amount than that authorized the argument that "the plaintiffs had no means of knowing or ascertaining whether the society had exhausted its powers of borrowing, or whether, indeed, there was any limit to such power," was thus answered by Baggallay, L.J.: "The plaintiffs and everyone else who have dealings with a building society are bound to know that such a society has no power of borrowing except such as is conferred upon it by its rules, and if, in dealing with such a society, they neglect or fail to ascertain whether it has the power of borrowing, or whether any limited power it may have has been exceeded, they must take the consequences of their carelessness. It may be that the plaintiffs in the present case have been misled, by the misrepresentations or conduct of others, into the belief that the company had full authority to accept the loan from them; that is a question which I shall have to consider when dealing with the other appeal. Such representations or conduct may doubtless give rise to a claim against the parties making such misrepresentations or so con-

affirmed by the House of Lords. See (1885) L.R. 10 App. Cas. 362. The point decided at another hearing before the Court of Appeal was merely that the power conferred by the special Act had not been extended by a subsequent general Act: (1888) L.R. 38 Ch. Div. 534, 59 L.T.N.S. 485, 57 L.J. Ch. N.S. 946.

For other cases decided with reference to the general rule stated in the text, see also *Chapleo* v. *Brunswick Permanent Bldg. Soc.* (1881), L.R. 6 Q.B. Div. 711, 50 L.J.Q.B.N.S. 372, 44 L.T.N.S. 449, 29 Week. Rep. 529, 2 Eng. Rul. Cas. 366; *Fountaine* v. *Carmarthen & C.R. Co.* (1868), L.R. 5 Eq. 316, 37 L.J. Ch. N.S. 429, 16 Week. Rep. 476, 22 Eng. Rul. Cas. 132; *Neath Bldg. Soc.* v. *Luce* (1889), L.R. 43 Ch. Div. (Eng.) 158, 59 L.J. Ch. N.S. 3, 61 L.T.N.S. 611, 38 Week. Rep. 122, and the cases reviewed in sec. 22, *infra*.

In *Re Pooley Hall Colliery Co.* (1870), 18 Week. Rep. (Eng.) 201, the articles of association of the company intrusted the directors with power to borrow money on mortgage, bond, and other securities, but in such manner that the liabilities of the company should never, without sanction of a general meeting, exceed the sum of £8,000. Discussing the enforceability of the debentures in question, Lord Romilly, M.R., said that their validity "depends upon the fact whether the liabilities did, or did not, at the date of issue, exceed £8,000. It is impossible to say that the liabilities are not to be reckoned as including all debts incurred in the ordinary course of business. . . . I am therefore of opinion that, as the liabilities did exceed £8,000, the company had no power to issue these debentures, and that the debentures are not voidable, but absolutely void, and that the holders must come in *pari passu* with the simple contract creditors." The question whether the claimants were entitled to the benefit of a presumption that the loan had been validated by the consent of the shareholders signified in the manner prescribed was not raised. See sec. 8, *supra*. The decision was approved in *English Channel S.S. Co.* v. *Rolt* (1881), L.R. 17 Ch. Div. (Eng.) 715, 44 L.T.N.S. 135.

[1] Buckley, L.J., in *Re Birkbeck Permanent Ben. Bldg. Soc.*, [1912] 2 Ch. (Eng.) 232.

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ducting themselves, but in my opinion they can in no way give rise to or support a claim against the society."[1]

12. Qualifications of the doctrine in equitable suits for affirmative relief.—(*a*) *Where the corporation is seeking to be released from the contract.* It is obvious that, in a case where a corporation brings suit to have a contract annulled on the ground of its being *ultra vires*, the ultimate and essential question presented is simply whether it is bound by the contract. In such a proceeding, therefore, the mere fact of its having received the benefit of the contract will not prevent it from obtaining the relief asked for.[2] But it is well settled that "equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he seeks."[3]

(*b*) *Where specific performance of the contract by the company is asked.* There is some apparent authority for the doctrine that in a case where a plaintiff is asking for the specific performance of an *ultra vires* contract by the company, the fact that it has received the benefit of the contract may, under some special circumstances, constitute a reason for rendering a decree which in effect, though not directly, will enforce the execution of the contract.[4]

[1] *Chapleo* v. *Brunswick Permanent Bldg. Soc.* (1881), L.R. 6 Q.B. Div. 711, 50 L.J.Q.B.N.S. 372, 44 L.T.N.S. 449, 29 Week. Rep. 529, 2 Eng. Rul. Cas. 366, where the action was brought after the agent who had received the loan had embezzled it.

[2] This was taken for granted in *Small* v. *Smith* (1884), L.R. 10 App. Cas. 119, where a bond of corroboration executed by the directors of the building society, and purporting to guarantee the payment of a prior encumbrance upon the estate of a person who had borrowed money from it on the security of the property, was "reduced" (Scotch expression for "annulled") in proceedings subsequently taken for the voluntary winding-up of the society.

In *Canterbury* v. *Cooper* (1909), 100 L.T.N.S. 597, 73 J.P. 225, 53 Sol. Jo. 301, 7 L.G.R. 908, where the action was brought to recover possession of property which a corporation had leased in excess of its powers, it was declared by the Divisional Court that the plaintiff was not estopped to set up the invalidity of the lease. But this point was not explicitly referred to in the affirming judgment of the Court of Appeal.

[3] Giffard, L.J., in *Re Cork & Y.R. Co.* (1869), L.R. 4 Ch. 748, 39 L.J. Ch. N.S. 277, 21 L.T.N.S. 735, 18 Week. Rep. 26.

In *Great North-West C.R. Co.* v. *Charlebois*, [1899] A.C. 114, reversing (1896) 26 Can. S.C. 221, where a company brought suit to set aside an *ultra vires* contract and a consent judgment obtained thereon, it was held by the Privy Council that this relief would be granted only on the terms—which were consented to—that the plaintiff should pay to the respondent the balance due to him for construction on a *quantum meruit*.

[4] In *Wilson* v. *Furness R. Co.* (1869), L.R. 9 Eq. 28, the defendant company agreed with certain landowners that, in consideration of their obtaining from the Admiralty a waiver of an obligation imposed upon the company by its Act to construct certain works, and upon their conveying the necessary land, it would make a carriage road between certain specified points, and also make and maintain a wharf for loading and discharging vessels at a specified place, of a stipulated length and of a suitable and convenient height. In pursuance of this contract the landowners obtained the stipulated waiver from the Admiralty and conveyed the necessary land, and the company commenced, but did not finish the road, and did not commence the wharf. James, V.-C., decreed the specific enforcement of the contract. He seems to have been of the opinion that, even assuming it to have been *ultra vires*, the plaintiffs were entitled to such relief, because the company,

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(c) *Where a shareholder is seeking relief.* In one case the right of a shareholder to maintain a suit for the purpose of compelling the directors of a company to repay dividends which had been paid out of the capital was denied for reasons thus stated by Vaughan Williams, L.J.: "I start with the assumption one is bound to make, that if an act is done by a company which is *ultra vires*, no confirmation by shareholders—not even by every member of the company—can convert that which was *ultra vires* into something *intra vires*; it must always be *ultra vires*. . . . But to my mind it is a different thing where the action is brought by a shareholder on behalf of himself and other shareholders. . . . I think an action cannot be brought by an individual shareholder complaining of an act which is *ultra vires*, if he himself has in his pocket at the time he brings the action some of the proceeds of that very *ultra vires* act."[1]

13. Rule in cases where money borrowed ultra vires has been applied to the payment of corporate debts.—In his treatise on Companies, Lord Lindley remarks that "there is . . . a very important exception to the general rule against liability by reason of benefits received;" viz., the doctrine which has been developed "to the effect that a company is liable in equity to refund money improperly borrowed by its directors on its behalf, but in fact *bonâ fide* applied in discharging debts or liabilities of the company which could have been enforced against it."[2] In a recent case Lord Parker observed: "It appears to be well settled that if the borrowed money be applied in paying off legitimate indebtedness of the company or association (whether the indebtedness be incurred

being under an onerous obligation to give a certain easement to the public, had agreed "to substitute something which it must have thought would be less onerous." But the precise position of the learned Judge in this point of view is rather obscure, and, as he also held that the contract was not *ultra vires*, the case is very far from being a clear authority for the doctrine of estoppel. To cite it in support of that doctrine, as was done in *People's Gaslight & Coke Co.* v. *Chicago Gaslight & Coke Co.* (1887), 20 Ill. App. 472, is obviously unwarrantable.

[1] *Towers* v. *African Tug Co.*, [1904; C.A.] 1 Ch. 558.

[2] See p. 292, vol. 1, 6th ed., bk. 2, ch. 5, sec. 2.

In *Portsea Island Bldg. Soc.* v. *Barclay*, [1895; C.A.] 2 Ch. 298, the rule was thus formulated by Kay, L.J., with respect to one particular class of corporations. By the substitution of the word "corporation" for "society," the statement may readily be generalized: "Where a person advances money to a society whose borrowing powers are exhausted, although he cannot recover the money from the society directly, yet in cases where the society has not increased its liability by the borrowing, but has applied the money in paying other debts, he may assert a right to stand in the position of a creditor who has been paid off with his money."

In *Re Wrexham, M. & C.Q.R. Co.*, [1899] 1 Ch. 440, Vaughan Williams, L.J., adverted to the principle "that, although the borrowing power is exhausted, and the transaction which purported to be a loan to the company is as such *ultra vires*, and therefore null and void, so that the would-be lender can neither enforce repayment of the loan nor rely upon the securities which he has taken for the loan, yet, if the company apply the money in their hands to the payment of debts actually owing by them, there is thereupon a new transaction between the company and the person who has paid the money for the purpose of the *ultra vires* loan."

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before or after the money was borrowed), the lenders are entitled to rank as creditors of the company or association to the extent to which the money has been so applied."[1]

In the earliest case in which this doctrine was recognized, the deed of settlement of a company formed in England for working mines in Germany provided for a specified amount of capital, and gave no power to the directors to raise money except by the creation of new shares. That capital was paid up and proved insufficient for working the mines. The wages of the miners being in arrear, and other debts being due, the managing directors obtained advances from some of the shareholders for the purpose of paying those debts and preventing the mines from being seized under the law of the country. The directors also borrowed other sums on their personal guaranty from the bankers of the company, not for payment of debts, but for carrying on the business of the company in its ordinary course, and they afterward repaid the bankers these advances. In winding-up proceedings it was held (1) that the advances made by the shareholders to pay debts of the company might be set off by them with interest against a call; and (2) that, although the advances made by the bankers did not constitute a debt due to them from the company, the directors having no power to borrow, the directors were entitled to be allowed the amounts repaid by them to the bankers, the directors being trustees, and in that character entitled to an indemnity from their *cestuis que trustent* against expenses *bonâ fide* incurred.[2] This

[1] *Sinclair* v. *Brougham*, [1914] A.C. 440.

[2] In *Re German Min. Co.* (1853), 4 De G.M. & G. 19, 43 Eng. Reprint 415, discussing the argument that the directors were not entitled to be repaid by the company the moneys they had paid in discharge of the amount due to the bankers, because they were in the position of agents with limited powers, Turner, L.J., said: "Although directors undoubtedly stand in the position of agents, and cannot bind their companies beyond the limits of their authority, they also stand, in some degree, in the position of trustees; and all trustees are entitled to be indemnified against expenses *bonâ fide* incurred by them in the due execution of their trust. There is no inconsistency in this double view of the position of directors. They are agents, and cannot bind their companies beyond their powers. They are trustees, and are entitled to be indemnified for expenses incurred by them within the limits of their trust. If, therefore, it appears that moneys advanced by the directors of companies have been duly applied for the purposes of the trust reposed in them (and it can make no difference whether the moneys were originally advanced, or were in the first instance borrowed and afterwards repaid by them), it may well be that they may be entitled to be repaid by their companies the moneys which they have so advanced, although the persons from whom they have borrowed for the purpose of making the advance may not be entitled to recover against the companies." It was also urged by counsel that, whatever might be the right of the directors to indemnity against the property of the company, they could have no such right against the shareholders personally; that the liability of the shareholders was limited to their respective shares of the £50,000. But Turner, L.J., said: "I think that, where parties place others in the position of trustees for them, they are in equity personally bound to indemnify them against the consequences resulting from that position. I may refer to the case of *Balsh* v. *Hyham* (1728), 2 P. Wms. 453, 24 Eng. Reprint 810, 2 Eq. Cas. Abr. 741, pl. 4, 22 Eng. Reprint 629, as a strong authority in support of that position." For a later case in which this precedent was followed, though not with regard to a corporate transaction, see *Hardoon* v. *Belilios*, [1901]

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decision has frequently been followed in later cases involving circumstances of a similar nature.[1] In several of them relief was

A.C. 124, 2 B.R.C. 355, 70 L.J.P.C.N.S. 9, 49 Week. Rep. 209, 83 L.T.N.S. 573, 17 Times L.R. 126. In Lindley on Companies, vol. 1, 6th ed., p. 292, the learned author refers to other analogous cases of recoupment; viz., where a person who *bonâ fide* advances money to an infant is allowed, on the administration of the infant's estate, to rank as a creditor in respect to so much of the money advanced as has in fact been expended in necessaries (*Marlow* v. *Pitfield* (1719), 1 P. Wms. 558, 24 Eng. Reprint 516); and where money lent to a married woman and expended in properly maintaining her is treated as being recoverable (*Jenner* v. *Morris* (1860), 1 Drew. & S. 218, 62 Eng. Reprint 362; *Deare* v. *Soulten* (1869), L.R. 9 Eq. (Eng.) 151, 21 L.T.N.S. 523, 18 Week. Rep. 203). See also the remarks of Giffard, L.J., in *Re National Permanent Ben. Bldg. Soc.* (1869), L.R. 5 Ch. 313.

[1] In *Lowndes* v. *Garnett & M. Gold Min. Co.* (1864), 3 New Reports 603, Wood, V.-C. (afterwards Lord Hatherley), laid down the law as follows: "No company which carries on business as a going concern, involving large current expenditure, can so use any provisions in its deed of settlement, which fix the amount of its capital and calls or limit its borrowing powers, as to relieve itself from liability to creditors who have supplied labour or materials to carry on the business of the company. The only effect of such provisions is that, if the borrowing powers have been exhausted, the directors are disabled from borrowing money on the security of the company; in other words, if persons advance money to pay off these debts, they cannot acquire the rights of creditors against the company. But the company is not the less bound to pay these debts. Under these circumstances, any director or shareholder is justified in advancing money for the purpose of paying the debts; and, if he does so, he has an equity for contribution from the other shareholders; only this equity is postponed to the rights of the regular creditors of the company."

See also *Troup's* case (1860), 29 Beav. 353, 54 Eng. Reprint 664; *Hoare's* case (1861), 30 Beav. 225, 54 Eng. Reprint 874, 2 Johns. & H. 229; *Fountaine* v. *Carmarthen & C.R. Co.* (1868), L.R. 5 Eq. 316, 37 L.J. Ch. N.S. 429, 16 Week. Rep. 476, 22 Eng. Rul. Cas. 132; *Re Victoria Permanent Ben. Bldg. Soc.* (1870), L.R. 9 Eq. 605, 39 L.J. Ch. N.S. 628, 22 L.T.N.S. 777, 18 Week. Rep. 967, 34 J.P. 532; *Re Harris Calculating Mach. Co.*, [1914] 1 Ch. 920, 83 L.J. Ch. N.S. 545, 110 L.T.N.S. 997, 58 Sol. Jo. 455; *Ulster R. Co.* v. *Banbridge, L. & B.R. Co.* (1868), Ir. Rep. 2 Eq. 190; *Re Bagnalstown & W.R. Co.* (1870), Ir. Rep. 4 Eq. 505; and the cases cited in the following notes.

In Re Norwich Equitable F. Assur. Co. (1886; C.A.), 34 Week. Rep. 206, affirming (1884), 32 Week. Rep. 1010, a director of an unlimited company, after a winding-up order had been made, handed over to the bankers of the company a sum equal to his proportion of the amount due on a promissory note which had been given to the bankers by the directors to secure overdrafts on the company's account. At the same time he took from the bankers an assignment of the proportion of their debt. It was doubtful whether the purposes for which the overdrafts were made were within the company's powers. Held, that, as his right to be repaid this sum by the company had not been established, he was not entitled to set it off against calls. Lindley, L.J., said: "I am sufficiently familiar with the case of *Re German Min. Co.* to know that nothing would be more dangerous than to assume that it applies to a director who has paid money for what he is pleased to call the benefit of the company. The principle of that case must be applied with the greatest caution, and, when looked at closely, one finds that it proceeded on this principle, that the money which the company is ultimately made to repay has been applied in the discharge of debts for which the company was liable. The liability does not depend on the mere fact that the money was borrowed from the bankers—that is no debt at all in law—but on the fact that the money itself was applied in discharging debts and liabilities which might otherwise have been enforced against the

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granted to lenders to whom the defendant companies had delivered obligations in writing upon which, by reason of their illegality, no action was maintainable. "If the facts of the case give them the benefit of that equitable principle, it is consistent with justice and with authority to say that irregularity of either the form or the substance of their course of dealing shall not stand in the way of the justice due to them."[1] The case most frequently referred to as illustrating this situation was one in which it was held that, although the class of securities called Lloyd's Bonds were invalid as being in contravention of a statute, and consequently could not themselves constitute an indebtedness as against the company issuing them, yet, nevertheless, they might be evidence of a contract between the company and the persons holding them, sufficient to entitle the holders to that security or right of repayment which the company might lawfully have given them under the actual circumstances of the case.[2]

company. And I doubt whether, when the claim is investigated, the appellant will be able to bring himself within that case."

For another case in which the doctrine was recognized, but not applied, see *Re Catholic Publ. & Bookselling Co.* (1864), 10 Jur. N.S. 192.

[1] Lord Selborne in *Blackburn Bldg. Soc.* v. *Cunliffe* (1882), L.R. 22 Ch. Div. 61, 31 Week. Rep. 98, citing *Re Cork & Y.R. Co.*, note 2, *infra*.

[2] *Re Cork & Y.R. Co.* (1869), L.R. 4 Ch. 748. There the conclusion of the Court was that the money received by the company for its property should not be distributed, in winding-up proceedings, to the shareholders without making provision in respect to the payments that had been made by moneys procured from one Lewis after the company, having expended the whole of its capital and reached the extent of its borrowing powers, found itself unable to discharge various debts, many of which were legally payable, being due to contractors and others for rolling stock and so forth. Lord Hatherley said: "If the money was really applied for the legitimate benefit of the company, can it be possible that the company can hold this money as a surplus which is directed to be paid to them under the Act, and treat these bonds as constituting no debt whatever by which they are in any way to be affected? They knew that there was a large sum of money which must be raised by some means, and for which the borrowing powers and subscription powers were not adequate; and although the bonds themselves may not be the proper instruments or mode by which that money ought to be raised, still they are instruments issued for the express purpose of inducing others to give faith and credit to Mr. Lewis as being a person to whom money was owing for the legitimate purposes of the company. . . . The proper course to be taken seems to me to be this, that, so far as the company have adopted the proceedings of their directors by allowing these moneys to be raised on the issue of these debentures, and so far as the money raised by the issue of the debentures has been applied in paying off debts which would not otherwise have been paid off, those who have advanced the moneys ought to stand in the place of those whose debts have been so paid off."

In *White* v. *Carmarthen & C.R. Co.* (1863), 33 L.J. Ch. N.S. 93, 1 Hem. & M. 786, 9 L.T.N.S. 439, 12 Week. Rep. 68, where a railway contractor was willing to give his services, and to take his chance of being paid at some future time, after further power of borrowing had been obtained by the company, it was held by Lord Hatherley that the company were authorized in giving him a Lloyd's Bond acknowledging the amount of the debt. This decision was referred to by the learned Judge in *Re Cork & Y.R. Co.*, *supra*, as being adverse to the contention of counsel "that when a railway company is formed with a certain amount of capital, and is authorized to execute certain works, then, unless the works can be executed with exactly the prescribed amount of capital, no further work can be done at all; in other words,

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The form in which the doctrine has been enunciated imports that it cannot be invoked except in cases where it is shewn that the corporation itself was the borrower,[1] and that the money lent enured to its benefit and was applied to the payment of an existing debt owed by it.[2]

In a case where it had been ordered that judgment should be entered for so much, and so much only, of the sums advanced to the defendant company by the claimants as was employed in the payment of any debts or liabilities of the defendant company properly payable by them, with interest from the respective dates of such employment, it was held (1) that the order should be construed as covering not only the moneys which had been applied in payment of debts and liabilities properly payable by the company at the date of the advances, but also those which had been applied in payment of debts and liabilities which arose or became properly payable at dates subsequently to the advances; and (2) that, apart from this particular aspect of the question, the equitable doctrine was not subject to any such limitation as would restrict its operation to debts already contracted when the advance was made.[3]

that no contractor who has entered into an engagement to make the 2 or 3 miles of line required for the purpose of completing the work would be able to recover in respect of the money, labour, and work expended by him on the company's behalf." The decision was distinguished in *Chambers* v. *Manchester & M.R. Co.* (1864), 5 Best & S. 588, 122 Eng. Reprint 951, where certain Lloyd's Bonds which were "intended to enable companies to hand over to contractors to whom they were indebted for work executed under their contract something which was equivalent to money, and upon which money might be raised," were held not to be enforceable. "The scheme of issuing these bonds was resorted to for the purpose of raising money upon them in order to enable the plaintiff to discharge the liability into which he had entered on behalf of the company of which he was chairman. I am inclined to think that that transaction, which was the origin of the whole, and which was in substance a loan, was illegal."

[1] *Portsea Island Bldg. Soc.* v. *Barclay*, [1895; C.A.] 2 Ch. 298, 64 L.J. Ch. N.S. 579, 12 Reports 324, 72 L.T.N.S. 744, affirming [1894] 3 Ch. 86.

[2] In *Chapleo* v. *Brunswick Permanent Bldg. Soc.* (1881), L.R. 6 Q.B. Div. 711, 50 L.J.Q.B.N.S. 372, 44 L.T.N.S. 449, 29 Week. Rep. 529, 2 Eng. Rul. Cas. 366, this situation was held not to exist, because the agent who had received the money in question had embezzled it.

In *Re Durham County Permanent Invest. Land & Bldg. Soc.* (1871), L.R. 12 Eq. 516, Bacon, V.-C., there dealt with the contention that, inasmuch as the money in question, improperly borrowed and improperly invested, had been laid out in the purchase of land, the man who had lent his money had a right to follow it: "There may be such a principle, but it would require very distinct evidence on the part of the person so claiming to prove that his £100 went into the purchase of any land. No such principle is applicable to this case. *Re German Min. Co.* [p. 136 *ante*] and *Re Cork & Y.R. Co.* [p. 138 *ante*] were referred to, but they do not touch this case in the slightest degree. The principle upon which those cases were decided was that the company, being under an obligation to pay debts for which they might have been sued, had procured money which was applied in discharging those debts. But in this case the directors were under no obligation to enter into the transaction. They were under no liability."

[3] *Wenlock* v. *River Dee Co.* (1887; C.A.), L.R. 19 Q.B. Div. 155. The special grounds upon which this decision was rendered are such that it scarcely seems to be an authority for the proposition that, for the purposes of the application of the general rule, "it is immaterial whether the debts paid off

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The burden of shewing that he is entitled to anything lies upon the lender.[1]

Some of the cases reviewed in the present section have been cited by American Courts as authorities for the general doctrine that a corporation which has accepted the benefits of a contract is estopped from setting up the plea of *ultra vires* in an action brought upon it. But having regard to the grounds upon which they were decided, it is clear that they cannot properly be treated as precedents for that doctrine.

14. Considerations to which this rule is referred.—The authorities are not in accord as to the principle upon which the person supplying the money is entitled to recoupment as against the company. The theory entertained upon this point is sometimes not material so far as regards the character of the relief to be granted; but it becomes extremely important where a Court is called upon to determine questions of priority as between the claims of the lender and various other classes of creditors.

In one of the cases in which the doctrine was applied, Giffard, L.J., observed: "In so far . . . as the company has had the benefit of those loans for its legitimate purposes, it must be taken to have adopted the transaction. It cannot be heard to say the contrary, and to that extent must be held liable."[2] This language apparently imports that the learned Judge regarded the equitable doctrine now under discussion as being referable to the notion either of a ratification or an estoppel. But such a view is so clearly inconsistent with the theory of the English Courts as to the absolutely void character of *ultra vires* contracts that the words quoted are presumably not to be taken in what seems to be their literal sense.

According to Lord Selborne, the consistency of the equity allowed under the doctrine with "the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shewn in this way: The test is, Has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remain in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and if the result is that by the transaction which

out of the advance were in existence when the advance was made, or arose subsequently": Lindley, Companies, 6th ed. 1902, bk. 2, ch. 5, sec. 2, pp. 293, 294.

[1] Lord Selborne in *Blackburn Bldg. Soc.* v. *Cunliffe* (1882), L.R. 22 Ch. Div. 71, 31 Week. Rep. 98.

[2] *Re Cork & Y.R. Co.* (1869), L.R. 4 Ch. 748.

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assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing."[1]

Under another theory transactions of the class to which the doctrine is applicable are regarded as involving a substitution of creditors, and, as an incident of such substitution, a subrogation of the lender to the rights of the creditors who are paid off.[2] The position at first taken by the Court of appeal was that this subrogation was sufficiently extensive to enable the lender to claim the benefit of any securities which the corporation might have given the creditors.[3] But upon this point the views of the Court afterward underwent a change, and it held that "the person who has made the advance is not entitled, by reason of its application, to any greater rights than if his advance had been in fact valid, and

[1] *Blackburn Bldg. Soc.* v. *Cunliffe* (1882), L.R. 22 Ch. Div. 71.

[2] In *Wenlock* v. *River Dee Co.* (1887; C.A.), L.R. 19 Q.B. Div. 165, Fry, L.J., speaking for the whole Court, said: "This equity is based on a fiction which, like all legal fictions, has been invented with a view to the furtherance of justice. The Court closes its eyes to the true facts of the case, viz., an advance as a loan by the *quasi* lender to the company, and a payment by the company to its creditors as out of its own moneys; and assumes, on the contrary, that the *quasi* lender and the creditor of the company met together, and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit."

In *Wenlock* v. *River Dee Co.* (1883; C.A.), L.R. 36 Ch. Div. 683, note, Cotton, L.J., laid it down that the plaintiffs had properly been allowed to amend in order that they might raise the "well-established equity that, even although the corporation had no power of borrowing money so as to bind itself irrespective of the purposes for which the money is applied, yet if it appears that the money lent was in fact applied in payment of debts properly contracted by the corporation, then the party lending the money is entitled to stand as if he were the assignee of the creditors who were paid off, and he is entitled to stand in their place, and is entitled to have an inquiry whether any of the money advanced by him without statutory authority on the part of the corporation to borrow it was applied in paying off any debts and liabilities on which the corporation could have been sued."

In *Neath Bldg. Soc.* v. *Luce* (1889), L.R. 43 Ch. Div. 158, Chitty, J., referred explicitly to the "equity of subrogation" which arises in cases of this type.

In *Re Birkbeck Permanent Ben. Bldg. Soc.*, [1912] 2 Ch. 183, one of the propositions formulated by Buckley, L.J., as being applicable to cases where an association having no borrowing power receives money by way of loan or advance, was as follows: "If the result of the transaction is that the indebtedness of the association is not increased because the new loan is applied in discharging an old debt, then it is not to be regarded as a borrowing transaction, for the invalid lender can be treated as standing in the place of those whose debts have been paid off."

[3] In *Blackburn Bldg. Soc.* v. *Cunliffe*, note 1, *supra*, certain mortgages given to secure sums lent to members of the society out of money advanced by the bankers in question were treated as "property which they were entitled to claim." When the case was before the House of Lords (see (1884) L.R. 9 App. Cas. 866), Lord Blackburn stated that the general effect of the decision of the Court of Appeal was that, "though there was nothing that amounted to an assignment to the bankers of the claims of those who were paid off by the money advanced, yet if it could be shewn that such claims were in fact paid off thereby, there was an equity in substance to give them, the bankers, the same benefit as if there had been such an assignment." But he pointed out that, as the decision had not been appealed against, it was not, and could not be, affirmed by the House.

Annotation. is not therefore entitled to the benefit of any securities held by the creditors who have been paid off out of the moneys advanced."[1] This modified doctrine has not yet been ratified by the House of Lords.[2]

[1] Lindley on Companies, vol. 1, 6th ed., p. 294, citing a case in which he took part as one of the Lord Justices, *Re Wrexham, M. & C.Q.R. Co.*, [1899; C.A.] 1 Ch. 440, 68 L.J. Ch. N.S. 270, 47 Week. Rep. 464, 80 L.T.N.S. 130, 15 Times L.R. 122, 6 Manson 218, affirming [1898] 2 Ch. 665. There the Wrexham, M. & C.Q.R. Company had power to borrow money by the creation of three classes of debenture stock, A, B, and C, to the extent of £175,000 by A stock, £175,000 by B stock, and £145,000 by C stock. The A stock had priority as to both principal and interest over the B and C stocks, and the B stock had a similar priority over the C stock. In July, 1897, these borrowing powers were exhausted, the whole of the three classes of debenture stock having been created, and the company had no further power to borrow money. The company had not any funds to enable them to pay the half-year's interest which was about to become due on August 1 on the debenture stocks, and they applied to their bankers, the North and South Wales Bank, to advance them money for the purpose. This the bank consented to do, and the advance was made by their paying the interest warrants to the stockholders when they presented them for payments. The total sum thus applied was £9,672, of which £3,850 went to pay the interest due to the holders of A debenture stock, £3,380 to pay the interest on the B stock, and the residue to pay the interest on the C stock. On September 8, 1897, upon a petition under the Railway Companies Act, 1867, presented by the Great Central Railway Company, who were judgment creditors of the Wrexham Company, an order for the appointment of a receiver was made against that company. The receiver had in his hands enough money to pay a half-year's interest to the A stockholders and to leave some surplus for the B stockholders. The bank claimed, in the first instance, that, to the extent of the whole £9,672 which they had paid to the debenture stockholders, they should be subrogated to the rights of those stockholders, and should, out of any moneys in the hands of the receiver, be paid what they had advanced in priority to any payment to the debenture stockholders. Romer, J., held that this claim was unfounded. The bank then claimed that, at any rate to the extent of the £3,850 paid to the A stockholders, they were entitled to stand in the shoes of those stockholders, and to be paid in priority to any payment to the B and C stockholders out of any surplus remaining after paying the interest due to the A stockholders. Romer, J., decided against this claim also. The bank appealed against both decisions; but they were affirmed. Rigby, L.J., said: "I think that the great preponderance of authority shews that the doctrine of subrogation has very little, if anything at all, to do with the equity really enforced in the cases, and that there is, at any rate, no authority for any subrogation to the securities or priorities of the creditors paid off. Dealing with this case independently of the authorities, I see no reason why the parties to an illegal lending should have anything more than bare justice dealt out to them; and this they get if they are allowed, as they have hitherto been allowed, to have that portion of the advance actually expended in payment of debts of the company treated as a valid advance."

[2] In *Sinclair* v. *Brougham*, [1914] A.C. 412, Lord Parker, after laying down the general principle, observed: "There appears to be some doubt as to whether this result is arrived at by treating the contract of loan as validated to the extent to which the borrowed money is so applied, on the ground that to this extent there is no increase in the indebtedness of the company or association, in which case, if the contract of loan involves a security for the money borrowed, the security would be validated to a like extent; or whether the better view is that the lenders are subrogated to the rights of the legitimate creditors who have been paid off. . . . It is still open to your Lordships' House to adopt either view, should the question actually come up for determination."

IV.—Canadian decisions reviewed.

Annotation.

15. Upper Canada and Ontario.—An early case in which the power of a railway company to lend money to a similar company was under discussion really turned upon the consideration that the loan, though originally *ultra vires*, had been validated by the legislature. But language was used by the Court which might apparently be construed as indicating that, even in the absence of such validation, the question of want of power could not have been raised, if one of the contentions advanced, viz., that the lender had got the benefit of the money lent, had been supported by the facts.[1]

In a later case it was laid down that "a corporation ought not to be allowed to avail itself of the doctrine of *ultra vires* as against a party seeking to enforce the contract, which has been performed by him, and has resulted in a corresponding benefit to the shareholders."[2] The authority upon which most reliance was placed was an American decision.[3] That decision was a clear authority for the doctrine enunciated. But the English precedents relied upon were certainly not in point.[4]

In a later case where it was held that money received on deposit by a company acting in excess of its powers must be restored, the Court seems to have assumed that an action on the contract itself was maintainable.[5] If so, the decision was clearly inconsistent with the English cases.[6]

The next expression of judicial opinion that calls for notice is the following *obiter dictum*: "The question of *ultra vires* cannot of course be made to depend upon the question whether the contract was or was not beneficial to the defendant."[7] This

[1] *Great Western R. Co.* v. *Commercial Bank* (1864), 2 U.C. Err. & App. 319, affirmed in (1865) 6 Moore, P.C.C.N.S. 295, 16 Eng. Reprint 112, where this point was not referred to.

[2] *Clarke* v. *Sarnia Street R. Co.* (1877), 42 U.C.Q.B. 39.

[3] *State Bd. of Agri.* v. *Citizens' Street R. Co.* (1874), 47 Ind. 407, 17 Am. Rep. 702. Another case cited was *Whitney Arms Co.* v. *Barlow* (1875), 63 N.Y. 62, 20 Am. Rep. 504.

[4] One of them was *Ex parte Chippendale* (1853), 4 De G.M. & G. 19, 43 Eng. Reprint 415, 18 Jur. 710, 2 Week. Rep. 543, the actual rationale of which is explained in secs. 13, and 14, *supra*. Another was *Bank of Australasia* v. *Breillat* (1846), 6 Moore, P.C.C. 152, 13 Eng. Reprint 642, 12 Jur. 189. This decision (so far as relevant in the present connection) was based upon the ground that the obligation of the company of which the defendant was chairman, to repay the loan in question, was not discharged by the fact that the contract which contained the stipulation as to repayment was accompanied by other stipulations which were *ultra vires* of the directors. Even if those stipulations had been *ultra vires* of the company itself, the decision would clearly afford no support to the doctrine enunciated by the Court.

The Court also cited *McDonald* v. *Upper Can. Min. Co.* (1869), 15 Grant, Ch. (U.C.) 179. There the *ratio decidendi* apparently was that the contract sued upon, one for the remuneration of the plaintiff, was *intra vires*. But it must be admitted that the doctrinal position of the Court is not as clearly defined as it might be.

[5] *Walmsley* v. *Rent Guarantee Co.* (1881), 29 Grant, Ch. (U.C.) 484.

[6] Proudfoot, V.-C., relied on the *Chippendale Case*. But see note 1, *supra*.

[7] Garrow, J.A., in *National Malleable, etc., Co.* v. *Smith Falls, etc., Co.* (1901), 14 O.L.R. 22 (29).

Annotation. remark is presumably to be regarded as a somewhat informal statement of the doctrine that, in an action on an *ultra vires* contract, the plea of *ultra vires* is available, even though the contract has been performed by the plaintiff, and the benefits of that performance have been received by the defendant. If this is the meaning of the words quoted, they betoken an abandonment of the position taken in the earlier cases.

That the acceptance of the benefits of the unauthorized contract is no longer treated as a material factor in this province has been placed beyond a doubt by a subsequent case, in which Hodgins, J.A., after laying it down that the liability of a corporation on an *ultra vires* guaranty cannot be predicated either on the receipt of benefits or a change of position by the party advancing the money, proceeded thus: "There is no estoppel by an act which is beyond the corporate powers; and where recovery has been had of property or money received by a company upon a contract afterwards found to be *ultra vires*, the principle is based upon rescission and restoration of the parties to the status *quo ante*, and even that remedy is confined to cases where the consideration has been received from the other contracting party, and not from outside parties."[1] The earlier cases seem to have escaped the notice not only of the learned Judge himself, but also of the counsel engaged in the case. The failure to advert to them is a notable illustration of the curious manner in which, under our system of case-law, even rules of the highest importance may be overthrown by the decision of a Court which was not fully acquainted with the precedents which should be considered, for the purpose either of approving or condemning them. In this instance of course the propriety of declaring the ignored precedents to be unsound, would have been perfectly clear, in view of the overwhelming accumulation of English authorities against the doctrine of estoppel.

16. British Columbia.—The decisions rendered in two cases are upon the facts inconsistent with the doctrine that a defendant who has received the benefits of an *ultra vires* contract is estopped from raising the plea of invalidity.[2] But the right of recovery was not discussed in this particular point of view.

17. Quebec.—That the principle of estoppel is not accepted in this province is to some extent indicated by a case in which it was held that no recovery could be had on an *ultra vires* guaranty.[3] But, as the direct benefits arising from the contract accrued only to the person in whose favour the guaranty was executed, the decision is one of ambiguous import.

[1] *Union Bank* v. *McKillop & Sons* (1913), 24 D.L.R. 787, affirming 30 O.L.R. 87, 16 D.L.R. 701, affirming (1913) 11 D.L.R. 449.

[2] *Carter Dewar Crowe Co.* v. *Columbia Bitulithic Co.* (1914), 20 B.C. 37, 18 D.L.R. 50 (no action maintainable on a promissory note executed by the defendant as guarantor of the purchase price of articles supplied to another company); *Columbia Bitulithic Co.* v. *Vancouver Lumber Co.* (1915), 21 D.L.R. 91 (chattel mortgage given for money lent by a company which had no power to make a loan was held not to be enforceable).

[3] *Johansen* v. *Chaplin* (1889), Montreal L. Rep. 6 Q.B. 111.

V.—American decisions reviewed. **Annotation.**

18. Generally.—A complete examination of the American decisions, which are extraordinarily conflicting, would carry us beyond the scope of the present monograph. For the purpose of conveying a general idea of the state of the authorities the brief summary offered in the following sections will be sufficient.

19. Doctrine that the plea of ultra vires cannot be excluded on the ground of an estoppel.—The nature and scope of the doctrine upon which a large number of American decisions proceed are indicated by the following statement in an opinion delivered by Justice Gray in a leading case: "The view which this Court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."[1]

After some rather remarkable fluctuations of opinion, this doctrine has been adopted by the Supreme Court of the United States as a controlling rule of decision in respect of all classes of cases, except this in which the plaintiff is a national bank.

It is also applied by several of the State Courts.[2]

20. Doctrine that a defendant may be estopped from pleading ultra vires.—A part of the cases in which this doctrine has been applied or recognized are cited in the subjoined footnote.[3] The list shews

[1] *Central Transp. Co.* v. *Pullman's Palace Car Co.* (1890), 139 U.S. 24, 59, 35 L. ed., 55, 68, 11 Sup. Ct. Rep. 478.

[2] See, besides the case cited in note *supra*, *St. Louis, V. & T.H.R. Co.* v. *Terre Haute & I.R. Co.* (1891), 145 U.S. 393, 404, 36 L. ed. 738, 753, 12 Sup. Ct. Rep. 953; *McCormick* v. *Market Nat. Bank* (1896), 165 U.S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *De la Vergne Refrigerating Mach. Co.* v. *German Sav. Inst.* (1899), 175 U.S. 40, 44 L. ed. 65, 20 Sup. Ct. Rep. 20; *Merchants' Nat. Bank* v. *Wehrmann* (1906), 202 U.S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613, reversing (1903), 69 Ohio St. 160, 68 N.E. 1004.

Chewacla Lime Works v. *Dismukes* (1888), 87 Ala. 344, 5 L.R.A. 100, 6 So. 122; *Southern Bldg. & L. Assoc.* v. *Casa Grande Stable Co.* (1900), 128 Ala. 624, 29 So. 254; *National Home Bldg. & L. Assoc.* v. *Home Sav. Bank* (1899), 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N.E. 619; *Stacy* v. *Glen Ellyn Hotel & Springs Co.* (1906, 223 Ill. 546, 8 L.R.A. (N.S.) 966, 79 N.E. 133; *Andrews* v. *Union Mut. F. Ins. Co.* (1854), 37 Me. 256; *Bailey* v. *Methodist Episcopal Church* (1880), 71 Me. 472; *Davis* v. *Old Colony R. Co.* (1881), 131 Mass. 258, 41 Am. Rep. 221; *Dresser* v. *Traders' Nat. Bank* (1895), 165 Mass. 120, 42 N.E. 567; *Downing* v. *Mt. Washington Road Co.* (1860), 40 N.H. 230; *Miller* v. *American Mut. Acci. Ins. Co.* (1893), 92 Tenn. 167, 20 L.R.A. 765, 21 S.W. 39; *Tennessee Ice Co.* v. *Raine* (1901), 107 Tenn. 151, 64 S.W. 29.

[3] *Western Development & Invest. Co.* v. *Caplinger* (1908), 86 Ark. 287, 110 S.W. 1039; *Main* v. *Casserly* (1885), 67 Cal. 127, 7 Pac. 426; *Denver F.*

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that it has been adopted in much larger numbers of jurisdictions than the one adverted to in the preceding section. But in the present instance this numerical test is not particularly impressive, when we consider the eminence of the Courts which have pronounced against the applicability of the principle of estoppel to actions brought upon *ultra vires* contracts.

In the great majority of the cases in which an opinion upon the subject has been expressed that principle has been declared to be inapplicable where the contract in question is illegal in the sense of being expressly prohibited or immoral or contrary to public policy.[1]

Ins. Co. v. *McClelland* (1885), 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771; *Union Hardware Co.* v. *Plume & A. Mfg. Co.* (1889), 58 Conn. 219, 20 Atl. 455; *Towers Excelsior & Ginnery Co.* v. *Inman* (1895), 96 Ga. 506, 23 S.E. 418; *Darknell* v. *Cœur D'Alene & St. J. Transp. Co.* (1910), 18 Idaho, 61, 108 Pac. 536; *State Bd. of Agri.* v. *Citizens' Street R. Co.* (1874), 47 Ind. 407, 17 Am. Rep. 702 (action for money which street railway company had promised to subscribe to fair); *Marshall Field Co.* v. *Oren Ruffcorn Co.* (1902), 117 Iowa 157, 90 N.W. 618; *Schrimplin* v. *Farmers' Life Asso.* (1904), 123 Iowa 102, 98 N.W. 613; *Blue Rapids Opera House Co.* v. *Mercantile Bldg. & L. Asso.* (1898), 59 Kan. 778, 53 Pac. 761; *Albin Co.* v. *Com.* (1908), 128 Ky. 295, 108 S.W. 299; *Lincoln Court Realty Co.* v. *Kentucky Title Sav. Bank & T. Co.* (1916), 169 Ky. 840, 185 S.W. 156; *Canal & C.R. Co.* v. *St. Charles Street R. Co.* (1892), 44 La. Ann. 1069, 11 So. 702; *Rehberg* v. *Tontine Surety Co.* (1902), 131 Mich. 135, 91 N.W. 132; *Peterson* v. *People's Bldg. Loan & Sav. Asso.* (1900), 124 Mich. 573, 83 N.W. 606 (sale of shares); *Hunt* v. *Hauser Malting Co.* (1903), 90 Minn. 282, 96 N.W. 85; *Watts Mercantile Co.* v. *Buchanan* (1908), 92 Miss. 540, 46 So. 66; *Cass County* v. *Mercantile Town Mut. Ins. Co.* (1904), 188 Mo. 1, 86 S.W. 237; *Camden & A.R. Co.* v. *May's Landing & E.H. City R. Co.* (1886), 48 N.J.L. 530, 7 Atl. 523; *De Groff* v. *American Linen Thread Co.* (1860), 21 N.Y. 124; *Woodruff* v. *Erie R. Co.* (1883), 93 N.Y. 609; *Jemison* v. *Citizens' Sav. Bank* (1890), 122 N.Y. 135, 9 L.R.A. 708, 25 N.E. 264; *Linkauf* v. *Lombard* (1893), 137 N.Y. 417, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N.E. 47; *Charlotte Twp.* v. *Piedmont Realty Co.* (1903), 134 N.C. 41, 46 S.E. 723; *Western & S.F. Ins. Co.* v. *Murphey* (1916), — Okla. —, 156 Pac. 885; *Oil Creek & A.R. Co.* v. *Pennsylvania Transp. Co.* (1876), 83 Pa. 160; *Hays* v. *Galion Gaslight & Coal Co.* (1876), 29 Ohio St. 330; *Larwell* v. *Hanover Sav. Fund Soc.* (1883), 40 Ohio St. 274; *Boyd* v. *American Carbon Black Co.* (1897), 182 Pa. 210, 37 Atl. 937; *Kammer* v. *Supreme Lodge, K.P.* (1912), 91 S.C. 572, 75 S.E. 177; *Texas Western R. Co.* v. *Gentry* (1888), 69 Tex. 625, 8 S.W. 98; *Ledebuhr* v. *Wisconsin Trust Co.* (1902), 112 Wis. 657, 88 N.W. 607; *Wuerfler* v. *Grand Grove, W.O.D.* (1902), 116 Wis. 19, 96 Am. St. Rep. 940, 92 N.W. 433; *Witter* v. *Grand Rapids Flouring Mill Co.* (1891), 78 Wis. 543, 47 N.W. 729; *North Hudson Mut Bldg. & L. Asso.* v. *First Nat. Bank* (1891), 79 Wis. 31, 11 L.R.A. 845, 47 N.W. 300.

[1] See for example, *Kennedy* v. *California Sav. Bank* (1894), 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039 (*arguendo*); *Fritze* v. *Equitable Bldg. & L. Soc.* (1900), 186 Ill. 183, 57 N.E. 873; *Franklin Nat. Bank* v. *Whitehead* (1898), 149 Ind. 560, 39 L.R.A. 725, 63 Am. St. Rep. 302, 49 N.E. 592; *Beach* v. *Wakefield* (1899), 107 Iowa 567, 76 N.W. 688, 78 N.W. 197; *Whitehead* v. *American Lamp & Brass Co.* (1905), 70 M.J. Eq. 581, 62 Atl. 554; *Bank of Salina* v. *Alvord* (1865), 31 N.Y. 473; *Crocker* v. *Whitney* (1877), 71 N.Y. 161; *Jemison* v. *Citizens' Sav. Bank* (1890), 122 N.Y. 135, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N.E. 264; *Simpson* v. *Greenfield Bldg. & Sav. Asso.* (1882), 38 Ohio St. 349; *Wuerfler* v. *Grand Grove, W.O.D.* (1902), 116 Wis. 19, 96 Am. St. Rep. 940, 92 N.W. 433; *Eastman v. Parkinson* (1907), 133 Wis. 381, 13 L.R.A. (N.S.) 921, 113 N.W. 649.

VI.—Rationale of each of the conflicting doctrines as to the subject of estoppel. **Annotation.**

21. Doctrine under which no estoppel is predicable.—The considerations to which this doctrine has been referred are as follows:

(1) As a contract which a corporation is not authorized to make is essentially one which belongs to the category of those which are prohibited, either expressly or by implication, by the lawmaking body, it is absolutely void in the same sense and the same degree as any other description of prohibited contract. In this point of view the conclusion stated in the following passage is obviously deducible: "If there is no power to make the contract, there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it and yet it may become legal and valid as a contract, by way of estoppel, through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power."[1]

(2) An essential prerequisite to the creation of an estoppel is that the party in whose favour the estoppel is to operate should, at the time when he entered into the contract, have been misled by the other party with regard to some material fact of which he had no knowledge, actual or constructive. But it is clear that, so far as the extent of the powers of a corporation are concerned, the element of deception must necessarily be absent from any transaction with that corporation. "Persons who deal with corporations and societies that owe their constitution to, or have their powers defined or limited by, Acts of Parliament, or are regulated by deeds of settlement or rules deriving their effect more or less from Acts of Parliament, are bound to know or to ascertain for themselves the nature of the constitution and the extent of the powers of the corporation or society with which they deal."[2]

(3) The doctrine is necessary for the proper protection of the shareholders.[3]

[1] *National Home Bldg. & L. Assoc.* v. *Home Sav. Bank* (1899), 181 Ill. 43, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N.E. 619.

[2] Baggallay, L.J., in *Chapleo* v. *Brunswick Permanent Bldg. Soc.* (1881; C.A.) L.R. 6 Q.B. Div. 696, 2 Eng. Rul. Cas. 366.

In *East Anglian R. Co.* v. *Eastern Counties R. Co.* (1851), 11 C.B. 775, 138 Eng. Reprint, 680, Jervis, Ch. J., speaking of the special Act under which the defendant railway company had been incorporated, said: "This Act is a public Act, accessible to all and supposed to be known to all, and the plaintiffs must therefore be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be."

In *Bank of Hindustan, China & Japan* v. *Alison* (1870), L.R. 6 C.P. (Eng.) 71, the reason assigned by Bovill, Ch. J., for holding that no estoppel could be predicated, was that "there was no misleading of the plaintiffs by the defendant into a belief of the existence of a state of facts which did not exist."

[3] "Every proprietor, when he takes shares, has a right to expect that the conditions upon which the Act was obtained will be performed." *East Anglian R. Co.* v. *Eastern Counties R. Co.* (1851), 11 C.B. 775, 138 Eng. Reprint 680,

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(4) The security of creditors considered as a general class will be imperfectly achieved if the mere fact that one particular member of that class has performed an *ultra vires* contract will enable him to maintain an action upon it. Everyone who deals with the company is warranted in assuming that its business has previously been, and will always be, carried on within the limits prescribed by its charter, or by the general law under which it was organized.

(5) The virtual effect of the doctrine of estoppel is to enable corporations to extend their powers indefinitely by simply disregarding the restrictions imposed upon their authority.[1] It would be easy to exaggerate the importance of this consideration. Its significance consists in the fact that it emphasizes the theoretic consequences which an application of the doctrine of estoppel may by possibility produce. In practice corporations do not, generally speaking, travel very far outside the domain covered by the powers conferred upon them. It is evident, moreover, that the preventive authority of the state will always be called into action by any attempt to usurp powers on an extensive scale.

Certain judges speaking in jurisdictions in which the doctrine of estoppel has been rejected have declared that it is unconscionable to raise the plea of *ultra vires* in an action brought by a claimant who has performed the contract

7 Eng. L. & Rep. 509, 7 Eng. Ry. & C. Cas. 150, 21 L.J.C.P.N.S. 23, 16 Jur. 249, 22 Eng. Rul. Cas. 21.

In *Taylor* v. *Chichester & M.R. Co.* (1867), L.R. 2 Exch. (Eng.) 356, Mellor, J., remarked: "However we may regret to give effect to the repudiation of a bargain entered into by the directors of a company, we cannot fail to see that the directors of railway companies, often, I fear, through indirect motives, do enter into contracts and engagements most ruinous to the interests of shareholders, who may have been led into a false security by the very limitations of the authority expressed or impliedly contained in the acts of incorporation."

"If the legislature accedes to such an application [for incorporation], the Act, when passed, becomes the charter of the company, prescribing its duties and declaring its rights, and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out to them by the Act, and liable to no obligations beyond those which are there indicated. If this be not the true principle, the legislature must be making itself ancillary to serious injury." Lord Cranworth, in *Caledonian & D.R. Co.* v. *Helensburgh* (1856), 2 Macq. H.L. Cas. (Scot.) 391, 2 Jur. N.S. 695, 4 Week. Rep. 671, reversing (1852), 15 sc. Sess. Cas. 2d. series, 148. This passage was quoted in *Mann* v. *Edinburgh Northern Tramways Co.*, [1893] A.C. (Eng.) 69, 62 L.J.C.P.N.S. 74, 1 Reports, 86, 68 L.T.N.S. 96, 57 J.P. 245.

"One of the grounds on which the doctrine of *ultra vires* rests is that the interest of the stockholders ought not to be subjected to such risks [*i.e.*, those not undertaken]. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation." *Ward* v. *Joslin* (1902), 186 U.S. 142, 151.

[1] See, for example, *Hood* v. *New York & N.H.R. Co.* (1853), 22 Conn. 502; *Montgomery* v. *Montgomery & W. Pl. Road Co.* (1857), 31 Ala. 76; *Westinghouse Mach. Co.* v. *Wilkinson* (1885), 79 Ala. 312; *Standard Sav. & L. Co.* v. *Aldrich* (1908), 20 L.R.A. (N.S.) 393, 89 C.C.A. 646, 163 Fed. 216; *Schurr* v. *New York & B. Suburban Invest. Co.* (1892), 45 N.Y.S.R. 645, 18 N.Y. Supp. 454.

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on his side.[1] So far as regards cases of the description ordinarily presented, this theory seems to have been satisfactorily disposed of by two eminent Judges in the passages quoted below.[2] On the other hand, it seems impossible to deny that the interposition of this defense may be most unrighteous, not to say downright dishonest, where the directors who made the contract held all the corporate stock up to the time when the proceedings were instituted, and the claimant is seeking redress in an action at law.[3]

[1] The best known of such expressions of opinion is the following statement: "In my opinion, nothing can be more indecent than for a great company like this to allege, by way of defense, that a solemn contract which they have entered into is void on the ground of its not being within their powers, not from any mistake, misapprehension, or subsequent accident, but because they thought fit to enter into it, and meant to have the benefit of it, if it turned out for their benefit, and to take advantage of the illegality in case the contract should prove onerous and they should desire to get rid of it. Lord St. Leonards in *Hawkes* v. *Eastern Counties R. Co.* (1852), 1 DeG. M. & G. 759, 42 Eng. Reprint, 739. In *Shrewsbury & B.R. Co.* v. *London & N.W.R. Co.* (1852), 16 Beav. 451, 51 Eng. Reprint, 848, Lord Romilly approved this statement. It was also cited in *Monument Nat. Bank* v. *National Bank Globe Works* (1869), 101 Mass. 57, 3 Am. Rep. 322.

In *Seligman* v. *Charlotteville Nat. Bank* (1879), 3 Hughes, 647, Fed. Cas. No. 12,642, *ultra vires* was designated as an "odious defense."

[2] "I cannot help adding an observation on the objection made to the honesty of a defense of this description. It is said the company has contracted and the company repudiates its contract. There cannot be a more perfect fallacy. 'Persons without authority have affected to contract for the company, and the company repudiates the act,' is the true expression. A, B, and C are in partnership as hatters; A buys boots in the name of the firm, and the sellers sue A, B, and C, who say they did not contract. It may be wrong in A, but are B and C to blame? I do not say these corporation cases are cases of partnership, but the principle is the same. And when I consider the mischief that has been done by directors under the temptations offered by interested parties and other considerations, adding to the schemes in which parties have contributed their capital, I own, hard as it may be in a particular case, I am not sorry that a lesson should be read that those who deal with directors must see they have authority to bind their companies, or must trust the director personally, a consideration which will make both parties more cautious in their speculations with other people's property." Bramwell, B., in *Bateman* v. *Ashton Under-Lyne* (1858), 3 Hurlst. & N. 340, 157 Eng. Reprint, 494. These remarks were made in a dissenting judgment; but they have nothing to do with the grounds on which the learned Judge disagreed with his associates.

In *Bissell* v. *Michigan S. & N.I.R. Cos.* (1860), 22 N.Y. 304, Selden, J., said: "The strength of the opposing views consists in the alleged injustice of permitting a corporation to avoid obligations by pleading its own want of power to incur them. But it should be remembered that this argument is just as applicable to the case of an individual who sets up the illegality of his own contract, and thus shields himself from responsibility upon it, as to that of a corporation. If it be said that in the case of illegal contracts between individuals, each party is a participator in the guilt, and hence the law will not interpose to protect either, this is equally true in respect to the unauthorized contracts of corporations. Their powers are prescribed by statute, and everyone who deals with them is presumed to know the extent of these powers."

[3] Such was the situation in *Wenlock* v. *River Dee Co.* (1883; C.A.), L.R. 36, Ch. Div. (Eng.) 674, note, where Lord Esher made the following emphatic remarks: "In this case Lord Wenlock's executors have brought an action against the River Dee Company in order to recover a very large sum with interest upon a covenant contained in a mortgage deed, and it is undoubted that Lord Wenlock did advance a very large sum upon a mortgage which was given to him under the seal of the company, and upon a contract which

Annotation. If adequate relief is to be attained at all under such circumstances, resort must clearly be had to the more flexible remedies afforded by equity or to a suit in disaffirmance of the contract.

22. Doctrine under which an estoppel is predicable.—As most of the discussion of the considerations upon which the doctrine of estoppel rests is to be found in the American cases, a detailed examination of the subject does not lie within the scope of this note. It will be sufficient, therefore, to point out that it is open to the following very strong, if not fatal objections:—

(1) It entails an illogical distinction between the incidents of corporate contracts which are merely unauthorized, and those of corporate contracts which are expressly prohibited. See sec. 9, *ante*.

(2) In the final analysis, it involves an acceptance of the following propositions, all of which are apparently untenable in point of logic, and irreconcileable with elementary legal principles, viz., (*a*) that a contract which, *ex hypothesi*, was void at the time when it was made, and which consequently cannot, without disregarding the analogies of the law in regard to other descriptions of void contracts, be deemed susceptible of a voluntary ratification, may, on the ground of an estoppel, be in effect validated against the will of the corporation; (*b*) that this estoppel may be predicated, although one of the essential elements of such a concept, that is to say, the misleading of the party who is seeking to enforce the contract, must necessarily be absent, owing to the fact that he is chargeable with notice of the extent of the

those who in fact made it with him represented to be a contract with the company. The defense is that, although the money was in fact advanced upon such representation, namely, that it was money to be advanced to the company, and although the mortgage and the covenant are a mortgage and covenant under the seal of the company, yet that the company is not liable to this action substantially in covenant, because it is alleged by the company that those who made that covenant and who made that mortgage had no authority to bind the company by the use of the seal for that purpose. If that defense be a valid one there can be no doubt the hardship thereby inflicted upon Lord Wenlock, and in this case a hardship much greater than usual, because this is not simply the case of directors either wilfully or inadvertently doing that which, if it were upheld, would bind a number of shareholders who are not directors, but actually in this case, if this covenant and this mortgage cannot be upheld, it is a covenant and a mortgage made by people who are said to be the agents of the company, but who in truth and in fact are the only persons interested in the company. It is as if all the shareholders of the company were to make this representation and obtain money, and then put forward the defense, when an action is brought against the company, that although they, the shareholders, had misled the person into advancing his money, nevertheless the company is not liable. If this action were really the defense of those who induced Lord Wenlock to advance his money upon the representation made by them,—if this action is defended in the name of the company by them,—I hesitate to express the feeling which I have as to such conduct; but if this action is really defended, although in the name of the company, on behalf of the Credit Foncier, I can pass no opinion upon whether it is a just or righteous defense or not, because I know nothing of the circumstances under which they became the persons having the command of this defense." The Credit Foncier here referred to was another creditor of the company.

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corporate powers; and (*c*) that a corporation may be estopped from denying its liability in respect to a contract entered into by its agents, even in a case in which they have transcended their authority and abused their trust, with regard both to making the contract and to their acts performed in pursuance of it, and in which the corporation itself, as distinguished from its agents, has not done anything which can be construed as an adoption of the contract.

(3) The effect of the doctrine is to impair the usefulness of the restrictions placed by statute upon the power of corporations or even to render those restrictions entirely nugatory. This objection has never been satisfactorily met, so far as the present writer knows.

(4) The doctrine wholly ignores the interests of "innocent shareholders,"—a term which in this connection imports those who have not authorized, either expressly or by implication, the formation of the contract or the subsequent acts upon which the alleged estoppel is founded. That this situation exists in respect to any shareholders who neither knew, nor had any means of knowing, that the contract was being made, is a necessary inference from the fact that their shares are deemed to have been purchased on the supposition that the corporation was to carry on a certain description of business, and that it would not enter into any contracts except those which were incident in a reasonable sense to that business. Under such circumstances, the presumption cannot warrantably be entertained that they consented to any particular *ultra vires* contract. Manifestly, therefore, it is unjust that they should be prejudicially affected by the making of the contract or by what is done in pursuance of it. Yet, it is easy to see that the application of the doctrine under discussion may often produce this consequence. The value of their shares may be diminished, or in extreme cases entirely destroyed, if the contract should eventually prove to be unprofitable.

(5) The application of the doctrine may and frequently does operate to the prejudice of third persons whose dealings with the corporation have reference to matters which are within the scope of its corporate powers. The Courts have paid even less attention to this feature of the doctrine than to the one discussed in the preceding paragraph. Yet its importance is indisputable, and the argument which it furnishes against the doctrine is in one respect even more cogent than that which is derived from a consideration of the interests of stockholders. Stockholders have, by reason of their position with respect to the corporation, various opportunities of learning whether its powers are being exceeded, and if we assume that their assent is to be treated as an element affecting its liability, the possession of such knowledge as will justify the inference of an assent may often be readily inferred. On the other hand, it is clear that third persons who enter into contracts which are *intra vires* of the corporation are justified in acting upon the supposition that it has not previously made, and will not subsequently make, any contracts which are not of that description.

B. C.

C. A.

SCOTTISH TEMPERANCE LIFE ASSN. v. REGISTRAR OF TITLES, VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and Galliher, JJ.A. June 5, 1917.

LAND TITLES (§ III—30)—FORECLOSURE OF MORTGAGE—REGISTRATION—PERSONAL JUDGMENT—EFFECT.

A personal judgment for the mortgage debt registered by a mortgagee in the course of foreclosure proceedings will not prevent him from registering the fee under the decree absolute without first discharging the judgment.

Statement. APPEAL by defendant from an order of Hunter, C.J.B.C., in an action for the registration of title in a mortgage foreclosure. Affirmed.

J. C. Gwynn, for appellant.

Sir Charles Hibbert Tupper, K.C., for respondent.

Macdonald, C.J.A. MACDONALD, C.J.A.:—I would dismiss the appeal.

The submission of Mr. Gwynn, appellant's counsel, shortly, is that if a mortgagee take a personal judgment in the course of foreclosure proceedings, and register it in the Land Registry, he must discharge it before he can claim, by virtue of his decree absolute, registration of his title in indefeasible fee; that the mortgagee's application to be so registered is an election on his part to take the land for the debt, and having so elected, his right to recover the debt is relinquished, and hence the registrar must refuse registration in fee until the applicant cancel registration of the personal judgment.

Assuming that it was the duty of the appellant, the Registrar of Titles, to concern himself with the questions involved in this appeal, I think he came to a wrong conclusion. I think he erred in rejecting the application on the ground that the registration of the personal judgment must first be cancelled. When a mortgagee obtains his decree absolute he becomes the legal and beneficial owner of the land. If thereafter he sue or levy in execution for the debt, he thereby enables the mortgagor to re-open the foreclosure. He is not precluded from suing or levying, but if he should do either, he must, if the amount owing be paid or tendered, restore the estate. If he cannot do this because of any disabling act of his own, he cannot proceed for the debt. Fisher on Mortgages (1910), par. 991; *Lockhart* v. *Hardy* (1846), 9 Beav. 349 (50 E.R. 378).

Now, if it be assumed that appellant's counsel is correct in his submission that an application for a certificate of fee involves

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an election to take the land and relinquish the debt, the most that can be said is that the mortgagor could then take proceedings to have the registration of the personal judgment cancelled, so as to release any other of his lands affected by it, but that is something with which the registrar is not concerned. So long as the mortgagee retains the land he can restore it, and his act in seeking registration does not interfere with his ability to do so, and therefore is not an election to take the land and relinquish the debt.

MARTIN, J.A.:—This petition raises the sole and neat question as to whether or no the fact that the mortgagee has registered a judgment against the mortgagor for the mortgage-debt before obtaining a final order of foreclosure prevents the mortgagee from obtaining a certificate of indefeasible title to the mortgaged premises without first discharging said judgment. In the case of *Re Land Registry Act and Shaw* (1915), 24 D.L.R. 429, 22 B.C.R. 116, I have set out my conception of the duty of the land registrar in the investigation of titles of various kinds, and I have nothing to add to it in its general application or to the circumstances of that case. In the matter at bar he would find a safe guide in the following remarks from Williams on Vendor and Purchaser (2nd ed.) p. 345:—

> When property is purchased, to which a mortgagee has become entitled under a decree of foreclosure absolute, care must be taken to ascertain that there were not any circumstances, attending the making of the order, which would induce the Court to re-open the foreclosure.

The point is elaborated in Dart on Vendors and Purchasers (7th ed.) 478-9:—

> The relief is wholly discretionary; and it is impossible to formulate definite rules as to what circumstances will induce the Court to exercise its discretion; each case must be decided upon its own merits.

The learned author goes on to give illustrations of cases in which the Court has felt justified in re-opening such a decree but it is sufficient to say that none of them approaches the present. Many authorities have been cited to us on the point but I shall content myself by saying that applying, chiefly, the principles enunciated in *Lockhart* v. *Hardy* (1846), 9 Beav. 349, 50 E.R. 378; *Campbell* v. *Holyland* (1877), 7 Ch.D. 166, and *Re Power and Carton's Contract* (1890), 25 L.R. Ir. 459, to this case, I find nothing therein that enables me to take the view that this decree would be re-opened by the Court because of the mere fact of the judgment being registered beforehand. I think that the appli-

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cation of the mortgagee to be registered under its foreclosure order as the indefeasible owner is a formal expression of an irrevocable intention to resort only to the land as its security and also as an intention to prevent by the operation of the statute any redemption by the mortgagor, and so this observation of Lord Langdale in *Lockhart's* case, *supra*, p. 357, comes into play:—

> The mortgagee had, by his securities, a right to foreclose the mortgage, and if he thought the estate insufficient, a further right to proceed on his personal securities, thereby giving to the mortgagor a renewed right to redeem; but when he has so dealt with the estate, that the mortgagor cannot redeem, it appears to me, that he is not entitled to proceed, and that this Court would restrain him from proceeding on the personal securities.

It must be, and was conceded at the argument that if there had been only the final order and no registered judgment the application must have been granted. In my opinion the existence of said registered judgment in these circumstances was not what Jessel, M.R., in *Campbell* v. *Holyland*, styled "an extraneous circumstance which would induce the Court to interfere," and open up the foreclosure, consequently the petitioner is entitled to be registered without formally discharging its obviously useless judgment.

It is stated in a report of this case in, [1917] 1 W.W.R. 666, that Macdonald, J., gave a prior decision to this effect, and in my opinion it was a sound one.

The appeal should therefore be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal.

Appeal dismissed.

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S. C.

DOMINION OF CANADA INVESTMENT AND DEBENTURE CO. v. GELHORN.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. July 14, 1917.

CONTRIBUTION (§ I—5)—BETWEEN CO-OBLIGORS ON MORTGAGE.

An obligor on a mortgage, or his assignee, who has not paid his share of the mortgage, is not entitled to sue a co-obligor for contribution.

Statement.

APPEAL by defendant from a judgment for plaintiff in action on an indemnity agreement. Reversed.

J. E. Doerr, for appellant; *D. H. Laird*, K.C., for respondent.

Elwood, J.

ELWOOD, J.:—On December 24, 1913, one Carstens and one Bredt executed a mortgage for $30,000 in favour of the plaintiff covering certain property in the city of Regina. By a transfer dated April 30, 1914, the said Carstens and Bredt transferred

said land to Annie Erena Miller, Walter Gelhorn and themselves in proportions of four-sixteenths, five-sixteenths, five-sixteenths and two-sixteenths respectively. The transfer was duly registered, and the defendant and the said Carstens thereby became each the registered owner of an undivided five-sixteenths interest in the property. On May 2, 1914, Miller, Bredt, Carstens and Gelhorn entered into an agreement in writing in reference to said mortgage and the land covered thereby, which agreement, *inter alia*, provided as follows:—

Memorandum of agreement made this 2nd day of May, 1914, between Annie Erena Miller, of the city of Regina, Province of Saskatchewan, civil servant, hereinafter called the party of the 1st part, Paul Moritz Bredt, of Edenwold, Province of Saskatchewan, farmer, hereinafter called the party of the 2nd part, Hugo Carstens, of the City of Winnipeg, Province of Manitoba, financial agent, hereinafter called the party of the 3rd part, and Walter Gelhorn, of the village of Edenwold, aforesaid, farmer, hereinafter called the party of the 4th part.

Whereas the parties hereto have purchased and obtained registration of title in their respective names and according to their respective interests and subject to the mortgages hereinafter mentioned of lots 15, 16, 17 and 18, in block 281, in the city of Regina, according to plan old number 33, at the cost of $115,707.96, which sum has been contributed and provided by the said parties as follows: as to four-sixteenths thereof by the party of the first part; as to two-sixteenths thereof by the party of the second part, as to five-sixteenths thereof by the party of the third part; and as to five-sixteenths thereof by the party of the fourth part, and whereas the amount of the mortgage in favour of Albert Leslie Gordon hereinafter mentioned is due and owing by the parties of the second, third and fourth parts, respectively, in proportions arranged between themselves, the moneys secured thereby having been used by such parties in making up the proportions of the $115,707.96 contributed by them as aforesaid; And, whereas, the parties of the second, third and fourth parts have agreed to enter into the covenant of indemnity with the party of the first part in respect thereof, hereinafter contained; And, whereas, in arranging for the purchase of the said lands the parties of the second and third parts respectively executed the mortgage registered against the said lands in favour of the Dominion of Canada Investment and Debenture Co. of Winnipeg, and gave their personal covenant to repay the principal moneys and interest secured thereby; And, whereas, the parties of the first and fourth parts respectively, have agreed to enter into the covenant of indemnity with the parties of the second and third parts respectively, in respect thereof hereinafter contained:

Now it is hereby agreed by and between the parties hereto: That in consideration of the premises and of the mutual covenants and agreements herein contained and on the part of each of the parties hereto, to be observed and performed, each of such parties doth mutually covenant and agree to and with the others and each of them, as follows:

1. A syndicate is hereby formed for the purpose of holding and possessing, dealing with and disposing of to advantage the said lots 15, 16, 17 and 18, in block 281 in the city of Regina.

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2. The capital of the syndicate is to be the sum of $115,707.96, representing the cost of the said property, subject to the mortgage in favour of the Dominion of Canada Investment and Debenture Co. Limited of Winnipeg, Manitoba, to secure the sum of $30,000 with interest thereon at the rate of 12 per cent. per annum, dated the 24th day of December, 1913.

3. The parties hereto shall become and are liable to the extent of their respective interests in the said land in respect of the said mortgage as to the Dominion of Canada Investment and Debenture Co. Limited of Winnipeg, Manitoba, and all outgoings, whether for interest, legal expenses or otherwise necessarily incurred in connection with the same and all outgoings for taxes, legal expenses or otherwise in respect of the said land and premises whatsoever other than in respect to the said mortgage to Albert Leslie Gordon.

. . . . .

5. The parties of the first and fourth parts respectively hereby covenant, promise and agree to and with the parties of the second and third parts respectively, that for the consideration aforesaid they, the said parties of the first and fourth parts, will contribute to the said parties of the second and third parts respectively, their proportionate share according to their respective interests in the land, of any sums which such parties may be called upon to pay by reason of their personal covenants contained in the mortgage to the Dominion of Canada Investment and Debenture Co. Limited, and that they will indemnify and keep indemnified the said parties of the second and third parts respectively from and against all actions, claims and demands in respect of the proportionate shares in such mortgage as aforesaid of the parties of the first and fourth parts respectively.

On February 7, 1916, Carstens executed to the plaintiff an assignment of all his rights under the said agreement of May 2, 1914, and under the mortgage.

Default having been made of interest due under the plaintiff's mortgage, and there being an acceleration clause in the mortgage, the plaintiff brought this action to recover from the defendant five-sixteenths of the principal and also five-sixteenths of the overdue interest under the mortgage and recovered judgment for the same.

The plaintiff claims to be entitled on two grounds: (1) By virtue of sec. 63 of the Land Titles Act, and (2) under the assignment of the agreement of May 2, 1914. So far as the first ground is concerned, that is disposed of by the judgment of my brother Lamont in *Dominion of Canada Investment and Debenture Co.* v. *Carstens et al.* (*ante* p. 25), which was argued at this Court.

Dealing with the second ground, it will be observed that Carstens became liable for five-sixteenths of the principal and interest of the mortgage under the agreement of May 2. He has not paid this five-sixteenths, or any part of it, and, apparently, the only demand that has been made upon him has been for

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some $2,700, for which, I understand, the plaintiffs have recovered judgment against him.

It seems to me that, under the circumstances of this case, the claim is not one for indemnity, but rather one for contribution. If Carstens had paid his share, or more than his share of the mortgage, then an action would lie against Gelhorn for indemnity as to Gelhorn's share. After Carstens had paid his share, the position between Carstens and Gelhorn would be that, as to Gelhorn's share, Gelhorn would be the principal debtor and Carstens the surety, but until Carstens has paid his share, then, as to any monies which may be paid by Carstens, he is entitled to contribution by Gelhorn.

In *Re Snowdon*, 50 L.J. Ch. 540, it was held that a surety, unless he has paid the whole of the principal debt, or a part in satisfaction of the whole debt, or more than his share of the principal debt, is not entitled to sue his co-surety for contribution.

It does seem to me that the above case is directly applicable to the case at bar. It further seems to me that, even if it were a case of indemnity, Gelhorn would have a counterclaim to compel Carstens to pay his share of the mortgage. The appellant, on the hearing, asked to be allowed, if necessary, to plead any such counterclaim. The plaintiffs cannot stand in any better position than Carstens, and such a counterclaim could, at least, be raised as a defence to the plaintiff's action. *Lillie* v. *Thomas*, 6 Terr. L.R. 263; *Executors, etc., Trust Co.* v. *Hoehn* (1917), 34 D.L.R. 287.

It would be inequitable to permit Carstens to bring an action to recover from Gelhorn the share which Gelhorn should pay of the mortgage and at the same time permit Carstens not only not to pay his (Carstens') share of the mortgage, but to retain, if he saw fit, the share of the mortgage which he should recover against Gelhorn.

I am not unmindful of the fact that the plaintiff is the person ultimately entitled to the money, and that, in this case, the money will be applied on the mortgage, but I am of the opinion, as I stated above, that Gelhorn is at least entitled to have Carstens pay his share of the mortgage before he is entitled to any action for indemnity.

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In my opinion, therefore, the appeal should be allowed with costs, and the plaintiff's action dismissed with costs.

McKAY, J., concurred with ELWOOD, J.

LAMONT, J.:—I concur in dismissing the action. In an action on a contract of indemnity the damages should be measured by the loss sustained: 22 Cyc. 87. Until Carstens has paid his own share, and is liable for Gelhorn's, he has suffered no loss.

Brown, J.

BROWN, J.:—The plaintiffs do not claim to be in any better position than their assignor would have been had he brought the action. Could Carstens have succeeded in such action? A mere recital of the facts is, in my opinion, a sufficient answer. I concur in allowing the appeal. *Appeal allowed.*

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BARRETT v. BANK OF VANCOUVER.

British Columbia Court of Appeal, Martin, Galliher and McPhillips, JJ.A. June 29, 1917.

COMPANIES (§ V B—178)—REPUDIATION OF SUBSCRIPTION—LIABILITY AS CONTRIBUTORY.

An allottee of shares who has received notice of the allotments, and delays to exercise his right of repudiation until after the winding-up of the company, may be held liable as a contributory.

Statement.

Appeal from the judgment of Murphy, J., dismissing an appeal to him from the order of the registrar, placing the appellant upon the list of contributories in the winding-up of the respondent under ch. 144 of R.S.C. Affirmed.

W. B. A. Ritchie, K.C., for appellant.

Joseph Martin, K.C., for respondent.

Martin, J.A.

MARTIN, J.A.:—In my opinion, the Judge below reached the right conclusion, and therefore this appeal should be dismissed.

Galliher, J.A.

GALLIHER, J.A.:—I would dismiss the appeal.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The appellant has paid $4,000 on the subscription for 500 shares and promissory notes are outstanding for the balance of the moneys due therefor, the sale price of the shares being $120 per share of the par value of $100. The applications for the shares were made in March, 1911, the allotment being formally made on November 23, 1911, and notice given thereof. At the time of the allotment, as the statute law then stood, no time was required to be fixed in the notice of allotment within which the allotment was to be accepted (see sec. 34 (2), ch. 29, R.S.C. 1906), the provision then being:—

Any of such allotted stock which is not taken up by the shareholder to whom the allotment has been made, within six months from the time when notice of the allotment was mailed to his address, or which he declines to accept, may be offered for subscription to the public, in such manner and on such terms as the directors prescribe.

When we have the fact, as in the present case, that there was allotment made in November, 1911, of which due notice was given to the appellant, and no evidence whatever of declination of acceptance, and with ample and cogent evidence to the contrary—payments on account, the giving of promissory notes, and the long delay—it must be held that there was acceptance of the allotment. The registrar has had the benefit of hearing the witnesses and he decided that the appellant should be placed upon the list of contributories and the Judge appealed to has taken the same view, and I am entirely unable to take any different view. It has not been established that the registrar was wrong in coming to the conclusion which he did—a conclusion further supported by the judgment of Murphy, J., from whose decision this appeal comes. A considerable amount of evidence has been adduced to endeavour to shew that the appellant was induced by an agent of the respondent to subscribe for the shares conditional upon the appellant being able to effect the sale of certain real estate, and that it was conditional only upon such event that the subscription was made. I have found it impossible to so find. The agreement was made in April, 1911, after the subscription for the shares, and was not with the bank, and cannot in any way be said to be the agreement of the bank, and not such an agreement as the bank could have been in law a party to. But even were it an agreement upon which the bank could be in any way responsible, it could only be viewed as a collateral agreement or condition subsequent. The appellant, on the allotment of the shares, became a shareholder *in presenti* absolutely, and is rightly placed upon the list of contributories: *Re Richmond Hill Hotel Co., Elkington's* case (1867), L.R., 2 Ch. 511; also see *Fisher's* case and *Sherrington's* case (1885), 31 Ch.D. 120; *Bridger's* case (1870), L.R. 5 Ch. 305; and *Thomson's* case (1865), 4 DeG. J. & S. 749 (46 E.R. 1114); *Barwick's* case (1911), 24 O.L.R. 301 *Oakes* v. *Turquand* (1867). L.R. 2 H.L. 325; *Burgess's* case (1880), 15 Ch. D. 507; *Cree* v. *Somervail* (1879), 4 App. Cas.

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648; *In re International Contract Co, Langer's* case (1868), 37 L.J.N.S. Ch. 292.

It is true that an application for shares should be accepted within a reasonable time (see *Crawley's* case, L.R. 4 Ch. 322, and *Ramsgate Victoria Hotel Co.* v. *Montefiore* (1866), L.R. 1 Ex. 109); but then that reasonable time is to be gathered from the special circumstances. It is, however, settled law that an allottee receiving notice of allotment, after a reasonable time has expired, must be vigilant and prompt in the exercise of his right of repudiation and not doing so he will be bound, *a fortiori*, if the rights of creditors have intervened, as in the present case, by a winding-up (*Boyle's* case, 54 L.J. Ch. 550 at 554, 33 W.R. 450; *Crawley's* case (1869), L.R. 4 Ch. 322).

In the present case, as remarked upon by Kay, J., in *Boyle's* case, *supra*, the appellant was guilty of delay and no effective steps were taken by way of repudiation of the shares. Kay, J., at p. 554, said:—

> If no steps had been taken to make the repudiation effective until the winding-up intervened, it would be a very doubtful question, to say the least of it, whether the name could be taken off the list, because then the rights of creditors would have intervened. . . .
>
> Therefore, simply on the ground that this gentleman did not repudiate the shares until after the winding-up in any effective way, though he had ample opportunity of doing so, I am obliged to refuse this application.

This Court considered the questions of law arising upon this appeal in *Fitzherbert* v. *Dominion Bed Manufacturing Co.* (1915), 21 B.C.R. 226 (23 D.L.R. 125), the headnote reading as follows:—

> Where, in an action by a shareholder against a company for rescission of a contract to take shares, the company was in financial difficulties at the commencement of the action, but liquidation had not taken place and no question of contribution had arisen, rescission will, in a proper case, be granted. *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325, distinguished.

To save repeating my view of the law, to which view I still adhere, I would refer to pp. 240-242 of the last mentioned case, and for the reasons there stated, and the authorities referred to, the appellant must be held to be rightly placed upon the list of contributories.

I would therefore dismiss the appeal.

Appeal dismissed.

MORGAN v. DE GEER.

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Saskatchewan Supreme Court, Haultain, C.J., and Lamont, Elwood and McKay, JJ. July 14, 1917.

VENDOR AND PURCHASER (§ II—30)—REMEDIES—SPECIFIC PERFORMANCE—PERSONAL JUDGMENT—EXECUTION.

A personal judgment for the unpaid amount under an agreement of sale, obtained in an action for the specific performance of the agreement and the enforcement of the vendor's lien, is subject to immediate execution; the remedies of personal judgment and specific performance are not inconsistent, and the exercise of one does not necessarily imply the negation of the other.

[*Standard Trust Co.* v. *Little*, 24 D.L.R. 713, 8 S.L.R. 205, distinguished; *Lee* v. *Sheer*, 19 D.L.R. 36, 8 A.L.R. 161; *Regina Brokerage* v. *Waddell*, 27 D.L.R. 533, 9 S.L.R. 154, referred to.]

Statement.

APPEAL by plaintiff from a judgment setting aside an execution in an action for specific performance, the plaintiff claiming the balance remaining unpaid under an agreement for the sale of land. Reversed. (The following statement of facts is taken from the judgment of LAMONT, J.)

On October 23, 1914, the plaintiff obtained from the local master at Saskatoon a decree that (1) plaintiff have judgment against the defendants for $4,083.45, (2) that the defendants pay into Court on or before January 23, 1915, the said sum, (3) that the plaintiff have a lien on the land for the said amount and (4) that in default of payment as provided the land be sold without further order under the direction of the sheriff.

Provision was made in the order for the advertising of the sale, and the conditions of sale were fixed.

The plaintiff not only entered the decree, but, using it as a fiat, entered formal personal judgment against the defendants, and, without waiting for the expiration of the time fixed by the Court within which the defendants might pay the above sum, he, on November 2, 1914, issued execution. Subsequently, under that execution, the sheriff seized another piece of land belonging to the defendant De Geer and advertised for sale the interest of the defendant therein. De Geer then launched this motion, asking that the execution be set aside as unauthorized.

The Master in Chambers held that the plaintiff had no authority to issue the execution and he set it aside, together with all proceedings taken thereunder. From that order this appeal is taken.

T. D. Brown, K.C., for appellant; *R. Hartney*, for respondent.

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ELWOOD, J.:—I cannot come to the conclusion that the taking out of the order in this case was an election to take only relief by way of sale.

The case of *Standard Trust* v. *Little*, 24 D.L.R. 713, 8 S.L.R. 205, was an action for specific performance, and the judgment of the Court appears to have gone on the ground that whereas a personal judgment affirms a contract, cancellation disaffirms it, and, these two positions being inconsistent could not both be taken by the same judgment. The following is quoted with approval:—

> Let us first consider what is meant in law by "an election of remedies." It not infrequently happens that for the redress of a given wrong, or the enforcement of a given right, the law affords two or more remedies. Where these remedies are so inconsistent that the pursuit of one necessarily involves or implies the negation of the other, the party who deliberately and with full knowledge of the facts invokes one of such remedies, is said to have made his election, and cannot, thereafter, have the benefit of the other.

The reason for the decision in *Standard Trust Co.* v. *Little*, appears to me to distinguish it from the case at bar.

The remedy of a personal judgment upon which immediate execution may issue and a decree for specific performance should not both be allowed, but they are not inconsistent in the sense that the remedies of personal judgment and cancellation are inconsistent. The pursuit of one does not necessarily involve or imply the negation of the other. The sale is a means whereby the plaintiff may recover the purchase-price in whole or in part; the personal judgment is for the same purpose. As a matter of fact, although I do not think it affects the question, the plaintiff, on the argument before us, abandoned his right to a sale and elected to rely on his personal judgment.

The various forms of the order for specific performance and what result therefrom is discussed by Beck, J., in *Lee* v. *Sheer*, 19 D.L.R. 36, 8 A.L.R. 161, and a perusal of that judgment and the various forms therein referred to lead easily to the conclusion that the form of the order is most material in coming to a conclusion as to what relief has been granted.

We must not confuse what the plaintiff is entitled to on an application for judgment with what he has in fact received upon a proper construction of the order or decree which he has obtained.

The question before us involves the consideration of what is the proper construction of the order granted in this case.

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The fact that the plaintiff signed a judgment in addition to entering the decree cannot affect the matter. The decree in fact ordered a personal judgment, but, in my opinion, the entering of the formal judgment roll does not make the plaintiff's position any stronger than the decree itself, neither does it make his position any weaker.

In *Regina Brokerage* v. *Waddell*, 27 D.L.R. 533, 9 S.L.R. 154, I find the following:—

> In so far as Waddell is concerned, this is an action for the specific performance by him of his contract and the enforcement of a vendor's lien, and the order as taken out does not make any provision for conveyance. It might also be considered objectionable in that it provided for personal judgment against the purchaser. I have consulted with the registrar of this Court, and he informs me that, according to our practice, an execution could immediately be issued against Waddell on the order taken out in this case, without waiting for the expiration of the six months within which the defendants were directed to pay. In my opinion this should not be allowed . . . . If personal judgment is to be granted against the purchaser in such a case, it would have to be a judgment on which execution could not issue, as in *Lee* v. *Sheer*, 19 D.L.R. 36. But so long as our rules and practice authorise the issue of execution on a fiat for judgment against the defendant, the better way, in my opinion, is not to allow judgment to be entered for the purchase money until the expiry of the time given to the defendant within which he is directed to pay. See *Standard Trust* v. *Little*, 24 D.L.R. 713.
>
> In the case at bar, the defendant Waddell did not appear to the action, nor does he appeal from the order made. Had he been before the Court he might have raised these objections, but I do not see how the defendant Porter can be heard to raise an objection which affects Waddell alone.

The above would appear to be an expression of the opinion of the Court that an order such as the one under consideration in the case at bar would justify the issue of an immediate execution thereon, and that, that being so, the judgment should be so worded that execution could not issue immediately.

The order was not so worded that execution could not issue immediately, and the result is that the plaintiff was entitled to issue immediate execution.

It is worthy of note that the order in the case at bar was made prior to the judgment in *Regina Brokerage* v. *Waddell*, *supra*, and was therefore made at a time when, according to the judgment in *Regina Brokerage* v. *Waddell*, the practice was to issue immediate execution under such an order. The order was a consent one, and, we should conclude, was made with a knowledge of the practice above referred to. It was intended, I assume, to have the effect of enabling immediate execution to issue.

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In *Robinson* v. *Galland*, 37 W. R. 396, at 397, I find the following:—

> The one order, that is, the one for payment into Court, is not final. The other order, that is, the order for payment to the person, or, which is the same thing, the common law judgment that the plaintiff do recover a sum of money, is final.

Applying the above quotation to the present; then, the order for payment into Court in default of which there was to be a sale, was not final. The order for personal judgment was final.

The order, having given the plaintiff something that he was not entitled to, might have been appealed from, as was suggested above in *Regina Brokerage* v. *Waddell, supra*. It was not appealed from, and so long as the order stands the execution must stand. The Judge in Chambers had no power to amend the order. See *Preston* v. *Allsup*, [1895] 1 Ch. 141.

In my opinion, therefore, the appeal should be allowed from the orders of the local master and the Judge in Chambers, with costs of the appeal and of the applications to the local master and the Judge in Chambers.

Haultain, C.J. McKay, J.

HAULTAIN, C.J., and MCKAY, J., concurred with ELWOOD, J.

Lamont, J.

LAMONT, J. (dissenting):—I am of opinion the order of the master is right.

In *Standard Trust Co.* v. *Little*, 24 D.L.R. 713, 8 S.L.R. 205; and *Regina Brokerage* v. *Waddell*, 27 D.L.R. 533, 9 S.L.R. 154, this Court held that, in an action for specific performance, a plaintiff was not entitled to a decree for specific performance and at the same time to a personal judgment against a defendant upon which immediate execution could issue. Where a decree has been obtained for the specific performance of an agreement for the sale of land, and a time fixed within which the defendant is to pay the sum found to be due, a plaintiff has no right to issue execution to realize the amount until after the expiration of the time fixed.

Although the decree in the first clause provides for judgment against the defendant, the next clause shews that the Court gave the defendants until January 23, 1915, to perform their contract. The performance of the contract is the remedy sought by the plaintiff. To hold the issuing of the execution to be valid before the expiration of the time fixed, would be to put the Court in the position of saying to the defendant in one paragraph, "You may

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have until January 23 to perform your contract," and, in another paragraph, of saying, "You must perform it at once."

Specific performance being the remedy the plaintiff asks the Court to decree, he must, when he gets that remedy, wait until default is made under it before he can proceed further in prosecuting his remedies.

The decree should be read as a whole, and although language is used in one clause which, standing alone, might entitle the plaintiff to judgment on which he could issue immediate execution, that interpretation is not to be put upon it when the very next clause shews that such was not the intention of the Court. The plaintiff seems to have considered that he had no right to obtain execution on the decree, for he entered a separate judgment for the amount found due.

This, in my opinion, was unauthorized and improper; the decree was the judgment of the Court and the only judgment given. Whatever rights that gives the plaintiff he is entitled to, but he cannot use a single clause in the decree as a fiat upon which to issue another judgment, the effect of which is entirely different. As the decree, when read as a whole, did not give the plaintiff immediate personal judgment, the entering of this judgment was unauthorized, and a nullity. Effect can only be given to a judgment or order when it is entered pursuant to a direction of the Court or under the rules. The execution is in precisely the same position. There was no judgment or order of the Court justifying its issue, and it is therefore of no effect.

It was further argued that it should not be set aside now, because, the time fixed having already elapsed, the plaintiff would be entitled to issue a new execution immediately.

If the plaintiff had not made an election at the time he took out his decree, he would have been entitled to make it after the expiration of the time fixed. But in this case he had made his election: he asked for and obtained an order decreeing that, if the defendants did not pay within the time fixed, the land was to be sold without further order to satisfy his vendor's lien. This was a clear election of the remedy he would take in case the defendants did not perform their contract. Having made that election, it is binding on him, and, until he has exhausted that remedy at any rate, he is not entitled to have to re-issue his execution.

Appeal allowed.

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. June 5, 1917.

BILLS AND NOTES (§ V B—135)—HOLDER IN DUE COURSE—ALTERATION—RATE OF INTEREST—BLANKS—ESTOPPEL.

A bill is not lacking in any "material particular" within the meaning of sec. 31 of the Bills of Exchange Act (R.S.C. 1906, ch. 119) because a space reserved for a rate of interest is unfilled, and filling in a rate, after the maker has signed the note, is a material alteration, if without his authority, which vitiates the note except against a holder in due course. One who acquires the note with knowledge of such alteration is not a holder in due course, nor can he hold the maker liable thereon on the ground of estoppel.

Statement. APPEAL by plaintiff bank from a judgment in an action on a promissory note. Affirmed.

T. R. Robertson, K.C., and *G. C. McDonald*, for appellant.

J. P. Foley, K.C., and *W. S. Morrissey*, for respondent.

Perdue, J.A. PERDUE, J.A.:—This is an action on a promissory note for $475, made by James Robertson and C. P. Wastle in favour of Harry Lottridge, and indorsed by Lottridge, Chas. McPherson and A. R. McPherson. The note was payable at the Imperial Bank of Canada, Winnipeg, 6 months after date. The printed parts of the note contained the following clause: "with interest at the rate of per cent. per annum until due and per cent. per annum after maturity until paid." In the first blank the figure "8" has been inserted. Nothing has been put in the second blank.

All the parties to the note agree that when it was delivered to Lottridge, the first blank space (for the rate of interest) was not filled up. The trial Judge finds that the note was signed by the makers and indorsed by the two McPhersons to enable Lottridge to raise money upon it, Lottridge leaving with the other parties 5 shares of stock in a creamery company as security. The two McPhersons and Robertson all state that the note was not to bear interest. The other maker was not called as a witness.

Lottridge took the note to the plaintiff's bank at Hamilton, Ont., and asked the manager to discount it. It was left with the bank for about 10 days so that enquiries might be made as to the financial standing of the parties. The bank then agreed to discount the note. Lottridge states that the rate of interest was not filled in when the note was first placed in the hands of the bank. He states that a conversation took place between him and the discount clerk when the discount was being put through, with

the result that the clerk inserted the figure "8" in the space left for the rate of interest. The discount was then put through by the bank, the note being treated as one bearing interest at 8%. Lottridge received the amount of the principal and the interest, less the charges for discounting the note. There is no evidence except that of Lottridge as to the state of the note when it was first brought to the bank. The discount clerk was examined under a commission. He stated that to the best of his belief the rate of interest had been filled in when the note was handed to the bank, but that if Lottridge stated the contrary he, the clerk, could not contradict him. The clerk also stated that he had no conversation with Lottridge at the time the note was discounted and that he was almost certain that he, the clerk, did not fill in the rate of interest. The uncorroborated evidence of Lottridge upon this point, contradicted as it is, although hesitatingly, by the bank clerk, is not as convincing as it might be, especially when we take into consideration the fact that Lottridge was the only person who would benefit by the filling in of the interest rate. But the trial Judge has found as facts that the rate of interest had not been inserted in the blank space when it was placed in the hands of the bank manager, that it remained in that condition while he was making enquiries, and that the plaintiff's discount clerk filled up the blank space in order to make the note, on its face, bear eight per cent. interest. The trial Judge saw Lottridge, heard him give his evidence and had the best opportunity of estimating the value to be given to his testimony. The evidence given by the discount clerk, while apparently quite honest, only feebly contradicts Lottridge. There is no other evidence to throw light on the matter. In these circumstances this Court cannot interfere with the findings of the trial Judge.

The plaintiff's counsel relies on secs. 31 and 32 of the Bills of Exchange Act. By sec. 31 "when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit." But the note in question, when it came to the hands of the bank and before the interest space was filled up, satisfied all the requisites of a valid promissory note under sec. 176 of the Act. It contained an unconditional promise in writing made by two persons to another person, signed by the makers, engaging to pay, at a fixed or deter-

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minable future time, a sum certain in money, to, or to the order of a specified person. A promise to pay interest is merely a further condition to be added if the parties have agreed that interest should be payable. In the present case the parties did not so agree. On the contrary, Lottridge was told by the other parties to the note that they would not pay interest and, therefore, he had no right whatever to insert in the note any word or figure in order to make it carry interest. To do so without authority would materially alter the note and would vitiate it in the hands of persons who were not holders in due course. See *Warrington* v. *Early*, 2 E. & B. 763 (118 E.R. 953); *Suffell* v. *Bank of England*, 9 Q.B.D. 555, 568, 574; *Gardner* v. *Walsh*, 5 E. & B. 83, 89 (119 E.R. 412); *Langley* v. *Lavere*, 13 D.L.R. 697.

If Lottridge had no authority to make the alteration in the note, anyone taking it from him, with notice that the alteration had been made, would have no higher rights than he had against the other parties to the instrument. The plaintiff, knowing that the space for interest was blank, assumed the risk that Lottridge was authorized to fill it up. The plaintiff was an actual party to the filling up of the blank space. There was not in these circumstances an estoppel in favour of the plaintiff as against the makers and indorsers other than Lottridge.

In *France* v. *Clark*, 26 Ch.D. 257, Lord Selborne said (p. 262):—

> The defence of purchaser for value without notice, by any one who takes from another without inquiry an instrument signed in blank by a third party, and then himself fills up the blanks, appears to us to be altogether untenable.

In support of this proposition he cited *Hogarth* v. *Latham*, 3 Q.B.D. 643, 647; *Hatch* v. *Searles*, 2 Sm. & Giff. 147, 152 (both cases of negotiable instruments), and *Taylor* v. *Great Indian Pen. R. Co.*, 4 De G. & J. 559, 574. Lord Selborne goes on to say:—

> The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a *bonâ fide* holder for value without notice; but it has been repeatedly explained that this estoppel is in favour only of such a *bonâ fide* holder.

France v. *Clark* was decided in 1884, after the coming into force of the Imperial Bills of Exchange Act, 1882. The expression used by Lord Selborne, "purchaser for value without notice,"

was the one in use before the Act. Of this Sir M. D. Chalmers says:—"The Act has substituted the positive term 'holder in due course' for the cumbrous negative equivalent *'bonâ fide* holder for value without notice." See Chalmers on Bills, 7th ed. p. 99. Sec. 56 of our Act, corresponding to sec. 29 of the Imperial Act, states what is necessary to constitute a person, a "holder in due course." Such a person must as one of the conditions have had no notice of any defect in the title of the person who negotiated the bill. By sub-sec. 2 of the same section, the title of a person who negotiates a bill is defective within the meaning of the Act when he obtained the bill or the acceptance thereof by fraud, duress, &c., "or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." It was a fraud on the part of Lottridge to fill up the interest blank, or to direct it to be done, in that way increasing the amount of the liability of the makers and indorsers. The plaintiff had notice that the blank had not been filled when the note was tendered for discount. The note itself conveyed a warning and put the plaintiff on enquiry. See Chalmers on Bills, 7th ed., 100, and cases there cited.

I think the appeal should be dismissed with costs.

HOWELL, C.J.M., concurred with Perdue, J.A. Howell, C.J.M.

CAMERON, J.A. (dissenting):—The facts in this case are dealt with by Perdue, J., in his judgment. The real question involved in this appeal is whether knowledge of the fact that the rate of interest was left blank in the note in question put the bank on inquiry as to the authority of Lottridge to fill it up. Cameron, J.A.

On the argument before us it was contended that the plaintiff bank was entitled to recover under secs. 31 and 32 of the Bills of Exchange Act, R.S.C. 1906, ch. 119.

I think there can be no doubt that the blank space left for the rate of interest in the note as it originally was, left it wanting in a material particular. An alteration made by inserting a provision for interest is a material alteration. It is to be observed the words used in sec. 31 is "material" not "necessary."

The authority to complete the bill, mentioned in the above section is, as stated by Cotton, L.J., in *Carter* v. *White* (1883), 25 Ch.D. 666, not merely that of an agent but arises from a contract that the person to whom the bills are given or anyone authorized by him should be at liberty to fill them up.

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Lord Mansfield laid it down in *Russel* v. *Langstaffe*, 2 Doug. 514 (99 E.R. 328), as clear law that the indorsement on a blank note is a letter of credit for an indefinite sum. This historic statement was subsequently followed though held to be limited to the amount warranted by the stamps. But Stuart, V-C., in *Hatch* v. *Searles*, 2 Sm. & Giff. 147 (65 E.R. 342), further restricted the proposition to a *bonâ fide* holder for valuable consideration without notice. He says, p. 153:—

> If the holder has notice of the imperfection (the signature being in blank), he can be in no better position than the person who took it in blank, as to any right against the acceptor or indorsee who gave it in blank.

This decision was affirmed on appeal, 24 L.J. Ch. 22, where it appears that additional evidence was taken affecting the position of the holder of the bill.

Hatch v. *Searles*, and *Hogarth* v. *Latham*, 3 Q.B.D. 643, in which was involved the question of the right of a partner to give a partnership bill for a private debt, were followed by Lord Selborne in *France* v. *Clark*, 26 Ch.D. 257, 262, where a debtor delivered blank transfers of shares to his creditor by way of security for a loan of £150 and the creditor subsequently transferred them to Q. as security for a loan of £250, and Q. had them registered in his own name. It was held that a person taking a transfer in blank and filling it up cannot be regarded as a purchaser for value without notice, even in the case of a negotiable instrument. Lord Selborne says (p. 262):—

> The defence of purchaser for valuable consideration without notice, by anyone who takes from another without inquiry an instrument signed in blank, . . . and then himself fills up the blanks, appears to us to be altogether untenable. . .
>
> The person who has signed a negotiable instrument in blank or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against a *bonâ fide* holder for value without notice; but it has been repeatedly explained that this estoppel is in favour only of such a *bonâ fide* holder; and a man who, after taking it in blank, has himself filled up the blanks in his own favour without the consent or knowledge of the person to be bound, has never been treated in English Courts as entitled to the benefit of that doctrine.

In *Awde* v. *Dixon* (1851), 6 Ex. 869, the promissory note there sued on originally lacked the day of the month and the name of the payee. The note read as a joint and several note and was signed by the maker on the understanding that it was to be signed

by another as joint maker and that the maker would not be responsible otherwise. The proposed joint maker refused to sign. Money was advanced by the plaintiff on the note and the blanks were filled in, his name being inserted as payee. Parke, B., said it was unnecessary to decide whether the instrument was a forgery or not, but as against the maker it was a false instrument. He held the note was made under a limited authority to use it, which authority was countermanded, and refused to hold the defendant liable.

This decision is questioned by Daniel, who states that the decisions in the United States, with reason, are the other way. The fact is that Baron Parke held that the instrument there was a "false instrument," in other words, a forgery. In those circumstances it would be "a fallacy to say that the plaintiff is a *bonâ fide* holder for value: he has taken a piece of blank paper, not a promissory note." As I read the judgment of Baron Parke, it does not rest upon the fact of the blanks in the note. He says expressly, "I do not gainsay the position, that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount the stamp will cover." It was, he says, a case of limited authority which had been countermanded. It would now probably be governed by *Smith* v. *Prosser*, [1907] 2 K.B. 735, where there had been no parting with the instrument for the purpose of its being negotiated. This seems to be indicated in Byles on Bills, at p. 107, note. The note in Chalmers, 7th ed., at p. 100, on sec., 29 of the English Act (our sec. 56), citing *Awde* v. *Dixon*, *supra*, does not, therefore, seem to me warranted.

If the dicta in *Hatch* v. *Searles*, and *France* v. *Clark*, had remained undisturbed there could be no question as to the result in in the case before us. But it seems to me the point of view has been materially altered by the decision in *Lloyds Bank* v. *Cooke*, [1907] 1 K.B. 794, where the Master of the Rolls held that the doctrine of estoppel applied to negotiable instruments independently of the Bills of Exchange Act, and where a party had entrusted an agent with blank securities for the purpose of obtaining money on them up to a certain amount, he was liable if the agent used them to secure a larger amount. And he went on to say that all the elements forming the doctrine of estoppel are more easily visible when the instrument to be handed over is a negotiable

instrument than where it is otherwise, as in *Brocklesby* v. *Temperance Permanent Building Soc.*, [1895] A.C. 173 (a case involving an equitable charge on title deeds), "for the intention that the security should be used as a means of raising money is more clearly indicated where the document is in its very nature one which is intended to be transferrable from hand to hand as a security for money." p. 802. Cozens Hardy, L.J., at p. 804, says the defendant "cannot, as against those who advanced the money on the faith of the instrument signed by him, be allowed to say that his agent exceeded the authority given to him."

In the *Lloyds Bank* case, *France* v. *Clark* was mentioned on the argument but not discussed in the judgments. The reason for this appears, I think, from the next case with which I deal.

In *Fry* v. *Smellie*, [1912] 3 K.B. 282, *France* v. *Clark* was discussed and distinguished by the Court of Appeal. There the registered holder of shares handed to an agent the indicia of title together with a transfer of the shares signed in blank and instructed him to borrow not less than a certain sum on the security of the shares. The agent borrowed a less sum for his personal benefit. It was held that the lender was entitled to retain the shares until payment of the loan. The case was distinguished from *France* v. *Clark*, on the ground that in that case the depositor of the certificates and the blank transfer was merely a mortgagee and in no sense an agent of the owner with limited authority: therefore, the rule, that an owner giving indicia of title to an agent and authorizing him to deal with such indicia for the purpose of raising money or sale owes a duty to persons whom he intends to act on such authority, did not apply. As the plaintiffs in *Fry* v. *Smellie*, "owed a duty to anyone to whom their agent, to raise money for them presented the certificates and blank transfer, to inform the person lending the money of any limitations in the authority of their agent," per Vaughan Williams, L.J., p. 292, he considered the plaintiffs estopped from setting up the limitations imposed by them on their agent. However, he considered it would be a more accurate description of the principle to say it was not so much estoppel as an instance of the application of the rule that, where one of two innocent persons must suffer, the person who rendered the wrongdoing possible by reason of the trust he reposed in the wrongdoer should suffer rather than the person who is injured from the agent having that opportunity.

Farwell, L.J., says, at p. 295:—

Estoppel is merely a rule of evidence which prevents the person estopped from giving certain facts in evidence. If A.'s conduct amounts to an invitation to B. to advance money to C. without limit on the title deeds of A.'s property, he cannot be heard to say that he had imposed on C. a limit, any more than if he had written or said to B. that he had given C. authority to borrow money and had not mentioned any limit.

At p. 296, he examines the decision in *France* v. *Clark*, and says:—

The question of authority by holding out was never suggested, because it was obvious that a man who creates an equitable charge on his shares by such deposit and blank transfer holds out nothing: p. 297.

Kennedy, L.J., at p. 300, takes the same view. All the members of the Court lay stress upon the strong expressions of opinion by Lord Herschell and Lord Watson in *Colonial Bank* v. *Cady*, 15 App. Cas. 267.

Cases such as that before us are clearly distinguishable, therefore, from *France* v. *Clark*, the decision in which must be taken as applicable only to the facts there before the Court and the remarks of Lord Selborne above quoted are not to be taken as applicable to a case where the element of authority by holding out is involved.

If the holder exceed the terms of his authority in filling up the blank, he can have no benefit from it, even to the extent of his authority, for his wrongful act is an utter nullity as to himself; and if the party who takes such paper from the holder have notice that he has exceeded his authority, he participates in the wrongful act by negotiating for it, and cannot recover against the party who signed the blank. But what charges the transferee with notice is a matter on which the authorities differ. By some authorities it is held that if he knew that the paper had been signed as a blank, and filled up by force of authority by the holder, he should inquire as to the extent of such authority, and if he fails to do so, he takes the paper at his peril. And Stuart, V.-C., said in an English case: "If the holder has notice of the imperfection (that the signature was made in blank), he can be in no better situation than the person who gave it in blank." But this qualification of Lord Mansfield's doctrine, that the blank signature is "a letter of credit for an indefinite sum," does not impress us as an improvement upon it. The paper, being limitless in its terms, is *primâ facie* limitless as to the authority it confers. The holder is invested with a general authority as to that paper, and the graphic phrase of Lord Mansfield describes it to perfection. High authorities, including Story and Parsons, concur in these views, which seem to us clearly the most philosophical: Daniel on Negotiable Instruments, 5th ed., vol. 1, sec. 147.

Our secs. 30 and 31 are to be found in the Negotiable Instruments Law, in force in the District of Columbia, and many of the States. See Daniel, Negotiable Instruments, vol. 2, p. 836.

As set out in sec. 56 of the Act, the bank actually became the

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holder of the note before it became overdue, when it was complete and regular on its face, without notice of dishonour, in good faith and for value, without notice of any defect in the title of the person negotiating it, whether such consisted in any of the particular defects set forth in sub-sec. (2) or any other defect of title such as those there enumerated, and therefore comes within the statutory definition of a holder in due course. As to its being complete and regular on its face, it complied with the definition of a promissory note in sec. 176.

After reflection, I have reached the conclusion that the decisions in *Hatch* v. *Searles*, 2 Sm. & Giff. 147, and *France* v. *Clark*, 26 Ch.D. 257, and similar cases, respecting the effect of blanks in negotiable instruments upon those taking them with knowledge of the imperfections, must be held as substantially overruled by *Lloyds Bank* v. *Cooke*, [1907] 1 K.B. 794, and *Fry* v. *Smellie*, [1912] 3 K.B. 282. The doctrine of estoppel is to be applied more strongly to negotiable instruments than to other instruments not strictly negotiable, such as transfers of shares. The persons who give out a promissory note or a bill of exchange with blanks owe a duty to the person taking it to inform them of the limitations on the authority of him to whom it is given for the purpose of being disposed of; and if they fail to do so, they are estopped from setting up those limitations.

It seems to be well settled in the United States that one who takes a negotiable instrument knowing that it contained blanks when it was delivered will not thereby be put on inquiry as to the extent of the agent's authority to fill those blanks, and may recover notwithstanding the authority given has been exceeded; and it has been held that, even where the instrument contains blanks when offered for negotiation which are filled up in the transferee's presence, or by the transferee himself, by the agent's authority, the transferee is not put on inquiry, 8 Corpus Juris, 733.

(It is to be noted that this is followed by the further statement that the rule seems to be otherwise in England, citing the cases of *Hogarth* v. *Latham*, *Awde* v. *Dixon*, and *Hatch* v. *Searles*.) I quote from a decision cited at the same p. 733:—

The supposition that the knowledge of the fact that the note is not filled up, should put any one taking the note on inquiry as to the authority of the agent, assumes as true the proposition to be established. It by no means follows that the possessor of a blank signature holds it under an agreement to fill it up for a particular amount, or dispose of it in a particular mode; a much more natural presumption is, that he is vested with a discretion in relation to it. . . . As ,therefore, the transaction may be what the holder of the blank represents it to be, or, at least, as there is nothing

in the mere possession of a blank note which would lead to a suspicion of unfairness or fraud, with no propriety whatever, could an innocent purchaser be so affected with notice of the transaction as to put him on inquiry of the maker: *Huntington* v. *Mobile Branch Bank*, 3 Ala. 186, 189.

I think this last quotation is important. The question here is whether the bank must be taken as put on inquiry because of the blank appearing in the note when offered to it. To hold affirmatively that the bank must be put on inquiry because there was a blank in the note is surely assuming the very thing that is to be established.

The bank in this case acted with due care in making inquiries as to the standing of the parties. What further, in reason, could it be asked to do? Is it common sense to say that the bank, because of the blank in the note, should have made further inquiries as to the authority of Lottridge to fill it in, when under sec. 31, he, by virtue of his possession of the note, had that authority? I think not. I think one object of the concluding part of sec. 31 was to enable holders to dispense with making such inquiries. It would be strange if the bank were held affected with suspicion, or put on inquiry, by reason of a blank in the note when the section declares that the person in possession of the note has *primâ facie* authority to fill up that very blank. And that would be so in the case of a blank that was "necessary" as well as one that is merely "material."

I have found the question here involved one of difficulty and it is not without hesitation that I differ from the other members of the Court. It does appear to me, however, upon my best consideration, that the note in question was negotiated after completion to the bank, a holder in due course, in compliance with the provisions of the statute and is therefore valid as against these defendants who by sending out to the world this printed note with an unfilled blank cannot be allowed to escape the consequences of their act.

I would allow the appeal.

HAGGART, J.A.:—I would not interfere with the trial Judge's finding of fact when there was contradictory evidence between Lottridge and the other defendants as to the question of interest.

Haggart, J.A.

In my opinion, it is a significant circumstance that the note in question was written by Lottridge at the time it was signed and endorsed by his co-defendants. The leaving of this blank I think

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corroborates the evidence of these co-defendants. For this reason *Lloyds Bank* v. *Cooke*, [1907] 1 K.B. 794; *Baxendale* v. *Bennett*, 3 Q.B.D. 525, 531; *British Columbia Land, &c.* v. *Ellis*, 6 B.C.R. 82, and the other cases relied upon by the plaintiffs are not applicable.

I would dismiss the appeal. *Appeal dismissed.*

ALTA.

S. C.

ROBERTSON v. BEADLE.

Alberta Supreme Court, Harvey, C.J., and Stuart and Walsh, JJ. June 18, 1917.

CONTRACTS (§ II D—190)—DRILLING—PRICE OF WORK.

Where one is employed to perform drilling work, and no price for the work has been agreed upon, the Court will fix a price that is fair.

Statement.

APPEAL by defendant from a judgment for plaintiff in action for services rendered. Affirmed.

C. F. Adams, for respondent.

Harvey, C.J.

HARVEY, C.J.:—The contract was to drill a hole in the ground. The purpose was to find water. The plaintiff is a well driller and his usual charge for his services is $2.25 a foot for a well in which water is found and which is cased and $1 a foot when no water is found, as must naturally often happen, and no casing therefore required.

The defendant's evidence is that the contract was to drill a well that would run 10 or 12 barrels of water a day and that nothing was said about a dry hole. The plaintiff doesn't remember just what took place.

When the plaintiff had drilled less than half the depth to which he subsequently went and wanted to stop, the defendant insisted on his going on and he did go on to what the trial Judge finds was the limit to which his outfit was capable of going. When the defendant insisted on his going on he knew what the plaintiff's terms for a dry hole were and he admits that if the plaintiff had drilled as far as he could and could find no water he ought to pay.

In my opinion the defendant, having employed the plaintiff to drill a hole he was bound to pay him the price agreed or in the absence of a price being agreed upon, a fair price for his work. The trial Judge has found specifically that there was no warranty or condition as to finding water and the result is that the price agreed on, if one was agreed on as the defendant states, was only a price for one contingency, and that for the contingency of no

water being found there was no price agreed on. The trial Judge has found the fair price to be $1 a foot, and that price was known to the defendant to be the plaintiff's usual charge during the progress of the work in the event of no water being found and with that knowledge he insisted on the plaintiff continuing.

Harvey, C.J.

I think the plaintiff is unquestionably entitled to be paid and I would dismiss the appeal with costs.

Walsh, J.

WALSH, J., concurred with HARVEY, C.J.

Stuart, J.

STUART, J.:—This action, begun in December, 1916, was "for work and labour supplied and services performed in and about the drilling of a well in the summer of 1913." The District Judge gave the plaintiff judgment for $264 and the defendant has appealed.

The plaintiff could not remember whether, when the arrangement was made, he had told the defendant what his charge would be, but he said his usual charge was $2.25 a foot for a well properly cased, in which water was found and $1 a foot for a dry hole. He denied that he had guaranteed to get water.

The defendant swore positively that the bargain was that the plaintiff was to bore a well in which not less than 10 barrels a day of water could be obtained and that nothing at all was said about a dry hole. He swore also that the plaintiff assured him that he could drill 500 ft. with his machine. He admitted that if the plaintiff had gone that depth and had not got water at all he would have felt obliged to pay him, though at what rate he did not say.

The plaintiff stopped at 264 ft. without having obtained water and because, with his machine, he could go no further. After waiting over 3 years he began action claiming $264 and interest.

The trial Judge said, "I find there was absolutely no guarantee or warranty or agreement by the plaintiff to strike water or receive no pay, and further, that there was no obligation resting on him to go beyond the capacity of his outfit."

In the face of the contradictory evidence I do not see how we can reverse, in this case, the finding of fact made by the trial Judge.

The position is, to my mind, rather unsatisfactory because the one party who pretended to remember the conversation at which the bargain was made was disbelieved. The other party, the person suing, could not remember what was said, though he

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denied that he had guaranteed to get water while admitting that water was mentioned in some way.

I had always been under the impression that the Court fixed a reasonable price for goods sold or services rendered only where it has been shewn, not that the price in fact agreed upon had been forgotten, but that there had been in fact no agreement at all. Here, one of the parties said he could not remember what was said, and the trial Judge disbelieved the account of the other. When the plaintiff was asked if he had had an agreement with the defendant about the price of the well he said: "I guess we had, sure," but he was unable to remember what it was.

This is the one quarrel I have with the reasons for judgment below. The trial Judge found that no agreement had been arrived at at all of any kind upon the subject of the price to be paid.

Usually when one witness swears that a thing did occur and another that it did not, if there is no other ground for choosing which to believe, the one swearing to the positive is accepted because the denial of the other, though honest, may be due to lapse of memory. Here, the one witness admits the lack of memory, while the other swears positively. Apparently the trial Judge did not like the manner of the defendant and thought he was lying.

However, I suppose, even where a price is shewn to have been agreed upon, but the Court, through its disbelief of one witness and through the lack of memory of the other, cannot now ascertain it, *i.e.*, as it is said, "the price is not ascertained," the only thing to do is to fix a reasonable price.

This the trial Judge did upon sufficient evidence. It seems to me to be impossible therefore to disturb his decision. But if I had been trying the case I should have wanted some reason for the delay in suing which resulted apparently in the plaintiff being unable to tell what his agreement was before I gave the plaintiff his costs in such a case. If he had stated definitely that the price had not been agreed upon at all, of course, the case would have been different.

For myself, upon a perusal of the evidence, I must say that I do not like the plaintiff's manner of telling his story. Neither do I like the absence of any agreement as to the right to stop the

work. Suppose the plaintiff had wanted to stop at, say, 150 ft., and the defendant were to say, "I believe you will get water at 160 ft. and I would rather pay $2.25 for that than $1 a foot for nothing;" and the plaintiff were to say, "I have taken risk enough. I don't think you will get water here at all and I have gone far enough at $1 a foot," what would decide their rights? Some such a situation did arise at about 125 ft. and the defendant insisted on the plaintiff going on; and it was because he did this after the plaintiff's workman, not the plaintiff himself, had said something about the plaintiff having made a lot of money drilling dry holes at a dollar a foot, that the trial Judge decided against him.

Where the relationship between the parties is that of master and servant, a reasonable rate of pay may, no doubt, be fixed by the Court if the agreement cannot be discovered. But where, as here, the relationship is that of independent contractors and the work done cannot really be said to be worth anything at all, that is, to the party receiving the results of it; although no doubt the other party spent valuable time and money in doing it, it seems rather peculiar to fix a "reasonable price" unless it is shown that it really was the intention of the parties that the work should be paid for whether abortive or not. But that is the exact point upon which the defendant's evidence was disbelieved and upon which plaintiff's memory failed him.

However, the remark of the defendant to Thompson that he had put so much money in it and he hated to quit and lose money, taken with his admission at the trial that he expected to pay, and would have paid even for a dry hole if the plaintiff had gone down 500 ft. as he contended the plaintiff had agreed to do, no doubt also influenced the trial Judge very much in deciding that the defendant ought to pay for the work done even though it was of no advantage to him.

On the whole I think the Court cannot do otherwise than dismiss the appeal, and I suppose it will have to be with costs.

Appeal dismissed.

B. C.

C. A.

MILNE v. SOUTH VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. June 5, 1917.

TAXES (§ III G—151)—REDEMPTION—TIME—MUNICIPAL ACT.

Under the British Columbia Municipal Act, as amended in 1906, ch. 32, sec. 156 (R.S.B.C. 1911, ch. 170, sec. 299), the owner's right to redeem land, sold by a municipality for unpaid taxes, exists for one year from the date of sale, and not until the expiration of the statutory notice or until the purchaser has demanded his deed.

Statement.

APPEAL by plaintiff by way of stated case from the judgment of Clement, J., 32 D.L.R. 184. Affirmed.

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

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I shall first refer to the recent history of the laws of this province concerning an owner's right to redeem lands sold by a municipality for delinquent taxes. Sec. 152 of the Municipal Clauses Act, as contained in R.S.B.C. 1897, gave the owner 1 year from the date of the Judge's order confirming the sale, or up to the date of delivery of the conveyance to the purchaser, to redeem his land. By statute of the following year, 1898, ch. 35, sec. 15, said sec. 152 was amended to give the owner 1 year from the date of the said order, or before a demand in writing by the purchaser for delivery of the conveyance. This was again, in 1906, by ch. 32, sec. 156, changed to its present form, and gives the owner 1 year from the date of sale simply.

When the collector sells land for delinquent taxes he is required to do the following, among other things:—(1) Give a certificate of sale to the purchaser *inter alia* stating that a deed will be given to him on his demand at any time after the expiration of 1 year from the date of sale if the land be not in the meantime redeemed; (2) Give notice to the person assessed and to the registrar of titles that the land has been sold for taxes; and (3) Give 3 months' notice to any persons, who, at the time of the same, appear on the records of the Land Registry Office as owners or holders of any registered charge of the collector's intention to execute the deed.

The facts are not in dispute. It is not denied that the notice of sale was duly given, or that an offer to redeem was not made within the year. The question for decision hinges upon this—that 3 months' notice above referred to was given before the period for redemption expired. That period expired on July 20, and the notice expired on the 27th of the same month. In these cir-

cumstances the owner claimed the right to redeem up to the said July 27.

Mr. Reid's two propositions of law were:—(*a*) that the right to redeem exists until the expiration of the notice; and (*b*) that it exists until the purchaser has demanded his deed.

The cases upon which he relies do not help him. When the land was sold, there being no question of the legality of the sale, the plaintiff's only right was the right to redeem. That right could, as I read what appears to me to be the plain and literal meaning of the statute, be exercised only within the year. When the year expired without tender of the redemption money, he ceased to have any rights at all in the premises: *McConnell* v. *Beatty*, [1908] A.C. 82. The 3 months' notice of intention to execute the deed may have been intended to give him an opportunity of shewing cause why it should not be executed at all, because of illegality or informality leading up to the sale or after the sale itself; or absence of, or informality in the statutory notice of the sale. There is no ambiguity about the language of the Act fixing the period of redemption, and no conjecture as to the object of the notice of intention to execute the deed can be indulged in to amplify or extend it. To give effect to Mr. Reid's argument would be to change the law back to approximately what it was before the said amendments. I would dismiss the appeal.

MARTIN, J.A.:—In my opinion the appeal should be dismissed, substantially for the reasons given by the Judge below. Martin, J.A.

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

MCPHILLIPS, J.A.:—I concur in the judgment of my brother Martin. See *Montreal Street Ry. Co.* v. *Normandin*, [1917] A.C. 170, at 174-8, 33 D.L.R. 195, 198, as to whether provisions in statutes are directory or imperative; also see *McConnell* v. *Beatty*, [1908] A.C. 82, referred to by Clement, J. *Appeal dismissed.* McPhillips, J.A.

GRAY-CAMPBELL, Ltd. v. REIMER.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 22, 1917.

1. GUARANTY (§ II—12)—DISCHARGE—IMPAIRMENT OF SECURITY—FAILURE TO REGISTER.

A failure to register a lien note, in consequence whereof a third person has acquired a good title to the property covered thereby, will discharge a guarantor from liability thereon.

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Statement.

2. PRINCIPAL AND AGENT (§ III—33)—DUTY TO FILL IN BLANKS—REGISTRATION.

The duty of an agent under the agency contract, to fill in blanks "to permit of proper registration," refers to the body of the instrument and not to the affidavit.

APPEAL by defendant from the judgment of Lees, Dist. J., in favour of plaintiff, in an action against the guarantor of a lien note. Reversed.

K. C. MacKenzie, for appellant.

H. H. Parlee, K.C., for respondent.

The judgment of the Court was delivered by:—

Walsh, J.

WALSH, J:—The defendant Drysdale who appeals is sued as the guarantor of what is described as a lien note made by the defendant Reimer to the plaintiff. Drysdale was the plaintiff's agent at Camrose, and as such he sold to Reimer a wagon for the purchase price of which the note in question was given and which reserves to the plaintiff the title, ownership and right to possession of the wagon until payment in full of the note. Under his contract of agency he agreed to guarantee and to endorse all customers' notes, and he accordingly by endorsement upon it guaranteed payment of this one. He sent it at once to the plaintiff's office in Moose Jaw, being the proper office in that behalf. The plaintiff neglected to register the note as required by the ordinance, and Reimer afterwards sold the wagon to a purchaser in good faith, who by reason of the non-registration of the note was entitled to hold it as against the plaintiff. Drysdale's defence is that the plaintiff's laches in this respect resulting as it did in the loss of the property in the wagon releases him from liability under this guarantee, its value according to the evidence being greater than the amount now owing upon the note. Lees, J., who tried the action, held that the appellant could not take advantage of the plaintiff's failure to register the lien note as he contributed to that failure by omitting to fill up the blanks in the affidavit of *bona fides* upon it as was his duty under par. 3 of his agency contract. It appears that the blanks in the note itself were properly filled up by the defendant before it was signed by Reimer but that he left unfilled all of the blanks in the affidavit of *bona fides*.

Dealing in the first place with this question I think that the Judge erred in the view that he took of it, and I so think for two reasons. In the first place, I do not read the paragraph of the agency contract to which he refers as imposing upon the defendant

the duty of filling up these blanks. By it he agreed "to take all note settlements upon the company's note form only (filling in all blanks completely so as to show catalogue and job numbers etc. to permit of proper registration.") This refers in my opinion to the body of the note and not to the affidavit. The words "to permit of proper registration," following as they do the words "so as to show catalogue and job numbers etc.," refer to the description of the goods required under that section of the ordinance which provides that "such writing shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished." But even if the Judge was right in the view that he took of the defendant's duty in this respect I am at a loss to understand how his failure contributed in any sense to the plaintiff's default in the registration of the note. The only blanks in the affidavit are those for the name, residence and description of the deponent at the top of it and those in the jurat and obviously none of the former could be filled in until it was known who was to make the affidavit and none of the latter until the deponent actually made the affidavit. An affidavit made by the defendant himself as agent of the plaintiff would have satisfied the ordinance which calls for "an affidavit of the seller or bailor or his agent" but the contract of agency not only does not in terms impose upon him the duty of meeting it but on the contrary seems to contemplate that he shall not do so, for pars. 2 and 3, which are the only paragraphs dealing with the question, both provide that all notes or other securities taken by him shall immediately upon settlement being taken be remitted by him to the plaintiff. That being so the affidavit of course must have been made by someone other than the defendant. The affidavit if not made by the defendant would of necessity be made by someone else and presumably by someone at the Moose Jaw office. How the defendant could have inserted in it the name and the residence and the occupation of this deponent and the date and place of swearing it I do not know, neither can I understand how the plaintiff could simply because these blanks were not so filled up have been led into the neglect which resulted in the loss of its property in the wagon.

What the defendant guaranteed was the payment by Reimer of a sum of money which he agreed to pay to the plaintiff as the

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purchase price of a wagon which by the terms of the contract under which this liability arose was to remain the property of the plaintiff until paid for and which it had the right to take possession of and sell if Reimer made default in his payments. I think that this was a security for the liability which the appellant undertook which he had a right to the benefit of, and as through the plaintiff's neglect to preserve it by registration, as was its duty, it cannot now be made available to him, he is thereby discharged from his liability. I have read the judgment of Gregory, J., in the *Northern Crown Bank* v *Walker* (1917), 2 W.W.R. 573, cited by Mr. Parlee, but I am quite unable to see how it or any of the cases cited in it help him at all. It is clear that the guarantors in that case were endeavouring to escape liability because of the plaintiff's failure "to effectively secure additional security which of his own motion he attempted to secure and which was not in the contemplation of either party when the guarantee was given." That is not this case at all, for here the security which the plaintiff lost by its neglect was one which was existing when the defendant went under this guarantee, for it was created by the very document under which the liability arose. Most of the authorities to which Gregory, J., refers are, in my opinion, from his statement of them, in favor of the view which I have expressed as to the effect of the plaintiff's neglect upon the defendant's liability.

It was suggested in argument that the defendant having this note in his possession and being an agent who could properly make the affidavit had it within his power to register it and it is therefore as much through his fault as that of the plaintiff that the property in this wagon passed to its *bonâ fide* purchaser. *Qua* guarantor he had no right to make the affidavit or register the note. Any right that he had in this respect was *qua* agent. I think in view of what I have said as to the duty that the plaintiff was under and the lack of legal obligation there was upon the defendant to register this note it cannot be that simply because the defendant if he had thought of it might have done so the plaintiff is thereby relieved from the consequences of its failure to do not only what it might but what it should have done.

I would allow the appeal with costs and dismiss the action as against the defendant Drysdale with costs.

Appeal allowed.

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Nova Scotia Supreme Court, Longley and Drysdale, JJ., Ritchie, E.J., and Harris and Chisholm, JJ. March 10, 1917.

WILLS (§ III G—140)—TRUST—CONTINGENT—GIFT—PERPETUITIES.

A bequest of a fund in trust for a daughter for life, and thenceforth in trust for "the child or children who being a son or sons attain the age of 21 years, or being a daughter or daughters attain the age of 25 years," is a contingent gift, and void for remoteness, as to the daughters, under the rule against perpetuities.

[*Hewson* v. *Black*, 33 D.L.R. 317, affirmed.]

Statement.

APPEAL from the judgment of Graham, C.J., 33 D.L.R. 317, in an action begun by originating summons for the construction of a will holding that the trusts expressed in said will were void for remoteness. Affirmed.

L. A. Lovett, K.C., and *G. H. Sterne*, for appellants.

F. L. Milner, K.C., for respondent.

Ritchie, E.J.

RITCHIE, E.J.:—I am in entire accord with the judgment appealed from, and, therefore, would dismiss the appeal. I would make the plaintiff's costs of the appeal payable out of the estate.

Harris, J.

HARRIS, J.:—I agree in the result with Chisholm, J.

If we could follow the cases of *Browne* v. *Browne*, 3 Sm. & G. 568 (65 E.R. 783), and *Riley* v. *Garnett*, 3 De G. & Sm. 629, (64 E.R. 636), we might decide this case in favour of the vesting of the property subject to be divested in case the children died being boys under 21 or being girls under 25, but the former of these cases is, I think, practically overruled; and the latter, if not overruled, at least turned on the fact that there the property in question was real estate, and the rule of construction adopted depended upon the law as to contingent remainders and partly upon the principle that as to real estate the Courts are always unwilling to hold the fee to be in abeyance. None of these considerations apply here and Lord Selborne, L.C., in *Pearks* v. *Moseley*, L.R. 5 App. Cas. 714, 722, says they have never been applied to gifts of personal estate.

The rule in *Edwards* v. *Hammond*, 1 B. & P., N.R. note 324 (127 E.R. 488), is that if real estate be devised to A. "if" or "when" he shall attain a given age with a limitation over in the event of his dying under that age, the attainment of that age is held to be a condition subsequent and not precedent and A. takes an immediate vested estate subject to be divested upon his death under the specified age. In a note to this case in Hawkins' on Wills,

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2nd ed., p. 289, the author quotes Mr. Hawkins' notes to his book made for the purpose of a second edition which unfortunately was never published. This is the note:—

It has been much disputed whether the rule in *Edwards* v. *Hammond* can be applied, where the attainment of the given age is made part of the description of the devisee; as if the devise be to all and every the children of A. *who* shall attain twenty-one, or to *such* children of A. as shall attain twenty-one with a gift over in default of children attaining that age. Notwithstanding *Browne* v. *Browne*, 3 Sm. & G. 568, the weight of authority appears to be against the extension of the rule to such cases: *Festing* v. *Allen*, 12 M. & W. 279; *Bull* v. *Pritchard*, 5 Hare 567; and the leading case of *Duffield* v. *Duffield*, 1 Dow. & Cl. 268. In *Duffield* v. *Duffield*, 1 Dow & Cl. 314, Best, C.J., said: "It is impossible to say that the words of this will do not import conditions precedent to the vesting these estates. The estates are not given to any particular children by name, but to such children as shall attain the age of twenty-one years; until they have attained that age no one completely answers the description which the testator has given of those who are to be devisees under his will; and, therefore, there is no person in whom the estates can vest."

The author of the second edition, after quoting the foregoing note, adds:—

The cases referred to by Mr. Hawkins and the subsequent cases of *Holmes* v. *Prescott*, 33 L.J. Ch. 264; *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; *Price* v. *Hall*, L.R. 5 Eq. 399; *Patching* v. *Barnett*, 28 W.R. 886; and *Re Edde's Trusts*, L.R. 11 Eq. 559, appear to have overruled *Browne* v. *Browne*, and also *Riley* v. *Garnett*, 3 DeG. & Sm. 629.

An examination of these cases confirms the statement of the author.

There is, I think, no doubt that a gift to the children who shall attain the age of 21 is *primâ facie* contingent. The sole question is whether the context qualifies the words of contingency and shows that the children were intended to take vested estates subject to be divested. I cannot find anything in this case to take it out of the general rule.

The cases cited by Mr. Lovett, K.C., in his able argument in support of the appeal are I think all distinguishable. They were cases where the context qualified the words of contingency. I take one of his authorities only to indicate what I mean. The case of *Turney* v. *Turney*, [1899] 2 Ch. 739, at first looks like this case but it is clearly distinguishable. There the will spoke of the children as having shares. Lindley, M.R., says at p. 745:—

But what to my mind removes the difficulty of holding these to be vested interests is this—that the testator treats the children of his son as having "shares" although they may die before attaining twenty-five. The words are, "In the event of the death of either or all the children of my

son James Neave before attaining twenty-five, then upon trust to pay the share of the child or children so dying to my son Horace." He treats the children of James who may die under twenty-five as having "shares" which he bequeaths.

Now, if we turn to the clause in the will of Dr. Hewson we find the words of the gift to the children are quite different. They are to "take the share to which his, her, or their parent would have been entitled if said parent had lived and attained the said required age."

The last words of this clause seem to me to be entirely inconsistent with a vesting in the first instance. The testator, in effect, says just the opposite. He refers to the shares as something which the parent was only entitled to upon attaining the required age.

And in the *Turney* case Lindley, M.R., points out that the word was "when," not "who" and he says, "If the word had been 'who' there might have been more difficulty." And again, he calls attention to the fact that the will provided that the children were to get the "interest on their respective portions" and he said, "I attach great importance to that phrase."

If one reads the *Turney* case carefully he must be impressed with the idea that it turned on these words and phrases which the Court considered as taking it out of the general rule.

There being nothing to show a contrary intention, I think the general rule must prevail and the appeal must be dismissed. I think the costs of both sides should be paid out of the estate.

Chisholm, J.

CHISHOLM, J.:—This is an appeal from the decision of His Lordship the Chief Justice, 33 D.L.R. 317, in proceedings begun by originating summons for the construction of that portion of the will of Charles W. Hewson, which deals with the residue of his estate. The testator was married twice; and of the marriage with the first wife he left one child, Florence R. Chapman, a married woman, who has an only child, Madeline Chapman, of about 12 years of age. The second wife survived the testator, and there is no issue of the second marriage. The testator's will is dated April 13, 1914, and he made a codicil thereto, dated January 8, 1915. He died on August 2, 1916, and the will and codicil were proved in common form on August 24, 1916.

The widow of the testator instituted these proceedings and asked to have it declared that the limitation in the clause of the will dealing with the residue, following the gift for life to Florence

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R. Chapman, is void for remoteness. The Chief Justice decided that the limitation is void, and has made a declaration to that effect. From that decision and the decree thereon, the said Florence R. Chapman and Madeline Chapman are asserting this appeal. The said clause in the will is as follows:—

And I further direct my said trustee or trustees to stand possessed of my said trust money or the stock, funds and securities whereon the same shall be invested as aforesaid (which money, stock, funds and securities are hereinafter referred to under the denomination of "the trust funds") upon trust during the lifetime of my daughter Florence R. Chapman, to pay two-thirds of the annual income therefrom to my daughter Florence R. Chapman during the term of her natural life for her separate use (said amount to be paid yearly) and to retain the other or remaining third part of said income, invest the same in good securities and pay the same and all accumulations thereof and all accumulated interest thereon to my granddaughter Madeline Chapman when she shall attain the age of 25 years; provided, however, that my said trustee or trustees are to pay thereout yearly to the said Madeline Chapman after she shall attain the age of 15 years, the sum of $1,000, and immediately after the death of my said daughter, Florence R. Chapman, as to as well the capital of the said trust fund as the income thereof to accrue due, thenceforth in trust for the child if only one or the children if more than one of my said daughter, Florence R. Chapman, who either before or after her death shall, being a son or sons, attain the age of 21 years or being a daughter or daughters attain the age of 25 years, provided always that the child or children of any deceased child or children of the said Florence R. Chapman is or are to take the share to which his, her or their parent would have been entitled if said parent had lived and attained the said required age, and if there shall not be any child of my said daughter who being a son shall attain the age of 21 years, or being a daughter shall attain the age of 25 years, or any child or children of the said Florence R. Chapman, then in trust for such other persons who at the death of my said daughter, Florence R. Chapman, shall be of my blood and of kin to me, and who under the statutes for the distribution of the personal estate and effects of intestates would be entitled to my personal estate if I were to die immediately after the death of the said Florence R. Chapman, intestate, except the heirs of Jane Gay and of the late William Hewson, who are not to share in said funds.

And the codicil contained the following clause:—

I hereby direct that the said sum of $1,000 hereinbefore directed to be paid by my trustees to the said Madeline Chapman, annually, is to be paid or withheld in whole or in part in the discretion of my said trustees who are hereby required to use their best judgment in making any payments. It being my intention that the said sum shall be used mainly for the maintenance and education of the said Madeline Chapman.

I also direct that my said trustees continue the said yearly payment until said Madeline Chapman attains the age of 25 years, providing, however, that they may withhold such payments or any part thereof should they deem it advisable.

It may be convenient in this place to mention a few facts, which an analysis of the will and codicil discloses, and to keep them in mind when the cases cited by counsel are considered.

1. The subject matter of the gift is the residue, and it is separated from the rest of the estate and vested in trustees. This circumstance has in some cases been regarded as an assistance in construing a will.

2. The gift is a gift of personalty, as to which class of gifts, it is said in Jarman on Wills (6th ed.) p. 1397:—

> The same general principles which regulate the vesting of devises of real estate apply to a considerable extent to gifts of personalty. Whatever difference exists between them has arisen from the application to the latter of certain doctrines borrowed from the civil law.

3. The attainment of the particular ages is introduced into the description of character of the objects of the gifts; the gift and the direction as to payment are not expressed in distinct clauses.

4. There is no direction to pay the whole of the interest to the legatees. The cases, therefore, where the gift of the whole interim interest to and for the benefit of the legatee has been held to vest the principal, have no application. There is a direction that the interest shall accumulate.

5. The trustees are given a discretion to apply $1,000 from the income towards the maintenance and education of Madeline, the daughter of Florence R. Chapman, after she attains the age of 15 years and until she attains the age of 25 years. If the testator had intended the gift to be a vested gift, there would be no need of directing maintenance out of her own money. The direction as to maintenance, however, does not according to the authorities assist in showing that there is a vesting.

6. There is mention of "the share" which the parent of any deceased child of Florence R. Chapman would be entitled to, if such parent had lived and attained the prescribed age.

7. There is a gift over in the event of failure of legatees of the described class.

The question to be determined is whether the gift to the child or children of Florence R. Chapman is a vested or contingent interest, and to determine that question it becomes necessary to consider whether the attainment of the ages mentioned is a condition precedent to any vesting. It has been mentioned by counsel, and it is well established by authority, that the will must in the first place be construed to determine whether there is a vesting, regardless of the existence of the rule against perpetuities; and then, if the gift is found to be contingent, we must

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see whether or not it comes within the rule. In *Pearks* v. *Moseley* (1880), 5 App. Cas. 714, the Lord Chancellor laid down the rule that in ascertaining whether a bequest falls within the rule against remoteness, the words of the testator are first to be taken, and their meaning determined; and it is then to be considered whether that meaning brings them within the operation of the rule.

In Gray on Perpetuities (3rd ed.), p. 497, the law is expressed in the following terms:—

> The rule against perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore, every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provision so construed the rule is to be remorselessly applied.

See also *Re Hume*, [1912] 1 Ch. 693, to the same effect.

The contention of Mr. Lovett, K.C., is that the gift vested in the child or children of Florence R. Chapman, with postponement of payment over until the required age is attained. That contention must be considered in the light of the cases in which limitations of like character have been discussed and decided. I shall take the line of cases upon which the plaintiff relies in their chronological order, and I shall afterwards take the cases upon which the defendants rely.

In *Bull* v. *Pritchard* (1826), 1 Russ. 213 (38 E.R. 83), the rights of the parties in the leaseholds of the testator were decided, the Master of the Rolls being of opinion that it would be premature to decide on the right of the parties under the will in the freehold estates of the testator. The testator bequeathed personal property to his trustees upon trust to pay the income to his daughter during her life and after her death to pay the principal unto all and every her children who should live to attain 23 years of age, share and share alike, with benefit of survivorship in case any of them died under that age; with limitations over, in case there should be no such child or children, or being such, all of them should die under 23 without lawful issue. The daughter had a child who died in the daughter's lifetime. The bequests to the children and the subsequent limitations were held to be too remote.

On the argument, it was urged that no distinction could be made in favour of the child who was in existence at the testator's death, nor of the children who might attain the age of 23 during

the life of Mrs. Bull, the life tenant, or within 21 years afterwards. "For," said the counsel: "the bequest is a general one to a class; the rule of law prevents it from operating in favour of the whole class; and the Court cannot split it into bequests to individuals or to some of that class; *Leake* v. *Robinson*, 2 Mer. 363, 388 (35 E.R. 979). The gift fails in toto."

Lord Gifford, M.R., observed, p. 218:—

It is clear that those children alone of the daughter were to take who attained the age of 23 years. The attainment of that age was necessary to vest an interest in any of them; and all who attained that age were to take. Consequently, the vesting of the interests might not take place till more than 21 years after a life in being. The Court cannot distinguish between the children born in the lifetime of the testator and those who were or might be born afterwards; and, therefore, the limitations over are too remote. . . . The attainment of the age of 23 is made a condition precedent to the vesting of any interest in the children.

Vawdry v. *Geddes* (1830), 1 Russ. & My. 203 (39 E.R. 78), is a case whose authority is questioned in the earlier edition of Jarman on Wills. It has been followed in later cases. The facts were these: The testatrix gave the interest of her residuary estate to her four sisters during their lives and directed that on their deaths, the interest of their respective shares should, at the discretion of the executor, be applied to the maintenance and education or accumulated for the benefit of the children of each of them so dying, until such children should respectively attain the age of 22 years, when they were to be entitled to their mother's share of the principal, with limitations over, in the event of the death of any of them under that age. It was held that the children of the sisters did not take a vested interest till they attained 22, and all the gifts, subsequent to the life estates given to the sisters, were void.

In *Dodd* v. *Wake* (1837), 8 Sim. 615 (59 E.R. 244), the testator gave £30,000 unto and amongst the children of his daughter who should be living at the time the eldest should live to attain the age of 24 and the issue of such of them as might be then dead, to be divided equally among them. At the testator's death the daughter had three children, aged 13, 12 and 9. The Court held that the testator intended only such of his daughter's children should take as should be living when the eldest for the time being should attain 24, and consequently the bequest was too remote.

The case of *Festing* v. *Allen* (1843), 12 M. & W. 279 (152 E.R. 1204), is the next case.

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Here the testator devised freehold estates to trustees, to the use of his grand-daughter M.H.J. for life: "and from and after her decease to the use of all and every the child or children of her the said M.H.J: who shall attain the age of 21 years and to their several and respective heirs, &c."

He directed that his trustees should stand possessed thereof, in trust, as to one moiety to permit A.J., the wife of his grandson T.R.B.J., to receive the rents and profits during her life for the maintenance and education of all and every child or children of his said grandson T.R.B.J., lawfully begotten, who should attain the age of 21 years, to hold as tenants in common and to their several and respective heirs, &c. A similar limitation was made as to the other moiety. The testator died in 1824 leaving him surviving his grand-daughter, the said M.H.J., the said A.J., the wife of T.R.B.J., who had four children and the said S.R., who had seven children. M.H.J. married in 1825 and died in 1833 leaving three children who were infants at her death. Some of the children of A.J., and S.R., attained the age of 21. The Court held that M.H.J. was a tenant for life, with a contingent remainder in fee to such of her children as should attain 21; and as no child had attained 21 when the particular estate determined by her death, the remainder was necessarily divested and the children took no interest in the estate divested. The limitations over also divested by the same event and the estate vested in the heir at law.

In *Bull* v. *Pritchard* (1847), 5 Hare 567 (67 E.R. 1036), the disposition of the freehold estates of the testator whose will, as to personal property, was construed in *Bull* v. *Pritchard*, 1 Russ. 213, was in question; and the limitation in remainder of the freehold property was held to be contingent as it had already been held as to the personalty. Counsel again contended that the decisions on the construction of limitations of personalty were not applicable to cases of real estate. The Vice-Chancellor did not give effect to that contention.

In *Boreham* v. *Bignall* (1850), 8 Hare 131 (68 E.R. 302), the limitation was substantially the same as in the case at bar.

A gift was made of the residuary estate in trust for such child or children of A. as being a son or sons or daughters should live to attain the age of twenty-five years, or being a daughter or

daughters should live to attain that age or marry, equally to be divided between them if more than one, but if but one, then the whole to that one, their, his or her heirs, &c., &c., provided that if any of them should die under such age or time as aforesaid leaving issue him or her surviving, such issue should take the same share as his, her or their parents, attaining such age as aforesaid would have done; with provision for applying income to maintenance, &c. This was held void for remoteness.

In *Southern* v. *Wollaston* (1852), 16 Beav. 166 (51 E.R. 740), the bequest was to A for life with remainder to such of his children as should live to attain the age of 25, equally, with an imperative direction that the interest thereof, while the person presumptively entitled should be under twenty-five, should be applied to his maintenance and a discretionary power of advancement. Held by Sir John Romilly, M.R., following *Vawdry* v. *Geddes*, and *Boreham* v. *Bignall*, that the limitation in remainder was void for remoteness.

In *Picken* v. *Matthews* (1878), 10 Ch. D. 264, 268, the limitation was different from the limitations which were construed in the cases already referred to. The testator gave his real and personal property upon trust for the children of his daughters who should live to attain 25 years. At his death one of his daughters had a child who had attained 25. It was held that the gift was not void for remoteness, but was a valid gift to such of the children living at the testator's death as should attain 25.

In *Pearks* v. *Moseley* (1880), 5 App. Cas. 714, already mentioned, the testator gave a fund to his daughter and her husband for life and after their deaths he directed the fund to be held in trust for the children of the daughter who should attain 21 years and the lawful issue of such of them as should die under that age, leaving lawful issue, which issue should attain 21, &c., &c., such issue to take only the share or shares which his, her or their parent or parent respectively would have taken if living. The testator gave a similar life interest to a son with exactly the same trusts for his issue, and in default over. The bequest was held to be void for remoteness.

It was decided that the bequest was to a class, and being to a class, that parts of it could not be severed, so as to treat one portion as good though the other was void.

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In *Re Edwards, Jones* v. *Jones*, [1906] 1 Ch. 570, 577, a testatrix gave all her real and personal estate to trustees in trust for her children who attained 21 or married, and if more than one in equal shares, with a gift over to other persons in the event of her death "without leaving any children surviving me." There was one child who survived the testatrix and died an infant.

Clause 3 of the will, upon which the question arose, was as follows:—

> I give all my property real and personal to my trustees in trust for my children or child who being sons shall attain the age of 21 years or being daughters shall attain that age or marry, and if more than one in equal shares as tenants in common.

The Court held that the child who survived the testatrix did not take a vested interest; that the gift over in another clause of the will did not take effect and that there was an intestacy.

This case is useful chiefly for the emphasis with which it is laid down that the meaning of clear unambiguous words is not to be cut down, unless the context shows an intention to the contrary.

I now pass to the consideration of the cases cited by Mr. Lovett, K.C.: *Re Edmondson's Estate* (1868), L.R. 5 Eq. 389; *Heasman* v. *Pearse* (1871), L.R. 7 Ch. App. 275; *Re Bevan's Trusts* (1887), 34 Ch. D. 716; *Butler* v. *Butler* (1896), 29 N.S.R. 450; and *Re Turney*, [1899] 2 Ch. 739.

Re Edmondson's Estate, supra. Here the testatrix bequeathed her residue, consisting wholly of personalty, upon trust, as to one-fifth to pay the income to H. for life and at his death to pay the share to the child or children of H., if more than one, equally; and as to the other four-fifths, upon like trusts, for the benefit of R., P., T., and A. In the event of the death of any one or more of them H.,R.,P.,T., and A. without leaving issue, she directed that the share or shares of him, her or them so dying should be a trust for the survivor or survivors of them.

Then she directed that none of the shares should be "so paid to or vested interests in" any of the said children of H.,R.,P.,T., or A. until he, she or they attain the age of 25 respectively; and that in the meantime it should be lawful for the trustees to pay any part of the income from such shares respectively towards the maintenance and education of such children respectively. Held that the word "vested" should be construed as "indefeasible"

and that the remainders to the children of H.,R.,P.,T., and A. vested in such of such children as were alive at the death of the testator or were born afterwards.

In *Heasman* v. *Pearse* (1871), L.R. 7 Ch. App. 275, it was held that no limitation after an estate tail is void for remoteness. The testator directed his trustee, after the failure of limitations for life and in tail, to sell his real estate and pay a share of the proceeds to the children of certain named persons. At the close of the will the testator added a proviso that if his real estate should be sold under the limitations thereinbefore contained, and the money should become payable to the issue of certain persons named, and any of such issue should then be dead leaving lawful issue, then the issue of such issue as should be dead should receive the share which his or her parent would have been entitled to if living.

The estate tail failed and the proceeds of the sale became divisible. It was held that the provison at the end of the will was not void for remoteness. There was no condition affixed to the gift to the children, and at the determination of the estate tail the legal and beneficial interests were ascertainable. I am unable to see that this case assists in the determination of the case at bar.

In *Bevan's Trusts* (1887), 34 Ch. D. 716, "Where," says Mr. Jarman, "the construction seems to have been influenced by a desire to evade the doctrine of remoteness," the testatrix gave all her property to trustees upon trust, as to the interest of a sum of £5,000 for her sister for life; and after the death of such sister the interest to be paid to the testatrix's daughter (she having first attained 25); and "if the daughter married with the consent of the executors and died 'leaving children the interest to be appropriated for the maintenance and education of such children . .' 'and the principal to be divided amongst them as they shall severally attain the age of 25 years,' after the death of the sister and in the event of the daughter marrying without consent, or marrying with consent, 'and dying without leaving issue,' then over."

The daughter survived the testatrix, attained 25, and in 1842 married with the necessary consent. The sister died in 1854, and the daughter in 1886, having had two children who survived her.

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It was held that the gift was not void for remoteness, and the fund vested in the children of the daughter living at her death.

The contention of the next of kin was that in the case of the children the attainment of the age of 25 years was of the essence of the gift; in other words, a condition precedent. The Court held, however, that upon the language of the will, the intention of the testatrix was that the gift should vest in the children of the daughter who were living at her death, but that the share of the children should not be paid over until each of them attained 25 years.

In *Butler* v. *Butler*, 29 N.S.R. 145, one of the gifts was to a person named, and the testator directed that the legatee might dispose of it by will at twenty-one, but the corpus was not to be paid over until he attained twenty-eight years. This was held to create an immediate vesting. The gift was not in the direction to pay.

Re Turney, [1899] 2 Ch. 739, which is the case, apparently, most favourable to defendants, the gift was to trustees upon trust to pay the income thereof to the testator's daughter and her husband for their lives; then, both as to capital and income, in trust for the children of the daughter when they should attain 25, but not before, and if more than one, in equal shares, and in case there should not be "any such child" the fund was to form part of the residue. The income was to be applied meantime. It was held that the grandchildren took immediate vested interests subject to be divested in case they did not attain twenty-five, and that the trusts were not void for remoteness.

In Jarman on Wills (6th ed.), p. 1415, we find after a review of most of the above and of some other cases the following summary:—

The following rules may be adduced from the foregoing authorities:—

1. A bequest to a class consisting of persons *who* attain a certain age or marry, etc., is contingent, and a gift of the intermediate income or of maintenance will not give a vested interest to any person before attaining that age or marrying, etc.

2. A bequest to an individual or a class of persons *on* attaining a certain age or marrying, etc., accompanied by a gift of the intermediate income or a trust to apply the whole of it for maintenance, will generally have the effect of conferring a vested interest. But, according to the latest decisions, if the bequest is to a class or number of individuals, an aliquot share of the income must be appropriated by the will to each legatee; it is not sufficient to direct the whole income to be applied for maintenance as a common fund.

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3. On the question whether a trust to apply the income of the property, or such part as the trustees think proper, for maintenance is equivalent to a gift of the whole income for the purposes of the foregoing rule, the decisions are conflicting. Assuming that the answer is in the affirmative, it does not follow that a mere discretionary power of maintenance has the same effect.

And Theobald on Wills (7th ed.), p. 582, dealing with gifts of this kind, says:—

It is important to distinguish a gift to a contingent class and a gift to a class upon a contingency; thus, a gift to children who attain 21, or to such children as attain 21, is a gift to a contingent class, and will only vest in those who attain 21, though there may be a gift of interest or other circumstances, which in a gift to a class upon a contingency, as, for instance, at 21, might have the effect of vesting the bequest.

I do not think the mention in the will of the "share" of a deceased child assists in the slightest degree in determining the construction of this will; nor does the gift over help, at all events, in upholding the contention of the defendants. The language of the limitation is clear; there is not, in my opinion, any doubt about the intention of the testator; where the direction creating the limitation is clear, and there is no direction in any other part of the will showing a contrary intention, we must apply the words in their natural sense. The gift is a gift to a contingent class, and the testator has expressed a clear intention that the gift shall vest only upon the attainment of the age mentioned in the will. The attainment of that age is introduced into the description of the objects of the gift, and the vesting is postponed until the attainment of the age. I cannot find any circumstances in the case to take it out of that category. The gift is remote and is void under the rule against perpetuities.

I think, therefore, the appeal must be dismissed. As to costs of the appeal, I assume that the parties are agreed that these costs shall be borne by the estate.

LONGLEY and DRYSDALE, JJ., concurred with Chisholm, J.

Longley, J. Drysdale, J.

Appeal dismissed.

Re DREWRY.

Alberta Supreme Court, Harvey, C.J., and Stuart, Beck and Walsh, JJ. June 21, 1917.

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S. C.

STATUTES (§ II D—125)—RETROACTIVENESS—MARRIED WOMEN'S RELIEF ACT—REPEAL—VESTED RIGHTS.

The repeal of sec. 10 of the Married Women's Relief Act (Alta. 1910, 2nd sess., ch. 18), which removes the qualifications as to the right to relief, is of no retroactive effect as to rights adjudicated upon and vested prior to the repeal.

APPEAL, by way of reference from Scott, J., on an application under the Alberta Married Women's Relief Act, resulting from

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the decision of the Privy Council, 30 D.L.R. 581, [1916] 2 A.C. 631, reversing 27 D.L.R. 716, 9 A.L.R. 363.

J. W. MacDonald, for applicant.

C. T. Jones, K.C., *contra*.

HARVEY, C.J.:—The widow of the deceased has applied for relief under the Married Women's Relief Act (ch. 18 of 1910).

The husband died in 1914, and an application was made by the present applicant for relief. The application was successful in our Courts, but on appeal to the Privy Council it was dismissed, the report of the reasons being found in 30 D.L.R. 581, [1916] 2 A.C. 631.

The reason the application was dismissed is that she was held to be excluded from the benefit of the Act by the provision of sec. 10. The reason for the present application in the face of that decision is that at the last session of the legislature sec. 10 was repealed.

The application was made to my brother Scott, when objection was taken that by reason of the facts stated no right to relief exists and this point was referred to this division for decision. In my opinion the objection is well taken.

The Act provides that the widow of a man who dies having made a will under which she receives less than she would have received had he left no will may apply to the Court for relief. Sec. 10, before its repeal, provided that any answer or defence that would have been available to the husband in an action for alimony would be an answer or defence to the application under the Act.

I am of opinion that the effect of that section was equivalent to an express qualification of the right to relief, in other words, the the right to relief was given only to widows against whom the defences mentioned in sec. 10 could not successfully be raised. The final decision against the applicant in the former application establishes, therefore, that she was not one of the persons given a right of relief by the Act.

The repeal of sec. 10 by removing the qualification extends the right to cases to which previously it was not granted, but there is nothing to suggest that its effect shall be retrospective and the general rule of interpretation is against giving legislation a retroactive effect. See Beal's Cardinal Rules (2nd ed.), p. 415 *et seq.*

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By reason of the facts which have been adjudicated upon by the Courts the persons named by the will as the beneficiaries of the testator have become vested with certain rights. To declare that the repeal of sec. 10 gave a right which did not previously exist, the enforcement of which would destroy in part, at least, the vested rights of the beneficiaries, would be to give an interpretation which would seem to work an injustice to avoid which the rule of construction against retroactivity has been laid down.

I am of opinion, therefore, that the rights of the applicant are to be determined by the law at the time of the death of her husband and that these rights having already been determined against her she cannot again be heard.

I would, therefore, dismiss the application with costs.

Stuart, J.

STUART, J., concurred with HARVEY, C.J.

Walsh, J.

WALSH, J.:—My first opinion of the effect of the repeal of sec. 10 was that the statute must upon this application be read as if it had never contained that section. Further consideration however has satisfied me that this is not the correct view.

In *Surtees* v. *Ellison*, 9 B. & C. 750, Lord Tenterden, C.J., said at p. 752:—

> It has been long established that when an Act of Parliament is repealed it must be considered (except as to transactions past and closed) as if it had never existed.

Kay v. *Goodwin*, 6 Bing. 576, Tindal, C.J., said at 582:—

> I take the effect of repealing a statute to be to obliterate it as completely from the records of Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law.

These propositions, so far as I have been able to ascertain, have never been questioned and the above quoted remarks of Tindal, C.J., were referred to with approval by Lord Robson in delivering the judgment of the Judicial Committee in the comparatively recent case of *Lemm* v. *Mitchell*, [1912] A.C. 400 at 406. The same result follows I think the repeal of a section of statute. It is to be taken as if it had never been enacted though it may still be looked at to give a proper interpretation to what is left of the statute. See *Attorney-General* v. *Lamplough*, 3 Ex. Div. 214, and particularly the remarks of Kelly, C.B., at p. 223, of Bramwell, L.J., at p. 227, and of Brett, L.J., at p. 231. Subsec. 48 of sec. 7 of the Interpretation Act however protects from

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the repeal of an Act any right existing, accruing, accrued or established before the time when the repeal takes effect and provides that in the absence of other provisions the repealed Act shall stand good and be read and construed as unrepealed in so far as is necessary to support, maintain or give effect to such right and the enforcement thereof. Now, before the repeal of sec. 10 and because of that section it had been finally adjudged that the present applicant was not entitled to relief under the Act. That decision had vested in the beneficiaries under the testator's will the right to enjoy his benefactions absolutely free from any claim of his widow under the Act. That I think is a right which is by the above mentioned sub-section saved from the repeal, and because of that I am of the opinion that such repeal cannot avail the applicant.

Without considering the broad question with any great care, I think that *Lemm* v. *Mitchell*, *supra*, is a strong authority in support of the view that the applicant's claim is *res judicata*.

I agree that the application fails and that it must be dismissed with costs.

Beck, J.

BECK, J. (dissenting):—The Married Women's Relief Act (ch. 18 of 1910, 2nd. Sess.), provides that:—

2. The widow of a man who dies leaving a will, by the terms of which his said widow would, in the opinion of a Judge before whom the application is made, receive less than if he had died intestate, may apply to the Supreme Court for relief.

10. Any answer or defence that would have been available to the husband of the applicant in any suit for alimony shall equally be available to his executors or administrators in any application made under this Act.

12. No application shall be entertained under this Act after six months from the death of the husband.

This was as the statute stood when Mrs. Drewry made her application, disposed of by Walsh, J., on December 16, 1915, and January 6, 1916, and by the Appellate Division on March 24, 1916 (27 D.L.R. 716, 9 A.L.R. 363). The Judicial Committee of the Privy Council on July 21, 1916, of course having regard to the law as it stood when the case was disposed of in this Court, reversed the decision of this Court. On April 10, 1916, sec. 12 was amended by adding the following words "except as to any portion of the estate unadministered at the date of the application."

The effect of this amendment doubtless is that a widow may apply after the expiration of 6 months from her husband's death,

but in that case she will be limited to relief out of any unadministered part of the estate.

At the last session of the provincial legislature (1917) sec. 10 was struck out.

The effect, it seems to me, is in no way to affect the grounds which an applicant must state as her grounds for relief but to take away from the executors or administrators with the will annexed a certain "answer or defence." The applicant's former application was defeated solely by reason of this "answer or defence," which is no longer available. And because the amendment of the Act by repealing sec. 10 does not change the grounds of relief, which are required to be affirmative only, but only removed a ground of defence, the applicant may, it seems to me, again apply and have her remedy against the unadministered portion of the estate. Clearly, it seems to me that if the former proceedings had not been taken at all and the present application had been made, as it was, after the repeal of sec. 10 the application would not be open to the answer or defence to which it would have been open up to the date of the repeal of that section. That section, it seems worth while to repeat, did not touch the grounds of the application for relief but allowed, so long as it stood, a certain defence being set up. The consequence of a delayed application is, in the plain words of sec. 12 as amended in 1916, only to restrict the applicant's remedy to the unadministered portion of the estate; and the express words of that amendment indicate clearly that only in the administered portion of the estate was it intended that the beneficiaries under the will should be deemed to have "vested rights;" the unadministered portion being always subject to the chance of the widow making a claim.

Then it is vigorously urged that the judgment in the former proceedings constitutes an estoppel by record. In my opinion this is not so. That judgment undoubtedly is conclusive upon the issue decided, namely, that at the date of the hearing such facts existed as to constitute a defence or answer under sec. 10. That is all.

The general question of estoppel by record is treated in 13 Hals., "Estoppel," from which I take some general propositions.

466. But in all cases where the cause of action is really the same, and has been determined on the merits and not on some ground (as the non-expiration of the term of credit) *which has ceased to operate when the second action is brought,*

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the plea of *res judicata* would succeed. . . . If there be matter subsequent which could not be brought before the Court at the time, the party is not estopped from raising it.

486. . . . A judgment may have passed in favor of the *defendant* on dilatory grounds or on one only of many alternative defences; and circumstances may have arisen entitling the plaintiffs to judgment, which were not in existence when the first action was brought.

In 23 Cyc., tit "Judgments," at p. 1290, it is said:—

The estoppel of a judgment extends only to the facts in issue *as they existed at the time the judgment was rendered*, and does not prevent a re-examination of the same questions between the same persons, where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants.

If the present were an action commenced by a statement of claim it is obvious that a defence of estoppel would require to be so drawn as to allege that the issue now in question was determined in favour of the plaintiff (Bullen & Leake, Prec. Pleadings, tit, "Estoppel." See *Chisholm* v. *Morse*, 11 U.C.C.P. 589; *Dean* v. *Gray*, 22 U.C.C.P. 202). But that could not be established in the present proceedings. The ultimate decision in the former proceedings decided nothing as to the grounds of the plaintiff's case; but only that a defence, then, but not now, available was proved. It seems to me quite untenable to say that a defence of estoppel is open. Any argument in support of it seems to get back to a question of the retroactivity of the section repealing sec. 10; on which I think I have sufficiently expressed my opinion.

I think the applicant is entitled to succeed and Scott, J., who referred the matter for the opinion of the Appellate Division, should be so advised. *Application dismissed.*

MAN.
C. A.

MAPLE LEAF MILLING Co. v. COLONIAL ASSURANCE Co.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. June 5, 1917.

INSURANCE (§ VI A—240)—FALSE PROOF OF LOSS—WAIVER—PARTICIPATION IN ADJUSTMENT.

A false statement by the insured in his statutory declaration as to the loss, by which the actual loss is greatly exaggerated, vitiates the claim under a condition to that effect in the policy; an appraisement of loss, or an endeavour to arbitrate the claim by an adjuster for the insurance company, does not operate as a waiver of, nor could he so waive, the condition.

Statement.

APPEAL from the judgment of Macdonald, J., 22 D.L.R. 822, in favour of plaintiff, in an action on a fire insurance policy. Reversed.

W. L. McLaws, for appellant; *E. Anderson*, K.C., and *R. D. Guy*, for respondent.

PERDUE, J.A.:—The defendant, an insurance company incorporated under the laws of the Province of Manitoba, issued the policy in question insuring the goods of W. Denby in his store at Burks Falls in the Province of Ontario, in the amount of $1,500. I think the conditions indorsed on the policy form part of the contract and are binding on both parties to it.

The insurance was placed on the goods by an agency in Toronto and the policy was one of five issued by different companies, the aggregate amount of the insurance being $6,000. The policy sued upon was assigned to the plaintiffs, for the benefit of the creditors of the insured, subsequently to the occurrence of the fire.

Two defences are relied on: first, that the fire was of incendiary origin; secondly, that one of the conditions of the policy required the insured to furnish an account of the loss with a statutory declaration that the account was just and true, that another condition provided that any fraud or false statement in the statutory declaration should vitiate the claim; whereas in fact the statement of loss in the declaration of the insured was false in a material part.

The circumstances surrounding the origin of the fire are suspicious, but I agree with the trial Judge that there is not sufficient evidence to establish that the fire was of an incendiary character.

In the proofs of loss furnished by the insured the value of the goods completely destroyed, of which no remnants were left, was placed at $2,000. The trial Judge finds that no such quantity of goods was totally burnt up. My brother Cameron has fully discussed the evidence on this point, and has given his reasons for coming to the conclusion that the claim as to the $2,000 item could not be supported. I fully agree with this conclusion. But the trial Judge was of opinion that because the defendant company was only liable for $1,500 on the policy and as the loss was clearly much more than that amount, the false claim for $2,000 did not matter. With great respect, I cannot agree with that view. The amount of the loss proved apart from this claim of $2,000 was $4,186.35. The total insurance was $6,000, for one-quarter of which defendant was liable. All the companies who had insured the goods would have to con-

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tribute ratably to compensate the insured for the amount of the loss. If the $2,000 were eliminated the defendant would, when the question of contribution was worked out, be liable for one-quarter of $4,186.35 instead of one-quarter of $6,000. The false claim for $2,000 for goods of which no traces were left, not only swelled the loss so that the defendant would be liable to contribute more in order to reimburse the insured, but was also aimed at increasing in a similar manner the amount to be contributed by each of the other companies which had granted insurance on the property. By the addition of the $2,000 claim the whole loss was made just sufficient to exhaust the total amount of the insurance on the property with a small sum over. I think there was a false statement deliberately and purposely made, and that a fraud was intended by the insured.

Under the fifteenth condition of the policy, "any fraud or false statement in a statutory declaration in relation to any of the above particulars (which would include a just and true account of the loss) shall vitiate the claim." In order to escape the effect of this condition the plaintiff claims that it was waived, first by an appraisement of the loss in which the defendant took part, and, secondly, by an arbitration. There was no actual appraisement. Grant, who represented the several insurance companies, and Ross, who acted for the insured, together examined the stock of goods after the fire, but disagreed over this item of $2,000, Grant refusing to admit that any goods had been burnt "out of sight." The arbitration referred to took place before a County Court Judge in Ontario. It was claimed by defendant, and I think justly claimed, that there was no authority for this arbitration and that it was irregular. The defendant took no part in it. The trial Judge rejected the alleged award. The defendant was in no way bound by it, and it could not operate as a waiver.

Condition No. 20 of the policy provides that:—

> No condition of the policy, either in whole or in part, shall be deemed to have been waived by the company unless the waiver is clearly expressed in writing signed by an agent of the company.

Grant, the defendant's adjuster, had no authority to waive any of the conditions of the policy, even if there had been evidence that he had done anything, which, apart from condition No. 20, would operate as a waiver of any condition in the policy.

See *Logan* v. *Commercial Union Ins. Co.*, 13 Can. S.C.R. 270, 277; *Atlas Assurance Co.* v. *Brownell*, 29 Can. S.C.R. 537. Condition No. 15 is a part of the contract of insurance between the insured and the defendant. There was a false statement made by the insured in his statutory declaration as to the loss by which the actual loss was increased almost fifty per cent., namely, from $4,186.35 to $6,186.35. The effect of this would be to increase the amount to be contributed by defendant and other companies which had insured the goods. This is not a case of a trivial error or of a *bonâ fide* mistake, or one of simple overvaluation of the goods burnt. It is one in which a large claim was fraudulently and deliberately introduced in respect of goods which, to the knowledge of the insured, had no existence. This fraudulent claim was stated by the insured in his declaration as to loss to be just and true. I think that under Conditions Nos. 15 and 20 the whole claim is vitiated. I would refer to *Levy* v. *Baillie*, 7 Bing. 349 (131 E.R. 135); *Britton* v. *Royal Ins. Co.*, 4 F. & F. 905; *Harris* v. *Waterloo Mutual Fire Ins. Co.*, 10 O.R. 718; *Claflin* v. *Commonwealth Ins. Co.*, 110 U.S. 81, 95; *Dolloff* v. *Phoenix*, 19 Atl. R. 396.

The appeal should be allowed and judgment entered for defendant.

HOWELL, C.J.M., concurred with Perdue, J.A. Howell, C.J.M.

CAMERON, J.A.:—This action was brought on a policy of fire insurance issued May 22, 1912, by the defendant company in favour of W. Denby, of the town of Burks Falls in the Province of Ontario, upon merchandise therein described against loss or damage by fire, not exceeding the sum of $1,500. The stock of merchandise in question was damaged by fire August 17, 1912. The plaintiff company sues as assignee from Denby under a written assignment dated September 30, 1912. The action was tried by Macdonald, J., who entered judgment for the plaintiff for the full amount of the policy. Cameron, J.A.

The policy in question is endorsed with what appear as the "Statutory Conditions" prescribed by ch. 103, R.S.M. 1913. Those statutory conditions, however, apply only to property in this province (sec. 3). The trial Judge took them as attached to the policy by virtue of the Ontario Insurance Act. They are, however, unquestionably part of the policy upon which the

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plaintiff brings this action, and form conditions which must be complied with by the insured in so far as they impose obligations on him.

Condition 13 provides that any person entitled to make a claim under the policy is to observe the following conditions:—

(*a*) He is forthwith after loss to give notice in writing to the company;

(*b*) He is to deliver as soon after as practicable as particular an account of the loss as the nature of the case permits;

(*c*) He is also to furnish therewith a statutory declaration declaring: (1) That the said account is just and true; (2) When and how the fire originated, so far as the declarant knows or believes; (3) That the fire was not caused by his wilful act or neglect, procurement, means or contrivance; and (4) The amount of other insurances; (5) All liens and encumbrances on the subject of insurance; (6) The place where the property insured, if movable, was deposited at the time of the fire.

Condition 15 provides that any fraud or false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim.

The stock of goods was owned by Denby, who, on September 25, 1912, made a statutory declaration (ex. 3), stating therein that the property was damaged and destroyed by fire to the amount of $6,186.35, as set out in the schedule attached, and that the total insurance on the same was $6,000, as set out in a schedule also attached. The first schedule referred to shewed:—

Loss by damage		$2,891.00
Goods estimated rendered valueless	$700.00	
Stock identified but totally destroyed in addition	595.35	1,295.35
		$4,186.35
And goods destroyed and no remnants (estimated)		2,000.00
		$6,186.35

On this branch of the subject the trial Judge says:—

I have no hesitation in holding that no such quantity of goods was totally burned up. The evidence on this point is conflicting, but there is no doubt that this estimate is entirely out of proportion to the actual loss (22 D.L.R. 825).

He adds:—

Now, does the statement in the statutory declaration claiming goods destroyed and no remnants to the value of $2,000 vitiate the claim? Had the claim been for $6,000 I think it would, but it seems to me that the statement must be material to the claim, and I cannot see how a claim for $1,500 on an ascertained loss of over $4,000 even if loss estimated at $6,000 can have such an effect (p. 825).

His finding according to this would appear to be that the statement in the declaration of an estimated loss of $2,000 was

wholly disproportionate to that actually sustained, that it was such a deliberate misstatement as would vitiate the claim had the policy been for $6,000. But his previous quotation from the case of *Norton* v. *Royal Fire Ins. Co.*, 1 Times L.R. 460, would indicate on the other hand that the claim for the $2,000 alleged to be wholly destroyed was an "excessive and exaggerated claim" rather than a claim "deliberately made . . . to obtain from the company money he (the insured) has no right to." I refer to the decision in *Norton* v. *Royal Ins. Co.*, later.

In dealing with the evidence, defendant's counsel went at length into that portion of it which was directed towards shewing that the fire was of an incendiary origin. The Court was of the opinion that this was not established, although the circumstances surrounding the fire may have been such as to arouse suspicion. It was, however, further urged that even if this were not established, these circumstances ought to be taken into consideration in determining the further point that the false statement in the declaration was such as to vitiate the claim. But if the fire were not of incendiary origin and if that issue is determined favourably to the plaintiff, there seems no clear ground on which the circumstances, suspicious though they may be, surrounding the origin of the fire can be connected with the alleged fraudulent statement of damage resulting therefrom.

The second and main point which defendant's counsel presented was that it was impossible that goods were totally destroyed by fire to the amount of $2,000 as claimed in the statutory declaration.

According to Davidovitch (plaintiff's manager and son-in-law) the stock-taking in June, 1912, shewed goods to the amount of $11,446. Ross, who was acting as adjuster for Davidovitch or (Denby) and who came to Burks Falls after the fire, said there must have been more than $9,000 worth of goods the day before the fire. Grant, who acted as adjuster for the company, thought there must have been more than $9,000 worth, and found $4,700 worth of stock after the fire, practically the same as Ross. The two fixed $595 as the value of the debris. It was in estimating the value of the goods destroyed that these appraisers failed to agree. When an adjustment of the claim for goods totally destroyed was brought up "Grant said $100 and Davidovitch said $2,000, Grant said $10 on the groceries."

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The result was that no adjustment was reached. Ross states that there was no way for him to arrive at any decision as to the value of goods destroyed.

According to the application for insurance the fixtures and stock were valued at $11,000. The fixtures were not insured.

The contention that a false statement made in a statutory declaration furnished a company in support of a claim under a fire insurance policy is a matter of defence, which must be clearly established. In *North British Mercantile* v. *Tourville*, 25 Can. S.C.R. 177, it was held by the Supreme Court that where an insurance policy is to be forfeited if the claim is in any respect fraudulent, it is not essential that the fraud should be directly proved; it is sufficient if a clear case is established by presumption, or inference or by circumstantial evidence. The rule has been recently laid down by the Chief Justice of Ontario in *Adams* v. *Glen Falls Ins. Co.*, 37 O.L.R. 1 at 16, 31 D.L.R. 166 at 176:—

> It is a very serious thing to find a man guilty of fraud and perjury; and, to justify such a finding, the evidence ought, if not such as would warrant a conviction for fraud and perjury, to be at least clear and satisfactory and to leave no room for any reasonable inference but that of guilt.

Citing *Rice* v. *Provincial Ins. Co.*, 7 U.C.C.P. 548; *Park* v. *Phoenix Ins. Co.*, 19 U.C.Q.B. 110; and *Parsons* v. *Citizens Ins. Co.*, 43 U.C.Q.B. 261.

There are facts and circumstances in connection with the claim of $2,000 for loss of goods wholly destroyed that compel consideration. I have read and re-read the evidence of Davidovitch on his examination-in-chief, and it strikes my mind as so indefinite and uncertain that, standing by itself, it would not justify a verdict for the plaintiff for the $2,000 for goods alleged to be wholly destroyed. It is of such a character that it arrests attention. There is a complete lack of particulars such as in all reason should be furnished to fix the company with liability. That consideration weighs strongly in a case of this kind, demanding the utmost good faith, where the information is necessarily in the sole possession of the plaintiff. Then, when I take up the cross-examination of the plaintiff (or rather of Davidovitch, his manager) I find it most unsatisfactory. He adds to and varies the list already given. He accounts for goods being consumed at the time of the fire by saying they must have been there. As to the claim for lace curtains, he thinks there must have been some

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bought from Finkelstein after last stock-taking and before fire. If so, he says, they were bought for cash and wouldn't show on the books. "There must have been" lace curtains bought at that time. As for children's dresses, he doesn't remember their value. The last stock-taking showed $2\frac{1}{2}$ doz. while at the fire there were ten or eleven or twelve dozen. The difference, according to him, was made up of dresses that were made up by a woman to whom material was given for that purpose. As for silk blouses or waists all consumed he does not remember how many there were or whether any were bought after last stock-taking. He doesn't know whether any were bought after the stock-taking, but he is sure there were some, though apparently only cotton blouses were in the stock-taking. As for raincoats and cravanette coats, while the last stock-taking showing $121 of the former and $21 of the latter they were, he asserts, entirely consumed and not a sign left and he doesn't think he bought any after the stock-taking. As for the ladies' skirts they were on the list at $141.05. and were entirely consumed except perhaps one or two. It is at this stage he says there was nearly $4,000 worth in all lost. He further mentions for the first time that the groceries were entirely burnt out, but qualifies this by saying that they were completely damaged and had to be thrown out. The $817.72 worth he had in June was a small amount. The amount at time of the fire was larger, but how much larger he does not state. When asked how it was that the amount of groceries at the time of the fire was larger than in June he says,—"There was very likely an order under way." And of these groceries, including canned goods, he says they were not part of the debris, which was composed of only dry goods and clothing. When asked here what else was burned out of sight he says he cannot remember the goods or the class of goods. Cross-examined as to two ladies' fur coats and a "bishop's coat," he had at the last stock-taking he can't remember whether these were burned out of sight. The furs he speaks of as being packed in boxes yet he didn't remember seeing them afterwards, only in small pieces. But all that were not in the debris were burnt out of sight. He wouldn't be surprised if there were 2 or 3 robes burnt. The biggest part of the furs was burnt. There was underwear for winter and it "must have been down there," that is where the fire was hottest.

It is to be particularly noted that Davidovitch states that the

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most valuable goods were in the part of the building, the south-west corner, where the fire was hottest and were those totally consumed. Another significant fact is that all the invoices were burned.

Another fact to be borne in mind is the short time the fire lasted. The evidence on this point is naturally conflicting. Wilson, a C.P.R. baggageman, spoke to Davidovitch when the latter was leaving his store, and heard the alarm not more than fifteen minutes after. After that the hose was in the door in ten minutes. He says the fire was over in half an hour. The boy Peck was in the store on the evening of August 17, to buy cigarettes. He went out with Ward, the boy who worked in the store. They ran back when the alarm rung and the fire was out in ten or fifteen minutes, he says. Gray, a clerk in Burks Falls went into the store with Peck. It was not more than seven or eight minutes before he heard the alarm and the fire was out in ten minutes. Fowler, who has the building adjoining that in question, saw Davidovitch that night about 11 o'clock, returned to his own building and heard the alarm 5 or 6 minutes after. He started to put blankets on his own windows and when he had one put on the fire was out. Dr. Partridge says it was ten or fifteen minutes from the time he saw fire until the hose was playing on it. Ward, the boy who worked in the store, was there five minutes before the alarm and says the fire was out in half an hour. Kennedy, the chief of the fire brigade, says the fire was out in fifteen minutes after he heard the cry of fire. Gowling, a witness for the plaintiff, says the fire was out in 10 or 15 minutes after the firemen got to the store. D. McIntyre says the fire was pretty nearly out 20 minutes after the alarm. Davidovitch gives a wholly different account, says it was 25 or 30 minutes before he got back to the store and that the fire was not out until 2 o'clock. I think we must disregard his evidence. The evidence of the disinterested witnesses points to the conclusion that the fire was of short duration. It was discovered in a few minutes after it started. The alarm was promptly given and the hose was playing on it in a few minutes thereafter, and I would say that Kennedy's evidence that it was out in 15 minutes thereafter is approximately correct.

The stock-taking in June showed goods amounting to $11,446.64, including $950 flour and feed in another building.

When Ross came he attempted to reach the value of the goods just previously to the fire by going over the stock-taking of June, finding out the sales made since last stock-taking and examining the bank-book. He found as a result that there must have been over $9,000 worth in the store at the time. This was also Grant's conclusion. Ross arrived at $4,719.09 as what he found after the fire, exclusive of $595, made up of goods remnants of which were found in the debris. This made a difference of nearly $4,000 to be accounted for. Davidovitch says, "that is what we were figuring on, three thousand to four thousand dollars worth of goods at the time." In endeavouring to account for the evident discrepancy, counsel for the plaintiff submits the following figures: Goods on hand, $5,314; flour and feed, $950; special summer sale, $2,000; burnt out of sight, $2,000; fixtures, $250 = $10,514.

This leaves out of account the purchase alleged by Davidovitch to have been made by him during the period between the stock-taking in June and the fire. At one place he speaks of $500 of goods that came in from Duncan & Mitchell, and it takes into account the $2,000 for goods burnt out of sight. Davidovitch gives vaguely the amount of the summer sale as $1,500 to $2,000.

Now the boy Ward states in his evidence that there might have been small articles burnt out of sight, but not any coats or anything. He was in the store working for two weeks after the fire. On cross-examination it is true he says he did not bother much about the matter, but the statement made by him no doubt records his impression of the state of affairs at the time, and is entitled to weight.

Fowler, the merchant occupying the premises next to the plaintiff's to the south, was in the store the morning after the fire, says if there were any goods burnt out of sight, it would be a very small amount, because the fire was burning such a short time.

Adamson, a fire adjuster, who was in the building a day or two after the fire examining it to report on it, says that he thought there was scarcely anything burnt out of sight.

Grant, who had large experience in these matters, and made a detailed examination, was of the opinion that it was "utterly impossible" that goods to the extent of $2,000 worth were burnt out of sight.

It is evident that goods of the various classes alleged to have

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been wholly consumed were such in themselves and in the manner in which they were stored that they would, with few exceptions, not burn quickly and would leave remnants when burned. The evidence of Code, assistant fire chief of Winnipeg, of many years experience, is to that effect. So also is that of Adamson. Grant's opinion, as I have stated, is that it was impossible that $2,000 worth of goods could have been utterly destroyed. I must say that Grant's evidence seems to me to carry conviction. Ross makes no real contradiction of Grant's statement on this point.

Attention was called to a comparison between some of the figures in the stock-taking of June and the results of the examination of the debris as shown in ex. 10. I have gone through the items as well as I could. I find furs in the stock-list, children's dresses, $15.65; in the debris $13.65, although said to be completely destroyed. "Pants" and suits, shown in the stock at a large amount, were only found in the debris to the extent of $4.75. And yet these are notoriously slow to burn, as can also be said of furs of which they found no less than $107.50 worth represented in the debris. Davidovitch is cross-examined as to this debris list, exhibit 10, which was prepared by Ross. He is asked whether there are any more furs than those mentioned in the debris list that he found evidence of and he replied, "I don't remember whether we found them or not. I know there was a lot more." Later he is asked "Now what was the value of the furs you had before the fire?" He replied, "I couldn't tell you, because we don't sell many fur goods in the summer time." And then he asserts that he did buy some between the stock-taking and the fire "but there were no other goods came in." At p. 122 he says he did not buy any furs. His cross-examination on the various items contained in the debris list is halting and unsatisfactory throughout.

The total insurance on the goods in question, effected by the insured, was $6,000, there being 4 other policies aggregating $4,500 in addition to that issued by the defendant company. The addition of the sum of $2,000 for goods wholly destroyed brought the amount claimed to $6,186.35, as appears by the plaintiff's statement of loss.

There is evidence of the plaintiff's indebtedness at the time of the fire to the extent of $2,400 or $2,500, and also $6,000 or $7,000 in addition.

After reviewing as closely as possible the evidence on this branch of the case, I cannot avoid the conclusion that the claim for $2,000 worth of goods totally destroyed had no substantial basis in fact. That is the finding of the trial Judge. But I cannot agree that this claim was a mere exaggeration or excess estimate. It was a claim for an amount for the loss of goods that were substantially non-existent and for which, if conceded, the defendant company would in part be liable, and it was deliberately made. Such a false statement in the declaration must, on the authorities referred to later, vitiate the whole claim under condition 15 of the policy. That being the case, the fact that it affected in this case a policy for $1,500 only, while there were goods damaged of more than that value, cannot relieve the plaintiff from the penalty imposed by the conditions. The additional claim of $2,000 was made in respect of total insurance for $6,000 of which the defendant company held one-fourth. The policies were effected at the same time, continued in force, and all were proportionately affected by the inclusion of the additional $2,000. It seems to me we must regard the transaction as a whole of which the policy of the defendant company formed a part.

It was urged that the company is not in a position to object to the proofs of loss as these were waived. Reference was made to an alleged arbitration held by the County Court Judge at Parry Sound, Ont. But the company took no part in this proceeding which was not authorized by condition 16 of the policy as the same is varied thereon. Another ground relied upon was the appraisement or investigation made by Grant acting for the company. We were referred to Bunyon on Fire Insurance, 6th ed., at p. 250, where it is stated that "the performance of this condition, *i.e.*, as to notice and proof of loss, may be waived by the acts of the insurers or their agents: *e.g.* (1) if they retain for a long time, without objection, proofs of loss; (2) if they absolutely deny their liability for any loss, and refuse to pay, (3) if they make an independent investigation." This last proposition seems to me too broadly stated. In *Washburn Halligan* v. *Merchants Ins. Co.*, 81 N.W.R. 707 (one of the cases cited in support of it) there was a denial of all liability by the secretary of the company. In *Larkin* v. *Glen Falls Ins. Co.*, 83 N.W.R. 409 (another of the cases cited), the company expressly recognized its liability. *Germania* v. *Ashby*, 65 S.W.R. 611, also cited, was

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a case of denial of liability. It seems to me that it may have been intended to read (3) with (2) in the above quotation. I find this statement in Clement on Fire Insurance (1903), p. 237:—

An independent investigation by the company on its own account before receiving proof of loss is no evidence of waiver,

citing *People's Bank* v. *Ætna Ins. Co.*, 74 Fed. 507. The facts on the point in question and the reasoning adopted by the Court are set out at p. 511. Surely an insurance company, knowing its loss, is not "obliged to wait and make no investigation or is to limit itself to the information received in the proofs of loss. It can do that which the interests of mankind always induce—look out for yourself and protect your own interests."

The above statement in Clement is borne out in 19 Cyc. 866, note, where it is stated that "the fact that the company proceeds to make an investigation on its own account as to the loss will not waive proofs." Citing a number of cases, including *People's Bank* v. *Ætna Ins. Co.*, *supra*.

Fisher v. *Crescent Ins. Co.*, 33 Fed. 544, 548, relied on by counsel for the plaintiff, as a case where the agent of the company had made an examination and had written a letter to the plaintiff denying the liability of the company and refusing to pay. This was, therefore, clearly a case of a denial of all liability, which is undoubtedly a waiver of the condition requiring proofs.

In the case before us Grant, acting for the company, made an investigation as to the loss, but there was no denial of all liability by the company or refusal to pay, to which our attention was drawn or which I have been able to discover in the evidence. If anything, the result of the investigation was to put the plaintiff on his guard as to the claim for $2,000 for goods totally destroyed, to which exception was taken. In spite of this warning he persisted in including that claim in the amount set forth in his statutory declaration. That there was nothing in the acts of Grant inconsistent with an intention to require strict compliance with the conditions appears from the subsequent conduct of the plaintiff in furnishing the proofs.

All that Grant did was to state that he refused to admit the claim to the extent of the $2,000 for goods wholly destroyed. A partial denial of liability does not waive proofs, 19 Cyc. 871. "In an endeavour to adjust the loss, if the agent of the company denies all liability under the policy, it thereby renders proof of

loss useless." "But certainly the company in endeavouring to make an adjustment, can deny its liability upon a portion of the claims made against it, without waiving its right to insist upon the terms of the policy." *Milwaukee Mechanics Ins. Co.* v. *Cornfield*, 51 Pac. R. 567.

It was argued that inasmuch as the company was at the time disputing the claim for $2,000 for goods wholly destroyed, there could not be any fraudulent object in the plaintiff's including that amount in his declaration. But the plaintiff was plainly seeking to secure payment of that amount and made his declaration for that purpose. That the word "estimated" is used in the declaration does not exonerate the plaintiff from culpability. The word would seem to be designedly used, in the circumstances, to avoid possible consequences. The attempt to induce the company to pay the $2,000 is still plainly evident.

It has been held in the Canadian Courts that a false statement in a statutory declaration of loss under a policy in reference to part vitiates the whole. *Cashman* v. *London & Liverpool Ins. Co.*, 5 Allen (10 N.B.R.) 246; *Harris* v. *Waterloo Mutual*, 10 O.R. 718; *Grenier* v. *Monarch Fire & Life Ins. Co.*, 3 C.L.J. 100.

In *Claflin* v. *Commonwealth Ins. Co.*, 110 U.S. 81, it was held that "false statements, wilfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance," p. 97.

In *Dolloff* v. *Phoenix Ins. Co.*, 19 Atl. R. 396, it was held that when the insured meets the demand for a detailed statement of his loss on oath "with knowingly false statements of losses he did not sustain, in addition to those he did sustain, he ought to lose all standing in a Court of justice to any claim under that policy."

"The Court will not undertake for him the offensive task of separating his true from his false assertions. Fraud in any part of his formal statement of losses taints the whole. Thus corrupted, it should be wholly rejected, and the suitor left to repent that he destroyed his actual claim by the poison of his false claim."

"It is immaterial whether this fraud affects the whole or only part of the claim." Welford & Otter-Barry on Fire Insurance, p. 260, citing *Britton* v. *Royal Ins. Co.*, 4 F. & F. 905, and *Cashman*

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v. *London & Liverpool Ins. Co.* and *Harris* v. *Waterloo Mutual Ins. Co., supra.*

I notice that the decision in *Norton* v. *Royal Fire & Life Ass. Co.*, 1 Times L.R. 460, cited in the judgment of the trial Judge and relied upon on the argument before us by counsel for the plaintiff, was reversed on appeal. See Welford & Otter-Barry, at p. 261, note.

In *North British & Mercantile Ins. Co.* v. *Tourville*, *supra*, the Supreme Court reversed the decisions of the Courts below finding that the charges of fraud had not been supported and held, on a review of the evidence, that they were sufficiently established. In the case before us I think that a wilfully false statement was made by the plaintiff in his statutory declaration on a material point and that he must fail in his action.

Appeal allowed.

SASK.

S. C.

WATERLOO MANUFACTURING Co. v. HOLLAND.

Saskatchewan Supreme Court, Newlands, Lamont, Elwood and McKay, JJ. July 14, 1917.

MORTGAGE (§ VI H—130)—COMPENSATION TO MORTGAGEE FOR IMPROVEMENTS.

A mortgagee is entitled to retain out of the proceeds of the mortgage sale, as part of the mortgage debt, any moneys rightfully expended in connection with the mortgaged premises which has increased the selling value.

Statement.

APPEAL by defendant from a judgment in an action brought by the plaintiff for an accounting by the defendant of the proceeds of land sold by auction under mortgage sale proceedings under the Land Titles Act.

H. E. Sampson, K.C., for appellant.

H. P. Newcombe, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—The defendant claims to be entitled to retain the sum of $552.50 paid by him for plowing part of the land sold under the mortgage.

The directions for sale were granted on or about July 9, 1915. The sale took place on August 14, 1915. It is not just clear by the evidence when the ploughing took place; some of the evidence shews that it was the end of June, and other evidence shews that it was commenced about July 12 or 15. The reason of the ploughing was that the land was very foul with weeds and it was necessary

to destroy the weeds in some way to prevent them from going to seed.

Two questions are raised in this appeal: (1) As the sale proceedings were taken under the Land Titles Act, can the defendant retain the expenses he had been put to as part of the moneys due to him under the mortgage? (2) Is the defendant in any event entitled to retain the moneys or any part of the moneys?

So far as question 1 is concerned, it will be observed that the defendant is not commencing an action to retain these moneys, but is resisting an action to recover these moneys from him.

The defendant having sold the land under the mortgage is a trustee of the proceeds of the sale for the mortgagor and other encumbrancers, and, holding these proceeds as trustee, I am of the opinion that he is entitled to retain any moneys which may be due to him under the mortgage, including any moneys which he may rightfully have expended in connection with the mortgaged estate.

So far as question 2 is concerned, a great deal of the argument before us was devoted to a discussion of the position of a mortgagee in possession.

The rights of a mortgagee in possession to charge for moneys expended appear to me to be quite distinguishable from the case of a mortgagee expending money on the mortgaged estate in order to increase the selling value of the estate. The whole question is gone into very exhaustively in the case of *Shepard* v. *Jones*, 21 Ch. D. 469, and at p. 477, Jessel, M.R., is quoted as follows:—

> It is a suit brought by the mortgagor for an account from the mortgagee who has exercised his power of sale of the application of the proceeds of that sale and a claim for the balance. If it should turn out that the mortgagee has done something to the property at his own expense which increased its salable value, I think it is plain on ordinary principles of justice, that that increase should not go into the pocket of the mortgagor without his paying the sum of money which caused the increase. It distinguishes it from the ordinary case of improvements. The increase may have been an increase which did not come under that denomination, but which increased the selling-price. It seems to me that wherever there is a case of that kind where the mortgagee can prove that the selling-price was increased by reason of the outlay, then to the extent to which that selling-price has been so increased the mortgagor cannot get the benefit of it without paying for the outlay. Of course the mortgagor could not be made to pay more than the increase; but to that extent it seems to me in ordinary justice the mortgagee is entitled to say: "You shall not get that increased benefit caused by my outlay without paying for that outlay."

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Elwood, J.

And at p. 482, Cotton, L.J., says:—

In a case of this sort, where there has been no alteration in the nature of the property, which a mortgagee must not make, but merely an expenditure *primâ facie* increasing the salable value of the estate for the purpose for which it was intended, it is, in my opinion, if it can be shewn that there has been an increase in the salable value of the estate, an expenditure which the mortgagee is entitled to have repaid to him as a reasonable expenditure. It is a matter which reasonably might be done for the purpose of improving the actual state of the property, not an alteration, but improving it for the purpose of carrying out the object of the mortgagee, namely, to realize it by a sale.

Primâ facie, the money expended would be an addition to the value of the property and would increase the selling price. There is, however, no evidence to shew to what extent, if at all, the selling price was in fact increased by this expenditure.

I am of opinion, therefore, there should be a reference to the Master to ascertain to what extent, if any, the selling-price of the property was in fact increased by the ploughing which was done by the defendant. As it would appear that there was no request made at the trial for an inquiry into the question of whether or not the selling-price had been increased in consequence of the ploughing, I am of opinion that the appellant should pay the costs of the trial and of this appeal.

If the result of the reference is that the selling-price of the land was increased by the ploughing, the amount of such increase will be deducted from the plaintiff's judgment, in which event the appellant will have also the costs of the reference. In the event of the finding of the reference being that there was no increase in the selling-price of the land on account of the ploughing, the appellant will pay the costs of the reference.

Judgment accordingly.

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DUNCAN v. CITY OF VANCOUVER.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. June 5, 1917.

DISCOVERY (§ IV—31)—OFFICER OF CORPORATION—CITY SOLICITOR.

A city solicitor, the appointed head of the city's legal department, serving exclusively in that capacity, is examinable for discovery as an "officer" of the corporation.

Statement.

APPEAL by defendant from an order of Hunter, C.J.B.C. Affirmed by an equally divided Court.

McCrossan, for appellant; *Duncan*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—Mr. Jones, whom it is sought to examine for discovery, was the head of the city's legal department.

He was appointed city solicitor by resolution of the council at a yearly salary, and was to give his services exclusively to the city. His offices were at the City Hall, and his staff of assistants were the city's employees.

The plaintiff alleges a collusive settlement made by the city with his client whereby the plaintiff was prevented from getting his costs of the legal proceedings which had been so compromised.

The affidavit making discovery of documents in this action was made by Mr. Jones as city solicitor.

The question is, Is he examinable *viva voce* for discovery as an officer of the corporation? It is a fair inference that he is the person best able to make discovery and the only obstacle in the way of his examination is his alleged privilege as a solicitor.

The case of *Re Liberator Permanent Building Soc.*, 71 L.T. 406, is, in my opinion, precisely in point, and so inferentially is *Carter's* case; *Re Great W. Forest &c., Co.* (1886), 31 Ch.D. 496, 54 L.T. 531. The only difference suggested by appellant's counsel between the case at bar and the *Liberator* case, *supra*, is that in that case the solicitor agreed not to take fees from members of the society, or if he did so, to hand them over to the society, but that fact, I venture to think, in no way affected the *ratio decidendi* of the case.

There is a suggestion by counsel for the appellant that the solicitor might, under his contract with the city, be entitled to fees earned in litigation between the city and others, but we know this contract as set out in the resolution and as stated by himself. It was to give his exclusive services to the city at a fixed salary of $3,000 a year. In the *Liberator* case, as I understand the facts, the solicitor was to do all the legal business of the society at a fixed salary, but was not precluded from practising as a solicitor in matters unconnected with the society; but had it even been proved that the solicitor in this case might take certain fees recovered by the city in litigation, it would not in my opinion have affected the case in the slightest. Those fees would merely be an additional remuneration for his services—his whole time and his independence as a solicitor were surrendered when he bound himself by accepting the office.

I think therefore the judgment appealed from is right, and ought to be affirmed.

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Martin, J.A.

MARTIN, J.A.:—Our rule 370 (1) was taken from and is the same as Ontario rule 327 (2) as regards the point in question, therefore we may turn to the best advantage to the decisions in that province as a guide for its construction. In determining the question as to whether or not the defendant's solicitor is an "officer" it is important to start right, and we should do so by bearing in mind what Moss, J.A., said in *Morrison* v. *Grand Trunk Ry. Co.* (1902), 5 O.L.R. 38, at 42:—

> In endeavouring to ascertain whether any named person does or does not come within the term "officer" as used in the rule, it is of course essential to bear in mind its object and purpose.

And at p. 43:—

> There appears no support from the language of rule 439 for placing a corporation in a less advantageous position than an individual party. I think that, as nearly as possible, the same sort of discovery is to be made on behalf of a corporation as is proper to be made when an action is against an individual and he is put under examination for discovery.

These are sound principles and I am not prepared to depart from them because of definitions that have been placed upon the word "officer" as used in other statutes of a different subject matter with varying facts and elements. I am prepared to assume that the solicitor here is employed exclusively by the defendant corporation and devotes his whole time to its service and is paid by a salary which is his sole source of income, nevertheless he is not an officer within the meaning of the rule, because the sole appropriation or retainer of his professional services by one person whether a corporation or individual does not deprive him of his professional character or status and transform him into something else so long as he is acting in the discharge of those professional duties. If a man of large property decides, for the better protection of his private interests, to retain, and does retain, the sole services of a solicitor at, say, $300 per month, does that make the solicitor anything else but his exclusive professional adviser? Clearly not: the solicitor does not thereby become his servant, or an "officer" of his household or business establishment, in the true legal sense, or his overseer, factor, or agent, or anything else of a different character, unless specially appointed thereto. And if the same employer were to enter into a partnership, and the partnership were to continue the same retainer, and the partnership later were changed into a limited liability company and likewise continue the retainer, the legal position of the solicitor

would also continue to be the same; just as it would be the same if it began with a limited company and ended with a private individual.

The case of the *Liberator Permanent Benefit Building Soc.* (1894), 71 L.T. 406, was much relied on by the respondent, but in the first place the question arose not on an application for discovery, but on an application to make a solicitor liable to contribute under the Winding-Up Act, and in the second place, the facts and judgment when carefully read show that the deciding factor was that the solicitor, Wright, had done other important work beyond that of a legal character, as Collins, J., thus points out:—

> Wright was acting in the capacity not only of a solicitor but much more nearly in the capacity which he ultimately assumed in name as well as in fact, that of financial manager.

Another instructive illustration of the elasticity of the term "officer" when used in a different connection is given in *The Queen* v. *Local Government Board* (1874), L.R. 9 Q.B. 148, wherein the Court of Appeal held that though a solicitor who was employed by the trustees of the Parish of St. Mary, Islington, at an annual salary was not an "officer under sec. 76 of the Metropolitan Poor Act, 1867, if the 'strict legal meaning'" of that expression were to be adhered to, yet the Court felt justified in extending it to cover his special case because "a reasonable interpretation is to be given and the word 'office' must be understood in a greater latitude than an office strictly legal." And the Court went on to say, p. 152:—

> We are the more induced to put this construction on the Act, because we think that to put the strict legal construction on the word "office" would render the Act nugatory, and give compensation to very few, if any, persons. This we cannot believe to have been the object of the legislature.

There is furthermore the fact in the case at bar that it would be futile to make the order because the defendant, his client, could always claim its privilege of requiring him to refuse to answer. See *Corporation of Salford* v. *Lever* (1890), 24 Q.B.D. 695, *aliter* where it elects to put him forward to answer having another officer who could do so.

It follows that the appeal should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—The question here is whether a solicitor appointed and employed by the City of Vancouver at a fixed salary, and who is to devote his whole time and attention to his

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duties as such, comes within the term "officer or servant" in marginal rule 370c., sub-paragraph 1, of the rules of the Supreme Court of British Columbia.

It seems to me there is no substantial distinction in principle between this and the *Liberator* case, 71 L.T. 406.

Gallihier, J.A.

In *Morrison* v. *Grand Trunk R. Co.*, 5 O.L.R. 38, MOSS, J.A., says, at p. 43:—

> There is always danger in even attempting to define a term which permits of so many varying descriptions.
>
> The question of what persons are examinable under the rule as officers of a corporation must always become more or less a question of fact, and it may generally be found more easy to say who is not an officer within the rule than to lay down any rule for general guidance.
>
> Speaking generally, I would say that the officer of a corporation, who, if the e was no action, would be looked upon as the proper officer to act and speak on behalf of and to bind the corporation in the kind of transaction or occurrence out of which the action arose, would *primâ facie* be the proper officer to be examined in the first instance.

Now if Mr. Jones is an officer of the corporation, and I think under the circumstances of this case, and in view of the authority I have cited the above words are peculiarly applicable as out of his mouth only can the evidence be obtained.

I think the judgment below should stand.

McPhillips, J.A.

MCPHILLIPS, J. A., concurred with Martin, J.A.

Appeal dismissed, the Court being equally divided.

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CANADIAN NORTHERN R. Co. v. CITY OF WINNIPEG.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. February 6, 1917.

TAXES (§ I F—80)—EXEMPTION—RAILWAYS—LOCAL ASSESSMENTS.

The exemption of railway property from all assessments and taxation of every nature and kind, as provided by sec. 18 of the Railway Taxation Act, 1900, ch. 57, is subject to the limitation of the amending Act, 1900, ch. 58 (R.S.M. 1913, ch. 193, sec. 18), empowering municipal corporations to assess the real property of railway companies for local improvements, the exemption, however, extending to special survey charges made under the Special Survey Act (R.S.M. 1913, ch. 182).

[*Can. North. R. Co.* v. *Winnipeg*, 27 D.L.R. 369, 26 Man. L.R. 292, affirmed.]

Statement.

APPEAL from a decision of the Court of Appeal for Manitoba, 27 D.L.R. 369, 26 Man. L.R. 292, reversing in part the judgment at the trial in favour of the plaintiffs. Affirmed.

T. A. Hunt, K.C., for respondent and cross-appellant.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This case must be governed by the last statute, *i.e.*, the Act to amend the Railway Taxation Act,

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10 Edw. VII., ch. 74. The first section of the Act declares that sec. 18 of ch. 166 of R.S.M. 1902, being the Railway Taxation Act, is amended as thereby provided. Sec. 2 declares that the exemption granted to the appellant by the agreement of February 11, 1901, is—

the exemption specified in sec. 18 of the said Railway Taxation Act as existing at the date of the passage of such last mentioned Act and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto.

As stated by Richards, J.A.:—

If we are as hitherto to read the section as referring to the Act of 1900 notwithstanding that ch. 166 of the R.S. of 1902 is mentioned then the respondent is exempt. That this was what the legislature intended need not be doubted, but perhaps nothing but an amending statute can carry out the intention. It does not seem to be a question of construction of the Act, the words of which are not equivocal. The trouble is that the words of the Act are reasonably clear, only they do not carry out the intention of the legislature.

Counsel admitted at the argument that the exemption granted is in terms not that of the Act of 1900 but that "specified in sec. 18 of the said Railway Taxation Act" (*i.e.*, ch. 166 of the R.S.M. 1902). This would have been the Act by virtue of the Interpretation of Statutes Act, R.S.M. 1902, ch. 89, sec. 8 (*b*), even if ch. 166 had not been mentioned. But he said it is reasonably clear that the Act of 1900 was meant which may be conceded.

It is argued that if the Revised Statutes had been intended the addition of the words "as existing at the date of the passage of such last mentioned Act" would have been superfluous and meaningless and that the only conceivable purpose of their insertion was to make clear the application of sec. 7 of the Act Respecting the Revised Statutes. This apparently concedes that without the addition of these words, sec. 7 of the Act Respecting the Revised Statutes would not have had its application. May not the purpose of their insertion have been precisely to prevent the application which sec. 7 would have had if they had not been inserted. If the legislature had really intended sec. 18 of the R.S. of 1902, could it have expressed more clearly an intention to prevent the operation of sec. 7 of the Act Respecting the Revised Statutes than by the addition of the words "as existing at the date of the passage of such last mentioned Act" (*i.e.*, the Revised Statutes of 1902).

It seems a forced construction in any case this calling in aid sec. 7 of the Act Respecting the Revised Statutes. What that Act says is that where the provisions of the repealed Act and the

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Revised Statutes are the same they shall be held to operate retrospectively as well as prospectively; this is a very simple provision and one that hardly seems capable of being invoked to prove that the repealed Act must be that referred to in sec. 2 of the Act of 1910.

It is reasonably clear what the legislature said and also what it intended; further that it did not say what it intended and that without disregarding the words of the statutes it is difficult to give effect to the intention.

Although a statute is to be construed according to the intent of them that made it, if the language admits of no doubt or secondary meaning it is simply to be obeyed. As Lord Watson said in *Salomon* v. *Salomon & Co.*, [1897] A.C. 22, at p. 38:—

> In a Court of law or equity what a legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication.

This appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—This appeal involves the proper construction of several Acts of the Legislature of Manitoba relating to the taxation of railways in that province, and especially with respect to the power of incorporated cities to collect frontage taxes for local improvements on railway lands.

I agree with the judgment appealed from affirming that power and right and negativing the right claimed by the respondents in addition of levying on the railway lands and collecting what was called a special survey tax.

The reasoning of Howell, C.J., concurred in by Perdue, Cameron and Haggart, JJ.A., commends itself to me as being sound and reasonable.

In the session of the legislature of 1900 there was passed a statute, ch. 57 of the statutes of that year, called the Railway Taxation Act, imposing upon railway companies owning or operating any line or lines of railway within the province a tax of 2% upon the gross earnings of such railway companies on its lines within the province in the years 1900, 1901 and 1902, and after that, a sum to be fixed by the Lieutenant-Governor in Council not to exceed 3% of such gross earnings. The 18th section of that statute declared railway companies coming within and paying taxes under its provisions to be

> free and exempt from all assessment and taxation of every nature and kind

within the Province of Manitoba by whomsoever made or imposed, except such as are made and imposed under the provisions of this Act.

At some period of the session it was found that the language of this exemption clause was too sweeping and went further than was intended and another statute, ch. 58, was passed concurrently with that containing the exempting clause enacting that—

the Railway Act passed at the present session of the Legislative Assembly is hereby amended, by adding thereto the following section:—

22. Nothing herein contained shall take away from any incorporated city any right or power which any incorporated city may now have of assessing and levying on the real property of any railroad company fronting or abutting on any street or place, taxes for local improvement done, in, under or upon any such street or place according to the frontage of such real property so fronting or abutting on such street or place or relieve any railway or telegraph company owning or operating a telegraph line or lines in the province from the payment of the taxes imposed in that behalf under the provisions of the Corporations Taxation Act.

The two Acts constituting in reality one were assented to by the Lieutenant-Governor together and, in my judgment, should be read together; otherwise the plain, obvious intent and purpose of the legislature not to deprive cities of the right and power of levying taxes for local improvements on railway companies as well as on other owners of lands would be defeated. Read together they preserve this right and power unto these cities and unless subsequent legislation has taken them away they should be maintained.

In the following year, an agreement dated February 11, 1901, was entered into between the Manitoba government and the appellant company guaranteeing the payment of certain railway bonds of the appellant by the Province of Manitoba in which the company covenanted up to the maturity of the bonds so to be guaranteed, to pay to the Government a sum not exceeding two per cent. of its gross earnings from its lines in Manitoba and in consideration of such payments it was agreed that

their properties, incomes and franchises shall be exempt from such taxation as is provided for by section 18 of ch. 57 of the Statutes of Manitoba of 1900 during the currency of the said bonds hereby agreed to be guaranteed.

Now, strictly speaking, no taxation was "provided for" in this sec. 18, but exemption from such taxation as they would be otherwise liable for. What was therefore the law at the end of the session of 1900 when the above two mentioned statutes were passed and on February 11, 1901, when this agreement was made?

Can it be doubted that this sec. 18 of ch. 57 was to be read

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and construed as if the amending or declaratory contemporaneous Act with the section named as sec. 22 had actually formed one of its sub-sections?

In law, I think it did form one of its sub-sections and was to be read and construed as one and that when the agreement in question of February 11, 1901, was entered into declaring the appellant company exempt "from such taxation as is provided for by section 18 of ch. 57 of the statutes of 1900," it meant sec. 18 as modified by sec. 22 and such exemption did not extend to or embrace local improvement taxes from which the legislature had already declared they were not exempt. These frontage taxes for local improvements which that sec. 22 of same Act as amended in the same session explicitly declared railway companies should not be relieved from are those we are now asked to declare the company should be relieved from.

In the R.S. for 1902, ch. 166, this legislation is re-enacted, sec. 22 being made sec. 19, following sec. 18 which remains numbered as before in the Railway Taxation Act.

But then it is said, assuming that to be so, subsequent legislation in 1910 sets the question definitely at rest as to the meaning of clause 16 of the agreement of February 11, 1901, and exempts the company from liability from local improvement taxes as well as general taxes. That legislation is embodied in 10 Edw. VII. (1910), ch. 74.

It makes no direct or specific reference to the local improvement taxes but enacts generally for the removal of doubt respecting the exemption from taxation granted under sec. 16 of the agreement of 1901 which agreement was validated and confirmed by statute that—

> the exemption so granted was and is the exemption specified in section 18 of the said Railway Taxation Act as existing at the date of the passage of such last mentioned Act, and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto.

Now at this time and ever since 1902 sec. 22 of the Railway Taxation Act had formed sec. 19 of ch. 166 of the R.S. and if it was intended to repeal that section and exempt the railway from local improvement taxes it was not difficult to say so in a few words. It will be noticed that this legislation declares the exemption so granted was and is the exemption specified in sec. 18. I have already given my reasons for holding that this sec. 18 must

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be read together with sec. 22 to determine its true meaning and that latter section expressly declared that nothing in that railway Act contained should take away from any city the right to tax for local improvements or relieve any railway from the payment of such taxes.

The Act of 1910, which is relied upon as effecting such exemption, merely declares in general terms that the exemption granted by clause 16 of the agreement of 1901 confirmed by ch. 39 of the statutes of that year was and is the exemption specified in sec. 18 of the Railway Taxation Act as existing at the date of the passage of such last mentioned Act. We are asked to say that the meaning of sec. 18 must be found within its own ambit and without reference to sub-sec. 22 which, in my opinion, formed part of it, though enacted in a separate chapter and withdrew local improvement taxes from its operation. I decline doing so because it would be bad construction.

I have already given my reasons for holding that at the date of the passage of the Railway Taxation Act of 1900 the right of the cities to levy and assess railways for local improvements was retained to them and these special taxes were not amongst those from which the railways were exempted and I think the legislation of 1910, though no doubt intended by the promoters to effect that exemption, failed because of the vague and uncertain language used.

If the legislature intended to exempt the railways from these local improvement taxes in 1910 they could have expressly said so in a few words.

In 1900, when they desired to continue the liability of the railways for these taxes the intention was clearly expressed in sec. 22 of the Act. In 1902 when the statutes were revised that intention was expressly re-enacted.

I do not think legislation so clear and explicit, mentioning local improvement taxes specifically, should be held to have been repealed by such vague and general words as the promoters of the Act of 1910 have used carefully avoiding the mention of those local improvement taxes.

Shortly re-stated my conclusion is that sec. 22 must be read into the Railway Taxation Act of 1900 as if it formed one of the sections of that Act and that its being enacted as a separate chap-

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ter of the same session's legislation makes no difference. That the meaning and intent of sec. 18 when read in conjunction with sub-sec. 22 clearly does not include local improvement taxes amongst those exempted. That the subsequent revision of the statutes in 1902 makes that still more clear and that it would require equally clear and plain language to be used to reverse that legislation and exempt railways from local improvement taxes and thus throw heavier burdens upon the other owners of lands liable for such taxes; that the language of the Act of 1900 is altogether too vague and uncertain to effect that object; and there therefore never was a time when the appellant company was exempt from local improvement taxes.

With respect to the special survey charges I agree with the decision of the Court of Appeal.

I would, therefore, dismiss both appeal and cross-appeal with costs in each.

Idington, J.

IDINGTON, J.:—Inasmuch as the expression used in the agreement in question by way of incorporating therein sec. 18 referred to does not when read therewith produce anything quite clear and unambiguous, I am driven to try and make of it something that is apparently what the contracting parties meant.

The part of the agreement which adopts for its definition of an exemption from such taxation as provided by a section which is in itself largely an exempting section instead of one directly providing for taxation, seems calculated to present a set of puzzles.

Surely whatever else was intended to be agreed to and thereby adopted, it must have been the substantial legal effect of sec. 18 as it stood amended at the date of the agreement.

I conclude that is the fair interpretation and that the judgment of the Court below should be maintained for that reason and the reasons assigned therefor by Howell, C.J.

The appeal should be dismissed with costs.

I am unable to comprehend why a municipality should so persist in its wrong-doing and seek to escape from the consequence of its acts as respondent does in regard to the costs it put appellant to. As the payments were made under protest the conception covered by a voluntary payment cannot help it.

The survey tax was covered by the phrase "by whomsoever imposed" in sec. 18.

The cross-appeal should also be dismissed with costs.

DUFF, J. (dissenting):—With respect, I am unable to concur in the conclusion of the Court of Appeal for Manitoba.

The point raised on the main appeal is, in my judgment, concluded by sec. 2 of ch. 74 of the statutes of 1910, which is in the following words:—

For the removal of doubt respecting the exemption from taxation granted under clause 16 of the agreement dated the eleventh day of February, 1901, set out in schedule "A" to ch. 36 of the statutes passed in the year 1901, it is declared that the exemption so granted was and is the exemption specified in sec. 18 of the said Railway Taxation Act, as existing at the date of the passage of such last mentioned Act, and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto.

The enactment must of course be read and construed in light of the circumstances with reference to which it was passed; and, to apply the principle on which the Judicial Committee of the Privy Council proceeded in *Salmon* v. *Duncombe*, 11 App. Cas. 627, at 634, it must not be given a construction which makes it nugatory or insensible with reference to those circumstances unless such a construction is forced upon us by the "absolute intractability" of the language used.

First, then, what is it that the legislature is dealing with in this section? It is dealing with clause 16 in a certain agreement dated February 11, 1901, confirmed and validated by ch. 39 of the statutes of that year, and the enactment has specific reference to a certain provision in that clause 16 by which it is stipulated that the "property, incomes and franchises of the company," that is to say of the now appellant company, "shall be exempt from such taxation as is provided for by section 18 of ch. 57 of the Statutes of Manitoba of 1900." It has explicit reference to this stipulation and it was passed "for the removal of doubt respecting" the meaning and effect of the stipulation. What was the nature of the doubt that had arisen? In order to make that clear let us reproduce textually sec. 18 of ch. 57 of the statutes of 1900. That enactment is in the following words:—

18. Every railway company coming within and paying taxes under the provisions of this Act or any Act or Acts amending this Act, and the property of every nature and kind of every such railway company, except the land subsidy to which such company is or may be entitled from the Dominion Government, and any land held by it for sale, shall, during the continuance of this Act, or any Act or Acts amending this Act, be free and exempt from all assessments and taxation of every nature and kind within the Province of Manitoba by whomsoever made or imposed, except such as are made and imposed under the provisions of this Act, or any Act or Acts amending this

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Act, and no person or body corporate or politic having power to make assessments or impose taxation of any kind shall during the continuance of this Act or any Act or Acts amending this Act make any assessment or impose any taxation of any kind of or upon any such railway company or any property of such railway company except the land subsidy to which such company is or may be entitled from the Dominion Government and any land held by it for sale as aforesaid.

The field in which the exemption hereby created is to operate, it will be observed, is limited by an exception, the exception being such assessment and taxation "as are made and imposed under the provisions of this Act or any Act or Acts amending this Act;" and it is upon the scope of this exception that the dispute has arisen. It was occasioned by these circumstances. In the very same year, the year 1900, the legislature passed an Act, ch. 58, amending ch. 57 (which was intituled Railway Taxation Act) introducing an additional section, sec. 22, as part of that Act, and by this last mentioned section introduced by this amending Act (ch. 58) it was declared that nothing contained in the Act (*i.e.*, nothing contained in ch. 57 of the Railway Taxation Act) should take away any right or power which an incorporated city "may now have" of assessing and levying on any property of a railway company taxes for local improvements. The argument against the railway company, and it certainly was not without force, was that this section introduced as sec. 22 by way of an amendment brought within the sweep of the exception from the exemption created by sec. 18, taxes for local improvements so assessed and levied; this consequence resulting, it was argued, from the fact that the exception embraces taxation imposed under the "provisions of this Act or any Act or Acts amending this Act," taxation imposed under sec. 22 being taxation imposed under an Act amending this Act; and that consequently the exemption from taxation stipulated for by clause 16 of the agreement of February, 1911, which was to be an exemption from such taxation "as is provided for by sec. 18 of ch. 57 of the Statutes of Manitoba of 1910" must be held to be subject to an exception embracing taxation for local improvements under sec. 22. This then was the point in dispute. Did the stipulation which was entered into in February, 1910, defining the exemption to which the company should be entitled, exclude from the scope of that exemption the sort of taxation authorized by section 22 introduced by the amending Act (ch. 58, statutes of 1900), or did it confer an ex-

emption, the scope of which was to be determined by an examination of sec. 18 alone without regard to the amending statute?

That being the point in dispute and the Act of 1910 being passed for the sole purpose of settling the controversy, how does the enactment of 1910 deal with the subject? The declaration of sec. 2 seems, when the circumstances just mentioned are considered, to be too explicit for misapprehension. The exemption intended to be created is to be the exemption specified in sec. 18 of the Railway Taxation Act, that is to say, of ch. 57 of the statutes of 1900, and it is further declared that the exemption is "unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto."

Comment would appear to be superfluous. The dispute being whether or not for the purpose of ascertaining the scope and character of the exemption, sec. 18 of ch. 57 of 1900 and sec. 22 introduced by ch. 58 of 1900 are to be read together or sec. 18 is to be read alone and ch. 58 disregarded—such being the nature of the controversy—can there be any doubt about the effect of this language of sec. 2 of the Act of 1910? Ch. 58 beyond question is an Act "amending this Act" (ch. 57) passed concurrently with or subsequently to it. Ch. 58 is therefore to be excluded from our purview when considering the effect of sec. 18.

It is argued on behalf of the respondent that the Railway Taxation Act must be taken to have been the Railway Taxation Act of R.S.M. 1902, which, it is said, was passed in 1902. The answer to that is that the Railway Taxation Act, ch. 166, R.S.M. 1902, was in truth passed in the year 1900, and was not repealed and re-enacted in 1902, as sufficiently appears from sec. 1, subsecs. 1, 6, 7, 8, of the statutes of 1902, ch. 41, the Act Relating to the Revised Statutes. But there is the additional reason that the construction proposed derives the intention of the Act of 1901 and the agreement confirmed by it from the provisions of a statute passed a year later; and the still further reason that it deprives the governing words of section 2, those relating to amendments, of all effect, and instead of removing doubts leaves the dispute exactly where it was; in other words, it makes the statute nugatory as regards its declared object, the "removal of doubt."

A much more difficult question arises on the cross-appeal. It is difficult to believe that the legislature had in contemplation such

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charges as those provided for by ch. 182 R.S.M., 1913. On the other hand, much may be said for the view that these charges are within the same category for the purposes of deciding this question as charges for local improvements. The point is a disputable one, but on the whole my conclusion is this: The amount chargeable (if not the question whether any amount at all shall be charged) against a specific property included in the survey is an amount not fixed by the reference to any rule prescribed by law but rests in the discretion of a public officer; and I think the charge falls rather within the class of imposts which would include the costs of works required by a Board of Railway or Municipal Commissioners assessed against a municipality or a railway company, which class of imposts would not according to the common notions of Canadian mankind come under the description "taxes;" and I think common usage should be a guide in construing such agreements as that before us.

Such expressions as that quoted from Strong, J. (*St. Sulpice* v. *City of Montreal*, 16 Can. S.C.R. 403), by the Chief Justice of Manitoba "every contribution to a public purpose imposed by superior authority is a 'tax' and nothing less"—must not, I think be taken too absolutely; they are not intended as definitions but as descriptions emphasizing the characteristic brought into relief by the controversy in relation to which they are employed.

Anglin, J.

ANGLIN, J. (dissenting):—By an agreement made in 1901 with the Government of Manitoba, confirmed by statute, the Canadian Northern Railway Company was granted an exemption during the currency of certain bonds from the taxation dealt with by sec. 18 of the Railway Taxation Act of 1900, ch. 57. That section exempted railway companies and all their property, except the Dominion Government land subsidy and land held for sale, from "all assessments and taxation of every nature and kind" except such as are made and imposed under the provisions of the Railway Taxation Act itself or any amending Acts. By an Act also passed during the session of 1900, but as a separate statute (ch. 58), there was added to the Railway Taxation Act, as sec. 22, a declaratory clause providing that nothing therein contained should take away from any incorporated city the right to assess and levy taxes for improvements on real property of any railway company fronting or abutting on any street or place in, under or upon which

such improvements should be done. In 1902 there was a revision of the statutes of Manitoba. In the Railway Taxation Act in that revision (ch. 166) sec. 18 is reproduced as it was in the Act of 1900 and the amending declaratory provision above referred to appears as sec. 19. A statute was passed in 1910, as ch. 74, in the following terms:—

1. Section 18 of ch. 166 of the Revised Statutes of Manitoba, 1902, being the Railway Taxation Act, is hereby further amended by adding at the end thereof the following words, "and except all lands and property held by the company not in actual use in the operation of the railway."

2. For the removal of doubt respecting the exemption from taxation granted under clause 16 of the agreement dated the eleventh day of February, 1901, set out in schedule "A" to ch. 59 of the statutes passed in the year 1901, it is declared that the exemption so granted was and is the exemption specified in sec. 18 of the said Railway Taxation Act, as existing at the date of the passage of such last mentioned Act, and is unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto.

Notwithstanding the reference to ch. 166 of R.S.M. 1902 in sec. 1 of this enactment, it seems to me reasonably clear that by sec. 18 of the Railway Taxation Act mentioned in sec. 2 was meant sec. 18 of the original Act of 1900, and that by the words "unaffected by any amending Act or Acts passed concurrently therewith or subsequently thereto," it was intended to exclude the amendment of 1900 which afterwards became sec. 19 of the Railway Taxation Act of 1902. By sec. 7 of the Act respecting the Revised Statutes (3 Edw. VII. ch. 41), to which counsel directed our attention, it is enacted that the provisions of the R.S. of 1902 corresponding to and substituted for provisions of repealed Acts, where they are the same as those of the Act so repealed, shall be held to have been passed on the days respectively upon which the Acts so repealed came into effect. By "the date of the passage of such last mentioned Act" (*i.e.*, the Railway Taxation Act) in sec. 2 of ch. 74 of the statutes of 1910 above quoted, is therefore meant not the date of the coming into effect of the R.S. of 1902 but that at which ch. 57 of the statutes of 1900 (the repealed Act) came into force; and "the exemption specified in sec. 18" as contained in that Act, "unaffected by the amendment passed concurrently," and found in ch. 58, is the exemption to which sec. 2 of the Act of 1910 declares the appellant company entitled. Of course this might readily have been made clearer and this litigation avoided had the Act of 1910, passed "for the removal of doubt"(!) referred directly to "the

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exemption specified in sec. 18 of ch. 57, 63 & 64 Vict., unaffected by sec. 1 of ch. 58, 63 & 64 Vict., instead of to that "specified in sec. 18 of the said Railway Taxation Act" (*i.e.*, ch. 166 of the R.S.M., 1902). But if it had been intended to declare the right of exemption to be that provided by sec. 18 of the Railway Taxation Act as found in the Revised Statutes (*i.e.*, subject to the declaratory provision of sec. 19) the addition of the words "as existing at the date of the passage of such last mentioned Act" would have been superfluous. The only conceivable purpose of their insertion in sec. 2 of the Act of 1910 was to make clear the application of it to sec. 7 of the Act Respecting the Revised Statutes. Moreover, as applied to the R.S. of 1902, the words "unaffected by any amending Act . . . passed concurrently therewith" would have no point. There was no amendment to the Railway Taxation Act in 1902 or 1903. They were obviously and aptly used in reference to the legislation of 1900, ch. 58. Notwithstanding the unhappy phraseology of sec. 2 of the Act of 1910, on a careful consideration of all this legislation it appears to me to express with sufficient certainty the intention of the legislature to exempt the Canadian Northern Railway from—to use the language of sec. 18—"all assessments and taxation of every nature and kind," except taxation made and imposed under provisions of the Railway Taxation Act and amending Acts.

Counsel for the respondent sought to bring local improvement rates within this exception by treating the declaratory clause, added by amendment as sec. 22, as an amending Act by which assessments and taxation were made and imposed. I am unable to accept that view of the scope and effect of sec. 22. Its provisions are negative. They do not provide for the making or imposition of any tax but merely declare that other provisions of the Railway Taxation Act shall not take away a right or power to assess and levy taxes for local improvement rates conferred by other legislation. It is by, or by virtue of such other legislation that local improvement taxation is imposed. I would therefore allow the appeal of the Canadian Northern Railway Company.

As to the cross-appeal, I am of the opinion that the cost of surveys authorized by the legislature to be assessed upon the property affected s assessment or taxation within the meaning

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of the exemption provided for by sec. 18 of the Railway Taxation Act, provincial and not municipal taxation it may be, but nevertheless taxation: *City of Halifax* v. *Nova Scotia Car Works*, [1914] A.C. 992, at 998, 18 D.L.R. 649—"a demand of sovereignty," *State Freight Tax Case*, 15 Wall. 232, at 278. As to the percentage added to the taxes and the cost of making title which the appellants were obliged to pay in order to redeem their property and prevent the issue of a certificate of title to it to the tax sale purchaser, cancellation of which they might have been unable afterwards to procure, I see no reason why these should not be refunded to them as well as the taxes themselves to which they were incidental. In view of the terms in which the special case has been submitted the plaintiffs are, in my opinion, entitled to a judgment against the defendant municipal corporation for the refund by it of the whole amount paid to it to prevent certificates of title for the lands wrongfully sold being issued, with interest thereon from the date of such payment. They should also have their costs of this litigation throughout.

Appeal and cross-appeal dismissed.

[Leave to appeal to Privy Council refused, July, 1917.]

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Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 23, 1917.

MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—AGREEMENT —"TOTAL INCAPACITY" CEASED.

A doctor's certificate that an injured person is "able to do light work" is not proof that he is "fit and capable of doing work," or that his "incapacity for work" or "total incapacity" has ceased, within the meaning of an agreement limiting the liability between master and servant.

Statement.

APPEAL by plaintiff from a judgment dismissing an action under the Workmen's Compensation Act. Reversed.

A. G. MacKay, K.C., for appellant.

N. D. Maclean, for respondent.

The judgment of the Court was delivered by:—

Stuart, J.

STUART, J:—The plaintiff was a miner in defendant's employ. In November, 1914, he was injured by an accident in the course of his employment. He was admittedly entitled to compensation under the Workmen's Compensation Act.

In January, 1915, an agreement in writing was entered into between the plaintiff and defendant which contained the following clauses:—

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1. The company shall pay and the claimant shall accept in full satisfaction of all claims by him against the company the sum of $9 per week from January 19, 1915, such payments to continue during the total incapacity for work of the claimant.

2. The company will make the said payments monthly on the 30th day of each and every month, the first of such payments being an apportionate one to be made on January 30, 1915.

3. The company shall be entitled at all reasonable times to have the claimant examined by a duly qualified medical practitioner, for the purpose of ascertaining whether the claimant is still incapable of working.

4. Upon such a duly qualified medical practitioner aforesaid certifying under his hand that the claimant is *fit and capable* of doing work, the company shall be released from its liability to make any further payments to the claimant after the date at which it is certified by such practitioner that the claimant's *incapacity for work* has ceased. Provided, however, that the claimant may dispute the fact alleged in such certificate and in such case then the question of the *disability of the claimant* shall be referred to a medical referee to be appointed under the provisions of the Workmen's Compensation Act.

The plaintiff went to live with his brother in Saskatchewan, and as the defendant was under the impression that the conditions which would relieve him from liability under the agreement could be established, he was by arrangement examined by a Dr. Walker, of Saskatoon. His report or certificate took the form of a letter addressed to the defendant's solicitors which read as follows:—

Messrs. Short & Cross. Saskatoon, Sask.
October 9, 1915.

Gentlemen:—I have, this day, examined Robert Russell, of Hanley, injured in a coal mine of the Twin City Coal Co.

There is still considerable tenderness over the right sacro-iliac region, but he is able to do light work. He will be unable for some time to do any heavy lifting. It is a question if he will ever possess his normal working power again. The muscles in this area were bruised and lacerated to such an extent that it is impossible to form an accurate opinion as to the final result.

(Sgd.) T. W. WALKER.

The defendants were not quite satisfied with this letter and its solicitors wrote to Dr. Walker, on October 23, saying:—

We are in receipt of your report on Robert Russell, of Hanley, in which you state that he is able to do light work. Would it be possible from your examination to form an opinion as to when he became able to do this work as he is claiming for total incapacity?

On the same day they wrote to the plaintiff's solicitors saying:—"We have received Dr. Walker's report herein but the same is not complete enough. We have written him again, &c."

There was then some delay and on November 18 defendant's solicitors wrote to Dr. Walker saying:—

We have been in communication with our clients and what they require is a medical report stating that Russell is still incapacitated owing to the

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accident of November 18, 1914. *If you can*, will you kindly let us have this report, as your *two previous letters* do not mention whether his present tenderness and incapacity is the result of the accident of November, 1914.

The second of the "two previous letters" was not put in evidence, but whatever its contents they apparently did not convince the defendant's solicitors that they yet had a certificate such as their clients were hoping to receive. Apparently the unproduced letter still spoke of an existing incapacity. In reply Dr. Walker wrote as follows:—

I am sorry that I have not made clear to you that Russell is still incapacitated owing to the accident of November 18, 1914. There is no question but that his disability is due to the accident. The point I took from your correspondence is that his disability must be total. He is able to do light work, but cannot do any heavy lifting and it will be some time, possibly a year or two, before he will be able to do any heavy work.

Hoping that I have made clear the point which you desire.

Treating these letters as a certificate sufficient under the agreement to release its liability the defendant refused to pay any further sums and the plaintiff thereupon issued his claim in the District Court as an ordinary action as he admittedly had a right to do, and did not resort to the statute.

The trial Judge dismissed the action except with regard to a small sum paid into Court, using the following words:—

It is not objected that exs. 4 and 11 are not "certificates" under the terms of the contract; and I think that the Court should accept them as proof under clause 4 that the claimant is fit and capable of doing work, and that his incapacity for work has ceased, for in both these letters it is stated that the claimant is able to do light work, and the defendant's liability was therefore at an end from and after October 9, 1915.

In so far as form goes no doubt the letters could not be objected to as "certificates," and there was no real ground of objection on that score. But from the observations of appellant's counsel upon the argument before us, I think the trial Judge, if he meant that there was no objection to the *substance* of the certificate or certificates as not complying with the requirements of the agreement, probably misunderstood the position taken by the appellant.

The appellant makes two contentions which are:—(1) that the certificate does not even substantially fulfil the terms of the agreement; (2) that even if it does it is incorrect and untrue, and that he has a right to dispute its correctness in the Court, and was not bound to resort only to the proviso at the end of par. 4 of the agreement.

In my opinion, it is necessary to deal only with the first objec-

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tion to the certificates because I think it is a sound one, and furnishes a sufficient reply to the defendant's claim that the conditions under which it was to be released from liability had been fulfilled.

Par. 4 of the agreement contains the words specifying what the doctor's certificate must contain. It is rather loosely drawn because the matter is put in a double form. It says that "*upon*" (the doctor) "certifying under his hand that the claimant *is fit and capable of doing work* the company shall be released from its liability . . . after the date at which it is certified that the claimant's *incapacity for work has ceased.*"

Thus the required contents of the certificate are described twice, in a double way, in the first case by one set of words, in the second by another set of words.

Now, whatever either of those two sets of words may properly be interpreted to mean, it is clear that in neither of the letters of Dr. Walker was either of them adopted. Dr. Walker did not certify either that Russell was "fit and capable of doing work" nor that "his incapacity for work had ceased." In his first letter he said "he is able to do light work." But as Fletcher Moulton, L.J., said in *Proctor v. Robinson*, [1911] 1 K.B. 1004, that is "a vague phrase." The very use of the qualifying adjective shows that the physician was not prepared to state plainly and absolutely "Russell is now fit and capable of doing work." The word "fit" must not necessarily be read with the words "of doing work" and does not connect with them grammatically. It very often has a meaning by itself although of course it is generally used in conjunction with some such phrase as follows the word "capable." Murray gives a colloquial use as meaning "in good condition, perfectly well." At any rate the defendant did not get in the first letter the certificate it required. In its solicitors' further request to Dr. Walker it is clearly shown that by them the first letter revealed a continuance of "the incapacity to work" because they asked the doctor to say that the fact "that Russell is still incapacitated" or "his present tenderness" was due to the accident of November 18, 1914. In the face of this it is difficult to see how the defendant can now argue that that first letter was a certificate that Russell's "incapacity for work has ceased" in the words of the second phrase used in par. 4.

The second letter of November 20 really contains nothing more favourable to the defendant. Indeed, so far from being a certi-

ficate that his "incapacity had ceased" it expressly says that he is "still incapacitated," while repeating that "he is able to do light work" in the words of the former letter.

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In this view of the matter I think it is not necessary to attempt to decide just exactly what the words of paragraph 4 really mean in reference to the use of the words "total incapacity" in paragraph 1. That the letters or certificates did not mean the same thing and did not fulfil the requirement is to my mind quite obvious, as indeed was practically assumed in the letters of the defendant's solicitors above quoted.

I would, therefore, allow the appeal with costs, and give the plaintiff judgment below for the amount still due and unpaid under the agreement on the basis that it was still in effect up to the date of judgment. If this amount cannot be agreed upon by the parties there may be a reference to the trial Judge to fix the amount.

The plaintiff should also have his costs of the action.

Appeal allowed.

JOHNSON v. SOLICITOR.

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Manitoba King's Bench, Curran, J. April 14, 1917.

SOLICITORS (§ II A—20)—LIABILITY FOR NEGLIGENCE—MEASURE OF DAMAGES.

Registering a conveyance in disregard of his client's instructions, and neglect to insert a necessary and usual covenant for the protection of his client, render a solicitor liable for all the pecuniary loss the client sustains through the negligence and breach of duty.

ACTION against solicitor for negligence and breach of duty. Statement.

J. F. Kilgour, K.C., for plaintiff; *H. F. Maulson*, K.C., for defendant.

CURRAN, J.:—The plaintiff sues the defendant, a solicitor of this Court, for negligence and breach of duty in his conduct of certain of the plaintiff's business entrusted to him, whereby the plaintiff alleges he has sustained pecuniary loss. The plaintiff is a farmer and at present lives in Saskatchewan but formerly resided in the Province of Manitoba, near the village of Russell. The defendant is a solicitor of this Court residing and practising at Russell. Curran, J.

The defendant admits that he acted as solicitor for the plaintiff in completing the transaction in question, which was an exchange of properties between the plaintiff and one Andrew Mil-

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ton Setter, but claims he also was acting for Setter in the same transaction and was, in fact, simply carrying out the joint instructions of the parties to prepare certain documents which were necessary to effectuate a verbal agreement previously entered into between these parties. The facts are somewhat complicated and the evidence is very conflicting. I incline, however, to the plaintiff's evidence of what really took place, not only because his manner of giving his evidence impressed me more favourably than that of either Setter or the defendant, but because his statements seemed to me more probable and consistent with what one would reasonably expect to have taken place under the circumstances.

The facts as I find them are as follows: The plaintiff owned in fee simple the north-east quarter of section 9, township 22, range 28, west of the first principal meridian in the Province of Manitoba, clear of encumbrances, which he valued at $5,500. He was desirous of disposing of this land and removing to Saskatchewan to take up a homestead. He had received an offer for his land from one Attwood of $2,000 to be paid in October, 1914, and conveyance of another quarter section, prior to the negotiations with Setter. On July, 22, 1914, he met Setter, whom he had known for many years and in whom he seems to have reposed a great deal of confidence, who suggested a deal for his (plaintiff's) farm, offering a house and lot in Russell, his equity of redemption in a quarter section near Shellmouth (the north-east quarter of section 29, township 22, range 29, west), and $1,700, payable in September, 1914, in exchange for the plaintiff's farm. The plaintiff then informed Setter about the previous offer he had received from Attwood, upon which Setter endeavoured to persuade the plaintiff and evidently succeeded in so doing, that his (Setter's) offer was the better of the two. Certain representations as to the number of acres under cultivation on the Shellmouth farm, the total acreage in the quarter section and as to the amount of encumbrance upon it were made by Setter to the plaintiff. For the purposes of the exchange Setter valued his properties at $5,700.

The preliminary negotiations were carried on at Setter's brother's farm, and an agreement was practically reached subject to the plaintiff's viewing the house property in Russell and inspecting the farm at Shellmouth. The $1,700, Setter informed

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the plaintiff, was to come from one Cakebread, to whom he had just sold a quarter section of land near Carnduff, Saskatchewan (the north-east quarter of section 2, township 1, range 34, west 1). Cakebread happened to be working at the brother's farm when the plaintiff called there and was then and there introduced by Setter to the plaintiff. The plaintiff says that Cakebread's name was not then otherwise mentioned in connection with the payment of the $1,700; but I think that before the parties reached the defendant's office, or whilst discussing their bargain in the defendant's office, he must have understood that Setter expected this money was to come from Cakebread as part of the purchase price of the Carnduff farm. However, I find that the plaintiff did not agree to accept Cakebread for payment of this $1,700 secured by an assignment of his agreement of sale with Setter and a transfer to the plaintiff of the Carnduff land, although Setter and the defendant both contend that this is what the plaintiff agreed to accept.

I think it highly improbable that the plaintiff would have been so rash as to accept Cakebread, a man wholly unknown to him, for so considerable a sum as $1,700, even though the payment was secured upon the Carnduff farm, which the plaintiff had never seen and as the fact is was then encumbered for $1,000 to the Confederation Life Association. Setter was a man of substance, well-known to the plaintiff, and there is every reason to believe that the plaintiff relied upon the $1,700 being paid to him at all events by Setter, as it was the only cash he was to receive out of the transaction.

The parties then went to Russell and viewed the house and lot mentioned. Cakebread's family were living in the house at the time and whilst in the house Mrs. Cakebread shewed the plaintiff a letter she had received apparently from Cakebread's mother in England in connection with sending Cakebread some money before September, derivable from the sale of some property there. I think this was brought about by Setter designedly to impress the plaintiff, and it could only have meant one thing to the plaintiff, namely, that Setter was to some extent looking to Cakebread for the money, $1,700, he had agreed to pay the plaintiff by the September following. The plaintiff was satisfied with the house and lot in Russell and apparently satisfied with

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the whole offer subject to his right of inspecting the Shellmouth farm and ultimate rejection of the bargain if he was dissatisfied with that property.

The parties, plaintiff and Setter, were unable to see the defendant that night in Russell, July 22, until about 12 o'clock midnight. Plaintiff says it was necessary to have the proper papers drawn that night as he was obliged to leave for home early next day. They met defendant accordingly at his office, where the transaction was fully explained to the defendant and some papers drawn up.

I find that Setter had represented to plaintiff as to the Shellmouth farm that there were 40 acres under cultivation, that the farm contained 150 acres, and that the encumbrance against it was about $732, of which it was agreed the plaintiff was to assume $700.

Now, there is a direct conflict of testimony as to what was said in defendant's office, and as to what papers were then drawn up and signed. The plaintiff says positively that the only papers then prepared and signed were a deed of his farm to Setter and an order on the Canadian Bank of Commerce at Kamsack for delivery of his title deeds to defendant; that no reference was then made to the Cakebread agreement except this, that Setter handed him a paper relating to the Carnduff property, but did not give him an opportunity to, nor did he, the plaintiff, read it. He says "Setter just shewed it to me and said, I will hold this as security; it is bearing 8%, and when I get the money in September I will hand it over to you." Setter's title deeds were then in the Merchants Bank at Russell, and of course not available at that hour of the night. No other papers, according to the plaintiff's testimony, were prepared or produced that night. The plaintiff says that the defendant was to draw up all papers necessary to complete the transaction when the plaintiff had approved of the Shellmouth farm.

Defendant says, however, and Setter corroborates him, that not only were the plaintiff's deed and order for papers drawn up and signed that night but also an assignment to the plaintiff of the Carnduff agreement, a quit-claim deed of the Shellmouth farm, a transfer of the Russell house and lot, a transfer of the Carnduff farm, not produced, and an order on the Merchants Bank for delivery of Setter's title deeds, not produced.

The transfer of the Carnduff farm was wrong in some respect and could not be registered, so the defendant says, and a new transfer was subsequently drawn up by him on January 19, 1915, and signed by Setter. Owing to a mistake in the description of the Russell lot a new transfer for the correct lot was also subsequently prepared and signed by Setter. This transfer cannot be produced as it was registered on April 27, 1916, and certificate of title in the plaintiff's name issued. There is no evidence to explain what became of the transfer of the Carnduff farm said to have been drawn that night and signed. A perusal of the quit-claim deed discloses that it was not completed that night even if signed, as certain exceptions from the description of the land were manifestly added later. The ink and handwriting disclose this.

The defendant was Setter's solicitor and it was through Setter that the plaintiff was induced to go the defendant to have their business transacted. The defendant had the Cake-bread agreement in his hands at the time, so that it was possible for him to have endorsed upon it the short assignment which it now bears.

Whether or not all these papers were prepared that night and signed by Setter, I am satisfied that the plaintiff was ignorant of the fact and honestly believed that his deed and order for title deeds were the only papers then prepared and that they were to be retained by the defendant in his possession (as I find on the evidence that defendant said they would be) until the plaintiff had inspected the Shellmouth farm and signified to the defendant his approval of the same, upon which the defendant was to do what was legally necessary to perfect title in the plaintiff to the Shellmouth farm and Russell property, and legally secure the due payment by Setter to the plaintiff of the $1,700 by the month of September following.

The plaintiff left for his home next morning and on his way stopped off at Shellmouth and made some inquiries of a Mr. Garnett, a former owner of the land, about the acreage. He became dissatisfied and at once wired the Bank at Kamsack not to deliver the papers and wrote the defendant and Setter the letters, which, if not a repudiation of the transaction, at all events conveyed an intimation to the recipients that the plaintiff was not

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satisfied. The statement that he "was withholding his papers in the bank owing to misrepresentation of the Shellmouth property," was a clear intimation to the defendant, as the plaintiff's solicitor, to proceed no further on his behalf with the closing of the transaction. It certainly was enough to deter the defendant, who was in duty bound to protect the plaintiff's interests as well as those of Setter, from parting with the deed, which, as I find to be the fact, was deposited in the defendant's hands subject to the plaintiff's orders as to its delivery. Whether or not the plaintiff had the right to withdraw from the transaction, it was clearly the defendant's duty to obey the instructions of his client and to hold this deed for further developments. The defendant does not seem to have taken the plaintiff's complaint very seriously as is apparent from his reply, which elicited a further protest from the plaintiff, as to the amount of encumbrance against the Shellmouth farm. A letter in similar terms was also sent to Setter.

Both of these letters are dated the same date, August 3, 1914. In them the plaintiff states that he had only agreed to assume $700 on the Shellmouth farm and avows his intention to call the deal off if the agreement he contends for in this respect is not adhered to. Ex. 4 has endorsed upon the back Setter's version of the agreement as to this encumbrance, and was forwarded by him to the defendant.

No attention whatever was paid by the defendant to any of these letters and he thereafter took upon himself to register the plaintiff's deed to Setter, thereby putting it in Setter's power to dispose of the plaintiff's farm at his convenience, a thing he in fact did.

Not hearing anything from the defendant the plaintiff went to Russell on January 11, 1915, and saw the defendant, but could get no satisfaction about the business. Heated words ensued and the interview ended by the defendant shewing the plaintiff to the door, having first, however, told him he had better go and see Setter. After several attempts the plaintiff ultimately got hold of Setter and the two went to the defendant's office on January 19, 1915, when the plaintiff says he told the defendant that he had nothing to shew for his farm, which indeed was quite true. Defendant then told him there was some money coming to him over and above the $750 on the Shellmouth farm, and that he had

got to take it. When asked about the $1,700, the plaintiff could get no satisfaction but was told: "You can't get it, because Cakebread had never come across; you will have to take hold of the Carnduff property. You have either got to take the Cakebread farm or lose it. You can't get anything else." Upon which the plaintiff replied, "I won't give up my papers." Defendant thereupon said, "Well, Setter will have to sue you for them." Plaintiff was not then told by the defendant that he had registered his deed—information that I think the solicitor ought to have imparted to his client.

The upshot of the matter was that the plaintiff was overborne and induced to accept what the defendant calls a settlement so far as Setter was concerned. Then a lease of the Shellmouth farm was assigned to him; a list of documents defendant said he was to get handed to him; a cheque for $23.62 of Setter's given him; a receipt to Setter signed by him, and a cross-receipt from Setter given him.

I do not believe the plaintiff voluntarily agreed to all this but was overborne by the defendant and Setter and induced, being without any independent advice, to agree to what they proposed and did. In short, that the plaintiff was not wholly a free agent or, as he expressed it, "I let myself be driven into this deal because I thought I couldn't do otherwise." The parties separated and the plaintiff returned home.

At this meeting on January 19, 1915, the plaintiff says Setter produced the Cakebread agreement, ex. 37, and said, "Now I am going to sign this over to you. It is no use to me anyway." It was then, according to the plaintiff's evidence, that the assignment on ex. 37 was endorsed and executed.

It will be seen from ex. 8 that the defendant retained $18 of the plaintiff's money for costs, yet to this day he has only registered the transfer of the Russell property and the quit-claim deed of the Shellmouth farm, and even this was not done until April 27, 1916, after legal proceedings against him were threatened. The transfer of the Carnduff farm has never to this day been registered.

Not hearing from the defendant after his return home, the plaintiff wrote two letters, one on April 14, 1915, and one on April 24, 1915, produced as ex. 11. To neither of these did he

receive any reply. Whereupon he went again to see the defendant on May 10, 1915, and asked him for his papers. The defendant replied, "You can't get those papers until I get yours," telling him to go up to Kamsack, get his papers and bring them down to Russell. The plaintiff did this, and returned to Russell on May 26, and handed the papers to the defendant, who, after looking them over, laughed and said "they are no earthly use, there is a deed from Richard Seaman missing." Upon which the plaintiff said he would not give up his papers until everything was cleared up, so the papers were left by the plaintiff with a bank at Russell. Thereafter the defendant apparently did nothing further to complete the plaintiff's title, and in June, 1915, the plaintiff was served with the writ commencing the action for foreclosure of the Confederation Life mortgage on the Carnduff farm.

Later on the plaintiff consulted a firm of solicitors in Regina, who wrote the defendant two letters, to neither of which did the defendant make any reply, and the matter was then placed in the hands of the plaintiff's solicitors on the record. A correspondence ensued which resulted in nothing. This action was then brought.

Now, having found the facts to be as stated above, what is the law applicable to the defendant's conduct and duty towards the plaintiff as his client? Had the plaintiff a right to expect that the defendant in preparing the various documents necessary to carry out and complete the transaction was bound to see to it that the plaintiff was assured of receiving, in so far as proper conveyancing with inclusion of proper covenants would assure it, the consideration which was to be given and paid him by Setter? If so, was he so protected by the documents which were in fact drawn by the defendant ostensibly to properly carry out the transaction.

To the first question, I think the plaintiff undoubtedly had the right; and to the second, I am forced to the conclusion that the defendant failed in his duty, either through negligence, ignorance or worse, as no adequate protection was given to the plaintiff for the payment of the $1,700 by Setter, which, as I have held upon the evidence, Setter had agreed to pay the plaintiff not later than the month of September, 1914.

A reference to the Cakebread agreement discloses that, al-

though there was a sum of $1,700 outstanding under it, payable to Setter, the payment of this sum was spread over a period of 5 years, so that had the plaintiff read over the agreement, as the defendant and Setter both say he did, he would at once have been disillusioned as to the possibility of the $1,700 being derivable from this source in time to put Setter in funds from this source to pay the plaintiff by September, 1914. But I am inclined to think that Setter relied upon the letter Cakebread had received from his mother in England, stating that the money would be sent to Cakebread some time in September, as the result of a sale of some property in the Old Country. This promise was not realized, owing, it was said, to the outbreak of the war, and throughout his evidence Setter endeavoured to make it appear that the plaintiff was thoroughly conversant not only with the Cakebread agreement but also with the correspondence relative to this $1,700, and was content to rely upon it for the payment of the $1,700. I do not believe this, but I do believe the plaintiff when he says that he looked to Setter for this money and to no one else. It was therefore the defendant's duty to have obtained Setter's written covenant obligation to this effect. He did not do this, but contented himself, to save expense to Setter, as he says, with endorsing on the Cakebread agreement a short informal assignment which neither operated to convey the land to the assignee nor contained the usual assignor's covenant to pay the unpaid purchase money if the original purchaser failed to do so.

Admitting the contention of the defendant to be true that the plaintiff had agreed to accept the Cakebread agreement to the extent of $1,700 as part of the consideration Setter was to pay, I think it was his clear duty to have prepared a proper formal assignment containing a covenant by the assignor Setter as to the amount of purchase money still outstanding, and the usual covenant found in all standard forms of such assignments for the assignor to pay if the purchaser did not. Failing this, it was his duty to explain to the plaintiff that a departure from the usual rule left him without any recourse against Setter, and that he must look to Cakebread and the Carnduff farm, with its encumbrance of $1,000, as his only security for this $1,700. Had he done this, I have little doubt but that the matter would have ended there and then.

Again I think the defendant was guilty of misconduct and

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breach of duty in registering the plaintiff's deed to Setter after receiving the plaintiff's letters before referred to. The defendant admits in his examination for discovery that he had received these letters before any papers were registered. He took upon himself to disregard his client's instructions, and, acting solely in the interests of Setter, as I am convinced, he registered the plaintiff's deed and delivered the registered duplicate over to Setter. This act, to my mind, was a clear breach of his instructions and misconduct which, if resulting in injury or damage to the plaintiff, rendered the defendant liable therefor.

The defendant's reason given for his extraordinary conduct in persistently refusing either to complete the registration of the plaintiff's papers or to deliver them up to the plaintiff when demanded, namely, the missing registered duplicate of the Seaman deed, is, to my mind, puerile, and coming from the lips of a solicitor, worse than puerile. Furthermore, he did not know that any such deed was missing until after the plaintiff brought his papers down to Russell and shewed them to the defendant on May 26, 1915. The defendant had neglected his clear duty to the plaintiff for nearly a year, for which neglect the missing deed could therefore have been no excuse.

In strict practice of conveyancers, production of title deeds is still necessary, notwithstanding the provisions of the Registry Act: *Freehold Loan* v. *McArthur*, 5 Man. L.R. 207; but here the defendant, by registering the plaintiff's deed and delivering the duplicate to Setter, who accepted it, and dealt with the property, thereby clearly accepted the plaintiff's title on Setter's behalf, and cannot now be heard to say to the contrary.

I am satisfied this alleged reason was merely an afterthought and an excuse to deceive the plaintiff and avoid explanations which would disclose a breach of duty and misconduct towards the plaintiff that the defendant did not care to make.

The whole course of conduct on the defendant's part towards the plaintiff indicates an utter lack of appreciation of his duty to his client. Even when the fact was brought clearly to his knowledge that the Confederation Life Co. were about to foreclose their mortgage on the Carnduff farm, this did not move him to do tardy justice to the plaintiff by registering the transfer of that property and thereby putting the plaintiff in a legal position

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to do something to protect it from foreclosure. It was all he had to represent $1,700 Setter ought to have paid him, yet the defendant was unmoved by the plaintiff's predicament, and still persisted in the absurd and captious objection about the missing deed. He still kept the plaintiff's transfer of the Carnduff farm locked in his safe. He did not deliver it to the plaintiff. He did not register it himself, and the result was that the plaintiff was powerless to do anything to protect the farm from foreclosure, an event which actually followed in due course, and the land was lost to the plaintiff as well as the $1,700.

Can the defendant be excused or exonerated from blame in this connection? I do not think so. He has signally failed to justify his conduct towards the plaintiff throughout. His disregard of instructions; his highly improper action in registering the plaintiff's deed to Setter; his withholding either from registration or from the plaintiff himself the transfer of the Carnduff farm under particularly aggravating circumstances without a shadow of legal or moral justification; his refusal to even reply to the letters of plaintiff's then solicitors, Barr, Sampson & Co., and his ignoring a proper written order for delivery to them of the plaintiff's papers; his putting forward in his letters to the plaintiff's solicitors, ex. 18, an untrue statement that he was holding the papers in question partly on account of costs that were due him when none were due or could have been due (the defendant's ledger account with the plaintiff clearly shews this), and again the untrue statement that he had registered the transfer of title to the Carnduff farm, and again reiterating the false claim for costs; his avoidance during this correspondence of any explanation of his action in registering the plaintiff's deed in the face of instructions by which the defendant himself took to mean that the deal was off, and his statement, all indicate to my mind bad faith and disregard of duty.

I cannot close my eyes to the fact that the evidence unquestionably shews that the plaintiff was practically forced to a recognition of the transaction which had, through the defendant's negligence and connivance with Setter, been put in a form entirely at variance with what the plaintiff supposed the bargain to be. He was in effect threatened with legal proceedings by the defendant solely in the interests of Setter and cannot be said to

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have voluntarily acquiesced in the altered conditions which were manifestly to his disadvantage. All this line of conduct on the defendant's part was contrary to his duty as a solicitor towards his client, and was, I believe, upon the defendant's own half-hearted admissions on his examination for discovery dictated because Setter was a regular and profitable client and the plaintiff was an ignorant man, who in all probability from his change of abode would never employ the defendant again. I do not for one moment believe that the defendant was sincere in his oft-repeated objections to the plaintiff's title on account of the missing deed. As a lawyer he must have known, or ought to have known, that such objection was untenable after he had registered the conveyance and handed over the registered duplicate to Setter, thereby enabling Setter to perpetrate a fraud on the plaintiff, which he, in fact, did by alienating the land with great promptness and preventing a rescission of the transaction, which is what, in my judgment, ought to have been done if it was legally possible.

For all these reasons I must hold the defendant legally responsible for breaches of his duty towards his client, whether wilful or negligent, for which the defendant must answer in damages to the plaintiff.

The measure of damage in such a case is the full amount of the pecuniary loss which the client has sustained: 26 Hals., p. 754; *Whiteman* v. *Hawkins* (1878), 4 C.P.D. 13.

The plaintiff must prove in an action such as this: (1) That there was want of care or skill, and (2) That owing to such want of care or skill he has suffered damage: 26 Hals., p. 754; *Hunter* v. *Caldwell* (1847), 10 Q.B. 69 (116 E.R. 28).

I think he has amply proved both. A solicitor holds himself out to his clients as possessing adequate skill, knowledge and learning for the purpose of properly conducting all business that he undertakes: 26 Hals., par. 1251.

In non-contentious matters it is his duty to carry them out according to the regular method prescribed by statute, rule or custom. If, where acting for a vendor, he allows an unusual covenant to be inserted in the conveyance and neglects to explain its effect he is liable: *Stannard* v. *Ullithorne* (1834), 10 Bing. 491 (131 E.R. 985). *A fortiori*, I think a solicitor equally responsible for neglect to insert a necessary and usual covenant for

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the protection of his client, such as here, a covenant by the assignor to pay the $1,700 if Cakebread made default, and to protect the assignee against default in Cakebread's covenant to pay the Confederation Life mortgage. Of course, if the plaintiff knowingly agreed to accept the assignment with all its onerations as the equivalent of $1,700 that would excuse the defendant, but I have held upon the evidence that no such agreement on the plaintiff's part was made with Setter or communicated to the defendant in instructing him to do what was necessary to effectuate the bargain.

There will be judgment for the plaintiff for $1,700 and interest at 8% from September 30, 1914, being the amount the plaintiff has lost through the defendant's negligence, with costs of suit and examinations for discovery. *Judgment for plaintiff.*

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Nova Scotia Supreme Court, Graham, C.J., and Russell, Longley, Harris and Chisholm, JJ. April 21, 1917.

WILLS (§ III G—150)—MAINTENANCE—LIABILITY FOR—REQUEST.

A devise charging an estate with the maintenance of the testator's widow living thereon does not render the executor liable for support furnished her without his request when she was living elsewhere.

Statement.

APPEAL from the judgment of Forbes, Co. C.J., for District No. 2, in favour of plaintiff, in an action brought against the executor and residuary legatee of Daniel Mason for the support and maintenance of the widow of the deceased. Reversed.

S. A. Chesley, K.C., for appellant; *D. F. Matheson*, K.C., for respondent.

Russell, J.

RUSSELL, J.:—The defendant married a daughter of Daniel Mason, deceased, and lived on his place for a year, after which he rented the farm for $30 a year. He gave the old man the use of a cow. For a couple of years his father-in-law did planting, after which the son-in-law found him in everything. The old man died in March, 1913, leaving a very small estate, the farm being valued at $700 and the personalty at $19.50. The defendant is his residuary devisee and legatee, and the small property left to him is charged, or if it is not he is, with $150 in legacies outside of a legacy to defendant's wife of $100. These facts may have nothing to do with the question to be decided, but they may help us to understand what the testator's intentions were when he "bequeathed" two rooms in the house to his widow and directed

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that she was "to have a Christian maintenance and to be supplied with fuel and light." The whole clause is as follows:—

1. I give and bequeath to my beloved wife Isabella the room and bedroom on the lower flat in my dwelling house, with a free and unrestricted right of way to said room and bedroom, and necessary conveniences for the comforts of a home, to have, hold and enjoy so long as she remains a widow in my name, no matter in whose name the said house and premises may be found from time to time; the said wife to receive the sum of $5 annually to be paid to her by my executor; the said wife to have a Christian maintenance and to be supplied with fuel and light.

I think it was clearly the testator's expectation and intention that his widow should occupy the rooms and be maintained there by his son-in-law, and that the latter, so long as he was willing to maintain her there, was not bound to maintain her anywhere else.

What happened was that after living for about a year and a half with the defendant, she went on a visit to the house of another daughter, wife of the plaintiff, and after staying there about a month, went back to the defendant's house, for her clothing, as plaintiff says—then returned to the plaintiff's house where she remained for a year or more, when a lunatic sister of plaintiff's wife came to plaintiff's house, whereupon she left plaintiff, remaining away for a year, returning to plaintiff's house April 16, 1916, where she has since remained.

Defendant notified the plaintiff by letter in May, 1914, that he would not be responsible for any bills the widow should incur away from her home and he forbade the plaintiff to shelter her. He claimed in this letter that he had always given the widow a Christian maintenance and the comforts of a home and that he always would do so, so long as she stayed in her home. There are, of course, the usual complaints of old persons in such circumstances. She could not eat the food that was provided; there was ice on the wood that she was obliged to bring in, and gas escaped from the base burner. On the contrary, there is evidence of her having said that the defendant was a good provider, and defendant explains away the ice on the wood by saying that there was always dry wood and kindling for her room. "One time last winter during a sleet storm it got on her large wood and was carried into the front entrance but she had dry wood besides." The patches which according to one account she was obliged to put on her clothes became, according to another story, an extra

piece of stuff sewed over the garment to keep the old lady warm between the shoulders.

What possible use can there be in any endeavour to determine the rights and wrongs of such a squalid controversy? There is happily a legal solution of the question at issue that need not take any note of the merits of such a family quarrel.

The defendant did not request the plaintiff to furnish any board or lodging for his mother-in-law, and plaintiff could not by his unsolicited services, even if they were ever so useful to the defendant in the way of relieving him of the expense of the widow's support, make the defendant his debtor. That is all that is necessary to be said as to the issue involved in this case. There are a few anomalous cases tending to shew that a subsequent promise would enable the plaintiff to sue upon such a consideration, but there was no such promise here. On the contrary, there is a distinct refusal.

If the defendant was at fault in not providing a suitable maintenance for his mother-in-law, I have no doubt there would be ground to charge the estate with her maintenance. There are no such proceedings before us and the merits of the case do not seem to me to be such as to render it advisable for us to endeavour to twist the present case into a proceeding of that sort. It seems to me to be simply the case of a dyspeptic and discontented old lady, who always imagines some position more desirable than the one in which for the time being she may happen to be. Her wanderings backwards and forwards are to my mind convincing to this effect.

I think the appeal should be allowed with costs and the claim dismissed.

GRAHAM, C.J., and LONGLEY, J., concurred.

HARRIS, J.:—Under the provisions of the will in question, I think the right of the widow to be maintained was to be maintained in the house of her late husband, and I have reached the conclusion, with great deference, that the finding of the County Court Judge that she was justified in leaving her home when she did, cannot be upheld. The trial Judge decided that she had good cause for leaving the defendant's house, because "she had to fetch and carry ice-covered wood all one winter and suffer from rheumatism in consequence, and also because the escaping gas

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from a coal stove choked her up." I cannot help thinking that the trial Judge overlooked the fact that she left home in May. There would be no ice-covered wood to carry, and probably no escaping gas from any stove during the next 4 or 5 months; and the impression left on my mind, after carefully reading the evidence, is that these were excuses which occurred to her afterwards and were not the real cause of her leaving. In view of this and of the fact that plaintiff was warned by the defendant that he would not be responsible for the widow's board, I think the action must fail.

If the plaintiff had succeeded in showing that the widow had good reason for leaving the home of the defendant, we should have been obliged to consider the question as to whether the doctrine of the conventional subrogation is in force in this province, and whether we should not permit an amendment on terms to enable the plaintiff to set it up. There are many American decisions by Courts whose opinions are entitled to serious consideration, holding that conventional subrogation results from an agreement made either with the debtor or creditor that the person paying shall be subrogated, and here the plaintiff swears that he had such an agreement with the widow. I refer to *Receivers of N.J.M. R. Co.* v. *Wortendyke*, 27 N.J. Eq. 658; *Tradesmen's Building &c. Assoc.* v. *Thompson*, 32 N.J. Eq. 133; *First Nat. Bank of Freehold* v. *Thompson*, 61 N.J. Eq. 193; Sheldon on Subrogation, 286; *Huffmond* v. *Bence*, 128 Ind. 131; *Clark* v. *Marlow*, 149 Ind. 131; *McCormack's Administrators* v. *Irwin*, 35 Pa. 111; see, also, *The Queen* v. *O'Bryan*, 7 Can. Ex. 19.

In view, however, of the conclusions which I have reached, as to the facts, this question does not arise.

I would allow the appeal with costs, and dismiss the action with costs.

Chisholm, J.

CHISHOLM, J.:—I concur in the opinion of Harris, J.

Appeal allowed.

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Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh and Ives, JJ. May 23, 1917.

SALE (§ I B—11)—DELIVERY "ON CAR"—DUTY AS TO—GRAIN ACT.

In a sale of grain to be delivered "on car" it is the buyer's duty to furnish the car, and he must do so before he can sue for breach of contract for non-delivery of the grain.

[Canada Grain Act (1912, ch. 27), considered.]

Statement.

APPEAL from the judgment of Harvey, C.J., in favour of plaintiff, in an action for breach of contract to deliver grain. Reversed.

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C. S. Blanchard, for appellant; *G. L. Fraser*, for respondent.

STUART, J.:—If the plaintiffs had been carrying on business at Jenner there would, I think, have been much less readiness on the part of everyone to suggest that the duty of obtaining a car might lie upon the defendant. There is, in my mind, no doubt that, at least in such a case, it would be the duty of the purchaser, under such a contract as that here in question, to supply the car. The delivery was to be "on car," that is, the handing over of the possession of the property from the defendant, the vendor, to the plaintiffs, the purchaser, was to take place "on the car." The car was to be the conveyance of the purchaser. It was the purchaser who was to select and control its destination. The car was to carry the purchaser's goods, not those of the vendor. The vendor was not interested in their destination except that it was no doubt understood that they would pass an inspection point where the grade would be fixed.

Aside from the provisions of the Grain Act, therefore, I think it is the purchaser's duty to supply his own conveyance and the vendor's duty merely to deliver the goods to the purchaser on board that conveyance which was to be a railway freight car. I cannot see any difference in effect in this regard between the words of the contracts here and those of the contract dealt with in *Marshall* v. *Jamieson*, 42 U.C.Q.B. 115. A contract fixing a price f.o.b. at a certain place clearly means that the trouble and expense of putting on board shall be borne by the seller, that is, that he shall deliver on board. I am of opinion that neither the Grain Act nor the fact that the buyer did not carry on business at Jenner makes any difference in regard to this question.

The provisions of the Act in regard to the ordering of cars were obviously intended as an exercise of control over railways in their functions as part of the machinery of trade and commerce and the control was exercised with a view to preventing their shewing any discrimination in their dealings with people who want to ship grain. Cars must be allotted by the railway company strictly in the order of application for them and an applicant must use a car within twenty-four hours after it has been placed at his disposal or lose his turn.

A person who "owns grain for shipment in car lots" may be an applicant. I think this phrase is quite general and is used

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in a popular sense. It covers and includes a man who has contracted to purchase grain which is to be delivered to him *on the car* even though the strict legal result of his contract may be that the legal property does not pass to him until so late as the moment of delivery on the cars.

Then the fact that the plaintiffs here were not carrying on business in Jenner can make no difference. Whether they were or not they were to take delivery of the grain on the car at that place. If the carriers were their agents to take delivery, which might no doubt be the case, the pertinent question is, who was to make the contract of shipment with the carriers? The vendor certainly could not do so, at least, *qua vendor*, because he did not know where the goods were to be sent. The rule laid down in the Sale of Goods Ordinance, sec. 31, which is merely the common law rule, does not seem to be directly applicable. That section reads:—

> Where, in pursuance of a contract of sale the seller is authorized or required to send the goods *to the buyer*, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be a delivery of the goods to the buyer. (2) Unless otherwise authorized by the buyer the seller must make such a contract with the carrier *on behalf of the buyer* as may be reasonable, having regard to the nature of the goods and the other circumstances of the case.

The reason why this rule is perhaps not directly applicable is that it is probable that it was not the intention of the parties that the grain should be sent to the buyer at Alderson where the buyer, the plaintiffs, carried on business. The use of the expression "basis No. 1 northern" shews that an official inspection was to take place somewhere and there was no inspection office, admittedly, either at Jenner or Alderson. There is nothing in the contract to shew that the seller was either authorized or required to send the grain anywhere at all. There is nothing even in the oral evidence to shew that the seller knew anything about where the buyer wanted the grain to go. I am unable, therefore, to discover any reason for thinking that, at least under the terms of the original contract, there was any intention that the seller should be the buyer's agent to make the shipping contract with the carriers. The buyer may have intended to ask the seller later on, as he in fact did, to make this contract on his behalf, but there was certainly nothing said about it when the sale contracts were entered into. Even if there was a discussion as to

the ordering of cars, even assuming for the moment that there was an agreement that the seller should procure them, the evidence does not shew that the defendant, the seller, was by arrangement to make the shipping contract on the plaintiffs' behalf with the railway company. The plaintiffs' evidence rather meagrely touching this point was self-contradictory.

It cannot, therefore, be denied that it was the buyer's duty under this contract to make the shipping contract either by themselves or by some instructed agent because they were the only persons who knew where and to whom they wanted the grain sent.

Now, I do not think that there is anything in the Grain Act which necessitates the rather absurd conclusion that it was intended that a person who can make no shipping contract, who does not indeed want to make a shipping contract because he does not want to be liable for the freight, should nevertheless be in certain circumstances the person to order a car or to secure a car.

Sec. 198 of the Grain Act says: "Cars so ordered shall be awarded to applicants according to the order in time in which such orders appear in the order book."

Sec. 203 says: "Each person to whom a car has been allotted under the foregoing provisions shall, before commencing to load it, notify the railway agent of its proposed destination."

Certainly the vendor could have done no such thing in this case unless, of course, he had received the information from the buyer. I think the more reasonable interpretation of this section, as applied to the conditions of this contract, is that the buyer who is to take delivery "on the car," and in that plain sense is "loading" the car, must before doing so inform the agent of its destination as having been the applicant for the car and as being the person who is going to make the shipping contract and to bind himself to pay the freight charges to the point chosen by him for its destination.

With regard to any special contract that the defendant should secure the cars I agree with Beck, J., that the evidence is not sufficient to shew the existence of any such contract. The most I can make out of the evidence is the possible existence of some sort of collateral agreement or undertaking by Clarke to act as

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the agent of the buyer and *in that capacity*, but in that capacity only, to secure a car for him. He had a right, under the Grain Act, to act as agent for an applicant. This hypothesis, and it is not much more in any case, is rather confirmed, in my opinion, by what the plaintiffs did in the letter of November 18, wherein they say, "When you get the car loaded, use one of the enclosed bills of lading to bill it out and send us the original." Here we have them directly requesting Clarke to act as their agent in making the shipping contract. I think whatever Clarke may perhaps have undertaken to do before that about the car must necessarily be held to have amounted merely to an undertaking to act for the plaintiffs as their agent in securing a car. If there were such an agreement, and he had omitted to do his best to secure a car, there might have been some reason for liability for damages for breach of that special contract. But that would be a different ground of liability and no such ground of action is alleged.

The action is for damages for non-delivery of the grain. In order to succeed, the plaintiff must shew that he was himself ready and willing to accept delivery or that the seller, the defendant, had done some act which amounted to a refusal ever to deliver and so relieved the plaintiff from the necessity of getting ready. He was not ready to do so because he had not supplied a car for the purpose as the contract contemplated. The defendant never refused to perform his obligation if a car were provided. Even if the defendant had agreed, as the plaintiffs' agent, to secure a car, I think the facts shew that the agent was unable to get a car within the time fixed for delivery. If the defendant had been suing for damages for non-acceptance, it would have been a good answer by the plaintiff to say "you agreed to get a car for me and I was always ready and willing to take delivery as soon as you provided me with that car." I do not think he can recover damages from the seller for not delivering when the reason for non-delivery was the inability of his own agent (the seller, it is true) to secure a car so that he, the principal, would be ready to accept delivery. In other words impossibility of performance of the act of delivery is a good answer where it is due, not to impossibility in the doing of some act which it was the vendor's duty, *qua* vendor, to do, but to the impossibility of doing some act which it was the *buyer's* duty to perform, but which was to

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be performed by the vendor as the buyer's agent. In other words, it is the buyer, the plaintiff, who would, in such a case, be really setting up impossibility of performance, not as a defence, but as an answer to a defence, as a reply to the answer to him that he was not himself ready and willing to accept delivery.

The plaintiff knew some considerable time before the dates fixed for delivery that there was great difficulty in getting cars. He had been told so by the defendant. So far as the evidence shews, he never made any attempt on his own part to secure the cars, after he learned of the difficulty, that is, he never tried to become ready to accept delivery. He cannot therefore hold the defendant liable for non-delivery.

There are other considerations in the case which would only apply if the defendant were the plaintiff and were suing for non-acceptance. It is very probable that he also might not have been able to succeed, for instance, because he did not notify the plaintiff in time as to when he would be ready to deliver. As Beck, J., points out, the contract almost necessarily implies some reciprocal duty of communication.

I would allow the appeal with costs and direct judgment to be entered dismissing the plaintiff's action with costs.

Beck, J.

BECK, J.:—The two memorandums, one dated in September, the other in October, evidencing the sale by the defendant to the plaintiffs of grain, provide for its delivery "on car at Jenner" "by" (in the one case) November 30, 1915, and (in the other) December 1, 1915.

The writings leave some things unexpressed, namely, which of the parties was (1) to provide the car; and (2) to fix the precise date of delivery. These questions must therefore, so far as it may be necessary, be settled by ascertaining what the law will take to be implied with respect to them, and this is to be ascertained by considering all the circumstances surrounding the making of the contract, including in this case the provisions of Canada Grain Act ((1912), ch. 27, D.). See generally on the subject of implied terms in a contract, 7 Hals., tit. "Contract," sec. 1035.

I call attention to some of the provisions of the Act which it seems to me have some special bearing upon the question under consideration.

Sec. 2 (q). "Applicant," referring to an applicant for cars, means any person who owns grain for shipment in car lots, or who is an operator of an elevator.

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Sec. 162 provides for a person having grain stored or binned in not less than car lots in any country elevator ordering cars to be placed at the elevator, and see secs. 163, 164.

Sec. 184 provides for the owner or operator of a flat warehouse applying to the proper railway official to furnish a car to the person to whom the bin is allotted, and see sec. 185.

Sec. 194 provides for applying for cars to be furnished to loading platforms.

Sec. 195 and a number of the following sections contain the general regulations respecting the ordering, awarding, placing and sending forward of cars.

Sec. 195. The railway company is to keep a car order book.

Sec. 196. An applicant may order cars according to his requirements.

Sec. 197. The applicant or his agent duly authorized in writing shall furnish to the railway agent the name of the applicant and the section, township and range in which the applicant resides, or other sufficient description of his residence in the car order book; and each car order shall be consecutively numbered in the car order book by the railway agent, who shall fill in with ink all particulars of the application, except the applicant's signature, which shall be signed by the applicant or his agent duly appointed in writing.

2. An agent of the applicant shall be a resident in the vicinity of the shipping point, and if the car order is signed by the agent of the applicant the appointment shall be deposited with the railway agent.

Sec. 199. The applicant or his agent on being informed by the railway agent of the allotment to him of a car shall at once declare his intention and ability to load the car within the next twenty-four hours, and provides for the case of his not fulfilling his obligation.

Sec. 202 provides for spotting the cars.

Sec. 203. Each person to whom a car has been allotted shall before commencing to load it notify the railway agent of its proposed destination.

Sec. 245 makes it a penal offence, among other things, for a person not being an agent duly authorized in writing of an applicant for a car for shipping grain obtaining the placing of a name

on a car order book as the name of an applicant for a car for shipping grain.

Sec. 243 makes any person guilty of a violation of the Act or of any regulation under it guilty of an offence punishable on summary conviction.

Form E is the form of the car order book and contains at its foot the following statement to be signed by the applicant or his agent: "I hereby declare by myself or agent appointed in writing that at the time of making this order I am the actual owner of a car lot of grain for shipment."

In *Kleinert* v. *Abosso Gold Mining Co.* (1913), 58 Sol. J. 45, the Privy Council adopted the rule of construction expressed by Lord Blackburn in *Mackay* v. *Dick*, 6 App. Cas. 251:

As a general rule where, in a written contract, it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.

In Williston on Sales of Goods, sec. 457, it is said:—

In order for either buyer or seller to put the other party in default, it is often necessary that notice of some fact be given. This necessity is sometimes due to an express condition in the contract. In other cases the condition, though not expressed in words, is necessarily involved in the agreement. Accordingly if the seller agrees to deliver on the buyer's ship when it is ready to receive the goods, notice to the seller that the ship is ready to receive them is a condition precedent to the seller's obligation (*Armitage* v. *Insole* (1850), 14 Q.B. 728 (117 E.R. 280); *Stanton* v. *Austin* (1872), L.R. 7 C.P. 651; *Pinkham* v. *Haynes*, 103 Me. 112, 68 Atl. 642, where the sellers agreed to deliver potatoes on board cars to be furnished by the buyer on or before a certain date; it was held that the sellers were entitled to such notice of the arrival of the cars as would enable them with reasonable diligence to load the potatoes, and not having received such notice were freed from their obligation to deliver any potatoes).

Generally where the buyer or seller is entitled to notice before performing, the notice is not simply a condition qualifying his obligation but it is also a legal duty of the other party to give such notice within a reasonable time. Accordingly if the notice is not given, not simply is the party who should receive it excused from performing, but he has a right of action against the party who should have given it.

It is quite clear from the provisions quoted from the Act that after the making of such a contract as that in question a necessity arises for communication between the parties—that there is an implied obligation on the part of the seller and the buyer respectively to make certain communications the one to the other, and also that there is an implied obligation on one or other and perhaps on both to give certain notices to the railway company.

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In *Forrestt* v. *Aramayo* (1900), 83 L.T. 335, the Court said (per Lord Halsbury, Smith and Williams, L.JJ., concurring):—

Whenever there are concurrent obligations the party who seeks to recover against the other must shew that he has always been ready and willing to perform the obligation upon him. It is immaterial whether the obligation is express or is implied: *Expressio eorum quæ tacite nisunt nihil operatur.* In a contract for the sale or manufacture of a chattel, the one party must be ready and willing to deliver, and the other to accept delivery. The difference between the two acts is quite immaterial. . . .

Whichever party is the actor, and is complaining of a breach of contract, he is bound to shew, as a matter of law, that he has performed all that was incident to his part of the concurrent obligations. The averment that he was always ready and willing to perform his obligation is a necessary averment. . .

Therefore (in this case) it seems to me that neither can bring an action against the other for breach of contract because neither party was ready and willing to do his part of the concurrent acts.

Smith, L.J., said:—

The defendants are suing the plaintiff to recover liquidated damages because the plaintiff did not deliver the launch until many days after the agreed date. The defendants, being the actor, must, in order to recover the damages, shew that they were always ready and willing to perform their part of the contract by having a vessel ready to receive the launch on board, and that they gave notice to the plaintiffs that they had such a vessel.

It seems to me that the Grain Act in using the word "owner" does not intend to attach to it any narrow, technical or strictly legal meaning or a meaning which as between farmers selling grain and persons engaged in the business of buying grain will vary with the special terms of each particular contract and the condition of the goods as disclosing whether or not in the particular case the property has passed from the seller to the buyer involving often a more or less intricate question depending upon whether the sale is of all the seller's grain and therefore of specific goods or of a defined but unascertained part of a specific entirety, or whether, and if so, when the quantity sold has been unconditionally appropriated to the contract and whether the buyer has had notice of the appropriation or whether the seller at or at any time after the making of the contract still remains under an obligation *for the purpose of ascertaining the price* (Sale of Goods Ord., sec. 20, III.) to weigh, measure, test or do some other act or thing. On the other hand, I think the Act intended the word "owner" to be taken in a wide, popular sense, such a sense as would be given to it by those classes of persons—farmers and grain buyers—to whose transactions extending during a considerable season year after year the provisions of the Act were directed and intended to

facilitate and simplify, and I think that sense would apply the word "owner" to the farmer when he is himself shipping his grain direct for sale on his own account, and to the grain buyer in all other cases, irrespective of the question whether or not according to the technical rules of law the property in the grain had passed from the farmer to the grain buyer.

In other words, I am of opinion that the obligation under such a contract as that under consideration—apart from express provision to the contrary—is upon the buyer to order the necessary cars. The conveniences of this course are, it seems to me, a confirmation of the view I have expressed; the grain buyer is presumably making similar contracts with a large number of the farmers in the same vicinity and is consequently in a position to arrange for the delivery of grain at times which will best accord with the supply of cars. A further confirmation of this view is that the Act imposes an obligation in favour of the railway company that the agent of the company shall at the time of shipment be informed by entry in the car order book of the destination of the grain, a direction which must necessarily come from the buyer. A further confirmation is furnished, I think, by reason of the Act imposing as I think it does a penalty upon a person applying for cars who is not entitled to do so. The Act must have intended, as I think, that not, sometimes the selling farmer and sometimes the buying grain dealer, but uniformly always one, and as I think the buyer should be the applicant, as being the "owner."

If this view is correct then the reasonable thing to be done—and therefore an implied term of the contract—is that the buyer shall give the seller some reasonable notice, having regard to the time within which the seller is to deliver and the probabilities as to the prompt supply or shortage of cars—something much more easily ascertained by the grain dealer than the farmer—as to the proper time for delivery so that the seller may make delivery within the time limited by the contract and so that delivery may coincide with the supply of the cars, a condition of things which may call for one or more provisional notices from the buyer, to which the seller, assuming he may disregard them under some circumstances, must do so at the peril of not being able to make delivery within the limited time because, through his fault in disregarding the buyer's notices and his arrangements for the

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supply of cars, the buyer cannot procure them, and under a penalty of the buyer either repudiating the contract for delay or insisting on a later delivery.

I come now to the evidence. As to the question which was to procure the car:—The defendant says that at the time of making the first contract he said to the plaintiff Stuart, "What will I do when I get ready to deliver this?" and that Stuart said, "You come to me when you get ready to deliver and I will fix you up, I will get you cars"; he said, "Come to me and I will do the rest." The defendant is not prepared to state that anything was said upon the question of cars at the time of making the second agreement. The defendant's son on speaking of the occasion of the making of the first contract says: "As near as I can remember my father I think asked him (Stuart) how he was going to get these cars as there was no agent at Jenner at the time, and I think Mr. Stuart said to come to him and he would get the cars and tell him where to ship to."

The plaintiff Stuart said on cross-examination:—

Q. You say that nothing was said as to who should order the cars. Is that what you say now? A. No, I did not say that. Q. Was anything said as to who should order the cars? A. I said I would not take the responsibility for ordering the cars. Q. Was anything said about who should order the car? A. I don't know as anything was said about that. The difficulty in getting cars was spoken of. Q. What was said? A. I explained to him that there would be difficulty in getting cars on account of the large amount of wheat to be shipped, and he might have some difficulty in getting a car to ship the grain even if he made the contract. Q. He might have it? A. Yes. Q. Did you say you would get the car? A. No, I certainly did not. Q. Did you explain that he would have to get the car? A. I explained he would have difficulty in getting it. Q. So that according to your story it was not discussed who was to order the cars? A. It was discussed that he might have trouble in getting a car. I don't know whether it was pointed out that he was to get the car. I won't say definitely that it was pointed out to him to get the car.

It seems to me that in view of such evidence it cannot be found as a fact that the parties agreed as part of the contract when made that the defendant was to procure the cars.

Afterwards there was a dispute over the question upon whom lay the obligation to get the cars, each claiming that the obligation was upon the other. So that the question is left, in my opinion, to be settled by ascertaining what was the implied term of the contract in that respect.

In the result neither got the cars, and if my view is correct

that the obligation to do so lay upon the plaintiff the necessary consequence is—following the principle laid down in *Forrestt* v. *Aramayo, supra*—that the plaintiff cannot recover.

I would therefore allow the appeal with costs and dismiss the action with costs.

WALSH, J., concurred with BECK, J.

IVES, J. (dissenting):—The two written agreements, the alleged breach of which gives rise to the action are in the following words:—

Alderson, Alberta, September 14, 1915.

This is to shew that I have sold to N. E. Stuart & Co. of Alderson, Alberta, 1100 bushels of wheat basis one Northern at 74¼ cents per bushel to be delivered on car at Jenner, Alberta, by November 30, 1915, and that I have received $1 on same. R. S. Clarke, N. E. Stuart & Co., by N. E. Stuart.

The second agreement is dated at Alderson on October 9, 1915, and in identical terms provides for sale and delivery of 1,500 bushels of wheat by December 1, 1915, at 76c. per bush.

Considerable evidence was given at the trial of a contradictory character on the point of who should provide the cars, and the trial Judge found that this duty was undertaken by the seller. I have read the evidence and I think that conclusion cannot be disturbed.

The evidence as to who was to supply the cars is also subject to the further consideration that the discussion anent cars between the parties at the time of or just before the contract largely arose by reason of the plaintiff's reluctance to enter into these contracts for future delivery, and he urged the difficulty and uncertainty of securing cars upon the defendant as a reason against making these contracts.

The contract itself fixes the place of delivery "on car at Jenner" and is a very different expression in my opinion from "F.O.B. car at Jenner." In the latter case the words relate to price or expense while in the present contract the words are used to denote a place of delivery.

If it is to be implied here that the buyer is bound to furnish the car then unquestionably it would seem to me that the implication is against the balance of convenience. The first contract is dated on September 14, and the seller is to deliver "by November 30," a period of two and a half months. It is at the seller's

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option to deliver on any day following September 14, up to November 30. Is the buyer to have a car in readiness every day of that time? There is no obligation on the seller's part to load it on any particular day.

Counsel urged the provisions of the Grain Act as bearing upon this contract. I cannot agree with such a contention. This is simply an agreement for the sale and purchase of goods. But the spirit of the Grain Act is to facilitate the prompt moving of grain and the avoidance of delay in the use of freight cars. If it is to be implied that the plaintiff here undertook to supply the car for the defendant to load, such implication is surely opposed to the spirit of the Grain Act.

The defendant failed to deliver any of the wheat within the times fixed or at any time. The Chief Justice fixed the time of the breach as January 3, 1916, on the ground that the parties orally agreed to extend the time for delivery to such time as defendant could get cars and found that defendant did procure and load and ship a car on his own behalf at that time and that therefore the breach then occurred. I think the oral agreement is within the Statute of Frauds and not enforceable. But it is a request by defendant to postpone the date for delivery which plaintiff granted, and the plaintiff is entitled to be indemnified in respect of the delay which he made at defendant's request. See *Ogle* v. *Earl Vane* (1867), L.R. 2 Q.B. 275, 37 L.J.Q.B. 77. He purchased plaintiff's forbearance and must pay for it.

I would dismiss the appeal with costs. *Appeal allowed.*

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BOYD v. ATTORNEY-GENERAL FOR BRITISH COLUMBIA.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. February 6, 1917.

1. TAXES (§ V C—193)—SUCCESSION DUTY—PARTNER'S SHARE IN LAND—SITUS—DOMICILE.

Succession duty is payable under the British Columbia Succession Duty Act (R.S.B.C. 1911, ch. 217, sec. 5) on the share of a deceased partner in lands situate in the province although the head office of the firm and the domicile of the deceased partner were outside the province. [*The King* v. *Lovitt*, [1912] A.C. 212, followed.]

2. CONSTITUTIONAL LAW (§ IG—140)—DIRECT TAXATION WITHIN PROVINCE—SUCCESSION DUTY.

The imposition of a succession duty upon the interest of a deceased person in partnership property within the province, where he was domiciled, is direct taxation within the province and consequently within the powers of a provincial legislature.

[28 D.L.R. 193, 23 B.C.R. 77, affirmed. See also *Cotton* v. *The King*, 15 D.L.R. 283, [1914] A.C. 176.]

APPEAL from a decision of the Court of Appeal for British Columbia, 28 D.L.R. 193, 23 B.C.R. 77, affirming the order of the Chief Justice, who dismissed the appellants' petition.

Lafleur, K.C., and *David Henderson*, for appellants.

J. A. Ritchie, for respondent.

Nesbitt, K.C., for the intervenant, the Att'y-Gen'l for the Province of Ontario.

FITZPATRICK, C.J.:—I think this case must be governed by the decision in *Rex* v. *Lovitt*, [1912] A.C. 212. The only question is whether the fact that the lands were, as is alleged, the property of the partnership instead of being vested in an individual can make any difference, and I do not see that it can. Fitzpatrick, C.J.

It is said that all that those claiming under the deceased would be entitled to would be a share in the surplus of assets over liabilities of the partnership. How does this differ from the ordinary case of a residuary legatee who is only entitled to the balance of the testator's estate after payment of debts? In the judgment in *Rex* v. *Lovitt*, *supra*, it was said:—"The tax is on the gross sum though it may be money used in trade and as such be subject to many deductions before it can fairly be treated as not property."

The case has been argued as if it depended solely upon the law governing such matters in the absence of express agreement. I am far from satisfied that that is the correct view. Pars. 8 and 9 of the articles of partnership are certainly not apt for providing for the usual sale, winding-up and division of the surplus of the partnership. It may well be that on a division and execution of proper releases and instruments, such as is contemplated by par. 9, each of them, the executors and the surviving partner, would hold one-half of the lands, the only difference being that they would hold divided instead of undivided shares.

Be this as it may, I am satisfied that this real estate in the Province of British Columbia passes under the will, and I do not think it possible that payment of succession duty can be avoided on any allegation that the devise may be subject to answer possible liabilities of the partnership.

I do not wish to embarrass the case by suggesting unnecessary points of doubt, but it is remarkable that, though the testator appointed executors and trustees of his will, there is no devise

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or bequest to them of any property whatever. If the land passes under the devise in the will to the widow and three sons of the testator, there would seem a still stronger case why they should be liable for payment of the succession duty.

That the lands must be considered as personal property is, I think, a question that chiefly concerns the intervenant, but it must be noted that in most, at any rate, of the cases to which reference has been made the question for decision has been whether the property was liable for probate duty.

The claim that the share of a deceased partner is situate where the business of the partnership is carried on, does not, I think, further the appellant's case. The distinction is overlooked between the locality where the asset forming part of the partnership property is situated and the place where the share of the partnership is considered to be situate. So far as this particular asset is concerned, the business of the partnership must, I think, be considered to have been carried on in British Columbia. In *Beaver* v. *The Master in Equity of the Supreme Court of Victoria*, [1895] A.C. 251, where a firm carried on business in London, Melbourne and Adelaide, it was held "that the interest of a deceased partner in the business carried on at Melbourne was locally situate in the Colony of Victoria so as to be liable to probate duty in respect of his will."

Davies, J.

DAVIES, J. (dissenting):—The question to be determined on this appeal is whether the share or interest of Mossom Martin Boyd, deceased, in certain real estate situate in British Columbia standing at his death in his name and in that of his partner William T. C. Boyd, is liable for succession duties under the Succession Duties Act of British Columbia, R.S.B.C. 1911, ch. 217.

Sec. 5 (*a*) of this Act enacts that:—

> On the death of any person the following property shall be subject to succession duty: All property of such deceased person situate within the province, and any interest therein or income therefrom whether the deceased person owning or entitled thereto was domiciled in the province at the time of his death, or was domiciled elsewhere, passing either by will or intestacy.

The case came before the Courts on the petition of the executors of M. M. Boyd's estate praying for a declaration that the properties in question were not liable for succession duties because they were acquired by the partnership the "Mossom Boyd Co." and were paid for out of the partnership funds; and although

standing and held in the names of the individual partners were so held by them on behalf of and as part of the assets of the partnership—and that as the business of the partnership was carried on in Ontario, where the head office was and where the books were kept, the interest of the deceased partner in these partnership lands was not liable to succession duty under the British Columbia Act.

The Chief Justice of British Columbia dismissed the petition without stating his reasons. On appeal to the Court of Appeal for that province the Court was equally divided and the judgment of the Chief Justice therefore stood.

I think the evidence shews that the partnership carried on its business in Ontario at Bobcaygeon, where its head office was and its books were kept, and that it had no partner or paid agent to transact business in British Columbia, though it purchased and sold lands there as elsewhere in Canada under the terms of the partnership deed.

I think also it is clearly shewn that the lands in question were purchased and paid for out of the partnership funds, and that, although they stood in the names of the individual partners, they did so in trust for the partnership, and must on the death of one of the partners and for the purposes of succession duty be treated as partnership property of the firm.

I am also of opinion that the shares of the individual partners in these real properties of the firm must be treated in the absence of any binding agreement between the parties as personalty: *Att'y-Gen'l* v. *Hubbock*, 13 Q.B.D. 275. The reasons why this must be so are clearly explained by Brett, M.R., at p. 285, and Bowen, L.J., at p. 289.

But, in my judgment, it does not matter for the determination of the question on this appeal as to the liability of the property in question to pay succession duties whether it is treated as personalty or realty.

The sole question is whether the interest, whatever it may be, of the deceased partner comes within the section of the Act I have quoted.

The section clearly overrides and excludes the rule of law based upon the maxim "*mobilia sequuntur personam*," and, therefore, though the deceased's domicile was in Ontario and the lands

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were treated as personalty, they would not escape liability on that ground.

That point being disposed of by the express terms of the statute, we must determine whether the other judicial rules relating to partnership property have also been set aside or overruled by the statute.

It is contended, on the part of the appellants, that, although the lands were situated in British Columbia and the title stood in the individual names of the partners, still, as they were partnership property of a firm carrying on its business in Ontario, they were not liable under the Act for the succession duties.

The contention was made and I agree with it that as under the facts the deceased partner had in law and equity no interest in these lands within the meaning of the statute they were simply these British Columbia assets of the partnership and must be held at its dissolution and for the purposes of succession duty to be situate in Ontario, where the business of the partnership was carried on—and that the only right or interest the deceased partner or his representative had at the time of his death was a right to share in the surplus assets of the partnership.

The law on this subject, as above stated, is clearly put in Lindley on Partnership, 8th ed., pp. 402 and 403, and Halsbury, vol. 22, p. 55, where the authorities are collected.

M. M. Boyd's interest in the partnership property under these authorities consisted at the time of his death of the surplus assets of the partnership after its debts and liabilities were paid and discharged, and this is the only interest which passed or could pass on his death to his representatives.

The only right of the executors of the will of the deceased partner, the petitioner in this Court, is a right to have such share of the deceased properly ascertained and paid. The right of the B.C. legislature to change and displace these rules of law and to make the interest of a deceased partner in partnership property situate in British Columbia liable to succession duties is not disputed.

The question is: Has it done so in the section of the statute quoted above, either expressly or by necessary implication? If it has not so changed and displaced these judicial rules with reference to the interest of a deceased partner in partnership property situated within the province, then *cadit questio*.

In the case of *Rex* v. *Lovitt*, [1912] A.C. 212, so much relied upon by the two Judges in the Court of Appeal as supporting the right of the province to claim the succession duties in this case, the Judicial Committee did certainly determine that a competent legislature may if so minded and by the use of apt language in its legislation impose a succession duty on property within its jurisdiction, even if in so doing it displaces the rule of law based upon the maxim *mobilia sequuntur personam*.

Their Lordships first decided that the monies there in question, being deposits made by the deceased testator in his lifetime in a branch bank in New Brunswick of the Bank of British North America, whose head office was in London, England, were primarily at least payable in St. John, N.B., where the branch bank was, and came, therefore, within the words of the statute, "property within the province."

They held further that the rule of law based upon the maxim *mobilia sequuntur personam* had been expressly displaced by the language of the section which made all such property liable to succession duties *though the testator's domicile may have been outside of the province.*

But the decision in that case does not help the Crown in the case before us because the British Columbia statute does not profess to displace any of the rules of law relating to partnership property or to alter the rights of a deceased partner or his representatives on his death in or to such property.

I am quite at a loss to understand what words in the section now under discussion can be invoked to displace any of such judicial rules. If none can then these rules must be given effect to. The mere fact that the property stood in the individual names of the two partners cannot affect the question. It was partnership property and the partners held it in trust for the partnership. The only interest which the partner held was a right to share in the surplus assets of the partnership, and as the business was carried on outside of the province the succession duties, if any such were payable at all, would be payable in the province where the business was carried on.

The words of the section relied upon as displacing by implication the ordinary rules of law relating to partnerships and the interest of the partners therein are no doubt these, "all property

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of such deceased person situate within the province and any interest therein or income therefrom."

From what I have already said it will be apparent that my conclusions are that the deceased partner had no interest in these properties at his death within the meaning of the section in question and that any interest he had with respect to them or that his representatives had under his will was a right to have them treated as partnership properties and to share in the surplus assets of the partnership, the business of which was carried on in Ontario and not in British Columbia. In other words, the property was not that of the deceased partner nor had he any interest in it. His sole right and that of his representatives on his death was the right to have the property treated as a partnership asset in winding-up its affairs in Ontario.

The answer to the argument arising out of the title to the lands standing in the individual names of both partners at the decease of M. M. Boyd is that previously stated by me, namely, that it being shewn to be partnership property purchased with partnership funds the deceased and his partner would be held respecting them to be trustees for the partnership and the executors of the deceased's will would be compelled to join in a sale of the properties for partnership purposes or otherwise to convey and assure the properties to the surviving partner for partnership purposes. No interest other than his right to a share of the surplus assets of the partnership was held or possessed by the deceased partner at his death or could be disposed of by his will in these properties.

If the legislature intended to make any such interest liable to succession duties they would have used express language to displace the rules of law respecting it as they did when they desired to displace the rule of law respecting personal property founded on the maxim *mobilia sequuntur personam*.

I would, therefore, allow the appeal and grant the declaration prayed for.

Idington, J.

IDINGTON, J.:—The late Mossom Martin Boyd carried on business in Ontario along with his brother under articles of partnership which I will presently refer to, and having made a will, also to be referred to, died June 8, 1914, when amongst other assets they held timber lands situate in British Columbia.

These lands had been acquired and registered in the names of the said M. M. Boyd and his said brother William Thorncroft Cust Boyd and were held as partnership property.

The question raised herein is whether the Province of British Columbia can, under its Succession Duties Act, R.S.B.C. 1911, ch. 217, sec. 5, claim that any interest in said lands or income therefrom was subject to succession duties.

Said sec. 5, so far as directly dealing with the matter involved, is as follows:—

5. (1) Save as aforesaid the following property shall be subject on the death of any person to succession duty, as hereinafter provided, to be paid for the use of the province over and above the probate duty prescribed in that behalf from time to time by law:

(*a*) All property of such deceased person situate within the province, and any interest therein or income therefrom whether the deceased person owning or entitled thereto was domiciled in the province at the time of his death, or was domiciled elsewhere, passing either by will or intestacy.

It is denied by appellant that this enables the province to collect duties in any case of death of a partner when the partners had carried on business and resided beyond the province at the time of such death.

We have been by means of the liberal citation of cases invited to consider the probate duties, the succession duties, the death duties, the legacy duties payable heretofore, and now under a variety of English statutes, the voters' franchise and legislation bearing thereon, and in the same way the several Acts in force in England and her colonies bearing respectively upon such like duties or rights not overlooking sundry other Acts such as Locke King's Act, and last but not least the Mortmain Acts, in order to be helped to a proper understanding of the sections just quoted.

Briefly put the argument was based upon the theory that land held by the members of a partnership was held as joint tenants, and therefore the share of one dying would by due course of law become vested in the survivor or survivors to be held subject to the terms of the articles of partnership as part of the assets of the firm and only be accounted for by the survivor or survivors in course of his or their winding-up the firm business or default through the Court, which necessarily must observe the doctrine of equity jurisprudence by which all the assets must be treated as personal property, and, as there could be no claim made by the personal representative of a deceased partner to

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any of the assets and only a possible claim to share in the residue of the proceeds realized by survivor or Court in Ontario in due course of liquidation, there was nothing for the said statute to operate upon.

I have, in deference to the course which that argument has taken in the hands of able counsel, considered all these cases, but I cannot say that I am much helped thereby to a solution of the actual problem presented to us to determine. Many of these cases cited to us had to distinguish between what should be held to be real and what personal property in certain contingencies for the purpose of applying the Act imposing a probate duty, or for other purposes the equitable doctrines properly relevant in certain cases wherein land had in fact furnished the basis of the dispute, but in such view had to be treated as personal property.

We have no such distinctions to make herein or at least if such like distinction has to be observed, it rests upon other conditions than those arising in many of the cases cited.

It matters not whether the interest that passes by this testator's will is real or personal or a mixture of both. Whatever it is the clear purpose of the Act is, if we study its provisions as a whole and regard its purview, to see that whatever passes shall be taxed.

There are some rather cogent reasons for holding that under the state of the law in England nothing in said land would have, if governed thereby, passed by such a will but the possible share of the personal representatives of deceased in the ultimate residue of the realized assets of the firm. But when I come to try and apply such reasons to this particular statute and its entire purpose and the relation thereof to the peculiar facts of the case and to the laws of British Columbia to which I am about to advert, I must hold that something in the nature of an interest in the property or the income thereof has passed.

It would surprise the appellants to be told that nothing in British Columbia passed by the will.

It is self-evident that everyone concerned felt the necessity of holding that something else than suggested in argument passed; else why resort to the B.C. Probate Court for ancillary letters through the statutory provision for recognition of the Ontario probate?

And when we go a step further we find that, in order to make a title to any purchaser of the B.C. lands in question, or even to one of those concerned in the event of a partition thereof, it seems necessary in order that there should be any title pass in either such case (the provisions of the Land Registry Act are such) that the parties concerned must resort to the will and probate and only by means thereof can title be made. These features seem to me to furnish the crux of the case to be considered and decided.

There does not seem to be anything in the nature of a transmission to the surviving partner such as formerly enured in England and does yet, by reason of the title being one of joint tenancy.

That phase of the English law of real property seems to be practically taken away by reason of the provision of the Land Registry Act, ch. 127, of the R.S.B.C. 1911, sec. 52, which enacts as follows:—

> Where by any letters patent, conveyance, assurance, or will, or other instrument made and executed after the twentieth day of April, 1891, land has been or is granted, conveyed or devised to two or more persons, other than executors or trustees, in fee-simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless a contrary intention appears on the face of such letters patent, conveyance, assurance, or will, or other instrument, that they are to take as joint tenants.

It will be observed that executors or trustees are the only grantees who may receive a title in joint tenancy to be governed by the incidents of survivorship peculiar to such a tenure unless by express provision to the contrary.

There is no such implication to be presumed from the mere fact of the existence of a partnership between the grantees.

There is no such statutory provision in England, so far as I can find, and certainly the text books indicate that the presumption of a grant to more than one person whether partners or not is, unless otherwise expressed, a grant to hold as joint tenants, with all the incidents of survivorship incidental to joint tenancy.

I need not dwell on the exceptions presumed from circumstances. It may be observed that many English decisions and some of those cited to us turn upon this conception of the law in England.

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The right of survivorship in law founded thereon has often enabled surviving partners to deal properly and advantageously with the partnership estate and even wind it up.

We must also remember that the jurisdiction of Courts of equity over the administration of partnership is so comprehensive that the views of these Courts, treating the entire property of such partnerships for that and like purposes as personal property, being that to which everything in the last resort is reducible by the process they adopt, dominate legal minds.

Hence we find the propositions laid down, perhaps rather broadly, by high authority that all partnership property is personal. Obviously the expressions so quoted relate to such cases as happen to be dealt with for some purpose incidental to a partnership as such, or to the view of Courts of equity in administering partnership assets.

I cannot accede to such a proposition as of universal application and covering cases where the partners see fit expressly to provide for an entirely different treatment of their assets.

What a Court of equity may do and find necessary to do in the course of administering a partnership estate in order that third parties may get their share, when no other provision has been made therefor, and the principles and practice of proceeding in a Court of equity have to be observed, is one thing. But when third parties have not to be protected and the partners have by their contract between themselves made ample provision for the manner of dealing with partnership assets, it is entirely another thing, and I venture to think that in such a case no Court of equity would interfere with that provision or the mode of carrying it out, but rather would aid in the due execution thereof according to the agreement.

Now what is the condition of things existent in the partnership we have to deal with and to which we have to apply if we can the statute now in question?

The articles of partnership are in the case and dated November 23, 1892, subsequent to the coming into operation of the statute I have quoted above relative to the nature of the tenure under which the lands acquired by the firm should be held, and constituting it, presumptively at least, a tenancy in common.

I may remark here that in Ontario there had long existed a

statutory provision from which I imagine the B.C. legislature copied that which I quote above, substituting the year 1891 for that of 1834 in the Ontario enactment.

This fact is, of course, of no further consequence than to suggest the mode of thought likely to prevail with business men of Ontario when acting as partners they enter into a bargain for the management of and dealing with their property including real estate at home and abroad. It may require that due heed should be paid to that circumstance in interpreting the language they have used in framing their articles of partnership and the agreement therein for the winding-up of their estate.

When due heed is paid thereto and to the language used in such articles and they are thus found to possess a meaning in accord with what a business man would read therein freed from the hampering preconceptions lawyers often have of what men are about, I submit no Court should interfere with, but try to execute, the purpose in the business man's mind.

The articles of partnership in question herein provided for its continuation for 10 years from the date thereof or until the partnership had been determined by either party giving six months' notice to the other.

Following such provisions are articles 8 and 9, which are as follows:—

8. If either partner shall die during the continuance of the partnership his executors and administrators shall be entitled to the value of the partnership property, stock and credits to which the deceased partner would have been entitled on the day of the date of his death.

9. On the expiration or other determination of the said partnership, a full written account shall be taken of all the partnership property, stock, credits and liabilities, and a written valuation shall be made of all that is capable of valuation, and such account and valuation shall be settled, and provision shall be made for the payment of the liabilities of the partnership, and the balance of such property, stock and credits shall be divided equally between the partners, and each shall execute to the other proper releases and proper instruments for vesting in the other, and enabling such other to get in such property, stock and credits.

Clearly this partnership ended by the testator's death, and what art. 9 provided probably was duly carried out. And, however that may be, it is to be presumed it was so until the contrary appears.

We are not informed on all this as we might have been. Probably a full exposition of the results of the provisions just quoted

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and what done pursuant thereto, would have deprived the theoretical argument submitted of much of its application.

The will of the testator is produced, and, assuming it was intended thereby, as suggested by counsel on the argument, to deal with the interest of the deceased in the lands in question, it furnishes an illuminating commentary on the pretensions set up in argument.

The will provides a period of 10 years is to be allowed for carrying out the greater part of the provisions made therein, in order to prevent any loss to this testator's estate by too hasty a realization of the assets.

Is not the fair inference that the testator well knowing the above quoted provisions for the settlement of the partnership affairs expected and intended that there should be no enforced winding-up thereof in the manner contemplated in the argument herein, but that after the valuation there should be a division of the lands as well as goods available for partition and the trustee executors be enabled thereby to execute the testator's directions? Every one of long experience in Canada knows the need that exists for dealing with timber limits and lands as this testator directs.

Such seems to me to have been the scope and purpose of both the articles of partnership and the will, and that there was thereby a transmission of the testator's interest in the lands in question clearly within the meaning of the statute in question rendering it liable beyond peradventure to the payment of succession duties in British Columbia.

In that view there is no need for speculation as to the possible outcome of a winding-up of the partnership by a sale of the assets and on the realization thereof a payment of money in Ontario where the surviving partner and the executors presumably would execute their respective duty or trust and the money be payable.

There also seems clearly in such a view no room for the argument presented on the basis of the results of such a speculative way of looking at the matter.

Even in such an alternative I by no means have a doubt as to what the legislature intended. The expression of that intention might well have been better put, so as to cover the grounds taken in argument.

However that may be, there is in sec. 5 (*b*) a provision made against the possible vesting of an estate in a joint tenancy whereby the beneficial owner might under the strict literal terms of sub-sec. (*a*) escape. This provision against any possible resorting to such subterfuge clearly suggests that the case of any other analogous result arising from the doctrine of survivorship in a joint tenancy was not expected as a thing that could arise under the law of British Columbia.

It is difficult to imagine a more tangible asset possessing a local situs than land in any country and especially so where both by virtue of the provisions I have quoted the tenancy would be presumed to be a tenancy in common and by the provision of the Land Registry Act it is contemplated that each of the parties named in the registry as owners, or their representatives, must join in order to effect a transfer of the entire estate.

The provision of sec. 25 of the Partnership Act declaring that real estate as between the partners shall "be treated" as personal or movable and not real and heritable estate, does not seem to me to affect the operation of the Act in the slightest degree so far as it relates to the situs of the property or interest therein to be taxed. It simply fits what Courts of equity for purposes of administration have always, at least *primâ facie*, maintained. There may arise sometimes but cannot in this case an arguable question as to the measure of interest of a partner in an insolvent partnership concern or one possessing little value. I express and indeed have no opinion in regard thereto.

I only refer to it to illustrate that there may be questions other than that of situs arise out of said sec. 5 in relation to which sec. 25 of the Partnership Act may have a bearing.

The Province of Ontario desired and was allowed to intervene. The fullest argument possible is always desirable in these cases. But we have no right, and are indeed not asked to pass upon the possible claims of that province, resting upon such theories as the argument presents, to maintain another succession duty even if the British Columbia claim is maintained. That possibility is properly suggested in argument as a reason for great care on our part.

The case of *Rex* v. *Lovitt*, [1912] A.C. 212, goes a long way to maintain the respondent's claim.

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The actual situation of the properties and the necessity to obtain probate where situated in order to secure the recovery of it or to enable any dealing with it, were cogent reasons in that case for maintaining the claim. Both exist and are strengthened in this case by the need for compliance with the Land Registry Act.

Moreover, in this case it was not seriously disputed in argument that the province would have the power within the jurisdiction conferred by the B.N.A. Act to impose direct taxation upon or in respect of the land in such a contingency as appears to result from the dissolution of a partnership by death and all involved therein.

It comes back to the narrow question of whether or not the legislature has succeeded in expressing itself within the meaning of that power. I think it has. The act of doing or attempting to do so has to bear the test of its being fitted to British Columbia laws and the condition of things created thereby, or flowing therefrom. Neither the power nor the mode of expressing its exercise can be very adequately helped by analogous cases founded on other laws and other conditions of things.

I think the appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The Mossom Boyd Co. was a firm composed of two members, Mossom Boyd and William Boyd, carrying on (*inter alia*) a lumber business with its head office at Bobcaygeon in Ontario. The partnership was formed on November 23, 1892, and by the articles was to last for 10 years; but the partners continued to carry on business as a partnership at will down to the death of Mossom Boyd in June, 1914. Both partners were domiciled in Ontario. Certain timber lands and timber leases were acquired in British Columbia and, it is admitted, became partnership property, and were partnership property on the death of Mossom Boyd. These properties were acquired and were registered in the names of the partners as individuals, as tenants in common in fee simple or as lessees.

The partnership acquired property in Saskatchewan, Manitoba and Quebec, as well as in Ontario and British Columbia. There was no place of business in British Columbia, and, excepting the acts done in acquiring the properties mentioned, in the payment of rent and taxes and license fees and in other acts inci-

dental to the ownership of the property, it did not at any time carry on business in British Columbia.

The question is whether the deceased Mossom Boyd had in these properties in British Columbia an interest that on his death became subject to succession duties under sec. 5 (1*a*) of the Succession Duty Act, R.S.B.C. 1911, which enactment is in the following words. (See judgment of Idington, J.).

That no such interest was vested in the decedent is alleged for the reason that by the law of British Columbia as well as by that of Ontario the "share" of a partner in the partnership assets is not an interest in any specific asset of the partnership, but is merely a right ultimately to receive his share of the proceeds of the sale of the surplus assets after payment of the partnership liabilities. This right, it is said, is of the nature of personal property, and the right had its situs, it is alleged (referring to the right of Mossom Boyd), in Ontario, where the head office of the business is and where for many purposes the business must be deemed to have been carried on.

The conclusions to which we are asked to assent as flowing from this are, first, that no interest devolved under the will of Mossom Boyd which was "property" belonging to him "situate within the province"; and, secondly, that any attempt to subject this right of the decedent to succession duty would be *ultra vires* as not being "taxation within the province" according to the meaning of sec. 92, B.N.A. Act.

The second of the questions raised presents little difficulty. The title to land and to interests in land within the boundaries of the province is a subject within the exclusive jurisdiction of the province, and no question can be raised touching the authority of the legislature to declare that on the devolution of a registered title consequent upon the death of one of two tenants in common the land or the undivided half interest vested in him whether as trustee or otherwise shall be charged with the payment of a duty to the Crown or that a condition of the registration of the title devolving by reason of his death or of the recognition as *jura in re* of the rights of the beneficiaries for whom that title is held in trust shall be the payment of such a duty. The extent of the legislative jurisdiction with respect to lands within the province may be gathered by reference to the decision of the

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Privy Council in *McGregor* v. *Esquimalt and Nanaimo R. Co.*, [1907] A.C. 462. This observation is subject to one qualification and only one, and that is that such legislation would not be effective if it appeared that, although "taxation," it did not when its real purpose was considered, fall within the description "direct taxation." *Payne* v. *Rex*, [1902] A.C. 552, at p. 560.

The first proposition stated above rests upon the assumption that at the time of his death Mossom Boyd had no interest in the partnership lands in British Columbia which could be described as "property" or interest in "property" within the meaning of the Succession Duty Act. With his brother as co-partner he was registered tenant in common, having vested in him an undivided moiety in the "absolute fee" in the timber lands and being joint lessee under the timber leases. It is argued, however, that the "absolute fee" vested in the partners as individuals was held by them as bare trustees for the "partnership."

The discussion of the question thus raised will be simplified by adverting to some of the fundamental principles of the English law of partnership. For our present purpose it is most suitable to quote a passage of Lord Lindley's from the 5th edition, Lindley on Partnership, at p. 111:—

> The firm is not recognized by lawyers as distinct from the members composing it. In taking partnership accounts and in administering partnership assets, Courts have to some extent adopted the mercantile view, and actions may now be brought by or against partners in the name of their firms; but, speaking generally, the firm as such has no legal recognition. The law, ignoring the firm, looks to the partners composing it; any change amongst them destroys the identity of the firm; what is called the property of the firm is their property, and what are called the debts and liabilities of the firm are their debts and their liabilities.

Notwithstanding the change effected by the Judicature Acts alluded to in this passage, "we have not yet," as James, L.J., says in *Ex parte Blain*, 12 Ch.D. 522, at 533, "introduced into our law the notion that a firm is a *persona*." When it is said, therefore, that property held in the names of the partners as partnership property is held "in trust for the partnership," it should be understood that what is meant is not that the partners are not the beneficial as well as the legal owners of the property, but that, as between the partners themselves and those claiming under them, the property is dedicated to the purposes of the partnership, and that each partner holds his interest in

trust for such purposes. The partners are owners in the fullest sense, both at law and in equity.

It is true, nevertheless, that, as between the partners themselves and those claiming under them and, generally speaking, as between the creditors of the partnership and the creditors of an individual partner, the share of an individual partner in the partnership assets is merely the share to which he may prove to be entitled in the clear surplus of the assets after the partnership affairs have been wound up, the property sold and the debts and liabilities paid. This rule and its effect through the operation of the equitable doctrine of conversion are explained in a well-known passage by Kindersley, V.-C., in *Darby* v. *Darby*, 3 Drew. 495, referred to with approval by the Court of Appeal in *Att'y-Gen'l* v. *Hubbock*, 13 Q.B.D. 275. The passage is in the following words:—

> Now, it appears to me that, irrespective of authority and looking at the matter with reference to principles well established in this Court, if partners purchase land merely for the purpose of their trade and pay for it out of the partnership property, that transaction makes the property personalty and effects a conversion out and out. What is the clear principle of this Court as to the law of partnership? It is that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule and it requires no special stipulation; it is inherent in the very contract in partnership. That the rule applies to all ordinary partnership property is beyond all question; and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he should retain his own share of it in specie.

It is said to be involved in this doctrine that a partner has no right or interest in any specific asset of the partnership, and further that the share of each partner in the assets is a right, the situs or constructive locality of which has no necessary relation to the situs in fact of the individual items, and that the true rule of law is that for all purposes this share or interest of the individual partner has its seat in contemplation of law at the firm's principal place of business.

The crucial question in the present controversy is whether Mossom Boyd had at the time of his death an interest in the British Columbia assets which the statute lays hold of. The question whether or not these assets became notionally converted into personal property on the acquisition of them by the partnership is not immaterial, but it is not the precise point involved.

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In the present appeal these questions must, as Mr. Ritchie argued, be considered with reference to the terms of the partnership articles and the relevant provisions are these:—

Whereas the parties hereto are desirous of carrying on the business of manufacturing lumber in all its branches and the purchase and sale of real estate or such other ventures as may from time to time be agreed upon between said parties, and have concluded to enter into and form a partnership according to the true intent and meaning of these presents.

. . . . . .

8. If either partner shall die during the continuance of the partnership his executors and administrators shall be entitled to the value of the partnership property, stock and credits to which the deceased partner would have been entitled on the day of the date of his death.

. . . . . .

9. On the expiration or other determination of the said partnership, a full written account shall be taken of all the partnership property, stocks, credits and liabilities, and a written valuation shall be made of all that is capable of valuation, and such account and valuation shall be settled, and provision shall be made for the payment of the liabilities of the partnership, and the balance of such property, stock and credits shall be divided equally between the partners, and each shall execute to the other proper releases and proper instruments for vesting in the other, and enabling such other to get in such property, stock and credits.

These terms of the contract between the parties seem either to exclude or greatly to restrict the application of the doctrine of *Darby* v. *Darby*, *supra*, even as between the partners themselves. Primarily the business of the firm was lumbering, and *primâ facie*, I think, the arrangements of the partners did not contemplate the disposal of such properties as were purchased in British Columbia by sale of them as lands except as the result of agreement between the partners. It is quite true that no lumbering appears to have been carried on by the firm in British Columbia, but we are not entitled to assume, I think, that the purchase of the timber lands and the acquisition of the leaseholds were operations merely in the business of "buying and selling real estate."

It should be noted that the "charge" arising out of the partnership articles was not registered.

Treating these timber lands as part of the assets of a firm whose business was lumbering, it would follow that in law neither partner would as between himself and his co-partner during the existence of the partnership have the right to sell them without the concurrence of the other, a possibility which, no doubt, never entered the mind of either of them. Then the terms of sec. 9

exclude the right of either partner, conferred by law in the absence of agreement to the contrary, to insist upon a sale of the partnership property at dissolution, a right which, as Cotton, L.J., pointed out in *Ashworth* v. *Munn*, 15 Ch.D. 363, at p. 374, is not merely a right to insist upon a sale for the payment of the debts, but a right in each partner in his absolute discretion to insist upon a sale even after the debts have been paid. This B.C. property cannot therefore be treated as (to use the words of Bowen, L.J., in *Attorney-General* v. *Hubbock*, 13 Q.B.D. 289), "in the end subject to a trust for sale"; and this, I think, is sufficient evidence of the existence of a "contrary intention" within the meaning of sec. 25 of the Partnership Act, R.S.B.C. (1911), ch. 175. The general rule therein laid down that where such "contrary intention" does not appear partnership property is as between the partners and the heirs and personal representatives of a deceased partner to be treated as personal estate, consequently does not apply.

Sec. 8 must, of course, be considered. That section, I think, should be read with sec. 9, and its office appears to be to fix the date in relation to which the value of the partnership assets is to be ascertained.

In this view it cannot be affirmed that no interest in the B.C. assets devolved on the death of Mossom Boyd as part of his estate. At his death an undivided interest in these assets was vested in him as land, subject to the operation of the stipulation of sec. 9.

True the effect of sec. 9 is to provide a method of distribution which in the result might give the whole of the B.C. assets to the surviving partner; but at the death of the deceased partner his interest was an undivided interest in the partnership assets as a whole, including the B.C. assets, an undivided interest in every item of the assets subject to a charge for payment of debts.

Some light is thrown upon the question of the nature of the partner's legal status with reference to the real property assets of the partnership during the existence of the partnership, by a consideration of the practice existing prior to the passing of the Partnership Act as regards the taking in execution of a partner's share for his separate debt. Before the passing of that Act partnership property could be seized under a writ of *fi. fa*

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upon judgment against one of the partners for his separate debt, the sheriff seizing such of the partnership effects as might be requisite and could be seized under the writ and selling the undivided share of the judgment debtor in them. The legal effect of such seizure and sale is described in Lindley on Partnership (5th ed.), at p. 358. The purchaser being a stranger unconnected with the firm acquired for his own benefit all the judgment debtor's interest in the property comprised in the sale and became as regards such property tenant in common with the judgment debtor's co-partners. The purchaser, however, held this interest subject to all the equities which the co-partners had upon it, and subject, therefore, to their right to have all the creditors of the firm paid out of the assets of the firm and *consequently pro tanto out of the property seized by the sheriff.*

It is clear, therefore, notwithstanding the fact that a suit in equity was formerly necessary or might have been necessary in such a case to have the partnership accounts taken and to have the partnership property correctly applied, that each of the partners had an interest in specific assets of the partnership which could be seized and sold under a judgment against him for his separate debt.

A few sentences from Lord Justice Lindley's judgment in *Helmore* v. *Smith*, 35 Ch.D. 436, at 447, may be advantageously quoted:—

> A writ of *fi. fa.* was issued against one of the two partners in the business of coal merchants. Let us consider what the sheriff could do under that *fi. fa.* He could seize all such of the assets of the firm as are seizable under a *fi. fa.* but he could not seize book debts or goodwill. The *fi. fa.* does not touch such things; *and it is a mistake and a very serious mistake, to suppose that when the sheriff, under a separate execution against one of the several partners, seizes the partnership goods, and sells the share and interest of the execution debtor in those goods, the sheriff can or does in practice sell the whole of the execution debtor's interest in the partnership.* Such a case is conceivable, but *in practice it never arises, because there are always in practice assets which cannot be reached by a fi. fa.* What the sheriff has got to sell is not the share and interest of the execution debtor in the partnership, but the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under a *fi. fa.*

I find some difficulty in holding that an interest which could be seized under a *fi. fa.* in British Columbia and sold by a sheriff under the authority of the writ is not an interest in property situated in British Columbia, and therefore subject to duty under sec. 5 of the Succession Duty Act.

In 1897 the law of British Columbia was changed by the Partnership Act; by sec. 24 (1) of that Act it was provided that a writ of execution should not issue against any part of the partnership property except on a judgment against the firm. By sub-sec. 2 another remedy is submitted. A judgment creditor having a judgment against a partner is given a right to obtain an order charging the debtor's interest in the property of the firm and subsequently to have a receiver appointed to get in that interest.

It seems probable that sec. 24 would not apply to the property of a partnership such as that of the Mossom Boyd Co., which had no place of business in British Columbia, which carried on business in other jurisdictions and had its principal place of business elsewhere; and if the section does not apply then the old law still remained applicable to the B.C. assets of this firm, and at the time of Mossom Boyd's death his interest in the partnership chattel property in B.C. was exigible under a judgment against him in accordance with the old law.

If sec. 24 does apply, then the second sub-section could only take effect as authorizing a charging order upon the partner's interest in the property in B.C. and the appointment of a receiver to realize that interest. On this hypothesis the observation made above as to the difficulty of holding that an interest capable of being so dealt with is not an interest situated within the province and not an interest within sec. 5 of the Succession Duty Act is equally pertinent.

In 1897, when the Partnership Act was introduced into B.C., and for a number of years afterwards, land and interests legal and equitable in land including charges on land and the moneys thereby secured could be seized and sold under a writ of *fi. fa.* and I can see no reason why the interest of a partner in the firm's real estate should not be subject to be taken in execution under that writ just as his interest in the firm's chattels was. It is useful also to refer to *Ashworth* v. *Munn*, 15 Ch.D. 363, at 370 and 374, cited by Mr. Ritchie as shewing that a partner's interest in the assets of a partnership which possesses land among its assets is an interest in land.

Ashworth v. *Munn* is an illuminating case. The decision was that a bequest in favour of a charity of the residue of a testator's real and personal property, part of which consisted in money to

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be derived from the sale of his share of the partnership assets which in part were land, was hit by the Mortmain Act and void, the share in the partnership assets being, as the Court held, an interest in land. James, L.J., at p. 369, says:—

It appears to me that in a private partnership which has got land it is difficult to say that the partner has not an interest in land . . . their interest is exactly in proportion to what the ultimate amount coming due to them upon the final taking and adjustments of the accounts may be.

The partnership in question, it may be noted in passing, was one to which the doctrine of *Darby* v. *Darby*, 3 Drew. 495, applied. But the case is chiefly valuable because all their Lordships agreed that their decision must be governed by the judgment of Lord Cairns in *Brook* v. *Badley*, 3 Ch. App. 672. In effect the Court held that Lord Cairns' reasoning, the substance of which is given in a passage I am about to quote, extends to the interest of a partner where land is included in the partnership assets. "If a testator," says Lord Cairns, at p. 674,

devises his land to be sold, and the proceeds given, not to one person, but to four persons in shares, and if one of those four persons afterwards makes his will, and gives either his share of the proceeds or all his property to charity, the position of that second testator with regard to the estate which is to be sold is in substance *that of a person who has a direct and distinct interest in land.* The estate is in the hands of trustees, not for the benefit of those trustees but for the benefit of the four persons between whom the proceeds of the estate are to be divided when the sale takes place. It may very well be that no one of those four persons could insist upon entering on the land, or taking the land, or enjoying the land *quâ* land, and it may very well be that the only method for each one of them to make his enjoyment of the land productive is by coming to the Court and applying to have the sale carried into execution, but nevertheless the interest of each one of them is, in my opinion, an interest in land; and it would be right to say in equity that the land does not belong to the trustees, but to the four persons between whom the proceeds are to be divided.

Even on the assumption that "value" in sec. 8 of the partnership articles means value in money, I am unable to agree that no interest devolved having a situs in British Columbia.

I do not think the effect of sec. 8 on that assumption is to convert the tenancy in common of the partners into a joint tenancy. The interest of the deceased partner in the partnership assets existing at his death which is explicitly recognized by sec. 8 would devolve in the usual course subject to the rights created by secs. 8 and 9, according to which the surviving partner would be entitled and compellable to take over that interest on payment of its value ascertained under sec. 9; and in any view there would be a charge on the whole of the partnership assets for the

purpose of paying the sum thus due from the surviving partner: *Ashworth* v. *Munn*, 15 Ch.D. 370. The registered title to the undivided moiety of the B.C. real estate vested in Mossom Boyd at the time of his death would devolve upon his heirs and devisees and the surviving partner, I think, would not be entitled to demand a transfer except upon paying this sum.

I can see no difficulty in ascertaining the portion of this sum which ought properly to be regarded as compensation for the interest in the B.C. lands since the total amount is determined by the valuation of these lands among the other assets; and I have great difficulty in understanding upon what grounds it can be alleged that the charge upon these lands for the payment of the moiety of their value plus the registered title in fee to that moiety does not constitute an interest dutiable under sec. 5 (1*a*) of the Succession Duty Act. See *Re Hoyles*, [1910] 2 Ch. 333, [1911] 1 Ch. 179.

A number of decisions of the highest authority were cited in which, as between the place of domicile of the partners and the place where the assets were and where the business was wholly carried on, the Courts had to decide which place was in point of law the situs of the share of a deceased partner in the partnership assets considered as an entirety; and in such a case it was held that the share had its situs where the assets and the business were: *Commissioners of Stamp Duties* v. *Salting*, [1907] A.C. 449; *Beaver* v. *Master in Equity*, [1895] A.C. 251; *Laidlay* v. *Lord Advocate*, 15 App. Cas. 468.

These authorities decide nothing as to a case where the question in dispute relates to a partnership having immovable assets purchased for the purposes of the partnership business in different jurisdictions and where the partnership articles contemplate carrying on business in those jurisdictions with a principal place of business in one of them; I think they establish no principle which governs the construction of the Succession Duty Act in its application to such a case.

The appeal should be dismissed.

Anglin, J.

ANGLIN, J. (dissenting):—The late M. M. Boyd was domiciled at Bobcaygeon, in the Province of Ontario. He was a member of the firm of Mossom Boyd & Co. which had its chief place of business at Bobcaygeon where all its affairs were managed.

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It had neither an office nor a resident agent in the Province of British Columbia. Amongst the partnership assets, bought with the firm's moneys, were certain timber lands and timber limits in British Columbia, title to which was registered in the names of the two partners but was held by them in trust for the firm. The question presented is whether an interest in this property devolved under the will of the late Mossom Martin Boyd which is liable to payment of succession duties under sec. 5 of the B. C. Succession Duties Act (R.S.B.C. 1911, ch. 217).

What passed under the will was the share or interest of the testator in the partnership assets. While living he had no enforceable claim upon or interest in any particular piece of property belonging to the partnership in specie. His only right was to be paid his share out of the surplus assets of the partnership. That and nothing more is the right which he transmitted to his personal representatives: *Re Ritson*, [1899] 1 Ch. 128, at 131; Lindley on Partnership (8th ed.), 694-5. It is a right similar to that of a legatee of a share in the residue of an estate, which does not give him a share or interest in any particular property of the estate in specie, but merely entitles him to have the estate as a whole duly administered and to receive the designated share of the clear residue: *Sudeley* v. *Att'y-Gen'l*, [1897] A.C. 11, at 21.

So far as the firm's assets consisted of lands, in the absence of any binding agreement between the partners to the contrary they are to be regarded as personal estate (*Re Bourne*, [1906] 2 Ch. 427, at pages 432-3) as between the partners themselves and as between persons claiming under them; *Re Wilson*, [1893] 2 Ch. 340, at 343; and they are so to be regarded in cases where the Crown is concerned as well as in other cases: *Att'y-Gen'l* v. *Hubbock*, 10 Q.B.D. 488, at 499.

Whatever the character is that is impressed on the property when the breath leaves the body of the owner, that is its character for the purpose of the fiscal duties which are alleged to attach upon it: *Att'y-Gen'l* v. *Hubbock*, 13 Q.B.D. 275, at page 280.

The operation of a contractual provision, the performance of which can only affect the property after the death, need not be considered: *ibid*, p. 286. I find no binding "agreement between the partners" which prevented their interests in the British Columbia timber lands of Mossom Boyd & Co. being regarded as personalty at the moment of Mossom Boyd's death.

The situs of a share of a deceased partner is where the business is carried on: *Stamp Commissioners* v. *Salting*, [1907] A.C. 449, at page 453. A partnership may of course control several separate businesses each carried on in a distinct locality. That was the case in *Beaver* v. *Master in Equity*, [1895] A.C. 251. It is not the case here. All the firm affairs were carried on as one business, managed and directed in and from Bobcaygeon, Ontario. As Lord Herschell said in *Laidlay* v. *The Lord Advocate*, 15 App. Cas. 468, at p. 485:—

> The question to be determined is what is the local situation of the asset with which we have to deal, because that the testator's interest in the partnership, however it is to be described, was one of his assets is beyond dispute.

In my opinion the share of Mossom Boyd in the partnership which devolved under his will was locally situate in Ontario.

If it be competent for a legislature whose powers of taxation are restricted to "taxation within the province" to declare that property, to which the general law of the province applicable under the circumstances attributes a situs outside the province, shall nevertheless, for the purpose of this or that species of taxation, be deemed situate within the province (I respectfully adhere to the view which I have more than once expressed that such a legislature has not that power): *Lovitt* v. *The King*, 43 Can. S.C.R. 106, at page 161; *The King* v. *Cotton*, 1 D.L.R. 398, 45 Can. S.C.R. 469, at 437-8; the legislature of British Columbia has not attempted to abrogate the general principles of partnership law to which allusion has been made, as it was held in *Lovitt's* case, [1912] A.C. 212, at 221-2—unnecessarily as I view it—the legislature of New Brunswick had done in regard to the application of the maxim *mobilia sequuntur personam* to movable property of a non-domiciled decedent having a situs within that province. On the contrary, by secs. 23 (2), 25 and 46 of the Partnership Act (R.S.B.C., ch. 175) so far as they go, those principles have been affirmed to be the law of the province.

It is perhaps unnecessary to state that the duties are claimed not in respect of the bare legal estate in the lands, which, although it of course devolves in, and under the law of, British Columbia, has no tangible value, but upon the beneficial interest held in trust for the partnership purposes.

I am, for these reasons, with great respect, of the opinion that the share of M. M. Boyd in the partnership of Mossom Boyd &

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Co. which devolved under his will was not an interest in property situate in the Province of British Columbia within sec. 5 of the Succession Duties Act.

I also think that the duties in question cannot be regarded as fees payable for services rendered by the provincial authorities of British Columbia in granting ancillary probate: *Standard Trusts Co.* v. *Treas. of Manitoba; Re Muir Estate*, 23 D.L.R. 811, 51 Can. S.C.R. 428, at 458.

I would, therefore, allow this appeal. *Appeal dismissed.*

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Re The LAND REGISTRY ACT. Re MANDEVILLE, HAGMAN AND McINTOSH.

British Columbia Supreme Court, Macdonald, J. January 29, 1917.

EXECUTION (§ I—8)—LIEN OF—"LANDS"—MORTGAGE.

The Execution Act (R.S.B.C. 1911, ch. 79, sec. 27), by virtue of which a judgment, when registered, forms a lien and charge on all the "lands" of the judgment debtor, includes also the interest of a mortgagee; and intending purchasers of the mortgage, also the mortgagor, when making payments, are obliged to search and determine whether any judgments exist against the mortgagee before dealing with him.

Statement.

APPLICATION to register an assignment of mortgage. Refused.

J. C. Gwyn, in person; *G. E. Martin*, for petitioner.

Macdonald, J.

MACDONALD, J.:—On May 3, 1911, Phoebe Archibald mortgaged certain lands to Frank Mandeville to secure $1,700. This mortgage was not registered until May 27, 1914. On June 30, 1915, the Investors' Investment Co. recovered a judgment against the said Frank Mandeville. A certificate of judgment was duly registered in the Land Registry Office at Westminster on the same day. On July 19, 1916, said Frank Mandeville assigned the said mortgage to one John Hagman. On December 18, 1916, Esther Ann McIntosh, according to her verified petition, paid to solicitors $1,991 in full satisfaction of the mortgage and received the assignment thereof. On December 31, 1916, she applied to register the assignment, and also a discharge of the mortgage. The *bona fides* of the transaction has not been attacked.

The district registrar refused to register such assignment and gave notice of his intention to cancel the application. He might, presumably, be willing to register subject to the judgment, though the petition only refers to a complete cancellation of the application. An order is sought by Mrs. McIntosh directing the registration of such assignment without referring to, or being subject o, such judgment.

The district registrar contends that the judgment, upon being registered, became a lien or charge upon the mortgage, so that the mortgagee could not dispose of or assign his security freed from such judgment.

When the certificate of judgment was registered, it formed, by virtue of the Execution Act, R.S.B.C. 1911, ch. 79, sec. 27:—

A lien and charge on *all the lands of the judgment debtor* in the several land registry districts in which such judgment is registered, in the same manner as if charged in writing by the judgment debtor under his hand and seal; and after the registering of such judgment, the judgment creditor may, if he wish to do so, forthwith proceed upon the lien and charge thereby created.

The question is, whether the mortgage and the rights possessed thereunder, by the mortgagee, come within the definition of "lands" in this section. Sec. 26 of the Act defines "land" as follows:—

The expression "land" or "lands" includes every estate, right, title and interest therein, and all real property, both legal and equitable, and of what nature and kind soever, and any contingent, executory, or future interest therein, and a possibility coupled with an interest in such land or real property . . .

It is submitted that, if this definition of "land" does not include a mortgage, then, that the Investors' Investment Co., as a judgment creditor, would have no redress to realize its claim against Mandeville as its judgment debtor out of his interest in such mortgage. The Execution Act is intituled, an Act to facilitate and explain the Remedies of Creditors against their Debtors. The intent of the legislation was apparently to provide a procedure by which a creditor might realize his debt. It can be assumed that this object was to be attained as fully as possible, and that all the assets of the debtor should be rendered available. The definition of "lands" is very broad, but is it so clear and sufficient as to enable the judgment creditor to realize his debt out of such mortgage or interest thereby created by simply registering a certificate of judgment? Generally speaking, a mortgage would not come within the category of "lands" as this part of the Act is intended to deal with executions against lands. I should be fully satisfied that the definition has this effect, before acceding to such a contention.

No argument was presented to me as to the effect of sec. 13 of the Execution Act, which proceeds thus:—

Any sheriff or other officer to whom any writ of execution is directed may and shall seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, *specialties or other securities for money*, belonging to the execution debtor.

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Provision is then made for the payment over of the money to the execution creditor, and the retention of the securities seized under the execution and entitling the sheriff to sue for the recovery of the sums thereby secured. The sheriff is not bound to sue, however, unless he is indemnified by the execution creditor. The effect of similar legislation was considered in Ontario in the case of *Smith* v. *Bernie*, 10 U.C.C.P. 243. This was an action brought by Smith as sheriff upon a chattel mortgage, seized by him under an execution in a judgment of *Smith* v. *Lawrence*, the mortgage having been made by Bernie to Lawrence. The sheriff invoked the provisions of 20 Vict. (Ont.) ch. 57, sec. 22. Draper, C.J., in his judgment, refers to this section as follows:—"This enactment seems copied from the Imperial statutes 1 & 2 Vict., ch. 110, sec. 12." The last mentioned statute is referred to in *Mutton* v. *Young* (1847), 4 C.B. 371, 11 Jur. 414, 136 E.R. 550.

In *Rumohr* v. *Marx*, 3 O.R. 167, the right of a sheriff to seize a mortgage on real estate, under a *fi. fa.* goods, was considered. There was no question as to the right existing, though the seizure in that particular case was not upheld, as the mortgage had been assigned as a security for an advance. It was held that the sheriff could not seize the mortgage subject to the rights acquired under such assignment. Reference is made to the legislation affecting such seizures as follows:—

> When the legislation authorised the seizure of securities as chattels, it pointed out, as I think unmistakably the mode in which the sheriff should realize upon them for the satisfaction of the writ of execution in his hands, viz: by suing upon them, and he is not obliged to bring such a suit until he is indemnified, as stated by the Act; and this seems to me to exclude the idea of the sheriff's selling such securities as he would a chattel of the ordinary kind seized by him.

The Judge then mentioned the fact that no case had been referred to in which the interest sought to be sold had been taken in execution by a sheriff, nor had he succeeded in finding such a case or what he would consider an authority for such a seizure. He drew a distinction between the case then being decided and that of *Ross* v. *Simpson*, 23 Gr. (Ont.) 552:—"For as to the equity of redemption in the leasehold there was no doubt that the leasehold could be sold on a *fi. fa.* goods, it was a chattel."

While holding the seizure, by the sheriff, unauthorized, reference is made to there being some other way in which the execution creditor might realize his claim other than by seizure. This may

have referred to proceedings by way of garnishment or equitable execution.

In *Lodor* v. *Creighton*, 9 U.C.C.P. 295, the question as to whether a mortgagee's interest was liable to execution was dealt with as follows at p. 297:—

> The Court of Queen's Bench of Upper Canada determined in *Doe, Campbell* v. *Thompson*, that after a mortgage in fee had become absolute by non-payment, the mortgagee's interest cannot be sold under a *fi. fa.* against lands, and our statute, 12 Vict. ch. 73, only authorises the sale of the mortgagor's interest in real estate, on the execution against lands, leaving the mortgagee's interest as it was before.

This matter was further considered in *Parke* v. *Riley*, 3 U.C.E. & A. 215, where it was decided that a vendor's interest or lien in land could not be sold by the sheriff, and nothing passed under his deed. The similarity of a mortgage and a vendor's lien was also dismissed. Sir Thomas Plumer in *Quarrell* v. *Beckford* (1816), 1 Madd. 269 (56 E.R. 100), is quoted as stating a mortgage to consist of two things:—

> It is a personal contract for a debt, secured by an estate, and, in equity, the estate is no more than a pledge or security for the debt. The debt is the principal—the estate is the accident.

Sir John Robinson, C.J., in *Simpson* v. *Smyth*, 1 U.C.E. & A. 9, at 44, on the same point says:—

> It has been decided in England and we have followed the decision here, that the estate of the mortgagee cannot be sold upon a *fi. fa.* . . . The extent of his interest is only to hold the estate till he is satisfied the debt, which in general is secured by a bond taken at the same time; and the effect of selling, as his, the only substantial interest which he really does hold, would be to separate the securities, and place the estate in the hands of one person, while the debt would remain in another.

These decisions are important as showing that, at that time in Ontario, an execution creditor, who had a judgment against a mortgagee of property, had no means of realizing his judgment through such mortgagee, except by a *fi. fa.* goods, or an application to the Court by way of equitable execution.

The necessity for legislation to enable a judgment creditor to properly realize upon a mortgage held by the judgment debtor, resulted in legislation for that purpose being passed in Ontario. See Ont. statute (1893), ch. 5. This Act provided that a sheriff, having an execution against goods, upon receiving information that a debtor was a mortgagee of land, should then notify the registrar of the office in which the mortgage was registered. Such notice operated as a charge and bound the interest of the execution

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debtor in the mortgage and the lands therein described and the money thereby secured. It was also a notice to all persons who might thereafter acquire any interest in the mortgage, lands or moneys. Then, there was also a provision requiring service of a like notice upon the mortgagor or upon a person liable to pay the mortgage. This legislation amply protected all parties. The position of such an execution creditor in this province would, of course, not be similar, if the contention of the registrar prevailed as to the definition of "lands" under the Execution Act including a mortgage. It would, however, have a strong bearing upon the decision of the matter, if "mortgages" are not within such definition and included within the assets seizable by a sheriff under a *fi. fa.* goods, pursuant to R.S.B.C. ch. 79, sec. 13, *supra*. Notwithstanding the reference of Draper, C.J., in *Smith* v. *Bernie*, *supra*, there is a difference between the Ontario Act and the English Act. In the former statute "mortgages" are specifically mentioned, while in the latter one they are not thus referred to and would not be included in the property liable to seizure under a *fi. fa.* goods unless they came within the term "specialties or other securities for money." Speaking generally, a "security" is "anything that makes the money more assured in its payment or more readily recoverable," *vide*, Stroud, vol. 3, p. 1815. A mortgage would come within this definition, but I think the meaning to be attached to the term "specialties or other securities for money" in the Act is governed by the context. The point was considered in *Rollason* v. *Rollason*; *Halse's Claim* (1887), 34 Ch.D. 495, where it was held that pawnbrokers' interest in redeemable pledges might to a limited extent, and only upon the happening of certain events, be seized under a *fi. fa.* goods. During the course of the argument, North J., referred to the securities mentioned in sec. 12 not being the same as pledges, as follows:—"I think that applies to bills and securities of the nature of those expressly mentioned in the section," and in his judgment thus expressed himself more fully as to a pledge:—"When I say it is a security, I do not think it is within 1 & 2 Vict., ch. 110, sec. 12, which I think means only securities *ejusdem generis* as the securities mentioned in the section."

In view of the difference in the two Acts, and the effect of this authority, while it may be quite arguable, still, I do not feel

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disposed to hold that "mortgages" come within sec. 13 of the Execution Act. I have dealt somewhat at length with this and other points, so that if I am finally sustained in my conclusion on the whole matter, legislation may be assisted.

Assuming then that "mortgages" do not come within the words "specialties or other securities for money" referred to in said sec. 13, I return to a consideration of the contention made by the district registrar as to their coming within the word "lands" as defined in sec. 26 of the Execution Act. In order to determine whether this definition includes mortgages, one should consider all that portion of the Act intended to deal with the procedure as to execution against lands. If the registration of the certificate of judgment forms a lien or charge on the mortgage, and the interest therein held by the judgment debtor, how could such a lien or charge be realized upon under the Act? Secs. 28, 29 and 30, while not apt in their terms, might, in their broadest sense, be held to apply to mortgages. Still, when you consider further sections, providing for the sale of land, they might lead one to the conclusion that mortgages are not intended to be included within the term "land." Section 42 provides a form of notice of sale. This is shown in the schedule to the Act, and is not applicable to the sale of or interest under a mortgage. Then, sec. 43 gives liberty to the plaintiff, or any mortgagee of the lands offered for sale, to purchase at any sale by the sheriff. This provision, coupled with the form to be used of release, could not very well cover the case of the sale of a mortgage. Other language in this section is also inapplicable. Section 44 is in the same position, while section 45 provides a form of conveyance and such form, or one to a like effect, could not, under a sale by the sheriff, properly dispose of the interest of a mortgagee in a mortgage. Section 52 provides for registration of the sheriff's conveyance and does not seem to contemplate the sale of a mortgage, but is intended to provide for the registration of such conveyance "according to the estate or interest in the land therein stated to be sold." It then enacts that in the case of an indefeasible or absolute fee "the registered certificate of title (if any), outstanding in the name of the judgment debtor, shall be deemed to be cancelled as to the estate or interest therein as to the debtor or as to the portion thereof registered in the name of the purchaser." As an instance of how inapplicable this provision might be, take the case of a judg-

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ment for a smaller sum than the amount of a mortgage held by the judgment debtor. Then, if this portion of the statute be applicable, and a sale were attempted of the mortgage, how could it be properly consummated under the procedure outlined? Any weight that is properly to be attached to this discussion or criticism of the inapt provisions of such portion of the Execution Act is lessened, if not destroyed, by the fact that when "mortgages" were, by R.S.B.C., ch. 72, sec. 2, specifically included in the term "lands," similar provisions prevailed and were apparently deemed sufficient and effective to seize and sell mortgages under a *fi. fa.* against lands.

The right to sell lands under execution was clearly at one time looked upon as a matter of substantive law, and not a matter of procedure. It required statutory provision before it could be accomplished. See *Traunweiser* v. *Johnston*, 23 D.L.R. 70. It is quite apparent that, while in the definition of "lands" in the Execution Act, the term "mortgages" is not specifically mentioned, still, that the property to be included within such definition was greatly extended by statute in 1909, and re-enacted by the Execution Act—R.S.B.C., ch. 79, sec. 26. While the mortgagee is only interested in the land covered by his mortgage to a limited extent, still, the words of the definition are, in my opinion, broad enough to include a mortgage. The mortgagee could, under "his hand and seal" execute a mortgage of the mortgage or he could encumber whatever interest he possessed in the land. There is thus an interest upon which the judgment against him could operate, and which could not be ignored by the registrar. I have already mentioned the difficulties that might arise in enforcing a judgment against a mortgage, but they are not so formidable as to destroy the effect of sec. 27. I am not overlooking the position or the injustice that may result as against mortgagors and parties holding agreement for sale. This may be shortly outlined, as to mortgages, as follows:—An intending purchaser of the mortgage, and also the mortgagor, will require to search and determine if a judgment exists against the mortgagee before dealing with him. Not only would this course require to be pursued, as a matter of safety, by a mortgagor, when paying off a mortgage, but in a mortgage, payable by instalments, upon each occasion when a substantial amount was being paid, the mort-

gagor would require to make a like search in order to be secure in making the payment. If not, if might so happen that a judgment had been obtained against the mortgagee in the meantime, which would exceed in amount the balance due or then being paid under the mortgage. The mortgagor might then, as registration is notice, be required, if my conclusion be correct, to make payment a second time in order to discharge the mortgage and free it from the lien created by the judgment. I believe it has never been the practice for a mortgagor to take such precautions in making a payment on a mortgage.

The conclusion at which I have arrived may not have been the intention of the legislature, but appears unavoidable. It follows that the registrar was right in refusing to register the assignment, in view of the judgment against Mandeville as mortgagee. *Application refused.*

TOWN OF GRANUM v. LENNOX.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. June 15, 1917.

TAXES (§ III E—140)—FORFEITURE—SATISFACTION—REGISTRATION.

An adjudication of a forfeiture of land for non-payment of taxes which was not registered nor advertised as required by the Towns Act, so that no title thereto has vested in the municipality, does not operate as a satisfaction of the taxes.

[*Town of Castor* v. *Fenton*, 33 D.L.R. 719, distinguished.]

Statement.

APPEAL from the judgment of McNeill, J., in an action for taxes. Affirmed.

J. D. Matheson, for appellant.

Clarke, Carson & Macleod, for respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The plaintiff's action was one for taxes and the defence was that the plaintiff had, prior to the action, taken proceedings for forfeiture of the land and obtained an adjudication. It was disposed of simply as a question of law without evidence and judgment was given for the plaintiff.

The facts, as appearing from the pleadings, and as admitted, are that the adjudication having been obtained, it was not registered nor were any of the other provisions of the Towns Act required to be observed to enable the plaintiff to become the registered owner of the land complied with.

The Act requires the adjudication to be registered and a copy to be sent to the persons entitled to notice. Then after 10, but

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before 11 months after the adjudication a notice must be published in the "Alberta Gazette" and in a local newspaper and a similar notice must be sent to the persons entitled to notice. After the expiration of a year from the adjudication, on written application to the Registrar of Land Titles and upon proof by statutory declaration in the form prescribed of performance of the above requirements, if the land has not been redeemed, the town may become the registered owner.

The defence sets up that a notice was sent the defendant on June 2, 1916, that the lands would be absolutely forfeited on June 11, 1916, which was 1 year after the date of adjudication, if not redeemed before that date, that he accepted the notice and did not redeem, and that the lands became forfeited.

The difficulty about this is that the notice was not in compliance with the Act and the lands did not and could not become forfeited. It might perhaps be open to argument that the defendant alone could object to the plaintiff's failure to comply with the provisions of the Act were it not for the fact that only by proof of the exact compliance with the provisions can the lands be forfeited and vested in the municipality by a certificate of title.

The plaintiff has not complied with the provisions of the Act and having allowed the times specified in the Act to pass is unable now to take any advantage of the proceedings against the land. The land is still vested in the defendant and the plaintiff cannot be said to have been paid in any sense. The action was not begun until after the year from the adjudication had elapsed, when the plaintiff had lost all benefit of the adjudication, as far at least, as satisfaction for the taxes, and must be deemed to have abandoned such proceedings.

The case is entirely different in its facts from *Town of Castor* v. *Fenton* (1917), 33 D.L.R. 719.

In that case the adjudication had been registered, the effect of which was to vest the land in the town subject to the right of redemption. All the other provisions of the Act had been complied with to enable the town to obtain a certificate of title after the period for redemption had expired. The period for redemption had expired and upon application the town was entitled to a certificate of title. It was held that the fact that the certificate of title had not been applied for was immaterial and that inas-

much as the town was entitled to it and the lands were vested in it by virtue of the prior registration it must be deemed to have taken the lands in satisfaction of the taxes.

No such situation exists here and that case is no authority for the appellant's contention here.

For the reasons stated the appeal will be dismissed with costs.

Appeal dismissed.

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TOWN OF GRANUM v. LENNOX.

Harvey, C.J.

HONESS v. B.C. ELECTRIC R. Co.

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C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. May 5, 1916.

STREET RAILWAYS (§ III B—33)—DUTY ON SEEING PERSON NEAR TRACK—WARNINGS—ULTIMATE NEGLIGENCE.

A motorman approaching a crossing, who has given the statutory warnings, is not bound to give additional warnings to persons approaching it, unless he had reason to believe that they were oblivious of his presence and of danger in crossing the track; his failure to do so, in the circumstances, does not constitute ultimate negligence.

[See annotation, 1 D.L.R. 783.]

Statement

APPEAL from the judgment of Schultz, Co.J., entered upon the verdict of a jury in favour of the plaintiff. The action was for damages on account of injuries sustained by the plaintiff, and for the destruction of his motor car through a collision with a car of the defendant company. The accident took place where the interurban double-track of the defendant company crosses Pine St. immediately north of Sixth Ave. in Vancouver. The Pine St. approach to the track from the north rises up on about 4% grade. A building stands on the north-east corner of the street, the south side of which is 23 ft. from the north track, and when travelling up the hill from the north, on coming level with the south side of said building, the track easterly can be seen for a distance of about 250 ft. On June 8, 1915, about 3 p.m., the plaintiff, with a companion, drove his motor car up the aforesaid hill from the north at a speed of about 5 miles an hour, and on arriving level with the south side of the building aforesaid, which was to his left, he swore he looked both east and west on the track, and seeing no cars approaching he continued on. When the front wheels of his motor car were about touching the north track he saw a car on the north track, coming from the east at about 10 miles an hour, close to him. He only had time to stop his machine when it was struck and overturned. The motorman on the interurban swore that as he approached Pine St. at from 6 to 8 miles an hour he saw the motor car as it appeared past the building

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before referred to, that it was moving slowly, and the driver was facing him. He assumed he would stop, and did not realize danger until about 10 ft. away from where the collision took place, when he immediately put on the emergency brake and rang his foot bell. There was some conflict of evidence as to the motorman blowing his whistle when approaching Pine St., but on the trial it was conceded that the Act had been complied with in this regard, and that the whistle was blown three-quarters of the distance from Fur St. to Pine St. The jury found for the plaintiff, and answered questions put to them as follows:—

1. Was the accident caused by the negligence of the defendant company? Yes.

2. If so, in what did such negligence consist? Answer fully. In not giving warning as soon as plaintiff's car was visible.

3. Was the plaintiff guilty of contributory negligence which was a proximate cause of the accident? Yes.

4. If so, in what did that contributory negligence consist? Answer fully. In not looking out for street car directly he passed the shed.

5. If you answer one and three both in the affirmative, did the defendants do anything or omit to do anything constituting a proximate cause of the accident, despite such contributory negligence? Yes.

6. If so, what should the defendants have done which they did not do or left undone which they should do? They should have given warning immediately on seeing plaintiff's car.

7. When did the plaintiff first look towards the interurban car after he could look east when he got south of the shed? A moment before his companion jumped from auto.

8. Damages, if any? $325.

The defendant company appealed on the grounds that the accident was due to the plaintiff's own negligence; that the Judge was in error in holding that the answers of the jury shewed the cause of the accident was the motorman's failure to give warning when he first saw the motor car, and there was, in fact, no evidence of negligence on the part of the motorman.

L. G. McPhillips, K.C., for appellant.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would allow the appeal. It seems to me that, on the findings of the jury, judgment should have been entered for the defendant. It is quite clear to my mind that if the motorman did, as it is conceded he did, give the statutory warning when approaching the crossing, he was not bound to give any other warning to persons approaching the crossing unless he had reason to apprehend that those persons were oblivious of his

presence and in danger in crossing the track. It is quite true that, if the motorman ought to have apprehended from the conduct and appearance of the plaintiff that he, the plaintiff, was oblivious of his danger and was going to cross the tracks, it was the motorman's duty either to give another warning or stop his car, and if he could in that way have prevented the injury which occurred, and did not do so, the defendant is responsible for his breach of duty—his negligence towards the plaintiff. But the jury have not found that that was the negligence of which the motorman was guilty. They have found that he should have given warning immediately on seeing the plaintiff's motor car. It appears to me that he should not have done so. There is nothing to shew why he should have given warning when the plaintiff's car was 30 or 40 or 50 ft. away, with the plaintiff's face turned towards him—looking towards him, apparently not unaware of the oncoming street car. I can see no reason why he should have given warning at that time. The motorman himself says that when he did finally realize, at a later time, that the plaintiff was going to cross the track, notwithstanding the danger, he did then everything he could to prevent the accident. Under those circumstances it cannot be said that the judgment was properly entered on the findings, or, if it was, that the jury had any evidence upon which they could reach the sixth finding.

Martin, J.A.

MARTIN, J.A.:—I entertain very serious doubts indeed whether, apart from any contributory negligence, there was negligence at all in this case; that is, in other words, if on the finding of the jury there was no contributory negligence on the part of the plaintiff, whether the verdict could be sustained, because the only finding of negligence that we have is in the second question, in not giving warning as soon as the plaintiff's car was visible. Having given the statutory warning, I must confess I cannot understand why it should be held at that stage that it was necessary for the motorman to give a new warning, because no circumstance, on the face of the evidence as I have been able to see, would suggest to the mind of a reasonable man that the time had come to give another warning. But I am assuming, for the purpose of what I am about to say, that the jury were justified in arriving at that conclusion. If I had been counsel in the case I would have argued that there was no case in favour of negligence. But assuming that there

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was negligence, then we have contributory negligence, and that is the end of the case, unless it can be shewn that thereafter something occurred which rendered it necessary for the defendant's servant to do something more. Now, what was that? The only suggestion is that, because the plaintiff became, as it has been suggested, oblivious of his danger, then the motorman should have done something further. Now, on the question of fact I am prepared to make this statement quite positively, that there was no evidence before the jury on which they could find that that oblivious state of mind ever existed. There was no evidence on which reasonable men could find that, because we see that the only 3 persons from whom that state of mind could be extracted were the plaintiff, Matheson, who was with him, and the motorman, and they do not say that. The motorman says that the plaintiff was in a state of reasonable alertness. The plaintiff himself repudiates that he was in an oblivious state of mind. On 3 different pages he persists that he did look for this car, and Matheson, the man who was sitting with him, repudiates the idea that he was talking to such an extent as to engage the plaintiff's attention to the detriment of his personal safety. In the face of that, how can it be said that that state of mind existed? To my mind it is absolutely impossible to say that. That is all there is to it. If that state of mind did not exist, there is nothing upon which what we call the ultimate negligence could be founded.

Now, supposing something had been adduced in evidence that would have raised that question. Then the jury would have found that that state of negligence had arisen consequent upon the oblivious state of mind being apparent, but they do not find that to be the case at all. They simply revert back to the finding of the second question, and say that the motorman should have given warning immediately upon seeing the plaintiff's car. That brings us back to precisely where we started. I have never before seen such a finding of the jury which relates to what we will call the ultimate negligence, bearing in mind what the Privy Council has just lately said in regard to the more or less looseness of this term. How the ultimate negligence can be thrown back to something which has disappeared by reason of the contributory negligence I cannot see. For these reasons I think that the judgment should be set aside and the appeal allowed.

McPhillips, J.A.

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

It seems to me that *B.C. Electric Ry.* v. *Loach*, 23 D.L.R. 4, [1916] 1 A.C. 719, is not really in point in this case. I think that case, if carefully studied, will shew this, that had it not been for the defective brakes the plaintiff would not have succeeded. That is, it was the excessive speed plus defective brakes that imposed the liability there. Therefore, at the moment of accident there was an act of negligence in not having effective brakes, as the evidence was in that case that proper brakes would have avoided the accident.

In this case the finding of the jury is that the defendant's servant should have given warning immediately upon seeing the plaintiff's motor car. On the evidence it is admitted that the statutory warning was given. Now, what further warning should be given unless it was present to the mind of the motorman at the first instant of time that he saw the plaintiff's car that the plaintiff was intending to virtually throw his motor car in front of the electric car? If that were so, that might be evidence upon which to found the answer that the motorman should have given warning immediately upon seeing the plaintiff's car; but, when you read all the questions and answers together that is not at all borne out, nor does the evidence bear it out, and, as indicated by the Chief Justice in his judgment, when the motorman did have that impressed upon his mind, he then acted with the greatest of promptitude. There is no evidence whatever that the car was not well equipped and that it did not have effective brakes, but the accident nevertheless ensued. Therefore, that absolutely disposed of the question, when you take the facts and the law together. That is, the defendant's servant could not, when he became aware of the negligence of the plaintiff, do anything at that moment which would have prevented the accident occurring.

It may be rightly said that this is not a sensible answer of the jury and that they have not acted reasonably. I am always impressed with the language used by Lord Loreburn, L.C., in *Kleinwort* v. *Dunlop Rubber Co.* (1907), 23 T.L.R. 696, at 697, wherein he laid stress that the verdict of the jury must not be lightly overturned, but as Lord Loreburn puts it, the jury must come to a sensible conclusion. Here a sensible conclusion has not been arrived at. That being so, the judgment as entered should be set aside, and judgment entered for the defendant.

Appeal allowed.

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ARMSTRONG v. BRADBURN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 20, 1917.

LANDLORD AND TENANT (§ III E—115)—RE-ENTRY—VOLUNTEERS AND RESERVISTS RELIEF ACT.

The defendant Bradburn and one Thomson were lessees of certain premises. These they mortgaged by a sub-lease to the plaintiff, Bradburn remaining tenant of a part of the premises. He formed a joint stock company, retaining himself 97 out of 100 shares, and the company became tenant of the part of the premises he occupied. In June, 1916, the company sold all its assets, not including its leasehold interest, to Bradburn, who assumed all its liabilities.

In 1915 he had volunteered for military service, and the Volunteers and Reservists Act (Alta., ch. 6 of 1916) applies to him. An action against the Bradburn Co. for possession was tried before Harvey, C.J., who decided that in 1917 Bradburn himself was in actual physical possession *along with the defendant company*, and that, as he was not a party to the action, no order could be made against him. An appeal was allowed (33 D.L.R. 625), but Bradburn was permitted to appear and defend, which he did.

In the judgment reported above, Harvey, C.J., adhered to the opinion entertained at the trial; Beck, J., thought that the action was, in effect, by a mortgagee for the rental value of the land, and consequently one which the Volunteer and Reservists Act does not affect, but he waived that view to concur, for the sake of finality, in the opinion of Stuart, J.,that Bradburn was not in possession for himself, but for the Bradburn Co., and the action ends, therefore, upon a question of fact, not of law.—(ED.)

Statement.

MOTION for judgment for possession of leased premises as against a party claiming protection under the Volunteers and Reservists Relief Act. (see 33 D.L.R. 625)

S. B. Woods, K.C., for plaintiff; *H. H. Parlee*, K.C., for defendant.

Harvey, C.J.

HARVEY, C.J. (dissenting):—In the action which was originally against the Bradburn Printing Co. Ltd. only, and was tried before me, I decided ([1917] 1 W.W.R. 854) that one W. C. Bradburn, who was not a party to the action, was, as shewn by the evidence, in actual occupation of the premises with his goods and business, under the management of his employees, and that the plaintiff therefore could not have the judgment for possession which he asked for since it would have the effect of giving him the right to put Bradburn out. On appeal from my decision, the Appellate Division decided (33 D.L.R. 625), that the plaintiff, notwithstanding that Bradburn was not a party, was entitled to the judgment asked for, it being intimated that if Bradburn wished to protect himself he could apply to be added. Being thus compelled by the judgment to apply to be added or be turned out, he applied, and was made a party defendant on special terms, which gave the plaintiff the right to apply for judgment against him, the entry

of judgment on the appeal being stayed meantime. The motion for judgment has now been made.

The case presented now is quite different from the one before me on the trial. The ground of my refusal to give judgment then was that the action of ejectment was an action *in rem*, and the evidence having disclosed that a party not before the Court was in occupation of the premises, the plaintiff could not succeed. That party is now before the Court. I pointed out in my judgment on the trial that it seemed clear to me that the reason the plaintiff had not made him a party was because he appeared to have the protection of the Volunteers and Reservists Relief Act, and could not be put out of possession. The plaintiff, however, argued that he was not in possession, because the company was. The fact is, however, that he is in occupation, which, as it appears to me, is nothing different from a physical possession. He is now, however, before the Court, and the only question is, whether the plaintiff is entitled to put him out of his occupation.

I indicated in my judgment at the trial that I was satisfied that Bradburn's course of action had, for its express purpose, the placing of himself in a position to defy the plaintiff. Under ordinary circumstances, such conduct might justly be called dishonest and fraudulent, but if it is within the law, I presume that such terms may no more fitly be applied to it than to say that a decision of the Judicial Committee is wrong in law. There are many people who believe that the protection given by the Act in question works great injustice, and that it is a most unjust law. It undoubtedly does prevent creditors from exercising rights which they formerly had. It enables a protected debtor, no matter how able to pay, to defy his creditor, no matter how needy. That however is a matter for the legislature and not for the Courts. If the legislation is, in the opinion of a Judge, unjust, that in no way absolves him from enforcing it, and to hold that it cannot have intended what the words plainly mean, because the Judge thinks it causes injustice, is not, in my opinion, exercising the function of a Judge, but is assuming that of the legislature. It is clear that a wealthy debtor who comes within the protection of the Act may refuse to pay a debt owing before the Act, though it may be the sole means of support for a widow and her family. Is there any ground for considering that the Act could not have intended some other consequence because in some cases a hard-

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ship might result? The legislature may and has a right to be of the opinion that though an Act may work injustice in some cases the measure of justice will exceed the injustice, and the Court has the right to prevent the injustice only when that right is given by the legislature.

The Act in plain words prohibits any action or other proceeding against a volunteer for the recovery of any lands or tenements or goods in his possession. It makes no exception, as it might well do, and I am quite at a loss to understand by what right the Court may amend the Act by making such exceptions. Sec. 8, in my opinion, adds nothing in this case. It is expressly for the protection of a mortgagee. It gives no right, but simply declares that the Act does not deprive the mortgagee of certain rights. If there is a right to receive the rentable value of land, then the mortgagee still has that right, but this is not an action to enforce any such right. The plaintiff, in his claim, does not suggest that he is a mortgagee, but alleges that he is the landlord, and the defendant his tenant by virtue of an agreement, and that tenancy has been determined, and he prays for possession.

I am quite unable to see how, without legislating, it can be held that the plaintiff has any right to maintain this action against Bradburn, who is admittedly a volunteer within the meaning of the Act, and I would therefore dismiss the application, and the action against him with costs.

Stuart, J.

STUART, J.:—Neither on the trial of this action nor on the appeal from the judgment of the Chief Justice was there any serious attempt made to deny that the defendant the Bradburn Printing Co. Ltd., had on March 30, 1916, by virtue of the agreement of that date, recognized the plaintiff as its landlord for the premises in question. That company paid rent to Armstrong on the basis of that agreement. W. C. Bradburn was the president of the company and owned all the shares except two which had been allocated formally to other persons. He had enlisted in the fall of 1915 or sometime prior thereto. On April 19, 1916, the Act called the Volunteers and Reservists Relief Act was passed. The company got into financial difficulties and it was only after a Judge's order for sale made under the Extra-Judicial Seizures Act that the rent for June and July was paid. Bradburn had returned from overseas, and in June,

1916, when the company's difficulties were gathering, he arranged a meeting of the limited company and caused it to assign to himself by a bill of sale "all the goods and chattels, stock in trade, fixtures, equipment and effects, bills and accounts receivable of the business, including all plant, machinery and supplies." This was done in consideration of one dollar and in further consideration of Bradburn assuming and discharging all the liabilities of the company.

There was in this document no assignment of the monthly leasehold interest unless the above words should be considered wide enough to cover it. It seems to me clear that no such assignment was effected by the bill of sale. Upon the rehearing of the case as against Bradburn, before the Appellate Division, after he had been added as a party by order of the Appellate Division, upon his own application, it was stated by his counsel that *as far as he knew* there was no additional evidence that could be given but he was careful not to admit that there really was no other evidence which could be given. There was no suggestion of delay or postponement until Bradburn could be communicated with, it being assumed, no doubt correctly, that the possibility of being able to communicate with a man in the trenches is very slight indeed at the present time. An affidavit was filed, made by one Dixon, who states that he is the manager for the Bradburn Printing Co. (*i.e.*, the partnership so-called, to which I shall again refer), and that he had received a letter from Bradburn saying that he could give no attention to the action or to his rights. The date of this letter is not given. Apparently then he had at least learned of the action and one would have thought that he could have stated at least whether the Bradburn Printing Co. Ltd. had either sublet to him or had assigned the monthly tenancy. An assignment by act of the parties even of a term which can be created without writing must be by deed (Foa, 5th ed., 401). I think it hardly likely that Bradburn would have taken any such deed along with him but that if it existed it would have been left in the possession of his representatives, or his solicitors, and its existence could have been known. Dixon was secretary of the company and would have had to sign the document for the company. I think there is no danger in deciding finally, even with Bradburn not here, that there never was any assignment. Neither was there any under-lease, if we may, as no doubt we

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may, conceive the possibility of an under-lease under a monthly tenancy. There is nothing in the minutes of the meeting held on June 17 to suggest any such thing. The secretary of the company knew nothing about it. There is no danger in saying that there never was an under-lease.

What happened was that Bradburn, owning all but two shares of the capital stock of the limited company which was the lessee and in possession and which had paid some rent but found difficulty in paying any more, decided that even the form of a one man company was not now the best protection that the law would afford. He decided to throw off that mask and appear in khaki. For the very purpose of embarrassing the company's creditors in the pursuit of their lawful rights, he causes his company to transfer its assets to him, allows his company to appear to vanish into the spirit world and, although president of the company, ventures to say: "Behold, I am now in possession, and the Volunteer and Reservists Relief Act protects me, and you, dear landlord, cannot put me out." Even then he does not appear in his own name. He filed a so-called "Declaration of co-partnership" under the Partnership Act, saying that he was the only member of the "said firm or partnership" without mentioning therein the name of his firm and therefore not complying with the provisions of sec. 5, but he proceeded, to all outward appearance, to do business under the name of "The Bradburn Printing Co.," leaving out the "limited."

For myself I do not think the Act was intended to give protection to such juggling for the purposes of fraud. There is no evidence that the limited company has actually come to an end.

In these circumstances, I do not think any one on Bradburn's behalf should be heard to say that he is in possession. Admittedly, he is himself physically in France. Neither he nor any one representing the limited company, the tenant, ever said a word apparently to the company's acknowledged landlord about any surrender or any change of possession.

If it be said that the possession is a physical fact, then the physical fact is that Bradburn is in France. And owing to the circumstances to which I have referred I do not think the persons in the premises should be treated as being anything other than the servants of the limited company, comparatively at least, of

the honest straightforward form in which their employer Bradburn at first presented himself and accepted the tenancy. In other words, I adhere to my previous judgment to the effect that as far as this Court can see, the only possession of the premises is that by the Bradburn Printing Co. Ltd.

But I am prepared to go farther. Even if it be said that Bradburn is actually in possession I think it is clear that the Act was never intended to, and does not, protect a possession obtained clandestinely and for a fraudulent purpose. The word "possession" in sec. 3 of the Act should be interpreted not as meaning a bare physical possession, however obtained, but as meaning an honest possession, honestly *obtained*, though made liable to forfeiture owing to impecunious circumstances when the tenant is fighting the battles of his country. That is the whole purpose of the Act as everyone knows, and it seems to me that so far from my view being a straining or amending of the Act by the Court, it is the opposite view, which would protect every person in possession, even a barefaced trespasser, which is strained and technical.

Still further, I think a great deal can be said in favour of the view that, by the words "the recovery of possession, as used in sec. 3, the legislature intended merely a remedy for enforcement of payment of any debt or liability or obligation incurred before the passing of the Act or "for the enforcement of any mortgage, charge, lien, encumbrance or other security created or arising before the passing of the Act." Why should mere possession, obtained after the passing of the Act, be protected when there is *no* protection given in regard to obligations entered into or securities created after the passing of the Act? I think it is clear that the legislature would have inserted the same words "before the passing of this Act" after the word "family" if they had intended to protect possession merely in itself, however obtained, instead to prevent the recovery of possession as a means for the enforcement of obligations and securities. If we remember the rules of interpretation, viz., that we must read not merely a whole section of an Act but the whole Act together, that a reasonable rather than an unreasonable interpretation should be adopted, that where the language is doubtful or obscure it may be modified by interpretation to avoid manifest absurdity or injustice (Beal Legal Interpretation, pp. 324, 302, 271, 272), I think a fairly good reason for limiting the meaning of the words "recovery of posses-

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sion of any goods and chattels or lands and tenements" in the way I suggest could be found. If I lent my horse to a volunteer or reservist and he decides to keep it against my will, it is both absurd and unjust that the statute should protect him. Recovery of possession of goods which have been mortgaged as security is a different matter and was probably all that was intended. But it is not necessary for the decision of the present case to adopt this interpretation, and I express no final opinion upon the point.

But in his defence filed, Bradburn makes a number of alternative allegations, all of which are inconsistent with the existence of a possession by the Bradburn Printing Co. Ltd., of which he was president, and practically sole owner, under the lease or attornment of March 30, 1916. In other words, he, by these pleas, attempts to cast aside that lease or attornment, to disregard it entirely, to treat it as a nullity, and to say that he was in possession from the first, along with his co-lessee Thomson, the latter of one store, Bradburn of the other. In reality these alternative defences are mere arguments and even as such they present on Bradburn's behalf a quite characteristic evasiveness. For instance, in par 8, Bradburn says, or his solicitor says for him, "and some time in the year 1914 he (Bradburn) *permitted* the defendant company to use the said north store, being the premises now claimed by the plaintiff, without consideration, and as tenants at will, or tenants on sufferance, and that in or about the month of June, 1916, the defendant Bradburn terminated all and any arrangements he had made with the defendant company and any tenancy existing between him and the defendant company and cancelled his permission to the company to occupy the said premises, and ousted the defendant company from the said north store and the defendant company thereupon quitted the said premises and delivered up the premises to the said Bradburn."

Of course, when a man owns all but two shares in a joint stock company, the possibilities of kaleidoscopic changes in the appearance of things are great. But, I think, the draughtsman of that paragraph surpassed himself when he spoke of Bradburn personally and individually "ousting" Bradburn as a limited company from the store.

Bradburn deliberately puts his business into the form of a joint stock company. No doubt he did it for the usual reasons

and quite legitimately. But having done so, and left officers and employees of that company in charge of the business of the company, as he did, I think it is impossible for him to say that he can disregard what they did when they, on behalf of the company, signed and attached the company's seal to the agreement of March 30, 1916. It is, I think, impossible to go behind that agreement. This is the view the Chief Justice took of the matter at the trial and I think it was a correct view.

For these reasons, I think the judgment directed to be entered upon the hearing of the appeal of the defendant company should still be entered and that the addition of Bradburn as a party defendant gives no reason for altering it.

The plaintiffs should have judgment against Bradburn for their costs of a formal application in Chambers before trial to add Bradburn as a party (he having already by direction of the Appellate Division paid the additional costs involved owing to the application having been made when it was) and also for their costs of the motion before us for judgment against Bradburn.

The judgment, however, should not issue for 10 days.

Beck, J.

BECK, J.:—This Court dealt with this matter in 33 D.L.R. 625. The judgment then rendered was to the effect that the plaintiff was entitled to a judgment for the possession of the land and premises in question against the defendant company, and that, whatever might be the right of W. C. Bradburn, who was said to be in possession, by virtue of his having a stock-in-trade in the premises and carrying on business there through his representatives, those rights would be dealt with in the action only if W. C. Bradburn chose to apply to be added as a party in accordance with r. 143, and the practice as indicated in *Minet* v. *Johnson*, 63 L.T. 507.

The claim was that W. C. Bradburn was protected by the Volunteers and Reservists Relief Act.

On motion to this Court, made before the issue of the formal judgment upon that decision, the issue of the formal judgment was stayed. Bradburn was, on his own application, added as a party defendant, he put in a defence, and it being admitted that no more evidence was available, this Court was then moved for judgment.

What we have now to decide is whether Bradburn, being a

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volunteer within the meaning of that Act, and being in possession of the premises, in the sense in which I have stated, can be ejected in view of the provisions of that Act.

In the reasons for judgment which I gave on the former occasion, I suggested more than one ground upon which I thought it probable that Bradburn's contentions, if eventually made, ought not to succeed.

Without inquiring further I think that the development of one of these suggestions affords an answer to his contention. Bradburn is a lessee of the entire premises, of which the store in question is a part. He and his co-owner mortgaged the leasehold to the plaintiff Armstrong, and the mortgage is long in default. *Primâ facie*, therefore, the plaintiff has a right to eject his mortgagor (*vide, e.g.*, Land Titles Act, sec. 104, sec. 62 (*a*) 1915, ch. 3, sec. 2).

The action of the ejectment is now treated in our statutes and rules as well as in those of England under the title, "Recovery of land," and the older methods have been, from time to time, much changed and amplified. A history of the older procedure which may be useful for some purposes will be found in Ency. of the Laws of England, 2nd ed., tit., "Recovery of land," and 15 Cyc., tit., "Ejectment," and 24 Hals., tit., "Real Property and Chattels Real," pp. 324 *et seq.*

It goes without saying that, with an action for the recovery of the possession of land, a claim for mesne profits may be joined.

The mortgagor, after default, holds merely at the sufferance of the mortgagee, that is, he may be ejected without notice or demand of possession. (Fisher on Mortgages, Can. ed., 1910, par. 877.) And notice to the tenants by the mortgagee entitles the latter to receive the rents (Coote on Mortgages, 8th ed., 673), and the mortgagor may, at the option of the mortgagee, be treated as a tenant or a trespasser (*Ib.* p. 685, 690).

The logical conclusion is that the mortgagee could bring an action not only for the ejectment, but also for the mesne profits, being entitled to recover by way of mesne profits the fair rental value of the land for the use and occupation of the land from the point of time at which he had signified his intention to treat the mortgagor as a trespasser.

As to mesne profits, see 15 Cyc., pp. 200 *et seq.* Blackstone's Commentaries, Bk. 3, pp. 199, 205.

Though I have found no case before the Judicature Act where this common law method was actually pursued, I have no doubt it could have been and, perhaps occasionally, was adopted. Both before the Judicature Act and since, however, an analogous method was followed, namely, the compelling of the mortgagor either to pay an occupation rent equivalent to the fair rental value of the land or to vacate the premises. This was usually preceded by the appointment of a receiver, but that, I should think, was not an essential condition and, in any case, the mortgagee could, without doubt, himself be made the receiver.

A number of cases in which this practice was made use of are collected in Ashburner on Mortgages, 2nd ed., p. 317.

Re Burchnall; Walker v. *Burchnall*, [1893] W.N. 171, in a mortgage action, Stirling, J., directed a reference to appoint a receiver and to fix an occupation rent and ordered the defendant (the devisee of the mortgagor) to attorn tenant to the receiver at such rent as should be determined by the Court as from the date of the order or in the alternative to deliver up possession.

In *Yorkshire Banking Co.* v. *Mullan* (1887), 35 Ch.D. 125, the headnote is:—

> In foreclosure action against a mortgagor in possession, an order having been made for the appointment of a receiver and for tenants to attorn and pay their rents in arrear and growing rents to such receiver:—*Held*, that the possession of the mortgagor being rightful, he was liable to pay an occupation rent from the date of demand by the receiver only, and not from the date of the order appointing the receiver.

In view of the law and practice being as above indicated sec. 8 of the Act is, I think, effective to deprive the now defendant W.C. Bradburn of a right, assuming the Act is at all applicable to him, of remaining in possession unless he pays a fair occupation rent. The words of the section are:—

> This Act shall not deprive a mortgagee or person having a charge or security on land of the right to collect and receive the rents or *rental value* of such land.

The intention then of the Act is, in my opinion, clear that a mortgagor can be dispossessed unless he pays the rental value of his occupation to be fixed by the Court. He is protected against a personal order for payment of the mortgage moneys; and against a sale or foreclosure of the mortgaged property, but he cannot remain in possession paying nothing by way of compensation. To do so is not honest, and in view of the very satisfactory

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provision made by the statute, military and civil regulations and voluntary assistance for volunteers and their dependents, sufficient to enable them to secure a decent maintenance, including premises to live in, there is no ground of reason or justice on which they can claim to live at the expense of other individuals. The exception created by sec. 8 makes a very small inroad on the general protection given by the Act.

In my opinion, therefore, the plaintiff is entitled to judgment for ejectment against the now defendant W. C. Bradburn unless he submits to pay such rentable value of the premises as shall be fixed by the Court.

I would therefore order the defendant, Bradburn, to give up possession unless he submits to pay such rentable value of the portion of the premises which he occupies as shall be fixed by a Judge or the Master at Edmonton, calculating such occupation rent from the date of his being added as a defendant, and unless such rentable value having been fixed he pay the amount thereof within such time after the fixing thereof as the Judge or the Master shall direct, and unless he shall continue to pay thereafter such monthly rentable value as shall in like manner be fixed, with leave to either the plaintiff or the defendant Bradburn to apply to a Judge from time to time for such change in the amount of the rentable value so fixed or postponement of the payment thereof or other modification in respect thereof or for an absolute order for possession by reason of default as the applicant may think himself entitled to. I would give the costs of the present proceedings including the costs of the reference to the plaintiff.

The Chief Justice holds that Bradburn is in possession, but that he is protected against ejectment by reason of his being a volunteer under the Volunteers and Reservists Act.

Stuart, J., holds that Bradburn, being now a defendant, the judgment of the Court already giving the plaintiff possession should go also against Bradburn.

While still retaining the opinion I have above expressed, being the junior Judge, I concur in the result reached by my brother Stuart as being that most near to my own opinion, inasmuch, as unless two members of the Court agree no judgment can be pronounced upon what is in effect a trial at bar before three Judges.

Judgment for plaintiff.

Re CANADIAN PACIFIC R. Co. CAVEAT AND LAND TITLES ACT.

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Saskatchewan Supreme Court, Newlands, Brown, Elwood and McKay, JJ. July 14, 1917.

LAND TITLES (§ V—50)—FREE FROM ENCUMBRANCES—RESERVATIONS—CAVEAT.

Under an agreement to transfer land in fee simple free from all encumbrances, subject to certain reservations, the transfer may be made subject to caveat for the reservations; but the caveat must not be made perpetual and is only to be continued until the rights of the transferee are determined by an action.

[*Re Grand Trunk Pac. Ry. Caveat*, 10 D.L.R. 490, 6 S.L.R. 296; *Roaf* v. *G.T.P.R.*, 24 D.L.R. 750, 8 S.L.R. 272, distinguished.]

Statement.

APPEAL from an order refusing an application for the removal of a caveat. Varied.

T. D. Brown, K.C., for appellant; *P. H. Gordon*, for respondent.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—By an agreement in writing dated May 19, 1910, respondent agreed to sell to the appellant certain land, the purchase-price for which was payable in certain instalments.

The appellant subsequently paid the various instalments of the purchase-price and became entitled to a transfer of the land, and on or about October 23, 1915, the respondent executed to the appellant a transfer of the land,

Excepting and reserving unto the C.P. Ry. Co., their successors and assigns, all coal and petroleum and valuable stone which may be found to exist within, upon or under the said land, together with full power to work the same, and subject to caveat registered in the Land Titles Office for the Regina Land Registration District as No. B.M. 3155.

This transfer was not delivered to the appellant for some time, and, prior to its delivery, the respondent caused to be filed in the proper Land Titles Office a caveat which *inter alia* contains the following:

Take notice that we, the Canadian Pacific Railway Co., having by agreement for sale dated the 19th day of May, 1910 (a duplicate whereof is hereunto annexed), agreed to sell to William John Vancise, of Grand Coulee, in the Province of Saskatchewan, farmer, the land hereinafter described, and it having in said agreement for sale been covenanted between us the said the Canadian Pacific Railway Co., and the said William John Vancise, as follows: "If the purchaser, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually at the several times above fixed and shall in like manner strictly and literally perform all and singular the aforesaid conditions, then he, his heirs or assigns approved as hereinafter provided, upon request at the land office of the company, at the City of Winnipeg, and the surrender of this contract, shall be entitled to a deed or transfer conveying the said premises in fee simple, freed and discharged from all encumbrances, but subject to the reservations, limitations, provisos and conditions expressed in the original grant from the Crown, and reserving all coal, petroleum and

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valuable stone, which may be found to exist within, upon or under said land, together with full power to work same, and for that purpose to enter upon and use and occupy the said land or so much thereof and to such an extent as may be necessary therefor, or for the effectual working of the mines, pits, seams and veins, containing such coal or petroleum, provided, however, that the company shall return to the purchaser or his approved assignee all purchase-money received by them, on account of any of the said land taken for the purpose aforesaid out of the land hereby agreed to be sold, and to pay the purchaser or his approved assignee the value of any improvements on said land taken for the purpose aforesaid, and in case of any dispute as to value the same shall be submitted to arbitration. One arbitrator shall be appointed by the company and one arbitrator shall be appointed by the purchaser or his approved assignee, and a third arbitrator shall be appointed by the said two arbitrators, and their decision shall be final, and also reserving a strip or strips of land one hundred feet wide (or so much of such strip or strips of land as may be within the said described premises) to be used for the right-of-way or other railroad purposes, wherever the line of the Canadian Pacific Railway or the Manitoba South-Western Colonization Railway, or any branch of either of said railways, is or shall be hereafter located over or within 50 ft., of the said land; also reserving a strip or strips of land across said land not exceeding altogether a width of one hundred feet wherever required in connection with any irrigation works, as defined in the North-West Irrigation Act, that may be located by the company on said land; the company shall, however, return to the purchaser all purchase-money received by them on account of any such strip or strips of land so taken out of the land hereby agreed to be sold, claiming an interest under and by virtue of the reservations contained in said agreement for sale in that certain parcel or tract of land and premises lying and being in the Townsite of Grand Coulee, in the Province of Saskatchewan, and being composed of all that portion containing 81 acres more or less of the south-west quarter of section 15 in township 17, and range 21, west of the second meridian, which lies south of a line drawn parallel with and distant perpendicularly, southerly 66 feet, from the southerly limit of station grounds of the Canadian Pacific Railway, as said southerly limit is shown on a plan of subdivision of part of the south half of said section registered in the Land Titles Office at Regina as 55059, standing in the register in the name of the said the Canadian Pacific Railway Co., forbid the registration of any transfer or other instrument affecting such land or the granting of a certificate of title thereto, except subject to the claim herein set forth.

Apparently, it was after the transfer was executed and before it was delivered that the caveat in question was filed, and it would appear as probable that, after the caveat was so filed, the transfer had added to it the reference to the caveat. The appellant applied to have the caveat removed and this request was refused; hence this appeal.

A number of cases were cited for the appellant which seem to me to be clearly distinguishable from the case at bar. For instance, in *Re Grand Trunk Pac. Ry. Co.'s Caveat*, 10 D.L.R. 490, 6 S.L.R. 296, the contract provided that the purchaser should be

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entitled to a transfer freed of encumbrances and did not provide that it should be subject to the restrictive covenant as to user. In *Roof* v. *G.T.P.*, 24 D.L.R. 750, 8 S.L.R. 272, the contract called for a deed freed and discharged from all encumbrances. A caveat there claimed a restrictive user, and the Court held that the restrictive covenant was only to apply during the currency of the contract. In the case at bar, however, it is quite clear that it was open to the respondent to deliver a transfer which on the face of it expressed that it was subject to the restrictions contained in the agreement of sale, and I apprehend had it so acted no objection could have been taken by the appellant.

Some of the restrictions provided for by the agreement were contained in the transfer: as to the balance of the restrictions, they are not set out at length in the transfer but are, in fact, set out by reference to the caveat. It will be noted that the transfer is subject to the caveat, and it will also be noted that the caveat sets forth in full the restrictions contained in the agreement of sale. Even conceding that the respondent had no right in strictness to lodge a caveat, yet the transfer having been delivered expressed to be subject to the caveat, the clear intention of the respondent to preserve its rights is indicated, and I am of opinion that the appellant should not under these circumstances be entitled to receive a certificate of title to the land except subject to the clearly expressed intention of the transfer.

I cannot see any force in the argument of the appellants' counsel with regard to perpetuities. This is not a case of certain indefinite rights being granted to the respondent, but is a case of the respondent selling or transferring to the appellant a certain portion of its interest in the land, and I am of the opinion is an agreement that no objection can be taken to. I am, however, of opinion that the Master erred in making the caveat perpetual, and that if the appellant desires he should have an opportunity of bringing an action to determine his rights under the agreement and transfer. I would therefore continue the caveat until the determination of any action which the appellant may bring to determine his rights under the contract and the transfer.

The appellant should have his costs of this appeal.

Appeal allowed.

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McKAY v. HALIFAX & SHEET HARBOUR S.S. Co., Ltd.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Russell, Longley and Drysdale, JJ. March 10, 1917.

SHIPPING (§ I—1)—QUARANTINE—LIABILITY FOR MEDICAL SERVICES.

The owners of a small coasting vessel exempt from contribution to the Sick Mariners' Fund (Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 403), are liable for professional services rendered by a Dominion quarantine physician in treating an outbreak of smallpox among the crew.

Statement.

APPEAL from the judgment of Chisholm, J., dismissing plaintiff's action to recover the sum of $678 for professional services rendered in attending the crew of defendant's steamer the "Margaret" when afflicted with smallpox. Reversed.

H. Mellish, K.C., for appellant; *F. H. Bell*, K.C., for respondent.

The judgment of the Court was delivered by

Graham, C.J.

SIR WALLACE GRAHAM, C.J.:—The defendants own the "Margaret," a small passenger and freight steamboat plying between Halifax and Marble Mountain on the coast of Nova Scotia, and intermediate ports. Her manager, owner and agent is J. Scott Chisholm at Halifax. The plaintiff is a physician and surgeon in practice at Halifax and he is also the Dominion quarantine officer at the port of Halifax for which he receives a salary of $1,000 per year. Of course, at a figure like that, he depends on his general practice.

In October, 1914, the "Margaret" arrived in the port of Halifax having on board a case of smallpox. One of the seamen had become infected. Of course, that is a serious thing for a boat of that kind. It means being quarantined, and because she was a small coasting vessel she had not the privilege of the Dominion Government quarantine grounds or Marine Hospital and the expense of treating the seamen would not be borne out of the Sick Mariners' Fund (R.S.C. 1906, ch. 113, sec. 403). The ship was, in consequence of her being a small coasting vessel, exempt from paying duties to the Sick Mariners' Fund and, no doubt, that was considered a great advantage by the owners when there was no sickness. But, being exempt, they had to provide for her quarantine and the expense of medical aid to the seaman. The city police took charge to prevent contagion. Passengers could not land and cargo could not be landed and no one was allowed on board. Chisholm was, of course, concerned about all that.

Now, it appears that it was hoped in some way to get the privilege of using the Dominion quarantine grounds and station

notwithstanding. But it must have been clearly understood from the inquiries which took place that the medical treatment itself was not to be borne by the Dominion Government, just as if this vessel did contribute to the Sick Mariners' Fund. Mr. Harvey, the agent of the Marine and Fisheries Department, informed them that they could not look after anyone on that boat and for that reason.

Dr. McKay, at the instance of Chisholm, did obtain from the Marine Department at Ottawa the privilege of using the Quarantine Grounds and Station, but it was stipulated that his principals would bear all the expense in connection with the attention and looking after the patient.

It appears that, later, the steamer not having been kept over a day, discharged passengers and cargo and proceeded on her return voyage. At Tangier another case of smallpox broke out and she had to return to Halifax.

I think there is practically no serious conflict between the testimony of the plaintiff and Chisholm; but if there was, the plaintiff speaks with circumstance; there is the telegram to Ottawa with which the plaintiff could at least refresh his memory. He says in the box "I have a copy of my wire," and it was also produced before us. And there is the return telegram. Would anyone, with those telegrams in existence, think that Dr. McKay could make a mistake or forget about his understanding of the agreement with Chisholm? Against that we really have nothing on the part of Chisholm worth while except a partial denial of a general character, and there is something tending to corroborate the plaintiff and an admission that an item for nursing and the drug bills were actually paid by him.

It appears that the bills rendered by the plaintiff were first made out to Chisholm.

The argument, as I understand it, for the defendants is this: "Chisholm may have believed that these services of Dr. McKay were rendered by him as quarantine officer. He should have told Chisholm that they were not. Their minds were not *ad idem*. I say, why was not Chisholm asked, did you believe that the services were rendered by him as quarantine officer? Sometimes a party is asked to pledge his belief when he is relying on his belief for his case. But I think the state of his belief would not be ad-

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missible in such a case and for a good reason, because it is immaterial, and particularly when it is set up as a ground for destroying an agreement. There are so many cases of contracts being held to be concluded notwithstanding one party believed he was agreeing to something else.

It is quite plain from the evidence that Chisholm knew he was headed off from looking to the Dominion Government to have the expense of the medical services borne by it, and he knew the reason why, namely, because this steamer was exempt from paying duties to the Sick Mariners' Fund. He also knew he was headed off from having the Health Board of the City of Halifax provide medical services. Dr. Almon, the city doctor, had been also seen, and that course was not open. The defendant's counsel would not admit the liability of the city at the argument. Chisholm knew that it was a great advantage to get the steamer to the Dominion quarantine grounds, and the seaman out of the steamer and into the Government station there and getting it free of charge. But to ask one to suppose that the Dominion medical officer was (R.S.C. 1906, ch. 113, sec. 403), all against his interest, to treat this ship and these seamen as if she did contribute to the Sick Mariners' Fund when she did not, is too much to expect. The alternative for this steamer was to have her turned into a hospital, remaining at her anchors, and the first member of her crew to take the disease isolated from all the others on board until cured and have a doctor visit the seaman there instead of what happened, a mere delay of one day for the steamer. That is what the owners escaped. True, in the haste to get off easy, a substituted seaman took the disease and died and she was stopped again.

I cannot imagine conditions in which Chisholm would not be swift to comprehend the condition on which he got the steamer to the quarantine station and the seaman out of her and into the hospital, and any pretence that he was guileless in such circumstances does not, particularly after the hurry was all over, and he, at least he swears to that, had sent word to Dr. McKay that "his charges were against the steamship company"; and "it was the company he did the work for," appeal to one. Surely Chisholm ought to know. He never said or suggested at the trial that he was mistaken when he said that. The awkwardness of the defendant's argument is that if it prevails no one is liable to pay for

these services. Services rendered in such a case by a doctor are very meritorious. No one, in a case of smallpox, can proceed to remove or cure the infected person but a doctor. He is indispensable. Other people are afraid. The doctors themselves do not court such cases. Their other patients are afraid. The patient is not only in danger but everyone he is likely to come in contact with is in danger.

Suppose that there had been no request or stipulation on the part of Chisholm to this plaintiff, the ship owner, the defendants, would be liable to bear the costs of these services.

It was held by this Court in 1838 in the case of *Ralston* v. *Barss*, 1 N.S.R. (Thom. 1st ed.) 48, and when it is seen that Bliss, J., was a member of the Court, everyone who has sat on this Bench since would defer to the judgment, that the owner of the ship was liable for the cost of surgical aid and maintenance rendered to a seaman at a port in this province where he had been injured in the ship and had to be landed and left behind at that port. Before I leave that case I wish to add that the port was the home port of the ship and it was not a case of a seaman injured in a foreign port. Bliss, J., followed the decisions of Story, J., which he found cited in 3 Kent's Commentaries, now p. 185.

I refer to such cases as *Harden* v. *Gordon*, 2 Mason 541; *The Brig George*, 1 Sumner 151; *Reed* v. *Canfield*, 1 Sumner 195.

These cases have since been followed in the Supreme Court of the United States. *The Osciola*, 189 Supreme Court 158; *The Iroquois*, 194 U.S. 240.

In *Reed* v. *Canfield*, 1 Sumner 197, Story, J., says:—

So far as any Act of Congress has changed or modified the principles of the maritime law it is to be deemed *pro tanto* repealed; so far as it stands unaffected by any such legislation it is to be followed out to all its just results.

Later, p. 198:—

Another objection is that the maritime law applies only to sickness and accidents and injuries occurring in the ship's service during the voyage abroad and not when she is in the home port either at the commencement or termination of her voyage; but I know of no such qualification engrafted upon the rule of the maritime law.

The doctrine, therefore, does not require that the port of disablement or of the curing shall be a foreign port. Nor does it provide that the action cannot be brought directly by the person rendering the services as the physician. *Holt* v. *Cummings*, 102 Pa. St. 212.

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Nor, is it any answer that statutes had been passed in respect to the subject but not covering the case for there had been such statutes.

Here, when the Canadian statutes do not cover the case, the steamer being a coasting steamer and not contributing to the Fund, I can see no reason why the decision of *Ralston* v. *Barss*, *supra*, would not apply.

If one were driven to find in this case that there had been no request at all proved, nor contract to be implied from Chisholm's conduct, having been all the time aware that the services were being performed, I would still fall back on that decision rather than attempt to overrule anything which had been decided by Story, J., and adopted in this province by Bliss, J.

In my opinion the appeal should be allowed with costs and the plaintiff should have judgment for his services with costs.

We will hear the parties on the question when the judgment order is taken out.

(Subsequently, the order was taken out and the amount which plaintiff was entitled to recover for his services was fixed at $522.)

Appeal allowed.

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GILBERT BROS. v. McDILL.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart, Beck and Walsh, JJ. May 15, 1917.

BROKERS (§ II B—13)—REAL ESTATE—COMMISSIONS—SALE WITHOUT BROKER'S AID.

A sale of land directly by the owner, after it had been listed for sale with a broker, does not entitle the latter to his commissions, merely because it happened to be a purchaser with whom he negotiated in a previous transaction.

[See annotation, 4 D.L.R. 531.]

Statement.

APPEAL from the judgment of Scott, J., dismissing the plaintiff's action for broker's commissions. Affirmed.

A. M. Sinclair, for appellant; *M. B. Peacock*, for respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—On April 17, 1916, the defendant signed a document in the following terms:—

Authority To Sell On Crop Payment Plan.

Messrs. Gilbert, Calgary.

In consideration of your endeavouring to find a purchaser for the following lands, situate in the Province of Alberta and being all 18, West 17, Tp. 25 R. 22, containing 960 acres, be the same more or less, I hereby list the said lands for sale with you and authorize you to sell the same for me, at $35 per

acre, payable as follows: The whole amount on or before the . . . day of . . . 19 . . in the manner set out in your agreement of sale on the crop payment plan, a copy of which I do hereby acknowledge to have received and read.

Price includes 100 head cattle, 7 teams good work horses, all machinery and harness or goods and 300 acres in wheat all in, assume $5 on C.P.R. or $40 and McDill pay C.P.R.

I further agree that if I desire to withdraw this listing from you for any reason whatsoever I will give you ten days' notice thereof by mailing the same prepaid and registered to you addressed to you at Calgary, Alberta, and that until the expiration of the time in which said notice should reach you in due course of post this listing shall remain in full force and effect.

Dated 4-17, 1916. (Sgd.) J. B. McDill, Owner

McDill pay $1 per acre.

On July 27, 1916, defendant wrote plaintiffs as follows:—

I have sold my place, therefore you can take it off your list.

Later in the year the plaintiffs were informed that the sale which was in fact of only section 18 had been made to a person to whom they had shewn the land along with some other lands they were authorized to sell for other owners in the preceding February. They then brought an action claiming commission on the sale at the rate of $1 an acre. At the trial they amended to claim alternatively $1 an acre on the whole 960 acres as damages by reason of the defendant's breach of the contract in withdrawing this authority without notice.

The statement of claim alleges that "relying on the terms of their agreement they advertised for and solicited purchasers for the said land and incurred expenses in so doing and in showing the said land to intending purchasers." It also alleges that the plaintiffs entered into negotiations with Samuel Horton and his son Burt Horton who subsequently became the purchasers.

The evidence at the trial does not support these allegations. The only evidence of a sale is that it was a sale of one section to Burt Horton and that the father Samuel Horton joined in the agreement.

The only evidence of any efforts of the plaintiffs is that they shewed the land to Samuel Horton and had some communications with him about it in February and March preceding the agreement.

The plaintiffs put in evidence three other documents similar to the one first above set out addressed to themselves or their predecessors, the last one being dated February 17, 1915, but in none of them was there any promise to pay a commission or any

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other remuneration for services, the price in all cases being specified as net. It may be open to doubt whether the authority given in 1915 was still effective in February 1916, but the services rendered in that and the following month if rendered under that authority would not entitle the plaintiffs to claim compensation from the defendant.

The plaintiffs' case, however, by the pleadings is that the services were rendered under the contract of 1916 above set out, but as already stated, whatever services were rendered were so rendered before its date and therefore could not have been rendered under it. There is no evidence that after its date until the letter of withdrawal of authority the plaintiffs made any effort to sell the land. Nor is there any evidence that if they had had all the notice the document calls for there would have been the least prospect of their effecting a sale, and consequently if the defendant did commit a breach of the agreement—as to which I express no opinion—no damage is shewn to have resulted.

Having come to this conclusion it is unnecessary to consider several other difficulties in the plaintiffs' way.

I would dismiss the appeal with costs. *Appeal dismissed.*

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BARRY v. STONEY POINT CANNING Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, and Anglin, JJ. May 1, 1917.

PRINCIPAL AND AGENT (§ II C—20)—SALE—SECRET COMMISSION—REPUDIATION OF CONTRACT.

A sale effected under an agreement by the vendor's agent to split his commissions with the agent of the purchaser is void and may be repudiated by the purchaser; it is not necessary to prove an actual fraudulent or dishonest motive by the vendor's agent, or that the buyer's agent was in fact induced thereby to make the purchase.

[*Stoney Point Canning Co.* v. *Barry*, 30 D.L.R. 690, 36 O.L.R. 522, reversed.]

Statement.

APPEAL by defendant from a decision of the Appellate Division of the Supreme Court of Ontario, 30 D.L.R. 690, 36 O.L.R. 522, reversing the judgment at the trial in favour of the defendant. Reversed.

McKay, K.C., for appellant; *J. G. Kerr*, for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J. (dissenting):—I am by no means satisfied that Durocher, who made the contracts sued on, had not the appellant's authority to enter into them on his behalf. Admittedly, the only question is as to the extent to which the appellant was committed to the speculative schemes of Durocher, and if

these had been successful, the appellant, at any rate, would never have raised a doubt as to the authority given by him. He admits that Durocher had not a dollar in the goods himself and, questioned as to some more or less dubious methods resorted to by Durocher in his attempted "corner," he says with perhaps unconscious cynicism: "I had no reason to interfere. If he had been successful, it would have been to my advantage."

A man who enters into speculations of this sort through a close friend ought not to be in the position of taking the profits if it is successful or repudiating the authority of the friend if it fails; still less if, as in the present case, he is obliged to admit the authority to a very large extent and only stops short when failure was clearly in sight. I do not think his bare denial of authority, still less that of his friend, can be entitled to much weight against the facts proved. I do not mean a formal authority, for, of course, he cannot escape liability by denying this, however plausibly.

But even if it is assumed that the appellant did not give his express authority, I think there is abundant ground for saying that he is precluded from raising this defence by having held out his friend as his authorized agent.

It is not necessary for me to go through the evidence in detail to point out the grounds on which I come to this conclusion. They are sufficiently set out in the reasons of the learned Judges for the judgment under appeal. Briefly, the appellant, a wholesale dealer in fruit, constituted Durocher his purchaser of all canned goods and left to him the sole management of what was in effect a branch of his business. He housed him at his place of business from which he himself was frequently absent for long periods; allowed him not only to use the firm's stationery with printed headings, but actually to conduct his correspondence in the firm's name and over its signature. Contracts made by Durocher previous to those now sued on were either authorized by him or if, as alleged sometimes, unauthorized, were ratified without complaint and the goods accepted and paid for by the appellant.

The appellant really, I think, held Durocher out as his agent in every possible way.

That the respondent's broker, Wm. Millman, supposed that

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he was dealing with the appellant through his authorized agent seems indubitable. He would hardly have entered into contracts for sale of the magnitude involved in an attempted corner of an important article of produce with a man not possessed of a dollar and only allowed desk room in the office of a friend. That he would not have dealt with him as an agent for the appellant if he had thought he was not his agent goes without saying. Mr. Millman swears that Durocher told him he was the appellant's agent and that he thought he had his authority.

The contracts, in my opinion, were duly made on behalf of the appellant in the ordinary course of business which could hardly be carried on if repudiation were possible under the circumstances of the case.

I do not attach much importance to the fact that the respondent's brother, Mr. Wm. Millman, agreed to split his 2% commission with the appellant's agent Durocher.

The principle that anything in the nature of a bribe by the vendor to the purchaser's agent to neglect his duty to look solely after his principal's interest should invalidate the sale is clear and well established in innumerable cases. Here, however, the payment was not made by the vendors, nor with their money. It cannot be said that it was within the scope of the duties of the vendors' agent to bribe the purchaser's agent. There is no suggestion that the vendors had any knowledge of the arrangement. Presumably Durocher must have said that he could not get any other remuneration himself as the vendors' broker would not have been likely to pay him half his own commission in addition to the commission of a purchaser's agent. Mr. Millman says that it is a common practice in his trade and that he had never thought of any secrecy about the payment. The total amount was comparatively small. We should be going beyond anything decided in the cases with which I am acquainted and unduly straining the widest interpretation of the principle involved if we were to hold these contracts invalid on such ground.

The appeal should, in my opinion, be dismissed with costs.

Davies, J.

DAVIES, J.:—This is an appeal from the judgment of the second Appellate Division of Ontario, reversing a judgment of the trial Judge (except with respect to a sum of $400 for storage not disputed) on the ground that the contracts of sale sued upon

were valid and binding upon the defendant, now appellant, and that the plaintiffs were entitled to damages for breach thereof.

The trial Judge had dismissed the action except with respect to the $400 above mentioned on the ground that no valid or binding contracts had been entered into by the defendant for the purchase of the goods.

The plaintiffs' claim was for $8,229.68 for loss or damage sustained by them on the sale of goods after defendant's repudiation of the contracts, that sum being the difference between the alleged contract prices and the price which the goods actually realized when sold.

There were two contracts sued on, one for 11,000 cases of canned tomatoes alleged to have been purchased by defendant on or about October 12, 1914, and another for 12,000 alleged to have been purchased by the acceptance of an option dated November 7, 1914.

The contracts were made and entered into by Millman & Sons, who acted as brokers for the Independent Canners, of which the Stoney Point Canning Co. was one, and one Durocher assuming to act for Barry, the defendant.

No controversy arises as to the agency of Millman & Sons to sell the goods. The whole controversy hinges upon the authority of Durocher to purchase them as agent for Barry.

The trial Judge, after hearing all the witnesses, including Barry, Durocher and Millman, stated in his considered judgment that:—

> Mr. Desmarais, who is really the plaintiff, acted, I think, in perfect good faith throughout, supposing that he had in truth made the contract sued upon with Mr. Barry, who was carrying on business under the name of John Barry & Son. On the other hand, Mr. Barry acted, I think, throughout with perfect honesty, and I accept his evidence without question.

Afterwards he stated his findings on the facts to be:—

> The situation seems to me plain upon the facts. Durocher never had any authority; there never was any ratification, and there never was any holding out by Barry. This being so, the plaintiff must fail.

The Judge was also of opinion that the action must fail on the ground that:—

> Millman, who says that he regarded Durocher as Barry's broker or agent, agreed to divide with Durocher the commission which he as vendor's broker would be entitled to recover.

The Judges of the Appellate Division who gave reasons for their conclusions, while agreeing to reverse the judgment of the

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trial Judge and to hold Barry liable on the alleged contracts, did not agree in their reasons. Meredith, C.J., held that:—

It was not a question whether the defendant assented to or did not assent to any particular sale, that narrow view of the case seems to have led to some serious misconceptions of the parties' rights; there was a general power and the authority to use the defendant's name in these operations; they could not have been carried on without that; no one would have wasted an hour upon any scheme that had no more than the credit financially of Arthur Durocher behind it; the defendant knew this; no one concerned in the matter could help knowing it; and in view of the manner in which the correspondence began and was carried on throughout the purchases made by Durocher and treated by the defendant as binding upon him, the opening of the office in Toronto and the defendant's personal participation in the negotiations for the purchase of a controlling interest in the output of the "independent" factories, with a full knowledge of all that had been done and was being done in his name and on his credit, how is it possible for him to escape liability on the contract in question merely because he did not give any specific authorization respecting it?

I understand that the learned Chief Justice in stating that "there was a general power and authority to use the defendant's name in these operations" was merely drawing an inference from the facts and documents proved and not intending to state or imply that there was any such direct or express general power. His inference may or may not be a proper inference to draw from all of the proved facts. In my judgment it is not.

Later on in his judgment the Chief Justice says:—

I cannot but find upon the whole evidence that the purchases in question were purchases within the authority of the witness Arthur Durocher acting for and in the name of the defendant carrying on business as John Barry & Sons; and that, if that were not so, the defendant is estopped from denying that the contracts in question are his contracts.

Of course, if the purchases were within the authority Barry had given Durocher, there is an end to the controversy. But if they were not within such authority, I fail to find any evidence from which the defendant could be held as "plainly estopped from denying that the contracts in question were his contracts;" that is, I assume, precluded from denying Durocher's authority because of having held him out as his agent under such circumstances that authority would be presumed.

Lennox, J., after disposing adversely of the "secret commission" defence by holding that "the divided commission was not intended as a dishonest or fraudulent inducement or to be kept from the knowledge of the defendant," went on to deal with the merits at very great length. He says:—

The first branch of the claim for 11,000 cases contracted for on October 5, 1914, can, I think, be safely determined by a careful examination of Barry's letter to Durocher on October 8, 1914, in reply to Durocher's letter to him of the day before, the admitted confidential relations, common purpose, and course of dealing established between these two men, and Barry's total inability to account for a liability for 94,000 cases of tomatoes mentioned in his letter without including in the 94,000 cases the 50,000 cases purchased by Durocher on October 5, and of which the 11,000 cases sued for is the part allotted to the plaintiff company.

It is quite apparent that the supposed or "unexplained discrepancy," as the Judge calls it, with regard to these 94,000 cases, had very great weight in inducing him to come to the conclusion he did "that whether Durocher had actual antecedent authority to purchase the 50,000 cases or not, Barry knew and approved of it and included it as a liability when he wrote the letter of the 8th October to Durocher."

It seems to me reasonably clear that the conclusion reached by Lennox, J., that of the 94,000 cases of canned goods specifically referred to in the defendant Barry's letter to Durocher of October 8, 1914, 50,000 were those purchased by the latter from Millman & Co. as brokers of the plaintiff and others, and now in controversy, settled his mind on the vital questions of Barry's knowledge and approval of the purchase, ratification of it if there was an absence of antecedent authority, and general authority of Durocher to make the purchase. If he was right in concluding that these 94,000 cases included the 50,000 cases in controversy, his final conclusion as to Barry's liability would be difficult to dispute. If it was not sufficient proof of an antecedent authority to make the purchase it would be very strong evidence of knowledge and approval of the purchase and ratification of it, and would in addition go very far to discredit Barry's credibility. No such acceptance "without question" by the trial Judge of Barry's testimony would in that case have been possible.

Lennox, J., however, seems to have overlooked the testimony of Millman, the plaintiff's broker and agent, on the point, who while advancing or accepting as correct the theory as put to him in his main examination of the inclusion of the 50,000 cases in the 94,000 referred to in the letter of October 8, when cross-examined, seems unqualifiedly to admit that any such theory was not under the facts tenable, and that the 94,000 cases mentioned in that letter of Barry's referred to a different and antecedent purchase of 94,000 cases made with his authority, which did not include or

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have any reference to the 50,000 cases in controversy. I notice that the theory put forward by Lennox, J., was favourably noticed in his reasons for judgment by the Chief Justice, and no doubt must have had weight with him though, as he said, he preferred putting the defendant's liability on what he called the "ground of the previous general and undisputed authority."

Masten, J., held that while at the beginning of the purchases of these canned goods Barry was a special agent only with limited authority afterwards but prior to the date of the contract sued on the business changed and Durocher became in fact the general agent of Barry in the buying and selling of canned tomatoes, peas and other like merchandise. This conclusion, he went on to say, rests on a general course of dealing rather than on any specific act of concurrence. Just precisely when this change took place I think it is impossible to say. It is sufficient that it took place, in my opinion, before the contracts now sued on were entered into.

The Judge doubted whether there was any such "holding out" to the plaintiff as would make a basis for the liability claimed, and repudiated the contention "that there was anything in the nature of a conspiracy to defraud between Barry and Durocher," but found Barry "liable for the loss in question without any impropriety on his part."

In view of the differences of judicial opinion and feeling some doubt at the conclusion of the argument on the question involved, I found it necessary to read the evidence with much care and have given the case much consideration.

The conclusions I have reached on the evidence, written and oral, are in general accord with those of the trial Judge, that Durocher never had any authority to enter into or bind Barry by the contracts in question, that the latter never ratified them in any way but that as soon as he reasonably could when they were first brought to his notice on November 28, when the draft for their purchase price was presented, refused payment and repudiated liability—and lastly that there never was any "holding out" of Durocher by Barry as his agent authorized to purchase these goods.

I frankly admit that the circumstances are peculiar. The facts that Barry had in the first instance given Durocher a limited authority to purchase some canned goods; that Durocher had exceeded that authority and had persuaded Barry to approve of and ratify the excess and accept the drafts therefor; the intimate relationship existing between the two parties; the letters

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which passed between them and the opening by Durocher, with Barry's assent, of a branch office of Barry & Son in Toronto, all afford ground for a strong argument either that there was a holding out of Durocher as an agent authorized to buy for Barry, or that the proper inference from all the facts proved, was that he had been so authorized as a general agent to buy.

But it does seem to me that the evidence taken as a whole is conclusive against any such holding out or any such an inference of general agency. Barry and Durocher both swear positively that no such authority as Durocher usurped ever was given, and Millman, the agent of the plaintiffs, who sold the goods and completed the contracts with Durocher, was obliged to admit in his cross-examination that when he made the contracts with Durocher assuming to act for Barry, *he* (*Millman*) *knew he* (*Durocher*) *had to go back to Barry and get authority before he could buy.*

Nothing could be more unequivocal. There was no qualification to Millman's statement nor was any satisfactory answer given to the argument based upon this witness' statement. It shewed beyond any doubt that the vendor knew Durocher had no authority to buy without going to Barry and getting authority. Now Millman was the plaintiffs' agent who carried on the negotiations for the sale and completed them. How in the face of this unqualified admission it can be successfully argued that there was a holding out of Durocher as Millman's agent or an authority to complete such a purchase as we have here in controversy without going back to Barry and getting authority, I do not understand.

Both parties to the contract, Durocher, the alleged agent of Barry, and Millman, the admitted agent of the plaintiffs, swear, the one that he had not authority, and the other that he knew the person to whom he was selling had to go back to his principal and get authority before he could buy. When to this is added the evidence of Barry accepted by the trial Judge "without question" that he never gave Durocher authority but repudiated the contract when it was first brought to his notice, how can it be held that there was authority either special or general?

As to the other defence relied upon, namely, the non-enforceability of the contracts sued upon because of the payments of commission by the vendors' broker to the purchaser's agent, I

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have had the advantage of reading my brother Anglin's reasons and concur in them.

The appeal should be allowed with costs in this Court and in the Appellate Division and the judgment of the trial Judge restored.

IDINGTON, J.:—Assuming that this action is maintainable, upon all the attendant facts and circumstances it is clear that the fundamental facts are that Durocher was employed by the appellant, or permitted by him whilst occupying a desk in his office, to act as if a clerk duly authorized to use the firm name in carrying on that branch of its business correspondence relative to canned goods such as in question, and in short to wear in that regard the semblance throughout from March 2 till the end of November following, of a mere employee of appellant.

I am of opinion that the giving by the respondent, through its agent, a share in his commission to induce Durocher under such circumstances to contract in said firm's name and on its behalf for the purchase of the goods in question from the respondent was corrupt and corrupting and, unless known to and presumably assented to by the appellant, destroyed any legal right to recover upon the alleged contracts.

Reason, fairness and consistency, alike demand herein that the law which forbids, as does also moral sense, the employment of such means to induce such a departure from duty on the part of any mere employee or trusted friend, in acting on behalf of his employer or friend entrusting business to him, should be applied to determine the liability of the appellant herein, which must rest, if at all, only upon facts and circumstances constituting Durocher an agent of one or either of the classes I refer to.

It is idle to put forward the cases of brokers who in certain localities and classes of business wherein and in relation to which all those dealing by and through them are, by reason of a practice or custom, well known to all such persons, habitually to divide the commission, or indeed in some cases, have become entitled to receive and demand it from the party the principal has contracted with.

This man Durocher, though possibly calling himself a broker, had in fact no visible means of support and was not employed, as to matters herein referred to, as a broker. That in truth is what

renders the case somewhat difficult on the other issues raised, and enables the respondent to present a plausible argument in order to maintain the action at all, so far as such issues are concerned. Had the business been conducted through a broker there would not have likely arisen any such complications as exist on the facts. Indeed all, or nearly all, that tends to support the respondent on the issue of authority or no authority could not have had any existence.

The evidence on this point of Mr. Millman, who acted for the respondent and made the offer to share his commission, is as follows:—

Q. And mentioning it in a telegram would not give you that impression? A. No, I did not know, only I knew he was with John Barry & Sons. Q. And you did not know him as a broker? A. I never heard of him as a broker. Q. Then you thought he was John Barry's agent? A. He told me he was. Q. And you made an agreement to pay him 1%? A. Yes. Q. To the agent of the man? A. Yes. Q. That was buying from you? A. Yes, he told me it made no difference, Mr. Barry knew what he was doing.

The appellant denies all knowledge of such facts till after his repudiation of those contracts.

The trial Judge believed him and I see no reason for setting aside his finding. Indeed, I see some reasons the other way.

For example, a specimen of how this man was approached is furnished by the following letter:—

Mr. A. Durocher. Toronto, Aug. 29th, 1914.

Dear Sir,—On contract number 1,493 from ourselves to John Barry & Sons 25 c/s peas we allow you personally 1% brokerage also on contract number 98 Beaver Canning Co. contract number 99 Ed. McCaw, contract number 100 A. A. Morden & Sons, at Wellington. All these we allow 1% brokerage to yourself when goods are paid for.

W. H. MILLMAN & SONS, *per* "M."

This particular letter possibly does not refer to these identical contracts now in question. I quote it only to shew the spirit of the giving and how Durocher was specially and personally addressed, instead of the firm, had it been intended for them. It was not given as sometimes happens between a commission man dealing with a buyer personally and offering to share his commission with him in order to close the deal, thus effecting a lowering of the price, though desirous not to call it that. Nor does such a personal address to the agent tend to inspire the belief that the principal knew all about it. In that case it would have been addressed to the first with a polite request to see that poor Arthur got his tip for his civility.

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It was not denied in argument that the like commission sharing applied to the contracts in question. I gather that sometimes it was agreed on with Durocher orally. Indeed it seems to be suggested he was the first to hold out his hand and shew how it might be advantageously managed. And it was stated in argument that the total of such gratuities thus paid to Durocher exceeded $1,200.

I suspect but for this bountiful stream we might never have been troubled with the numerous exhibitions of commercial schemes and plotting and contriving which appellant denies he was an actor in but I think evidently quite willing to encourage, or as he, knowing of it, expresses it: "I had no reason to interfere. If it had been successful it would have been to my advantage," and which we have had presented for our serious consideration.

Sometimes fine distinctions have been drawn heretofore as to the intention and the result of such gratuities for which at least in this case I find no warrant, and I respectfully submit there never was a place therefor in law.

The encouragement thus lent as by expressions in the case of *Smith* v. *Sorby*, 3 Q.B.D. 552, n. to lessen the rigour and force of the law on the subject and somewhat corrected as Field, J., pointed out in *Harrington* v. *Victoria Graving Dock Co.*, 3 Q.B.D. 549 at 552, should neither receive approval or extension.

What he there expressed regarding loose commercial practice has so grown as to be a menace to those trying to adhere to honest practices and continue in business.

The illicit commission must be most rigidly suppressed if honest men who will not stoop to its use are to be given a fair chance for their commercial life in Canada. The proof of knowledge on the part of any one whose agent has yielded rests with him so asserting. An honest business man giving such gratuity will always put beyond peradventure his ability to prove that he had given notice to the principal in the plainest terms.

If such clear proof be required there will not be many gratuities of substantial amount going into the hands of the agent, I imagine.

It seems bordering on childishness to ask in this age for further proof of the motive than the promise of such substantial payment, on the successful accomplishment of its purpose, as implied in above letter.

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Nor can I entertain the *pro formâ* submission made that as it was not proven that respondent knew of this splitting of commission it should succeed, although the legal existence of the contract repudiated therefor is gone.

The repudiating of fraud on that ground possibly should have come earlier but *Clough* v. *London and North Western R. Co.*, L.R. 7 Ex. 26, will support raising it even at the trial so long as no affirmation of the contract by him defrauded or his estoppel in some other way. And the learned trial Judge notes he gave leave at the trial to amend.

I think for these reasons the appeal should be allowed and the judgment of the trial Judge restored. I think, however, there should be no costs allowed either party in regard to the appeal below or here. The great weight of the appellate costs here certainly consisted in presenting and arguing about the issue of law and fact in regard to what the appellant does not succeed as to, and I presume the same was the case below.

An apportionment of costs according to the result of the issues hardly fits the case.

To give appellant costs generally when the argument of the point on which he succeeds (if my view adopted) took less than twenty minutes on each side would not be a satisfactory result. The costs allowed him by the learned trial Judge should stand. The item upon which judgment below was allowed by the trial Judge with costs fixed at $75 did not trouble us and judgment therefor should also stand and be set off as directed.

DUFF, J., concurs with Idington, J.'s conclusion.

Duff, J.

ANGLIN, J.:—This action is brought to recover damages for breach by the purchaser of two contracts for the sale of canned goods. The defence originally pleaded was that the defendant's alleged agent, Durocher, was not authorized to make the contracts.

Anglin, J.

Early in the trial, however, the plaintiffs' broker, Millman, deposed that although he understood Durocher to be the defendant's agent, he agreed on Durocher's demand to divide with him his 2% commission from the vendors on sales made to the defendant for the plaintiffs and other canners whom he (Millman) represented. Durocher's share of these commissions (according to a statement of counsel made at bar and not controverted)

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would amount to the substantial sum of $1,200. Millman's evidence indicates that he was relying upon Durocher to "put the deal through" with Barry, the defendant, and that Durocher was insistent upon being paid the commission. Millman says he made no secret about the commission and that Durocher told him that the defendant knew what he was doing. The defendant denied having had knowledge of any commission arrangement with Millman until some time after the alleged contracts had been made—some time about the end of November—about the time that he repudiated Durocher's authority. Durocher corroborates this testimony.

The defendant's explanation of his having failed at once to repudiate liability on this ground is that it was then too late to object to the commissions as Durocher had received them and probably spent them. The omission from the statement of defence of a plea based on the commission agreement would indicate that, even when giving instructions to his solicitor, Barry did not appreciate its importance and neglected to bring it expressly to the solicitor's attention.

Durocher was largely indebted to the defendant and, while no definite arrangement was made as to the amount of his remuneration, the defendant advanced him money for expenses and says that he expected to pay him for his services. An amendment to the statement of defence alleging voidability because of the payment of commission by Millman to Durocher was allowed at the trial.

Middleton, J., who tried the action, has had a large experience as a trial Judge. In his judgment he says of the defendant: "Mr. Barry acted, I think, throughout with perfect honesty and I accept his evidence without question."

Accepting Barry's evidence, corroborated as it was by that of Durocher, notwithstanding many features of the correspondence in evidence and some circumstances which go far to warrant contrary inferences in regard to some phases of the case, the Judge expressly found that: "Durocher never had any authority; there never was any ratification and there never was any holding out by Barry. This being so, the plaintiffs must fail."

No doubt this conclusion was not a little influenced by the explicit acknowledgment of Millman that, while he regarded and

dealt with Durocher as Barry's agent, he also, "knew he (Durocher) had to go back to Barry and get authority before he could buy," by Barry's explicit denial that he ever authorized or ratified the contracts, and by the absence of any direct evidence of ratification.

If disposing of the case on this aspect of it, notwithstanding the forceful presentation by the Judges of the Appellate Division of such facts and circumstances in evidence as tend to support their reversal of the findings of the trial Judge, I am not satisfied that I should have been prepared to concur in their conclusion. I should not improbably have felt impelled to hold, for the reasons stated by my brother Davies, that, depending, as it necessarily did, almost entirely upon the credit to be attached to the oral evidence of the defendant given in his presence, the opinion of the trial Judge on the pure question of fact in issue should not have been disturbed.

But having regard (as Field, J., put it in *Harrington* v. *Victoria Graving Dock*, 3 Q.B.D. 549, 552), to "how sadly loose commercial practice has become in respect to transactions of this nature" it seems highly desirable and, on the whole, more satisfactory that this appeal should be disposed of on the other question which it presents, viz., the effect on the enforceability of the contract sued on of the payment of commission by the vendors' broker to the purchaser's agent. On this branch of the case the trial Judge said:—

> Upon another branch of the defence the plaintiffs must, I think, also fail. Mr. Millman, who says that he regarded Durocher as Barry's broker or agent, agreed to divide with Durocher the commission which he as vendors' broker would be entitled to receive. Mr. Millman seeks to shew that that division was not to be with Durocher, but between Millman and Barry & Sons. I cannot so find upon the evidence.
>
> In *Hitchcock* v. *Sykes*, 29 O.L.R. 6, 3 D.L.R. 531, 13 D.L.R. 548, I stated my views that the payment of any sum to any person occupying any fiduciary position, by way of secret commission, is fraudulent and cannot be permitted to be explained away, and that, as held in *Panama Co.* v. *India Rubber Co.*, 10 Ch. App. 515, any surreptitious dealing between one party to a contract and the agent of the other party is a fraud in equity and invalidates the agreement. Although this was said in a dissenting opinion, that view was subsequently sustained, and I am informed by counsel who presented a petition to the Privy Council for leave to appeal, that their Lordships expressly assented to this view.

The learned Judge's opinion was substantially approved in this Court, 23 D.L.R. 518, 49 Can. S.C.R. 403.

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That Durocher was the defendant's agent, authorized to bind him by the contracts sued upon is the basis of the plaintiffs' case and of the judgment of the Appellate Division. Speaking of the 1% commission paid Durocher, Millman himself tells us:—

I said you (Durocher) can do what you like with it.

Dealing with this defence in the Appellate Division (36 O.L.R. 536, 30 D.L.R. 690), Meredith, C.J.C.P., after disposing of the question of Durocher's authority adversely to the defendant (which involved discrediting utterly Barry's denial of that authority and of all knowledge that Durocher had contracted for him), said:—

After being asked to swallow the camel of the defendant's "innocence" involving more than $8,000, we are urged to strain at the gnat of the divided commission amounting to a few hundred dollars and upset the whole transaction on the ground of fraud in it.

I venture to think that in his necessitous circumstances Durocher did not look upon the $1,200 commission as a mere "gnat." The learned Chief Justice himself subsequently emphasizes its importance to Durocher when, on the assumption that he was not to be remunerated by Barry for his services, he says:—

The defendant knew that the man could not live upon air alone.

The Chief Justice proceeds to hold that the payment of commission by Millman to Durocher was innocuous and affords no defence to the plaintiff's claim, because of its comparative insignificance; because the arrangement for it appears in the correspondence; because the evidence does not disclose actual fraudulent intent on the part of Millman; because splitting commissions was customary in the trade; because the commission was received by Durocher "in good faith;" because, not having agreed with Durocher for a definite remuneration for his services, the defendant knew, or must be taken to have known, that he would seek remuneration from "the other side;" because the defence based on the commission agreement should be regarded as only "a solicitor's defence raised at the eleventh hour;" and because the arrangement for the commission was made not by the plaintiffs themselves but by their broker, Millman, and it did not appear that it was made in the course of the plaintiffs' business and for their benefit.

Mr. Justice Lennox discards this defence in three sentences:—

It is so much a question of fact that no nice point of law arises; and the reliable evidence in this case is documentary. That the divided commission was not intended as a dishonest or fraudulent inducement or to be kept from the knowledge of the defendant is manifest from the correspondence. The contracts ought not to be avoided on this ground.

Mr. Justice Masten, who had said:—

I do not for a moment differ from the learned trial Judge in his estimate of the evidence given by the witnesses

and "felt great difficulty" in dealing with this defence, disposed of it by holding that there was no evidence that the commission was paid

with the view of influencing Durocher to purchase more canned goods or at an enhanced price

and that, because of his expectation of sharing in the defendant's profits from the transaction,

his interest was immeasurably greatest in the direction of doing the best he could for Barry, and the commission receivable from Millman was not such, . . . either in amount or in the way in which it was received, as to bribe;

We have not the advantage of knowing the grounds on which Riddell, J., based his concurrence.

These reasons for reversing the judgment of the trial Judge on this aspect of the case, with respect, appear to me to be based in part on a misunderstanding or erroneous appreciation of the evidence, and in part on a misconception of the effect of the authorities on this branch of English law.

To deal first with Masten, J.'s view:—

There is no evidence whatever that Durocher was to share in the defendant's profits. The evidence is that the defendant "expected to pay him a commission for his services." Neither is there any evidence that the price of the goods sold was enhanced by reason of Durocher sharing in Millman's commission. There is, therefore, nothing to indicate that the substantial interest, directly adverse to that of his principal, created by Durocher having been promised a commission by Millman was in any way, or to the slightest extent, offset by a countervailing interest in prospective profits. No doubt where it is demonstrably obvious on undisputed facts that the advantage promised by the "other side," whatever form it took, could not have created an interest in the agent in conflict with his duty to his principal (as it was in *Rowland* v. *Chapman*, 17 Times L.R. 669, cited by the Judge) the right of repudiation does not arise. But the Courts will not undertake an investigation involving a speculative weigh-

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ing and balancing of opposing influences in the mind of the agent in order to determine which of them dominated. To do so would be to enter on the prohibited field of inquiry whether the bribe had been effectual. *Parker* v. *McKenna*, 10 Ch. App. 96 at 118, 124-5; *Harrington* v. *Victoria Graving Dock*, 3 Q.B.D. 549; *Shipway* v. *Broadwood*, [1899] 1 Q.B. 369 at 373.

All three of the Appellate Judges appear to have shared the opinion that in order to maintain this defence it was necessary for the defendant to establish actual fraudulent or dishonest motive or intent on the part of Millman. The Chief Justice speaks of the trial Judge having "been carried away" by the contrary view, adding: "it need hardly be said that that is not the law. In such cases, it is fraud and fraud only that had that effect," *i.e.*, of rendering the contract voidable by the principal.

No doubt actual fraud must be shewn when no fiduciary relationship exists (*Lands Allotment Co.* v. *Broad*, 13 R. 699, 2 Manson, 470); see, however, the observations on this decision of Collins, L.J., in *Grant* v. *Gold Exploration and Development Syndicate*, [1900] 1 Q.B. 233 at 249-50). But given that relationship between one principal and the recipient of a secret commission and knowledge of it by the other principal (or his agent), who makes the agreement to pay such commission, it is quite as unnecessary (and it would seem even more clearly immaterial), to prove an actual fraudulent or dishonest motive on the part of the latter as it is to prove that the former was in fact induced by the promise of the commission to betray his trust.

The fundamental principle in all these cases is that one contracting party shall not be allowed to put the agent of the other in a position which gives him an interest against his duty. The result to the agent's principal is the same whatever the motive which induced the other principal to promise the commission. The former is deprived of the services of an agent free from the bias of an influence conflicting with his duty, for which he had contracted and to which he was entitled. "The tendency of such an agreement as this," said Cockburn, C.J., in *Harrington* v. *Victoria Graving Dock*, 3 Q.B.D. 549, at 551, "must be to bias the mind of the agent or other person employed and to lead him to act disloyally to his principal."

As Chitty, L.J., said in *Shipway* v. *Broadwood*, [1899] 1 Q.B

369 at 373: "In *Thompson* v. *Havelock*, 1 Camp. 527, Lord Ellenborough said 'no man should be allowed to have an interest against his duty.' That great principle has been applied in cases innumerable."

In *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, at 637, Lord Alverstone quoted with approval the following passage from Story on Agency, page 262, par 210. [Extract cited.]

Moreover, by whatever sophistry the person who promises the secret benefit may endeavour to persuade himself to the contrary, the instances are rare indeed in which in his inmost heart he does not hope to derive some advantage from it, direct or indirect, which from the nature of the case must involve a dereliction of duty by the agent to his own principal.

For gifts blind the eyes of the wise and change the words of the just. Deut. XVI, 19.

The same doctrine was acted on in *Panama Co.* v. *India Rubber Co*, 10 Ch. App. 515, by James, L.J., who said at p. 527: "In this Court a surreptitious sub-contract with the agent is regarded as a bribe to him for violating or neglecting his duty."

And the Lord Justice speaks of this as

a plain principle of equity which is to be enforced without regard to the particular circumstances of the case. . . . You must act upon the general principle from the impossibility in which the Court finds itself of ever ascertaining the real truth of the circumstances.

He had already said:—

According to my view of the law of this Court I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this Court.

Romer, L.J., in *Hovenden & Sons* v. *Millhoff*, 83 L.T. 41, at page 43, still more definitely states the rule that the motive which induced the offer of the benefit cannot be considered.

[Extract cited.]

Indeed the decision in this case is very much in point. Although a jury had negatived conspiracy between the agent and "the other side," and had estimated the loss of the principal at one farthing, the secret commission was nevertheless unhesitatingly treated by the Court of Appeal as a bribe. See also *Hough* v. *Bolton*, 2 Times L.R. 788 at 789.

In the same judgment in which he laid down the doctrine that the secret benefit to the agent must invariably be regarded as a bribe and the promise of it as a fraud, James, L.J., added:—

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That I take to be a clear proposition, and I take it, according to my view, to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him.

These principles of equity, so far as I am aware, have never been departed from or questioned. They have, on the contrary, been frequently recognized, approved and applied.

Since the contracts sued upon in the present case still remained executory and there had been no laches on the part of the defendant such as might render repudiation inequitable, I am at a loss to understand the applicability of the distinction to which the Chief Justice of the Common Pleas alludes between the right to set aside the transaction and the right of the principal to recover from his agent the commission or other benefit received by him. Speaking generally, when the circumstances do not actually preclude the relief of rescission or render it inequitable, the same facts which will support a claim to recover the commission from the agent and damages from the other principal will justify repudiation of the contract with the latter.

Neither in *Hippisley* v. *Knee Bros.*, [1905] 1 K.B. 1, nor in *Great Western Ins. Co.* v. *Cunliffe*, 9 Ch. App. 525, to which the Chief Justice refers in this connection, did any question arise as to the effect upon the enforceability of the contract of the receipt by the agent of one of the parties of a secret benefit from the other. In neither case was the transaction in respect of which the agent received a secret allowance or gratuity the making of a contract between his principal and the person who paid such allowance or gratuity. In neither case could the payment or allowance by any possibility have given the agent an interest adverse to his prinicpal in transacting the business for which he was employed.

Moreover, in the *Cunliffe* case, 9 Ch. App. 525, the circumstances were such that the Court found that knowledge of the allowance should be imputed to the principal and that with such knowledge he had acquiesced in it. Barry has sworn that the agreement for splitting the commission in the present case was unknown to him. The only ground for questioning his statement is the fact that the commission is alluded to in some correspondence concerning the contracts sued upon. But the letters which

contain these references were either written by Durocher or addressed to him, or, if addressed to the defendant, were placed in envelopes marked "personal attention of Mr. Durocher," and the evidence of the practice as to the handling and disposing of correspondence in the defendant's office makes it quite probable that he never saw these letters. I have found nothing in the record to justify a reversal of the finding of the trial Judge that the commission was "secret"—in the sense that Barry was ignorant of it.

Although there is some evidence that it was Millman's practice to split commissions with purchasers' agents, there is no evidence that that custom was so prevalent in the trade that Barry should be charged with knowledge of it—if indeed knowledge of a custom involving such an essential departure from the usual relations of principal and agent could be imputed without proof that it actually existed: *Robinson* v. *Mollett*, L.R. 7 H.L. 802; *Johnson* v. *Kearley*, [1908] 2 K.B. 514 at 530.

Nor is this a case in which, because he did not himself contemplate remunerating Durocher for his services, Barry must be taken to have expected that he would seek remuneration from the "other side," such as were the cases of *Baring* v. *Stanton*, 3 Ch. D. 502, and *Great Western Ins. Co.* v. *Cunliffe*, 9 Ch. App. 525, cited by the Chief Justice of the Common Pleas. (See comment of Alverstone, C.J., on these two decisions in *Hippisley* v. *Knee Bros.*, [1905] 1 K.B. 1 at 7.) On the contrary, the evidence of both Barry and Durocher is that, while no definite basis was fixed, it was expected that Barry would pay Durocher for his services. Moreover, Durocher was largely indebted to Barry.

It may be, and not improbably is, quite true that Millman did not intend that the payment of commission to Durocher should be concealed from Barry and that he was deceived by Durocher's assurance that Barry knew what he was doing. But the law is thus stated by Collins, L.J., in *Grant* v. *Gold Exploration Co.*, [1900] 1 Q.B. 233 at 248, 249. [Extract cited.]

As Chitty, L.J., said in *Shipway* v. *Broadwood*, [1899] 1 Q.B. 369 at 373: "It was the plaintiff's duty to inform the defendant of the promise . . . if he wished to escape the consequences of having made it. . . . The real evil is not the payment of the money, but the secrecy attending it."

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There was nothing in the present case amounting to acquiescence or waiver by Barry of his right to rescind on account of the payment of the secret commission to his agent. He discovered the commission arrangement only after the contracts sued upon had been entered into. Where that is so a very clear and a very strong case indeed must be made to support an allegation of acquiescence or waiver: *De Bussche* v. *Alt*, 8 Ch. D. 286 at 314; *Bartram & Son* v. *Lloyd*, 90 L.T. 357.

Nor does the failure to set up the defence based on the secret commission until the facts concerning it had been disclosed at the trial present a formidable obstacle: *Shipway* v. *Broadwood*, [1899] 1 Q.B. 369; *Hough* v. *Bolton*, 1 Times L.R. 606. Moreover, the trial Judge exercised a discretion in allowing the amendment setting up this defence which, in my opinion, should not have been interfered with on appeal.

Finally the fact that the agreement to split the commission was not made by the plaintiffs themselves, but by their agent Millman, is not an answer to the defendant's assertion of his right to repudiate. What Millman did was done while purporting to act within the scope of his employment, and in the course of the service for which he was engaged by the plaintiffs; and it is immaterial that it may have been in his own interest as well as in, or even to the exclusion of, that of the plaintiffs: *Lloyd* v. *Grace, Smith & Co.*, [1912] A.C. 716. The defendant's agent was given the disqualifying adverse interest which made him incapable of binding his principal.

My apology for having dealt with this appeal at what may seem inordinate length is that when a judgment which deals with matter so fundamental is reversed, courtesy to the learned Judges who pronounced it demands an adequate statement of the grounds on which it is held to have been erroneous; and also that it is of the utmost importance that it should be clearly understood that in this, the Court of last resort in Canada, the rule of equity on which the judgment allowing this appeal rests is regarded as inflexible and its application as universal.

In conclusion I cannot do better than quote some apposite observations from the judgments of Lord Alverstone, C.J., and Kennedy, J., in *Hippisley* v. *Knee Bros.*, [1905] 1 K.B. 1. Kennedy, J., said at p. 9:—

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If a principal when contracting for the services of an agent, is told that the agent is going to receive a profit out of the agency beyond the remuneration that the principal is to pay, there can be no possible harm in the agent receiving it; but, unless it had been in this way authorized by the principal the receipt of such a profit is an indefensible act. I quite agree with my Lord that in this case the defendants were only doing what they honestly believed to be right having regard to a general practice; but I should be sorry to say that the practice itself is an honest one, if it is to be taken as extending to cases in which the fact that the profit will be received and kept by the agent is not brought to the knowledge of the employer.

And Lord Alverstone, at p. 7:—

Unfortunately there appears to prevail in commercial circles in which perfectly honourable men desire to play an honourable part an extraordinary laxity in the view taken of the earning of secret profits by agents. The sooner it is recognized that such profits ought to be disapproved of by men in an honourable profession, the better it will be for commerce in all its branches.

The appellant is entitled to his costs in this Court and in the Appellate Division, and the judgment of the trial Judge should be restored. *Appeal allowed.*

ACME GRAIN Co. v. WENAUS.

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Saskatchewan Supreme Court, Sir Frederick Haultain, C.J., and Lamont and Elwood, JJ. July 14, 1917.

CONTRACTS (§ I D—60)—OFFER AND ACCEPTANCE.

A telegram instructing an agent to buy grain at a certain price, which has been communicated to a third person, who thereupon intimated to the sender that he will deliver at the price named, is not an offer constituting the basis of a contract; nor does such an alleged acceptance amount to a counter-offer, capable of acceptance by the recipient.

Statement.

APPEAL by defendant from a judgment for plaintiffs in an action for damages for failure to deliver 2,000 bushels of wheat in accordance with a contract alleged to have been made between them. Reversed.

M. A. Miller, for respondent; *H. J. Schull*, for appellant.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The facts, which are all admitted, are as follows: On October 1, 1915, the plaintiffs sent a code telegram to their agent at Verwood, which, deciphered, read as follows:—

October options opened 89¼ to 89 3-4c. closed 88 3-8c. Buy basis net store Fort William or Port Arthur. One Northern now loading 87 3-8. October delivery 87 3-8c.

This telegram on being deciphered was communicated and translated to the defendant. On October 2, the defendant sent the following telegram to the plaintiff company: "Accept 87 3-8c. for 2,000 October delivery."

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On the same day the plaintiffs wrote the defendant as follows:—

Your wire received accepting offer of 87 3-8c. net basis One Northern store Fort William for 2,000 bus. October delivery, and we trust you will have this grain shipped out as quickly as possible.

The price of wheat grading No. One Northern, at the close of the market on October 30, the last business day of said month, was $1 per bushel net store at Fort William. The defendant delivered no grain at all to the plaintiffs.

The question is, can an enforceable contract be spelled out of the above documents? To constitute a contract there must be an offer by one person to another and an acceptance of that offer by the person to whom it is made. A mere statement of a person's intention, or a declaration of his willingness to enter into negotiations is not an offer and cannot be accepted so as to form a binding contract: 7 Hals., pp. 345-346.

The first contention made on behalf of the plaintiffs was that, as the telegram of the plaintiffs to their agent had been communicated to the defendant, his telegram of October 2nd is to be considered as an acceptance of an offer made to him by the plaintiffs' agent in the terms of the plaintiffs' telegram. If such an offer was ever made to the defendant, there is absolutely no evidence of it before the Court. The case was tried on facts stated; no evidence at all was given.

The only admissions made by the defendant in the statement of facts are, that the plaintiffs' telegram to their agent was communicated and translated to him, and that he sent the telegram of October 2.

The communicating to the defendant of the contents of the plaintiffs' telegram is not an offer to him. The telegram is not an offer at all. It is simply instructions from the plaintiffs to their agent to buy at certain prices. If the fact was that the plaintiffs' agent made an offer of 87 3-8c. to the defendant for 2,000 bushels of wheat, that fact might have been established by calling the agent or the defendant. It was not established, and we cannot assume that any such offer was made. If no offer was made by the plaintiffs' agent, the defendant's telegram of October could not constitute a binding contract.

If after the defendant had sent his telegram of October 2, the price of wheat had fallen and the defendant had sought to make the plaintiffs accept delivery of 2,000 bushels of wheat at

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87 3-8, the plaintiffs could, on the material before us, have effectually resisted such a claim by setting up that no offer had ever been made by them to the defendant for his wheat.

The next contention on behalf of the plaintiffs was, that the defendant's telegram should be considered as an offer on his part, and the plaintiffs' letter in reply as an acceptance thereof.

The answer to that is that the defendant's telegram does not purport to be an offer, nor do the plaintiffs treat it as an offer. They treated it as an acceptance of an offer which they presumed their agent had made on their behalf to the defendant. As neither party considered it as an offer it cannot be so considered.

But even if the defendant's telegram were to be treated as an offer, what does he offer? The telegram does not say. How, then, can we find it was wheat? Had he been called as a witness at the trial, it is probable that he would have testified that he was referring to wheat. It was argued that wheat could be inferred, because the Grain Act made a classification of wheat in which grain No. 1 Northern appears. The defendant, however, in his telegram does not refer to No. 1 Northern. He merely says: "Accept 87 3-8 for 2,000 October delivery."

From these words alone it is impossible to say that the defendant was making an offer of wheat, let alone wheat grading No. 1 Northern.

The appeal should, therefore, be allowed with costs, the judgment of the Court below set aside and judgment entered for the defendant with costs. *Appeal allowed.*

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Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Walsh, JJ. June 21, 1917.

VENDOR AND PURCHASER (§ ID—20)—WARRANTY—DEFICIENCY—COMPENSATION—RESCISSION.

The words "said land containing 271 acres," following the description in an agreement of sale, imply a warranty as to the quantity, a breach whereof gives rise to compensation for the deficiency, even after conveyance, but not to rescission.

Statement.

APPEAL by plaintiff from the judgment of Ives, J., dismissing an action for rescission of an agreement for the sale of land or compensation for a deficiency. Reversed.

Jones, Pescod & Hayden, for appellant.

Macleod & Matheson, for respondent.

Harvey, C.J.

HARVEY, C.J., concurred with Walsh, J.

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WALSH, J.:—By agreement in writing the defendant agreed to transfer to the plaintiff the land in question and the plaintiff agreed to transfer to the defendant certain land in the State of Washington. Though not so stated in it the fact is that the defendant agreed to pay and did pay to the plaintiff $3,500 in cash, as being the difference in value between these parcels. This agreement has been fully executed. The plaintiff complains that he entered into it on the faith of the defendant's covenant or representation that the parcel of land which he took under it contains 271 acres, while, in fact, its area is admittedly but 164.80 acres, and he now asks either rescission of the contract because of, or damages, or compensation for this deficiency. Ives, J., who tried the action, dismissed it and from that judgment the plaintiff appeals.

The Judge held that the plaintiff was not entitled to rescission, because he did not act promptly after learning of the deficiency and because the defendant has disposed of the land which he took under this contract. In this conclusion, I think he was quite right, though I am not ready to agree entirely with his reasons for it. It was frankly admitted by counsel for the plaintiff both at the trial and before us that there was no fraud in any of the representations as to the acreage of this land which the defendant made to the plaintiff, as he then honestly believed it to contain 271 acres. The plaintiff took the transfer of it some 8 months after the making of the contract and recorded it, then knowing that there was a considerable deficiency in the acreage though not aware of its extent. By so doing, he clearly affirmed the contract and disentitled himself to have it rescinded. The defendant some 3 years later disposed of the land which he took under the agreement so that *restitutio in integrum* is impossible. Further, I do not think that rescission of an executed contract upon the ground that it was induced by an innocent misrepresentation can be decreed. The Supreme Court of Canada so held in *Cole* v. *Pope*, 29 Can. S.C.R. 291, though it found other ground for giving the plaintiff the relief which he claimed. For all of these reasons, rescission of this contract is out of the question. The authorities are clearly against the right to order payment of compensation for this deficiency after transfer. The Supreme Court of Canada has so held in *Penrose* v. *Knight*, referred to in Cassels' Digest of

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Supreme Court Decisions, p. 776. Mathers, J., in *Foster* v. *Stiffler*, 12 W.L.R. 60, after reviewing the English cases says, at p. 65:—

> It is settled, I think, that, in the absence of fraud, a covenant in the conveyance which has been broken, some express provision for compensation in the original contract that has not become merged in the conveyance or some warranty, the purchaser, after conveyance and payment of his purchase money, has no remedy either at law or in equity.

The law is stated much to the same effect in the second edition of Williams on Vendor and Purchaser, at pp. 610, 611, where the authorities for the author's proposition are noted. He says, speaking of an error caused by innocent misrepresentation and not by fraud: "When the contract has been fully performed the purchaser will not be entitled to any relief in respect thereof except (1) by virtue of an express agreement contained in the contract to make compensation for such errors or (2) if the defect be really a defect of title and compensation be recoverable under the covenants for title contained in the conveyance or (3) if the representation amounted to a warranty, collateral to the contract for sale of the truth of the fact stated." The British Columbia Court of Appeal in *Jackson* v. *Irwin*, 12 D.L.R. 573, 18 B.C.R. 225, held that it had no power to award compensation for a deficiency in acreage after conveyance. I think it clear that unless the case can be brought within one of the exceptions above noted the plaintiff must go without remedy.

There is no express covenant of any kind in the transfer. It is in the simple statutory form without more and therefore carried only the covenants implied under the Act none of which are helpful to the plaintiff in this connection. There is no express agreement in the contract for compensation for such an error as this. The only ground that is left open to the plaintiff is that the defendant warranted the acreage of this parcel at 271 acres. If that is established the plaintiff is entitled to damages for the undoubted breach of that warranty, otherwise he is without redress.

The plaintiff and the defendant were the only witnesses at the trial. The only reference in the plaintiff's evidence to what took place in this respect between him and the defendant before the making of the contract is in the following question and answer:

> Q. Did you have a description of the land or see a description of it naming the acreage in it before you made the transaction? A. Yes.

A portion of his examination for discovery was put in but it does not appear from it that there was any discussion at all of the

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acreage of this parcel. The only portion of the defendant's evidence bearing upon the point is in the following question and answer:

Q. You do admit that you told him your land had 271 acres in it? A. I think I told Henry (obviously meaning the plaintiff) there was 271 acres, at least, I told him that is what the deed called for.

And from his examination for discovery the plaintiff put in the following question and answer:

Q. Did you ever mention to him the number of acres that were there? A. I told him that according to the deed it was 271 or 272 acres, I think. That is my recollection. Of course, it was a long time ago.

The agreement of the parties contains the following covenant on the part of the defendant, namely, that he "will deliver unto the second party hereto a warranty deed showing a clear title to the following described property to wit, all that part of sec. 3, township 8, range 1, west of the 5th principal meridian lying west of the river, said land containing 271 acres and being located in Alberta, Canada." There is nothing else in either the oral or written evidence that bears upon this question unless it be that in the transfer which was given some months later the land is described as containing 271 acres more or less.

Heilbut, Symons & Co. v. *Buckleton*, [1913] A.C. 30, a judgment of the House of Lords, is the most recent case of authority on the question of warranty that I have been able to find. In each of the three judgments handed down in that case, reference is made with approval to the language of Holt, C.J., in *Crosse* v *Gardner* (1689), Carth. 90, and *Medina* v. *Stoughton* (1699), Salk. 210, that "an affirmation at the time of the sale is a warranty provided it appear on evidence to be so intended." Lord Atkinson then goes on to say, at p. 43: "The existence or non-existence of such an intention in the mind of the party making the affirmation, that his affirmation should be taken as a warranty of the truth of the fact affirmed is, in an action of breach of warranty, no doubt a question for the decision of the jury which tries the action; and all the evidence in the case touching the knowledge, conduct, words and actions of that party, from first to last, may be considered by them in arriving at a conclusion upon this question." Viscount Haldane, L.C., at p. 37, says:" Words which on the face of them appear to be simple representations of fact may, if the context so requires, import a contract of warranty." Lord Moul-

ton, at p. 51, says: "The intention of the parties can only be deduced from the totality of the evidence."

Looking at the facts of this case in the light of the definition given by Holt, C.J., of the judgment of the House of Lords in the case just referred to, I am of the opinion that a warranty of this area at 271 acres was intended. It is clear from the evidence that the plaintiff knew nothing of its acreage beyond what the defendant told him. The plaintiff says and the defendant admits that he then had no opportunity of measuring the land, which makes it plain, I think, that he relied and to the defendant's knowledge on what he told him of its acreage.

It was not until he began to farm it, after the contract was made, that he found out that there was any deficiency in the acreage, but he says he found it out very quickly then, and as soon as the opportunity presented itself he communicated the fact to the defendant. This information seems to have impressed him with some sense of responsibility for he says that he at once said "the best thing we can do now is to try and get it surveyed," and he interested in the matter the gentleman who then represented that district in the House of Commons and afterwards his successor in that representation and they tried but unsuccessfully to get some redress from the government. It surely requires no evidence to establish the materiality of a statement as to the number of acres in a farm even if it is taken at a lump price as was the case here instead of at a price per acre based upon an estimated acreage. Though the plaintiff says nothing more than that he saw a description of the land mentioning the acreage before he bought and though the defendant said nothing more than that his deed called for 271 or 272 acres I think that these things coupled with the other facts to which I have referred point very strongly to the conclusion that a warranty was intended.

The defendant then had a transfer from his vendor the Calgary and Edmonton Land Co. Ltd., in which the land is described as containing 271 acres more or less, a fact which he would doubtless think quite justified him in so warranting the acreage. But the wording of the covenant in the agreement affords, to my mind, the strongest possible proof of the intention to give this warranty. The words "said land containing 271 acres" which follow the description are I think equivalent to saying "which land contains

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271 acres." He thereby bound himself to give a warranty deed of a certain parcel of land which he stated contained 271 acres. Apart from the use of express terms of warranty I cannot fancy words better calculated than these to convey the idea that a warranty of the acreage was intended particularly when used under the circumstances which I have described. Stress was laid in the argument on the covenant being for a *warranty* deed but I do not attach much, if any, importance to it. That is a form of conveyance which is unknown to our conveyancing law or practice though it is in general use in some, at least, of the States of the American Union. It was no doubt provided for because both of the parties to the contract were then living in the United States in which country it was, I fancy, prepared. There is nothing before us to indicate what it means and the only definition of it which I have been able to find is in a foot note to page 494 of 40 Cyc. as follows: "In common parlance, however, a warranty deed means a perfect title and in legal contemplation when parties contract therefor they must be understood to mean a title paramount to all others." This definition does not help the plaintiff at all, as it is not a defect in title that is complained of by him. In my opinion the intention of the parties as deduced from the totality of the evidence, to use Lord Moulton's phrase, was that the acreage should be warranted and as there has undoubtedly been a breach of this warranty the plaintiff is entitled to relief.

The value put upon this parcel in this transaction was, according to the plaintiff's evidence, $3,500. That is borne out by the transfer which states that sum to be the consideration for it and that is the sum sworn to in the affidavit of value. The defendant's version of it is that he offered the plaintiff this land and $3,500 for his farm and he thinks the plaintiff was asking $7,000 for his land. It is, I think, a fair conclusion, from all this evidence, that it was worth and was taken at $3,500 on the basis of its area being 271 acres, which is at the rate of $12.92 per acre. The deficiency of 106.20 acres represents at this rate a loss of $1,372.10 to the plaintiff and for that amount, I think, he is entitled to a judgment against the defendant. He claims a further sum of $2,000 as damages for the loss of the use of 106.20 acres from the date of the agreement, but there is nothing in the evidence to justify an award of any damages under this head.

I would allow the appeal with costs and set aside the judgment dismissing the action and direct the entry of a judgment for the plaintiff for $1,372.10 and costs.

Beck, J.

BECK, J.:—I agree in the result arrived at by my brother Walsh, on the ground that there was a warranty as to the quantity of land. The earlier portions of his reasons for judgment seem to me deal with questions of law, which it is unnecessary to discuss in the present and I merely wish to guard myself again as I did at greater length in the recent case of *Anderson* v. *Morgan* (1917), 34 D.L.R. 728, from being supposed to accept the general proposition that a contract completely executed cannot be rescinded except for fraud. This proposition is very often asserted; but almost always as applicable to an agreement for the sale of land completed by a conveyance containing a variety of covenants for the protection of the grantee and the agreement is deemed, except as to covenants for compensation or as to other collateral covenants, such as, in the present case, a warranty, to be merged in the grant. That and nothing more is, in my opinion, what is meant by most of the appropriate English authorities, and by the decisions of the Supreme Court of Canada in *Cole* v. *Pope*, 29 Can. S.C.R. 291.

I think, as I said in the former case, that those decisions are inapplicable in this jurisdiction where an agreement for sale is not followed by a deed of grant but by a transfer, which in my opinion is in effect only an order to the registrar to cancel the vendor's certificate of title and to issue a new one in the purchaser's name, leaving in my opinion in full force and effect all the covenants of the agreement for sale.

Stuart, J.

STUART, J. (dissenting):—I agree in the main with the general principles of law laid down by my brother Walsh, and I think the result of his judgment is perhaps substantially just, but I shrink from fully concurring in the view that a warranty has in fact been made out; particularly in view of the long standing practice of inserting in deeds of conveyance, after the description of the land, a statement of the number of acres contained therein. We have been referred to no case where it has been decided that such a statement amounts to a warranty. Even in the case of *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30, referred to, the House of Lords actually held that, where certain underwriters, who were also rubber merchants, stated that they were bringing out a rubber

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company and sold shares to the plaintiff, there was no evidence of a warranty that the company was a rubber company. I gather from that case that there must be an intention shown to give a warranty and I doubt if there is sufficient evidence in the present case to show such an intention on the part of the defendant.

Moreover, I should have preferred to have had the case tried upon pleadings specially alleging a warranty so that evidence might have been led by the defendant to meet such a claim. As it is drawn the statement of claim seems to be one for specific performance or damages for breach of covenant, that is, it is alleged that the defendant agreed to convey 271 acres and did not do so. That is rather a different thing from alleging that the defendant guaranteed or gave a warranty that a certain described piece of land contained 271 acres.

I am so pleased however that the other members of the Court are able to give the plaintiff relief, that I do not care to say more. Still I do not concur in the judgment and rather incline to the view that the appeal should be dismissed. If it were necessary for me to say so, I should, as at present advised, feel bound to take that course. *Appeal allowed.*

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EMPIRE CREAM SEPARATOR CO. of CANADA v. FRIER.

New Brunswick Supreme Court, Chancery Division, Grimmer, J. May 14, 1917.

MORTGAGE (§ IIA—35)—PRIORITIES—FIRST MORTGAGE—VENDOR'S LIEN—COSTS.

Upon the foreclosure of a mortgage on land subject to a prior mortgage and vendor's liens, the property will be ordered sold subject to the rights of the first mortgagee, with a priority, as to the costs, in favor of the second mortgagee over the vendor's liens.

Statement.

ACTION for foreclosure of mortgage and sale of two lots of land subject to encumbrances.

M. G. Teed, K.C., for plaintiff.

R. St. J. Freeze, for defendants, except mortgagors.

Grimmer, J.

GRIMMER, J.:—This action was brought for the foreclosure of a mortgage made February 6, 1913, by the defendant Frier and his wife, in her own right, to the plaintiff company, covering two lots of land in Sussex in the County of Kings.

A prior mortgage had been given by the Friers to one Joseph Campbell, which had been assigned to, and is now held by the defendant White & Co. Ltd., and is unsatisfied, but which however includes only one of the lots conveyed by the plaintiff com-

pany's mortgage. The defendant Simeon H. White also holds a vendor's lien on each of the lots described in the second mortgage.

An account was also sought of the amount due on the first mortgage, as well as upon both of the vendor's liens, and an order for the sale of the said lands, and a distribution of the proceeds was also asked for. No defence was entered by the mortgagors in the suit, nor by the other defendants as to the plaintiff's claim, and upon application of counsel for the plaintiff company, the amount due upon its mortgage was assessed at the sum of $1,740.98 and judgment was ordered to be entered against all the defendants for this sum, and that the equity of redemption of the mortgagors in the second mortgage be foreclosed.

Counsel for the defendants, the S. H. White Co. Ltd., and Simeon H. White, thereupon called witnesses to prove the amount due upon the first mortgage, and upon the vendor's liens.

From the evidence it appeared that the mortgagee Campbell made a verbal agreement with the defendant the White Co., under which the latter, in view of the failure of the mortgagors to make the payments required by the first mortgage, were to make the same as they respectively fell due, until the principal sum was fully paid, whereupon the mortgage was to be assigned to them. This agreement was afterwards reduced to writing and executed between the parties.

Following this agreement, the company commenced to and did make payments regularly as provided by the mortgage, and so continued until the sum secured was fully paid, whereupon in accordance with his agreement Campbell duly assigned the mortgage to the company.

The company also paid certain sums by way of taxes, and for insurance on the property, the total sum so paid by them upon the said first mortgage amounting to $1,489.70.

It was contended on behalf of the plaintiff that the money paid by the company before the agreement in writing was signed should not be allowed as payment on account of the mortgage, inasmuch as they were charged against the defendant Margaret Frier on the books of the company. In this view I cannot concur. From the evidence, I am satisfied no payments were made by the company until after the verbal agreement was entered into by them with Joseph Campbell, which I find to be a perfectly good agreement,

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and which was carried out by the parties to the full extent of its meaning and purpose and intent, quite as much before it was reduced to writing as after. I find that the payments made by the company to Campbell were made for the purpose of paying the amount secured under and by his mortgage, and for the protection of the property, and that the sums so paid by them by way of principal and interest on the mortgage, and for taxes and insurance, amounted to the sum of $1,489.70.

I also find that the lien of the vendor Simeon H. White, on lot called No. 2 by Joseph Mills in his evidence, or the house lot, being that first described in the statement of claim, and upon which the defendant company holds a mortgage, amounts to the sum of $608.60 in all, and that his lien on the second lot, so called No. 3, not covered by the defendant company's mortgage, amounts to the sum of $487.67, making in all for both liens the sum of $1,095.67.

It was on the hearing suggested that the defendant company and Simeon H. White should consent to a decree being made, foreclosing both mortgages and the vendor's liens, that all the property should be sold, and that the plaintiff's costs should be first paid out of the proceeds. That the defendant company and Simeon H. White's costs, in relation to the foreclosure suit and vendor's liens, should next be paid, and that the balance of the proceeds of sale should be applied first to the payment of the first mortgage and secondly to the vendor's liens, and the balance, if any, should then be applied to the plaintiff's mortgage, so far as it might go. To this counsel for the said defendants declined to consent, and in view of the refusal the proposed decree cannot be made. I do however order that the property covered by the plaintiff's mortgage be sold in separate lots, the first lot described in the statement of claim to be sold subject to the defendant company's mortgage, upon which there is due up to April 19 last, the sum of $1,489.70, of which $1,100 is principal money and $323.10 is interest.

Out of the proceeds of the sale of the first lot I order that the defendant company's costs as such mortgagee shall first be paid. Secondly, I order that the plaintiff's costs of suit including the costs of the decree and the costs of the sale shall then be paid proportionately out of the proceeds of the sale of the two lots.

Thirdly, that the defendant Simeon H. White shall then be paid his costs of the vendor's liens, which shall be paid proportionately out of the proceeds of the sale of the two lots. Fourthly, that the said defendant Simeon H. White shall then be paid his lien upon the first lot so called, amounting to the sum of $608, and subsequent interest, the same to be paid out of the proceeds of the sale of the said first lot. Fifthly, that the said defendant Simeon H. White, shall then be paid his lien upon the so called second lot, amounting to the sum of $487.67, and subsequent interest, the same to be paid out of the proceeds of the sale of the said second lot.

I do further order that the balance of the said fund shall be applied towards the settlement and payment of the amount found to be due upon the said plaintiff company's mortgage which has been ascertained and assessed at the sum of $1,740.98.

Judgment accordingly.

CREEDEN v. NORTH CHINA INS. Co.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. June 29, 1917.

INSURANCE (§ VIB—259)—MARINE—"PERIL OF THE SEA."

Damage to a cargo from sea water that apparently had forced through the hatches of the ship during a storm is sufficient *primâ facie* proof of injury from a "peril of the sea" within the meaning of an insurance policy covering a risk of that kind. (Court divided.)

Statement.

APPEAL by defendant from the judgment of Macdonald, J., in an action on a marine insurance policy. Affirmed; Court divided.

E. P. Davis, K.C., for appellant; *S. S. Taylor*, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The consignment of beans in question in this action were delivered in good order to the ship in Yokohama, consigned to the respondent at Vancouver. On the passage across the Pacific, the ship encountered a storm of considerable violence, which washed the decks. It is said that the hatches were closed and made water-tight. On arrival at Vancouver, the beans were found to be damaged by salt water.

The decision of this case depends largely on the credence to be given to the evidence of James Sennett, a witness for the appellant and the inference to be drawn from the other facts and circumstances of the case. It was Sennett's duty to batten down the

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hatches when a storm threatened, and he has deposed that he did this on the occasion in question, and that no sea-water could have got through them.

I do not think the Judge fully credited Sennett's evidence. I gather from what he says in his reasons for judgment that he was not convinced that the hatches had been battened down in time to prevent sea-water reaching the cargo. It appears quite probable that the water got through the hatches before they were battened down, because of the suddenness of the storm. It therefore comes to this, the goods were shipped in good condition; the ship encountered a sudden storm which caused the seas to wash over the hatches; when examined at destination, the goods were found to have been damaged by salt water. If these were all the facts proven, the fair inference would be that sea-water got down the hatches during the storm and injured the beans. The onus of proof of all facts necessary to sustain the plaintiff's case would be satisfied.

It is not disputed that if that be the true inference to draw from the evidence, the injury was one of the risks of the sea insured against.

Now the Judge was entitled to give such credence to Sennett's evidence as he thought was due to it. He might disbelieve it altogether, or he might regard it as that of a man over-anxious to shield himself from imputation of breach of duty.

In these circumstances, I would not interfere with the conclusion arrived at by the trial Judge. The appeal should therefore be dismissed.

Martin, J.A.

MARTIN, J.A.:—This action is defended by the underwriters on the ground that unless the shipment of beans which they insured can be proved to have been injured by a "peril of the sea," they are not liable for the damage to the beans under the policy in question. That term "peril of the sea" has led to much discussion, and as is said in Arnould on Marine Insurance (1914), 1017, "it is perhaps easier to arrive at a true understanding of the term by suggesting rather what it does not embrace, than what it does." It will be found considered in the cases hereinafter cited and in my recent judgment in the Admiralty Court in *Donkin* v. *The Chicago Maru*, a case on a shipment of maize from Japan, delivered on November 24, 1916, but not yet reported.*

* [Reported 33 D.L.R. 38.]

It has been found by the trial Judge that the beans were damaged by sea-water and apparently he inclines to the opinion that this was the result of a storm which arose during the voyage. I say "apparently" because he makes no precise finding on the point, but rather evades it, as I understand his remarks, though they leave me in doubt as to his meaning. But I have no hesitation in finding as a fact upon the uncontradicted evidence (taken by commission) of the master and chief carpenter, and made a part of the plaintiffs' case, that the sea water did not get into the ship as the result of bad weather upon the sole occasion alleged, *i.e.*, during the "one ordinary moderate gale" (as the master describes it) of the voyage—which had only one rough day. The latter witness is clear and precise upon the means taken to batten down the hatches and I feel quite unable to accept the responsibility of rejecting his evidence as unworthy of credence.

But in this entire lack of any evidence of a peril of the sea, the proposition was submitted to us that as the beans were proved to have been shipped in good condition and upon discharge thereof at Vancouver were proved to have been damaged by sea water, therefore the damage must be presumed to have been caused by a peril of the sea. Upon a careful examination of the authorities, I find myself unable to accept this view. It is clear that damage may be done to a cargo by sea water getting into a ship, which is not caused by a peril of the sea, a recent example of which is *Sassoon* v. *Western Assurance Co.*, [1912] A.C. 561, where their Lordships of the Privy Council held that opium placed in a wooden hulk in the river Whangpoo was not damaged by a "peril of the sea," where sea water percolated through a weak place in the hull, which was covered up by copper sheathing [Extract cited, p. 563.]

On the other hand, it had earlier been decided, in 1868, in *Davidson* v. *Burnand*, L.R. 4 C.P. 117; and *Blackburn* v. *Liverpool etc. S. Nav. Co.*, [1902] 1 K.B. 290, that it was a peril of the sea where damage had been done to a cargo by sea water accidentally coming in through cocks or valves being left open, and where it came in through a lead pipe (taking sea water to a bath) gnawed by rats. *Hamilton* v. *Pandorf* (1887), 12 App. Cas. 518; 57 L.J.Q.B. 24, in which last case Halsbury, L.C., made these remarks upon the entry of sea water:—

One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water from the sea getting into

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the vessel upon which the cargo was to be carried in accomplishing her voyage —it would not necessarily be by a storm, the parties have not so limited the language of their contract; it might be by striking on a rock, or by excessive heat, so as to open some of the upper timbers; these and many more contingencies that might be suggested would let the sea in.

And another "contingency" is suggested by Lord Watson—"where one of the crew leaves a port hole open through which the sea entered"; or which actually occurred in *Carmichael* v. *Liverpool S.S. Assen.* (1887), 19 Q.B.D. 242; or through collision as suggested in *Davidson* v. *Burnand*, *supra*, p. 121. We have, however, in the case at bar no suggestion of any accident, whether the result of negligence or not, which would have allowed the sea water to get into the cargo on this voyage and we are therefore left to mere speculation on the point. It might, for example, have been caused by sea water coming through an open hatch when the decks were being cleaned, by means of a hose carelessly used, or otherwise. This situation has been considered in the United States and we are fortunate in having a decision of the Supreme Court of that country upon it. which I cite (as Lord Herschell cited and followed in *Hamilton* v. *Pandorf*, *supra*, a Pennsylvania decision) as it precisely covers the point in principle. I refer to *The Folmina* (1902), 212 U.S. 354, wherein it was held that damage to the cargo of an apparently seaworthy ship through the unexplained admission of sea water in the absence of any proof of fault on the part of the officers or crew is not of itself a peril of the sea. There a consignment of rice had been shipped in Japan in good order, but, upon arrival at New York, it was found to have been damaged by sea water and an action was brought on the bill-of-lading to recover the damage sustained and the same contention as to the inference to be drawn from the damage being caused by a peril of the sea was advanced there as here. But the Court said, p. 361:—

> Proof merely of damage to cargo by sea water does not necessarily tend to establish that such damage was caused by a peril or danger of the seas . . . As well observed by counsel in the argument at bar, the efficient cause of the damage sustained by the rice on board the "Folmina" must be sought in those conditions or events which caused or permitted the entrance of sea water. It cannot in reason be said that sea water was the efficient, the proximate cause of the cargo damage, because no other cause for that damage has been disclosed. As there must have been an efficient cause permitting the sea water to enter, so long as that cause remains undisclosed it cannot be said that the damage has been shown to have resulted from causes within the scope of a sea peril . . . Manifestly, however, the presence of the sea

water must have resulted from some cause, and it would be mere conjecture to assume simply from the fact that damage was done by sea water, that therefore it was occasioned by a peril of the sea. As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier.

This principle was applied by the U.S. Circuit Court of Appeals in *The Medea* (1910), 179 Fed. Rep. 781, to which we were referred.

Here the burden of proof rests upon the insured to show that the damage comes within that clause of the policy covering perils of the sea, and, in my opinion, on the two authorities cited they have failed to do so. It was suggested that there was a distinction because those cases were against the carriers on bills-of-lading and this is on a policy of insurance, but it is clear that as regards the question before us of proof of "perils of the sea" there is no distinction. See the remarks of Lord Herschell in *Wilson* v. "*Xantho*" (1887), 12 App. Cas. 503, Lord Watson in *Hamilton* v. *Pandorf*, *supra*, and Lord Mersey in *Sassoon* v. *Western Assce. Co.*, *supra*, p. 564, where he said. [Extract cited here.]

Reliance was placed by the Judge below and by counsel before us on the case of *Ajum Goolam Hossen & Co.* v. *Union Marine Ins. Co.*, [1901] A.C. 362, but there the insurance company was seeking to escape from the policy on the ground that the ship was unseaworthy and in such case as Lord Lindley said, "the burden of proving that she was so is on them, and the sole question is whether they have established their contention," and his Lordship, p. 366, pointed out "the danger and error of acting on the presumption in favour of unseaworthiness in case of an early loss of which the assured cannot prove the cause," and went on to say that "in this case an enormous mass of evidence has been given as to the condition of the ship before and when she sailed, etc." With all due respect, it is obvious that when that case is properly understood it is not in favour of the respondents but of the appellants.

It follows from the foregoing, that the appeal should, in my opinion, be allowed.

GALLIHER, J.A.:—I would dismiss the appeal. Galliher, J.A.

MCPHILLIPS, J.A.:—In my opinion, the appeal should succeed. McPhillips, J.A. That which was insured against was "perils of the seas"—what that means is well defined by the House of Lords in *Thames & Mersey Marine Ins. Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484. Lord Bramwell in that case, at p. 629, said:—

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McPhillips, J.A.

I think the definition of Lopes, L.J., in *Pandorf* v. *Hamilton* (55 L.J.Q.B. 546), very good:

"In a seaworthy ship damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody" is a damage from a peril of the sea.

I have thought that the following might suffice: "All perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such."

It will be noticed that in the definition of Lopes, L.J., he makes use of the words "action of the sea." Chalmers, in his work on The Marine Insurance Act, 1906 (1907), at p. 145, discusses the question. [Extract quoted].

It cannot be said upon the evidence that any "peril of the sea" caused the damage to the goods. The mere fact that there was damage from sea water is not sufficient. As I understand the law, the insurer is not liable for ordinary occurrences, say ordinary leakage; that which is insured against is maritime perils (*The "Xantho"* (1887), 12 App. Cas. 503, at 509; *Koebel* v. *Sanders* (1864), 33 L.J.C.P. 310).

Could the present case be held to be on the facts within *Montoya* v. *London Assurance* (1851), 20 L.J. Ex. 254 (6 Exch. 451), there would be clear liability. But that was a stated case and the essential facts were admitted, *i.e.*, "encountered much bad weather, was struck by heavy seas and shipped large quantities of water by reason whereof the produce so shipped sustained damage as hereinafter mentioned." The counsel for the appellant greatly relied upon two decisions in the U.S. Courts, *The Medea* (1910), 179 Fed. Rep. 781, a decision of the Circuit Court of Appeals, and *The Folmina* (1909), 212 U.S. 354—a decision of the Supreme Court of the United States. In the headnote to the last case mentioned, we read that it was decided that "merely proving that damage to cargo was by sea water does not establish that such damage was caused by peril of the sea within the exception of the bill-of-lading; in such a case conjecture cannot take the place of proof. The *G. R. Booth*, 171 U.S. 450." There has been no proof adduced to show that the damage in the present case was caused by the "action of the sea." The trial Judge has drawn an inference from the facts that the sea water damaged the goods in the way of a "peril of the sea," upon, in my opinion with great respect, wholly insufficient facts. We read this in the judgment:— "I am not satisfied that the storm did not either come up so quickly or afterwards was so violent that the sea water did not come in and injure

the goods." It is very questionable if it can be at all said that there was a "storm" and the evidence is positive and express that sea water did not come through the hatches. [Extract quoted from the judgment of White, J. (now Chief Justice of the Supreme Court of the United States) in the *Folmina* case (1909), 212 U.S., in which the following cases are cited.] *The Sloga*, 10 Ben. 315; *The Compta*, 4 Sawyer, 375; *Bearse* v. *Ropes*, 1 Sprague 331; *The Zone*, 2 Sprague 19; *The Svend*, 1 Fed. Rep. 54; *The Centennial*, 7 Fed. Rep. 601; *The Lydian Monarch*, 23 Fed. Rep. 298; *The Queen*, 78 Fed. Rep. 155, 165, 168; affirmed 94 Fed. Rep. 180, 196; *The Phoenicia*, 90 Fed. Rep. 116, 119; S.C. 99 Fed. Rep. 1005; *Ins. Co.* v. *Easton & M. Transp. Co.*, 97 Fed. Rep. 653; *The Presque Isle*, 140 Fed. Rep. 202, 205." (Also see—as to burden of proof—Brett, M.R., in *Pickup* v. *Thames Marine Ins. Co.*, 3 Q.B.D. 594, at 599; *Ajum Goolam Hossen & Co.* v. *Union Marine Ins. Co.*, [1901] A.C. 362, at 366; and *Lindsay* v. *Klein*, [1911] A.C. 194, at 204. It is apparent by a close examination of all the authorities that: "There may be a peril which is not a peril of the seas (thus the bursting of the air chamber of a donkey-engine owing to an excessive pressure of water is not due to a peril of the seas, though it occur at sea) and there may be damage caused by the sea without any peril." [Reference to Arnould on Marine Insurance, 8th ed., vol. 2, p. 986, *Thames and Mersey* v. *Hamilton Fraser & Co.* (1887), 12 App. Cas. 484, *Popham* v. *St. Petersburg Ins. Co.* (1904), 10 Com. Cas. 31, also to *Ajum Goolam Hossen* v. *Union Marine Ins. Co.*, *supra*, where the assured recovered for a total loss, although the loss did not appear to be traceable to any violence of wind or wave or to any unusual circumstances.]

In *Sassoon & Co.* v. *Western Assce. Co.*, [1912] A.C. 561, Lord Mersey, delivering the opinion of their Lordships of the Privy Council, at p. 563, said:—"The risks covered by the policy were the risks usually described in such a contract"—and the contract in the present case is the same in form.

Continuing, Lord Mersey said:—

It was not contended on the plaintiff's behalf (nor could it have been) that these words covered any risk except the risk of damage by perils of the sea; but it was said that the loss was due to such a peril. The learned Judge held that the damage was not due to a sea peril at all, but was solely due to the weakness of the hulk, and he thereupon dismissed the action. Their Lordships are of opinion that the learned Judge was right.

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The facts of the case showed that the opium damaged was in a wooden hulk which was in a rotten condition moored in a river and was damaged by sea water percolating through some copper sheathing which covered up a weak place in the hulk. It is at once seen that the facts show how the sea water got into the hulk, but in the present case there is no proof whatever how the sea water got to the goods. The effect of the decision in the *Sassoon* case was, that the opium was not covered by the policy, the damage though proximately due to sea water was not due in any sense to a peril of the sea. In the present case, with the entire absence of the essential proof that the damage to the goods was occasioned by a peril of the sea, no right of recovery under the policy can be granted. Lord Mersey, in the *Sassoon* case, expressly dealt with the actual established facts; accounting for the incursion of the water. [Extract quoted from judgment of Lord Mersey.]

Now in the present case the mere fact that there was loss or damage by sea water to the goods in no way demonstrates that the loss was consequent upon and attributable only to a peril of the sea. In truth and in fact no peril of the sea was established, nor was it even shown, if the "storm," so-called, was a *peril of the sea*, that it was the proximate cause of the damage, *i.e.*, that by reason thereof sea water made its way into the ship, and not otherwise. As it was strongly contended by the counsel for the respondent, that cases decided upon language although similar in bills-of-lading to that appearing in policies of insurance were inapplicable. [Further reference to the judgment of Lord Mersey in the *Sassoon* case, pp. 232-3.]

In my opinion, no case has been made out which entitles liability being imposed upon the appellant within the terms of the policy of insurance. No sufficient evidence was adduced at the trial that there was loss or damage resultant from "perils of the sea"—no case of fortuitous accident or casualty of the sea. Without that essential proof and that it was the proximate cause (*Pink* v. *Fleming* (1890, 25 Q.B.D. 396) of the loss or damage, the respondent was not entitled to recover.

I am therefore of the opinion that the appeal should be allowed.

Appeal dismissed; THE COURT *being equally divided.*

DEGRIDAKIS v. REGINBALD.

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Quebec Superior Court, Bruneau, J. April 24, 1917.

ALIENS (§ I—3)—DEPORTATION—FUGITIVE FROM JUSTICE—DOMICILE.

A fugitive criminal unlawfully entering Canada cannot acquire a domicile therein, and is subject to deportation by the immigration authorities, even after 3 years' residence.

Statement.

PETITION under the Habeas Corpus Act, for the prevention of the immigration authorities from the deportation of Emmanuel Degridakis, alias Degris in his own country, Greece, where a Court convicted him of murder. Degridakis, alias Degris, arrived at Quebec Nov. 14, 1913. He had left Greece, passing through Marseilles. He had been deported from the United States before coming into Canada. At Marseilles he had falsely declared to the French authorities that his wife was at Athens, who in fact was at that time in the United States. In this latter country, he had been convicted for the unlawful carrying of arms, with malicious intent. He was fined $100 and three months' imprisonment and was afterwards deported. In Montreal, in January last, his wife laid a complaint against him for ill treatment. The complaint was brought to the knowledge of the immigration authorities, who made an investigation and discovered that Degridakis had been duly condemned to death in a Greek possession, Feb. 27, 1910. He had succeeded, however, in evading justice. It was proved that the fugitive was a dangerous person. In letters intercepted by the postal authorities, he asked friends to testify in his favour, so that he might regain his liberty. It was then that the immigration bureau decided to deport him.

As Degridakis has been here for 3 years, he made an application to the Minister of the Interior, but same was rejected. Finally he commenced proceedings under the Habeas Corpus Act, contending that there was no law to deport him, in that he had been in the country 3 years and had acquired domicile in Canada.

Walsh & Walsh, for plaintiff.

Curran & Curran, for immigration authorities.

Bruneau, J.

BRUNEAU, J.:—This claim is wrongly founded, and the claim of the applicant under the Habeas Corpus Act ought to be rejected, on the ground that, as a fugitive from justice, he had not told the whole truth in his statement when he entered Canada.

In the terms of the immigration law, a domicile cannot be acquired in this country except by those who come here in a

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lawful manner. Degridakis entered Canada either under false or secret representations. He could not, therefore, have acquired here a lawful domicile within the meaning of the immigration law. Moreover, not only must an immigrant be examined by the immigration authorities, and deported if his entrance into Canada is illegal, but anyone who is found as an unlawful resident of Canada may likewise be deported, at all times, if it is proved that he is a dangerous character.

Consequently, there is no room for this Court to intervene. The *habeas corpus* writ issued in this case ought to be annulled and the immigration authorities are allowed to deport the said Degridakis to his own country.

[May 7, 1917, the applicant presented a *requête civile* to Bruneau, J. against the judgment above. This was refused on the ground that it did not invoke any reason and that in the nature of the case there was no room for such proceedings. If it is true that in terms of art. IX. of the old declaration of the King, at Versailles, April 22, 1733, there might be a case where a Judge, on *requête*, will give explanations on some part of his judgment which might be obscure; in this case this doctrine could not be applied. The judgment of April 24, 1917, is absolutely clear and the sole recourse of the applicant, if he considers himself wrongly treated, would be by a proceeding to the Court of Appeal.]

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Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Russell, Harris and Chisholm, JJ. May 12, 1917.

1. TRUSTS (§ III A—60)—LIABILITY OF CESTUI QUE TRUST—TRESPASS.
Cestuis que trustent cannot resort to force when excluded from the trust property, without rendering themselves liable for the trespass to the trustees; their remedy, in case of a breach of trust, is for equitable relief.

2. CHARITIES (§ I D—35)—POWERS OF TRUSTEES—CONVEYANCE—PURPOSES OF TRUST.
Property held as a charitable trust for the use of all Protestant denominations, for social and religious purposes, cannot be conveyed by the trustees for the purpose of a church for any particular congregation or faction thereof.

3. EVIDENCE (§ VI I—567)—PAROL EVIDENCE—CONSTRUCTIVE TRUST—STATUTE OF FRAUDS.
An unexpressed trust cannot be supplemented by a deed of the grantor's wife who joined with him in the conveyance; a constructive trust may be proved by parol evidence, and is not within the Statute of Frauds.

Statement.

APPEAL from the judgment of Longley, J., in favour of plaintiffs, in an action claiming damages for acts of trespass alleged to have been committed by defendants by breaking and entering a building known as Farmington Hall and unlawfully trespassing upon lands and premises conveyed to plaintiffs in trust. Varied.

A. Roberts, K.C., for appellants; *J. A. McLean*, K.C., for respondents.

GRAHAM, C.J.:—The three plaintiffs seek, among other things, to recover damages for trespass to Farmington Hall. I refer to this paragraph in the statement of claim:—

On or about August 15, 1915, the defendants broke and entered said Farmington Hall and broke off locks off the door of said hall and unlawfully trespassed upon said lands and premises.

The claim includes other relief. The claim is as follows:—

(*a*) $50 damages; (*b*) an injunction restraining the defendants from repeating said acts of trespass; (*c*) a declaration that the said lands and premises were at the time of the wrongs complained of in the possession of the plaintiffs as trustees of said Farmington Hall; (*d*) in the alternative a declaration that the plaintiffs hold the said lands and premises in trust for the use and benefit of the Baptist Congregation at Farmington; (*e*) such other relief as plaintiffs may be found entitled to.

The defendants, among other things, justify as follows:—

Subsequently to the time mentioned in the preceding paragraph, from time to time, the said residents of Farmington referred to in para. 16 hereof, including the defendants, wished to assemble in and use the said Farmington Hall for religious worship and purposes, as they had a right to do, in accordance with the said trusts, and at such times requested the plaintiffs and their servant and agent to open the said Farmington Hall therefor or to give the defendants the key thereof for such purposes, but the plaintiffs and their agent and servant refused and have always refused to so open said hall or to give up the key thereof, and denied and still deny that the defendants and such residents had or have any right to enter or use the said hall for such or any purpose; whereupon at such times the defendants for the purposes aforesaid removed the locks from the said hall, as they had a right to do, using no more force than was necessary and doing no more damage than was necessary therefor, after which the defendants and the other said residents of Farmington referred to in this paragraph held religious services in the said hall at the usual times and in the usual way they had theretofore done, which are the alleged acts of trespass referred to in the statement of claim.

And there is a counterclaim as follows:—

The defendants by way of counterclaim repeat paras. 9 to 19 hereof, both inclusive, and claim on behalf of themselves and on behalf of the said residents of Farmington referred to herein, or such of them as may be entitled thereto:—(*a*) A declaration that the said conveyance by the plaintiffs to the said "The Trustees of the New Germany Baptist Church" is null and void, and an order setting the same aside, and vacating the registry thereof (*b*) A declaration that the plaintiffs hold the title to the said Farmington Hall, if at all, solely in trust as set forth therein. (*c*) A declaration that the defendants and the said residents of Farmington, or such of them as may be found entitled thereto, are the owners of the said Farmington Hall and are entitled to enter and to use the same at any and all times for religious or social purposes. (*d*) An injunction restraining the plaintiffs from preventing the defendants or such residents from so using said hall, and from

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any repetition of the acts complained of herein. (e) A declaration of the trusts hereinbefore referred to. (f) Declaration of the respective rights of the plaintiffs and defendants in the said Farmington Hall. (g) All such other relief as the defendants may be found entitled to or the nature of the case may require.

The instrument, dated October 2, 1897, under which these plaintiffs claim the legal title to the hall is as follows. It is in the usual form of a deed purporting to be made:—

Between Eleazer Ramey and Abbie his wife of Farmington in Lunenburg county and Province of Nova Scotia of the one part, and Nathan Langille, Harvey Lantz, and Richard Delong (trustees of Farmington Hall) and their successors in office, all of Farmington in said county and province, of the other part.

Witnesseth that the said Eleazer Ramey and Abbie his wife, for and in consideration of the sum of one dollar of lawful money of Canada to the said Eleazer Ramey and Abbie his wife in hand well and truly paid by the said Nathan Langille, Harvey Lantz, and Richard Delong, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, enfeoffed, released and confirmed, and by these presents doth grant: (Here follows the description.)

To have and to hold the same unto the said Nathan Langille, Harvey Lantz and Richard Delong and their successors in office forever, peaceably and quietly without let, molestation, eviction, or disturbance from or by any persons whatsoever claiming the same or any part thereof, and the said Eleazer Ramey and Abbie his wife and their heirs the said land and premises hereby conveyed and every part thereof with the appurtenances unto the said Nathan Langille, Harvey Lantz and Richard Delong and their successors in office against the lawful claims and demands of all and every person or persons whomsoever shall and will by these presents warrant and forever defend.

One of the difficulties is that the trusts are not defined.

In the dissension which unfortunately occurred in August, 1915, and to which I shall have to refer more particularly, an attempt was made to remedy the defects of the instrument by a further instrument obtained from the widow of the deceased Ramey.

I think this was ineffective, and it is not necessary to deal with it, but in so far as it is an attempt to interfere with any trust attaching to the property the plaintiffs being concerned in obtaining it must be judged accordingly. The trust could not be defined in that way. The original grantees are all living.

It appears that at an informal meeting of the residents of Farmington it was unanimously decided to acquire land at Farmington for the purpose of erecting thereon a hall for religious and social purposes; and at that meeting Ramey offered the land in question as a gift for such purposes, and the offer was accepted

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by the meeting. It was decided to build such a hall and the residents at the meeting agreed to contribute to the cost of the same. A building committee was appointed for the purpose of building and soliciting subscriptions. The building was constructed out of the money raised by the residents by what they called socials and also by the personal services of the residents.

The building was started in 1896 and finished in 1899. These plaintiffs were at a meeting appointed trustees and the property conveyed to them. The trustees have, so Nass says, effected repairs such as painting and shingling, holding a social to raise the money.

Unfortunately, differences arose as to whether a certain minister should be allowed to preach in this building on certain occasions. There were two factions and no doubt to prevent his preaching there the plaintiffs did not place the key at his disposal or the disposal of those who wished to have him preach there, and in fact instructed the caretaker not to do so, and the defendants thereupon opened the door in another way.

By reference to the unanimous report of the council of June 2, 1915, composed of 9 ministers and 4 laymen called in from other churches, it will be seen that it contains the following advice which had been given to the Central or New Germany Church of which these Baptists worshiping in this hall were a branch.

Whereas the New Germany United Baptist Church has called a council to consider difficulties existing between Pastor E. A. McPhee and the New Germany Church and the advisability of organizing a separate church at Parkdale and Maplewood. And whereas such a council was duly organized on June 2nd in the New Germany Baptist Church and accepted by all concerned, and thoroughly considered the evidence submitted by all parties:

Therefore resolved that the said council strongly recommend the following:

That in view of the fact that grave difficulties have arisen chargeable in part to both pastor and people. Therefore in the interest of both Pastor McPhee and the New Germany Church, as well as the larger work of the Kingdom, Pastor McPhee be advised to resign and seek at once a pastorate altogether beyond the limits of his present field of labour.

Mr. McPhee did not take this advice, and there were, as I said, two factions. I merely quote that report to shew that these plaintiffs had some ground for their action in seeking to prevent McPhee from preaching in the hall; although they were mistaken as to the law of trusts, I think they were not very unreasonable as these things go. The actual trouble the council

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dealt with it is not necessary to mention. But his faction fell back on the trusts attached to this hall property, and the other faction, I suppose, attempted to have the minister brought within the reach of the council. But, unjustifiable as this was, it is fair to say that it is not the case of the one Lutheran resident and the one member of the Church of England asserting their rights under the trusts; only one denomination was actually concerned.

I think the legal title and possession were in the plaintiffs, and in respect to any injury to the property I think they were entitled to maintain trespass in respect to that injury to the possession. I know of no better form of redress. Certainly they could, as against a mere stranger, maintain the action. Are these defendants, because they were subscribers to the fund, I will call them *cestuis que trustent* under the trust instrument, putting their interest at the highest, entitled to break into the property? I think not. They have other remedies if these persons are trustees and are violating the terms of the trust. But for the trespass I think there must be damages.

Dealing with the nature of the trust, in my opinion it is not a private trust. It is rather a charitable trust, namely, for the benefit of the residents of Farmington, an uncertain or fluctuating body: *Dolan* v. *Macdermot*, (1868) L.R. 3 Ch. 676; Tudor on Charitable Trusts, pp. 11 and 12; 2 Perry on Trusts, s. 704.

In Tudor on Charitable Trusts, p. 97, it is said:—

> A charity established or supported by voluntary contributions stands in the same position as any other charity so long as there is a fund or property impressed with a charitable trust. If there is, it is immaterial whether the source of it is the subscriptions of a number of people or the donations of one.

Then it is clear that the legal title did not and would not vest in the supposed *cestuis que trust* under the Statute of Uses, for instance: 2 Perry on Trusts, sec. 735a.

It is familiar law that the holders of the legal estate must prevail at law against those having only an equitable estate. In Perry on Trusts, 328, it is said:—

> It is the duty of the trustees to defend and protect the title to the trust estate, and as the legal title is in him he alone can sue and be sued in a Court of law; the *cestui que trust*, the absolute owner of the estate in equity, is regarded in law as a stranger. The rule is carried to the extent that the grantee of the trustee can alone maintain an action on the legal title although the conveyance to him was a breach of the trust.

I have re-read what Blackstone (or rather Stephens' edition, 3 Stephen 271) and Pollock on Torts, p. 181, say on the subject

of redress by the mere act of the parties, and I think that these authors exclude the view that *cestuis que trustent* of any sort may redress their being shut out of the trust property by breaking into it.

But in this Court, since the Judicature Act, we have to consider the equities of the case as well: Judicature Act, R.S.N.S. ch. 155, sec. 18.

In a note to the English section, Jud. Act sec. 24, from which this is taken, this note appears (Annual Practice, 1917, p. 2038):—

> The Judicature Acts, it is considered, merely allow legal and equitable remedies to be enforced in the same Court, but have not changed the nature of equitable as opposed to legal rights (and reference is made to an article in 51 Sol. J. 141).

In *Bankes* v. *Jarvis*, [1903] 1 K.B. 549, 552, Lord Alverstone, referring to this sec. 24 of the Judicature Act, sub-secs. 2 and 3, says:—

> If grounds exist which formerly would have entitled a defendant to file a bill in chancery to restrain the plaintiff from proceeding with his action, I think a defendant is now enabled to rely on those grounds as a defence to the action.

Then the legal title and possession of a trustee must prevail unless the *cestuis que trustent* could have formerly restrained by injunction the action. This, I am of opinion, they could not do here. Their right consists only of an ability to prevent any breach of trust and compel its performance.

There are many breaches of trust which a Court of equity will restrain or remedy in various ways, but it will not in every case turn out the trustees and order them to reconvey the legal title. Here the defendants must go that far before they would be entitled to restrain the action. To use a figure of one of the English cases, they might in this action use their equity as a sword as by counterclaim, as they have done, but not as a shield by way of defence, for it is not a sufficient answer to the action.

I think the trust here involves powers commensurate with the duties necessarily required, and one of those duties is the preservation of the trust property.

An equity Court could not restrain or enjoin the action of trespass. It will control the trustees in every possible way, but their duty is to protect the trust property against even the *cestuis que trust* from breaking into or from violence to the same.

I do not think that $10 damages allowed by the Judge is excessive.

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But, in respect to the counterclaim, I think the Judge could and should have given some relief. The plaintiffs made a mistake in supposing that they could transfer the property to trustees of the New Germany Church. That is the last thing a trustee of any institution can do, to part with the trust property to anyone else. These trustees did not actually do this. In the contest they had a deed prepared which was not delivered or registered, but it was held until it was ascertained whether it was legal to do so. The solicitor who was consulted, of course, advised that it could not be done, and it was not done. The evidence clearly establishes this and it is not denied. Then the obtaining of that instrument from the widow of Ramey was an attempt to set up other trusts than the circumstances justified. And when the plaintiffs, in their prayer in this action, ask in the alternative for a declaration numbered (*d*), namely, a declaration that the property was held in trust for a particular congregation, that is very clearly out of the question. I need not refer to it further. The purpose of the residents in obtaining the land and erecting the building by their benefactions was clearly not for any one congregation or denomination, but was for use by all Protestant denominations, and for social purposes as well as religious purposes. It was for a hall, not for a church. Whether it was a breach of the trust not to place the key at the disposal of the other faction to let Mr. McPhee preach there under the circumstances is a difficult question. But, even if it was, the defendants could not resort to force to obtain admittance.

I am sorry these trusts were not expressed in the original instrument as the Statute of Frauds would seem to require. But certain it is that there is at least a constructive trust, and the Court can at least restrain the plaintiffs from conveying the property away, or from claiming to hold it on trusts other than those justified by the intention of the founders.

I think, however, that this is a different matter from saying that some of these residents and their descendants can interfere with the legal possession of the trustees and bodily take possession. If some can do so, others can, and there would be physical confusion between the two factions. There should be a declaration that these plaintiffs cannot part with the property nor hold it in trust for any one denomination. They never, even

temporarily, claimed to do more, and this will probably prevent them ever attempting it again. The Court cannot in this action define trusts for such an instrument or such a property when none were ever made, declared or expressed in a legal instrument.

The defendants' appeal as to the action should be dismissed, and, as to the counterclaim, it should be allowed and declarations made as hereinbefore indicated, each with costs here and below to be set off.

Graham, C.J.

RUSSELL and CHISHOLM, JJ., concurred.

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HARRIS, J.:—From the evidence it is, I think, clear that the property was not conveyed to the plaintiffs in trust for the use and benefit of the Baptist congregation of Farmington, but for the use of the inhabitants of Farmington of all denominations except Roman Catholics for holding religious services and for social purposes, and this recital in the deed of Ezekiel Woodworth and his wife is not in accordance with the facts.

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I am further of the opinion that the plaintiffs were bare trustees and that the legal title was conveyed to them in trust to permit the inhabitants of Farmington to use and occupy the property for the purposes mentioned, and that the act of the plaintiffs in refusing to permit the inhabitants to use the building for the purpose of holding religious services was unjustifiable and a breach of the trust. The trustees had no more right to say that the Rev. Mr. McPhee should not be permitted to hold services in this hall than they had to say that only Episcopal or Methodist services should be held. What the plaintiffs claim in this action is a right to regulate the kind of services which shall be held and the particular clergyman who is to hold those services. It is clear that they were not vested with any such power or authority. It is true that, in the absence of some rules and regulations governing the matter, confusion may arise in the community. One can imagine the difficulty which there might be if, say, the supporters of McPhee and the followers of some other clergyman of the same denomination, or of some other denomination, insisted upon holding services in this building at the same hour on the same evening, but this only illustrates the difficulties which might arise if the inhabitants of the district were not working in harmony, or if they failed to exercise common sense about the use of the hall, but it is no reason for saying that

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the plaintiffs have any power to regulate such matters. Their powers and duties do not depend upon the deed, but upon the terms of the trust, and the terms of the trust are, unfortunately, shrouded in some uncertainty. What, however, the evidence does shew, I think, conclusively, is that the plaintiffs have the legal title simply as trustees to permit the inhabitants to use the building for the purposes for which it was erected, and it is equally clear, I think, that they cannot control the inhabitants in that use.

It is urged, however, that, assuming this to be so, the defendants were not justified in removing the lock, but were technically guilty of a trespass in so doing, and that they should have resorted to an action against the trustees instead of taking the law into their own hands. Although not without considerable doubt, I feel constrained to agree to this proposition.

There is a counterclaim arising out of the proposed conveyance of the property by the plaintiffs to the trustees of the New Germany Baptist Church, and the attempt of the plaintiffs to deny to the people the right to use the hall for religious worship and other purposes, and there is a claim for a declaration that the plaintiffs hold the title to the property simply as trustees for the purposes referred to, and that the defendants and other residents of Farmington are the beneficial owners and are entitled to enter and use the same at any and all times for religious and social purposes, and an injunction is asked for restraining the plaintiffs from interfering with the use of the property by the inhabitants.

In connection with the counterclaim, the Statute of Frauds is pleaded, but very little, if anything, was said about it by counsel on the argument. The law seems well settled that it is a fraud on the part of a person to whom land is conveyed as a trustee and who knows it to have been so conveyed, to deny the trust and claim the right to use the land for any purpose inconsistent with the trust, and, notwithstanding the Statute of Frauds, it is competent to prove by parol evidence that it was so conveyed on trust and that the grantee knowing the facts is denying the trust. The principle upon which the authorities proceed is that the Courts will not allow the Statute of Frauds to be made an instrument of fraud.

In *Haigh* v. *Kaye*, L.R. 7 Ch. 469, James, L.J., said:—

Now, the Statute of Frauds, no doubt, says that a person claiming (an estate) under any declaration of trust or confidence must shew that in writing; but the statute goes on to say that no resulting trust and no trust arising from operation of law is within that enactment. . . . The words of Turner, L.J., in the case of *Lincoln* v. *Wright*, 4 DeG. and J. 16 (45 E.R. 6), where he said "The principle of this Court is that the Statute of Frauds was not made to cover fraud," express a principle upon which this Court has acted in numerous instances where the Court has refused to allow a man to take advantage of the Statute of Frauds to keep another man's property which he has obtained by fraud.

It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud, and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself, consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant and that the grantee, knowing the facts, is denying the trust and relying upon the form of the conveyance and the statute in order to keep the land himself.

Later, he quotes Gifford, L.J., in *Heard* v. *Pilley* (1869), L.R. 4 Ch. 548, who, in speaking of the case of *Bartlett* v. *Pickersgill* (which shortly after the Statute of Frauds was passed had refused relief in such a case), said (p. 553):—

It seems to be inconsistent with all the authorities of this Court which proceed on the footing that it will not allow the Statute of Frauds to be made an instrument of fraud.

And Lindley, L.J., proceeds:—

The case not only seems to be but is inconsistent with all modern decisions on the subject.

See Lewin on Trusts 56 and 57; *Gordon* v. *Handford*, 16 Man. L.R. 292.

Here the plaintiffs, knowing that the property had been conveyed to them as trustees to permit the inhabitants of Farmington to use it for religious and social purposes, unjustifiably attempt to prevent the inhabitants from using it for such purposes and claim the right to so prevent them, and they have proposed to convey the property to the trustees of the New Germany Baptist Church, none of the members of which church reside in Farmington. If this conveyance had been made, it would have been a gross violation of the trust. The whole con-

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duct of the trustees in this case is inconsistent with the trust upon which they hold the property, and just as much a fraud upon the inhabitants of Farmington as if the trustees were claiming the property for themselves. The cases cited happen to be cases in which the trustees were claiming the property as their own, but the principle applies equally where they are attempting to use it for any other purpose than that upon which they hold it, and where they are endeavouring to prevent the *cestuis que trustent* from enjoying their rights in the property it is as much a fraud in the eyes of the law in one case as in the other.

Under these circumstances the evidence to shew the real trust upon which the plaintiffs hold the property was admissible as a defence to the plaintiffs' action as well as on the counterclaim.

I agree that the defendants' appeal as to the action should be dismissed, and, as to the counterclaim, it should be allowed and declaration made as asked for, each with costs here and below, to be set off.

I cannot part with this case without giving expression to the hope that the residents of Farmington will adopt the sensible course of getting an Act of the legislature incorporating the inhabitants for the purpose of holding the title to this property, and prescribing regulations for the government of the property for the uses for which it was intended. A hall of this description in such a community is a valuable asset and ought to be preserved. *Judgment varied.*

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HUTCHINSON v. STANDARD BANK OF CANADA.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 3, 1917.

1. HUSBAND AND WIFE (§ II A—50)—TRANSACTIONS BETWEEN—PRESUMPTION—UNDUE INFLUENCE—INDEPENDENT ADVICE—ONUS.
There is no presumption of undue influence in regard to a mortgage made by a married woman as security for her husband's indebtedness to a bank, and no burden is cast on the person sustaining such transaction to prove that the wife had independent advice; the onus is upon the person attacking the transaction to prove undue influence by the husband and knowledge thereof by the creditor.
[*Bank of Montreal* v. *Stuart*, [1911] A.C. 120, distinguished. See also *Macdonald* v. *Fox*, 35 D.L.R. 198, 39 O.L.R. 261.]

2. BANKS (§ VIII A—160)—STATUTORY SECURITIES—MORTGAGE—PAST DEBT.
A mortgage to a bank intended as security for a past indebtedness is not in contravention of sec. 76 (2) (c) of the Bank Act, Can. 1913, ch. 9.

Statement.

AN appeal by the plaintiff from the judgment of BOYD, C., in an action brought by Lillian M. Hutchinson, wife of

George Hutchinson, against the Standard Bank of Canada, to set aside, as obtained by undue influence and misrepresentation and without independent advice, a mortgage made by the plaintiff in favour of the bank, the indebtedness of the Monarch Optical Company Limited, for which her husband was a surety; and against the defendant McMillan, manager of the bank, to set aside a subsequent mortgage made by the plaintiff in favour of McMillan, to pay off a prior incumbrance; and also to set aside a release to McMillan of the equity of redemption of the mortgaged premises.

Statement.

W. R. Smyth, K.C., and *J. F. Boland*, for the appellant.

Gideon Grant, for respondents.

The judgment of the Court was read by

FERGUSON, J.A.—On the hearing of the appeal, counsel for the appellant abandoned the appeal as against the McMillan transactions, and confined his argument to an attack upon the mortgage to the bank.

Ferguson, J.A.

As argued before us, the appellant's right to succeed in the appeal is founded on propositions of law which counsel stated on the argument and in his written memorandum as follows: that, where a wife becomes, on her husband's request, surety for his debts, the law presumes undue influence on the part of the husband; and that, if such a transaction is impeached, the burden rests on the creditor to prove that the wife had full knowledge of the facts at the time she became surety for her husband, that she understood the transaction, and that she had competent independent advice.

For these propositions the appellant's counsel rely on the cases of *Chaplin & Co.* v. *Brammall*, [1908] 1 K.B. 233; *Bischoff's Trustee* v. *Frank* (1903), 89 L.T.R. 188; and *Turnbull & Co.* v. *Duval*, [1902] A.C. 429.

In a case of *Howes* v. *Bishop*, [1909] 2 K.B. 390, all these cases, cited by the appellant's counsel in their memorandum, are considered and discussed, with, I think, the result that the Court dissented from the decisions in these cases, in so far as they can be read to have decided that there is a presumption of undue influence in a husband and wife transaction, or in so far as they can be taken to decide that in a transaction between husband and wife it is necessary for the person sustaining the transaction to prove that the wife had competent independent advice. And, after considering these authorities, the Court decided that in a husband

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and wife transaction there was no presumption of undue influence; that no burden was cast on the person sustaining such a transaction to prove that the wife had independent advice; but that, on the contrary, it was upon the person attacking the transaction to prove affirmatively undue influence by the husband and knowledge thereof by the creditor.

This, I think, is the result of the decision in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120, where Lord Macnaghten in giving judgment says (p. 126): "The case of *Cox* v. *Adams*, 35 S.C.R. 393, in the Supreme Court of Canada . . . decided, or was supposed to have decided, that no transaction between husband and wife for the benefit of the husband can be upheld unless the wife is shewn to have had independent advice . . . Their Lordships do not think that the doctrine supposed to be laid down in *Cox* v. *Adams* can be supported." And again (p. 137): "Their Lordships accept the law as laid down by Parker, V.-C., in *Nedby* v. *Nedby* (1852), 5 DeG. & Sm. 377, to the effect that in the case of husband and wife the burden of proving undue influence lies upon those who allege it."

This view of the law is accepted in our own Courts in *Euclid Avenue Trusts Co.* v. *Hohs*, 24 O.L.R. 447, where Moss, C.J.O., at p. 450, says: "It must now be accepted as settled by authority that in a case like the present the absence of independent advice is not in itself a sufficient reason for treating a security given by a wife for the benefit of her husband as a void transaction. If undue influence on the part of the husband is relied upon, the burden of proof lies upon those who allege it."

See also *T. J. Medland Limited* v. *Cowan*, 10 O.W.N. 4.

The case of *Talbot* v. *Von Boris* (1910), 27 Times L.R. 95, referred to in Halsbury's Laws of England, vol. 15, para. 215, appears to be authority for the proposition that a duty is still upon the husband, or the person sustaining a husband and wife transaction, to prove that the nature of the transaction was explained to the wife.

After carefully reading the evidence, I am of the opinion that the appellant had the document carefully read over and explained to her by Mr. Wherry, who was acting in the transaction as solicitor for her and her husband; that she herself read it over carefully and understood it; that she discussed it and considered it, not

only with Mr. Wherry, but with her father, Mr. Beaton, and with her husband. No doubt, she was to some extent influenced by her husband's desire to secure money from the Standard Bank for his proposed new venture, and also by her husband's and her own necessities, and by her wish to help her husband to earn a livelihood for both.

During the course of the trial the learned Chancellor expressed the opinion that both the husband and the wife were of the opinion that the proposed new venture would be a success. (See p. 114 of the notes of evidence.)

The only attempt made to prove influence or persuasion by the husband, in the sense of undue influence, is a statement made by counsel to witnesses to the effect that the husband had threatened the appellant that, if she did not sign the mortgage to the Standard Bank, he would leave her.

At p. 134 of the evidence, the learned Chancellor points out to counsel for the appellant that he has not proven his statement made to a witness that the appellant had told Mr. Wherry she was doing this because her husband threatened to leave her. To meet that, the appellant is called in reply, and, when questioned in reference to the alleged threat, it appears that, while her father, Mr. Beaton, was objecting to the transaction and advising his daughter not to enter into it, he was doing so, not because the transaction was improvident or improper, but because the appellant's husband would not consent to Mr. Beaton being put in control of the new company, and it was in reference to the dispute as to who should have control of the new business that the alleged threat is said to have been made.

No attempt, however, is made to fasten the bank or its agents with notice of this threat, and the appellant does not say that she would not have signed the mortgage but for that threat. And, in my opinion, this evidence, when read along with the other evidence and considered in connection with the circumstances of the case, falls far short of proving that the husband, either by undue influence or by pressure, exercised a domination over the mind of his wife, so as to prevent her understanding the nature of the transaction or exercising her judgment and a freedom of action in reference thereto.

There is nothing in the transaction itself, when looked at in

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HUTCHINSON v. STANDARD BANK OF CANADA.

Ferguson, J.A

connection with all the surrounding circumstances then present to the minds of the parties entering on the proposed new venture, to lead to the conclusion that it was an improvident transaction, or that there was overreaching or impropriety in connection with the appellant's execution of the mortgage attacked. It is not an immoderate or irrational transaction such as was the subject of attack in *Bank of Montreal* v. *Stuart*, in reference to which, and to the solicitor's advice thereon, Lord Macnaghten, at p. 138 of [1911] A.C., says: "The game Mr. Stuart was playing was desperate. It was the throw of a gambler with money not his own. No man in his senses with any regard to the interest of Mrs. Stuart or the interest of Mr. Stuart could have advised Mrs. Stuart to act as her husband told her to do."

On the contrary, Mr. Hutchinson, Mr. Wherry, Mr. Beaton, and the appellant, having the facts and circumstances before them, seemed to have thought that the new venture would probably prove successful, and it was only on the question of control or management that Mr. Beaton differed from the others.

The fact that the bank advanced to the new company much more than the amount of money secured by the appellant's mortgage is, to my mind, good evidence of the bank-manager's opinion.

The appellant charges in her statement of claim that the mortgage executed by her in favour of the bank was made in contravention of sub-sec. 2(*c*) of sec. 76 of the Bank Act, 3 & 4 Geo. V. ch. 9 (D.), the allegation being that, while the mortgage purports to be made as security for a past indebtedness by the Monarch Optical Company Limited, it was in fact given as security for a future advance to be made to the Monarch Optical Manufacturing Company Limited.

This question was gone into fully at the trial; and I have, after a perusal of the evidence, come to the conclusion that the mortgage, as drawn and executed, was fully discussed by Mr. Patterson, solicitor for the bank, with Mr. Wherry, solicitor in that transaction for the appellant and her husband, and was explained to and understood by all parties, and that the document represents the real transaction intended to be entered into, and that in connection with the transaction the bank carried out any verbal representations it made as to making advances to the Monarch

Optical Manufacturing Company Limited, on the indebtedness of the Monarch Optical Company Limited being secured by the mortgage in question.

For these reasons, I am of the opinion that the appeal fails and should be dismissed with costs. *Appeal dismissed.*

TAYLOR HARDWARE Co. v. HUNT.
COCHRANE HARDWARE Co.'s CLAIM.

[See also 35 D.L.R. 504.]

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. March 5, 1917.

MECHANICS' LIENS (§ VI—45)—*Right of sub-contractor—Terms of principal contract—Waiver—Non-completion of work—Hindrance—Value of work done.*]—Appeal by the Cochrane Hardware Company from the judgment of the Judge of the District Court of the District of Temiskaming disallowing the claim of the appellant company (a sub-contractor) to a lien under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140. Reversed.

A. G. Slaght, for appellant company; *G. H. Kilmer*, K.C., for defendant the Cochrane Public School Board, respondent.

The judgment of the Court was delivered by

MEREDITH, C.J.O.:—This is an appeal by the Cochrane Hardware Company from the judgment dated the 16th November, 1916, which was directed to be entered by the Judge of the District Court of the District of Temiskaming, after the trial of the action before him on the previous 7th and 8th July.

The appellant was a sub-contractor, having entered into a contract with the defendant Hunt, who was the contractor for the principal work of erecting a school-house for the respondent —the appellant's contract being for part of the work which the defendant Hunt contracted to do.

Hunt's contract is dated the 22nd April, 1915, and was for the complete work, except heating, plumbing, and electric wiring, which he contracted to do for $23,932, and the work was to be completed on or before the 15th November, 1915.

The time for completion was, by resolution of the respondent of the 16th November, 1915, extended until the 1st December following, and was in like manner again extended for two weeks from the 6th December, and the work was not completed by that day.

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On the 16th December, 1915, Hunt attended a meeting of the School Board, and told the members present that he was not in a position to complete; and, according to the minutes of the meeting, gave "notice that he abandoned contract on new school;" and the following resolution was then passed: "That Mr. Williams be instructed to proceed with completion of school-building, employing the men necessary to do the work."

The respondent afterwards completed the work which Hunt had contracted to do and had not done, and the building was afterwards destroyed by fire.

Hunt's contract contains a provision that, if the work should not be "carried on with such expedition and with such materials and workmanship as the architects, superintendent, or clerk of the works may deem proper," the architect might, with the written consent of the respondent, give three days' notice to Hunt "to supply such additional force or material" as in the opinion of the architect should be necessary, and, in default of compliance with the notice, the respondent might dismiss Hunt and itself complete the work, and that, if that should be done, "if any balance on the amount of this contract remains after completion, in respect of work done during the time of the defaulting contractor, the same shall belong to him."

What took place at the meeting at which Hunt informed the respondent that he could not complete his contract was in substance, I think, a waiver of the notice for which the provision of the contract to which I have just referred provides, and a consent to the respondent completing the work in accordance with the terms of that provision; and the respondent is, I think, indebted to Hunt in the amount which would have been payable to him if the terms of that provision had been literally followed.

I see no reason for treating what was done as a complete abandonment of the contract and of Hunt's rights under that provision—and the injustice of so treating it is manifest.

If that be the correct view of Hunt's position, the right of the appellant and the other sub-contractors to a lien on the land and the insurance money which the respondent has received, to the extent of what is owing to Hunt, is clear.

The fact that the appellant had not completed the work it had contracted to do does not, in my opinion, defeat or affect

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its claim. It was the act of the respondent in itself completing the work that rendered it impossible for the appellant to complete it; and the respondent cannot, therefore, be heard to rely upon the work not having been completed by the appellant. Hunt is not objecting to the claim as against him; and, that being the case, there is no reason why the respondent should be at liberty to do so.

The appellant's claim and lien will, of course, be limited to the value of the work done, calculated according to the contract price.

I would allow the appeal with costs, reverse the judgment as to the claim of the appellant, and substitute for it a judgment declaring the rights of the parties as I have found them to be, with all necessary provisions for the realisation of the lien.

The appellant's costs of the proceedings in the Court below of and incidental to the contestation of its claim there should be paid by the respondent. *Appeal allowed.*

DUNLAP v. DEVINE.

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Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Longley, Drysdale, Harris and Chisholm, JJ. March 10, 1917.

SALE (§ III A—50)—*Timber—Forfeiture of price upon non-completion of contract—Acceptance.*]—Appeal by plaintiff from the judgment of Patterson, Co.J., for District No. 5, dismissing an action for goods sold and delivered. Reversed.

F. L. Milner, K.C., for appellant; *A. G. Mackenzie*, K.C., for respondent.

DRYSDALE, J.:—The contract under discussion in the action was one to supply timber of certain dimensions with a provision that defendant should have the right to retain 20% of the timber price until the completion of the contract. In this action defendant alleges non-completion of the contract and asserts his right to detain and keep 20% of the price of the goods delivered under the contract. It is clear that plaintiffs furnished and defendant accepted a large quantity of the goods contracted for, and on the state of the accounts between the parties the trial Judge finds a sum of $90.98 due plaintiffs, but dismisses the action because this is a less sum than the 20% of all timber accepted.

On the argument before us, it appeared the action should not have been dismissed with the above amount found due unless

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the plaintiffs under the contract forfeit 20% of the price of the goods accepted and defendant has a right to keep the 20% for all time as his own. This is not the contract, and under the circumstances disclosed, the plaintiffs should not lose the moneys detained in defendant's hands. The 20% is only to be held until the contract was completed. If the contract was not filled in terms, there was acceptance by defendant of the goods sued for. The time for completing the contract has expired, and it seems unjust that defendant should assert forfeiture as against plaintiffs of 20% of the price of the goods so received. In no other way can the judgment appealed from be supported. The contract and the circumstances disclosed do not warrant such forfeiture.

I am of opinion the judgment ought to be reversed and a judgment entered for the amount found by the trial Judge as due plaintiffs disregarding the alleged forfeiture or right to retain set up by defendant.

Nothing is disclosed under the pleadings or in the action to justify defendant in any effort to deduct the 20% retained, and I am of opinion he must pay it.

I would allow the appeal with costs.

GRAHAM, C.J., and LONGLEY and CHISHOLM, JJ., concurred.

HARRIS, J.:—The rule with regard to contracts for delivery in parcels is that the buyer who has received some parcels may still return them if the whole quantity is not delivered, but he must pay for any instalment he keeps and deals with as owner, or any which he retains after the period stipulated for complete delivery. Here there is no dispute that the defendant received and resold part of the timber, and he must pay for the part so retained.

The provision of the agreement under which defendant had the right to retain the 20% until the contract was completed does not authorize the defendant to retain that money as his own indefinitely. The most that can be said is that it was a fund against which defendant could claim for any damage he might have for breach of the contract. In this action he does not allege any damage by breach of the contract, but claims to retain the money as his own. That he cannot do.

The appeal should, I think, be allowed with costs. The judgment below should be set aside and the plaintiff should have judgment for $90.98 and the costs of the action.

Appeal allowed.

KANE v. W. R. BROCK Co., Ltd.

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Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Longley, Drysdale, Harris and Chisholm, JJ. March 10, 1917.

NEW TRIAL (§ III B—15)—*Verdict against evidence—Agreement—Release—Return of collateral—Policies.*]—Motion on behalf of defendant for an order setting aside the findings of the jury and for a new trial, or, in the alternative, that the action be dismissed with costs.

The action was brought by plaintiff claiming (*a*) a declaration that plaintiff was released and discharged from all liability to the defendant company under or by virtue of certain agreements in writing, and from all personal liability to the defendant company by virtue of said agreements or otherwise; (*b*) delivery up and cancellation of said agreements or a properly executed release of plaintiff's alleged liability; (*c*) a re-transfer and delivery to plaintiff of all life insurance policies delivered by plaintiff to defendant company, and of any other securities claimed to be held by the defendant company.

The questions submitted to the jury and their findings thereon, moved against, were as follows:—1. Was it a term of the agreement if any between the plaintiff and the defendant company of August 16, that the plaintiff should be relieved from all liability he was under by virtue of the agreement of May, 1913? A. Yes. 2. Was it also a term of such agreement that the defendant company should at once return to the plaintiff the policies of insurance held by them as collateral? A. Yes. 3. Was it included in the terms of such agreement that the plaintiff should be released from all liability to the firm of W. L. Kane & Co., Ltd.? A. Yes. 4. Was the agreement, if any, between the plaintiff and the defendant company for the return of the policies of insurance conditional upon the carrying out of a sale of the business to the contemplated purchaser? A. No.

H. Mellish, K.C., for defendant, appellant.

T. S. Rogers, K.C., for plaintiff, respondent.

The judgment of the Court was delivered by

HARRIS, J.:—This action was first tried by Russell, J., with a jury, and the verdict was set aside, and a new trial ordered by the full Court. The case is reported in 49 N.S.R. 362.

The second trial came on before the present Chief Justice, Sir Wallace Graham, and on account of something which happened

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during the course of the trial that Judge discharged the jury, and the hearing was abortive.

The third trial also took place before Russell, J., with a jury, and there is a motion to set aside the findings of the jury and for a new trial. The grounds relied upon are that the verdict is against the evidence and there was misdirection by the trial Judge.

Viewing the whole evidence I think the verdict is not such as reasonable men could find, and that the verdict ought on this ground to be set aside.

Many of the things were not put to the jury, or at least they were not put in such a way as to place before the jury their real significance, and many phases of the plaintiff's conduct were explained in such a way as to give the jury a wrong impression of the importance of these matters. The jury were told more than once that on August 16, the Brock Company got a controlling and absolute interest in the stock of the company, and not only got the shares out and out, but they got "out and out control of the business of Kane & Co., formerly in the hands of Kane, and that means they got absolute title clear of any equity on the part of Kane in these shares which they had held up to that time as collateral for whatever debts Kane owed to them."

I do not see how the jury could understand this in any other way than as a direction as to the law—as to the legal effect of what happened on August 16—and after the law was so given to them they had nothing else to do but to record their verdict accordingly. The case was, I think, virtually withdrawn from the jury.

I think there was a mistrial, and the verdict should be set aside with costs and a new trial granted. *New trial ordered.*

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DIXON v. CANADIAN COLLIERIES.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. April 3, 1917.

MASTER AND SERVANT (§ II A—110)—*Defective system of inspection—Timber—Decay—Negligence causing death.*]—Appeal by defendant from the judgment of Clement, J., awarding plaintiff damages for defendant's negligence causing death. Affirmed.

E. P. Davis, K.C., for appellant; *J. W. deB. Farris*, for respondent.

MACDONALD, C.J.A.:—The case was submitted to the jury to find whether or not there was liability at common law. The state-

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ment of claim alleged a defective system of inspection. The evidence relating to a system of inspection is that of Eban Johns, a fire boss in the defendants' employ at the time that the injury to the deceased occurred. This witness said:—

We have no particular system (of inspection), we went through and if we saw any signs of timber decaying we would have it attended to if it was very bad. Then we could tell by the moss growing on the timbers.

Q. When you saw this moss on the timbers you did not put supports in but left them until they gave way? A. Until we saw signs of decay in or heavy pressure and we put in extra liners then. Q. So when you saw these timbers begin to give way you put extra liners in? A. Yes, as they are decaying.

I think this evidence, and this is all there is upon the point, conclusively proves the lack of any system of inspection in the proper sense of the term.

The jury in answer to questions found that the deceased came to his death through defendants' negligence, and that this negligence consisted of "inadequate inspection, inadequate repair," and gave damages to the wife and children. Judgment was entered thereon for the plaintiffs accordingly.

Counsel for defendants, very frankly admitted that if the finding had been "inadequate system of inspection" his clients could not hope to succeed in this appeal. The question to be decided therefore is, on the whole case, could the finding be given that interpretation? The Judge instructed the jury that if they found that a proper system of inspection had been provided, the negligence of the inspector would not be the negligence of the company. He said:—

He (plaintiff's counsel) is not basing his claim upon any act of personal negligence in connection with the company's inspectors. The case he makes out is that whether or not a timber was inadequate to support the weight, they had no proper system of inspection, and he argues that the very fact that this accident occurred, that this weight of earth brought down the timber, shews that it had got into an inadequate state, and that that was the result of their lack of a proper system of inspection and repair.

I think it was made plain enough to the jury that in order to find the defendants liable in relation to inspection, they must conclude that the *system* of inspection was defective. It is unfortunate that the doubt which has arisen upon these answers was not cleared up at the time. It will be noticed that defendants' counsel made no objection to judgment being entered for the plaintiffs on the findings, apparently not regarding the findings

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as other than a finding that the inadequate inspection was the fault of the defendants and not of their employees.

I would dismiss the appeal.

MARTIN, J.A.:—In my opinion the answer of the jury read with the charge of the Judge means that there was a lack of a proper system of inspection and repair and there is some evidence upon which the jury could reasonably come to that conclusion. Therefore the appeal should be dismissed.

MCPHILLIPS, J.A., agreed. *Appeal dismissed.*

ROYAL BANK v. SKEANS.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin and McPhillips, JJ.A. April 30, 1917.

SET-OFF AND COUNTERCLAIM (§ II—40)—*As to costs—Jurisdiction at common law—English Law Act, R.S.B.C.* 1911, *ch.* 75.]—Application for set-off by plaintiffs. Granted.

Sir C. H. Tupper, K.C., for application; *C. M. O'Brian, contra.*

The judgment of the Court was delivered by

MARTIN, J.A.:—In this province, through various channels, we have (save as restricted by statute or rule) inherited all the powers of the English Courts of common law and equity, and therefore, in the light of the decision of the Court of Appeal in *Reid* v. *Cupper*, [1915] 2 K.B. 147, we have their individual and collective inherent jurisdiction to make the order asked for, if it commends itself to our discretion as being equitable, *i.e.*, "to do that which is fair"(Buckley, L.J., p. 149) and it does so appear to me to be fair to make it. Buckley, L.J., said, p. 152:—

It was always within the jurisdiction of the Court to deal with this matter in its discretion as it thought proper. The practice differed in the various Courts; but in this case I think the learned Judge was entitled to exercise and did exercise a discretion.

Phillimore, L.J., observes (p. 153) that "the discretion had been suspended from the year 1832 till the date when Ord. LXV. r. 14 was passed" because in that year the Judges of the common law Courts had passed the General Rules of Hilary Term (3 B. & A. 374, 388), of which 93 is in point, and cited on p. 150 by Buckley, L.J., and it was reproduced in 1853 by the rules of that year, and so stood till said O. LXV. was passed which, as Phillimore, L.J., says, was intended to repeal it, and that "repeal . . . re-

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stores the equitable jurisdiction of the Courts and enables us to approach this question as one of discretion."

There is nothing in our English Law Act, R.S.B.C. 1911, ch. 75, introducing "so far as the same are not from local circumstances inapplicable" (as to which see *Sheppard* v. *Sheppard*, 13 B.C.R. 486, affirmed in *Watts* v. *Watts*, [1908] A.C. 573), "the civil and criminal laws of England as the same existed on November 19, 1858," because our Courts fell heir to the suspended discretion of the English Courts as they did to other jurisdictions and it was as capable of restoration here as there, by our identical r. 989. Moreover, it must be remembered that the jurisdiction was only suspended in the common law Courts by said rule, not in the Court of Chancery, which jurisdiction we also enjoy as aforesaid.

The motion therefore should be allowed with costs.

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GUSKY v. ROSEDALE COAL & CLAY PRODUCTS Co.

Alberta Supreme Court, Appellate Division, Stuart, Beck, Walsh and Ives, JJ. May 4, 1917.

MASTER AND SERVANT (§ II A—60)—*Injury to workman raising building—Safety of method and appliance—Inspection—Latent defects.*]—Appeal by plaintiff from a judgment of the Chief Justice in an action to recover damages for personal injuries sustained in course of employment. Affirmed.

C. Montrose Wright, for appellant; *C. F. Adams*, for respondent.

The judgment of the Court was delivered by

IVES, J.:—The plaintiff is a coal miner by trade and was so employed by the defendant company for some months prior to April 18, 1916. On that date or the day before he was directed to work with other fellow workmen about a one-storey frame building which defendant was moving. The building was 20 ft. by 40 ft. with 14 in. walls. The work was being done under the supervision of one Barkley, defendant's foreman. The accident occurred while the building was being raised from the ground preparatory to removing it. The method adopted to raise it was by blocks used as fulcrums resting on the ground near the building while the end of a 3½ in. by 12 in. plank, 16 ft. to 20 ft. long, was thrust under the sill of the building and rested on the block, the building being then raised by a leverage exerted from the other end of the plank. The plaintiff was climbing on to the plank at a

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point between the building and the elevated end whereon a fellow workman was sitting when the plank broke at or near the block and the fall resulted in a serious injury to plaintiff, the fracture of his kneecap into three pieces.

I think it cannot be held on the evidence that the method adopted to raise the building was an improper one under the circumstances and there was therefore no negligence in adopting that method. The only evidence of the condition of the appliance (plank), the breaking of which caused the accident, is to be found in the questions by the Chief Justice to the witness Barkley, called by defendant.

The answers disclose that the break was about a foot and a half long between the break on top of the plank and the break underneath, and it was "slightly" cross-grained. There was then a defect in the plank, and under the circumstances I think it must be held to have been a latent defect. I think a fair definition of latent defect is submitted by plaintiff's counsel when he says it is a defect which would not be revealed by the best method of inspection known to the trade. According to the evidence this plank should have borne three times the strain put upon it. That being so can it be said that an employer of ordinary care and prudence and knowing how, where and for what it was to be used in this instance, would have hesitated to supply it to his workmen as amply sufficient for the purpose, or that, under the circumstances, the best method of inspection would require more than a visual inspection? It would seem to me that if defendant had, by placing the plank or boring holes in it ascertained the extent of the cross-grain as disclosed by the break, and then put it in plaintiff's hands to use, it would not have been negligence because the defect in view of the strain to be put upon it compared with what it should bear would not be sufficient to cause a prudent and careful man to refrain from using it under the circumstances here.

The extent of the master's duty varies according to the degree of danger involved in the work. Surely the work here in which plaintiff was engaged could not be contemplated as dangerous. The defendant explains the break in the plank and here I think that is as far as the defendant is called upon to go. The defendant is not bound to shew that the accident arose in some way for which it was not responsible. *Appeal dismissed.*

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Nova Scotia Supreme Court, Graham, C.J., and Russell, and Drysdale, JJ., Ritchie, E.J., and Chisholm, J. July 27, 1917.

COMPANIES (§ VI A—313)—WINDING-UP—NOTICE OF PRESENTATION OF PETITION.

The notice of an "application for a winding-up order" under secs. 13 and 14 of the Winding-up Act (R.S.C. 1906, ch. 144), has reference to the hearing of the application and not to the filing or "presentation of the petition" within the meaning of sec. 5.

Statement. STATED CASE in an *ex parte* application made to a Judge in Chambers by the solicitor of a creditor to fix a day for the hearing of an application for the winding-up of the company. An order was granted fixing a day and 4 days' notice of hearing was given. The hearing was adjourned by consent to a later day when the preliminary objection was taken that the expression "application for a winding-up order" in sec. 14 of the Act, R.S.C. 1906, ch. 144, means the same thing as the words "presentation of a petition" in sec. 5, and that no notice of the first presentation or filing having been given and the Court had no jurisdiction to proceed.

W. A. Henry, K.C. for creditor; *V. J. Paton*, K.C., for company.

Graham, C.J. GRAHAM, C.J.:—I refer to the Winding-up Act, R.S.C. 1906, ch. 144. [The Judge here cited secs. 5, 12, 13 and 14.]

In 1891 this Court made the following rule, among others, under the Winding-up Act, namely, Judicature Rules, appendix, p. 69, r. 2:—

Every such petition shall be advertised at least ten clear days before the hearing, once at least in two Halifax daily morning newspapers, and in cases in which the office, or principal, or last known place of business as the case may be, of such company, is or was situate outside of Halifax, then once at least in a local newspaper, if any, circulating in such district.

This was made in view of notice having to be given to creditors and shareholders.

In this case the solicitor for the creditor having prepared the petition applied to a Judge, of course *ex parte*, to fix a date for the hearing of it as he would have to give the 4 days' notice and also to settle the requirements of the advertisement under the rule. The 4 days' notice was given for the hearing on the date fixed, the required 4 days' notice and the 10 days' advertisement were given and made. The notice is as follows:—

Notice is hereby given that a petition for the winding-up of the above-named company by the Supreme Court of Nova Scotia was on June 1, 1917,

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presented to the said Court, and that the said petition is directed to be heard before the Judge presiding in Chambers at the County Court House, Halifax, N.S., on Friday, June 22, 1917, at the hour of 11 o'clock in the forenoon or so soon thereafter as counsel can be heard, and any creditor or contributory of the said company desirous to support or oppose the making of an order on the said petition, may appear at the time of hearing by himself or his solicitor for that purpose, and a copy of the petition will be furnished to any creditor or contributory of the said company requiring the same by the undersigned on payment of the proper charge for the same." Dated at Halifax, N.S., June 9, 1917.

On the date fixed for the hearing, or rather a date to which it was adjourned by consent, the application came on before a Judge sitting as a Court under the Act.

The objection was made that the expression "application for a winding-up order" in sec. 14 means the same thing as the "presentation of a petition" in sec. 5, and that no 4 days' notice of the first presentation or filing had been given.

Those provisions of secs. 5 and 14 refer to two different things. The phrases are different. One is the first presentation or filing and the other is the application for the order, *i.e.*, the hearing.

In this Act, provisions of which contemplate a struggle for priority between judgment creditors and so on, and liquidators under a winding-up, it is necessary to fix a time when the winding-up shall be deemed to commence. So arbitrarily the legislature by sec. 5 fixes a period for that service of notice of the presentation.

In secs. 13 and 14 the requirements are in respect to notice of "an application for a winding-up order," and a 4 days' notice is required. That clearly means the hearing, which may result in granting or refusing of the petition, or an adjournment or other interim order, and that can only result after hearing and after notice of that hearing.

The obtaining of an appointment fixing the date for hearing must be made and it can only be *ex parte* as appointments of that kind are generally made. I do not say that where a Court sits regularly on certain days in the week, as in England, you need have an appointment. There is an ambiguity about the expression, "notice of the presentation." It may mean a presentation to be made or one already made. Here, it means clearly one already made or given, and the notice combines the presentation already made and when the hearing of it will come on.

The priority is determined by reference to the time when the

notice for the hearing is served and in that notice there is combined necessarily a notice that the petition has been presented.

Of course for the hearing, this notice of hearing must be given. That is what Riddell, J., decided in the case of *Farmers Bank*, 22 O.L.R. 556, and that it could not be waived, and that is all that he did decide.

Under the English Companies Act and cases decided under it, the expression, "presentation of a petition," is freely used, but it never is used to mean the hearing of the application for winding-up but only the first presentation when it is brought to the registrar, and the time is fixed for the hearing. In England another period is used for the date of precedence, not that provided in Canada.

I think where two different phrases are used in an Act such as "presentation of a petition," and an "application for winding-up," it is not according to rules for the interpretation of statutes to hold that they mean the same thing.

However, I think this case can be disposed of without coming into conflict with the reasoning of Ritchie, J., in the case of *Eldorado Union Store Co.*, 18 N.S.R. 514. That was an application for a restraining order under sec. 18 of the Winding-up Act, and the Judge had to consider what the phrase, "presentation of a petition" meant. If it means, as he apparently held, that it was the hearing, though I do not agree (with great respect), yet here the petitioner can contend that he is within that meaning, he is presenting his petition now, and he has given the notice of the application.

If in the future or in some other case a question of priority arises, then it may have to be determined what precisely constitutes the presentation of the petition.

Upon the case reserved for the full Court by the Judge, I am of opinion that there was sufficient notice and the hearing of the application for a winding-up order should be proceeded with.

The matter is remitted to the Judge to be continued and disposed of by him on the first Chambers day after the order and notwithstanding vacation.

Costs to be costs in the application.

CHISHOLM, J.:—I concur. Chisholm, J.

RUSSELL, J. (dissenting):—The petition by which proceedings for winding-up this company were begun was presented Russell, J.

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without any notice having been given previously to the presentation and was advertised in the newspapers. It is contended on behalf of the company that this was the wrong way to start the matter and the decision of the Court in the case of *Eldorado Union Store Co.*, 6 R. & G. 514, is cited as authority. In that case Ritchie, J., delivering the judgment of the Court, said that the only inference he could draw from examining the different sections of the Act was that . . . the words "presentation of the petition" and "apply by petition" were different terms descriptive of the same act.

Such being the case there is no authority for the presentation of a petition until after the expiration of the four days' notice, and any presentation or application before that period, as well as any order based thereon, would be irregular and of no avail: p. 520.

The rules made under the authority of the Act cannot change the meaning of the Act or over-ride its provisions. Nor do I think there need be any conflict between the Act and the rules. The rule provides for ten days' advertisement before the hearing of the application. That requirement can easily be complied with by appointing the hearing ten days after the application has been made, notice having been duly given 4 days before the application.

It is to be observed that the 4 days' notice required to be given is not merely 4 days' notice of the hearing, or 4 days' notice before an order is made. The rule is that notice must be given 4 days before the application is made, and such application is to be by petition to the Court. I think it is clear that the making of the application is the presentation of the petition. In the Ontario case of *Arnold Chemical Co.*, 2 O.L.R. 671, the notice was given November 4, returnable on the 8th November, and the petition was presented to Boyd, C., in Chambers on November 8. The only question was whether 4 clear days had elapsed. That question does not arise here. No notice at all was given, as I understand, before the application. The petition was read before the Judge at Chambers on June 1, and an order made thereupon that the hearing should be on June 22. The notice to the company which should have preceded the application was not given until June 9. The order of June 1, therefore, according to the ruling in the case of *Eldorado Union Store Co.*, was "irregular and of no avail."

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Sec. 5 enacts that the winding-up of the business of a company shall be deemed to commence at the time of service of the notice of presentation of the petition for winding-up. I should have supposed that the actual commencement of the winding-up would be the presentation of the petition, and that the date of service of the notice would not have been selected as the *punctum temporis* of the commencement unless there was some desirable purpose to be served by making it relate back to an earlier date—a policy adopted in the legislation respecting bankruptcy. I cannot understand why a later period should have been chosen which is so uncertain and indefinite in the time of its occurrence as a notice of the kind given in this case.

I do not see how the notice given on June 9 can be of any service to the applicants. It is in effect a notice that a petition was irregularly presented and that an order which it turns out was irregular and of no avail was made directing that the petition be heard at Chambers on a later day. This notice is not a compliance with the requirements of the statute and no notice has been given which is a compliance with the statute, nor can such notice now be given referable to past proceedings because the statute has not been complied with.

Drysdale, J.

DRYSDALE, J.:—A petition to wind up this company was read to a Judge in Chambers on the first day of June last. That Judge fixed June 22 as the day for hearing said petition, thereupon the 10 days' notice of the hearing required by our rules was given as well as the 4 days' notice to the company required by the Act. Upon the hearing coming on upon the day so fixed, counsel for the company objected that such petition could not be considered, or any order made herein by reason of the fact that 4 days' notice was not given to the company of the intended presentation before the Chambers Judge fixed June 22 for a hearing. This, in my view of the Winding-up Act, is not necessary, and I am of opinion the preliminary proceedings herein were regular.

The *Eldorado* case, 18 N.S.R. 514, relied upon does not, I think, affect the question argued.

I would dismiss the objections with costs.

Ritchie, E.J.

RITCHIE, E.J.:—I concur in the conclusion arrived at in the judgment of the Chief Justice. *Objections overruled.*

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SASKATCHEWAN CO-OPERATIVE ELEVATOR CO. v. TOWN OF OGEMA.

Saskatchewan Supreme Court, Newlands, Brown, Elwood and McKay, JJ. July 14, 1917.

TAXES (§ III B—125)—ASSESSMENT—GRAIN ELEVATOR.

By virtue of sec. 302 of the Town Act, R.S.S. 1909, as amended in 1915, a grain elevator is assessable at the actual value of the building, and unless it is used for commodities other than grain the business carried on therein is exempt from taxation; nor, by virtue of sec. 292, is it subject to taxation when not in existence at the time of the completion of the assessment roll.

Statement. APPEAL by defendant municipality in an action to recover back taxes paid under protest. Affirmed.

R. W. Hugg, for respondent; *H. Y. MacDonald*, K.C., for appellant.

The judgment of the Court was delivered by

Brown, J. BROWN, J.:—On or about June 12, 1915, the plaintiffs commenced the erection of a grain elevator in the town of Ogema, and completed same on or before July 28th. The elevator was opened for business about August 20th, and was not at any time used for commodities other than grain. The assessment roll for the town was completed on or before May 31, and no assessment of the plaintiffs in respect to the said elevator, or in respect of the business carried on therein, was included in the roll as so completed; this, of course, being impossible, owing to the fact that neither the elevator nor the business were in existence at that time.

On October 8, the town council, pursuant to notice given on September 20, assessed the elevator and also the business carried on therein for the year 1915, and amended the assessment roll accordingly. The plaintiffs denied the defendants' right to so assess, either as to building or business, and have paid the taxes under protest. This action is brought for the recovery of the money so paid.

By sec. 302 (1) of the Town Act, being ch. 85, R.S.S. 1909, buildings are to be assessed at 60% of their actual value, and sub-sec. 2 specifies the mode for assessing the business carried on in the building.

By sec. 21 of ch. 17 of 1915, sec. 302 aforesaid is amended by adding sub-sec. 8 thereto as follows:—

(8) Notwithstanding anything herein contained a grain elevator shall be assessed at the fair actual value of the building and shall not be otherwise assessed unless used for commodities other than grain.

Having sub-secs. 1 and 2 as aforesaid in view, it seems clear

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that sub-sec. 8 is intended to provide that a grain elevator shall be assessed at its actual value and not simply at 60% of such value, but that, unless used for commodities other than grain, it shall not be assessed in any other way, and shall in consequence be exempt from taxes in so far as the business carried on therein is concerned.

The defendants, therefore, in my opinion had no right to assess the business carried on in the elevator.

The further question to be considered is: Was the council authorized to assess the elevator itself for the year 1915, the same having been constructed after the completion of the roll?

Sec. 292 of the Town Act is as follows:—

If at any time before the first day of December it shall be discovered that either the property, business or income of any taxable person or any part of same is not included in the roll or that any person has commenced business after the assessment roll has been completed the assessor shall notify such taxable person by registered letter mailed to the post office address of such person if such address be known that at a meeting of the council to be held at least fifteen days after the mailing of such notice an application will be made to the council to assess such taxable property for such sum as may be deemed right and that such taxable person is required to attend at such meeting to show cause why the said taxable property should not be assessed and as to the amount the same should be assessed for.

(2) After such notices have been mailed as aforesaid and after the expiration of the time mentioned therein or if such taxable person be not known then without any notice the council may assess such taxable property and direct the assessor to enter the same upon the proper tax roll as they shall direct and the name of such taxable person if known: Provided always that all the provisions of this Act as to appeals from assessment as far as the same are applicable shall apply to any such assessment.

(3) Immediately after such assessment shall be made as aforesaid the assessor shall place the same on the tax roll at the end thereof and shall rate the same at the same ratio as the rest of the said roll and thereafter the same shall be collectible in the same manner as the rest of the taxes.

It is to be noticed that, in the first place, "*property, business* and *income*," if not included in the roll are provided for, and in the second place *business commenced after the completion of the roll* is provided for. This, in my opinion, makes it clear that the first provision refers to property, business and income in existence before the roll is completed, as otherwise there would be no object in making the second provision for business commencing *after* the completion of the roll, and, in that view, as the elevator in question was not in existence when the roll was completed it could not subsequently be added thereto. The defendants therefore had no right to any of the taxes in question and the appeal should be dismissed with costs. *Appeal dismissed.*

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SMITH v. CURRY.

Manitoba King's Bench, Macdonald, J. August 9, 1917.

EASEMENTS (§ IIA—5)—PARTY-WALL—PASSAGEWAY—CREATION—BUILDING PLAN—EXTENT OF RIGHT.

Where adjoining owners construct their buildings according to a party-wall plan, and one is given a passageway to his building by means of a communicating door through the party wall, a valid easement is thereby created, independently of any grant or deed, to the stairways and passageways necessary for the proper use of his building, and it is co-extensive with and as durable as the easement to the party wall.

Statement.

ACTION for injunction to restrain defendant from closing up a passageway.

E. G. Hetherington, for plaintiff; *S. H. Forrest*, for defendant.

Macdonald, J.

MACDONALD, J.:—The plaintiff and the defendant Curry were the owners of adjoining lots in the Town of Souris, and each decided to erect a building on his lot, the plaintiff for occupation as a drug store with rooms overhead on the first storey, and the defendant for use as a hardware store with rooms overhead on the first storey.

In the year 1905, each, without the knowledge of the other, engaged the same architect to prepare plans.

The architect conceived the idea of a party-wall and other concessions in common, and submitted his scheme to the plaintiff and the defendant, resulting in a plan of a building being prepared by him which was accepted by both parties and according to which a building was constructed.

The plans have been lost, but ground floor and elevation plans with sketch, showing the relation the buildings had to each other, were preserved and are now filed.

In the plan of the building, and in the building as constructed, the front entrance leading into the upstairs is in the defendant Curry's building (hereinafter described as the "Curry building"), and is situate at the extreme west side of the store adjoining the plaintiff's building (hereinafter described as the "Smith building"); and to get into the rooms overhead in the Smith building, a passageway was provided running east from the landing of the front stairway in the Curry building, connecting with a passageway running north and south and along the party-wall in the same building; in this party-wall doorways and fire-proof doors are provided for ingress and egress to and from the upstairs of the Smith building.

The back entrance into the upstairs of the buildings is by a

stairway provided in the Smith building, and both the front and back entrances have been used for the purposes of their construction since the building was erected.

The upstairs of the Smith building is used as suites of rooms, offices, etc., and the upstairs of the Curry building is used and occupied for similar purposes.

Shortly after the building was erected, the defendant Curry submitted for execution by the plaintiff a party-wall agreement, and the plaintiff submitted for execution by the defendant Curry an agreement with respect to front entrance and passageways. The latter, the defendant Curry refused to execute, giving as his reason that he did not wish anything against the property in case he wanted to dispose of it. The plaintiff, in consequence, refused to execute the party-wall agreement, and thus matters have stood all those years; both parties using the premises, stairways and passageways as laid out in the plans.

Since the erection of the buildings the defendant Mitchell has become jointly interested in the Curry property with his co-defendant.

Now the defendants have notified the plaintiff of their intention to close the communicating doors through the said party-wall, and the plaintiff brings this action to restrain them from closing, or otherwise interfering with the right of way of the plaintiff over, along or through the property of the defendants as originally provided for.

There was no agreement in writing between the parties, excepting the plans to which both agreed, and to this plan they both must submit. If an agreement had been made it would not be otherwise than as the plan would indicate, and such is the agreement the Court would order specifically performed. The plan is the agreement to which both parties assented.

To deprive the plaintiff of the use of the front stairway, party-wall and passageways leading to it, would leave him without any means of ingress and egress to and from the first storey of his building excepting by a back lane entrance in the rear of his building, and to provide himself with a front entrance would necessitate such a change as to materially damage both his store and his upstairs rooms.

It is not reasonable to expect that the plaintiff would consent

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to the plans as made out if the building was, when constructed, to be subject to change at any time at the fancy or caprice of the defendant.

The position taken by the defence is that they would refuse to sign any agreement that would damage the selling value of their property; but they were willing to make the arrangement the plan indicated, which would likely continue for some time but not in perpetuity. In other words, put it up in this way now, and we will dictate a change when we feel like it.

At common law a deed was in all cases necessary for the creation of an easement. The rule in equity, however, was different. According to this rule, if there is an agreement, whether under seal or not, to grant an easement for valuable consideration, equity considers it, as between the parties to the agreement and parties taking with notice, as granted.

The consideration for the granting of the front entrance way and passageways was the agreement with respect to the party-wall. It is one transaction and one is referable to the other.

In *Dalton* v. *Angus* (1881), 6 App. Cas. 740 at 765, it is laid down that an agreement for valuable consideration although not under seal, is sufficient to create a right in equity in an easement and, for the purpose of creating a lawful user, is as good as a deed.

Again, assent or acquiescence on the part of the defendant to the erection of the plaintiff's building, with a knowledge of its peculiar mode of construction, would, in the absence of any deed under seal, entitle the plaintiff to maintain this action: *Brown* v. *Windsor*, 1 Cr. & J. 20 [148 E.R. 1318].

In *McManus* v. *Cooke* (1887), 35 Ch.D. 681, the plaintiff and defendant being owners of adjoining houses, had entered into a verbal agreement under which a party-wall was to be pulled down and rebuilt at their joint expense, and each party was to be at liberty to make a lean-to sky-light resting on the new party-wall and running up to the sill of the first floor window of his own building. The defendant had shaped his sky-light so as to show above the wall and obstruct some of the light coming to the plaintiff's sky-light. Kay, J., granted an injunction, holding that the agreement was for an easement of light and that the defence of the Statute of Frauds (if good) was answered by the plaintiff's part performance.

In Devonshire v. *Eglin* (1851), 14 Beav. 530, the defendant verbally consented to the plaintiff's making a watercourse through his lands on being paid a reasonable compensation. The watercourse was made, but no grant was executed and no sum arranged. After nine years user the defendant stopped it up. He was restrained by decree from so doing, and it was referred to the Master to settle a proper compensation. The defence of the Statute of Frauds was answered by the part performance.

In *Wood* v. *Manley*, 11 Ad. & E. 34, [113 E.R. 325]. This was a case not of a mere license, but of a license coupled with an interest and irrevocable.

A mere license to enter upon land uncoupled with an interest may be revoked at the will of the party by whom it was given: *Wood* v. *Ledbitter*, 13 M. & W. 838, at 852, [153 E.R. 351].

The law in this case is, however, the subject of doubt. See *Hurst* v. *Picture Theatres, Ltd.*, [1915] 1 K.B. 1.

In *Rochdale* v. *King*, 16 Beav. 630, by a canal company Act, mill owners were empowered to use the canal water merely for condensing steam. In 1829, King being about to erect a mill, applied to the company for leave to take water for generating as well as condensing. The company did not appear to have refused and the pipes were laid down in the presence of their engineers. The mill being built on the principle of using the canal waters for both purposes and having been used in that way for 24 years, the Court, although the company's right had been established at law, held that they were bound by the acquiescence and refused a perpetual injunction to restrain King from taking water for the purpose of generating steam.

The principle on which the defendants rely is one often recognized by this Court, namely, that if one man stand by and encourage another, though but passively, to lay out money, under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the Court will not permit any subsequent interference with it, by him who formally promoted and encouraged those acts, of which he now either complains or seeks to obtain the advantage. This is the rule laid down in *Dann* v. *Spurrier*, 7 Ves. 231, *Powell* v. *Thomas*, 6 Hare 300, and many other cases, to which it is unnecessary to refer, because the principle is clear.

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The plaintiff in this action claims the stairways and passageways as easements necessary for the proper use of his building, and from a perusal of the authorities and a careful consideration of this case, I am of the opinion that the plaintiff is entitled to succeed.

It is argued on behalf of the defendant that there is no time specified during which this easement is to continue for the benefit of the plaintiff, but it seems to me that the plaintiff is entitled to the benefit of the easement to the same extent that the defendants are to the party wall.

The defendant Curry is entitled to one-half cost of party wall as claimed, but without interest or costs. Costs to the plaintiff.

Judgment for plaintiff.

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CANADIAN PACIFIC R. Co. v. FULLER.

Alberta Supreme Court, Harvey, C.J., and Stuart, Beck, and Walsh, JJ. June 18, 1917.

VENDOR AND PURCHASER (§ III—39)—RIGHTS OF VENDOR—TIME AS ESSENCE —ASSIGNMENT BY PURCHASER.

Where time is made the essence of an agreement for the sale of land, and the purchaser has made a default, the vendor exercising his right of repossession of the land under the terms of the contract is entitled to the rents and profits as against an assignee of the purchaser.

[*Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599, applied.]

Statement.

APPEAL by plaintiff from the judgment of Morrison, J., in favour of defendant, in an action under an agreement for the sale of land. Reversed.

James McCaig, C.P.R. Law Dept., for appellant.

G. F. Auxier, for respondent.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is a stated case which was determined by His Honour Judge Morrison in the defendant's favour. The facts as stated in somewhat abbreviated form are as follows:—

1. The plaintiffs are the registered owners of the land in question.

2. By an agreement between the plaintiff and one Switzer dated July 4, 1911, the plaintiff agreed to sell and Switzer agreed to purchase the said land and Switzer entered into possession and retained possession either personally or by his tenant until August 28, 1916, at least.

3. On April 3, 1916, and at all times subsequent thereto,

Switzer was in default as to payment of certain instalments of principal and interest under agreement.

4. By the agreement it was provided *inter alia* as follows:—

That if the purchaser or the approved assignee, as the case may be, shall fail to make the payments aforesaid, or any of them, within the times above limited respectively, or shall fail to carry out in their entirety the conditions of this contract in the manner and within the times above mentioned, the times of payment as aforesaid, as well as the strict performance of each and every of the said other conditions and stipulations, being a condition precedent and of the essence of this contract, then the company shall have the right to declare this contract null and void.

5. By the said agreement it was also *inter alia* provided as follows: "In case the company (plaintiff) at any time hereafter becomes entitled to cancel this contract, they shall, without prejudice to their right thereafter to cancel, have the right to enter into, have, hold, use, occupy, possess and enjoy the said land and any improvements thereon, including any growing crops, without let, hindrance, suit, interruption or denial of the said purchaser (Switzer), his heirs or assigns, or any other person or persons whomsoever, and to occupy the said lands personally or by their servants or agents or to lease the same to any person, firm or corporation, applying on this contract the net amount received by the company therefrom after payment of all costs, charges and expenses in connection therewith, the company to have entire discretion in their own option as to the method, the manner and price of such occupation or letting."

6. On April 3, 1916, Switzer demised the land to one Wimmer, the lease being: "for the term of one year from January 1, 1916, yielding and paying therefor one-fifth of the whole crop, said share to be delivered in the elevator at Castor on or before November 15, 1916."

7. On May 16, 1916, Switzer, being indebted to the defendant Fuller in the sum of $500 and interest in respect of a certain promissory note then past due, assigned to defendant all the rents payable in respect of the lease, under an arrangement with defendant that all moneys received in respect thereof should apply upon the amount of such indebtedness, such assignment being endorsed upon the lease mentioned in par. 4 hereof, and being in the words and figures following:—

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I, Edgar Switzer, the lessor under the above lease, do hereby assign unto Edwin Fuller, of Castor, Alberta, farmer, all my rights, title and interest in the said lease.

8. Due notice of the assignment was given to the tenant Wimmer by the defendant on or about June 15, 1916, the notice directing that all rents should be paid to defendant.

9. On or about August 28, 1916, plaintiff served upon Wimmer a notice, reciting the agreement of sale of July 4, 1911, and the provision therein already quoted, that the said agreement was in default and the company entitled to cancel it and that Wimmer held the said land as tenant of Switzer which then proceeded to notify Wimmer to pay and deliver to the company "all rents, sums of money or share of crop" agreed by him to be paid or rendered to Switzer in respect of the land under or by virtue of the lease granted by Switzer in his favour, and that, in the event of his refusing or neglecting to so pay, the company would forthwith proceed to exercise all the rights conferred upon it by the said agreement for sale.

10. Wimmer, by endorsement dated August 28, 1916, upon the notice, acknowledged to have received notice from the company, the registered owners of the land and vendors of the same to the said Switzer to deliver the said one-fifth share of the crop to the company and thereby undertook to deliver the one-fifth share of the crop to their order at the elevator at Castor, Alberta.

11. The plaintiff did not enter into possession of the land and is not yet in possession thereof except in so far as the giving of the notice mentioned in par. 9 hereof to Wimmer may be construed as an "entering into possession" by the plaintiff of the land within the terms of the clause in the agreement for sale more particularly set out in par. 5 hereof.

12. The rents aforesaid amounted to the sum of $279.58, and Wimmer being threatened with action by both plaintiff and defendant in respect of the said rents, applied to the Court for relief and by the order was granted leave to pay the moneys into Court less his costs of the application to be taxed, and has paid or will pay the same in accordingly.

13. By the order, an issue was directed to be tried between plaintiff and defendant herein, and the issue so to be tried is as follows: Is the plaintiff entitled as against the defendant to the said moneys?

Much argument was directed to the analogy between the facts of this case and the case of a mortgagee entitled after default to take possession or give notice to tenants to pay him their rent. A consideration of the rights of a mortgagee in such a case would take one very far afield and would involve one in an historical enquiry into the rights under a mortgage which operates as a conveyance and one which operates as a charge only as does a mortgage under the Land Titles Act. I think no such enquiry is of value for the purposes of the present case.

On the facts stated there is nothing to shew that the decision in *Brickles* v. *Snell*, 30 D.L.R. 31, [1916] 2 A.C. 599, is not applicable, and it appears therefore that by reason of the default of Switzer, the purchaser from the company, time being expressed to be of the essence of the agreement, the company could cancel the agreement, though remaining subject to the power of the Court to give the purchaser such relief from the penalty of forfeiture of the purchase money paid or otherwise as the Court might deem equitable under the circumstances. This being the case, then, under the terms of the agreement of sale and purchase, the company-vendor became entitled, instead of cancelling the agreement, to

> enter into, have, hold, use, occupy, possess and enjoy the said land and any improvements thereon, including any growing crops . . . and to occupy the said lands personally or by their servants or agents or to lease the same . . . the company to have entire discretion in their own option as to the method and manner and price of such occupation or letting.

I should think that if the words had merely authorized the company to take possession of the land a notice to the tenant to pay his rent to the company would be a taking of possession; but, however that may be, it is clear to me that the notice given was a fulfilment of the larger terms of the provision quoted and consequently entitled the company to insist upon the tenant Wimmer delivering Switzer's share of the grain payable as rent to the company instead of to Switzer; and that the only real difficulty in the case is what was the effect of the assignment from Switzer to the defendant Fuller; for, of course, the company by its notice to Wimmer adopted the lease.

The one-fifth of the crop was payable by way of rent and I think that the assignment from Switzer to Fuller was an assignment of the rent and therefore was an assignment of a chose in action.

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It is undoubtedly true to say, as is said in 4 Hals. Laws of England, tit., Chose in Action, p. 390, sec. 827, that: "When the benefit of a burdensome contract is assigned, the assignee will take, subject to the rights of the other party to the contract," for which are cited *Newfoundland Government* v. *Newfoundland R. Co.* (1888), 13 App. Cas. 199; *Smith* v. *Parkes* (1852), 16 Beav. 115, and other cases.

But if the assignment was an assignment of an interest in chattels I think the result is the same. Switzer could assign only subject to the infirmities of his title. In either view the right of Switzer was always subject to be defeated by the act of the company, his vendor; the company might have ejected him and all persons claiming under him. Instead of taking this position the company exercised a right less harsh in its operation, and in effect took possession not of the whole land itself nor even of the whole crop, but only of that portion—one-fifth—to which Switzer was entitled. That portion was always subject to the rights of the company-vendor, and it seems clear to me that the company's rights could not be defeated by any disposition made by Switzer but, on the other hand, that those rights constituted an attaching equity which remained notwithstanding the assignment. In my opinion, therefore, it should be declared that the plaintiff company is entitled to the money in question and there should be judgment in favour of the plaintiff accordingly with costs, and the appeal should be allowed with costs. *Appeal allowed.*

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FAWELL v. ANDREW.

Saskatchewan Supreme Court, Brown, Elwood and McKay, JJ. July 14, 1917.

JUDGMENT (§ I G—55)—AMENDMENT OF—COSTS—MISTAKE.

An appellate Court may amend its judgment, after it has been formally entered, to correct a mistake as to costs.

[*Fawell* v. *Andrew*, 34 D.L.R. 12, amended.]

Statement.

MOTION to amend the judgment of this Court on appeal, 34 D.L.R. 12, and which judgment has been duly entered. Granted.

H. F. Thomson, for appellant; *H. V. Bigelow*, K.C., for respondent.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—The facts in connection with the case are largely set out in the judgments given on appeal and reported in 34 D.L.R. 12. The order appealed against provided that, upon

payment of the plaintiff's costs incurred in consequence of the defendant's default in delivering defence within one week after taxation, the order of the Master should be set aside. It appears that these costs were taxed at $349.08 and were duly paid. These facts, however, were not brought to the attention of the Court, and the Court rendered its judgment in ignorance thereof. The defendant now applies to have the judgment amended so as to provide for repayment of this amount.

There is no doubt that the judgment as formally entered correctly represents the judgment of the Court as rendered and as intended, and there is no doubt, either, that had the fact of this payment been brought to the attention of the Court provision would have been made in the judgment for repayment.

Upon the authority of *Chambly Manufacturing Co.* v. *Willet*, 34 Can. S.C.R. 502, I am of opinion the amendment should be made. It is relief to which the defendant is undoubtedly entitled as a result of the reversal of the judgment appealed from.

The judgment appealed from also provided that the order made by the Master and the executions issued thereon should stand pending the trial of the action, and, in consequence, the sheriff remained in possession of the goods under seizure and, apparently, had in his hands as a result of such executions some $2,957.35.

It also appears that after argument on appeal and before delivery of judgment, the action itself came on for trial and that a consent judgment was arranged, and counsel for the defendant authorized the sheriff to apply the said sum of $2,957.35 in his hands, less his (the sheriff's) fees and expenses on the judgment so obtained by consent. The sheriff's fees and expenses were apparently $473.57, and after deducting this amount he applied the balance as instructed.

Counsel for the defendant contends that these fees and expenses of the sheriff should be borne by the plaintiff, and that he is entitled to payment of this amount from the plaintiff, and he now applies to have this amount also included in the judgment of this Court and to have same amended accordingly.

I am of opinion that, while the defendant may be entitled to be reimbursed this amount, yet it is not an item which can be provided for in this way. If the claim is resisted, and we were

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given to understand on the argument that it would be, the defendant must be left to his remedy by action.

In the result, the judgment should be amended so as to provide for the item $349.08, and, under the circumstances, without costs of this application to either party. *Motion granted.*

BRUCE v. WESTERN CANADA FLOUR MILLS Co.

MAN.

K. B.

Manitoba King's Bench, Macdonald, J. August 9, 1917.

COMPROMISE AND SETTLEMENT (§ I—4)—VALIDITY—DURESS—STIFLING PROSECUTION.

A settlement or release obtained under threat of criminal prosecution, or for the purpose of stifling a criminal prosecution, is of no effect.

Statement.

ACTION to recover the market value of grain stored.

W. Hollands, and *T. W. Robinson*, for plaintiff.

C. P. Fullerton, K.C., and *E. P. Garland*, for defendants.

Macdonald, J.

MACDONALD, J.:—In the month of September, 1914, the plaintiff delivered to the defendants at their elevator at Berton, in Manitoba, and the defendants received from the plaintiff 1,087½ bushels of wheat.

In December, 1914, the plaintiff delivered in like manner 260½ bushels of wheat making a total delivery of 1,348 bushels of No. 1 northern wheat received by the defendants from the plaintiff for storage. Storage tickets were not issued for the wheat so delivered.

Harold Lobb was the agent of the defendants in charge of the elevator, whose duty it was to issue such storage tickets.

Plaintiff says that he asked Lobb for storage tickets from time to time, but that he was always put off.

In February, 1915, the plaintiff wanted to sell his wheat and requested Lobb to dispose of it. Wheat was then $1.55 per bushel, shortly afterwards he again saw Lobb, who said he had not sold as wheat had declined, and advised holding for a rise in the market.

The fact was that Lobb was a defaulter to the defendant company, and was making use of the plaintiff's wheat to cover up his default; of the fact, however, the plaintiff had no knowledge.

Shortly after the request of the plaintiff to have his wheat disposed of, Lobb's defalcation was discovered. He was under bond to the defendants with the U.S. Fidelity and Guarantee Co. for the sum of $1,000, and on the shortage being discovered,

this company was advised, and through Mr. Guertin, their agent, they took the matter in hand.

Harold Lobb was placed under restraint, and brought to Winnipeg by Mr. Bremner, manager of the grain department of the defendants, and was at the time of his release in charge of one Stodgill, a detective.

William W. Lobb, the father of Harold Lobb, interested himself in his son's behalf, and came to Winnipeg, and called on Mr. Guertin and settled with him for $2,000, for the claim of the defendant company against his son, and for this Mr. Lobb, Sen., says the company were to release his son, who, he says, was in custody at the time.

Bruce, the plaintiff, and one Curtis were still to be reckoned with and their claims disposed of before Harold Lobb could be released from custody, and on the 25th February, 1915, the plaintiff came to Winnipeg, having been telephoned for by Mr. Guertin, and went direct to the latter's office. The plaintiff says that Guertin accused him of defrauding the company by not getting storage tickets, that it was a very serious matter, and rendered him liable to criminal prosecution. Curtis, whose grain was also in the defendants' elevator, and who was in the same position as the plaintiff, was enquired for, and his absence not being accounted for, Guertin said he would send a constable after him, as he would for the plaintiff if he had not come down. He said his company would not pay anything, and that the plaintiff would not get anything unless he got it out of W. W. Lobb, the father of Harold Lobb. He then told the plaintiff that he would get the price of his grain at the time of delivery, which after deducting charges would be 80c. a bushel. The plaintiff demurred, and Guertin said that if he would not take that, he would take criminal proceedings against him, and that he was liable for $50 a load for every load for which he did not get a ticket. Plaintiff says that he was alarmed and frightened; that Guertin called Bremner in after making these statements, and the latter said from what he had heard the plaintiff could not collect a cent. The plaintiff then agreed to accept 80c. a bushel rather than have proceedings taken. In his evidence Bremner says: "I do not think the plaintiff is entitled to a dollar." Why he is not entitled to pay for his wheat I cannot understand.

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It is quite evident that Guertin and Lobb, Sen., had arrived at an understanding with reference to a settlement of the claims of the plaintiff and Curtis, and it was in the latter's interest to reduce those claims as much as possible.

After the plaintiff had agreed to accept 80c. a bushel, Lobb, Sen., said that he would have to accept his note at three months, which he did. The release, ex. 3, was then executed, notes given by Lobb Sen., and then Harold Lobb was released.

An effort was made to impute dishonesty to the plaintiff, in an attempt to defraud the defendants in making a secret arrangement with Harold Lobb to have his grain stored in the defendant's elevator free of storage charges, and Harold Lobb suggests this secret arrangement as a reason for the non-issue of storage tickets. The plaintiff was not the only one whose grain was stored in this manner. There were several others, and there is no suggestion that such an arrangement was made with anyone else.

Guertin says that the usual charge for storage is one-thirtieth of a cent per bushel per day after the first 15 days, which are free, but that a farmer might get 6 weeks' free storage.

The plaintiff denies that there was any such arrangement that he was to have free storage as stated by Harold Lobb, and why Lobb should make such an arrangement is not reasonable. He was not getting any consideration for such a favour, nor can he give any explanation why he made such an arrangement. He gave his evidence in a halting, hesitating and altogether unsatisfactory manner, and I am led to the conclusion that no such an arrangement was made.

An effort was made to corroborate Harold Lobb in this question of free storage by showing that no storage charges had been deducted from the wheat which had been sold by the plaintiff to the defendants in previous years, and certain certificates and statements are filed in support, exs. 7, 8, 9 and 10.

Ex. 7 shows statement with storage tickets annexed for grain which purports to have been delivered in July, 1913, and sold to the defendants in August, 1913. Harold Lobb says he did not issue storage tickets when the grain was delivered, but does not say when it was delivered. The storage tickets are dated July 24, 1913, and the cheque in payment is dated August 16, 1913.

Ex. 8 shows storage tickets dated March 3, 1913, and cheque in payment dated September 8, 1913, and statement made out by the defendants dated September 5, 1913.

Ex. 9 shows storage tickets dated July 30, and August 1, 1913, sold to defendants, and cheques issued September 8, 1913.

Ex. 10 shows storage tickets dated December 19, 1913, and cheque in payment dated July 8, 1914. So far from these facts being corroborative of Harold Lobb, they are contradictory of his evidence when he says that he did not issue the storage tickets until the plaintiff was ready to sell.

It must also have been evident to the defendants when they made out the statements to which those storage tickets are annexed, and which statements are dated prior to the issue of the cheques in payment of the grain, that storage charges were not deducted if as a fact they had not been otherwise provided for or taken into consideration.

The statement of Harold Lobb that the object in not giving tickets was to cover up shortage in elevator, explains his conduct in withholding storage tickets for the grain in question in this action.

The plaintiff demanded storage tickets from Harold Lobb, and this is corroborated by the fact that on a renewal of such a demand, Lobb made out and handed to the plaintiff a statement showing the quantitly of wheat stored (ex. 1).

Were it not for this statement and the possession of it by the plaintiff, I can foresee where difficulty would stand in the way of proof of delivery, which is put in issue by the defence.

I am satisfied that Guertin intimidated the plaintiff and misrepresented his position, and therefore induced him to accept the settlement relied on as a defence to the action.

Guertin had settled with Lobb, Senr., the loss sustained by the defendant company through the defalcation of Harold Lobb, and he then undertook to settle the claims of the plaintiff and Curtis, and thus secure the freedom of Harold Lobb and immunity from proceedings against him and Harold Lobb was held pending the final settlement.

The market price of wheat was represented to the plaintiff as $1 per bushel at the time of delivery, which after deducting expenses would net 80c. per bushel. To this the plaintiff object-

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ed, but was told by Guertin if he would not accept that, criminal proceedings would be taken. Guertin denies this, but his activity in the matter, his keenness on behalf of Lobb, Senr., to secure the son's freedom, led him, I believe to threats and intimidation. The plaintiff says that he read from the Grain Act, and told him he was liable for $50 fine for every load for which he did not get a storage ticket. Guertin denies this, but admits he asked him if he did not know it was unlawful not to get tickets, and told him the Western Canada Flour Mills Co. would not recognise his claim, but notwithstanding that fact Lobb was prepared to pay him. He admits he may have made some mention of $50 fine per load before the grain commission.

I find that the plaintiff delivered to the defendants 1,348 bushels No. 1 northern wheat, and sold them a quantity thereof to the value of $2[illegible].60.

Guertin, who was acting for Lobb, Senr., at the time of the settlement with the plaintiff, misrepresented the market value of the wheat and thereby and by threats and intimidation induced the plaintiff to execute the release set up as a defence to this action.

Although the defendant company now claim the benefit of this release, they claim they were not parties to the settlement urged as a defence. Bremner, their manager, says:—"The settlement made with Bruce was not for any claim he had against the company, but a voluntary payment by Lobb, Senr."

Before the note given by Lobb, Senr., to the plaintiff had matured, the latter repudiated the settlement, and sought and now seeks redress against the defendants.

The negotiations between the plaintiff, Lobb, Senr., and Guertin were for the purpose and with the intention of protecting Lobb, Junr., from criminal prosecution for his defalcation with the defendant company, and the whole transaction is tainted with illegality as tending to affect the due administration of justice.

Counsel for the plaintiff contends that the defendants are not entitled to credit for the amount of the note given him by Lobb, Senr., and cites the case of *Re Rowe, Ex parte Derenburg & Co.*, [1904] 2 K.B. 483. In that case "A" a bankrupt owed "B" some £16,500 moneys advanced on deposit of shares

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which turned out to be a forgery. Subsequently "C," who was formerly A's partner, whilst repudiating all liability for A's fraud, voluntarily paid "B" £6,500 for the loss thereby sustained. Under the facts of the case it was held that the payment was not made on account of the debt or the debtor, and that this payment need not be taken into consideration in proving against the estate of "A."

Here Lobb, Senr., gave his note to be applied on defendants' liability, and if he had given the cash instead of the note, the defendants would be entitled to credit for the payment, but Lobb, Senr., at maturity of the note repudiated liability, upon what ground does not appear.

Under the facts and circumstances in this case, I am of the opinion that the defendants should not be held bound by the release pleaded as a defence to the action, and that the plaintiff is entitled to be paid the market price of the wheat stored by him in the defendants' elevator, and converted by them to their own use.

The plaintiff offered the wheat for sale in February, 1915, when the market value was $1.55 per bushel, and he is entitled to that price for 1,348 bushels less $226.60 received for the quantity thereof sold to the defendants, and less storage charges of one-thirtieth of a cent per bushel per day after the expiration of the first 15 days from the date of delivery, September 26, 1914, which 15 days were free from storage, up to February 5, 1915.

Costs to the plaintiff. *Judgment for plaintiff.*

THE KING v. CARLETON; Ex parte De Long.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., and White and Grimmer, JJ. April 20, 1917.

JUSTICE OF PEACE (§ III—10)—STIPENDIARY MAGISTRATE—TERRITORIAL JURISDICTION IN CIVIL CASES.

Under the New Brunswick Statutes (C.S.N.B. 1903, ch. 119, as amended in 1915, ch. 22), a stipendiary or police magistrate has no civil jurisdiction where both the parties to the action reside outside the parish in which the magistrate resides, though within the county.

Statement.

APPEAL from the judgment of Grimmer, J., granting an order for *certiorari* and an order *nisi* to quash an order on review made by Carleton, J., of the Carleton County Court, setting aside a judgment in an action tried before Roy W. Cameron, Esq., stipendiary or police magistrate for the parish of Brighton Civil Court, in the County of Carleton.

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THE KING v. CARLETON.

White, J.

M. L. Hayward supported order *nisi* to quash; *J. R. H. Simms*, contra.

The judgment of the Court was delivered by

WHITE, J.:—This motion raises a question as to the meaning and effect of the Act 5 Geo. V., ch. 22. The Act, omitting the enacting clause, is as follows:—

1. The following section is substituted in lieu of sec. 4 of ch. 119 of the Consolidated Statutes, 1903.

4. Stipendiary or police magistrates, appointed under this chapter with civil jurisdiction, shall have civil jurisdiction in the county in which they reside, to the same extent, and in the same manner as parish Court commissioners have by the provisions of ch. 120 of these Consolidated Statutes; and the provisions of sec. 4 of said ch. 120 shall apply to stipendiary or police magistrates appointed under this chapter.

2. The Act, 1 Geo. V. (1911), ch. 38, is hereby repealed.

The section which, by this Act, is substituted for sec. 4 of ch. 119 of the Consolidated Statutes, is identical in language with sec. 4 of that chapter as amended and enacted by the repealed Act 1 Geo. V., ch. 32, save that, in lieu of the words, "sec. 7," found in the Act of 1911, are substituted the words, "sec. 4," in the Act of 1915.

If we have regard alone to the language of sec. 4, as enacted by the Act of 1915, and construe that language according to its plain, ordinary and natural meaning, it would seem quite clear that the legislature intended, by its enactment, to do just what the section declares, that is to say, to give every stipendiary magistrate, appointed under the chapter with civil jurisdiction, the like jurisdiction and procedure as is conferred upon the parish Court commissioners under ch. 120, of Consolidated Statutes of 1903. Turning to this ch. 120, we find that sec. 4 thereof provides that every commissioner,

shall have jurisdiction in the county in which he resides, and for which he may have been appointed a Justice of the Peace, over the following civil actions:

(*a*). Actions of debt, including any claim for a sum certain due upon a specialty, when the sum demanded does not exceed eighty dollars.

(*b*). Actions of tort to real or personal property when the damages claimed do not exceed thirty-two dollars; . . . but no commissioner shall have jurisdiction over civil actions where the King is a party, etc.

Sec. 6 of the same chapter provides:

Except as in the next section provided, no commissioner shall hold a Court for the trial of any action under this chapter unless the plaintiff or defendant, or some one of the plaintiffs or defendants, resides in the parish where such commissioner resides, or unless the plaintiff or defendant, or some one of the

plaintiffs or defendants, is a non-resident of the county, and no commissioner shall hold a Court for the trial of any action under this chapter in any other parish than that in which the commissioner resides, and for which he has been appointed.

Sec. 7 of the same chapter is as follows:

In case there be no commissioner of a parish Court in any parish, or in case the commissioner of any parish is unable to act by reason of sickness, kindred, or affinity to either party, or other inability, a commissioner of the parish Court in any adjoining parish in the county shall have jurisdiction in all cases as fully, and to the same extent, as if the parties in the suit resided in such adjoining parish, and such last mentioned commissioner may act and hold his Court either in the parish in which he resides or in which there was no commissioner as aforesaid.

It is, however, contended that the words in sec. 4, as enacted by the Act of 1915, "shall have civil jurisdiction in the county in which they reside," show the legislature intended that every stipendiary magistrate in a county should have jurisdiction in civil actions regardless of the place of residence of the litigants; and that the words, "to the same extent and in the same manner as parish Court commissioners have by the provisions of ch. 120," merely define the character and amount of the civil claims such magistrates can hear and determine, and the procedure to be followed.

As to the words, "shall have civil jurisdiction in the county in which they reside," the legislature, apparently, adopted them from sec. 4 of ch. 120. Yet there can be no doubt, that in enacting that chapter, the legislature did not intend to confer jurisdiction upon commissioners save where one of the litigants at least resided within the same parish as the commissioner, or, without the county; for that is expressly so provided by sec. 6 of the chapter. It is argued, however, that the legislature, in passing the Act of 1915, did not intend the jurisdictional limitation imposed by sec. 6 of ch. 120 to apply to stipendiary magistrates, because they left sec. 7 of ch. 119 unrepealed, and, therefore, in full force and effect. But, if we attempt to apply this sec. 7 to the amended sec. 4, construed as the plaintiff claims it should be construed, we find the legislature solemnly declaring the following absurdity: "Such magistrate shall not have, or exercise, the jurisdiction herein given unless the plaintiff or defendant, or some one of the plaintiffs or defendants, resides either within the territory wherein such magistrate has civil jurisdiction as such magistrate" (that is to say, if the plaintiff's contention is correct, resides within the county) or without the

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county. If, on the other hand, we construe the Act in question as intended to make the jurisdiction and procedure in stipendiary magistrate's Courts the same as that provided by ch. 120 for parish Courts, then sec. 7 of ch. 119, in effect, merely duplicates the provisions of sec. 6 of ch. 120. It might, therefore, have been omitted from ch. 119 had that chapter originally contained sec. 4 thereof as now enacted. But although sec. 7 has, now, no other effect than to declare what is otherwise provided in somewhat different language, by sec. 6 of ch. 120, made applicable to ch. 119 by sec. 4, the legislature may well have thought that to expressly repeal it by the Act of 1915, would have opened the door to an argument, that by such repeal the legislature had evidenced an intention to give stipendiary magistrates jurisdiction throughout the county regardless of where any of the litigants resides. Moreover, it is hardly possible to believe, that if the legislature intended their enactment of sec. 4 by the Act of 1915, to carry the meaning which the plaintiff, arguing in support of this motion, seeks to attach to it, they would have left unrepealed secs. 14 to 35 inclusive of ch. 119, each of which sections expressly declares the extent of the territorial jurisdiction which the magistrate therein named shall have and exercise, and provides that such jurisdiction shall be had and exercised within the parish. Secs. 4 to 11 of ch 119 do not apply to secs. 36, 37 and 38 of that chapter by reason of the provisions of sec. 40 of the chapter.

As these sections, 14 to 38 inclusive, are left unrepealed, the presumption is that they were intended to remain in force. Exclusive of the stipendiary magistrates provided for by these sections, and by sec. 39 of the same chapter, the number of stipendiary magistrates appointed with civil jurisdiction under the power conferred by sec. 1 of the chapter, as distinguished from those appointed under secs. 14 to 38 referred to, or under special Acts, is comparatively few. Hence, the result of adopting the construction of the Act of 1915, which the plaintiff contends for, would be to give to magistrates, appointed under the powers conferred by sec. 1 of the chapter, a different, and wider, jurisdiction than is possessed by the great majority of stipendiary magistrates. Thus, the Act, instead of securing that uniformity of jurisdiction which it was argued the enactment contemplated, would result in a greater want of uniformity than existed prior to its enactment.

Where the language of an Act is ambiguous and admits of two constructions, we should, I think, adopt that which is most in harmony with the intention of the legislature as evidenced in other legislation dealing with a like subject matter.

Finally, in the Act of 1911, referred to, the legislature used the identical words the construction of which is now in question. It is manifest that the legislature of that day, in enacting that Act, could not have intended these words to carry the meaning which the plaintiff seeks to have us attach to the same words in the Act of 1915. Because, under such a construction, the provisions of the 1911 enactment, that sec. 7 of ch. 120 should apply to stipendiary magistrates, would clearly be inapplicable and meaningless. It seems quite clear, therefore, that the legislature, in enacting the Act of 1911, intended to do that which the words used, construed according to their ordinary and natural meaning, imply, namely, to give stipendiary magistrates the like jurisdiction and procedure which commissioners of parish Courts have under ch. 120 of the Consolidated Statutes, 1903.

When we find the legislature in 1911 using these same words as in the enactment now in question, the presumption is that they intended these words to bear the same meaning as they had in the Act of 1911. It is suggested, indeed, that in the clause in the last mentioned Act which made the provisions of sec. 7 of ch. 120 applicable to stipendiary magistrates, the figure 7 was inserted by error for the figure 4; and that the purpose of the Act of 1915 is to correct this mistake. That, however, is a mere supposition and we could hardly accept it as fact and base upon it our construction of the language here in question. Nor does the supposition, even if accepted, help very much the argument for the plaintiff. Because, if his contention is correct, that the words, "to the same extent," used in the amended sec. 4 as enacted by the Act of 1915, clearly refer only to the nature and amount of the causes of action which stipendiary magistrates are given jurisdiction to try, then there would have been no necessity for the legislature to pass the Act of 1915, for the purpose of providing that the provisions of sec. 4 of ch. 120 should apply to stipendiary magistrates. The legislature would, in such case, naturally merely have repealed that portion of the 1911 enactment which made the provisions of sec. 7 applicable to such magistrates.

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McLeod, C.J.

I therefore, think the motion to quash should be refused and the order *nisi* to quash discharged.

McLEOD, C.J. (oral):—I concur in the judgment of my brother White, which is the judgment of the Court. I merely wish to add that no question of the propriety of bringing up by *certiorari* with a view of quashing an order of review made by a Judge of a County Court was raised in this case. An important question as to the jurisdiction of certain stipendiary or police magistrates was involved and the matter was heard, but it must not be taken as a precedent establishing the principle that this Court will, under ordinary circumstances, review by way of *certiorari* an order of a County Court Judge made on review. *Order nisi discharged.*

CAN.

S. C.

MARSHALL BRICK Co. v. YORK FARMERS COLONIZATION Co.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Duff, Anglin and Brodeur, JJ. February 19, 1917.

MECHANICS' LIENS (§ II—8)—"OWNER"—"MORTGAGEE"—UNPAID VENDOR —PRIORITIES.

An unpaid vendor who advances funds to the purchaser to build upon the land is not an "owner" within the meaning of sec. 2(c) of the Ontario Mechanics Lien Act (R.S.O. 1914, ch. 140), so as to subject the land to mechanics' lien for work done and materials furnished under contracts with the purchaser; but by virtue of sec. 14 (2) of the Act, such vendor is deemed a "mortgagee" for the purpose of giving priority to the liens upon the increased selling value of the land caused by the improvements. [*Marshall Brick Co.* v. *Irving*, 28 D.L.R. 464, 35 O.L.R. 542, affirmed.]

Statement.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario, 28 D.L.R. 464, 35 O.L.R. 542, *sub nom. Marshall Brick Co.* v. *Irving*, reversing the judgment of the official referee in favour of the appellants. Affirmed.

The respondents the York Farmers Colonization Co., Ltd., are a land company. They sold to one Irving, four lots on Edmund Avenue, Toronto, for $2,400, he paying a cash deposit of $120 and undertaking to erect four houses according to plans furnished by the vendors, the company to advance money for building purposes, and, when the houses were completed, deeds to be given to the purchaser on payment of the balance of the purchase price and re-payment of the advance with interest.

The property is under the Land Titles Act, R.S.O. ch. 126, and the agreement was not registered.

Irving proceeded to build the houses and these appellants supplied labour and materials therefor. The appellants registered mechanics' liens against the property under the Act (R.S.O. 1914,

ch. 140) and it is undisputed that they are now entitled to the liens as against Irving's interest in the property.

Irving became insolvent and the company exercised their right under their contract with him to serve notice of forfeiture. After the notice of forfeiture they took possession of the property and claim now to hold the houses free from any liability to the appellants under the mechanics' liens.

The houses when completed would have been worth about $2,400 each, that is to say, $9,600, independently of the land. The respondent company advanced $3,400 to Irving under the agreement. Two of the houses were about finished, a third was roofed in and the walls of the fourth up to the joists, leaving about $3,000 still to be expended to complete all four.

Statement.

The issue was tried before R. S. Neville, K.C., official referee, at Osgoode Hall, Toronto. He delivered judgment establishing the liens of these appellants as against the interests of both Irving and the York Farmers Colonization Co. in the lands in question.

From this judgment the York Farmers Colonization Co. appealed and the Second Appellate Division of the Supreme Court of Ontario reversed the judgment of the official referee, being of the opinion that the referee erred in finding that the liens of the appellants attached as against the interests of the respondent company in the property.

Sec. 6 of the Act (R.S.O. 1914, ch. 140) provides that:—

Unless he signs an express agreement to the contrary . . . any person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making, constructing . . . any erection, building . . . for the owner, contractor, or sub-contractor shall by virtue thereof have a lien for the price of such work, service, or materials upon the erection, building, . . . and the land occupied thereby or enjoyed therewith or upon or in respect of which such work or service is performed, or upon which such materials are placed or furnished to be used.

And sec. 8 (1) provides that:—

The lien shall attach upon the estate or interest of the owner in the property mentioned in sec. 6.

Owner is defined by sec. 2 (c):—

(c) "Owner" shall extend to any person, body corporate or politic, including a municipal corporation and a railway company, having any estate or interest in the land upon or in respect of which the work or service is done or materials are placed or furnished, at whose request and (i) upon whose credit or (ii) on whose behalf or (iii) with whose privity and consent or (iv) for whose direct benefit work or service is performed or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the

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Statement.

work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished.

Secs. 8 (3) and 14 (2) of the Act are as follows:—

8. (3) Where the land upon or in respect of which any work or service is performed, or materials are placed or furnished to be used, is incumbered by a prior mortgage or other charge, and the selling value of the land is increased by the work or service, or by the furnishing or placing of the materials, the lien shall attach upon such increased value in priority to the mortgage or other charge.

14. (2) Where there is an agreement for the purchase of land, and the purchase money or part thereof, is unpaid, and no conveyance has been made to the purchaser, he shall, for the purpose of this Act, be deemed a mortgagor and the seller a mortgagee.

Raney, K.C., and *C. Lorne Fraser*, for appellants.

B. N. Davis, for respondents.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I do not dissent from the judgment dismissing this appeal, reserving to the appellant the right to a reference under the conditions mentioned in Anglin, J.'s. notes.

Davies, J.

DAVIES, J. (dissenting):—This is an appeal from the judgment of the Second Appellate Division of Ontario, which reversed that of the official referee before whom the case was tried, which latter judgment maintained the claim of the now appellants to a lien against the interest of the respondents in the lands in question as "owners" under the Mechanics Lien Act, R.S.O. 1914, ch. 140.

The main question argued was whether the appellants were owners of the lands within the meaning of the word "owner" defined in the interpretation clause 2 (c) of that Act.

Subsidiary questions were also raised and argued whether, if the claimants were not such "owners" the "mortgage or other charge" which the respondents claimed to have as a prior claim to the appellants' lien was the balance of the purchase money of the lands sold by the respondents to one Irving, which amounted to $2,280 or that sum plus $3,400, which they had actually advanced to Irving under the agreement with him for the building of four houses upon the lands sold to him, in all $5,680.

The facts are not in controversy. The respondents, the York Farmers Colonization Co., Limited, are a land company. They sold to one Irving, four lots on Edmund Avenue, Toronto, for $2,400, he paying a cash deposit of $120 and undertaking to erect four houses according to plans furnished by the vendors, the company to advance money for building purposes, and, when the houses were completed, deeds to be given to the purchaser on payment of

the balance of the purchase price and re-payment of the advances with interest.

The property is under the Land Titles Act, and the agreement was not registered.

Irving proceeded to build the houses by a contractor, Campbell, and these appellants supplied labour and materials therefor. The appellants registered mechanics' liens against the property, under the Mechanics Lien Act, and it is undisputed that they are now entitled to liens as against Irving's interest, if any, in the property for the amount.

Irving became insolvent and the company exercised their right under their contract with him to serve notice of forfeiture. After the notice of forfeiture they took possession of the property and claim now to hold the houses free from any liability to the appellants under the Mechanics Lien Act.

The houses if completed would have been worth about $2,400 each, that is to say, $9,600, independently of the land. The respondent company advanced $3,400 to Irving under the agreement to build them. Two of the houses were about finished, a third was roofed in and the walls of the fourth up to the joists, leaving about $3,000 or more still to be expended to complete all four.

The agreement, after witnessing that the vendors agreed to sell and the vendee to buy from them lots as described for $2,400, went on specially to provide for the building on each lot by the vendee of a solid brick house to be used for private residences only, and that the vendors should lend him $6,400 for the construction of the four houses in instalments as the work progressed, which was to be applied only to the construction of such houses and that the houses should be built according to plans and specifications dated and signed by the vendors.

Many very special stipulations were inserted for the protection of the vendors' interests and to secure that, "the houses should not be used for any purpose that might deteriorate the adjoining property" which I therefore assume was the vendors.' Time was declared to be of the essence of the contract and discontinuance of the work at any time for two weeks gave the vendors the right to take possession, made the agreement "null and void" and forfeited to the vendor all moneys paid and improvements made thereunder.

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I think it necessary to state these facts, because, in construing this Mechanics Lien Act and the rights of the different parties thereunder, it seems clear that "each case must be governed by its own facts." A few general principles have been laid down in the decided cases and accepted as the law, such as that mere knowledge of or consent to the work is not either a "request" or "privity and consent" within the meaning of the interpretation clause, and in the case of *Orr* v. *Robertson*, 23 D.L.R. 17, at 18, 34 O.L.R. 147, at 148, Riddell, J., in delivering the opinion of the Appeal Court, said:—

> While, to render the interest of an owner liable, the building, etc., must have been at his request, express or implied, there is no need that this request be made or expressed to the contractor—if the owner request another to build, etc., and that other proceeds to build, by himself or by an independent contractor or in whatever manner, the building being in pursuance of the request, the statute is satisfied. The taking of a contract from Hyland to build is a request within the meaning of the statute.

I think this statement of the law as to the construction of the statute a correct one.

Dealing with the main question then, as to whether the respondents are under the facts proved "owners" of the land and buildings within the interpretation of clause (c) I am not able to agree with the conclusions reached by the Court of Appeal that the respondents were not "owners" within that clause. That clause (c) reads as follows:— (Quoted in statement.)

In the case before us, it is not disputed that the respondents had an interest in the land. The dispute is, whether there was a "request" and a "privity and consent" on the part of the respondents with respect to the work done on the buildings and the materials supplied for them for which the lien is sought.

I do not think, as I have said, a direct request is necessary from the owner to the workman or the materialman. Such a request must be one to be reasonably implied under the facts of each case: *Orr* v. *Robertson*, above cited, so decided and I agree with that construction of the statute. If that was not so the main purpose and object of the Act, namely, the protection of these workmen or material-men would be easily defeated. All that would be required would be the interposition of a third party between the real owner and the workman or materialman supplying the labour or the materials.

In the case now before us, therefore, I do not entertain any doubt on the facts as proved—alike on authority and on the con-

struction of the Act, apart from authority—that the work and materials for which a lien is sought to be established was done and materials supplied at the respondents' request. If that is so, I cannot find any difficulty in concluding also, that they were done and supplied with the privity and consent of the respondents.

This is not a case of *mere knowledge* or *mere consent* on the part of the respondent company. The agreement they made with Irving, to whom they sold the lot, specially provided for the building of these four solid brick houses in accordance with the plans the company had prepared and which they required him to sign. It also provided for the advance to Irving of a substantial portion of the cost of the buildings, and made very special provisions for the forfeiture, under certain circumstances of delay and otherwise, of all moneys paid by Irving to them, and of all improvements made by Irving upon the lands. Under these forfeiture provisions the company acted and the referee finds that Irving's interest was determined and is gone and that the ownership of the land and buildings now belongs to the company.

These facts shew that the action of the company was not that of mere knowledge or mere consent to the work being done, which the Courts have held to be insufficient. The agreement with Irving to build the houses and to advance him a portion of the money necessary to do so, was more than a mere request on their part that Irving should build. It bound him to build in accordance with plans and specifications provided by the vendors, respondents, and bound them to supply him with a substantial portion of the moneys necessary to enable him to carry out his contractual obligation—being careful, of course, to secure themselves by stipulations providing for time being of the essence of the contract, and for delay creating forfeiture and making the agreement null and void.

If the facts as proved in this case and the agreement under which the houses were partly built, do not constitute a "request" under the statute, I am at a loss to know what facts would. It does seem to me, therefore, that not only was there a "request" to build, but there was necessarily involved in the agreement to build, the actual building and the advances made by the respondents of the moneys they contracted to supply from time to time as the work progressed, the "privity and consent" also required

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by the section of the statute. It surely was not necessary that there should be direct contractual relations proved between the respondents and the lien claimants for the materials they supplied the contractor and the actual labour they performed. But the fair and reasonable inference from the proved facts, is, that there was alike such "privity" and "consent" of the respondents as satisfies the statute.

Davies, J.

Having reached these conclusions, holding the respondents "owners" under par. (*c*) of the interpretation clause of the Act, it is not necessary for me to deal with the other questions raised on the argument.

I would allow the appeal with costs and restore the judgment of the official referee.

Duff, J.

DUFF, J.:—I concur in dismissing this appeal. I agree with the conclusions of Meredith, C.J., and the reasons assigned therefor.

Anglin, J.

ANGLIN, J:—Although the Mechanics Lien Act (R.S.O. ch. 140) in sec. 14 (2) expressly declares that an unpaid vendor who has not conveyed shall, "for the purposes of this Act, be deemed a mortgagee," it seems reasonably clear that if he fulfils the requirements prescribed by the statutory definition of that term he may also be regarded as an "owner." I am not convinced, however, that the Appellate Division erred in holding that the respondent company was not an owner.

As an unpaid vendor the company was not an owner apart from the statutory definition. That definition sec. 2 (*c*) extends the meaning of "owner" to include a person

> having any estate or interest in the land . . . at whose request and . . . with whose privity and consent . . . (the) work or services are performed or (the) materials are placed or furnished,

in respect of which the lien is claimed. Upon the authorities holding that the "request" may be implied, of which it is necessary to refer only to *Orr* v. *Robertson*, 23 D.L.R. 17, 34 O.L.R. 147, the contractual provision by which the respondent company required its purchaser to erect buildings on the land according to approved plans and specifications and within a defined period may have amounted to a "request" under the statute, although an opinion to the contrary was expressed at the conclusion of the judgment delivered in this case by Riddell, J., 28 D.L.R. 464, 35 O.L.R. 542, at 551-2. The Judge's reasoning, however, rather points to an absence of the requisite "privity and consent."

While it is difficult if not impossible to assign to each of the three words "request," "privity" and "consent" a meaning which will not to some extent overlap that of either of the others, after carefully reading all the authorities cited I accept as settled law the view enunciated in *Graham* v. *Williams*, 8 O.R. 478, 9 O.R. 458, and approved in *Gearing* v. *Robinson*, 27 A.R. (Ont.) 364, at 371, that "privity and consent" involves

> something in the nature of a direct dealing between the contractor and the persons whose interest is sought to be charged . . . Mere knowledge of, or mere consent to, the work being done is not sufficient.

There is no evidence here of any direct dealing by the respondent company with the purchaser's contractor such as is necessary to establish the "privity" requisite to constitute the respondent company an "owner" within the definition of the Mechanics Lien Act.

Failing to establish the respondent's interest as "owner," the appellants prefer a right to a lien under sec. 8 (3) of the Act upon "increased selling value." In making this claim they assert the position of the respondent company to be that of a mortgagee. In so doing they necessarily invoke the agreement for sale since it is as an unpaid vendor that the statute declares the respondent to be a mortgagee (sec. 14 (2)). Invoking that agreement they must take it as a whole, including its provisions for advances to be made to the purchaser secured by the stipulation for re-payment before conveyance. The priority of this "charge" on the land does not depend on registration but upon its existence as a charge before the lien arose: *Cook* v. *Belshaw*, 23 O.R. 545. Under sec. 14 (1) the mortgage or charge is to be regarded as a "prior mortgage" only in respect of payments or advances made before notice in writing or registration of the lien. To the extent to which the selling value of the property has been increased by the work or services performed or the materials furnished by the plaintiffs the company's interest as such prior mortgagee is subject to the plaintiffs' lien (sec. 8 (3)): *Patrick* v. *Walbourne*, 27 O.R. 221, at 225-6.

At the trial before the official referee the plaintiffs expressly abandoned this right to a lien upon increased selling value. They were, nevertheless, as a matter of grace, offered in the Appellate Division an opportunity to apply for "a reference to permit of their claims being reviewed on the basis of the company being

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only prior mortgagees." They failed to take advantage of the indulgence thus extended. In view of these facts they would have no ground for complaint if this branch of their appeal to this Court were not entertained. But, taking all the circumstances of the case into account, I think the ends of justice will be best attained by allowing them, if so advised, even at this late date, to take a reference in the terms which I have quoted from the judgment of the Chief Justice of the Common Pleas.

The respondent is of course entitled to its costs of this appeal and these costs as well as the costs awarded them in the Appellate Division may be set off against any amounts for which the appellants may establish liens on the reference, should they take it.

Brodeur, J.

BRODEUR, J. (dissenting):—This appeal has reference to the application and construction of the Mechanics and Wage-Earners Lien Act of Ontario (R.S.O. 1914, ch. 140).

The appellants have established their claims and we have now to decide whether or not those claims affect the interests of the respondent company. According to sec. 8, sub-sec. 1, the lien shall attach upon the estate or interest of the "owner" in the property. We have then to find out whether the company should be considered an "owner."

The respondent company was the proprietor of the lands in question in this case and, on July 17, 1914, it entered into an agreement with a man by the name of Irving, by which the company agreed to sell and Irving agreed to buy the said lands for a sum of two thousand four hundred dollars ($2,400).

The agreement recited that Irving desired to build four houses on the lands and required to borrow money for that purpose, and the company agreed to lend him a sum of $6,400, which was to be advanced for the construction of the houses during the progress of the building operations. The agreement provided that the houses should be built according to certain plans and specifications.

It was agreed also that the work would begin on July 20, 1914, and be completed in the month of November of the same year, and it was further stipulated that the company should pass a deed of the property within one month after the houses would be completed if Irving re-paid the company all the moneys advanced and the purchase price.

It was also agreed that time would be of the essence of the

contract and that if the work should, at any time, be discontinued for two weeks the company would have the right to take possession of the property and the agreement of sale would become null and void.

The agreements of sale are contemplated by the Mechanics and Wage-Earners Lien Act, sec. 14, sub-sec. 2, which declares that

Where there is an agreement for the purchase of land, and the purchase money or part thereof is unpaid, and no conveyance has been made to the purchaser, he shall, for the purposes of this Act, be deemed a mortgagor and the seller a mortgagee.

This is not, however, all the law on the matter; and, as was stated by the Chief Justice in the Court below,

that, however, does not prevent mortgagees from being more than mortgagees, they are "owners" if they come within the definition of that word contained in the interpretation clause of the Act.

The definition is contained in sec. 2 (*c*); which declares that:—(Section printed in statement).

The question then to be determined is whether the building has been built at the request of the respondent company and with its privity and consent.

The company appears to be the proprietor of a large number of vacant lots in the vicinity of Toronto, and the form of agreement entered into in this case between the defendant company and Irving is one which has been in use by the company and its predecessors for many years. Instead of having those vacant lots built on by the company itself they make arrangements with some contractors, as they have done in this case, because Irving is a contractor and is so called in the deed, by which those contractors obligate themselves to build and if they fail to carry out their contract during a certain period of time then the buildings become the absolute property of the company. If, on the other hand, the contractor carries out his contract, builds the houses and reimburses the money which had been advanced by the company for their construction, and if he pays the price agreed upon for the sale of the land itself, then the contractor is entitled to a conveyance.

Those contracts of the respondent company had to be considered by the Court in the unreported case of *Toronto Junction Co.* v. *Armstrong and Cook*. The referee tells us in his judgment that the case was tried before the late Master in Chambers and it is contended that the interest of the company was declared to be

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charged with the lien; but unfortunately this case is not reported, and it is contended, on the other side, that the judgment which has been rendered has not that effect.

It was decided in the case of *Orr* v. *Robertson*, 23 D.L.R. 17, 34 O.L.R. 147, that a contract similar in many respects to this one should be construed as constituting on the part of the respondent a request. If the company had simply agreed with Irving, that it would advance to the latter the necessary money for erecting the buildings, then the relations would be those of mortgagor and mortgagee. But when Irving obligates himself towards the company to erect those buildings, then I would consider that the obligation contracted by Irving is such that he should be considered as having been requested by the company to erect the buildings and that the latter erected them with its privity and consent.

This case is distinguished from the case of *Graham* v. *Williams*, 8 O.L.R. 478, much relied upon by the respondents; because in that case the builder or the intended purchaser never obligated himself to build, it was purely and simply a case of the owner permitting his lessee to erect some buildings and to advance him some money. There was no formal obligation on the part of the contractor to build and the proprietor could not force the intended purchaser to build. It is a very different case from this one, where the contractor has bound himself to build. The company was entitled to retain the building if the contractor had not finished it within a certain time.

The case of *Garing* v. *Hunt*, 27 O.R. 149, has also been cited on behalf of the respondents.

That case is also, in some respects, based upon a contract very similar to the contract which we have to examine in the present case, but the relations between the parties were those of lessor and lessee, and Falconbridge, J., who rendered the judgment, relied on the fact that a formal consent in writing had not been given, as provided by sec. 5 (2) of the Act which declared that in cases where

> the estate or interest charged by the lien is leasehold, the fee simple may also with the consent of the owner thereof, be subject to such charge, provided such consent is testified by the signature of such owner upon the claim of lien at the time of the registering thereof and duly verified.

That section cannot be invoked in the present case. Irving was not the lessee of the York Farmers Company but an intending purchaser.

There is also the case of *Gearing* v. *Robertson*, 27 A.R. (Ont.) 364, which is invoked by the respondents, where the parties were lessors and lessees; and Mr. Shepley, who argued the case for the lessors, claimed also that there was no liability because under sec. 2 of sub-sec. 7 there was no consent in writing.

In the case of *Gearing* v. *Robertson*, *supra*, the lease also contained a clause that the lessee was allowed to make some changes in the intended structure of the building, but the lessee never bound himself, as in the present case, to make those improvements. It was simply stated that if the improvements were made the lessee would have the right to be reimbursed at the expiration of the lease.

The request certainly did not exist in that case.

The contract that we have to deal with in this case is a very different one from those which had to be construed in the last three cases relied upon by the respondent and then those cases have to be distinguished from the present case.

It may be urged that the terms of this contract do not contain any clause by which a formal request has been made by the proprietor to build houses on his property for the contract declared that the intended purchaser desires to build and much stress is laid upon the word "desires."

But the contract has to be construed by all its clauses and if the contract is made in such a way as to defeat the Mechanics Lien Act, I should say that such an agreement should be held against public order (sec. 6).

I have come to the conclusion that the respondent company should be considered an "owner" under the provisions of the Mechanics Lien Act, and that its interest should be charged with the lien claimed by the appellant.

The appeal should be allowed with costs of this Court and of the Court below. *Appeal dismissed.*

GASS v. DICKIE.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Drysdale and Longley, JJ. April 21, 1917.

JUDGMENT (§ I G—55)—CORRECTION—OF CONFIRMED REFEREE'S REPORT.

A description of land in a referee's report cannot be amended summarily, under a Judge's order, after the report has been confirmed by a judgment of Court.

Statement.

APPEAL from the order of Chisholm, J., made at Chambers, directing that the report of the referee be referred back to him

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for amendment, on the ground of mistake, notwithstanding the fact that after the making of the report it had been confirmed by order of the Court, made by Ritchie, E.J. Reversed.

H. Mellish, K.C., for appellant; *W. A. Henry*, K.C., for respondent.

Russell, J.

RUSSELL, J.:—This was an application to a Judge at Chambers to remit a case back to the referee in order that he might investigate a question as to the correctness of a description of land which had been sold to satisfy a charge thereon pursuant to an order of this Court. The question was as to what land was included in the term "homestead" as used in a devise or deed. The applicant had full opportunity to adduce evidence on the point if he thought fit to do so and the referee fully considered and deliberately settled what lands should bear the charge in question and in what proportion the burden should be borne. He then made his report and it was confirmed by the Court. The cases shew that if an order is made which correctly formulates the judgment of a Court it cannot be changed by the Judge because the judgment was wrong. It is only clerical mistakes or slips that can be amended in this summary way. The present application seems to me to be more like an application for a new trial upon the discovery of fresh evidence than the correction of a clerical mistake.

I think, therefore, that the appeal must be allowed with costs.

Graham, C.J. Drysdale, J.

GRAHAM, C.J., and DRYSDALE, J., concurred.

Longley, J.

LONGLEY, J. (dissenting):—In this case I am satisfied there has been a mistake and that the property which is now in dispute was that embraced in the will of the late James Gass, deceased. The only question is whether the Court has power to make the change which has been made by Chisholm, J., in this case.

The only difficulty is in respect to the point taken by the defendant's counsel that the Court has no power to make any such change.

I have examined the cases cited by counsel for the plaintiff and I am perfectly satisfied that the Courts are prepared to make changes under any circumstances where a mistake has been made. The Courts in England have been regular in their decisions in remedying mistakes. In the case where the matter had been referred to the Court upon a judgment of the referee as to

the amount due on a certain claim, the referee made the mistake of allowing some years' interest too little and the Court in that case, several years after the judgment, made an order permitting the remainder of the interest to be ascertained and decided upon. I think that case fits the present one, and I give judgment upholding the order granted by Chisholm, J. *Appeal allowed.*

TRAFTON v. DESCHENE.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., and White and Grimmer, JJ. March 16, 1917.

LIBEL AND SLANDER (§ II E—65)—PRIVILEGED COMMUNICATION—COURSE OF DUTY—CONSTABLE—PUBLICATION.

The publication of a slander in the course of an effort to ferret out a crime is not privileged on the part of a person who believed he was a constable, and acting as such, if in fact he was not a constable.

Statement.

MOTION to set aside the verdict for the defendant and enter a verdict for the plaintiff or for a new trial on the ground of improper admission of evidence in an action for slander.

The judgment of the Court was delivered by

Grimmer, J.

GRIMMER, J.:—This action, which is for slander, was tried before Barry, J., and a jury at the last Restigouche Circuit Court.

The plaintiff alleged the defendant made certain statements charging her with giving medicine to a girl named Fortin for an improper purpose.

The defendant denied speaking the words complained of, pleaded justification, and at the trial added a special plea in which he alleged he was a constable and peace officer for the county of Restigouche, and that he spoke the words in the course of his duty as a constable and peace officer believing them to be true, and for the purpose of securing information so that the criminal laws of the country might be vindicated.

Upon answers of the jury to questions, the Judge ordered a verdict to be entered for the defendant. The plaintiff now appeals. The evidence of the plaintiff, in my opinion, fully sustains all the allegations made against the defendant, who was clearly proved to have uttered and circulated the statements attributed to him by the plaintiff. On the trial the defendant was permitted to answer questions, which, under his plea of justification, I think, were improperly allowed, and may have, in a measure at least, influenced the minds of the jury in some of their findings.

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The defendant was asked subject to objection: "Did you tell Martin what Napoleon Bergeron had told you concerning Mrs. Trafton and the Fortin girl?" I cannot see upon what ground this question was allowed. I do not conceive it to be the law, that a person having heard a rumour or statement, which charges another with the commission of a criminal offence, is entitled to circulate the report and send it broadcast through the community, which impression it may fairly be assumed, the result of the question would create in the minds of the jury, with after effect upon their verdict.

Every repetition of a slander is a wilful publication of it, rendering the speaker liable to an action. "Tale bearers are as bad as tale makers," is a well established maxim. It is no defence that the speaker did not originate the scandal, but heard it from another, even though it was a current rumour and he believed it to be true: *Watkin* v. *Hall* (1868), L.R. 3 Q.B. 396.

It is no defence that the speaker at the time named the person from whom he heard the scandal: *McPherson* v. *Daniels* (1829), 10 B. & C. 263 at 270.

Even if the defendant, as he pleaded at the trial in amendment, as a constable in the exercise of his duty, had honestly been endeavouring to ferret out crime, he could not, in my opinion, justify the circulation of the rumour he had heard. The defendant was also, in my opinion, improperly allowed to answer whether or not he was actuated by malice at the time, if he honestly believed he was a constable, in speaking to different parties of the subject-matter of the complaint, and whether or not he had any intention of hurting, or doing damage to the plaintiff, this being a very important fact in the case, which the jury particularly had to find and pass upon.

Neither do I think the defendant should have been allowed to state his opinion of what he considered his duties as a constable were, or what he was in duty bound to do in ferreting out the truth of rumours he may have heard, and then circulated. The duties of constables have been described as original or primitive as conservators of the peace, and secondly as ministerial and relative to justices of the peace, coroners, sheriffs, etc., in obeying their precepts and warrants. They have also statutory duties to perform, but they have no right or authority to undertake

functions which are not prescribed by law, or statute, nor can they escape from the result of their improper acts, by their imagination of what they considered their duties to be. In this case the defendant had been appointed a constable some three years before the commencement of this action. He had never been notified of re-appointment nor had he been re-sworn, and yet he seeks to obtain relief in this suit by claiming he was a constable engaged in tracking down crime.

Constables by statute are appointed from year to year, and the defendant cannot have been very much impressed with the importance of his position, as, by the evidence, he did not perform one official act during the time he was a constable, and while his appointment was made in 1913, he had never been notified of re-appointment, nor had he acted in the capacity of constable, or been called upon to do so. But had the defendant been a constable duly appointed and acting, he could not, in my opinion, justify his course in this case as he was not authorized by law to investigate the rumours, and he was not acting under orders from a justice of the peace, or some higher authority. I am, therefore, of the opinion there was a misdirection on the part of the Judge to the jury when he told that as a matter of law,

whether the defendant was not in fact a constable and honestly believed he was pursuing his duty when he was making inquiries, then whether he was a constable or not makes no difference, and that, if believing he was a constable and acting in what he conceived to be the public interest, in the discharge of his duty as an officer of the law, he went around and made inquiries of the people whom he thought would be likely to know whether the rumours were true or not, with a view, if they were true, of bringing the plaintiff to justice, and if he did it in a discreet and honest way, and did not wantonly and unnecessarily promulgate, repeat and publish these rumours to the world, then I tell you, as a matter of law, the defendant is blameless, he did no more than was his right and was his duty.

This direction to the jury was founded upon the assumption that the occasion was privileged, and that the utterances would be excused if the defendant had used the privilege fairly and honestly in the course of duty, which I think was calculated to mislead the jury, and confuse them as to the real issue and what the question was for them to decide. I am unable to agree that the occasions were privileged. In slander or libel the term "privileged communication" comprehends all cases of communications made *bonâ fide* in pursuance of a duty, or with a fair and reasonable purpose of protecting the interest of the party uttering the defamatory matter: *Somerville* v. *Hawkins* (1851), 10 C.B. 583 (138 E.R. 231).

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Privileged communications are of four kinds, viz.:—

(1). When the publisher of the alleged slander acted in good faith in the discharge of a public or private duty, legal or moral, or in prosecution of his own rights or interests.

(2). Anything said or written by a master concerning the character of a servant who has been in his employment.

(3) Words used in the course of a legal or judicial proceeding.

(4). Publications duly made in the ordinary mode of parliament: *Clark* v. *Molyneux* (1877), 3 Q.B.D. 237.

The jury found that the defendant spoke the words complained of; that they were not true; that they were likely to be understood in the manner in which it is alleged they were understood; that in investigating the rumours which he heard concerning the plaintiff, the defendant was not acting as a constable endeavouring to ferret out crime; that he was not legally entitled to act as a constable at the time he uttered the words charged; and that in making the statements he made them as rumours and not as true statements.

Under these findings I do not think the Judge was right in holding the occasion was privileged, and the verdict should not have been entered for the defendant, as under all the evidence, if there was no privilege and no justification, the verdict should have been for the plaintiff. In answer to a question put by the plaintiff, the jury found that the defendant believed he was acting as a constable, honestly discharging his duty as such, which answer largely influenced the Judge in directing the verdict for the defendant. In my opinion, there was no evidence to justify this finding; it was against the weight of evidence, and the jurors as reasonable men were not justified by the evidence in coming to this conclusion. This answer, too, was directly in the face of their other findings that the defendant was not a constable, nor legally entitled to act as such, and that he was not acting as a constable endeavouring to ferret out crime.

In order to prevent further litigation in this matter the learned Judge directed the jury to assess damages on the basis of having found a verdict for the plaintiff; and the damages have been assessed at $50. Under all the circumstances of the case, I am of the opinion this appeal should be allowed and a verdict entered for the plaintiff for this amount with costs.

Verdict set aside; judgment for plaintiff.

SHEPHERD v. CITY OF MONTREAL AND CANADIAN AUTOBUS Co.

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Quebec Court of Review, Archibald, A.C.J., Fortin and Guerin, JJ.
February 9, 1917.

MUNICIPAL CORPORATIONS (§ II C—60)—ATTACKING BY-LAW, RESOLUTION OR CONTRACT—PROCEDURE—INTEREST OF RATEPAYER.

Under the provisions of the charter of the City of Montreal, a municipal resolution may be attacked by petition to the same extent as a by-law; but a contract or franchise approved thereby cannot be attacked by such procedure. A ratepayer without any other special interest has no legal status to launch such attack.

[*Robertson* v. *Montreal*, 26 D.L.R. 228, 52 Can. S.C.R. 30, affirming 23 Que. K.B. 338, followed.]

Statement.

APPEAL from the judgment of the Superior Court rendered by Demers, J. Affirmed.

A petition presented in December, 1912, by plaintiff asked to annul and set aside a by-law of June 10, 1912, and a resolution of August 14, 1912, adopted by the council of the City of Montreal, approving a contract to be made between the city and the Canadian Autobus Co., to allow this latter to run a line of autobusses on certain streets of the city. The grounds of the demand were substantially the following: (*a*) The City of Montreal had not the power to grant an exclusive privilege; (*b*) if, however, it had this privilege, it could only be exercised by by-law; (*c*) the by-law does not purport to authorize a contract, conferring an exclusive privilege. The defendant and the *mise-en-cause* contested the petition and maintained the legality of the resolution and by-law; and alleged that the petitioner was without interest in his petition as he was not suffering any prejudice; and moreover he could not proceed, as he has done, by a petition. The Superior Court dismissed the petition.

Desaulles and *Garneau*, for petitioners.

Laurendeau and *Archambeault*, for defendant.

Guerin, J.

GUERIN, J.:—Art. 304 of the charter of the City of Montreal, 62 Vict. ch. 58, (1899) enacts:

Any ratepayer, in his own name, by petition presented to the Superior Court . . . demand the annulment of any by-law on the ground of its illegality.

Art. 300, as amended by the charter of the city, 2 Geo. V. (1912), ch. 56, sec. 12, sub-sec. (137), empowers the city:

to permit, under such conditions and restrictions as the city may impose, the circulation of autobusses and the establishment, maintenance and operation of autobus lines in the city of Montreal; to prescribe on which streets they may circulate and be established, and from what streets they may be excluded; subject to the provisions of arts. 1388 to 1435 of the Revised Statutes, 1909, governing motor vehicles, respecting speed limits, the registration of vehicles and the licenses of owners and chauffeurs.

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Guerin, J.

The impugned by-law is general in its provisions, and does not purport to authorize the granting of any exclusive privilege. It is not suggested that any legal formalities required for its passage have been omitted.

There is no ground of illegality to justify its annulment; the by-law is without a fault, and should stand.

This being the case, it would seem that all the conclusions of the petitioner must be dismissed. As a ratepayer he had the right by petition presented to demand the annulment of the by-law on the ground of its illegality—nothing more. This is a special right conceded to ratepayers by statute. If the petitioner has the proper status he may prosecute his rights by direct action, and by petition; art. 304 concedes to the ratepayer the right to contest the by-law on the ground of illegality; no mention is made of resolutions of the council.

The Judge who rendered the first judgment points out, however, that art. 565 of the charter enacts that all laws incompatible with the dispositions of the charter, 62 Vict. ch. 58, are repealed, and that the old charter (1889), specially mentioned resolutions. This is art. 144 of the charter, 52 Vict. ch. 79, which enacts:

> Any municipal elector, in his own name, may by petition presented to the Superior Court, demand and obtain, on the ground of illegality, the annulment of any by-law, resolution, assessment roll or apportionment.

As the right to contest a resolution by petition is not incompatible with the right to contest a by-law by petition the right of petitioner in the present case to attack the resolution of August 14, 1914, is to be conceded, but there is nothing in either the old or the new charter of the city which authorizes this special procedure of petition to impugn the contract of August 22, 1914.

As regards the merits of the petition to set aside the resolution of August 14, 1914, it will serve no useful purpose to engage upon a discussion; for it is to be observed that by direct action the same by-law, resolution and contract have already gone through the crucible of the Superior Court and of the Court of King's Bench in the case of *Robertson* v. the same defendant and the same *mise-en-cause*, 23 Que. K.B. 338. On May 28, 1913, the Superior Court, Demers, J., dismissed this action, which was founded on the same reasons as those mentioned in the petition which is now under consideration. On January 10,

1914, this judgment was unanimously confirmed by the King's Bench, Archambeault, C.J., Trenholme, Lavergne, Carroll, and Gervais, JJ. It was then held that there was no error in the judgment of Demers, J., appealed from.

Subsequently, on appeal to the Supreme Court of Canada, 26 D.L.R. 228, 52 Can. S.C.R. 30, a majority of the Court affirmed the decision of the Court of King's Bench, on the ground that the plaintiff, being a ratepayer without any other special interest, had not the legal status to institute the action against the present defendant and *mise-en-cause*.

Referring to the right which the petitioner has exercised in the present case under art. 304 of the charter of the City of Montreal, 62 Vict., ch. 58, Fitzpatrick, C.J., added:

> I do not doubt, however, that but for this provision, individual ratepayers would have no right to take action such as this section expressly confers upon them.

Robertson made a final attempt to be allowed to appeal to the Privy Council; his petition was rejected.

Under the circumstances until a higher authority than our Court of King's Bench has spoken on the merits of the petitioner's demand, the judgment in appeal confirming that of the Superior Court is to be respected as disposing of the petitioner's pretensions.

I am, under the circumstances, of opinion that the final judgment of the Superior Court of May 28, 1913, dismissing the petition should be confirmed, and that the inscription in review should be dismissed with costs against the petitioner-appellant.

ARCHIBALD, A.C.J.:—The same issues are raised in this case as were raised in the case of *Robertson* v. *Montreal and Autobus Co.*, 23 Que. K.B. 338, affirmed in 26 D.L.R. 228, 52 Can. S.C.R. 30, the only difference being that in the latter case the action was a direct action. There the case was dismissed in the Superior Court and that judgment unanimously confirmed by the Court of Appeal and again confirmed by a majority in the Supreme Court.

We are bound by this judgment and the judgment dismissing the present petition must be confirmed. I am of opinion to confirm.

Appeal dismissed.

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QUEBEC BANK v. PHILLIPS.

Saskatchewan Supreme Court, Haultain, C.J., and Newlands, Lamont and Elwood, JJ. March 10, 1917.

BANKS (§ VIII B—170)—PROHIBITED SECURITIES—LAND—ADDITIONAL SECURITY.

A certificate of title intended as security on land, for an advance by a bank, delivered at a time when a new note was taken on the transaction, held, *per* Haultain, C.J., and Elwood, J., to be a prohibited security under sec. 76 (2) (c) of the Bank Act (R.S.C. 1906, ch. 29); *per* Newlands and Lamont, JJ., that it amounted to a security for a past due debt permissible under sec. 80 of the Act.

[*National Bank of Australasia* v. *Cherry*, L.R. 3 P.C. 299, considered.]

Statement. APPEAL by plaintiff bank from a judgment declaring the deposit of a certificate of title a prohibited security under sec. 76 (2) (c) the Bank Act. Dismissed by divided Court.

W. H. McEwen, for appellant; *J. A. Allan*, K.C., for respondents.

Haultain, C.J. HAULTAIN, C.J.:—Some time in December, 1911, William Phillips applied to the manager of the plaintiff at Herschel, Sask., for a loan of $5,000. This application was referred to the general manager of the bank by the local manager by the following letter:—

The General Manager, Head Office. Herschel, Sask, 7th December, 1911.

APPLICATION FOR LOAN, WILLIAM PHILLIPS.

Dear Sir:—I enclose a copy of Mr. Phillips' statement given me to-day. He asks for a loan of $5,000 for no definite period. Mr. Phillips is building a hotel here, and intends that his two sons shall manage it when completed, probably in about a month's time. This hotel will cost somewhere in the neighbourhood of $5,000 and it is to clear the expense upon this that the loan is asked for.

Mr. Phillips has a son who has recently completed his term on his homestead, and I have in my possession a letter from the government stating that the title will most likely be granted if a house is erected thereon. The house will shortly be completed, and as soon as the title is to hand, which will probably be two months, Mr. Phillips will deposit it with us in support of his statement.

I feel perfectly satisfied that the hotel will pay well, judging by the business done in the hotels in the neighbouring villages. The one at Rosetown is supposed to make a clear profit of $900 per month. There is no boarding-house of any description at Herschel, and on an average of three travellers per day have to drive a distance of 20 miles to stay the night. The district is also a very extensive one, and a large number of farmers pass through Herschel daily.

Applicant is also a good farmer and much respected by Herschel people.

The land on which the hotel is being erected cost about $450, there still being $200 owing on it. I can arrange with Mr. Phillips to pay this up, and I have no doubt that he will deposit this deed with us also.

If we fail to advance the money, the Union Bank at Rosetown have

promised to see him through it. I wrote to the Union Bank some two weeks ago, asking them for their opinion of Mr. Phillips, but have received no reply.

The land I refer to as being held by the son is the N. W. ¼ section 4-31-17 and is considered worth $4,000 at least. The term of tenancy was completed in September last.

Mr. Phillips is rather anxious about this, so you will kindly wire reply as soon as possible. Mr. Phillips will pay the cost of the wire.

I have pleasure in recommending the advance, and hope the reply will be favorable. L. CALDECOTT, manager.

P.S.: The flax in the statement I have priced at $1.50 only; this, if held until spring, will be worth anything from $2 to $3 per bushel and will realize about $2,500. Mr. Phillips has practically no debts.

The loan was approved by the general manager on December 15, by a telegram which was confirmed by the following letter:—

L. Caldecott, Esq., Herschel, Sask. Quebec, December 15, 1911.

I wired to-day that you could give Mr. Phillips an advance of $5,000, provided that he deposits with you clear title to the hotel property.

It may take a short time for him to procure the title, in the meantime he can give you a letter undertaking to procure the title, stating he will deposit it with you as soon as it has been secured. I enclose a form which you should fill out and have signed by him in this connection.

You can also take a letter from him, stating that he will deposit with you the N. W. ¼ 4-31-17 held by his son. This credit will require to be revised on the first of December, 1912. B. B. STEVENSON, general manager.

The telegram could not be produced by the plaintiff.

The advance of $5,000 was made and a 6 months' note for the amount, dated December 15, 1911, was given to the bank by William Phillips and the defendant Amos Gordon Phillips, the son mentioned in the previous correspondence.

At the same time, an agreement or letter was taken from Amos Phillips with regard to the deposit of the certificate of title to his farm as soon as it was granted.

The evidence as to when this agreement or letter was given is conflicting, but I am inclined to accept the evidence of Amos Phillips that it was given on the same day the loan was made. This letter was not produced at the trial, and both Caldecott and counsel for the bank admitted that it could not be found. There was some evidence given as to the meaning of the phrases "deposit in support of his statement" and "deposit for safe custody," but the undoubted intention of the deposit of the certificate of title was for security. If that was not the intention, then, as stated by the trial Judge, the bank has no claim under it against the defendants.

Any question as to this is entirely removed by the statement

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Haultain, C.J.

in the caveat filed later on by the bank against the land in question, that the bank claimed an equitable interest in the land under "and by virtue of a certain hypothecation in writing given by Amos Gordon Phillips, dated December 22, 1911." This statement is sworn to by Caldecott in the affidavit supporting the caveat. As to the date of the letter, Phillips swears positively that it was given on December 15, 1911, while Caldecott is not very definite on the point. In any event, the letter whenever written was given in pursuance of the prior verbal agreement and must relate back to the earlier date.

William Phillips died about December 22, 1911, and in February, 1912, certain negotiations took place between the bank and his sons. Caldecott's account of these negotiations and the ensuing transaction is as follows:—

> Possibly the middle of February, 1912, the 3 sons of the late William Phillips, that is, William H., Amos Gordon and Andrew J. Phillips, met together in my office one evening, and after considerable conversation as to their shares in the estate and in regard to a settlement, the question arose about assuming the loan which Mr. Phillips and the son Gordon owed to the bank. I explained to them I was quite agreeable and willing to take a joint and several note from the 3 sons and surrender the old note signed by Mr. Phillips and the son Amos Gordon; I also explained in the conversation to them that I had spoken to Gordon Phillips and he was quite agreeable to deposit title of the land when it came to hand to secure the bank on account of the debt. I explained that the death of Mr. Phillips materially affected, in our opinion, the security we had. There was a great deal of the personal element. I think that is all.

In his examination for discovery, Caldecott said that the December note "was surrendered to the sons at the time the estate was wound up; at the time the sons assumed the indebtedness." Also, on the same occasion, in answer to the question: "Do you remember the circumstances in connection with the surrender of the note?" he said "Yes, the three sons, Amos Gordon, William H., and Andrew J. Phillips, came into my office one evening. The question arose as to the disposition of the estate of the father, and I agreed to make a joint and several note from the 3 sons to assume the debt of $5,000 and surrender the note signed by the late father. This was agreed upon after they had agreed as to their share of the estate. I also explained to them that the bank considered the death of William Phillips materially weakened our security as there was a great deal in the personal element."

The defendant Phillips denies that there was any mention of the deposit of his certificate of title at any time during these negotiations, and the trial Judge evidently accepts his evidence on this point. The fact that the certificate of title was not actually delivered to the bank until a later date does not necessarily support Caldecott's evidence, because Phillips did not receive it until March and delivered it as soon as he did receive it, in pursuance, as he says, of the earlier arrangement.

The trial Judge has found, on very conflicting evidence, that the deposit of the certificate of title was made in relation to the first transaction in December, 1911, and, therefore, comes within the prohibition of the statute, the Bank Act, R.S.C. 1906, ch. 29, sec. 76 (*c*).

It was argued before us that the new note taken in February and the certificate of title which was handed in in March were taken as "additional security" for the old debt, and were, therefore, properly taken by way of additional security for a previously contracted debt.

Leaving aside altogether the finding of the trial Judge as to the deposit of the certificate of title, were the note of February and the certificate of title delivered as *additional security* for the old debt? At the time the February note was given, the December note was not yet due, although, under it, there was a *debitum in præsenti solvendum in futuro*. The new note was, in my opinion, not taken as *additional* security for the old debt, for reasons which I will state later on.

If the certificate of title was taken as security for the old debt its deposit with the Bank must be held to relate back to the original transaction which, as found by my brother Brown and as is borne out by the evidence, was within the prohibition of the Act. The mere fact that it was deposited later on cannot alter the fact that its deposit or promised deposit was the consideration or part of the consideration for the first advance. The evidence in regard to the deposit of the certificate is very difficult to follow.

Phillips swears positively that the deposit of the certificate was never mentioned during the transactions in February and that it was made expressly in relation to the December transaction. I must confess that it does not seem reasonable that he

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should hand over the certificate and say "here is your security," some time after the transaction, in connection with which he had promised to do this, had been completely closed. The bank manager, on the other hand, states positively that Phillips agreed to deposit the certificate on the second transaction. But he, again, is contradicted by the documentary evidence which shows that the caveat was based on the letter of December 22. Under all these circumstances, I do not see how the express finding of facts by the trial Judge, on very conflicting evidence, can be disregarded.

The transaction in February, as related by Caldecott, the bank manager, in the evidence I have already set out, does not seem to me to be the ordinary case of substitution by renewal without actual payment, "making the whole series of notes and renewals links in the same chain of liability." Here there were a surrender of the old note, the assumption of the debt by the new parties, valuable consideration in the shape of William Phillips' liability surrender, and a change in the condition of the original parties, all pointing to "the inception of a new transaction or negotiation of securities." *Dominion Bank* v. *Oliver* (1889), 17 O.R. 402.

If the February note is a renewal, then, on the finding of the trial Judge, the deposit of the certificate of title relates back to the original transaction, and, therefore, comes down with all its original defects attaching to it. In any event, I do not see how the bank can escape this conclusion, in view of the fact that as late as November 26, 1914, it filed its caveat based on Phillips' letter of December, 1911.

If the February transaction cannot be taken as a renewal, then, if Caldecott's account of the February transaction is accepted (and it is only contradicted as regards the deposit of certificate), there is, in my opinion, another distinct breach of the Act. I might have said, a third breach of the Act, because the general manager's instructions of December 15: "I wired you to-day that you could give Mr. Phillips an advance of $5,000 provided that he deposits with you clear title to the property," and the further instructions to get a letter undertaking to procure the title and deposit it when procured, were acted upon by Caldecott by taking a letter from William Phillips undertaking to deposit his title to the hotel property.

The appeal should be dismissed with costs.

NEWLANDS, J.:—By sec. 76 (2) (c) of the Bank Act,

except as authorized by this Act, the bank shall not, either directly or indirectly lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property.

The exception is contained in sec. 80:

The bank may take, hold and dispose of mortgages and hypotheques upon real or personal, immovable or movable property, by way of additional security for debts contracted to the bank in the course of its business.

A bank cannot lend money on the security of real estate, but it can take such security for debts already contracted.

The question in this case is: Did the bank advance money on the security of the quarter-section in question or did it take such security for a debt which had been already contracted? It is true that the trial Judge has found that the advance was made on the security of the land and I do not dispute this finding, but if that transaction was closed by the new arrangement entered into in February, and the new note and certificate of title, which was handed in, in March, taken as security for the old debt, then the illegal transaction was closed and the security would have been taken for a past due debt.

There is authority that such a transaction is within the powers of a bank.

In *National Bank of Australasia* v. *Cherry*, L.R. 3 P.C. 299, Lord Cairns, p. 305, gives the facts as follows:

that White was a customer of the bank, and that he was allowed a cash credit, and to overdraw his account, upon an agreement to deposit, and upon a deposit, of the title deeds of landed property; that this state of things continued for some years, at the end of which time a large sum, upwards of £10,000, was due from White to the bank; that an action was brought by the bank against White to recover this sum; that this action was proceeding to judgment, and that an agreement was then come to between White and the bank, by virtue of which the bank were to sign judgment; but it was stipulated that if they would forbear taking proceedings under the judgment, and allow the property of White to remain undisturbed for a certain length of time, the title-deeds should remain and continue with the bank as a security for the whole of their demand.

These facts are not dissimilar to the facts in the present case. Here, on account of the death of one of the debtors, a new arrangement was made and a new note taken, and the security was to remain as security for this debt.

The Act under which this case was decided is also similar to our own Bank Act, in that, at the time of the advance, the bank was not at liberty to stipulate for, or to obtain, landed security.

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Newlands, J.

In discussing this Act, Lord Cairns said, p. 307:—

It would seem to have been the object of the legislature in this clause, not to make void the contracts for such advances as between the bank and their customers, in the same way that in former times contracts open to the objections of the usury laws were made void, but rather to make it something *ultra vires* the bank to take, upon the occasion of contracts for those advances, securities of the kind mentioned in this section. And this construction of the section would harmonize with what was very properly, as their Lordships think, admitted at the Bar on behalf of the respondents—that upon a transaction of the kind described in this bill, the contract for the loan of money would be perfectly valid, and the question would be confined to a question as to whether the bank had the power to take the security which it took for the advance.

I think these remarks are applicable to our Act, showing, as they do, that the only question is, did the bank have the power to take the security in question?

Applying this construction of the Australian statute to that case, Lord Cairns says, p. 309:—

Now, it is to be observed that, supposing the construction of the Act of the Colony to be that which their Lordships have assumed, the position of White at this time was this:—He might have said to the bank, "You may proceed against me and recover your debt; you may sign judgment, and you may take such steps under that judgment as the law allows, but the deposit of my deeds is invalid. It was *ultra vires* the bank to obtain such a security. I demur, therefore, to your interfering with my estates and I require you to deliver up these deeds, which you had no right under your Act to take from me." That, I say, Mr. White might have done. He did not think fit to do so, and, on the contrary, for considerations which are tangible and valuable, and which are described in this section, he preferred to make a fresh agreement of a different kind with the bank, by which he authorized the bank to retain these deeds, and promised that the deeds should be a security for the sum for which judgment was to be signed.

Now, it appears to their Lordships that that is a transaction which falls within the enabling part of the 7th section. It is a transaction in which security is taken by the Bank for a debt or liability *bonâ fide* incurred and come under previously, and as such would be warranted by that section.

This language applies directly to this case. When his father died and a new arrangement was asked for, defendant could have requested that his agreement to give security be given up to him. but he did not do so, and, when he got his certificate of title in March, he took it in and delivered it to the bank. Now, he could not have given this security to apply on the first transaction because that was closed by the new note, but it must have been given to secure the existing note, the one given in February by himself and his brothers for the old indebtedness of his deceased father and himself.

This, as was the case in *National Bank of Australasia* v. *Cherry* (*supra*), brings the case within the exception, *i.e.*, it was given for a debt already incurred, and not for an advance in anticipation or expectation of such security.

If the security is good under the Bank Act, then, under the findings of the trial Judge, it is also good against the defendant McIntosh and the appeal should be allowed with costs.

Newlands, J.

LAMONT, J., concurred with NEWLANDS, J.

Lamont, J.

ELWOOD, J.:—By his judgment the trial Judge *inter alia* finds that the title deed in question was delivered to the bank pursuant to an undertaking given and insisted upon at or prior to the time that the money was advanced. In effect, this finding is a refusal to accept the evidence of Caldecott that in the month of February after the advance was made, as part of the arrangement which was then made whereby the defendants' brothers were substituted for the defendants' father, it was agreed that this title deed should when issued be delivered to the bank as security.

Elwood, J.

While I might not have come to this conclusion myself, yet, in view of the evidence of Phillips that he deposited this title deed in pursuance of the agreement of December and in view of the caveat which was executed by Caldecott, in which he claimed that the interest of the bank was under the writing of December 22 and completed by deposit of the title deeds, and as this caveat makes no mention of the alleged agreement of February, it seems to me that there was evidence which justified the trial Judge in coming to the conclusion that he came to.

Having come to the conclusion that the trial Judge was justified in this finding, then, it seems to me, that the transaction is void under the Bank Act. It was part of the arrangement which was entered into at the time that the advance was made and part of the consideration for making the advance.

It was contended on behalf of the appellant, that the title deed had been deposited in pursuance or as part of the arrangement of February and that, therefore, it was given for a debt already incurred and was not void in consequence of what is laid down in *National Bank of Australasia* v. *Cherry*, L.R. 3 P.C. 299. It seems to me, however, that that case is distinguishable, on the ground that, at the time the final arrangement with regard to the

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security was made in that case, the bank was in a position to sign judgment against the defendant, and that it was only in consideration of the bank agreeing not to proceed under that judgment that the defendant agreed to let the security stand. The bank in that case had a debt overdue under which, at the time of the arrangement, it was in a position to recover. In the case at bar, the bank at the time the arrangement was made was not in a position to recover under its debt. Its debt was not overdue, and the defendant, who deposited the title deed, continued to be liable for the debt. It is, however, unnecessary that I should express any decided opinion on this aspect of the case. The finding of the trial Judge is that it was not a part of the arrangement of February, and this, at any rate, distinguishes it from *National Bank of Australasia* v. *Cherry*, *supra*.

In my opinion, therefore, the appeal should be dismissed with costs. *Appeal dismissed.*

MAN.

K. B.

PALMASON v. KJERNESTED.

Manitoba King's Bench, Macdonald, J. August 9, 1917.

1. MORTGAGE (§ VI E—90)—WAR RELIEF ACT—APPLICABILITY.
The War Relief Act (Man.) cannot be invoked against a mortgagee proceeding with a mortgage sale commenced prior to the passage of the Act, particularly after the property has been sold, and a certificate of title issued.

2. PRINCIPAL AND AGENT (§ II—8)—SALE OF LAND—PURCHASE BY AGENT—EJECTMENT.
The purchase by an agent of land he was authorized to sell, without the knowledge of the principal, can only be attacked by the principal; it is no defence to an action of ejectment.

Statement.

ACTION of ejectment.

H. A. Bergman, for plaintiff; *L. Marosnick*, for defendant.

Macdonald, J.

MACDONALD, J.:—The plaintiff is the registered owner of the south-west quarter of section 28, township 57 and range 4, east of the principal meridian in Manitoba.

The main defence is that the defendant's husband, Kristjan Kjernested, became the owner of the said lands and was in lawful possession when he enlisted and was mobilized as a volunteer on October 24, 1914, in the forces raised by the Government of Canada in aid of His Majesty at war and that he left Canada as a volunteer, and that the defendant, Johanna Kjernested, is the wife and claims the benefit of the War Relief Act, being ch. 88, 5 George V., Statutes of Manitoba, and amendments thereto.

The defendant Olson says that he is in possession, at the request of the said Kjernested, and is employed by him and his co-defendant and is in possession of the said lands as the agent for the said Kjernested and as such claims the benefit of the War Relief Act.

The said Kjernested was, on November 10, 1911, and down to August 22, 1916, the registered owner of the said land, subject to a mortgage to the J. I. Case Co.

Under this mortgage the property was on May 3, 1913, put up for sale under the ordinary regular sale proceedings and the sale proved abortive.

On November 30, 1914, the plaintiff purchased the said lands from the J. I. Case Co. for the sum of $2,000 under agreement of that date, and before Christmas of that year entered into possession and continued in possession for 11 months, during which time he made considerable improvement, he claims to the value of $500.

The property was put up for sale prior to the passing of the War Relief Act, and up to that point this Act has no application. The sale proved abortive. The mortgagee was then entitled to possession and to sell by private sale, and in my opinion the War Relief Act could not be invoked as a bar to future dealings with the land, but even if it could, it cannot now, as the property has been sold and a certificate of title has issued under the Real Property Act and the title thereunder is unimpeachable.

The defendant has since 1913 been trying to assist Kjernested in making a sale of the land and on November 27, 1914, after he had enlisted, Kjernested authorized the defendant to look after his interests in connection with the farm and sell if possible for the sum of $2,000, on such reasonable terms as could be arranged between him and the J. I. Case Co.

The defendant accepted the trust thus imposed upon him by Kjernested and was his agent, and 3 days after the acceptance of this agency from Kjernested, he purchased the property himself from the J. I. Case Co. without the knowledge of his principal, agreeing to pay therefor the sum of $2,000 upon terms agreeable to the Case Co.

The property was at the time unoccupied and shortly after the purchase the plaintiff entered into possession, improved the

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K. B.

PALMASON v. KJERNESTED.

Macdonald, J.

premises as stated and remained thereon with his family until January, 1915, when he moved with his family into the City of Winnipeg, having first locked up the dwelling on the premises.

In March, 1916, the defendants entered into the occupation of the dwelling and building on the premises and upon a demand for possession refused to vacate.

The defendants further contend that the plaintiff being the agent for the sale of the premises cannot himself be the purchaser. The law is well settled that an agent must not buy the principal's property without the knowledge of the principal, but this is a defence (allowing the amendment raising this defence) that cannot in my opinion be raised by these defendants. If the principal desires to take advantage of that position, his remedies remain open.

The plaintiff is the registered owner by certificate of title under the Real Property Act, and as such is entitled to continue in his possession of the premises without the hindrance of the defendants, and there will be judgment in his favour with costs.

Judgment for plaintiff.

CAN.

S. C.

HOCHBERGER v. RITTENBERG.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. December 30, 1916.

1. INSOLVENCY (§ II—5)—AGREEMENT FOR EXTENSION—SECRET PREFERENCE —PUBLIC POLICY.
   Where at a meeting of creditors an agreement for extension of time provided that the debtor will not give a preference, a prior secret agreement by which one of the creditors obtains security and more favourable terms is against public policy and void as against the other creditors.
2. CONFLICT OF LAWS (§ I B—19)—LIABILITY OF INDORSER—LEX LOCI.
   The liability of the indorser of a promissory note is governed by the laws of the place where the note was drawn up and made payable. (*Per* Idington and Anglin, JJ.).

[31 D.L.R. 678, 25 Que. K.B. 421, affirmed.]

Statement.

APPEAL from a decision of the Court of King's Bench, Appeal Side, for the Province of Quebec, 31 D.L.R. 678, 25 Que. K.B. 421, affirming the judgment at the trial in favour of the defendant.

In the spring of 1913, one Grossman, a jeweller of the City of Toronto and brother-in-law of respondent, having become financially embarrassed in his business, called a meeting of his principal creditors, with a view of obtaining from them an extension of time.

After some *pourparlers* with representatives of creditors present they all agreed to an extension of delay and a memorandum of

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extension of time was drafted and was submitted to the above-mentioned creditors and signed by Grossman, and his creditors, with the exception of appellants whose representative was not authorized to sign.

Shortly afterwards, Julius Hochberger, one of the appellants, came to Toronto, for the purpose of ascertaining the financial standing of their debtor, with special instructions as regards settlement to be made with him. During the course of the discussion, which took place with Grossman alone, at Toronto, Julius Hochberger refused to consent to the proposed extension unless appellants' claim was secured and the promissory notes then offered in settlement be made at shorter dates.

The promissory notes sued upon in this case having been prepared by Julius Hochberger, Grossman sent them to respondent, at Montreal, with a request to indorse them. Respondent returned the notes to Grossman refusing to indorse unless he got more particulars about them.

Having been informed by Grossman that plaintiffs, appellants, would not consent to the extension unless their claim was secured, and knowing that Max D. Eisen, the representative of plaintiffs, in Toronto, had previously promised Grossman that Hochberger would supply him with certain goods to carry him along, and replenish his stock, he then and there consented to indorse the notes, not being told that appellants were to sign the memorandum of agreement for extension.

Defendant, respondent, having returned the promissory notes to Grossman, at Toronto, never heard anything further about them until the following January (1914), when Grossman, being incapable of meeting his payments, had to make an abandonment of his property for the benefit of his creditors. An action was then brought against respondent as indorser.

Lafleur, K.C., and *Lamothe*, K.C., for appellants.

R. G. deLorimier, K.C., and *Aimé Geoffrion*, K.C., for respondent.

FITZPATRICK, C.J.:—This appeal should be dismissed with costs. Fitzpatrick, C.J.

The promissory notes sued on were obtained in execution of an agreement between the appellants and their insolvent debtor. The defendant, indorser of the notes, was a brother-in-law of the maker, Grossman, a jeweller, of the City of Toronto, and the appel-

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lants were amongst the latter's creditors. The notes were given to induce the appellants to sign Grossman's deed of composition.

As Best, C.J., said in *Knight* v. *Hunt*, 5 Bing. 432, at 433, these agreements for composition with creditors require the strictest good faith. The principle to be drawn from all the cases on this subject is "that a man who enters into an engagement of this kind is not to be deceived."

It has been argued that here the debtor is not injured, nor the funds for the other creditors rendered less available, because the indorsation given and sued on was that of a third party who took no interest in the estate, but as the Chief Justice said in *Brigham* v. *Banque Jacques Cartier*, 30 Can. S.C.R. 429, at 436:—

> Upon a principle well established by the English Courts such a payment by a third person is just as much a fraud on the general body of creditors as a payment or an agreement to pay by the insolvent debtor himself: *Wells* v. *Girling*, 1 Brod. & Bing. 447; *Knight* v. *Hunt*, 5 Bing. 432; *Bradshaw* v. *Bradshaw*, 9 M. & W. 29; *McKewan* v. *Sanderson*, L.R. 20 Eq. 65; *Re Milner*, 15 Q.B.D. 605.
>
> Pollock on Contracts (7th ed.), 293.

The one question which always remains is whether the judgment of the creditors has been influenced by the supposition "that they are treating on terms of equality as to each and all." This is not a case of a gratuitous gift made after composition. Here there was a previous secret understanding that the appellants should receive security for their debt and a direct advantage over all the others who were contracting on the assumption that all were being treated alike. The notes sued on were given in pursuance of an agreement, which was void, as made in fraud of the other creditors of Grossman: art. 990 C.C.; see also *Ex parte Milner*, 15 Q.B.D. 605.

Idington, J.

IDINGTON, J.:—The appellants sued the respondent as indorser of 6 or 7 promissory notes, remainder of 10 or a dozen such, made by one Grossman and indorsed by respondent in order to satisfy the demands of appellants upon said Grossman, who had asked them to join in an agreement he was trying to obtain from a half dozen of his chief creditors for an extension of time. The agreement, as drawn up, had named one Eisen as one of the creditors intended to execute the agreement.

Eisen, it turned out, had no authority to sign being only an agent of the appellants. This circumstance tends to confuse matters and the most has been made thereof.

But as appellants signed the agreement and Eisen did not and there can be no doubt of what was intended to have been accomplished by the substitution of appellants for Eisen in the way of signing and in fact I think was accomplished, the agreement should be treated as one of the ordinary kind for an extension by creditors of time to a debtor, who otherwise might be forced to make an assignment as an insolvent.

On such basis I agree with the late Dunlop, J's., construction of the clause in said agreement which reads as follows:—

The first party agrees that he will not during the currency of this extension and until these liabilities are paid off give any preference or security on any of his assets no matter where situate without the consent of the second parties.

What was done was clearly a preference, and none the less obnoxious because an ingenious method was resorted to of extracting something from the assets without the assent of other creditors. It was circuitous but partially effective.

The notes given on the basis of the extension were to have been, and I think in fact were, for 3, 6, 9 and 12 months.

The appellants got, in substitution thereof, notes spread over some 12 months, indorsed by respondent, divided into equal sums but payable monthly. Thereby unless (which is not pretended) the money could be conceivably got elsewhere than out of the debtor's assets mentioned in above clause, the appellants got an improper advantage over others they held themselves out as joining.

Then apart from the interpretation of the agreement the giving these notes was illegal.

It may be worth while to let those people and others inclined to do the like, know what Malins, V-C., an able English Judge, thought was the law. He, in the case of *McKewan* v. *Sanderson*, L.R. 15 Eq. 229, at p. 234, spoke thus:—

I give no opinion as to whether this is a proper case for law or equity, and I give no opinion as to the law or the equity. That will have to be considered hereafter; but the ground of this plea is that there was an improper arrangement between the debtor and his creditor to the detriment of the other creditors, and the doctrine of this Court is appealed to which was laid down so repeatedly by Lord Eldon, and finally in the case always referred to, of *Jackman* v. *Mitchell*, 13 Ves. 581. It is a doctrine founded on the soundest principles, namely, that whenever there are proceedings in bankruptcy or insolvency, or any arrangement between a debtor and his creditors generally, and one of the creditors stipulates either for the payment of a greater dividend to him than is paid to the other creditors, or for

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any collateral advantage whatever, even such as giving the right to purchase a horse, or any advantage whatever not common to the creditors, any payment made will be ordered to be repaid, any security given will be ordered to be given up, and this Court will treat the whole thing as fraudulent against the other creditors; and anything done in favour of the creditor who obtains this advantage will be set aside by this Court. That principle has been frequently acted upon. I refer to *Jackman* v. *Mitchell*, 13 Ves. 581, because it has been cited, but *Geere* v. *Mare*, 2 H. & C. 339, is a case on the point at law; and, finally, it was very much considered by Vice-Chancellor Stuart in *Mare* v. *Sandford*, 1 Giff. 288, which, as well as some other cases, arose under the same bankruptcy as *Geere* v. *Mare*.

The case is adopted, and cited with many others, by Sir Frederick Pollock, at p. 238 of his work on Contracts, when dealing therein with the subject of fraudulent or illegal contracts of this character.

"Against public policy" is, I think, in this connection but another name for fraud. I agree with the law as laid down in what I quote from Malins, V-C. and hold the promissory notes sued upon herein are of the kind he describes and subject to the legal consequences he suggests.

They furnish no security upon which any one can recover or should as part of public policy be permitted to recover.

I cannot distinguish in principle any difference between a deed of composition and anything else of the like nature, jointly agreed upon by creditors, or a number of them, in case of a common debtor.

The Quebec law, I imagine, is the same despite the nice distinction said to have been made in France. I also think, as the debtor gave the notes in Toronto and all else was done there, except possibly the mere signing by respondent, and as it is the indorsement of a promissory note delivered there that is in question the Ontario law is what should govern, if there is any difference.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J. (After stating the facts):—

The respondent's defence is that the agreement to give this guarantee behind the backs of the other creditors participating in the extension arrangement being a fraud on these creditors—the fraud vitiates the agreement and deprives of all legal effect the indorsements given in execution of it.

The memorandum signed by the creditors contains a recital to the effect that the creditors named as parties have executed it; and there can be no doubt that this recital embodies an essential

term of the extension agreement which was made on the understanding that the claims of all the creditors named in the instrument as drawn were to be affected by the extension. It is true that the appellants are not mentioned *eo nomine* as parties but their agent is named and it was no doubt the appellants' claim that the parties had in view. It is clearly made out in point of fact, that Grossman, the appellants and the respondent all understood that the appellants' claim was to be brought within the arrangement for giving time and that involved, as it has been many times held, the assumption that they were to stand on an equal footing with all the other parties to the extension. Any advantage, therefore, obtained by them as the price of their participation, which was not made known to the other parties, must be an advantage which they could not retain without departing from the line of conduct marked out in such circumstances by the dictates of good faith. Yet this, in view of the agreement between the respondent and Grossman and the appellants, must be held to have been precisely what it was intended the appellants should do. In *Ex parte Milner*, 15 Q.B.D. 605, it was decided by the Court of Appeal that the essence of a composition arrangement between a debtor and his creditors is equality among the creditors; and that any departure from the course pointed out by this principle by which one creditor seeks to obtain an unconscionable advantage over the others must fail of its object because any arrangement having that as its object is unenforceable as being a fraud upon the other parties to the composition.

It was not suggested that the principle is any less a principle of law in the Province of Quebec, than in places where the common law obtains. But it was argued by Mr. Lafleur that the principle has no application in the case of a mere agreement for extension. That is a view I cannot accept, for the core of the matter is that the inculpated transaction is a fraud upon persons to whom in the circumstances the creditor owes a duty of disclosing any such transaction. I cannot concede that the principle of equality or that this duty of disclosure is any less imperative where the creditors give merely an extension of time, than where they give up a proportionate part of their claims; and such being the case the sterility which affects a bargain for a secret advantage where a composition is in question is equally the consequence of a secret bargain having reference to an arrangement for giving time only.

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An argument which at first gave me some concern arising out of the last paragraph of the memorandum requires notice. The paragraph is in the following words:—

> The first party agrees that he will not during the currency of this extension and until these liabilities are paid off give any preference or security on any of his assets no matter where situate without the consent of the second parties.

It was contended by Mr. Lafleur that the preposition "on" connects "preference" as well as "security" with the succeeding phrase "any of his assets" and that consequently the respondent's guarantee is not within the contemplation of this clause. I do not find it necessary to express any opinion upon the point of construction. Assuming Mr. Lafleur's reading to be the right reading, I think, after reflection, that the respondents' rights are not in any way prejudiced by the presence of this clause. The clause, it should be noted, is not primarily directed to securing the observance of good faith among the persons executing the memorandum; it imposes primarily a duty upon the debtor who is a party to the agreement and the result of it is to disable him from giving any preference or security to any of his creditors including, of course, those who were parties to the extension agreement, but including also those who were not parties to it, The clause itself would no doubt, apart from any general principle of law, involve the persons executing the memorandum in an obligation not to concur with the debtor in any conduct which would be in violation of the letter or spirit of it. But the clause is not aptly framed to displace, and the duties and rights expressly created by, or arising by implication out of the clause, do not necessarily displace, the reciprocal obligations of good faith which the law imposes *ab extra* upon the creditors who are parties to the transaction *inter se;* and it would not be right to infer an intention to displace them for the reason already mentioned, namely, that primarily the clause is framed *alio intuito*, namely, to impose an obligation on the debtor; and extends to the claims of all creditors whether parties to the arrangement or not.

I think the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—By executing the agreement made between the debtor Grossman and a number of his principal creditors the appellants represented to the other creditors who were parties to it, that they were giving to the debtor an extension upon the terms

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contained in that agreement, to which the other creditors had bound themselves, and without obtaining any preference or advantage over them. The agreement contained a recital that the creditors named in it had agreed to grant the debtor an extension only on the condition that all of them should join therein. In that agreement the appellants were first represented by their agent Eisen. Eventually they executed it in their own name. But whereas the other parties who executed the agreement accepted from the debtor, without other security, his notes at 3, 6, 9 and 12 months the appellants insisted on their claim being liquidated in monthly instalments and upon payment thereof being secured by the indorsement of the debtor's brother-in-law. When making this arrangement they impressed upon the debtor the necessity of keeping it from the knowledge of the other creditors.

I can see no distinction in principle between an agreement for extension given by his creditors to a debtor and an agreement whereby they forego proportionate parts of their claims. Equality as between themselves and a strict adherence to the terms of the common arrangement with the debtor is an essential element in both cases. On the grounds of public policy a secret bargain violating that equality is unlawful and additional security obtained under it is unenforceable: *Clarke* v. *Ritchie*, 11 Gr. 499; *McKewan* v. *Sanderson*, L.R. 20 Eq. 65. No authority has been cited which upholds a security obtained in distinct violation of the express terms of an agreement made with other creditors such as we have before us. The present case is clearly distinguishable from *Langley* v. *Van Allen*, 32 Can. S.C.R. 174, relied on by the appellant. That was a case of seeking to recover for the estate money given by the debtor to a creditor who had insisted on being paid off sooner than the other creditors. This is a case of resisting the enforcement of a security unlawfully taken.

This action was brought in Montreal, no doubt because the defendant resides there. But the notes sued upon were made at Toronto and are payable there. The extension agreement was also made at Toronto, where the debtor resided and carried on business. It would therefore seem that the legality of the transaction whereby Rittenberg became an indorser must be tested according to the law of that province, which was duly proved at the trial. It may be observed, however, that a French decision

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cited by the appellants, reported in D. 69.1.92 and noted in Fuzier-Herman, Rep. Vo. "Atermoiement" No. 106, is there significantly referred to as having been "commandée par l'espece," and not in conflict with the rule of equality.

The appellant's case, in my opinion, is wholly devoid of merit. The appeal should be dismissed with costs.

Brodeur, J.

BRODEUR, J. (translated):—By an agreement granting an extension of time of payment dated April 14, 1913, between the debtor Grossman, and certain of his creditors amongst whom were the appellants, it had been agreed that an extension of time should be granted to the debtor to pay his different creditors; and one of the clauses of the contract stated that the debtor could not during the course of this extension give any preference or security on any of his assets, no matter where situate, without the consent of his creditors.

The appellants, in spite of this formal agreement, had obtained from their debtors promissory notes endorsed by the respondent. It is a question of whether this endorsement is legal, and whether it does not constitute a preference contrary to public order.

The appellants claim that, in virtue of the agreement, the debtor could not give a preference or guarantee on any of his assets, but the fact that they have obtained the consent does not constitute a violation of the agreement.

The formal clause which is found in the agreement does not permit the different creditors to obtain from their debtor a special advantage. This clause in my opinion, aimed to prevent the debtor from suspending the existence of the agreement for extension, from giving to any other creditor privileges, or guarantees, with respect to his assets. At that time no one wanted the debtor to contract new debts in order to be able to give to the new creditors particular favours in connection with their assets which were the security of his former creditors.

But, could this particular provision of the contract hinder the creditors who signed it from obtaining in their turn from their creditor particular advantages? I think not.

The law exists that all creditors in agreements, or in Acts giving extension of time may be all placed on the same footing. It prescribes every advantage agreed to with regard to a single creditor. Fuzier-Herman verbo "Atermoiement," No. 96. It is

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a public order. It is in the interest of the good faith of contracts, that these acts may be committed without any creditor having an advantage over another. That is a principle well established in our law, and which has been recognized in our jurisprudence in the case of *Brigham* v. *La Banque Jacques Cartier*, 30 Can. S.C.R. 429, where a promissory note given in order to guarantee the amount of a preference is absolutely void.

The appellants have tried to point out that rules concerning agreements and an agreement of extension of time were different and they have cited for that purpose a case published in Fuzier-Herman Répertoire vo. "Atermoiement," No. 106.

The decision which is invoked by the appellants ought to be considered as the decision of this case, in view of the fact that Fuzier-Herman himself declares that it should not be necessary to consider, as contrary to the doctrine which exists, that the advantages agreed to with regard to a creditor may be prohibited.

Supposing that the claim of the appellant should be sustained by the evidence, it would not be necessary to rely too strongly on French authorities, provided that the provisions of their commercial code differ somewhat from the provisions of our law. On general principles, agreements for extension of time ought to be made in the best faith between the different creditors who sign them. The debtor should not then give advantage to any one of his creditors, but ought to keep them all on the same footing. He should not give to one guarantees which he would not give to another, unless he notifies the latter of these particular advantages. Moreover, every act or indorsement made by the debtor, which is of such a nature as to destroy this equality which ought to exist between all the creditors, is in my opinion illegal, contrary to public order, and should be set aside.

The lower Courts have come to this conclusion, and judgments which they have rendered ought to be confirmed with costs.

Appeal dismissed.

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Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ. July 14, 1917.

LIENS (§ I—2a)—THRESHER'S LIEN—SEIZURE—FORCIBLE ENTRY.

The position of a lienholder under the Thresher's Lien Act (Sask.), sec. 1, is that of a purchaser for value, and he has the right of forcible entry for the purpose of taking a sufficient quantity of grain in satisfaction of his lien.

[See also *Rudy* v. *Sonmore*, 29 D.L.R. 40, 9 S.L.R. 267.]

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Newlands, J.

APPEAL by plaintiff from a judgment for defendant in an action for trespass for breaking open plaintiff's granary and taking therefrom a quantity of wheat. Affirmed.

W. B. Hartie, for appellant; *A. Frame*, for respondent.

NEWLANDS, J.:—Defendant was a thresherman and threshed plaintiff's grain. Defendant and his witnesses swore that the terms were 10c. per bushel if the grain threshed out 120 bushels to the hour, if less to be $12 per hour, and this must have been the finding of the trial Judge as he found for the defendant. The threshing was, therefore, done at a "fixed price or rate of remuneration" as provided by sec. 1 of the Act respecting Threshers' Liens.

The threshing account came to $456, on which the plaintiff paid $346.50, leaving a balance of $109.50 due. Before the expiration of 60 days from the completion of the threshing, the defendant gave the plaintiff 24 hours' notice in writing of his intention to take sufficient quantity of grain to satisfy his lien as provided by sec. 1 of said Act, and, as plaintiff did not pay the same within that time, defendant took 106 bushels of wheat from plaintiff's granary. To do so, defendant had to break the lock on the door of the granary. This grain was hauled to an elevator, and after 5 days was sold at $1.70 a bushel, a total of $175.10. Of this amount defendant applied $109.50 in payment of threshing account, $6 for hauling the grain to the elevator and returned the balance of $59.60 to the plaintiff.

The plaintiff says that the defendant had no right to break open his granary and was therefore a trespasser and is liable to the full amount of the damage he did, including the value to plaintiff of the grain seized. As I have said, the trial Judge found for defendant.

The Threshers' Lien Act provides that everyone who threshes grain for a fixed price shall, from the commencement until 60 days after the completion of the threshing, have a lien upon the grain for the purpose of securing the payment of the price, and may, after giving to the owner 24 hours' written notice of his intention, take a sufficient quantity of such grain to secure payment of the price. Provision is also made for storing the grain and for selling the same after 5 days.

As there is no similarity between the above lien and a lien at

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common law it would be useless to consider the law applicable to the latter subject. The intention of the statute is all that I need take into consideration in order to decide what are the rights of the parties.

This lien is given for 60 days after the completion of the threshing. The thresher may, after 24 hours' notice in writing, take a sufficient quantity of grain to secure the price of the threshing, he may take away such grain and store it in an elevator and after 5 days sell the same, and, finally, he is to be considered a purchaser for value of the grain he takes.

The statute contemplates the grain being left in the possession of the owner after threshing, because it says the thresher can only take it after notice to the owner. In order to take it, the thresher must go on the land of the owner. As he is authorized to take it, he must be authorized to do what is necessary to take it, *i.e.*, go upon the land of the owner. This case is, in my opinion, similar to the case where the owner of land sells goods and authorizes the purchaser to come upon the land and take them away

In *Wood* v. *Manley*, 11 Ad. & E. 34 (113 E.R. 325), the plaintiff was the tenant of a farm, his landlord distrained on him for rent, and the goods seized—comprehending some hay which was in question—were sold on the premises, the condition of the sale being that the purchaser might let the hay remain on the premises for a certain time and enter on the premises, in the meanwhile, as often as they pleased to remove it. The defendant purchased the hay, and the evidence shewed that the plaintiff was a party to these conditions. After the sale, the plaintiff served upon the defendant a written notice not to enter or commit any trespass on his land. The plaintiff locked the gate leading to the *locus in quo* where the hay was, and the defendant broke the gate open, entered the close, and carried away the hay. It was held that the defendant had a license to enter and take away the hay which was not revocable, and that he was, therefore, not guilty of trespass. Lord Denman, C.J., at p. 37, said:—

> Mr. Crowder's argument goes this length, *i.e.*, that, if I sell goods to a party who is, by the terms of the sale, to be permitted to come and take them, and he pays me, I may afterwards refuse to let him take them. The law countenances nothing so absurd as this: a license thus given and acted upon is irrevocable.

This case was approved by the Court in *Wood* v. *Leadbitter*,

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13 M. & W. 838 (153 E.R. 351). In this case, by the statute, the defendant was a purchaser for value of the grain, he had a statutory license to enter and take the same away. I can see no difference in the breaking open of the door of the granary and the breaking open of a locked gate.

I am, therefore, of the opinion that defendant was not guilty of trespass, and that the appeal should be dismissed with costs.

McKay, J.

McKAY, J., concurred with Newlands, J.

Brown, J.

BROWN, J.:—I concur, but not without some hesitation.

Appeal dismissed.

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VANCOUVER POWER Co. v. CORP. of N. VANCOUVER.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Dunedin, Lord Shaw and Lord Sumner. July 30, 1917.

MUNICIPAL CORPORATIONS (§ II F—165)—FRANCHISE—LIGHTING PLANT—AREA—DISTRICT—CITY—NOTICE.

The right of a district municipality to assume ownership of an electric lighting system, under the terms of its agreement or franchise, extends to an area comprising a portion of the district which has been formed into a city corporation; the notice of the termination of the franchise is effective, as against both municipalities, when given to the district municipality.

[27 D.L.R. 727, 22 B.C.R. 561, affirmed.]

Statement.

APPEAL from the judgment of the Court of Appeal of British Columbia, 27 D.L.R. 727, 22 B.C.R. 561. Affirmed.

The judgment of their Lordships was delivered by

Lord Shaw.

LORD SHAW:—This appeal is brought from a judgment of the Court of Appeal of British Columbia, dated April 4, 1916, dismissing an appeal by the appellants against the judgment of Murphy, J., dated June 29, 1915.

The respondents, the Corporation of the District of North Vancouver, are a municipality incorporated under the Municipal Act of the Province of British Columbia. On August 16, 1905, they entered into an agreement with the appellants, the Vancouver Power Company, Limited, granting to the latter power for the construction, maintenance, and operation, within the limits of the district, of all the works, power-houses, buildings, poles, and wires required "for the generation, distribution, and sale of electricity for light, heat, and power, and any other purpose." By clause 11 of that agreement, a monopoly or exclusive right was granted to the company.

By the same clause 11, however, it was provided:—

But at the expiration of 10 years from the said date of this agreement the corporation may, upon giving at least 12 months' prior notice in writing of its intention to do so, assume the ownership of the electric lighting system within the limits of the district, together with all the real and personal property of the company used, in use, or to be used in the operation of the lighting system within the limits aforesaid, upon payment being made by the corporation to the company of the value of the said lighting system as a going concern, but not including any payment for goodwill.

On May 13, 1907, a portion of the district municipality described in schedule B. to ch. 35 of the Acts of British Columbia, 1906, was incorporated as the City of North Vancouver. The provisions of that Act will be presently referred to. On August 14, 1914, the respondents, the corporation of the district, gave notice of their intention, in terms of sec. 11 of the agreement, to assume the ownership of the electric lighting system. No objection is taken to the form of this notice, and it is, of course, admitted that it was given in time.

The proceedings out of which the present appeal arises were by way of special case; and the action was begun on June 14, 1915. The facts are set out in the case, and the question for decision is formulated as follows:—

Whether the plaintiff by reason of having given the said notice of intention to purchase is entitled at the expiration of 10 years from August 16, 1905, to assume ownership of the electric lighting system of the defendant, situate within the area comprising the City of North Vancouver and within the area comprising the District of North Vancouver, together with all the real and personal property of the defendant used, in use, or to be used in the operation of the said lighting system within the said areas upon payment therefor in the manner provided in the said agreement.

This question was answered by both Courts in the affirmative, and their Lordships are of opinion that that answer was correct.

The appellants, the Vancouver Power Co., present an argument to the effect that the notice is invalid, in consequence principally of the City of North Vancouver having been carved out of the District as already stated. Part of the company's operations and plant are within the city; part extends beyond the city bounds and into other portions of the district. So far as practical working is concerned, the incorporation of the city as a separate municipality seems to have imported no change in the working of the system of the appellants as a unity, a unity which covers territory both within and beyond the city. Under these circumstances one could have imagined a strong objection being formulated to any attempt by a separate city notice—applicable only

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within the city bounds—to terminate the agreement for the city itself, thus splitting up the ownership of the concern and producing in all likelihood an unworkable business result. The present objection, however, is to a notice which has been given exactly in terms of the agreement, by the party with whom the agreement was made, viz., the respondent district municipality, and covering the exact case provided for, viz., the entire locality to which the agreement applied. In their Lordships' opinion, the incorporation of the City of North Vancouver did not result in dividing the agreement of August 16, 1905, into two agreements.

It was contended, however, that the carving out of the city from the district produced such a state of matters as to make the provision as to the taking over of the ownership of the concern at the end of the 10 years unavailing, and thus impliedly to operate the repeal or deletion of that provision.

This contention is manifestly much in the interest of the appellants; but, in their Lordships' opinion, it is without foundation either on the statute or on the agreement.

Sec. 23 of the City of North Vancouver Incorporation Act ch. 35 of 1906, is in these terms:—

> The three agreements made by the Corporation of the District of North Vancouver with the Vancouver Power Company Limited for street car service, street lighting, and the supply of electric light and power, respectively, and the agreements made by the said corporation with the British Columbia Telephone Company, Limited, and the Vancouver Ferry and Power Company, Limited, in so far as the several agreements affect the area by letters patent under this statute incorporated as the City of North Vancouver, are hereby ratified and confirmed, and shall be adopted and carried into effect by the council of the city of North Vancouver, but in other respects the said companies shall be subject to the ordinary jurisdiction of the council.

On a true construction of this section, it appears to the Board that the agreements scheduled in the Act are not in any respect destroyed or repealed so far as the city is concerned, but on the contrary are ratified and confirmed, the effect of this being to preserve intact the rights of both parties, that is to say, on the one hand of the Power Co., and on the other, of the district municipality. It follows from this that the right of acquisition in the latter body is not abrogated, but remains unimpaired. In the second place, however, the city authorities having come into power within the city area, the Act very naturally provides that in so far as the city is concerned the provisions of the agree-

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ment affecting the city area shall be adopted and carried into effect by the city council. No occasion arises for attempting to give any technical definition or consideration to these simple words, "adopted and carried into effect," and no difference or dispute between city and district is before their Lordships or is even suggested. The sole point before the Board is raised by a third party, namely, the Power Co., as to the alleged effect of the separate creation of the city upon the clause as to the assumption of ownership at the end of 10 years. Their Lordships are of opinion that the right to assume ownership remains as in the agreement, and that the conditions of the assumption—namely, that proper notice be given—having been complied with, the objection of the appellants is unsound.

Their Lordships will humbly advise His Majesty that the appeal be disallowed with costs. *Appeal dismissed.*

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. December 11, 1916.

HIGHWAYS (§ IV A—155)—DEFECTIVE SIDEWALK—LIABILITY OF MUNICIPALITY—FAILURE TO ENFORCE BY-LAW.

A municipal corporation having, by its charter, power to maintain its highways in a reasonable state of repair, which permits continued vehicular traffic over a sidewalk, although no proper crossing had been provided, and although regulations had been enacted prohibiting such traffic, is charged with notice of a condition of disrepair, and having failed to remedy the defect within a reasonable time is guilty of negligence and liable for injuries caused thereby.

[*City of Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194; *Maguire* v. *Liverpool Corporation*, [1905] 1 K.B. 767; *City of Vancouver* v. *Cummings*, 2 D.L.R. 253, 46 Can. S.C.R. 457; *Mersey Docks Trustees* v. *Gibbs*, L.R. 1 H.L. 93, referred to.]

Statement.

APPEAL by plaintiff from a judgment of the Supreme Court of Alberta, 27 D.L.R. 168, 9 A.L.R. 253. Reversed.

Chrysler, K.C., for appellant.

Lafleur, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—This is an action brought by the appellant to recover damages for injuries caused by the defective condition of a sidewalk built by the corporation respondent for the use of the public.

The charter of the City of Edmonton (sec. 507) in express terms imposes upon the corporation the legal duty to keep the sidewalk in a reasonable state of repair and at the same time gives it authority to take all necessary measures to prevent the side-

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walk becoming a danger to the public making use of it in the exercise of their right (sec. 237).

It is not disputed that the sidewalk was out of repair, that the appellant was making a proper use of it under the belief that it was in good condition and that as a result he was injured as alleged in his statement of claim.

There is in consequence no doubt that the appellant had a civil action against the respondent to recover compensation in damages for his injuries unless we are prepared to overrule the decision of this Court in *City of Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194.

An action is given for breach of a statutory duty irrespective of whether the act done would be a wrong apart from the statute.

In *Dawson* v. *Bingley Urban District Council*, [1911] 2 K.B. 149, Farwell and Kennedy, L.JJ., put the matter in this way: That where a person is one of a class for whose benefit a statutory duty is imposed, he is on breach of that duty entitled to maintain an action for damages occasioned to him by the breach unless the statute has indicated an intention to exclude that remedy.

In the case of *Maguire* v. *Liverpool Corporation*, [1905] 1 K.B. 767, Vaughan-Williams, L.J., asserts the same general rule as do Farwell and Kennedy, L.JJ., in the *Bingley* case, *supra*, and treats the immunity of the authority in respect to the non-repair of highways as an exception due to the particular history of the highways. But in *City of Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194, the distinction is very clearly made between those English cases in which the duty imposed is, as Sir Louis Davies says, one transferred from a body or authority on or with whom it previously rested and which body or authority was not itself liable in civil actions for non-feasance (p. 196) and cases in which the duty is created and imposed in the charter calling the corporation into existence. The general rule is that every public duty presumably gives rise to a private action in favour of a person injured by its breach and I know of nothing in the history of the highways in Edmonton which would justify creating an exception to that general rule in the case of breach by non-feasance in respect to their repair.

But it is said that there is no proof of notice to the City of Edmonton of the existence of the hole in the sidewalk which

caused the appellant's injury and that in consequence no liability attached. In *City of Vancouver* v. *Cummings*, 2 D.L.R. 253, 46 Can. S.C.R. 457, Idington, J., speaking for the majority of this Court, said (p. 466):—

> I am, despite dicta to the contrary, prepared to hold that, unless in some such 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.

My brother Anglin describes the circumstances under which the sidewalk became dangerous to the public using it and it is unnecessary for me to add anything to what he says beyond this. As a necessary consequence of the improper use to which it was put, to the knowledge of the corporation, the sidewalk became out of repair and a danger to those obliged to pass over it. The hole actually made in the sidewalk as a result of that improper use and which was the direct cause of the accident was allowed to remain unrepaired for over twenty-four hours, and the city police whose duty it was to report such conditions passed the place frequently. In these circumstances I am bound to hold, in view of the opinion expressed in *City of Vancouver* v. *Cummings, supra*, that there arises a presumption without proof of notice that the duty relative to repair has been neglected. On the authority of *Mersey Docks Trustees* v. *Gibbs*, L.R. 1 H.L. 93, at p. 121, I would add, it must be taken as an established fact that the respondent had, by its servants, the means of knowing the dangerous state of the sidewalk, but was negligently ignorant of it. If the knowledge of the defect would make it responsible for the consequence of not having it repaired, it must be equally responsible if it was only through its culpable negligence that its existence was not known to them.

The appeal should be allowed with costs.

DAVIES, J. (dissenting):—After much consideration of the facts in this case I have reached the conclusion that the judgment of the Supreme Court of Alberta was right and that this appeal should be dismissed.

Davies, J.

I am satisfied with the statement of the facts and of the law as applicable to them made by the Judges who formed the majority in the Court below. All the Judges in that Court held that as the city had not any actual notice of the break in the sidewalk which

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led to plaintiff's injuries sufficient time had not elapsed between such breakage and the accident to impute notice to them. The evidence shews beyond doubt that the city had kept the sidewalk, which was for pedestrians only, in suitable repair for the purposes intended.

I do not think there was any obligation upon the city to make the sidewalk stronger in order to accommodate trespassers who desired to cross it with loaded trucks or drays. Nor can I find any obligation existing on the part of the city to make a crossing at the place in question. The liability of the city must therefore depend on their alleged negligence in enforcing the by-law, and it seems to me that the limit of the city's obligation in that regard was to prevent trespasses by prosecuting offenders.

Before liability can attach to the city for non-enforcement of a by-law an existing nuisance must be shewn to exist of which it had notice or be held to have had notice in law. Nothing of the kind existed here.

Beck, J., sets out in his judgment the provisions of the by-law relied on as casting a duty upon the city and shews that they do not support the statement of the trial Judge that the city could require an owner to put and keep a sidewalk abutting on his property in repair but merely prohibits him or any one else from crossing the sidewalk without taking steps to avoid injuring it. The Judge adds that the most that might be expected of the city in the present case was that they should have prosecuted under the provisions of the by-law and he concludes (citing as authorities 14 Cyc., title Municipal Corporations, p. 1356, under the sub-title Failure to prevent improper use of streets, and Dillon on Municipal Corporations, vol. 4, p. 1627) that no action can lie against the city for failure to enforce such by-law except in cases amounting to a public nuisance.

In this opinion I agree and would dismiss the appeal.

Idington, J.

IDINGTON, J.:—The appellant recovered judgment against the respondent, a municipal corporation, for damages suffered by reason of his leg getting broken in consequence of the negligence of the respondent in failing to keep in a reasonable state of repair its sidewalk whereon he was walking. The Court of Appeal for Alberta reversed that judgment and hence this appeal.

The duty of the respondent in the premises is defined by sec. 507 of its charter, which is as follows:—

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507. The city shall keep every highway, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the city, in a reasonable state of repair, having regard to the character of the highway and the locality in which the same is situated or through which it passes.

The respondent had constructed the sidewalk, some 6 or 7 years before the accident in question, of spruce planks, laid, I infer from the evidence, transversely to the line of the street, and supported by light scantling fit only to support pedestrian travel.

At the place in question there was a lane running at right angles to the sidewalk to serve the houses abutting thereon.

It turned out that teamsters who might have entered at the other end of this lane, with loads of any kind, got into the habit of using for their entrance or exit the end of the lane fronting on the sidewalk in question.

If the respondent had either protected the end of the lane next the sidewalk from any entrance, or built or caused to be built a proper crossing, by usual structure for such use, the sidewalk would have been in no danger of being broken as it was, and thus producing such accidents as this.

Instead of doing so the respondent tolerated the use that was made continuously, for at least a year or more, next preceding the accident, of that means of entrance into the lane in question and thereby endangered the maintenance of the sidewalk, and consequently the safety of pedestrians.

Indeed earth excavation, resulting from the execution of other work on the street at that point, was left lying as thrown there, while doing the work, long after such work was completed, and till some neighbours levelled it off and piled some of it up against the sidewalk so as to give it the appearance of a proper entrance to the lane and thereby invite just such traffic across the sidewalk as was sure to destroy it, and did destroy it 28 hours before the accident in question.

Planks of the sidewalk had been worn out or destroyed by such use and the want of repair thus created was attended to more than once by the respondent's servants.

Even when repaired there remained a breaking or chipping off of the ends of the planks in the sidewalk, so apparent to everyone, that no man, qualified for his job, when looking after

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the sidewalks could fail to recognize the notorious fact that this crossing use was being made of it, and was liable any day to break planks never intended to bear such traffic, and hence unfitted to meet the needs of pedestrian travel which demands safety.

That open and notorious use of the sidewalk and condition of things resultant therefrom having existed by the negligence of the respondent for a year or more, it has the temerity to suggest that this case falls within that class of cases where Courts have had to consider whether or not when an unavoidable, unexpected and improbable accident has put the highway out of repair, or wrong done by others had obstructed its use in a way of which the municipal authorities had no knowledge or notice, should be held to constitute negligence.

No Court could properly find on the facts in question, in most of these cases, where the municipality was excused that there was negligence. Some of them may be very questionable.

The usual statute in question in each of such cases made no provision for actual notice, indeed notice of any kind, but has been so interpreted as to render the question merely one of negligence in the discharge of a statutory duty, and in short the application of common sense.

In defining the law in such cases the term "want of notice" has been used sometimes when it was only intended to signify that the defendant might or might not, or should or should not have known, if all reasonable means had been taken to observe and discharge the duty which the statute had imposed.

The short method of expressing the duty has led some people to imagine and loosely to assert that notice is actually necessary.

It has been time and again explained that the same degree of vigilance and the same condition of repair or maintenance could not be reasonably insisted upon in every case.

The highway that only serves a remote and sparsely settled district would not be tolerated in the centre of a large city, or serve its needs. The inspection demanded in the latter could not reasonably be required in the former. It comes to this that the section of respondent's charter quoted above expressly provides by the word "reasonably" what the law had already been determined by the Courts to mean in cases where the statute merely imposed the duty of keeping in repair.

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If a municipality persists in using a mode of construction and material fit only for pedestrian traffic, when its officers know that it is used also for loaded teams to cross, it has not discharged its obligations but laid a trap for its citizens getting their legs broken. All that has been urged about liability for non-observance of its own by-laws is quite beside the question involved.

It matters not whether there was a by-law enacted or not, or enacted only to be broken. No man could seriously consider the sidewalk as constructed at the point in question as fit for the use that it was being put to or a safe place over which to induce daily travel by pedestrians in a thickly inhabited part of the city. As well invite men to rely for crossing, by night and by day, a brook, upon a bridge which everyone concerned to know should, if thinking for an instant, realize will be swept away by the first storm that comes that way.

It is idle to point to the by-law forbidding such use when the breach thereof from week to week is tolerated. As well pass a by-law against storms in the illustration I put.

It is the maintenance of an insufficient sidewalk in a place notoriously needing something more substantial, or more rigorous means of warding off its destruction, than merely passing a by-law which nobody but its authors ever reads.

The powers the respondent had for enforcing the construction of a proper crossing at the point in question at the expense of those concerned in its use render the negligence of the respondent the less excusable.

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

Duff, J.

DUFF, J.:—The appellant one evening in November, 1914, after dark, stepped into a hole in a wooden sidewalk on Fifth Ave., a street in Edmonton, with the result that his leg was broken. He sued the municipality for damages, basing his claim upon sec. 507 of the Edmonton City Charter, which is in the following words:—

> The city shall keep every highway, including all crossings, sewers, culverts and approaches, grades, sidewalks and other works made or done therein or thereon by the city or by any person with the permission of the city, in a reasonable state of repair, having regard to the character of the highway and the locality in which the same is situate or through which it passes.

At the trial before McCarthy, J., he succeeded; but the

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judgment given in his favour at the trial was reversed on appeal with the dissent of Stuart, J.

In the immediate neighborhood of the place where the accident happened there were some residences which had a lane or back area in the rear and for many months before the accident—at least a year—it was the practice for delivery vehicles entering this lane to pass over the place where the plaintiff met his injury; and the day before the date of the accident the sidewalk had collapsed under the weight on one of these vehicles.

Some facts are admitted or so clear as not to be open to dispute. The sidewalk was not of sufficient strength to support traffic of the kind to which it was thus subjected. For the convenience of vehicles passing over this sidewalk an approach had been made by banking with earth the street side of the sidewalk opposite the lane and the sidewalk itself there shewed unmistakable evidence of the passage of wheels—unmistakable, that is to say, to competent persons performing the duty of observing the condition of the sidewalk.

It was not disputed, I think, that in the condition in which the sidewalk was when the accident occurred the street was not in a "reasonable state of repair" having regard to "the character of the streets and the locality in which it was situated" within the meaning of sec. 507; and I have no difficulty in holding that if due diligence had been used by the municipality and those entrusted by the municipality with the care of the streets, that is to say, if diligence had been exercised of such a degree as to bring it into conformity with the standard supplied by the ordinary notions of sensible people, the sidewalk would not have been allowed to fall into that condition. Proper diligence would have led to the knowledge, by the persons responsible, of the fact that this sidewalk was being subjected to the burden of an extraordinary traffic—a usage under which it was certain eventually to collapse; actuated by a reasonable respect for their duty, such persons on discovering the state of affairs, would have addressed themselves to finding means for the prevention of that which might be expected to happen in the absence of precautions, and which did in fact happen. They could have attained this object by stopping the traffic; or they could have attained it by strengthening the sidewalk.

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The question to be decided on this appeal is whether in the circumstances the municipality is responsible in damages for the consequences of the neglect to take proper measures to prevent this sidewalk, under the effects of this traffic, falling into such condition as to amount to a nuisance. Sec. 507 is capable of being read as creating an absolute duty to prevent the highways of the city falling into a state of disrepair. There is, however, much to be said and there is a long line of authorities beginning with *Hammond* v. *Vestry of St. Pancras*, L.R. 9 C.P. 316, in support of the view that where duties of maintenance are, by enactments similar to sec. 507, cast upon a municipal body, the responsibility is not an absolute responsibility making the municipality in all circumstances answerable in damages for the existence of a state of things which the statute aims to prevent, *e.g.*, a nuisance arising from the disrepair of a sewer; but that the public authority charged with such responsibility is not answerable if the state of things out of which the complaint arises is one which could not have been prevented or made innocuous by the observance on its part, and on the part of such agencies as it employed, or ought to have employed, of proper care and diligence. A highway may become a dangerous nuisance through a sudden operation of nature not reasonably foreseeable, or from the mischievous act of some person for whom the authority charged with the care of the highway is not responsible and which it could not reasonably be held to be negligent or incompetent in not anticipating. In such cases and generally speaking in cases in which the state of things complained of can be shewn to have been something which the public authority could not reasonably have been expected to know or to provide against, it has been held that there is a good answer to any claim for reparation: *Bateman* v. *Poplar District Board of Works*, 37 Ch. D. 272; *Brown* v. *Sargent*, 1 F. & F. 112; *Blyth* v. *Company of Proprietors of Birmingham Waterworks*, 11 Ex. 781; *Whitehouse* v. *Birmingham Canal Co.*, 27 L.J. (Ex.) 25. Under an enactment in the Ontario Municipal Act, to much the same effect as sec. 507, municipalities have uniformly been held to be exonerated in the absence of negligence. It may properly be assumed that sec. 507 was not enacted without reference to this course of decision and therefore, in construing that section, one is not without weighty sanction

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when giving effect to the considerations upon which these decisions rest.

Strictly, no question of burden of proof is here material. By the pleadings the onus of establishing an actionable breach of duty, is of course, on the plaintiff in the first instance. I express no opinion upon the question whether the effect of the statute itself is that where a nuisance is shewn to have existed in fact the onus is thereby cast upon the municipality to establish that the nuisance was not due to any cause for which it is responsible; in other words, whether or not there is a presumption of law arising from the existence of a nuisance—in the condition of a highway—that the municipality is responsible for it; a presumption that the municipality can only meet by establishing the negative of the issue. 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. (See *Blamires* v. *Lancashire & Yorkshire R. Co.*, L.R. 8 Ex. 283).

The evidence before us in this case is quite sufficient, as I have already indicated, to shew failure to discharge the duty arising under sec. 507 for which the municipality is responsible.

It is argued that the municipality cannot be held responsible for the non-enforcement of its by-laws. In truth the municipality in the view expressed above is held responsible for allowing a nuisance to come into existence which could and ought to have been prevented. It was incumbent upon the municipality to use its powers of control on the highway to that end; and if the enforcement of the by-law had been its only means of effectively executing its duty, the municipality was bound to resort to that means. There is a passage in Lord Blackburn's judgment in *Geddis* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430, at 456, that may be usefully quoted. It gives the principle which affords another answer to this argument:—

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And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, "negligence" not to make such reasonable exercise of their powers.

ANGLIN, J.:—The plaintiff was injured through stepping into a hole in a sidewalk constructed by the defendant corporation on a city street where the traffic was considerable. The accident occurred at half-past seven o'clock on a November evening. The sidewalk had been broken down by a heavy load of coal driven over it on the afternoon of the previous day about 4 o'clock. The evidence shewed that the sidewalk had been constructed as an ordinary plank walk intended for use by pedestrians only, and that no provision had been made for the crossing of it by vehicular traffic at the point in question. A by-law of the city prohibited the crossing of sidewalks by horses and vehicles where protective timbering had not been provided for that purpose. Notwithstanding this by-law the place in question had been used throughout the whole of the year preceding the accident without any such protection as a crossing to a yard or private lane. The user had been of such a character and to such an extent that the Judge found, properly, in my opinion, that the city had notice of it. No charge of contributory negligence is pressed against the plaintiff. At the trial before McCarthy, J., the city was held liable on the ground that there had been a breach on its part of a duty

to have put and kept *the crossing* in a state of repair or to have required that the private owners of the property adjoining who used the crossing should put the same in a proper state of repair.

The Appellate Division of the Supreme Court reversed this judgment, holding that there was no obligation on the part of the city to provide a crossing, that its only duty in respect of the sidewalk was to repair it within a reasonable time after notice, that it was out of repair and that notice actual or imputed of the existence of disrepair was not established. Stuart, J., dissenting, held that because the municipal corporation knew that the sidewalk was being crossed continually by vehicles the place in question had the combined character of a sidewalk and crossing of a highway and should have been kept in a state of repair suitable to that character. He found that such a state of repair was not maintained. He also held that, having regard to such user and the character of the construction of the sidewalk, the

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city was called upon, if it did not desire to reconstruct so as to make the place suitable for a crossing for vehicles, to exercise greater vigilance in discovering breakages.

By its charter (sec. 507) the City of Edmonton is required to keep sidewalks constructed by it in a reasonable state of repair having regard to the character of the highway and the locality. This duty is imposed to ensure the safety of persons lawfully using the sidewalk and a breach of it entails liability in damages to such persons when injured in consequence: *City of Vancouver* v. *McPhalen*, 45 Can. S.C.R. 194. It must have been obvious to anybody giving the matter a moment's consideration that the user of a crossing over a sidewalk constructed as was that in question might result in its breaking down at any time. The user was certain sooner or later to put the sidewalk into a state of disrepair. I think it is not imposing upon the municipality an obligation greater than the legislature intended to hold that the duty to keep in a reasonable state of repair involves the duty to prevent, as far as reasonably possible, the continuance of known conditions which will bring about a state of disrepair, and, if the continued existence of such conditions is not prevented, to take precautions in the nature of extra inspection commensurate with the likelihood of a dangerous state of disrepair arising. Probably the safest and least expensive method of discharging its duty to keep in repair would have been to construct a proper crossing at the place in question. But, without holding that the municipality was under an obligation to construct such a crossing, or that failure to institute prosecutions for breaches of its by-law forbidding the crossing of unprotected sidewalks rendered it liable for damages, having knowingly permitted the continuance of forbidden and dangerous vehicular traffic involving risk of a break in the sidewalk at any moment, I think it cannot escape liability for injury sustained in consequence of a break occasioned by such traffic, after it had been allowed to remain unrepaired for more than a day. Whether such liability would arise in the case of an accident happening immediately, or very shortly, after the occurrence of a break it is not necessary now to determine. It may be said that this implies an obligation of at least daily inspection of a place such as that in question which would be too onerous to impose upon the municipality. But the neces-

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sity for such an inspection could have been so easily avoided, either by putting in a comparatively cheap crossing, which the city might have done on its own initiative, or by taking steps to prevent vehicular traffic crossing the sidewalk, which need have entailed no great trouble or expense, that the municipality can scarcely be heard to complain of the burden so imposed. Because, in my opinion, under the special circumstances in evidence it failed to take adequate measures for the fulfilment of its statutory duty to keep the sidewalk in a reasonable state of repair as a sidewalk, I would hold the defendant corporation liable.

The appeal should be allowed with costs in this Court and in the Court appealed from and the judgment of the trial Judge should be restored. *Appeal allowed.*

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FIDELITY & CASUALTY INSURANCE Co. v. MITCHELL

Judicial Committee of the Privy Council, Viscount Haldane, Lord Dunedin, Lord Shaw and Sir Arthur Channell. July 27, 1917.

1. INSURANCE (§ VI B—280)—ACCIDENT POLICY—DIRECT CAUSE—TOTAL DISABILITY—SPRAINED WRIST—TUBERCULOSIS.

A sprained wrist incapacitating one from performing his work as an eye, ear, nose and throat specialist, is a "total disability that prevents him from performing any and every kind of duty pertaining to his occupation," within the meaning of an accident policy; the disability is "immediate and continuous," resulting from accidental means, "directly, independently and exclusively from all other causes," though recovery had been prevented by a latent tuberculous condition becoming active.

2. INSURANCE (§ III E—75)—WARRANTY—MISREPRESENTATION—HEALTH—TUBERCULOSIS.

It is not a misrepresentation or breach of warranty by an assured that he was in "sound condition mentally and physically," merely because he once suffered with a tubercular affection of the lung which has healed up, no disease being apparent which could not have passed him as sound under any medical examination.

[28 D.L.R. 361, 37 O.L.R. 335, affirming 26 D.L.R. 784, 35 O.L.R. 280, affirmed.]

Statement.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario, 28 D.L.R. 361, 37 O.L.R. 335, affirming 26 D.L.R. 784, 35 O.L.R. 280. Affirmed.

Sir John Simon, K.C., *D. L. McCarthy*, K.C., and *M. W. Slade*, for appellants.

P. O. Lawrence, K.C., and *J. D. Montgomery*, for respondent.

The judgment of their Lordships was delivered by

Lord Dunedin

LORD DUNEDIN:—The plaintiff in this case sues on an accident policy dated February 10, 1913. The policy is in the following terms, omitting such parts of the document as are immaterial to the questions raised:—

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$15,000—$30,000 full life-indemnity disability policy providing indemnity for (1) bodily injury sustained through accidental means and resulting in disability, dismemberment, loss of sight, or death; (2) illness from any disease resulting in disability: to the extent herein provided. No. 2460756.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

THE INSURING CLAUSE.

The Fidelity and Casualty Company of New York (herein called the company) does hereby insure the person (herein called the assured) named in Statement A of the schedule of warranties against—(1) Bodily injury sustained during the term of one year from noon, standard time, of the day that this policy is dated, through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane), and resulting directly, independently and exclusively of all other causes, in—(a) Immediate, continuous, and total disability that prevents the assured from performing any and every kind of duty pertaining to his occupation.

ACCIDENT INDEMNITIES—TOTAL DISABILITY.

Art. 5. If the assured suffers total disability, the company will pay the assured so long as he lives and suffers said total disability $75 a week.

DOUBLE INDEMNITIES.

Art. 9. The amounts specified in arts. 5, 6, 7, and 8 shall be double if the bodily injury is sustained by the assured—(2) while in or on a public conveyance (including the platform, steps, and running-board thereof) provided for by a common carrier for passenger service.

On May 30, 1913, being within 12 months of the date of the policy, the plaintiff was travelling in a sleeping-car on the railway, and was thrown out of his berth on to the floor of the car. He was rendered insensible and was afterwards found to have severely sprained his wrist. The wrist did not get better, and it is now in such a condition as entirely to prevent him using his hand so as to perform such operations as are part of the necessary work of a throat, ear, and eye specialist. The defendant company paid the weekly allowance of $150 down to March 1, 1915. After that they refused to pay, and this action is for the quarterly payment due on May 30, 1915.

Before the trial Judge the defendants, while admitting the notification of the accident, pleaded that if the accident had happened there had been complete recovery from its effects, or if there had not been complete recovery, that such non-recovery was due to inattention on the part of the plaintiff and a fraudulent design on his part to prevent the injury healing. These pleas were emphatically negatived by the trial Judge, whose verdict on this matter was unanimously confirmed by the Court of Appeal; and they have not been insisted on before this Board.

The defendants, however, had three other pleas which, though

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repelled by the trial Judge and unanimously by the Judges of the Court of Appeal, have been argued before their Lordships. They were:—1. That there was breach of warranty on the part of the plaintiff, who was thereby disentitled to sue on the policy. 2. That the injury sustained by the plaintiff through accidental means did not independently, exclusively of all other causes, result in immediate, continuous and total disability. 3. That the disability does not prevent him from performing any and every kind of duty pertaining to his occupation.

This last plea may be at once disposed of. His occupation is that of a specialist in work on eye, ear, nose, and throat. The Judges have all held that a man with a totally disabled hand cannot, in any fair sense, perform any and every kind of duty of that occupation. With that finding of fact their Lordships entirely agree.

As regards pleas one and two, some further explanation is necessary. It is the fact that there is present in the plaintiff a part of the chest where there is dullness on percussion, which indicates that at a previous period, probably some 10 or 15 years before the accident, there had been a tubercular affection of a small part of the lung. The lesion in the lung had healed, and there was no active trouble in the chest. There was no positive evidence of an actual tubercular condition of the wrist; but a sprain, however severe, would normally get better in some 6 months or so, and would not settle down into the chronic condition which was here disclosed.

Upon this evidence, and upon the somewhat conflicting evidence of the doctors examined, the trial Judge and the Judges of the Court of Appeal came to the same conclusion as to findings of fact. These findings were accepted by the counsel for the defendants; and even had they not been so accepted, their Lordships would have been slow to disturb them. They may be summarised thus: There was no active tuberculosis in the arm, but there was present in the plaintiff's system tuberculosis in some form, such tuberculosis—the lesion in the lung having completely healed—was latent, and would have remained harmless had it not been for the accident.

As regards the first plea on the warranty, their Lordships have no hesitation in coming to the same conclusion as the Courts

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below. The plaintiff has no apparent disease, and would have been passed sound by any doctor who might have examined him, and the statement in the schedule of warranties, that he was in "sound condition, mentally and physically," was true.

The more difficult and delicate part of the case is in relation to the second plea. It was strenuously urged by the appellants that the disability here could not be said to be caused by the accident independently of another cause; the other cause being the tuberculous condition, without which there would not have been continuous disability, as the sprain would have passed away in ordinary course.

The point is narrow and not without difficulty. But their Lordships agree with the result reached in the exceedingly careful and able judgment of Middleton, J., confirmed unanimously by the Judges of the Court of Appeal. His view is most tersely expressed in a single sentence:—"This diseased condition is not an independent and outside cause, but it is a consequence and effect of the accident."

Their Lordships agree with the counsel for the appellants who argued that the matter is not concluded by the cases on the Workmen's Compensation Act. What is there sought is a chain of causation starting from the accident without (to use the phrase used in the House of Lords in *Coyle's* case, [1915] A.C. 1), "any intervening circumstance to break the chain of causation." What has got to be determined here is the construction of this clause.

What is insured against is, first, bodily injury sustained through accidental means. As to that, there is no difficulty. The wrist has been injured by an accidental fall. Then, secondly, this bodily injury must result in immediate, continuous and total disability that prevents the assured, &c. This, also, is clear. The wrist was disabled at the moment of the fall, and has been disabled ever since. The point as to preventing the assured from doing work has been already dealt with. But then comes the third condition, which is the critical point. This bodily injury, sustained through accidental means, and resulting in disability, must so result "directly, independently and exclusively of all other causes." Now the expression "other" causes postulates a cause already specified. The word "cause" has not, so far, been used in the sentence, and it must therefore

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be found in the words "accidental means." Therefore, there must be independency between cause 1—the accident—and cause 2, whatever that may be. But in this case, on the view of the facts taken by both Courts—with which their Lordships agree, and which in any case they would be slow to disturb—there is no independency between the alleged second cause—the tuberculous state—and the first cause—the accident. Prior to the accident there was only a potestative tuberculous tendency; after it, and owing to it, there was a tuberculous condition. In other words, the accident had a double effect: it sprained the tendons, and it induced the tuberculous condition. These two things acted together, and were the reason of the continuing disability; but while they are both ingredients of the disabled condition, there has been and is, on the true construction of the policy, only one cause, viz., the accident.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal. The respondent, in terms of the order, granting special leave to appeal, will have the costs of the appeal taxed as between solicitor and client. *Appeal dismissed.*

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Quebec Court of Review, Martineau, McDougall and Panneton, JJ. May 28, 1917.

INSURANCE (§ VI B—280)—ACCIDENTAL INJURY—HERNIA—IMMEDIATE CAUSE.

Hernia resulting from playing golf, and not due to any pre-existing disease, is an "accidental injury," "immediately" caused by accident, within the meaning of an accident policy, though the assured be predisposed thereto owing to his physical condition.

[See also *Fidelity & Casualty Ins. Co.* v. *Mitchell* (P.C.)36 D.L.R. 477.]

Statement.

APPEAL from the judgment of the Superior Court rendered by Greenshields, J. Affirmed.

Action on two special accumulative accident policies. The plaintiff while he was taking exercise with golf clubs felt a tearing pain in his left side. He consulted a doctor, who, after an examination, pronounced that he was suffering from double hernia. He had to undergo an operation and the treatment lasted during fourteen weeks. He claimed an indemnity under his policies, but the insurance company refused to pay. The policy had been appropriated to his minor son. He therefore took, as tutor, an action against the defendant, and demanded for 7 weeks of total disability, $175; for 14 weeks of partial dis-

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ability, $140; for a surgical operation, $150, forming a total of $465 under the above contracts of insurance. The defendant denied the allegations of the declaration, and pleaded especially that the accident did not come within the scope of the risk mentioned in the policies. The Superior Court maintained the action.

The judgment appealed from was as follows:—

GREENSHIELDS, J.:—There are some striking facts in the case which admit of little, if any, doubt.

1. The actual condition in which the insured found himself on the morning of March 13 had never existed before; no matter how predisposed the insured may have been to develop that condition, even from his childhood, the actual condition never developed until that last mentioned date.

2. It is a fact, well known to medical science, that a person may become immediately afflicted with hernia as a result of a sudden strain or wrench, no matter from what cause that strain may arise.

3. That the condition in which the insured found himself on the morning of March 13, 1914, necessitated the operation, bringing about a total disability.

4. In 1910 the insured was examined by his family physician, and was recommended to wear a light truss for commencing hernia. He never did wear the truss, never consulted his physician again about the matter, but continued his active participation in out-door sports.

There is some proof in the record that the muscular formation found in the insured in the region where the hernia pronounced itself is not perhaps of normal development, and lacks somewhat in resisting power.

Now, dealing with these facts in the light of the policy invoked by the plaintiff and its clauses and conditions invoked by the defendant, to what conclusion are we led? I have no doubt that whatever the predisposition of the insured may have been to hernia, the actual condition developed and visible on March 13, 1914, was due to the violent exercise of swinging his golf club on the morning of the 12th. If that be a correct finding of fact, and assuming for a moment a predisposition to hernia existing, we have double hernia immediately pronounced in the insured as a result of violent exercise indulged in by the insured. That the policy contemplates hernia being caused by an accident

is beyond any question. The policy specially provides a fee of from $200 downwards for a surgical operation for hernia, caused by an accident in the terms of the policy.

If there was any doubt upon this point, it is absolutely dispelled by the letter of the chief agent and attorney of the company defendant, wherein he asks the insured to eliminate the disability due to hernia from the coverage, to use his word, of the policy. To eliminate something that does not exist is a contradiction in terms.

The liability existed from the moment that the policy was issued. The company wanted the insured to eliminate or obliterate the liability. The insured refused, and the company now seeks by its defence to do what the assured refused to do. But, says the defendant, in the first place, that was not an accident as contemplated by my policy, even if the hernia resulted as a consequence of what the plaintiff was doing. I cannot follow the defendant in this pretension.

The word "accident" or "accidental" where used in the policy, in my opinion, has no technical, restricted, or what I might call "insurance meaning." It is a contract, the wording of which was chosen by the defendant, and I should interpret the word "accident" and "accidental" when and where used in the policy, in the ordinary and popular significance of the word.

The insured intended to swing his club for healthful exercise; he did not intend to cause himself injury; and if while doing this and as a consequence of doing it, injury resulted, as, Lord Halsbury said, in *Brintons* v. *Turvey*, [1905] A.C. 230, would not the generality of mankind say, that what occurred was an injury caused by an accident.

At the present time thousands of men earn their livelihood as professional instructors of the game of golf; in the course of their laborious work they swing clubs, and that with violence, and if one of these club golf instructors, while so swinging his club in the course of his work, ruptured himself, could it be said that that rupture or injury was the result of anything but an accident? If he were employed by one who came under the operation of the Workmen's Compensation Act, no Court in Christendom would refuse him his indemnity.

If instead of injuring that part of his anatomy that was in-

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jured, the assured had dislocated his shoulder, it seems to me it would be with bad grace that the defendant would seek to escape liability. I find, therefore, that the condition necessitating the operation was directly and exclusively brought about by what the insured did on the morning of March 12, 1914. I find that the injury he sustained at that time was an injury resulting from an accident.

But, says the defendant, hernia already existed. It is not clear what incipient or commencing hernia really means. It is clear that some persons are more predisposed to hernia than others. Hernia is not a germ disease. Hernia may develop in one person by a less strain than in another, owing to a defective or abnormal anatomical form; all that may have existed in the insured. The defendant insured him as he was without any statement from him as to what the condition of his anatomy was, or without any steps being taken to ascertain the same. A man may have a very weak arm, and therefore it might be very easily broken, but if accidentally broken, he is entitled to recovery, nothwithstanding that thousands of other arms would never have been broken.

In the case of *Brintons* v. *Turvey*, already referred to, and decided as late as 1905, a workman was overcome by heat and died. It was held that his death was due to an accident, and one of the very reasons given for so holding was that it happened that he was in a weak state of health and so easily overcome by the heat, and therefore in his case it was an accident. With equal force it might be said that the anatomy of the insured in this case was accidentally abnormally weak and therefore the strain accidentally produced greater results.

The counsel for the defendant has referred to the American case of a man riding a bicycle at top speed for a considerable time, and causing an irritation of the appendix, and it was held that his death was not accidental. I doubt the soundness of the holding. I should rather follow the principle laid down in the English jurisprudence in the case of *Marshall* v. *East Holywell Coal Co.*, 93 L.T. 360. It was held that a coal miner claimed compensation for an abscess of the hand, caused by the continuous rubbing of the pick handle producing what is known as a "beat hand," was not an accident. The Master of the Rolls said: "Yet

to be an accident, it must be something which is capable of being described as having occurred on a particular day, and must be an accident in the ordinary and popular meaning of the word." A man working with a blistered finger for a time among red lead and oil, producing inflammation and swelling, was held not to be an accident; but where a coal miner who was compelled to kneel at his work developed blood poisoning from a piece of coal which at a certain moment worked into his knee, it was held to be an accident.

I have a word to say in conclusion, as to the meaning to be placed upon the word "immediately," and I dispose of it at once by the statement, that I accept the holding of the Divisional Court of Ontario in *Shera* v. *Ocean Accident*, 32 O.R. 411: "'Immediately' in the policy does not mean from point of time immediate resulting total disability: if that meant that, the defendant under its policies would escape liability in innumerable cases." As said in this case, it refers to causation and not to time. The resulting disability to the insured in the present case was immediately due, in my opinion, to the accident which happened on March 12, 1904.

"Accident" has been defined to be unusual and unexpected result attending the performance of a usual and necessary act. It is an unexpected event which happens as by chance, or which does not take place according to the usual course of things. Any event which takes place without the foresight or expectation of the person affected by the event; or is an unusual effect of unknown cause and therefore not expected. In *Barry* v. *U.S. Mutual Association*, 23 Fed. Rep., p. 702, it was held: "'Accidental' as used in an accident policy is used in its ordinary sense and means, happening by chance unexpectedly, or not as expected." *Martin* v. *Travellers Insurance Co.*, 1 F. & F. 505, held "Injury to the muscles of the back in lifting a heavy weight is an accident within the meaning of the accident policy." *Fitton* v. *Accidental Death Ins. Co.*, 17 C.B. (N.S.), 122 at 132 (144 E.R. 50), held: "The deceased fell with violence on the floor of his room, and thereby produced an immediate rupture, which resulted in hernia and death after a surgical operation." It was held that the policy though excluding hernia generally must be construed to mean hernia arising within the system independently of external

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violence. In *North American Ins. Co.* v. *Burroughs*, 69 Pa. 43, "Death resulted from peritonitis caused by a blow." It was held to be an accident.

Considering that on March 12, 1914, A. C. Brook Claxton, the assured under the policies sued upon, met with an accident, resulting in bodily injuries, and as a consequence of said accident was partially disabled for a period of 14 weeks, and totally disabled for a period of 7 weeks;

Considering that the injuries and consequent disability resulted from an accident within the terms, meaning and conditions of the said two accident insurance policies issued by the defendant;

Considering that even if on March 12, 1914, the assured was predisposed, owing to his physical condition, to hernia, the hernia which developed on said date was not due to a pre-existing disease, but was caused and brought about by an accident, and the indemnity payable under said policy is due;

Considering that the bodily injuries suffered by the assured were effected directly and independently of all other causes through an accident which happened to the assured on March 12, 1914;

Considering that under and by virtue of the said policies the plaintiff, *es qualité*, is entitled under the two policies issued by the defendant to the sum of $25 per week during a period of 7 weeks, making a total of $175, being a total disability claim, $10 per week during a period of 14 weeks, making a total of $140, being a partial disability claim, and is further entitled to $100 for the surgical operation to which he was subject, which sums united make a total sum of $415;

Doth dismiss the said plea; doth maintain the plaintiff's action, and doth condemn the defendant to pay to the plaintiff the sum of $415, with interest from date of service of process, and costs.

The judgment of the Superior Court was affirmed by the Court of Review, Panneton, J., dissenting.

Atwater, Duclos & Bond, for plaintiff.

Foster & Martin, for defendant.

Panneton, J.

PANNETON, J. (dissenting):—The two policies give him together $25 per week for total disability and $10 for partial disability. And he claims $150 for the operation under the following

clause "hernia (abdominal). Any cutting operation for radical cure of reducible, irreducible or strangulated form." Against this whole claim, defendant urges that plaintiff's injury was not caused by external, violent, and accidental means. The exercise plaintiff was going through is a succession of violent efforts which determined the accident. A person walking on the street sprains his ankle. In ordinary language we say, "he met with an accident."—I am not disposed to restrict the ordinary meaning of the word accident because the words accidental means are used. A written contract is the witness of an agreement. If the words used in it convey the idea which presents itself to the mind of ordinary persons, effect must be given to them in that sense, though the same words examined with a legal magnifying glass may mean something different. No company nor its agents would ever volunteer the explanation to an applicant for insurance against accidents that they do not insure against accidents as this word is generally understood to mean, but that they insure against injuries received through accidental means. By this distinction, if it really exists, as has been held in some legal decisions not Canadian, and by some authors, the defendant stands the chance of not paying under a policy with the restricted meaning it applies to it, but which was good to enable it to receive the premium under the same policy as understood by the insured without such restriction.

The next objection of defendant is that under the policies the injury must be effected directly and independently of all other causes. Defendant urges that plaintiff having four years before suffered from an hernia, there was a constitutional weakness in that part of his body which contributed to the result complained of. In 1910 the hernia existed only on the one side, whilst he had a double hernia in 1914, one on each side. The existence of the hernia on the one side in 1910 would not preclude him from recovering his indemnity for the hernia on the other side in 1914.

No examination by a doctor is made to obtain a policy against accidents. Companies accept risks upon the declaration of the applicant. In the schedule of warranties given by him there is nothing that applies to any constitutional weakness such as defendant claims existed in him.

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Having disposed of these general objections, let us see to what extent plaintiff is entitled to be indemnified under these two policies.

The first item of the plaintiff's claim, "total disability seven weeks, $175," is for the period of time which followed the operation during which he was in fact totally disabled to attend to his business.

The objection made to that part of his claim is that this disability did not follow immediately and continuously the accident, the policies read "for the period during which the insured shall be immediately, continuously and wholly disabled by injuries."

He was wholly disabled but only after the operation, not immediately after the accident, only 14 weeks after the company bound under the contract to indemnify plaintiff, notwithstanding this formal condition stipulated in it.

This contract must be interpreted according to the usual language—which to my mind is clear. The judgment complained of gives to the word "immediately" the meaning of "immediate cause" of the injury, and not a reference to time.

That word "immediately" may be considered and held to have relation to causation and not to time when used, as in the case of *Shera* v. *Ocean Accident*, 32 O.R. 411, in connection with other kindred words, if this meaning can reasonably be attached to it. In that case the words "immediately, continuously and wholly disabled" were together in the same manner as in the policies in question in this cause, but there are in the policies we are dealing with preceding those words the following words in the principal clause of each: defendant "does hereby insure A.G.B. Claxton against bodily injuries effected directly and independently of all other causes," which were not in the *Shera* case.

The causation is there indicated, therefore the word "immediately" in the other part of the policy need not be tortured to mean anything else than its ordinary sense, a reference as to time. In the margin opposite the clause containing the word "immediately" are found these words: "Total loss of time." This distinction is made in the Ontario case in the notes, where it appears clearly that if the reference as to causation had been made in the policy, as it is made in the present case, the Court

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would not have given to the word "immediately" the meaning which he and the Court hesitatingly gave to it. It was the verdict of a jury which was submitted to the Court of Appeal.

I therefore find that the disability did not follow "immediately" the accident since plaintiff worked from March 13 to May 21 as usual, and that the plaintiff is not entitled to recover any weekly indemnity either for total or partial disability from defendant.

There remains the item of $100, under the special clause referring to operation for hernia.

I would give him judgment for $100 and the costs of the Superior Court as in an action for that amount and dismiss his action for the surplus and grant defendant costs in review.

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Manitoba King's Bench, Curran, J. June 25, 1917.

INSURANCE (§ III F—145)—FORFEITURE—NON-PAYMENT OF PREMIUM—PAYMASTER'S ORDER—NOTICE—ESTOPPEL.

Where a premium is made payable out of the wages of the insured, by an order on a paymaster, and there is sufficient wages earned to pay the premium, failure by the insurance company to give the usual notice that it held such order, or to present it for payment in due time, or to notify the insured of its intention to look directly to him for payment, if it had that right, will estop it from insisting upon a forfeiture of the policy for non-payment of the premium.

Statement.

ACTION on an insurance policy.

H. F. Tench and *D. Campbell*, for plaintiff.

F. R. Hamilton, for defendant.

Curran, J.

CURRAN, J.:—The plaintiff is the widow of Charles Edward Moore, deceased, and brings this action as the beneficiary named in a policy of accident insurance dated April 11, 1911, issued to the deceased by the Canadian Railway Accident Insurance Co., to recover from the defendant, who is the successor of this company (or admittedly bound by its obligations, if any, under this policy), the amount for which the deceased was insured being $2,000, plus $500 for accumulations, or $2,500 in all.

The defendant admits liability if the policy was in force at the time of the death of the deceased, but alleges that the policy was not then in force owing to non-payment of premiums for the year 1916.

The policy, ex. 2, provides that the former company,

In consideration of the warranties in the application and of an order on the paymaster of the applicant (for moneys therein specified) on the

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Grand Trunk Pacific Railway, does hereby insure Charles Edward Moore for the period specified . . . against bodily injuries caused solely by external, violent and accidental means.

It provides further for a renewal of the policy from year to year on payment of premiums as provided for in paymaster's order.

The amount of the annual premium is not stated in the policy, but is stated in the application to be the sum of $32 for the risk against accident.

The payment of this amount is provided for by a paymaster's order, ex. 3, out of the insured's wages for the months of May, June, July and August in each year.

The policy has endorsed upon it in print the following:—

11. It is understood and agreed that this policy is issued and accepted by the insured subject to the following condition, that should the paymaster omit for any reason to collect premiums as stated in aforesaid order, the insured must remit same to the Canadian Railway Accident Company, Ottawa, Ontario, before the last day of the month in which the premium comes due, and, should he fail so to do, this policy will become void at the end of the period provided for by the previous premium paid, if any.

The application, ex. 4, which the insured signed, contains a similar proviso, as follows:—

10*b*. That should the paymaster for any reason whatever omit to collect premiums as stated in order when due, I will remit amount not collected to the Canadian Railway Accident Insurance Co., Ottawa, Ontario, on or before the last day of the month in which aforesaid premium comes due, and, failing to do so, policy will lapse and become void at the end of the period provided for by previous premium paid, if any.

The order on the paymaster, also signed by the insured, contains word for word the same clause as that above recited from ex. 4. The application and order appear to be standard forms prepared and used by the defendant company for this class of insurance.

Certain written admissions of the defendant's solicitor were put in evidence on the part of the plaintiff, from which it appears that in each of the years 1911, 1912, 1913, 1914 and 1915 the defendant gave notice to the paymaster of the deceased from time to time to deduct the sums set out in the order from the deceased's wages, and that such deductions were made and the amounts remitted to and received by the defendant company, which kept the policy in force until April 11, 1916; but that the defendant company did not notify the paymaster of the deceased in the year 1916, nor did it receive any money from the

paymaster in that year, nor did it inform the deceased that it did not intend to give, or that it had not given, notice to the company as in previous years. The defendant also admits that if notice had been given by the defendant to the paymaster of the deceased, the paymaster would have deducted out of deceased's pay the amount asked for in said notice, provided that deceased had then earned sufficient money to pay the amount called for by the notice and the order had not been cancelled by the deceased.

The deceased died on September 5, 1916, as the result of a railway accident, a contingency and risk which it was admitted was covered by the policy, and, as before stated, if the policy was in force at the time of death, the defendant admits liability to the plaintiff for the amount sued for.

The method of collecting premiums under such orders as ex. 3 was explained in evidence by C. R. Mackenzie, chief clerk to the general superintendent of Canadian Government Railways (previously for many years in the employ of the Canadian Pacific Railway, during which time he had handled many orders for payment of premiums on accident policies held by employees of the railway company), as follows: Lists of employees who had given such orders were furnished by the insurance company to the railway company each month in time to have the necessary deductions from the man's pay made before the wages were paid. To such lists were attached receipts for the amounts to be retained for insurances, which were signed by the paymaster and forwarded to the employees, thus intimating to the employee that the necessary amount to protect his insurance had been deducted from his wages by the company to be paid over to the insurance company.

The last payment on the deceased's policy by his employer the Canadian Government Railways was made to the defendant in August, 1915. This payment kept the policy in force until April 11, 1916. No payment was made by anyone in respect of premiums on this policy subsequent to August, 1915. The Canadian Government assumed the operation of the Grand Trunk Pacific Railway between Winnipeg and Fort William on July 1, 1915, and deceased was working on this section of the railway during May, June, July and August of 1916, and earned, in those

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months, more than sufficient wages, after making all other deductions, to pay the amounts called for by the paymaster's order, which had not been cancelled by the deceased and was in force at the time of his death. No deductions from the deceased's wages for the above months on account of this order were made, but the fact is that deceased received the full amount earned in each of these months, less some small deductions for medical fees and board.

Had the defendant sent notice to the paymaster as usual, it is conceded that the premiums would have been paid and the policy kept in good standing. No reason for failure to give such notice by the insurance company is given. It may have happened accidentally, or by mistake, or it may have been by design of the defendant company. It seems to me, under the circumstances, immaterial for which reason the omission occurred.

Upon the foregoing state of facts, can the plaintiff succeed? The policy is unilateral and no enforceable obligation to pay premiums rested upon the deceased, apart from the order given the paymaster on his wages.

It is clear no premiums upon the policy were paid to the company subsequent to August, 1915, and if there was nothing more in the situation relative to the payment of premiums, the plaintiff could not succeed, as the policy had become forfeited during the lifetime of the deceased for non-payment of premiums: *Edwards* v. *Imperial Life Assur. Co.*, 6 O.W.R. 170; *Frank* v. *Sun Life Assurance Co.*, 20 A.R. (Ont.) 564, affirmed in 23 Can. S.C.R. 152; and *McGeachie* v. *North American Life Ins. Co.*, 23 Can. S.C.R. 148.

Is there any ground then for the contention of the plaintiff that, notwithstanding the actual non-payment of premiums, the policy was under the foregoing circumstances still in force and binding upon the defendant company at the time of the death of the insured?

I have not been referred to any Canadian cases where the facts were at all similar; but there are numerous American decisions which, if not wholly in point, are somewhat analogous and instructive. Of these the plaintiff cites *Lyon* v. *Travellers Insurance Co.*, 20 N.W.R. 829, where the facts were very similar to the facts in this case.

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In that case the decedent, a railway employee of the Detroit, Grand Haven & Milwaukee Railway, held a policy of accident insurance in the defendant company. Payment of the premiums on the policy was provided for by the insured giving the defendant a paymaster's order for the amount in the following words and figures:—

Paymaster's order for $27. No. 92,746.

To the Detroit, Grand Haven & Milwaukee Railroad Co.:—

Please pay to the Travelers' Insurance Co., of Hartford, Conn., or its authorized agent, the sum of $27, by instalments, as follows: First instalment, $6.75, to be paid and deducted from my wages for the month of March, 1883; second instalment, $6.75, to be paid and deducted from my wages for the month of April, 1883; third instalment, $6.75, to be paid and deducted from my wages for the month of May, 1883; fourth instalment, $6.75, to be paid and deducted from my wages for the month of June, 1883.

The first instalment being the premium for two months, the first insurance period under a policy of insurance issued to me by said company, and bearing even date and number herewith; the second instalment being the premium for two months, the second insurance period under said policy; the third instalment being the premium for three months, the third insurance period under said policy; and the fourth instalment being the premium for five months, the fourth insurance period under said policy—all in accordance with the provisions and conditions of said policy, and my application for the same.

Occupation, brakeman, mixed train.

It was also stipulated by the policy that there should "be no liability under this policy for any claim by reason of personal injuries, as aforesaid, occurring in either of the said insurance periods for which the respective instalments of premium shall not have been actually paid." The defendant, after receiving the order, and soon after its date, deposited the same with the railway company, in accordance with a custom existing in such cases between them; and it was the practice of the defendant, early in each month, to send to the railway company a statement of the amount due from the employees of such company by reason of insurance, which the said railway company stopped against the pay of such employees about the middle of the month and paid it over to the defendant. The insured had money due him from the railway company for wages in each of the months of March, April, and May, in excess of the amount falling due on said order. The defendant rendered its statement of the amount due on the order to the railway company on the 1st of April, May, June, July and August, and the first two payments were made by the railway company to the defendant, being from the

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March and April wages of the insured. These sums paid for insurance to July 3 at noon. The railway company did not pay the third instalment from the May wages, though it had money in its hands, subject to said order, sufficient for that purpose. The insured was accidentally killed on September 26, seven days before the expiration of the third insurance period, while at work for the railway company, as a brakeman. He had no wages due him for June, and was for some reason paid his May wages by a station agent of the railway company on July 6, according to his time kept by the railway company, three days after the commencement of the third insurance period. The defendant did not notify the insured of the non-payment of the third instalment; did not cancel the policy, nor return the order to him. The main defence at the trial was that at the time the insured received his injuries the contract of insurance by its own terms had expired and become null and void by reason of the non-payment of the premium.

The trial Judge held, as a matter of law, that the premium was not paid for the third instalment period mentioned in the policy, and that by reason thereof the contract of insurance was rendered of no effect, and gave judgment for the defendant. On appeal, however, this judgment was reversed, the Appellate Court holding that the facts shewed clearly a transfer of the premium for the third period to the insurance company, and that the insured received the consideration therefor in the policy issued to him; that the assignment was in writing and independent of the order given on the railway company for the amount; that the order was but a notice to the railway company of the transfer and voucher for it when paid; that the assignment was complete without it, and the insurance company could, when the instalment became due in May, have brought suit for it against the railway company; that the assignment, although made at the time the policy issued, did not take effect until the money for the premium for the particular period was earned by the insured; that the May instalment was earned and in the hands of the railway company in accordance with its rules and customs in dealing with the defendant in such cases and its practice in this particular case when the same became due; that, while it was true non-payment of the premium for any one of the periods

suspends the enforcement of the policy, the insured, in a case like this, when he has provided for the payment when due, and the premium is in the possession of the defendant or under its control, payment will be deemed to have been made, until the insured is notified by defendant to the contrary, and the failure of the railway company to make payment when the amount assigned became due will not be presumed.

The Appellate Court rested its judgment on the law as thus briefly stated: "Payment of the premium will be presumed, and deemed to have been made out of the fund provided and assigned to the company for that purpose, until notice of non-payment is given to the insured."

The procedure, it is to be noted, was the same as that followed in the present case, with this exception, that here the defendant did not deposit the paymaster's order with the railway company, but retained it in its own possession and contented itself with sending to the railway company a list of names of employees, including that of the insured, from whom it had received paymaster's orders for insurance premiums. The policy, as here, was based upon a written application and an order on the railway company, both executed by the insured and bearing even date with the policy, and these three instruments, taken together, constituted, as here, the policy of insurance upon which the rights and obligations of the parties depended. The order, however, did not contain any proviso such as the order here contains, namely:—

> That should the paymaster for any reason whatever omit to collect premiums as stated in order when due, I will remit amount not collected on or before, etc., and, failing to do so, policies will lapse and become void, etc.

In other respects the orders were almost identical.

It does not appear from the report of this case how the assignment, which was said to be independent of the order, was effected, whether in terms of the order or application or policy, but it is clear the Court held there was such an assignment to the insurance company of a wages fund, out of which the premiums were to be paid, and upon which a right of action accrued against the railway company when wages had been earned by the deceased in sufficient quantum to cover the instalments due.

This case, however, seems to be distinguishable on the facts. The order in it does not contain, as before stated, any clauses

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like 16*b* of the application, No. 11 of the conditions endorsed upon the policy and the concluding paragraph of the paymaster's order, and, furthermore, the order was deposited with the railway company, which was not done in this case; and, in addition to such deposit, the insurance company notified the railway company in advance in each month of the amount claimed under the order, which was not done in this case.

I understood defendant's counsel to argue that these clauses imposed upon the insured the duty of inquiry, as premium instalments became due, to ascertain whether or not they had been deducted from his wages and so appropriated for the defendant's use to pay premiums. That it mattered not that the defendant company had not notified the railway company of the order and had not filed the order with the railway company or presented it for payment, and this without any notification to the insured, leaving him possibly in ignorance of the fact of non-payment through the medium of the order unless he should discover it from the diminished amount of his pay-checks, an unlikely thing, as he was receiving variable and not fixed monthly wages, or unless the non-receipt by him of the paymaster's receipts or vouchers for the deductions should have warned him of the fact that such deductions had not been made. As to this, there is no evidence that such vouchers had been previously sent to the insured. Is this construction of these clauses justified under the circumstances? What does the expression, "Should the paymaster omit for any reason to collect, etc.," mean?

"An omission to perform a duty involves the idea that the person to act is aware that performance is required or needful": Stroud's Judicial Dictionary 529. In other words, that before the paymaster could be said to be guilty of an omission in this respect, he must first be made aware of what he was expected to do. Without a notification from the defendant company of the order it held against the insured's wages, how could the paymaster know of its existence, or be said to have omitted to collect the premiums? I think, then, before any omission to collect on the part of the paymaster can be said to have occurred, so as to raise the duty of direct payment by the insured, to the insurance company, it must first be shewn that the paymaster had notice of the order and had failed to recognize it. If there was

no omission to collect on his part, then there was no corresponding duty to pay raised against the insured by the clauses under discussion, until notice, at all events, was given him by the insurance company to that effect.

Again, I do not agree with the defendant's contention as to the insured's duty to inquire. I think a duty to pay, in view of the special arrangement contained in the application, the policy and the order for payment of his premiums by a third party, namely, the railway company, ought not to be inferred against him until he had received notice of the paymaster's omission to collect, either express, which would be the more reasonable course, or implied, due to the fact of his knowingly receiving the full amount of his monthly wages without any deduction for premiums.

The former notice he did not receive from anyone, and the latter ought not, I think, to be presumed for the reason that his pay was not a fixed monthly wage, but varied considerably from month to month, and there is no evidence that he received intimation in any other way that the necessary deductions had not been made.

It is true the defendant company did not receive the premiums and that the insured, whether wittingly or unwittingly, did receive the full amount of his wages during those months of 1916 prior to his death in which deductions therefrom for instalments of premium should in terms of the order have been made. This was no fault of the paymaster, as the defendant company, whether intentionally or by error, failed to notify him of the order, as it had done in each of the five previous years. It was not the fault of the deceased, as the defendant company failed to notify him that the premiums had not been paid from the fund in accordance with the provisions of the contract.

It is therefore clear to me that it was the fault or neglect of the defendant company in not observing the provisions of the policy as to payment of the premiums (which the deceased had a right to expect in the absence of notice to the contrary were being observed, as they had been consistently since the inception of the insurance) which primarily led to default in payment of premiums, and it seems to me that the defendant ought not to be allowed to take advantage of their own failure or neglect in this respect to defeat the insurance.

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Upon the question of affecting the deceased with notice that deductions for premiums had not been made, I refer to the American case of *Geddes* v. *Ann Arbor Railroad Employees' Relief Ass'n*, 144 N.W.R. 828. Brooke, J., at p. 830, said:—

Plaintiff relies entirely upon the case of *Lyon* v. *Travelers' Insurance Co.* (above cited). We are of opinion that that case is distinguishable and not controlling. There the insured, a brakeman, was earning variable wages, so that he might be excused for a failure to notice that no deduction from his pay had been made, while in this case Westerland was working for a fixed salary, and the fact that his premiums were not deducted could not well have escaped his attention.

This case does not seem to be in point in any other respect.

Another American case cited was *Pacific Mutual Life Ins. Co.* v. *Walker*, 53 S.W.R. 675, and seems to me considerably in point. There the insured had given an order to the insurance company on the railway company, his employer, authorizing the paymaster to deduct from his future monthly wages and pay to the insurance company the premium on his accident policy. This order the insurance company accepted, and the Court expressed the opinion, at p. 677, that if the railway company retained funds in its hands belonging to the insured to pay the premiums and the insurance company either failed to present the order, or, if presented and not paid, failed to return it to the insured or made no effort to notify the insured of its non-payment, there will be grounds for holding the company liable, just as if the order had been in fact paid. If wages were due Walker from the railway company for the month upon which the order was drawn sufficient to pay the order, then, in the absence of any complaint or notice from the insurance company to the contrary, he might well presume that the order he had given it for the premium had been paid, or that the insurance company treated the order as a payment, and would not insist upon a forfeiture for non-payment of the premium. Having acted in a way that would naturally lead the insured to believe that his premium had been paid, the company should not, under such circumstances, be allowed to insist on a forfeiture for nonpayment. I think the judgment in this case expresses what should be the law here and also what is only natural justice.

Johnson v. *Standard Life & Accident Ins. Co.*, 97 S.W.R. 831, is another American authority cited; but is hardly in point, because the railway company there was the agent of the insur-

ance company, and the insured had been told by the insurance agent that he need only give the assignment directing the railway company to pay the premiums and they would be deducted. The insured did not know what was due him and thought the premiums had been deducted. It was held that the company was not in a position to claim a forfeiture under a clause stipulating that the policy should be void, if the insured failed to leave with the company any instalment of premiums.

In 1 Corpus Juris., p. 410, par. 29, under the heading "Accident Insurance," sub-title "Giving Order on Employer," the following statement of the law appears:—

> It is customary with some companies to accept from the insured an order upon his employer in lieu of a cash premium. In such case, the duty of insured is usually fully performed if he leaves a sufficient amount in the hands of his employer to meet the instalments as they fall due, and the insured is under no obligation to see that it reaches the hands of the insurer. It devolves upon the insurer to present the orders for payment as the instalments fall due, and also to notify insured of their non-payment as a prerequisite to the right to insist on a forfeiture therefor. (And again.) Where the insurer fails to present the order for payment within a reasonable time and before the death of the insured, it cannot rely on non-payment of the premium as a defence to an action on the policy: *Cotten* v. *Fidelity, etc., Co.*, 41 Fed. Rep. at p. 511.

The plaintiff's counsel also cited the case of *York* v. *Railway Officials' & Employes' Accident Ass'n*, 41 S.E.R. 227. In this case the paymaster's order recited that the assignment is "in lieu of payments," which is not the case here, and contained a clause whereby the insured agreed that failure from any cause to deduct from his wages any of the instalments shall be at his risk, and effect a forfeiture of all rights of himself and his beneficiary under the policy, and waives, for himself and beneficiary, notice of the payment or nonpayment of the premium. In part this provision is somewhat analogous to the clause in the order here, "Should the paymaster for any reason whatever omit to collect the premiums as stated in the order when due, I will remit the amount not collected, etc., and, failing to do so, policy will lapse and become void." The Court held in this case that the paymaster's order containing the provisions recited was not equivalent to payment of the premium, though delivered by the insurance company to the paymaster of the railway company and filed in his office, and if, after it is so filed, the insured continues in the service of the railway company and earns wages continuously until

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the time of his death by accident, but by inadvertence the premium is not deducted and he draws all his wages and the premium is not actually paid, no recovery can be had on the insurance policy, when the policy and application therefor make the order a part of the policy and contract. The reference in the judgment in this case, at p. 229, to the stipulation in the order is as follows: "That if, for any reason—be it a mistake of the paymaster or any other—the deduction should not be made, all Henry's rights under the policy should be forfeited," may at first seem pertinent to the case at bar, and aid the defendant's contention that it was the duty of the insured not to rely wholly upon the order, but to see to it himself that the premiums were paid in any event. This is what the Court said: "Whatever the relation created by the order between the insurance company and the railroad company may be, this (the stipulation) was a positive and express agreement between Henry and the insurance company. The policy made the application of the insured a part of it. It was further provided in the application that the paymaster's order should be a part of the contract. Hence the contract itself provided . . . and it was agreed by the insured that any failure, from any cause, to deduct any of the instalments, should result in the forfeiture of all his rights under the policy while any instalment remained unpaid. Granting that the railroad company was, in a very limited sense, the agent of the insurance company, it was competent for the insurance company and the insured to provide by their contract that the insured should take the risk of the failure of the railroad company to deduct the premium from his wages. It was also competent for them to make the railroad company the agent of the insured, and, by providing that the risk of the failure of the company to make the deduction should be upon the insured, it would seem that to that extent the railroad company was the agent of Henry, and not of the insurance company."

And at p. 231:—"There is no doubt about the validity of the assignment. The railway company could have deducted the premium from the wages. The order was complete authority for that. If it had made the deduction, taken out the money, and held it for the insurance company, it would have been a sufficient payment, for that would have been in accordance with the agree-

ment expressed in the order. But in entering into that agreement both parties looked forward to, and provided for, the very contingency which happened, namely, that through some mistake or accident the money might not in fact be deducted, and provided in that case that the order should not amount to payment. How this express agreement can be laid aside and ignored is nowhere indicated in the brief for the defendant in error."

Reference may also be made to the cases of *Landis* v. *Insurance Co.*, 6 Ind. App. 502; 33 N.E.R. 989; *McMahon* v. *Insurance Co.*, 77 Iowa 229, 42 N.W.R. 179; also *Bane* v. *Travelers Ins. Co.*, 85 Ky. 677, 4 S.W.R. 787.

I have adverted to these American cases at some length because there are no authorities in our own Courts dealing specifically with the liability of accident insurance companies upon policies issued under such conditions as are here found—at least I can find none and none have been cited to me by counsel on either side.

After carefully reading the different American cases to which I have referred, I am of opinion that none of them is fully in point. Possibly the case of *Lyon* v. *Travelers Ins. Co.*, *supra*, is nearer in principle than any of the others, so I must rest my findings upon the interpretation of the contract here as a whole, which the parties have made, and as contained in the application for insurance, the policy of insurance and the paymaster's orders, and particularly upon the clauses or stipulations in all three, which I have quoted in full in the earlier part of my judgment.

There is no doubt that this provision is a very material part of the contract, and that upon the proper application of it to the facts in this case will depend a right decision.

It is clear, then, that as the premiums for 1916 were not paid, that the policy lapsed and became void in virtue of the stipulations or provisos referred to unless the principle of waiver or estoppel can be invoked to assist the plaintiff.

Now all three documents, exs. 2, 3 and 4, contain this stipulation as to payment direct by the insured, and its repetition in each seems to emphasize its importance, and not only served as a warning to the insured, but justified the company in relying upon its being adhered to under proper circumstances.

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Now, under what circumstances would the insurance company be entitled to look to the insured directly for payment of premiums under the provisions of the insurance contract? It must be borne in mind that the giving of the order on the paymaster formed a material part of the consideration for the policy, and that when the order was signed by the insured and delivered to the insurance company that part of the consideration moving from him to the company became executed to the extent that it put the insurance company beyond any doubt in the position of an assignee of so much of the insured's wages, to take effect *in futuro* it is true, but nevertheless operative if the insured continued in the employ of the railway company and earned sufficient wages to satisfy the order, and did not revoke the order, all of which conditions were duly fulfilled.

It is admitted that had the insurance company notified the railway company of the order as theretofore it had done, the necessary deduction from the insured's wages would have been made and the policy protected.

Had the defendant company, then, in view of the terms of its contract with the insured, by which a special method of paying the premiums was provided, the right suddenly and without warning to the insured, to either deliberately or negligently abandon or neglect or refuse to act on the paymaster's order, the appointed and primary means of payment provided by the contract? Or, in other words, to do exactly what it did do or abstained from doing in this case? There can be no doubt that the insurance company had the right to cancel the policy for non-payment of premiums. Has it the right to repudiate the policy on this ground where payment of premiums through the medium of the paymaster's order was provided for and the money earned and in the company's hands to satisfy the order? I do not think, in reason and justice, it should have such right.

The language of the contract seems to forbid that, for it says: "This policy may be renewed from year to year on payment of premiums as provided for in paymaster's order." So that if the insured left with the paymaster, out of his wages, the necessary amounts to be remitted to the company, it seems clear that the company could not cancel the policy on this ground alone.

And, if not, had it the right to defeat the policy by preventing

the paymaster from doing that which the insured had by the order directed him to do to protect the insurance, and which the contract, equally binding upon the company as the insured, expressly stipulated should be the primary source and method of payment, by the simple expedient, unknown to the insured, of refraining from giving notice of the order to the paymaster, or by not presenting the order to, or filing it with, the railway company? I do not think it had this right, which seems clearly a derogation from the contract; nor do I think the paymaster can be said to have "omitted for any reason to collect the premiums" until he was made aware that performance of that duty was required of him, applying the legal definition of the word "omission" before cited from Stroud.

If this be so, then there was in this case no omission of duty or action on the part of the paymaster which rendered operative the stipulation in the contract that the insured must himself pay the premiums.

The defendant's counsel argued that the expression "for any reason" was so wide and sweeping as to impose upon the insured the duty of payment in any event. I do not agree with this contention, for to give effect to it would be to ignore that part of the contract which not only permitted the insured to pay in a special and particular manner, but in fact provided expressly for that mode of payment in the first instance.

I think the contract imposed upon the insurance company a corresponding duty to do its part in giving effect to that provision of the contract, by at all events giving notice of the order to the paymaster and enabling him to collect the premium if the insured had earned it. To construe the contract otherwise would do violence to its manifest and expressed intention.

I interpret the words "for any reason" to mean and cover any defect of duty, or, if there was no duty, then of action, on the part of the paymaster to collect if he knows that such collection is expected of him. This could only be if he had notice of the order in some way that expressly brought its terms to his attention and enabled him to do that which the insured desired him to do with the specified portion of his wages, namely, withhold it from the insured and pay it to the insurance company.

The facts in this case differ from those in the case of *York*

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v. *Railway Officials', etc.*, before cited, in this, that in the latter case the order was actually filed with the railway company and the defect of payment was due solely to the mistake or omission of the paymaster, for which the insured was in no way to blame. The direct result of which was that none of the instalments were deducted. Manifestly here was just such a contingency as was provided for by the order in that case, which contained this clause: "I agree that failure to deduct any of the above instalments by said paymaster from any cause is at my risk and if any instalment be not deducted as above provided for all my rights and the rights of my beneficiary under said policy issued to me shall be void." This difference in the facts is in my judgment very material and clearly distinguishes this case from the case under consideration.

I have reached the conclusion that the defendant company by failing either to file the order with the railway company or present it for payment in due time, or give notice to the railway company in due time that it held such order, was guilty of a failure in duty to be properly inferred from the contract towards the insured, and, further, by its failure to notify the insured of its intention to ignore the order and look directly to him for payment, if it had that right, which I much doubt, it has waived its right to enforce against the beneficiary the provisions of the contract to which I have specially referred, or, at all events, is estopped by its conduct from setting up failure of the insured to comply with these provisions as a good defence to this action.

I draw this inference of fact that the insured ought not to be presumed to have received his wages for the months of May, June, July and August with knowledge that the necessary deductions therefrom for his insurance premiums had not been made by the paymaster, as he was not receiving a monthly wage, but variable wages, which, in fact, in each of those months was for a different amount, and subject to varying deductions on other accounts.

It is not shewn that any statements disclosing just how each of these month's wages was made up and particulars of deductions, if any, were given to the deceased. In any case, to fix the insured with knowledge that no deductions for his insurance

premiums had been made in these months some reasonable evidence should have been offered by the defendant to override the presumption in favour of deduction, which I think the insured might reasonably have entertained from the fact that this had been systematically done in these four months for five years in succession without any action on his part inducing such deductions beyond the giving of the order to the insurance company in the first instance. It does seem to me that the contract imposed some obligation on the defendant company to make that use of the order contemplated by the contract between the parties, and that the insured, having done his part by signing and delivering the order and earning the requisite money to pay the amounts stated in it on presentation, had a right to expect that the company was doing its part in carrying out the prescribed method of payment by use of the order.

The company had the right to cancel the policy under condition No. 8, endorsed on the back of the policy. It did not avail itself of this privilege, which one would naturally expect it to do if for any reason it desired to be released from the risk on the insured's life or limbs. I do not think it can legally accomplish the same purpose by a policy of inaction, such as it here pursued. I think it was bound to use the order in the manner contemplated by the contract as the primary means of collecting the premiums of insurance, and that, until it had first attempted to do this without obtaining results, the onus of paying direct would not be shifted to the insured.

For the foregoing reasons I think the plaintiff is entitled to succeed, and there will be judgment in her favour for $2,500, with interest as prayed, and costs of suit, which will include all necessary discovery examinations.

I think the sum of $32 should be deducted from the verdict on account of unpaid premiums. *Judgment for plaintiff.*

CANADIAN NORTHERN PACIFIC R. Co. v. CITY OF NEW WESTMINSTER.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Dunedin and Sir Arthur Channell. August 3, 1917.

1. TAXES (§ I F—80)—EXEMPTION—RAILWAY PROPERTIES—WHAT ARE—LAND.

Lands acquired by a railway company for railway purposes, contingent upon the approval of the plans by the Minister of Railways, are not, until definitely appropriated as part of the railway and taken from

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other uses, "properties and assets which form part or are used in connection with its railway," so as to be exempt from taxation under clause 13(*e*), ch. 3, B.C. statutes 1910.

[See annotation 11 D.L.R. 66.]

2. STATUTES (§ II A—95)—SETTING OUT AGREEMENT—BINDING EFFECT.

An agreement set out in a schedule to a statute has the same effect as if it were a clause in the statute.

[25 D.L.R. 28, 22 B.C.R. 247, affirmed.]

APPEAL from the judgment of the Court of Appeal of British Columbia, 25 D.L.R. 28, 22 B.C.R. 247. Affirmed.

The judgment of their Lordships was delivered by

SIR ARTHUR CHANNELL:—This appeal raises the question whether certain lands belonging to the appellants, the Canadian Northern Pacific Railway Co., and within the City of New Westminster, in the Province of British Columbia, are exempt from taxation by the respondents, the corporation of that city. The Court of Appeal of British Columbia has held that whatever may be the case after the appellants have deposited plans pursuant to sec. 17 of the B.C. Railway Act (1911), ch. 194, and have got such plans approved by the Minister, at all events the lands in question are not exempt until such plans have been so deposited and have been so approved. That has not been done yet. From that decision the present appeal is brought.

The exemption which the appellants claim and which they allege extends to the lands in question, arises in a rather peculiar manner. Another company, the Canadian Northern Railway Co., governed by Dominion Acts of Parliament, was minded to get, in connection with their own line of railway, a line through the Province of British Columbia, but instead of getting direct authority to extend their own line, they procured the incorporation of the appellant company by an Act of the Legislature of British Columbia (10 Edw. VII., 1910, ch. 4). Prior to that incorporation an agreement (dated January 17, 1910) had been made between His Majesty the King (acting by the Minister of Mines for B.C.) and the Canadian Northern Railway Co., containing many provisions which could not have been made effective except by Act of Parliament, and that agreement had been ratified by an Act of the Legislature of British Columbia (1910, ch. 3), which said that the provisions of the agreement were to be "taken as if they had been expressly enacted hereby and formed an integral part of this Act." The agreement is set out in a schedule to this Act, and clause 13, sub-sec. (*e*) of the agreement reads thus:—

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The Pacific Company and its capital stock, franchises, income, tolls, and all properties and assets which form part of or are used in connection with the operation of its railway shall, until the first day of July, 1924, be exempt from all taxation whatsoever, or however imposed, by, with, or under the authority of the legislature of the Province of British Columbia, or by any municipal or school organisation of the province.

On the argument some question was raised by the respondents' counsel as to the operation of this provision, and as to its binding effect, but the board are clearly of opinion that it operates as if it were a clause in an Act of the provincial legislature, and is binding on the City of Westminster with the force of such an Act.

The sole question in the appeal, therefore, is as to the true construction of this clause 13 (*e*), but there are both in the agreement and in other Acts of the legislature, provisions which have to be considered in arriving at the true construction. The lands in question have undoubtedly been purchased by the Pacific Company with the intention that they shall be ultimately part of the railway and be ultimately used in connection with the operation of the railway, and the question for consideration is whether they can be said now to come within the words as being now part of the railway used, as described in the clause. The precise position of the railway track cannot be known until the plans required by sec. 17, already referred to, have been deposited and approved. The Minister has the power of directing the line to be made in a position in which the lands in question would not form part of the track, but it is contended, and the board think rightly contended, that the company might still use the lands in some other way connected with the railway. It is contended also, that the word "railway" in the clause in question does not merely refer to the track, but is to be read with the definition of railway in sec. 2 of the B.C. Railway Act (1911), ch. 194, which is a mere re-enactment of a similar definition in Acts which were in force in 1910.

That definition includes in the term railway "all branches, sidings, stations, depots, wharves, rolling-stock, equipment, works, property, real or personal, and works connected therewith, and also every railway bridge, tunnel, or other structure connected with the railway and undertaking of the company."

The things so brought by definition into the term "railway" are all physical things, as the railway itself is. The definition does not bring into "railway" the whole "undertaking" of the company. Manifestly, it cannot be intended by the words of clause (*e*) to

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exempt all the property of whatever kind of the Pacific Railway Co., because, if so, almost all the words of the clause would be surplusage. Counsel for the appellants, in his very able argument, pointed out that the Pacific Railway Co. was not merely a railway company, but had power to construct and operate telegraph lines (sec. 4), telephone lines (sec. 5), steamships (sec. 7), wharves, docks, and elevators (sec. 8), and coal mines (sec. 9), and also to deal in a special way with town sites, and he suggested that "railway" in clause (*e*) should be held to include the whole undertaking of the company, so far as it was a mere railway company, and that the clause (*e*) was framed as it is to prevent the exemption extending to lands and things connected with operations of the company otherwise than as a mere railway company. This, however, is giving to the word railway, a meaning which, in the opinion of the Board, it cannot bear. It is used in the clause as denoting a physical thing, of which something else can form part and which can be "operated." The mere fact, therefore, that these lands are the property of the company, and that the intention with which they were purchased may earmark them as owned by the company in their capacity of a railway company proper, is not of itself enough, in the opinion of the board, to bring them within the exemption. Clause (*d*) was called in aid. That says that the portions of lands acquired under that clause for the government which should be required for the purposes of the Pacific Company "will, as the property of the company, come within the railway exemption clause herein (referring to clause (*e*))." This merely says that the exemption of these lands will be dealt with under clause (*e*), and certainly throws no light on the question when the exemption of them is to begin.

It is essential to the argument of the appellants that the board should read the words "which form part of and are used" as including lands "acquired for the purpose of forming part of and being used," but the words of the clause are in the present tense, "form part and *are* used," and clause 9 of the agreement quoted in the judgment of McPhillips, J.A., gives the government security over the property of the company "acquired for the purpose of, and used in connection with" the lines and ferry, thus showing that the framers of the agreement, and the legislature which adopted the words of it, had in their minds the distinction between lands acquired for the purpose of being hereafter used and lands actually now used.

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To read the clause in the way desired would be to add to it words which are not to be found in it, and it appears to the board that there is nothing in the context or in the object of enactment, or in the incorporated enactments, which make it necessary or justifiable to read in the necessary words.

The company are no doubt justified in buying land which they expect they will want for the railway before getting their compulsory-powers, and they are probably in most cases acting providently in doing so, as they may have to pay more for the lands when they come to exercise their powers, but there seems no reason for giving the exemption to such lands as soon as they become the property of the company. They may remain for some time in use for the purpose for which they have previously been used. In this case the lands are said to include some mills and such like buildings still being used as before. Why should they be exempt from taxation to cheapen the ultimate cost to the company of the lands required for their undertaking, when the public are neither getting the actual railway, nor having it already in process of construction for their ultimate benefit? The benefit expected to the public from the railway is of course the consideration for the remission of taxation. From the time the lands are definitely appropriated as part of the railway and taken from other uses there appears reason for the exemption, and at any rate it is then clearly given. As to the period when lands have been purchased for the purpose of being ultimately used in some way or other for the railway, including the case when the mode of user has been decided on by the company, subject only to the Minister's power to direct alteration of the proposed plans, but when nothing further has been done there seem no express words to give the exemption, and no such necessity as would justify the board in putting on the words which are used the meaning necessary to give it.

This conclusion is supported by considering the difficulty in which the taxing authority would be placed by an exemption depending not upon facts, of which they would necessarily have notice, but upon the intention of the company, not publicly disclosed, as to the use to be made of lands not yet entered in the land register as owned by them. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

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DOW v. PARSONS.

Nova Scotia Supreme Court, Sir Wallace Graham, [illegible], and Longley, Drysdale, Harris and Chisholm, JJ. March 10, 1917.

BASTARDY (§ I—5)—BOND—FAILURE TO APPEAR—LIABILITY—FILIATION ORDER.

Sureties are liable on a bond under sec. 6 of the Bastardy Act (R.S.N.S. 1900, ch. 51), upon a failure of the putative father to appear, before any filiation order is made.

Statement. APPEAL from the judgment of Ritchie, E. J., dismissing with costs an action against sureties on a bond given under the Bastardy Act (R.S.N.S. 1900, ch. 51). Reversed.

V. B. Fullerton, for appellant; *J. B. Kenny*, for respondents.

The judgment of the Court was delivered by

Graham, C.J. SIR WALLACE GRAHAM, C.J.:—The main question in this action is, whether, under the Bastardy Act, R.S.N.S. 1900, ch. 51, when a putative father fails to appear after the first bond has been given before the birth, and the child has been born, and no hearing takes place in consequence of his non-appearance, that constitutes a breach of that bond. The provisions of the statute bearing on the case are as follows:—

Sec. 5 provides that if a woman is pregnant with a child likely to be born a bastard and to become chargeable to any poor district, she shall make an information in writing under oath (Form A.) before a justice stating that she is so pregnant the district to which such child is likely to become chargeable and the name of the father of such child.

Sub-sec. 2. Such justice shall forthwith issue a warrant (Form B.) directed to a constable requiring him to apprehend such putative father and cause him to be brought before him or some other justice, etc.

Sec. 6. The putative father when brought before a justice of the peace under such warrant shall enter into a bond (Form C.) in the sum of $150, with sufficient sureties conditioned for the fulfilment of any order of filiation which may be made against him in respect to such child.

(2). If he does not furnish such bond to the satisfaction of such justice he shall be committed to jail (Form D.) until such order is made or refused or until such bond is sooner given.

The form of the bond C. is as follows:—

FORM C. SEC. 6.—BOND BEFORE BIRTH.

Know all men by these presents that we C. D. of.....in the county of.....and E. F. and G. H., of.....in the same

county.....are held and firmly bound unto the overseers of the poor for the poor district of.....in the said county (or unto the town of.....) in.....dollars to be paid to the said overseers of the poor (or to the said town) or to their assigns, for which payment well and truly to be made we bind ourselves and each of us by himself, our and each of our heirs, executors and administrators firmly by these presents, sealed with our seals. Dated this .....day of.....A.D.....

Whereas A. B. of.....has declared on oath that she is pregnant with child, which is likely to be born a bastard and to be chargeable to the poor district of.....(or to the town of.....), and that the above bounden C. D. is the father of such child.

Now the condition of this obligation is such that if the said C. D. in the event of a warrant being issued, after the birth of such child, commanding his appearance at the hearing of an application for an order of filiation against him in respect to such child appears at such application and surrenders himself into the custody of the constable executing such warrant, and, whether he so appears or not, fulfils such order when made, then this obligation shall be void.

Sec. 8 (1). As soon as convenient after the birth of a bastard child, two justices shall issue a warrant (Form E.) on the application of a ratepayer directed to any constable to bring before them the mother and the putative father.

(2). If the mother has previously to the birth of the child made an information . . . a second information need not be made on the application for such warrant after such birth.

5. If such putative father has remained in jail under a warrant issued before such birth, he shall be delivered into the custody of the constable who produces a warrant requiring him to be brought before the two justices.

The amendment, 1908, ch. 23, sec. 1, provides for an adjournment in certain cases and releases the father upon giving a bond for his appearance and fulfilling the order of filiation, but that is not applicable to the case of a putative father not appearing.

The amendment of 1910, ch. 17, sec. 7, provides for his being committed until the adjourned date or until a bond is given. This, also, is not applicable to this case.

Sec. 9 of the principal Act provides:

Upon the mother and putative father being brought before the two justices in obedience to such warrant, they shall hear the evidence of the mother, the putative father, and any other evidence which is adduced before them.

(2). Upon such evidence they may, unless they discharge the putative father, make an order of filiation requiring him to

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pay to the overseers of the poor for the poor district, etc., (*a*) the expenses incidental to the lying in and maintenance of the mother and to the birth and maintenance of the child up to the date of the order and (*b*) such sum of money weekly towards the maintenance of such child while chargeable to such poor district or for such period as they consider right, etc.

3. The two justices may order such putative father to give a bond for the fulfilment of such order or in default thereof to pay a lump sum of not less than $80 nor more than $150, to be fixed by them in lieu of the payments in this section mentioned and to be applied as in this section mentioned.

7. The order of filiation may be in Form G. in the schedule or to the like effect.

Sec. 10. The putative father shall, upon an order of filiation being made, enter into a bond (Form H.) in the penal sum of $150 with sufficient sureties conditioned to fulfil such order of filiation, or shall pay the lump sum fixed by the justices.

FORM H. SECS. 10, 11.—BOND TO FULFIL THE ORDER OF FILIATION.

Know all men by these presents that we C. D. of.....in the county of.....and E. F. and G. H. of.....in the same county .....are held and firmly bound unto the overseers of the poor for the poor district of.....(or to the town of.....) in.....dollars to be paid to the said overseers of the poor (or to the said town) or to their assigns, for which payment well and truly to be made we bind ourselves and each of us by himself, our and each of our heirs, executors, and administrators, firmly by these presents sealed with our seals. Dated this.....day of.....A.D. 19....

Whereas by an order of filiation made by.....and..... esquires two justices of the peace for the county aforesaid (or stipendiary magistrate for.....) in the matter of a bastard child lately begotten of A. B. the said C. D. has been adjudged to be the father of such child and has been required to enter into a bond to fulfil such order of filiation. Now the condition of this obligation is such that if the said C. D. his executors or administrators do well and truly fulfil such order of filiation, then this obligation shall become void.

Sec. 11 (1). If a putative father conceals himself or avoids arrest under a warrant, so that he cannot be brought before the two justices of the peace, as therein directed, they may, upon proof thereof, by affidavit or oral testimony, make an order of filiation against him in his absence.

Sec. 12 provides that in default of furnishing a bond or payment of a lump sum for committing the putative father to jail with hard labour for not less than 6 months and not more than 12 months.

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Sec. 11 does make provision for trial in his absence *ex parte* if he conceals himself or avoids arrest so that he cannot be brought before the two justices . . . Even in that case however there is to be a fresh hearing on warrant and the *ex parte* order already made is to be reversed, confirmed or varied.

But the putative father did not bring himself within that exception and it appears he was not within it. Before passing that provision accounts for the appearance in the condition of the bond (Form C.) the words "whether he appears or not." Of course the language of sec. 6 is to the effect that the first bond is only conditioned "for the fulfilment of any order of filiation which may be made against him," and it is contended that because it does not also provide for including in the condition (as the bond itself does) a requirement as well for his appearance on the hearing of the application, therefore the bond is inoperative. There is more than one answer. The form of the bond which does contain that contingency in the condition has under sec. 6 substantive legislation to support it and make it valid. The form is not at variance with the section itself and the whole must be read together. It refers to the form for details. Then if it is conditioned for the fulfilment of the filiation order and a filiation order cannot be obtained without the appearance of the putative father, it must be taken to be conditioned for his appearance at the trial as a necessary step. The provisions of the Act would be quite useless without such a construction being given to them. The first bond would be without any useful purpose. It not being a case within sec. 11 of his concealing himself, or avoiding arrest, so that he cannot be brought before the justices (in effect cannot be served at all) the overseers of the poor are very helpless. They cannot get on with their trial because he is absent and their bond is always useless if the defendant's contention is sound. Such an interpretation leading to invalidity ought not to be adopted. The sixth section does not give all the details of the first bond. It gives part but it does say that the putative father shall be required to enter into a bond (Form C.) etc., and Form C. contains the details, including one requiring his appearance. That is a provision which must be complied with. A form may be just as binding as a substantive provision if it is put on the same footing as the provision and that is the case here. The bond sued on here is in the exact form given by the statute.

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If I am correct in the contention that the bond in this form has the sanction of the statute the rest of the argument, namely, its construction and the effect of a non-appearance by the putative father is simplified by a decision of Shaw, C.J., in respect to the first bastardy bond in much the same form, under similar legislation in Massachusetts.

In *Jordon* v. *Lovejoy*, 20 Pick. 86, the bond was conditioned to appear in Court and answer to the accusation made by the plaintiff charging him with being the father of a bastard child of which she was pregnant, and that he should abide the order of the municipal court therein. Shaw, C.J., says:

> The only question, in the opinion of the Court, is whether the replication disclosed a breach of the bond, that is, whether the bond is forfeited by a default without a judgment of filiation. It appears sufficiently clear from the statute, though in many respects obscure, that there can be no adjudication without a trial and that there can be no trial until the respondent has appeared to answer. . . . The provisions imply that the respondent is to appear and put himself on trial. And if he do not appear, the Court can render no judgment nor make any order and can only enter his default. The consequence is that upon such default the only remedy of the complainant is upon the bond, and the whole object and purpose of the bond would be defeated if such default and failure to appear and answer were not deemed a breach of the condition.

I refer also to *Town* v. *Hale*, 2 Gray 199.

Coming to the pleadings, the statement of claim, after setting out the bond, the recital and condition, alleges that a warrant was duly issued on December 12, 1914, after the birth of the child, commanding the appearance of the putative father upon January 6, 1915, at the hearing of an application for an order of filiation and that the defendants, the sureties, had notice of such hearing, proceeds, "but the defendant did not appear nor did he surrender himself into the custody of the constable executing the warrant, nor fulfil any order of filiation." The amount of the bond is claimed and there is an allegation that it has not been paid.

The statement of claim against the sureties alleges service on them of notice of the warrant.

Now there is nothing in the statement of defence which denies the breach alleged, namely, the non-appearance, etc., nor is there any condition set out and fulfilment pleaded.

Something is pleaded about an attempt on the part of the putative father to bring on a hearing earlier than the issue of the second warrant, and of an attempt to surrender himself.

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But that is in the circumstances quite irrelevant and immaterial and there is no proof to support it.

It will be clearly seen that there are in the case in hand to be two bonds, one before the birth which, as I contend, is one to secure the appearance of the putative father before the justices when the trial is to come on and to indemnify the poor district in respect to expense incurred up to the time of the giving of the second bond. *Overseers* v. *Chase*, 28 N.S.R. 314. And the other to fulfil the filiation order by the payment of the expenses mentioned in the Act or the payment of the lump sum, etc.

The provisions of this statute it will also be noticed are in their character very like proceedings in a criminal matter. It is clear, I think, that except in the contingencies provided for by sec. 11, which does not cover this case, the justices cannot proceed with the investigation or trial necessary to make an order of filiation except upon the putative father being before them either under a warrant or by a rendering of him by the bondsmen.

The trial Judge has quoted a passage in the judgment in *Overseers* v. *Chase*, 28 N.S.R. 314.

That happened, however, to be an action where no second bond had been taken through some oversight, and it was brought to recover the penalty after an order of filiation had been made upon the first bond as if the words in the condition to "fulfil such order when made," would cover the case. But it was held by the Judge of the County Court in effect that they did not except in respect to expenses incurred before the return day of the warrant and trial; that this really was not the object of the first bond but only to provide for an indemnity to the poor district up to the time that the second bond would be taken.

The judgment was affirmed by the Supreme Court on appeal and though the sentence quoted in the judgment here looks as if the common case of a form prevailing against substantive legislation would be applicable to this case the very next sentence of the judgment shows that that was not the ground of the judgment.

In my opinion the bond is assignable as the form shows.

The appeal should be allowed and the plaintiff should have judgment against the defendants for damages in the sum of $80.

In assessing the damages at $80, it will be seen that the

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minimum lump sum which the justices could allow is taken and the defendant cannot very well complain. The plaintiff should have the costs of the action and the appeal. *Appeal allowed.*

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MONTREAL TRUST CO. v. ROBERT.

Quebec Court of Review, Archibald, A.C.J., Martineau and Lane, JJ. March 31, 1917.

COMPANIES (§ V F—262)—SUBSCRIPTIONS—ILLEGALITY — FRAUD — LACHES —ESTOPPEL.

Silence for more than a year after notice amounts to acquiescence and laches which will estop a subscriber for shares from attacking his subscription on the ground of fraud or illegality, particularly as against the rights of a *bonâ fide* transferee.

Statement.

APPEAL from a judgment of the Superior Court rendered by Lafontaine, J., June 30, 1916. Affirmed.

The defendant subscribed for and agreed to purchase from J. A. Mackay & Co., Limited, 100 preferred shares of the capital stock of the Canadian Jewellers, Limited, at the par value of $100 for 95% of its par value, with a bonus consisting of 50% in the common stock of the company, payable on September 15, 1912. The following condition was contained in the deed of subscription:—

This underwriting may be pledged or hypothecated with any banking institution or trust company as security for advances.

This subscription was transferred to plaintiff by the J. A. Mackay Co. as collateral security, the balance of which amounted, at the time of the action, to the sum of $138,141.15. The defendant did not pay the amount of his subscription, although very often requested by several letters from the J. A. Mackay Co.

On October 30, 1914, among other agreements between the latter company and the plaintiff, it was stipulated that the plaintiff might exercise all rights, remedies and recourse of the J. A. Mackay Co. against the defendant; and a duplicate of this deed was served on the defendant.

The plaintiff sues the defendant for his preferred shares—that is, for the sum of $9,500, with interest.

The defendant pleaded a long defence, summarized as follows in the judgment of the Superior Court:

Whereas defendant has pleaded to the action a long defence, in which, after having denied the allegations of plaintiff's action, save and except those which are based on writings, pleads, *en résumé*, misrepresentations and non-fulfilment of the obligations of said vendor, J. H. Mackay & Co., and also irregularities and illegalities in the formation of the company, the Canadian Jewellers, Limited, and its creation and its operation.

The Superior Court dismissed defendant's plea on the grounds of acquiescence and laches as follows:—

Considering that, after having signed said agreement, and being notified of the transfer in favour of plaintiff as pledgee for the security of advances, the defendant kept silent all the time, paid no attention to the letters and notices sent to him, took no proceedings to set aside and annul his agreement, and that, under these circumstances, he must be deemed to have been entirely satisfied with what has been done and what would be done, and that he is now estopped, as to third parties who acted in good faith, from raising any question of irregularities or illegalities, or misrepresentation or non-fulfilment of the obligations contracted towards him, which might be raised between himself and his vendor; that between plaintiff, who acted in good faith, on the strength of the agreement signed by defendant, and advanced good money, and the defendant, who, if what he now alleges is true, committed the imprudence of trusting too much to his vendor, and committed the fault of giving him the power and authorization to pledge and hypothecate the sum he agreed to pay, before the vendor would be entitled to ask for it, the defendant must lose and suffer damages and not the plaintiff, who committed no fault or imprudence, but merely trusted defendant's signature; that it would be regrettable, in the interest of the security of transactions, and it would be ruinous to the trade and to the community, if the law was otherwise, but fortunately it is not, without the necessity of going completely into the doctrine and jurisprudence established, and of which a good statement is contained in the complete memorandum submitted by plaintiff.

Considering that with these views of the case it is not necessary to go into the merits of the important points raised by the defence.

Brown, Montgomery & McMichael, for plaintiff.

Perron & Taschereau, for defendant.

The judgment of the Court of Review was delivered by

LANE, J.:—Nothing appears to have occurred between the plaintiff and the defendant, or the Mackay Co. and the defendant, till September 14, 1912. On that date the plaintiff wrote the defendant in the following terms:— Lane, J.

Re Canadian Jewellers, Limited. The amount due on your underwriting of the above company comes due on Monday, the 6th instant, and we would ask you to be good enough to let us have your cheque to cover as soon as possible.

This letter was carelessly written. It was written September 14. As a matter of fact, the defendant's subscription was to become due on the 15th instant, and could not become due on the 6th instant, which had passed. But defendant had a copy of the underwriting in his possession, and could tell when the payment became due. It served as a *mise en demeure* to pay and to repudiate the underwriting, if he had cause to repudiate it. It also served as a notice that the plaintiff was the trust company contemplated by the underwriting with which J. A. Mac-

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kay & Co., Ltd., had pledged the underwriting for advances, past, present or future, and, though it does not formally say so, any business man, under the circumstances, would so interpret it. The notice in this respect was not necessary, as the defendant, from the wording of the underwriting, had authorized such pledging with any trust company, but is important not only as being a *mise en demeure*, but from the point of view of the defendant's silence in respect of same, as will be presently narrated.

The defendant admits in his evidence that he was aware of the false representations he complains of in his evidence at this time. He does not say how, from whom or exactly when he learned that the representations he says Mackay made to him when soliciting his subscription or underwriting were false; but he does admit that he knew of their falsity before the due date, which was September 15, or the day after the date of the plaintiff's letter; how much sooner he does not disclose. One would naturally expect and have every reason to expect that on the receipt of that letter he would have at once communicated with the plaintiff repudiating the underwriting, and with J. A. Mackay Co., Ltd., requesting the return of the underwriting and its cancellation, and, failing which, that he would have instituted a civil action to set it aside against that company, and, seeing the nature of the underwriting, possibly a criminal action against J. A. Mackay, its president, and whose representations, he says, were false, had induced him to sign, deliver and enter into the underwriting in question. Instead he does nothing and says nothing, either with respect to the plaintiff or to J. A. Mackay & Co., Ltd., or J. A. Mackay himself. He must, as a business man, have known that the plaintiff had advanced money to J. A. Mackay & Co., Ltd., on the strength of his signed underwriting or that it had actually advanced money on it, and might possibly advance more. He says, from the knowledge he had, he considered he was not bound by his signature, and treated it as a nullity. Yet he keeps silence. Again on November 9, 1912, possibly seeing that the plaintiff's letter of September 14 had not succeeded in getting even a reply from the defendant, J. A. Mackay & Co., Ltd., wrote the defendant informing him that the plaintiff has asked them for $1,000 margin on his underwriting, and that if inconvenient to send the money, that security would do as well. This was another intimation to any business man

that the Mackay Co. had acted on the clause in the underwriting permitting its pledging and that the plaintiff was the pledgee. The result, the same as in the case of the plaintiff's letter, no money, no repudiation, no response of any kind. The Mackay Co. having been no more successful than the plaintiff in getting the defendant to fulfil his obligations under his underwriting (though they only asked for the payment of a small fractional part of it), the plaintiff resumes the attack, and, on December 13, 1912, writes the defendant saying the Mackay Co. had requested it to call on the underwriters for 10 per cent. of their underwritings, and asking the defendant for $1,000. It met with the same inaction and silence.

We now get to the year 1913, in which, on August 7, the plaintiff writes the defendant saying that, with reference to his $10,000 Canadian Jewellers, Ltd., underwriting, which is hypothecated with it, steps must be taken to reduce the loan, and payment of 10 per cent. is requested not later than the 15th instant. But they were no more successful in 1913 than in 1912 in getting the defendant to pay or reply.

The plaintiff does not appear to have written the defendant again. But in 1914, on May 5 and August 12, the Mackay Co. wrote the defendant, but did not succeed in breaking his silence.

Thus far I have mentioned what took place between the plaintiff and J. A. Mackay & Co., Ltd., on the one hand, with regard to the defendant on the other, and what passed between the plaintiff and the Mackay Co. till January 6, 1912, when that company placed the defendant's underwriting with the plaintiff and assigned same to it, as collateral security, with the agreement that it would apply to the advances then made and which would be made in the future. The Mackay Co. seems to have had an open running account with the plaintiff, which was advancing moneys at interest, and the plaintiff was retaining the underwritings to secure the account. From January 6 onward the plaintiff continued to advance on these securities. By October 30, 1912, the plaintiff has advanced sums which, with interest, amounted to nearly $210,000, and, after deducting payments on account, left a balance of about $195,000. By September 15, 1912, the net balance due the plaintiff against those securities had got down to about $166,000, and on October 30, 1914, when

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the transfer was made, it had got down to $138,141.15, and when the action was taken it had slightly increased, the said Mackay firm borrowing and paying on account from time to time.

On that date an agreement was passed, a duplicate of which defendant admits was served upon him on December 18, 1914, when the Mackay Co. wherein acknowledged an indebtedness for that sum, and as collateral security said firm acknowledged to have assigned, transferred and made over all its right, title, claim and interest in the subscription in question of the defendant, and vesting the plaintiff with all its rights and remedies against the defendant, and in said deed the plaintiff acknowledged the delivery to it of stock certificates of 100 preferred and 50 common stock shares of the Canadian Jewellers, Ltd., for which defendant had subscribed, to be delivered to defendant on payment of his subscription. As a matter of fact, it would appear that the Mackay Co. had not delivered the share certificates on said occasion, for they are only dated January 21, 1915, the day the writ issued, which probably accounts for the interval elapsing between the transfer of October 30, 1914, and the institution of the action. They are produced, however, with the return and tendered by the action to the plaintiff. The indebtedness of the Mackay Co. to the plaintiff has not in the interval in question been extinguished, but, on the contrary, has increased.

The judgment appealed from has declined to adjudicate upon the contentions the defendant has urged as a reason for not carrying out and as freeing him from all obligations under the underwriting agreement on the ground that in this action brought at the instance of this plaintiff it was not necessary and that the defence was unfounded in law.

The underwriting provided that the payment should only become due and hence the delivery be made in the future, namely, on September 15, 1912; it gave power and authority to the vendor, J. A. Mackay & Co., Ltd., to pledge and hypothecate with any banking institution or trust company the said underwriting as security for advances, and the Court below interpreted the underwriting agreement as implying an authorization or mandate from the defendant to that company to transfer the defendant's debt or obligation of $9,500 under the underwriting to any trust company as security for advances, and as equivalent

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to a guarantee to any such company which might take the same as such security, that the defendant would pay such sum in any event on obtaining his shares, and, in my opinion, it was right in that interpretation.

The defendant must be considered as having contemplated and as having authorized the assignment of his underwriting to any bank or trust company as collateral for advances, at any moment, after he signed and parted with the underwriting. He also must be held to have known that if a bank or trust company would advance money on this underwriting, it would be on the strength of his signature to a firm contract, and on the reasonable and just assumption that he would meet his obligation and honour his promise to pay. The proof is that the plaintiff did rely on his signature and on that assumption.

The Court below also found that, being notified of the transfer in favour of the plaintiff as pledgee for the security of advances, the defendant kept silence all the time, paid no attention to the correspondence and took no proceedings to set aside his agreement. This finding is fully justified by the proof. The judgment does not say when the notification took place. In my opinion, the first letter of the plaintiff of September 14, 1912, constitutes such a notice, as also that of the Mackay Co. of November 9, 1912, that the plaintiff had asked for margin on the defendant's underwriting, clearly indicating to a business man like the defendant that the underwriting had been assigned in pledge, not to speak of any of the others.

The Court below held that, under the above circumstances, the defendant must be deemed to have been entirely satisfied with what had been done, and what would be done, and that he is now estopped as to third parties who acted in good faith from raising any question of irregularities or misrepresentations or non-fulfilment of the obligation contracted towards him which might have been raised between himself and his vendor; that, as between the plaintiff, who acted in good faith on the strength of the agreement signed by the defendant and advanced its money, and the defendant, who, if his complaints are true, committed the imprudence of trusting too much to his vendor, and gave the latter power and authority to pledge and hypothecate the sum he agreed to pay, before the vendor would be entitled

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to ask for it, the defendant must suffer any loss, rather than the plaintiff, who was guiltless of fault or imprudence, but merely trusted defendant's signature, which holding he found to be in accordance with the doctrine and jurisprudence. Entertaining these views, the Court, as already explained, found it was unnecessary to go into the points raised by the defence, and holding that the plaintiff had established the essential allegations of his action, and that the defence was unfounded in law, it dismissed the defence and maintained the action for $9,500, with interest from September 15, 1912, and costs. I can find no error in these holdings.

No jurisprudence of the Courts of this province has been cited by the Bar. In fact, the defence has cited no authorities, while the plaintiff has cited numerous decisions of Courts where the English law prevails, and the doctrine of that law and the doctrine of the French law on the "*fins de non recevoir*," which is equivalent to that known in the English law as estoppel. They are set out in plaintiff's factum with much precision and, in my opinion, apply. I consider this case affords an opportunity of applying that doctrine, and that the judgment *a quo* was right in applying it. As to the point raised in defendant's factum, but not in his pleadings that defendant should get credit for dividends, there is no proof that such were paid to the plaintiff, and the Mackay Co. account with the plaintiff is non-credited with them.

Seeing the character of the underwriting in question, and the proof of record, to reject the plaintiff's demand, even if the complaints of the defendant in connection with the underwriting and shares in question are well founded, would be a contravention of the principles of equity as well as those of law. I would be to confirm the judgment. *Judgment affirmed.*

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Manitoba Court of Appeal, Howell, C.J.M. and Perdue, Cameron and Haggart, JJ.A. March, 20, 1917.

EVIDENCE (§ VIII—674)—CRIMINAL TRIAL—ADMISSION OF STATEMENTS MADE BY ACCUSED IN CUSTODY—IRREGULAR CAUTION BY POLICE—NO SUBSTANTIAL WRONG—CR. CODE SEC. 1019.

Every case reserved as to the admissibility of a statement made by an accused person while under arrest must be decided according to its own circumstances; and where the statements made by the accused under arrest for murder were not confessions of guilt, but were intended to justify the killing as done in self-defence and were, in substance,

repeated by the accused in giving evidence on his own behalf at the trial, the Court of Appeal, acting under Cr. Code sec. 1019, should affirm the verdict whether or not the form of caution given by the police, before the admission was made, was strictly regular in telling him not only that he need not make any statement and that if he did so it might be used against him, but that he had "nothing to hope for and nothing to fear *by* any statement he might make," where the Court of Appeal finds the circumstances to be such that the case against the accused was clearly made out apart from the admissions to the police officers and their admissibility was most unlikely to have affected the verdict.

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Statement.

CROWN case reserved by Macdonald, J., on a conviction for murder.

J. Allen, Deputy Attorney-General, for Crown.

E. J. McMurray, and *J. F. Davidson*, for accused.

HOWELL, C.J.M., and HAGGART, J.A., concurred in affirming the conviction and answering the questions reserved as set out by Perdue, J.A.

Perdue, J.A.

PERDUE, J.A.:—The accused was indicted and tried in February, 1917, for the murder of James Vincent. He was found guilty and Macdonald, J., who presided at the trial, stated certain questions for the opinion of this Court. The alleged crime was committed near Stonewall, Man., on 9th December, 1916. The accused was arrested in Toronto on the 12th of same month. At the trial two of the witnesses called by the Crown were one William Croome, a detective employed on the police force of the City of Toronto, and one James Bain, a constable on the provincial police force of the Province of Manitoba. Croome had taken part in the apprehension of Spain at Toronto and was present on the 13th December, at police headquarters in that city, when Spain made a statement after being cautioned by Inspector Kennedy. Before calling Croome and Bain, counsel for the Crown said that it would be necessary for the Judge to decide whether their evidence was admissible, and that this should take place in the absence of the jury. Counsel for the accused then said he did not think he would oppose the purported confessions. The evidence of Croome was then taken. The warning given to the accused by Kennedy was, according to Croome, as follows: "Inspector Kennedy told him that he was not obliged to make any statement unless he liked, that anything he might say might be used in evidence against him, he had nothing to hope for and nothing to fear by any statement he might make." Croome also stated that detective Montgomery who assisted him in making the arrest had previously given the accused a similar warning. Spain

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stated to Kennedy in Croome's presence that he had accidentally shot Mrs. Vincent while cleaning a rifle, that he then ran out of the house and met Vincent and told him what had happened, that Vincent said, "I will get you." He said Vincent was in the habit of taking a gun with him to shoot rabbits, and he thought Vincent would "get him" and so he shot Vincent. His statement was in brief that he had accidentally shot the woman and that he shot the man in self-defence. After the evidence of Croome had been taken and near the close of his cross-examination, counsel for the accused again stated positively to the Judge that he did not think the evidence of Croome improper and that he consented to the reception of it.

The accused was called as a witness to give evidence on his own behalf and he again repeated with greater details his statement that the killing of Mrs. Vincent was accidental and that he had shot James Vincent in self-defence.

On his way to Winnipeg in the custody of Bain, the accused was properly warned by Bain as to any statement he might make and he again voluntarily gave the same account of the shooting of Vincent that he had given to Croome but with additional details.

The trial Judge reserved for the opinion of this Court the following questions:—

"1. Was the statement of the said Bertram John Patrick Spain made in the presence of the said Robert William Croome properly admissible in evidence?

"2. Were the statements of the said Bertram John Patrick Spain to the said James Bain properly admissible in evidence?

"3. Was the said statement of counsel for the Crown to the jury an improper statement?

"4. Is there any misdirection in law in my said charge to the jury?

"5. If either or both of above questions 1 and 2 be answered in the negative, is the accused entitled to a new trial?

"6. If either or both of above questions 3 and 4 be answered in the affirmative, is the accused entitled to a new trial?"

On the argument before this Court, after hearing counsel for the accused, counsel for the Crown was told by the Court to confine himself to questions Nos. 1 and 2.

In regard to question No. 1, it is argued that on the trial of a charge of murder counsel for the accused could not consent to the reception of evidence not lawfully receivable. I do not think that it is necessary to discuss the effect of the consent by counsel in this case. The questions before the Court can be answered without considering the effect of that consent.

In his evidence at the trial the accused gave, as might be expected, a much more extended and amplified account of what had taken place than he had given in his statements to Croome and Bain. The main statement as to killing Mrs. Vincent and her husband was the same, but the minor and minute details of the tragedy were more fully stated in his sworn testimony. The story he gave in the witness-box was much more damaging to himself than his previous statements to the police officers. He stated in his evidence that while he was cleaning a Lee-Enfield rifle in the house alone with Mrs. Vincent, the rifle went off accidentally and shot her. He did not go to her assistance or ascertain the nature of the wound, but stood standing some time. Then he heard Vincent, who had been away from the farm, returning with his sleigh. He went out to meet Vincent carrying the rifle in his hand with the magazine containing several cartridges. He told Vincent, according to his evidence, that he had shot Mrs. Vincent accidentally. He says Vincent changed colour, put his hand on Spain's shoulder and said, "My God, what have you done?" left him and ran into the house. After some time Vincent ran out, grabbed him, Spain, by the chest, shook him and said "Will shoot you then." During all this time the accused remained where he was with the loaded rifle in his hand. Vincent then, he says, walked towards the granary door against which a shotgun was leaning. He saw Vincent with the gun in his hands but does not know whether he raised it. Spain then commenced firing with the rifle and kept on firing until the magazine was empty. He then, he says, saw Vincent stagger and the gun fall from his hands. Accused says he then ran forward, seized the gun and discharged both barrels into Vincent's face. The accused admitted that after the shooting he took from the house a coat belonging to Vincent and $1,600 in $50 bills, went to Stonewall, bought a new suit of clothes, a watch and a number of other articles, then he went to Winnipeg, where he spent considerable money, and then went to Toronto from which place he intended to go to Windsor.

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His main statements to Croome and Bain that he killed both the Vincents agrees with his sworn evidence, but the latter, with its varying details, its self-contradictions and its whole incredible story, is far more disastrous to him than the meagre admissions made to the police officers. In cross-examination he varied considerably from what he had said in his examination-in-chief. His whole account of how the tragedy took place has the appearance of having been concocted and is, to my mind, absolutely inconsistent with his innocence.

The evidence put in by the Crown, wholly apart from the statements made to Croome and Bain, made such a strong case against the accused of having murdered Vincent that any jury of reasonable men would have no hesitation in finding him guilty.

It was established by other uncontradicted witnesses that on the morning of the tragedy James Vincent had gone to a neighbour's farm, half a mile away, for a load of feed, leaving his wife and the accused alone in the house. There was a Lee-Enfield rifle and cartridges for it in the house. There was also a double-barrelled shotgun. Mrs. Vincent's dead body was found, she having been shot through the head with a rifle. The body of Vincent was found in the granary. He had been shot with a rifle, the bullet entering his back near the spinal column, passing through the body, lacerating the lung and emerging through the breast. There were minor wounds shewing that at least two other rifle shots had been fired at him. There was a frightful wound in his face, evidently made by a shotgun. Every bone in the skull was broken. In the brain were pieces of bone, teeth, a couple of gun wads and some shot. The face had been scorched as if the gun had been held close to it when discharged. The repeated shots fired at Vincent and the dreadful injuries caused by the shotgun, which must have been inflicted after the rifle had been emptied, point conclusively to murder and not to self-defence. A large sum of money, $1,600 or $1,700 in new $50 bills, which the Vincents had in the house was taken. The accused was seen driving to Stonewall with Vincent's horse and buggy about half-past ten o'clock that morning. At Stonewall he paid out two $50 bills. Then he went to Winnipeg, travelled under an assumed name, spent money lavishly, paying out several $50 bills. He then went to Toronto and was arrested at the King Edward

hotel in that city. At the time of his arrest there were found upon him sixteen new $50 bills besides other money. From the time he left the Vincent's house he repeatedly made false statements intended to mislead and for the purpose of aiding his escape. The actions and statements of the accused from the time he fled from the Vincent's house shewed that it was the flight of a guilty person who was seeking to escape the consequences of his crime.

It is argued for the accused that if evidence of the statements made to the police officers were admitted, and the admission of them were improper, it would be impossible to say what might have been their effect on the jury, and therefore there should be a new trial. For this proposition the following cases were relied upon: *Rex* v. *Allen*, 22 Can. Cr. Cas. 124, 14 D.L.R. 825; *Makin* v. *Atty.-Gen. of N.S.W.*, [1894] A.C. 57, 70; *Allen* v. *The King*, 44 Can. S.C.R. 321, and other cases.

Every case as to the admissibility of a statement made by an accused person while under arrest must be decided according to its own circumstances. See *Reg.* v. *Miller*, 18 Cox 54; *Rex* v. *Knight*, 20 Cox 711, 713; also *Ibrahim* v. *The King*, [1914] A.C. 599, at 614.

I do not think that the cases relied upon by counsel for the accused apply to the circumstances of the present case. Here there was clear and definite evidence of Spain's guilt, quite apart from his statements to the police officers, statements which were not confessions of guilt, but which were of an exculpatory nature and intended to justify the killing of James Vincent. They are repeated by the accused in his evidence given at his trial. I think the view taken in the *Ibrahim* case is peculiarly applicable to the present. In that case, as in this, a clear case was made, apart from the admissions by the accused. Lord Sumner in giving the judgment of the Judicial Committee said:—

> "It appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence of what Ibrahim said to Major Barrett. If not impossible, it is at any rate highly improbable, that this should have been so, and when the preponderance of unquestioned evidence is so great, their Lordships cannot, in any view of the matter, conclude that there has been any miscarriage of justice, substantial, grave or otherwise."

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The above, along with other passages in the same judgment, are very illuminative in the consideration of the powers of the Court of Appeal under sec. 1019 of the Criminal Code.

Rex v. *Kelly*, 54 Can. S.C.R. 220, 34 D.L.R. 311, decided in November, 1916, contains the very latest pronouncement of the Supreme Court of Canada as to the effect of that section. Anglin, J. with whom the Chief Justice and Mr. Justice Davies agreed, expressed his conclusion as follows (p. 337):—

"But without dwelling further on the several grounds urged, and without determining that in regard to any of them there has been such error in law as would, if 'some substantial wrong or miscarriage (had been) thereby occasioned on the trial' (Crim. Code, sec. 1019), have entitled the appellant to a new trial, we are of the opinion that his guilt on the fourth count has been established by uncontradicted evidence, of which the admissibility upon that count has not been and could not be successfully challenged, so complete and so convincing that in regard to that count a substantial miscarriage on the trial is out of the question, and the matters complained of, whether taken singly or cumulatively, are 'most unlikely to have affected the verdict' (*Ibrahim* v. *The King*, [1914] A.C. 599, at p. 616, 83 L.J.P.C. 185), if indeed it is not impossible that they could have had any influence upon it. *Makin* v. *Atty.-Gen. of New South Wales*, [1894] A.C. 57 at pp. 70-1, 63 L.J.P.C. 41."

Mr. Justice Duff in his judgment expressed a similar opinion upon the same point.

Apart from the statements made to the police officers, the evidence of the Crown witnesses and of the accused himself at the trial leave no doubt as to his guilt. The accused admitted killing and robbing the Vincents. His attempted explanation of accident and self-defence, with his self-contradictions, shiftings and evasions is such that no honest jury would believe it. Why then should the jury be influenced by hearing the much less damaging statement he made to Croome and Bain? The answer attempted to this question is that the details he gave to the officers enabled the Crown counsel to cross-examine him with great effect and exhibit to the jury the contradictions and variations in his story. To my mind this does not constitute a substantial wrong or miscarriage.

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I would answer the questions submitted by the trial Judge as follows:—

Question No. 1. Whether admissible or not, the admission of the statement made by the accused, Bertram John Patrick Spain, in the prescence of Robert William Croome, occasioned no wrong or miscarriage on the trial.

Question No. 2. Yes; whether these statements were admissible or not they occasioned no wrong or miscarriage at the trial.

Questions Nos. 3, 4, 5 and 6, are all answered in the negative.

It should also be declared that the said Spain is not entitled to a new trial and the conviction of the said Spain should be confirmed.

Cameron, J.A.

CAMERON, J.A.:—This case comes before us upon certain questions reserved by the Hon. Mr. Justice Macdonald, who presided at the trial of Bertram John Patrick Spain for the murder of James Vincent at Rockwood in the Province of Manitoba on December 9, 1916. After a trial lasting five days the jury brought in a verdict of guilty and Spain was sentenced to be hanged.

The first question reserved, and the main question discussed on the argument before us, was whether the statement made by the prisoner in the presence of Robert William Croome, a detective on the police force of the City of Toronto, was admissible in evidence. Croome assisted in the apprehension of the prisoner. When he went with detective Montgomery of the Toronto force in the evening of December 12, 1916, to the King Edward Hotel in Toronto, he saw the prisoner there, went with him to his room and searched him, finding upon him $1,062 in bank bills and other money. The prisoner when first interrogated gave his name as "Young." Then Croome told him his true name which he admitted. Montgomery told him he was charged with murder, when Spain said, "What: Murder? My God; Not me; There must be some mistake." Montgomery then "told him that he was not obliged to make any statement unless he liked, that anything he might say might be used as evidence against him; that he had nothing to hope for, nor nothing to fear." Croome also told him "that he need not make any statement unless he liked; that was all I said." They then proceeded to take Spain to the police station, when Montgomery asked the accused which one he had

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shot first. Spain replied he did not care to make a statement. A little later Spain went on to state that the shooting of Mrs. Vincent was accidental and that meeting Mr. Vincent coming to the house he told him what he had done and then shot Mr. Vincent in self-defence. The next morning (December 13) Spain was brought to Inspector Kennedy's office, and there were in the room Kennedy, Montgomery, Sergeant Mackie (part of the time) and Croome. Kennedy asked Spain his name, which he gave, and then told him, "he was not obliged to make any statement unless he liked, that anything he might say might be used in evidence against him, he had nothing to hope for, nor nothing to fear by any statement he might make." Thereupon Spain made the statements appearing in the evidence, the admissibility of which is now objected to. At the trial, it is to be noted, counsel for the prisoner did not oppose but consented to the reception of the statement. It is the warning of Inspector Kennedy above stated that is now objected to. No fault is found with that given by Croome.

It was argued by Mr. McMurray that, considering the circumstances in which the prisoner was, in a room in a police station surrounded by several police officers, the above words of Inspector Kennedy could not be considered a proper caution to the prisoner. Emphasis was placed by prisoner's counsel on the words "nothing to fear," the implication being, as it was argued, that the prisoner was asked to believe that he had nothing to fear in the way of any statement made by him being used at the trial, and that an inducement was thus held out to him to make a statement.

Mr. McMurray contended that the form given in sub-sec. 2 of sec. 684 of the Criminal Code should be followed. But that is intended to be used by a magistrate at a preliminary trial, and, as pointed out in Crankshaw, p. 959, the second part of the caution is applicable only to cases where there has been a previous promise of favour or threat. There is no statutory form prescribed for police officers. The whole question of admissibility of such evidence is in the discretion of the Judge at the trial.

A confession to be admissible must be free and voluntary. "If it flows from hope or fear, excited by a person in authority, it is inadmissible," per Cave, J., in *R.* v. *Thompson*, [1893] 2 Q.B. 15.

In the earlier part of the nineteenth century the tendency was to admit a prisoner's statement made to officers when in custody,

but the question was reopened by A. L. Smith, J., in *R.* v. *Gavin*, 15 Cox 657, who stated that when a prisoner is in custody the police have no right to ask him any questions. But in *R.* v. *Best*, [1909] 1 K.B. 692, Lord Alverstone, giving the judgment of the Court of Criminal Appeal, holds that *R.* v. *Gavin* was not a good decision. Apparently also this would be his opinion of the decision in *R.* v. *Male*, 17 Cox 689. It is in this last case that Cave, J., used the words: "A policeman should keep his mouth shut and his ears open," though he qualified his remarks, saying they are only intended to apply to the case before him. In *R.* v. *Brackenbury*, 17 Cox 628, Day, J., admitted evidence elicited by questions of a policeman expressly dissenting from the judgment in *R.* v. *Gavin*. In *R.* v. *Thompson*, *supra*, Cave, J., reviews the authorities. He cites with approval a statement from Taylor on Evidence, and says the material question to be affirmatively established is, was it (the confession) preceded by any inducement held out by a person in authority? But the judgment of Cave, J., in this case is to be considered in the light of the facts involved in it, as is pointed out repeatedly in the decisions. "Every case must be decided according to the whole of its circumstances:" *R.* v. *Miller*, 18 Cox 54, per Hawkins, J.

In *Rex* v. *Ibrahim*, [1914] A.C. 599, Lord Sumner states as the rule, "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" (p. 609). The actual words used by the officer and the circumstances in which they are spoken are set out at p. 608. Lord Sumner, discussing the cases, points out that the law is still unsettled, that some Judges, in their discretion, exclude such statements whilst others admit them, and that the Court of Criminal Appeal would not quash the conviction thereby obtained if no substantial miscarriage of justice had occurred.

If a Judge, after consideration, decides in accordance with what is at any rate a "probable opinion" of the present law, if it is not actually the better opinion, this conduct, he states, would not be ground for interference by the Board. If even on the line of decisions not followed by the trial Judge, the matter is still one for the Judge's decision, depending on circumstances, he holds

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that in the circumstances of the case before the Board, the discretion of the trial Judge in admitting the evidence was not shewn to have been exercised improperly.

In *R.* v. *Day*, 20 O.R. 209, questions arose as to the admissibility of statements made by a prisoner to certain detectives when in their custody, in answer to questions put by them. Armour, C.J., held, "although we reprehend the practice of questioning prisoners, that we cannot come to the conclusion that evidence obtained by such questioning is inadmissible." This, he said, was in accordance with the great weight of authority.

In *R.* v. *Elliott*, 3 Can. Cr. Cas. 95, Chancellor Boyd approved and followed *R.* v. *Day*, which he regarded as settling the law in Ontario and stated that it had been followed by a majority of the Judges of the Appellate Court in the Province of Quebec.

In *R.* v. *Ryan*, 9 Can. Cr. Cas. 347, evidence of a confession to a person in authority was held rightly admitted by the Ontario Court of Appeal. Osler, J., referred to the judgments in *R.* v. *Thompson*, *R.* v. *Day*, and *R.* v. *Elliott*. I refer also to *R.* v. *White*, 15 Can. Cr. Cas. 30, and *R.* v. *Steffoff*, 15 Can. Cr. Cas. 366.

In *R.* v. *Wallace*, 24 Can. Cr. Cas. 158, 20 B.C.R. 97, it was pointed out by Gregory, J., that the English practice evidently gives more protection to the accused than the Canadian practice, and followed the decisions of Armour, C.J., in *Regina* v. *Day*, 20 Ont. R. 209.

In *Atty.-General* v. *Martin*, 9 Com. Law Rep. 713 (1909, Australia), where the accused made a statement after the constable had read to him a paper, the contents of which were not proved, it was pointed out by Chief Justice Griffith that the decision in *R. v. Thompson*, *supra*, must be read with the facts of that case borne in mind. The statement, he says, there objected to was made to the prisoner's brother in circumstances that raised a doubt whether the confession was voluntary, and it then became the duty of the prosecution to discharge the liability to prove that it was voluntary. This, he observes, is a different thing from proving in every case, by positive evidence, that a confession is free and voluntary; and the confession was held properly admitted.

In *Rogers* v. *Hawkins*, 67 L.J.Q.B. 526, Lord Russell of Killowen, held there was no rule of law excluding an answer given by

an accused person to a police constable, without threat or inducement, from being given in evidence. See *R.* v. *Hoo Sam*, 19 Can. Cr. Cas. 259, 1 D.L.R. 569, 1 W.W.R. 1049, and *Trepanier* v. *The King*, 19 Can. Cr. Cas. 290, 18 Rev. de Jur. 177, where Cross, J., says that detective officers have a duty in finding out those by whom crimes have been committed, and Judges should hesitate before saying anything that would hamper the performance of that duty. How is that duty to be performed otherwise than by asking questions? The subject is dealt with in an instructive article in the *Law Quarterly Review*, vol. 30, p. 292.

There is, therefore, no question now in Canada that the evidence of police officers as to statements made by an accused person to them is properly admissible if they appear to have been made voluntarily and in reply to questions put without threat or inducement.

The main question before us is whether the trial Judge exercised proper discretion in admitting the statements made by the prisoner to Croome, and in view of the fact that the counsel for the prisoner did not oppose, but practically consented to these admissions, it is difficult to see how it can be said that the trial Judge exercised his discretion erroneously. While it may still be open to counsel for the prisoner to take the objection to the admissibility of the statements, nevertheless I think the course adopted by him at the trial can be fairly taken into consideration in determining the propriety of the trial Judge's action.

Passing over that consideration for the time, the principal point argued before us here, is whether there is implied in the words used by Inspector Kennedy, as above quoted, an inducement of some kind to the prisoner to make a statement. I must say that, to my mind, it is difficult to infer anything in the nature of the inducement such as counsel for the prisoner argues could be drawn from the words, "that he had nothing to hope for nor nothing to fear by any statement he might make, viz.: that if he made a statement it would not be used in evidence against him. That was expressly negatived by the words preceding, "that anything he might say might be used in evidence against him." The words used might possibly be taken to mean that the prisoner had nothing to hope for from any statement he might make and nothing to fear if he refused to make it. It is difficult, if not impossible, to understand how the words used could possibly convey

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to the prisoner's mind, after he had been explicitly told that any statement he made might be used in evidence against him, that, if he did make a statement, which might be used in evidence against him, it would not be so used. While the meaning of the words cannot be said to be wholly clear, it seems reasonably obvious to me that they do not mean this. And if they do not bear that meaning, what other possible inducement can they be said to have conveyed to the mind of the accused?

No objection was taken to the terms of the warning given by Bain, a member of the Manitoba provincial police. The statements made to him were made some five days later, when he was bringing the prisoner back to Winnipeg. It was argued that the alleged defect in the warning given by Inspector Kennedy still persisted, and affected the statements thereafter made by the prisoner to Bain. Considering the circumstances, it is difficult to attach any weight to this objection. The two statements were made at distinctly separated times and places, and it is incredible that the prisoner thought he was making his second statement as a result of Inspector Kennedy's words of warning.

Upon consideration, I am disposed to hold that, in the circumstances of this case, the discretion of the trial Judge in admitting the statements made to Croome and Bain was not shewn to have been improperly exercised.

But, even taking for granted that the evidence of the statements made by the prisoner to Croome and Bain were wrongly admitted, ought this Court to interfere with the verdict when there was plainly overwhelming independent evidence to justify it? The statements made to Croome and Bain were not in substantial particulars different from those made by the prisoner at the trial. Counsel for the prisoner indicated some items of difference, the effect of which he argued might or would be to throw discredit on the prisoner's evidence if the jury chose to accept the statements made to Croome and Bain as given correctly. But it is, I think, obvious that any jury would be certain to regard the evidence of an accused in circumstances resembling those brought out in this case, with suspicion. In any event the variations here cannot be said to be important. Bain says accused stated that Mr. Vincent, when he drove into the yard after Mrs. Vincent had been shot, said: "What is all this noise?" while the accused in the witness-box does not so state. Bain also states that accused

said Mr. Vincent jumped off the "waggon" when in fact it was a sleigh. But these differences are wholly immaterial. Bain also said the accused told him that Mr. Vincent rushed to the waggon "where the shotgun was lying on the top of the sacks." In the witness-box the accused stated that he noticed the gun standing against the granary, that Mr. Vincent grabbed hold of him and walked "towards the door of the granary evidently making for the gun." But surely it cannot be considered a matter of consequence where the gun was; and that this variation, or any one of the variations brought to our attention, was a material factor in determining the jury's attitude to Spain's story is difficult to believe. There were so many other facts of the greatest importance, established by indisputable evidence, such as the taking of the money, the flight of the accused, his lying attempts at concealment as admitted by him, the coat of James Vincent produced at the trial, the evidence of the coroner as to his wounds, the retention of the rifle by the accused after the shooting of Mrs. Vincent until he killed Mr. Vincent, and the other outstanding facts brought to the attention of the jury, that it was impossible for them, as men of common sense, to view the story of the accused with any other feelings than those of the gravest suspicion, and, indeed, of incredulity. His story in the box was merely an elaboration in greater detail of that told the detectives. The central facts of the killing of Mrs. Vincent and of Mr. Vincent were admitted in the witness-box and to the detectives. The details surrounding those events do not differ materially in the different statements, though in the box there were additional particulars. The substance of the story throughout the different statements was the same.

Sec. 1019 of the Criminal Code reads:—

> "No conviction shall be set aside nor any new trial directed, though it appears some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned in the trial."

This section of the Code came under consideration by the Supreme Court in *Allen* v. *The King*, 44 Can. S.C.R. 331, 18 Can. Cr. Cas. 1. The Chief Justice referred to the English Act, 7 Edw. VII. ch. 23, sec. 4.

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In his opinion, the two sections are practically to the same effect, the underlying principle of both being "that, while the Court has a discretion to be exercised in cases where improper evidence has been admitted, that discretion must be exercised in such a way as to do the prisoner no substantial wrong or to occasion no miscarriage of justice." As the defence in the case was that of insanity, it is obvious that the evidence objected to and ruled against, tended to shew the making of previous threats by the accused and thus was directly relevant to the issue. He held that section 1019 merely gave the Judges on appeal a discretion to be exercised only where the illegal evidence or other irregularities were so trivial that it may safely be assumed the jury was not influenced by it. To hold that a Court of Appeal should decide how far improperly admitted evidence may have influenced the jury would be, he said, "to deprive the accused in a capital case of the benefit of a trial by jury." He cited at length from *Makin* v. *Atty.-Genl.*, [1894] A.C. 57, 63 L.J.P.C. 41, 17 Cox 704, where a similar section of a New South Wales Act was dealt with. Mr Justice Anglin, who agreed with the Chief Justice, also referred to the *Makin* case, and held that it was impossible to say that the minds of the jury may not have been, or were not in fact, affected prejudicially to the appellant by a matter so pertinent to the main issue before them [44 Can. S.C.R. 331, at 361]. Mr. Justice Duff agreed with the Chief Justice, while Justices Davies and Idington dissented. The judgment of the majority of the Court was based upon the material character and relevancy of the evidence objected to, evidence of facts not otherwise established.

Such was also the case in *R.* v. *Allen*, 22 Can. Cr. Cas. 124, 14 D.L.R. 825.

In the case of *Ibrahim* v. *The King*, [1914] A.C. 599, 83 L.J.P.C. 185, 24 Cox C.C. 174, the *Makin* case came up for discussion. It was pointed out that the Board in that case had held the evidence there objected to properly admitted, and that, therefore, the observations as to the construction of the New South Wales Act were technically *obiter*. These observations were, however, adopted by the Court of Criminal Appeal in *R.* v. *Dyson*, [1908] 2 K.B. 454. Lord Sumner goes on to say that the statutory powers of a Court of Criminal Appeal are different from those vested in the Board, and that, "even in *Makin's* case, however, reservation was made of cases 'where it is impossible to suppose that the evidence im-

properly admitted can have had any influence on the verdict of the jury,' and this reservation is not to be taken as exhaustive." He cites a number of cases where the Court of Criminal Appeal has refused to interfere on this ground, and a case where the Court quashed the conviction. He concludes his observations on this branch thus: "The rule can hardly be considered to be settled, but at any rate it seems to go so far as to substitute 'highly improbable' for 'impossible' in Lord Herschell's reservation (in the *Makin* case) above quoted." He reviews the circumstances of the case before the Board, and says: "it appears to their Lordships that a clearer case there could hardly be, and that it would be the merest speculation to suppose that the jury was substantially influenced by the evidence of what Ibrahim said to Major Barrett."

In *R.* v. *Davis*, before the Supreme Court in 1915 (not reported), evidence of an admission by one prisoner against the other was admitted without the trial Judge directing the jury that such an admission could not affect the prisoner not making it. The Chief Justice held that it could not be said, in the circumstances, that any substantial wrong or miscarriage had been occasioned, referring to *John Bowler's* case, 2 Cr. App. R. 168. We were also referred to several decisions in the Criminal Appeal Reports, amongst them *R.* v. *Cornock*, 10 Cr. App. R. 208; *R.* v. *King*, 10 Cr. App. R. 49, and *R.* v. *Seeham Yousry*, 11 Cr. App. 18, are particularly important.

The judgments in the recent case of *R.* v. *Kelly*, 54 Can. S.C.R. 220, 34 D.L.R. 311, in the Supreme Court, referred to by Perdue J. in his judgment in this case, throw further light upon the true construction to be given to sec. 1019.

To imagine that the jury were influenced in their considerations by any serious question as to the credit to be given to Spain's attempted justification or defence of his acts by reason of the contradictions, such as they were, between his various statements, seems to me the "merest speculation."

In my judgment, when the jury in this case had before them the first-hand statements of the accused, made in the witness-box, giving his account of the deaths of Mrs. and Mr. Vincent, and of the events prior and subsequent thereto, it is highly improbable, if not impossible, to suppose that they were influenced in arriving at their verdict by the operation on their minds of any differences between those statements and the statements made by

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the accused to Croome and Bain and by them given in evidence. And it must surely appear, beyond question, that the statements objected to were "most unlikely to have affected the verdict" to use the language of Lord Sumner in *Ibrahim* v. *The King*, [1914] A.C. 599, at p. 616, adopted by Mr. Justice Anglin in *R.* v. *Kelly*, 54 Can. S.C.R. 220, 27 Can. Cr. Cas. 282, 34 D.L.R. 311.

I have read the judgment in this case prepared by Mr. Justice Perdue, and agree in answering the questions reserved in the manner set forth by him. *Conviction affirmed.*

Note.

Note.—COMMUTATION OF DEATH SENTENCES.

The convict being only 16 years of age the death sentence was commuted by the Executive at Ottawa to one of imprisonment, it having been the custom for many years both in England and in Canada not to inflict a death sentence upon so young a culprit. All cases of death sentences in Canada are reviewed by the Minister of Justice at Ottawa before the sentence can be executed, and express power to commute the sentence is reserved to the Crown under sec. 1077 of the Criminal Code. The trial Judge has no option under Code sec. 263 but to pass sentence of death on a conviction for murder regardless of the extreme youth of the convict.

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GRAND TRUNK PACIFIC R. Co. v. CITY of CALGARY.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur, JJ. June 22, 1917.

1. TAXES (§ I E—48a)—ASSESSMENT OF OWNER OF LAND—OCCUPANT—PURCHASER.

A purchaser of Crown lands entitled to possession thereof, the title remaining in the Crown until completion of payment, is assessable as the equitable owner and occupant of the land.

[*Southern Alta. Land Co.* v. *McLean*, 29 D.L.R. 403, 53 Can. S.C.R. 151; *Smith* v. *Vermilion Hills*, 20 D.L.R. 114, 49 Can. S.C.R. 563, affirmed in 30 D.L.R. 83, [1916] 2 A.C. 569, followed.]

2. TAXES (§ III B—112)—ASSESSMENT OF RAILWAYS—"SUPERSTRUCTURE."

The "superstructure" of a railway, within the meaning of an assessment statute (Con. Ord. N.W.T. 1898, ch. 71, sec. 3), includes that which constitutes the line of railway, such as the ties, rails, bridges, culverts, platforms, etc., but not the buildings thereon.

[*Re C.P.R. and Macleod*, 5 Terr. L.R. 192, followed.]

Statement.

APPEAL from the judgment of the District Court Judge, of the District of Calgary, confirming the assessment made upon the lands of the appellant by the respondent. Reversed.

Geo. H. Ross, K.C., for appellant; *C. J. Ford*, for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I concur somewhat reluctantly in the conclusion reached by Davies, J., and by my brother Anglin. My inclination would have been to include in the exemption the tracks running to the roundhouse and the other sidings used for ordinary terminal purposes. I defer, however, to what must be the better opinion of my brethren.

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Davies, J.

DAVIES, J.:—This is an appeal from the judgment of the District Court Judge confirming the assessment made upon the lands of the appellant in the City of Calgary and occupied and used by them as terminals and station grounds.

The parcel of land in question consists of a large block situate almost in the heart of the city, and in near proximity to its business centre. It contains in all 25.5 acres of which quantity 3.64 acres are comprised in what was assessed as the "roadway" of the railway crossing through this block or parcel of terminal lands.

This "roadway" was assessed separately at $1,000 per mile under sec. 3 of ch. 71 Consol. Ord. N.W.T. 1898.

This part of the assessment is not appealed against, the appeal being only as to the assessment of the remaining portion of the Terminal Block comprising 21.86 at $8,000 per acre.

The facts agreed to by the parties to the appeal were as follows:—

1. The property which forms the subject-matter of this appeal is the same property as is specified in the Order-in-Council dated January 27, 1914, which is, by agreement, made part of the record on appeal herein.

2. The appellant purchased the land in pursuance of the Order-in-Council and has paid $125,000 on account thereof, being one-half the purchase price. The other half of the purchase price should have been paid in June, 1914, but, by arrangement with the Dominion Government, has been deferred upon the appellant paying interest on the unpaid balance.

The ordinance in question, upon the construction of which this appeal depends, is as follows:—

1. Every railway company whose railway is not exempt from taxation shall annually transmit on or before February 1, to the secretary-treasurer of every municipality, and to the secretary or other officer of every public school district through which the company's railway may run, a statement to be signed by some authorized official of a company shewing:—

(1) The quantity of land other than the roadway owned or occupied by the company, which is liable to assessment.

(2) The quantity of land occupied by the roadway.

(3) Whether such statement on sec. 1 of this ordinance is placed in the hands of the assessor of any such municipality or school district or not, the assessor of every municipality or school district, as the case may be, shall assess the lands of such railway company and the roadway thereof, and the superstructure of such roadway, and give such notice as is required by sec. 2 hereof: Provided that the roadway and superstructure thereon shall not be assessed at a greater value than $1,000 per mile.

The evidence shewed that the assessor did not ascertain the number of miles of trackage laid down upon the terminal grounds, and the area of land necessary for the proper usage of such trackage

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lines to roundhouses, warehouses, etc., and assess such area on the basis of $1,000 per mile of trackage or other mileage rate but that he assessed a 100-foot strip as shewn on the location plan *and that strip only* on the basis of $1,000 per mile. That strip contained 3.64 acres. Another 100-foot strip, running from the eastern boundary of the terminals property to the turntable, comprises an area of 3.64 acres, and is in actual use, and still another strip running from the eastern boundary of the property to *the station* comprises an area of 4.08 acres.

The whole block of 25.5 acres had been purchased from the Crown in right of the Dominion for the sum of $250,000, of which $125,000 had been paid, and the remainder was still unpaid The legal title still remains in the Crown, but the G.T.P. Co. is the equitable owner and the actual occupant.

Its liability, therefore, to be assessed as such equitable owner and actual occupant is under the decisions of this Court unquestionable. See *Calgary and Edmonton Land Co.* v. *Att'y-Gen'l of Alberta*, 45 Can. S.C.R. 170; *Smith* v. *Vermilion Hills*, 20 D.L.R. 114, 49 Can. S.C.R. 563, affirmed on appeal to Privy Council, 30 D.L.R. 83, [1916] 2 A.C. 569, and *Southern Alberta Land Co.* v. *McLean*, 29 D.L.R. 403, 53 Can. S.C.R. 151.

The contention therefore of the appellant that the assessment is void, because it does not assess the interest of the railway company apart from that of the Crown, and that the two interests cannot be separated, must fail. The company is properly assessed as the equitable owner and the actual occupant of the land, and there is nothing to warrant a suggestion that any interest of the Crown has been assessed.

The other contention of the appellant that none of the land in question should be assessed as acreage, but only on a mileage basis reckoned, "(*a*) on the distance across the property from east to west; or (*b*) on the number of miles of trackage laid on the land; or (*c*) on the number of miles of trackage laid *or proposed to be laid* on the land" need, in my judgment, only be mentioned to be dismissed. They practically amount to total exemption of the whole block of 25.5 acres from the assessment on an acreage basis, and affirm that it all should be assessed on the mileage basis reckoned on one or more of the three plans or bases above mentioned.

The appellants also contended that if the above contentions were rejected the 4.08 acres comprised in a 100-ft. strip of the rail track, running from the eastern extremity of the property to the station, and the 3.64 acres on which the track to the turntable runs, should not be assessed as acreage but only on a mileage basis.

There is much to be said for each and both of these contentions. I have considered carefully alike the English and American cases on this important question of railway taxation which were called to our attention. They are, in a sense, valuable as shewing the view the respective Courts took upon the particular statutes authorizing the assessments they were dealing with.

The divergent views expressed in several of the American cases are not surprising when the different language of the statutes is considered.

We must, of course, be guided by the language of the N.W.T. ordinance above quoted, and the question in this appeal in the last analysis is reduced to this: What is the meaning and extent of the words used in that ordinance—"The roadway thereof and the superstructure thereon?"

I agree with the meaning put upon the word "superstructure" by Scott, J., in *Re C.P.R. Co. and Town of Macleod*, 5 Terr. L.R. 192, where, at p. 197, he says:—

> I am of the opinion that the word "superstructure" as it is used therein is intended to mean and include only the superstructure constituting the line of railway, and that it is not intended to include, and does not include, any buildings or structures upon or adjoining the line of railway which, though used for railway purposes alone, form no part of that line of railway. In this view the term would include the ties, rails, turntables, bridges, culverts, etc., and (following the principle laid down in *South Wales Rly. Co.* v. *Swansea Local Board*, 24 L.J.M.C. 30, 4 El. & Bl. 189, it would also include railway platforms, but it would not include station or office buildings, warehouses, storehouses, or dwellings or lodging houses for employees of the railway. Neither would it, in my opinion, include roundhouses.

I do not wish to be understood in adopting this meaning of the word "superstructure" to include *turntables*, and confess I cannot understand why the Judge did include them.

I will not attempt any definition of the word "roadway" or what it comprises. I think to a large extent it is a question of fact to be decided in each case.

In the case before us the line of railway track forks as it enters the block of 25 acres of land in question, one fork running to the

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general station at the south-western corner of the block of land, and the other fork continuing on in a westerly direction through the city.

I am of the opinion that the contention of the appellant is right as to this track to the station being part of the "roadway" and not being assessable as acreage, but on a mileage basis. I cannot see on what reasonable ground it can be excluded, and held not to be part of the roadway. It is the track which conveys all passenger traffic to and from Calgary. I would accept the evidence of Graves, the engineer of the G.T.P. Co., as to the necessary width of the roadway. He says:—

> The necessary area you have to have each side of your lead track or your yard tracks, whichever it is, I have figured it here about twenty feet outside of the track.

I understand the acreage comprised in that strip would amount to 4.08 acres, which, in my opinion, has been wrongly assessed on the acreage basis.

I do not accept the contention of the appellant as to the tracks running to the roundhouse being similarly treated, or the other sidings on this block of land which are being used for ordinary railway terminal purposes.

The result, in my opinion, is that the judgment below should be varied by substituting the assessed value of the roadway or line to the station upon a mileage basis of $1,000 a mile, instead of an acreage basis of $8,000 an acre at which it has been assessed and that such judgment should otherwise be confirmed; the registrar will make the necessary calculations.

As the area of this part of the roadway comprises 4.08 acres and the plans filed shew its mileage, there should be no difficulty in making the necessary variation in the judgment by substituting the mileage assessment under the ordinance for the acreage assessment adopted by the judgment appealed from of this line to the station.

There should be no costs, as the appellant, in my view, obtains a small, though a material, modification of the judgment appealed from.

Idington, J.

IDINGTON, J.:—This appeal raises the puzzling question of what is the meaning of that part of the provision in ch. 71, C.O. of the Territories, 1898, intituled An Ordinance respecting the Assessment of Railways, which reads as follows: "Provided that

the roadway and superstructure thereon shall not be assessed at a greater value than $1,000 per mile, C.O. ch. 71, sec. 3."

The appellant has been assessed for some 25.5 acres of land in Calgary, of which a strip of a hundred feet wide has been assessed on the basis of $1,000 a mile, and the remainder at $8,000 an acre.

The strip of 100 ft. wide is supposed to represent the roadway within the meaning of the words of the provision just quoted.

The Railway Act of Canada then in force, which would seem to be the only one the North West Council could have had in view in enacting as above, provided for railway companies taking for use of railways a width of 33 yds., which at stations could be increased to 100 yds. for the length of 650 yds. And I imagine such spaces were what the legislation in question probably had in view.

I further imagine they had a wider vision of things than the view which the assessor stands for in his long narrow strip of unvarying width, and that the valuation of $1,000 a mile was intended to cover the varying or various widths so used for the railway.

The nearest I can approach that which was intended to be thus comprehended seems to be to allow the acreage of trackage and superstructure of any kind in use for actual running of the railway, at the point now in question as covered by this low but fixed value, to be applied for assessment purposes.

I would exclude from the benefit thereof, land not in use, but held for prospective use.

There is no principle to guide us in the interpretation of this Act.

A mere arbitrary value is fixed for what common knowledge tells us is probably worth ten times the value fixed.

Roughly speaking, the land taken is possibly now, in fact, of the value which was then arbitrarily or as matter of expediency universally fixed for each 12 acres, yet I imagine far beyond what it was, generally speaking, likely to be worth at the time of the enactment.

I cannot hold roadbed and roadway as interchangeable terms in this connection. Nobody ever dreamt of assessing the land alongside the actual roadbed within the lines of the right of way. Nor can I adopt the words "right of way" as convertible into the

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word "roadway." Nor can I imagine that the universal exemption of highways from taxation, as we find them now without private ownership, is to be taken as a guide.

The most ardent advocate of the single tax principle, which is possibly right, would not think of taxing such a highway. Then why a railway should be taxed no doubt puzzled some people, and why it should be exempt puzzled more, and hence a mere arbitrary expedient or compromise was resorted to and we have to make the best of the curiosity.

I understood in argument 10 acres would cover what I indicate as reasonable interpretation of what is presented. In other words, 7 acres more than the assessor allowed should come under the statutory valuation.

The appeal should therefore be allowed by the reduction of the assessment by $56,000. I doubt if costs should be allowed either party.

Duff, J.

DUFF, J.:—I have not been able to arrive at a conclusion entirely satisfactory to my own mind in this appeal, but on the whole I think the balance of argument inclines in favour of the view that "roadway" means the continuous strip commonly known as the "right of way."

In this view the appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—I concur with Davies, J.

Brodeur, J.

BRODEUR, J.:—The questions at issue in this appeal are: (1) Whether the yards of the appellant company in the limits of the City of Calgary are liable to taxation; (2) If they are liable to taxation, whether they should be assessed on the mileage or acreage basis.

On the first point, the appellant claims that the property belongs to the Crown in right of the Dominion, and that under the provisions of the B.N.A. Act those lands cannot be taxed.

The appellant has purchased from the Dominion Government the lands in question and, as the purchase price has not been entirely paid, the legal title is still in the Crown; but the property has been occupied by the appellant company, which has in the lands such interest as may be assessed, and taxed. It does not appear that any attempt has been made to assess the interest of the Crown in respect of those lands, and it has been decided by this Court in the following cases: *Calgary and Edmon-*

ton Land Co. v. *Att'y-Gen'l of Alberta*, 45 Can. S.C.R. 170; *Smith* v. *Vermilion Hills*, 20 D.L.R. 114, 49 Can. S.C.R. 563, affirmed on appeal to the Privy Council, 30 D.L.R. 83, [1916] 2 A.C. 569, and in *McLean* v. *South Alberta Land Co.*, 29 D.L.R. 403, 53 Can. S.C.R. 151, that the provincial legislature could authorize the assessment of a person in respect of his occupation of lands of which the bare legal estate is vested in the Crown.

Applying those decisions to the present case, I see that we have nothing before us to shew that the appellant is assessed for the interest of the Crown in the said land; but that assessment simply covers the interest which the appellant company possesses.

On the second point raised by the appellant, viz., that the assessment should be made on the mileage basis, we have to examine and to construe the provisions of the Ordinance respecting the assessment of railways, ch. 71, Territories' Act, 1898.

By the provisions of that Act, the railway companies are bound to give to every municipality an annual statement shewing: "1. The quantity of land other than roadway owned or occupied by the company which is liable to assessment, and (2) The quantity of land occupied by the roadway;" and then the assessor of the municipality assesses the lands of those railway companies, and the roadway and the superstructure; and the Ordinance contains a proviso that "the roadway and superstructure thereon shall not be assessed at greater value than $1,000 per mile."

As we see, there is a distinction between the assessment to be placed on the land of a railway company and on its roadbed.

The appellant contends that the roadway would include, not only the 100 ft. right of way mentioned in the Railway Act, sec. 177, but would include also the land used for sidings, station grounds, yards, freight tracks, freight sheds, turntables, etc., in other words, everything that goes to make up what is strictly railway property.

On the other hand, the City of Calgary contends that the property of a railway company to be assessed on a mileage basis should include simply the right of way.

The word "roadway" in the N.W.T. Ordinance is not defined, and it is not defined either in the Railway Act. Sec. 177, however, of the Railway Act determines what constitutes the

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right of way, and what property could be acquired by a railway for works, for stations, yards, warehouses, etc. For the right of way proper, 100 ft. in breadth is generally allowed to be taken by the railway company. In cases, however, where land should be required for stations, depots and yards, one mile in length by 500 in breadth, including *the width of the right of way*, could be taken.

These provisions of the Railway Act, and that determination of what is the right of way should help us in determining what the North West Legislature intended when it spoke of the roadway.

I think that the term "roadway" should be applied to that part of the railway leading from one place to another, and should include the whole right of way where it is used for no other purpose than as a right of way for the railway track. It would not include the yards and the stations, and when the statute speaks of superstructure, it refers, in my opinion, not to the buildings which could be erected, but to the ties and the rails which constitute the railway property.

Bouvier, in his dictionary, says that the roadway is the right of way which has been held to be the property liable to taxation. That is the interpretation which has been generally accepted in the North West, and which was made the subject of several decisions, viz., in the cases of *C.P.R. Co. and Macleod*, 5 Terr. L.R. 192, at 197; *Re Edmonton and C.P.R. Co.*, 6 W.L.R. 786; *C.N.R. Co.* v. *City of Edmonton*, 5 W.W.R. 1088.

I would therefore consider that the assessment made upon the property occupied by the appellant was a proper assessment and that the appeal should be dismissed with costs.

Appeal allowed.

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TARRABAIN v. ALLY.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Walsh, JJ. March 30, 1917.

VENDOR AND PURCHASER (§ I E—25)—REPUDIATION OF CONTRACT—REFUSAL TO CONVEY.

A refusal to convey land as agreed, because of a dispute as to the liability for taxes, does not amount to a repudiation of the contract.

Statement.

APPEAL by defendant from a judgment declaring that an agreement to transfer land had been repudiated. Reversed.

H. A. Friedman, for defendant, appellant.

J. A. Ross, for plaintiff, respondent.

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Walsh, J.

The judgment of the Court was delivered by

WALSH, J.:—The statement of claim alleges that the defendant who had been trading with and was indebted to the plaintiffs, who are merchants doing business in Edmonton, agreed with them on December 20, 1912, to give them a transfer of certain land in Edmonton and they agreed to credit him therefor with the sum of $400 to apply on the old account and to cover goods that would be subsequently delivered; that they did give credit for this sum and did supply goods to that value including the amount of the then indebtedness, but the defendant has never given the transfer and has remained indebted to them in said sum of $400, for the recovery of which amount, with interest, this action was brought. The statement of defence after formally denying every allegation in the statement of claim alleges that the defendant has at all times been and still is ready and willing to give the plaintiffs a transfer of the land to which under the agreement in question they are entitled.

At the trial there was but little, if any, dispute as to the agreement. Whether it was a sale of the plaintiff's goods to be paid for by a transfer of the land or a sale of the land to be paid for by the delivery of the goods or an exchange of one for the other it is very hard to make out. The admitted fact is that the defendant was to get and has got from the plaintiffs, credit on this account for $400, and the plaintiffs were to get and have not yet got from him a transfer of this land. The case turns for its disposition upon the acts and conduct of the defendant in failing or refusing to deliver the transfer. The evidence of one of the plaintiffs is that he on several occasions after the making of this agreement asked the defendant for the transfer, and while the defendant promised to give it to him he never did so. In March, 1915, the plaintiffs' solicitor, Mr. Lavell, wrote the defendant demanding the transfer and threatening "to press the collection of the claim for which this transfer was given" unless he heard from the defendant in due course of mail. In June, 1915, one of the plaintiffs and the defendant called at the office of Mr. Lavell and discussed the matter with him and it is upon what took place there that the plaintiffs base their allegation that the defendant refused to give them the transfer of this land, and that he did so in such terms as to entitle them to be paid by him $400 in lieu of it.

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Walsh, J.

The trial Judge quite properly accepted the evidence of Mr. Lavell, who was called by the plaintiffs, as stating correctly the occurrences of that meeting. His evidence, in brief, was this: The talk began with a complaint from the plaintiff about the length of time that he had waited for a transfer and that taxes had accrued against the property. Lavell suggested that the transfer might be signed and the question about the taxes settled later. He asked the defendant to sign the transfer and the defendant said: "What about the taxes?" Lavell said he, the defendant, should pay them, but this he refused to do. A suggestion was made that he should give the transfer and that the question of his liability for the taxes should be settled afterwards. The defendant refused to sign the transfer until the plaintiffs agreed to pay these taxes but said he would sign it if they would so agree. Being unable to agree upon this subject they parted and no further effort appears to have been made to procure the transfer or adjust the difficulty over the taxes, though this action was not commenced until more than nine months later. It was admitted on the argument that the taxes over which this dispute arose were those which had accrued since the making of the agreement in December, 1912.

It is very plain from this that the defendant's refusal to sign the transfer was by no means an unqualified one, nor was it based upon any idea of his that he was not bound to give it or founded in any intention not to do so. It is abundantly clear that the whole trouble was occasioned by the suggestion of his liability for these taxes. If no demand had been made upon him for them or if, having been made, it had been unconditionally withdrawn, I am satisfied that he would have signed the transfer without hesitation. He, a foreigner, unacquainted with our laws, was discussing what was really a legal proposition with the plaintiffs' solicitor. He disputed his liability for these taxes and, in my opinion, quite properly so. He was, I think, apprehensive lest his execution of this transfer with the question of his liability for these taxes left open might involve him in responsibility for them, and so while freely admitting the plaintiffs' right to it and expressing his willingness to give it, he simply withheld it because of the dispute over the taxes.

This section is in substance, though not in form, one for the

rescission of the agreement of December, 1912. The restitution to the plaintiffs of the goods supplied by them on the strength of it is impossible, and they therefore ask that as the defendant refused to transfer to them the land which he agreed to give and they agreed to take in settlement for them, they should get their value in money. If the defendant's refusal to transfer the land was an absolute one, evidencing a determination upon his part not to be bound by his contract, the plaintiffs would have very good reason for putting forth such a claim, but I do not think that they are entitled to treat his refusal to transfer under the present circumstances as any indication of an intention on his part to repudiate the contract so as to free them from it.

In *Freeth* v. *Burr*, L.R. 9 C.P. 208, Lord Coleridge, C.J., says, at p. 213:—

> In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. . . . The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.

Keating, J., in the same case, at p. 214, says:—

> It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract, but there must be an absolute refusal to perform his part of the contract.

This case was approved by the House of Lords in *Mersey Steel & Iron Co.* v. *Naylor*, 9 App. Cas. 434. Parke, B., thus put it in *Ehrensperger* v. *Anderson*, 3 Ex. 148 at p. 158, (154 E.R. 797):—

> In order to constitute a title to recover for money had and received, the contract on the one side must not only not be performed or neglected to be performed, but there must have been something equivalent to saying, "I rescind this contract," a total refusal to perform it, or something equivalent to that, which would enable the plaintiff on his side to say, "If you rescind the contract on our part, I will rescind it on mine."

Applying this principle to the facts of this case they fall far short of a repudiation by the defendant of his contract. Instead of there being a denial by him of the plaintiffs' right to this transfer there was an express affirmation of such right and full recognition was given by him to the contract under which the plaintiffs claimed it. In my opinion, the trial Judge was wrong in treating what took place between the parties on the occasion in question as a repudiation of the contract by the defendant,

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and I would therefore allow the appeal with costs and dismiss the action with costs.

Upon the argument Mr. Friedman stated that he has a transfer of the land executed by the defendant ready for delivery to the plaintiffs, and he undertook to deliver it if his appeal succeeded. The plaintiffs have the duplicate certificate of title in their possession, so that if the registration of the transfer from the defendant will give the plaintiffs a good title to the land the contract will have been fully performed on both sides, though the defendant's performance of it on his part has certainly been greatly delayed. *Appeal allowed.*

MAN.

C. A.

MORRISON v. McPHERSON.

Manitoba Court of Appeal, Howell, C.J.M., Cameron and Haggart, JJ.A June 21, 1917.

ASSIGNMENT (§ II—20)—EQUITABLE—APPROPRIATION OF FUND.

The appropriation of a claim against a company in liquidation, by a shareholder, in reduction of his liability as such, operates as an equitable assignment of the claim.

[*Fraser* v. *Imperial Bank*, 10 D.L.R. 232 (annotated), 47 Can. S.C.R. 313, specially considered.]

Statement.

APPEAL by plaintiff from a judgment of Prendergast, J., ordering a claim paid to a prior assignee. Affirmed.

I. Pitblado, K.C., for plaintiff, appellants.

C. P. Wilson, K.C., and *W. C. Hamilton*, for defendant, respondent.

Howell, C.J.M.

HOWELL, C.J.M.:—Ten gentlemen, consisting of the respondent, one Robinson and eight others, desired to form a fire insurance company, and, in order to raise the necessary initial capital, all signed a joint and several promissory note for $25,000, payable to a bank, which note was duly discounted, and, as I gather, this money was paid into the company upon each of their subscribed stock.

The company went into liquidation and the bank evidently was pressing for reduction of the note. The respondent was president of the company, and, I gather from the affidavits, Robinson was an employee to whom something was due from the insolvent company. It appears that of the payments which had been made on this note Robinson had not paid his share and the respondent, who was apparently endeavouring to get all parties to pay their shares, and who had apparently paid more

than his share, pressed Robinson for payment. The latter claimed that the company owed him for services and that he was entitled to have his indebtedness for his share of the payments made on the note reduced by the amount of this claim against the company.

The amount for which Robinson was a delinquent in the payment of his share on the note was apparently fixed at $2,286.79, and the books or accounts of the company shewed an admitted claim in his favour for $362.99, and to arrange this matter Robinson then gave to the respondent two promissory notes for $923.80 and $1,000 respectively, both dated June 30, 1916, and both payable November 1 of that year, and at the end of each note is written "Midland Fire a/c." At the time when this balance was arrived at and covered by the notes Robinson claimed that he was entitled to a much larger sum.

After giving these notes Robinson put in a claim to the liquidator for his services which was disputed and the matter came up before Macdonald, J., who decided in favour of Robinson and fixed the amount of the claim at $1,530.62.

The respondent opposed the claim made by Robinson and asserted by affidavit made in that matter that the sum by which the amount of the notes was reduced represented the full amount due Robinson, but the Judge found the much larger sum. While these proceedings were going on, the respondent, as a matter of safety apparently, sent the two notes to the liquidator, duly endorsed to him, so that the liquidator might apply on the notes any sum found due Robinson.

Soon after the claim had been settled by the Judge, the appellant gave notice to the liquidator that he held an assignment thereof from Robinson, and demanded payment. Thereupon the liquidator applied for interpleader, filing the usual affidavit which, after setting forth the facts as the receipt of the two notes above set forth, contains the following two paragraphs:—

9. That the liquidator has no interest in either of the said notes or the said assignment and does not collude with the said Ritchie McPherson, to whom the said notes were payable, or with the said J. M. Robinson, or his assignee, but is willing to pay the amount of said claim in such manner as the Court may direct.

10. That in the opinion of the liquidator an issue should be directed wherein one of the above mentioned parties should be plaintiff and the other of said parties, defendant. The question to be tried should be as to whom said money properly belongs.

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MORRISON v. MCPHERSON

Howell, C.J.M.

Upon motion for an interpleader order affidavits were filed by both parties and instead of directing an issue the whole matter was disposed of by the Judge on that application.

The respondent claims to be an equitable assignee of Robinson's right against the company by virtue of an agreement made between himself and Robinson when the above mentioned promissory notes were given. This claim is supported by the respondent's affidavit, clause 6 of which is as follows:—

> 6. At the time of the said settlement the said parties did not have before them the books of the company, and the amount of the balance of Mr. Robinson's claim against the company was taken at the sum then stated by him, namely, $362.99, and it was then distinctly agreed between Mr. Robinson and the other shareholders that in the event of it appearing that Mr. Robinson's claim was larger than the said last mentioned sum, the excess should be deducted from and set off against the amount of the said notes for $923.80 and $1,000, and the said notes were to the extent of any such excess taken and held by me for the benefit and on behalf of the company.

This clause is supported by several other affidavits, and I accept the facts therein as proved notwithstanding Robinson's denial.

In the affidavit which the respondent swore to, used to oppose Robinson's claim against the company, above mentioned, in referring to the two notes and shewing how the amount was arrived at, he used the following language, "which notes I took on behalf of the company." In the affidavit made by the liquidator, above mentioned, he swore that the company was not in any way liable on the $25,000 note which the 10 men signed, held by the bank, but for some reason the respondent thought, as shewn by his affidavits, that he took the two notes in question for the benefit of and on behalf of the company.

If there was an equitable assignment of this claim, it must be found in clause 6 of the affidavit.

If the books had shewn the full amount of the claim when the notes were given, it seems clear that the notes would have been for the much smaller balance, and I think it fair to infer that it was originally agreed that the notes were to be only for this balance. They were taken for the larger sum because the respondent believed nothing more was coming to Robinson. If there was any sum coming to Robinson beyond the sum deducted it "should be deducted from and set off against the amount of the said notes." The only one who could do this was the liqui-

dator, and he has refused to do it. The notes were taken by the respondent as he thought for the benefit of the company and he has transferred them to the company, and I assume, with the right to set this claim off against them or apply it on account of the notes.

The notes were really taken for the benefit of those shareholders and directors of the company who had paid more than their proportion on the $25,000 note, and the respondent confused this with a claim of the company.

Clearly the company has no right to these notes, especially after the liquidator has refused to treat the company as holder and apply the law of set-off, but apparently the notes are still in the possession of the liquidator and the respondent is entitled to them. The party who holds the fund is in possession of the notes, the respondent did what he could to have the bargain carried out —that is, to have the fund applied on the notes—and the Court is really asked to make this application.

I know of no principle of law by which relief can be granted to the respondent unless it can be held that there was an equitable assignment to some one. There cannot be an equitable assignment to the promissory notes, although Robinson really appropriated this fund towards payment thereof. Prendergast, J., who heard this motion, stated that the sum found due Robinson by Macdonald, J., included the $362.99, by which the amount of the notes was reduced as above set forth, and I have no reason to differ from him in this respect. Upon that assumption the claim then as allowed clearly includes the sum of $362.99, which was assigned to the respondent and appropriated to the payment of an indebtedness due him and to that extent he is entitled to payment out of the fund.

Robinson really agreed with the respondent to appropriate and did appropriate whatever claim or right he had beyond that sum towards the payment of the promissory notes which he then gave to the respondent, and which were made payable to the latter, and I think that can be construed as an equitable assignment of the fund to him to be applied towards the payment of these notes. In 5 Corpus Juris there is an excellent article reviewing English, Canadian and American authorities on equitable assignments of choses in action, and at p. 897 the law is stated as follows:—"No

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particular mode or form is necessary to affect a valid assignment and any acts or words are sufficient which shew an intention of transferring or appropriating the owner's interest."

Upon putting in his claim to the liquidator, Robinson directed the liquidator as follows: "As soon as the account is accepted, you will pay to the Merchants Bank, Brandon, the amount necessary to equalize my stock with that of the other shareholders and pay the balance to me." The notes had been previously given for this very purpose and this shews, first, that he wished to carry out his agreement, and, second, that the liquidator had notice in a way of an appropriation of this fund.

The appellant gave no evidence of having given any consideration for the assignment to him, and even if the liquidator could not be held to have had notice of the prior assignment, the prior assignment to the respondent has not been cut out. Pomeroy's Equity, sec. 695, and see p. 1211. The liquidator must pay to the respondent the amount found due Robinson and the respondent must apply on the promissory notes the sum of $1,167.63.

The appeal is dismissed with costs.

Haggart, J.A.

HAGGART, J.A.:—After listening to the forcible discussion of counsel and perusing the many authorities cited to us, I read with appreciation an observation made by Brett, J., in the case of *Field* v. *Megaw*, L.R. 4 C.P. 660, at 664, where, after concurring with the judgment of the other members of the Court, he said: "I must confess I have entertained some doubts. The law upon this subject is brought to such an exquisite degree of refinement that it is by no means easy to understand it."

Halsbury, in discussing the subject of equitable assignments, in vol. 4, p. 375, says: "The mode or form of assignment is immaterial provided the intention of the parties is clear. The assignment may be verbal, unless in the particular case writing is required by law, and no particular form of words is necessary so long as they clearly shew an intention that the assignee is to have the benefit of the chose in action. It may be addressed either to the debtor or to the assignee. An agreement amounting to an equitable charge may even be made out from a course of dealing between the parties. An engagement or direction to pay a sum of money out of a specified debt or fund constitutes an equitable

assignment, though not of the whole debt or fund. But it is necessary to specify the debt or fund. So also a mere charge on a debt or fund operates as a partial equitable assignment. It is immaterial that the amount of the debt assigned is not ascertained at the date of the assignment."

White & Tudor, 8th ed., at p. 111, substantially states the proposition as I have just cited from Halsbury. 5 Corpus Juris, at p. 900-1 and 909.

Mr. Pitblado relied very strongly upon *Field* v. *Megaw*, L.R. 4 C.P. 660. That was a case of a promise to pay money when the debtor receives a debt due to him from a third person, and it was held that in that case it did not constitute an equitable assignment so as to charge the debt in the hands of such third person. A. having a cargo of wheat brought by a vessel called the "Maraquita" in the hands of a factor for sale, obtained from B. a loan of £500, for which he gave B. his acceptance at two months, describing the consideration to be "value received in wheat ex 'Maraquita,'" and they verbally agreed that the bill was to be renewed from time to time until A. should receive from the factor the proceeds of the wheat. As I have said, it was there held that this did not charge the fund in the hands of the factor so as to amount to an equitable assignment of, or an equitable charge upon, the fund.

Brandt v. *Dunlop*, [1905] A.C. 454, was a case where merchants agreed with a bank by whom they were financed that goods sold by the merchants should be paid for by a remittance direct from the purchasers to the bank. Goods having been sold by the merchants, the bank forwarded to the purchasers notice in writing that the merchants had made over to the bank the right to receive the purchase money and requested the purchasers to sign an undertaking to remit the purchase money to the bank. In that case it was held that there was evidence of an equitable assignment of the debt to the bank with notice to the purchasers, and that the bank could recover the debt from the purchasers. In that case the decision of the Court of Appeal, [1904] 1 K.B. 387, was reversed and the decision of the trial Judge restored.

The subject matter has been frequently before the Ontario Courts. *Lee* v. *Friedman*, 20 O.L.R. 49, was a case where the

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plaintiff, by an oral agreement between himself, an incorporated company, and the company's wage-earners, supplied goods to the wage-earners, to be paid for out of the wages. The plaintiff at the end of each month was to hand and did hand in to the company particulars of his account against the men, and the company was to keep out of the men's wages the amount of the account, and hold the amount for the plaintiff. The company was allowed by the plaintiff $10 a month in part for its trouble in collecting. The plaintiff did not discharge the liability of the men for the goods bought by them until the money had been actually paid over by the company. It was held that there was a good equitable assignment of the wages.

In *McMaster* v. *Canada Paper Co.*, 1 Man. L.R. 309, it was held by the full Court, affirming a decision of Taylor, J., that an equitable assignment of a chose in action may be made by any words or acts shewing a clear intention to assign; a deed or writing is not necessary.

In *Re McRae Estate*, 6 O.L.R. 238, it was held no writing or any particular form of words is necessary to constitute an equitable assignment, an intention to pass the beneficial interest being all that is required. A client, who was indebted to a solicitor for costs incurred, informed him that, on the receipt by him of certain moneys, which he was instructed to collect for the client, he was to pay certain obligations, including his own bill of costs. It was held that this constituted a good equitable assignment.

Fraser v. *Imperial Bank*, as reported in 10 D.L.R. 232 (47 Can. S.C.R. 313), with annotations, which is an appeal from this Court to the Supreme Court, is instructive as to what constitutes an equitable assignment. I would refer particularly to the reasons of Davies and Duff, JJ., which are a comprehensive treatise on the law involved in the case at bar.

It is to be observed that the evidence shews there existed the following facts:- McPherson had paid to the bank, or into the treasury, more than his share; Robinson paid less than his share; there is the meeting of those same parties and the making of the adjustment; the making of the notes by Robinson to the order of McPherson on June 30, 1916, for $1,000 and $923, respectively; the transfer by the payee of the notes to the liquidator of the com-

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pany; the placing of McPherson in a position to set off the indebtedness against any claim made by Robinson against the company; and the memorandum in the book made by Robinson in his own handwriting when the adjustment was made.

All these circumstances existed independently of the verbal arrangement referred to in the affidavits and I think they strongly corroborate the version of McPherson. I think these circumstances all shew that the intention of the parties was that the indebtedness of each should satisfy the indebtedness of the other, and I think the Court was justified from the course of conduct in drawing the inference that there was an equitable assignment of Robinson's claim against the company and that such was the intention of all parties. There was the intention to assign; the intention to accept; and there was the valuable consideration given.

I would affirm the judgment of Prendergast, J., and dismiss the appeal.

CAMERON, J.A., concurred. *Appeal dismissed.*

Cameron, J.A.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.O., and Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 3, 1917.

COMPANIES (§ V C—188)—TRANSFER OF SHARES—CERTIFICATE—STATUS OF HOLDER.

Under the Ontario Companies Act (R.S.O. 1914, ch. 178), the holder of a share certificate has *primâ facie* evidence of title to the shares mentioned in it, to compel, under sec. 121 of the Act, their registration or transfer in his name on the corporate books.

Statement.

APPEAL by plaintiffs from the judgment of Lennox, J., dismissing an application by the plaintiffs to compel the defendant company to register the plaintiffs as holders of shares of the defendant company. Reversed.

The judgment appealed from was as follows:—

LENNOX, J.:—The issue I have to determine is, whether the plaintiffs are entitled to the transfer on the books of the defendant company of 1,500 fully paid-up shares of its capital stock.

It is quite impossible, I think, to direct that the defendant company register the share-certificates in question in the name of the plaintiffs as owners. The plaintiffs are not the owners. They did not agree to buy and never thought of buying the shares in question. They were instructed, as agents or brokers, to sell shares, and made arrangements for a sale. Their client could not

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hand over the shares intended. If this default subjected the plaintiffs to the dire pains and penalties on the Stock Exchange, pretentiously hinted at but not clearly shewn, their remedy was against the man who employed them, for breach of contract. This remedy was not pursued. Instead they got other shares to meet the sale, from another source, or another bundle, I think perhaps the same source, but it does not matter, and the transaction went through. That did not make them the owners of these shares in question, nor entitle them to registration. If their employer furnished the substituted shares, the matter, so far as they are concerned, is at an end; if the substituted shares were "borrowed," as they say, whatever that may mean, they may still have an action for damages against their employer, but I am not called upon to express, and do not express, any opinion upon this point. Dealing with the question from this point of view, all I feel called upon to say is, that they have no *locus standi* against the defendant company; and, if any one had a right to insist upon a transfer of these shares upon the mining company's books, it is the employer, not the agents of the employer.

This point, although I think it sufficient to dispose of the plaintiffs' claim, does not go to the root of the matter as it was fought out. The defendant company contends that these share-certificates were not lawfully issued—that they have no legal existence as issued shares. I find that this defence is fully established by the evidence, documentary and verbal. Mr. Montgomery, secretary of the company at the time, and of course likely to know a good deal about it, at the beginning of his evidence was clearly of a contrary opinion; but, when the minutes of the company's proceedings and his own letters were read to him, he saw the matter in an entirely new light, and very properly and candidly admitted his error.

The company also set up and has proved that, before this transaction of the plaintiffs took place, Mr. Lorsch was expressly and definitely notified of the irregularity and illegality of what purported to be an issue of the Gooderham shares; and, upon condition of being allowed to carry out the transactions then pending, undertook and agreed that he would not handle or attempt to sell any of the residue of this stock. He has acted in bad faith. He does not come into Court with clean hands; and, while this would

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not bar the plaintiffs in obtaining their legal rights, if any they could shew, it bars the way to the indulgent consideration of the Court, and assists one in determining the proper adjudication as to costs.

There will be judgment dismissing the plaintiffs' application with costs, including the costs of the motion before the Chancellor, if these have not been disposed of.

W. Laidlaw, K.C., for appellants; *Peter White*, K. C., for defendant company, respondent.

The judgment of the Court was read by

Hodgins, J.A.

HODGINS, J.A.:—Appeal from the judgment of Lennox, J., by the applicants, Lorsch & Company, who had moved for an order under the Companies Act, R.S.O. 1914, ch. 178, sec. 121, requiring the respondent company to register 1,500 shares in their name.

The appellants produce numbered certificates duly and properly issued by the transfer agents on the respondent company's orders, based upon resolutions regularly passed and ratified. It is proved beyond question that the shares represented by these certificates were paid for, to the respondent company on the 9th May, 1916, at the issue-price, and that it still has the money therefor. In the stock-register of the company, the original block of 10,000 shares is entered under the name of Gooderham, and there are also entered therein transfers amounting to 6,800 shares, leaving 3,200 in Gooderham's name. These transactions extend from the 1st December, 1915, to October, 1916. Notwithstanding this, the respondent contends that there was "some irregularity" in the issue of these certificates, and that, in consequence, it is not bound to allow the appellants to be recorded in its books as owners of the shares in question. The learned trial Judge has given effect to the respondent's contentions, holding that the appellants are not the owners of the shares; that they were illegally issued; and that the appellants, having notice of this, do not come before the Court with clean hands.

Dealing with the status of the shares, it would appear that there were on the 1st December, 1915, two options outstanding for blocks of shares, one to Eastwood & Co. at 11 cents per share, and the other to Bilsky at 10 cents a share. A market was to be made for the shares, but the respondent company would not lend shares for that purpose. The result was that Bilsky arranged with the respondent company's secretary that, if 10,000 shares were issued

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to Eastwood, he would guarantee payment at 10 cents. The 10,000 shares, in which those in question were included, were then issued, and the transfer agents directed to countersign certificates for them, for Eastwood's benefit, made out in Gooderham's name.

Confusion occurred at this point as to the identical option under which they were issued; the secretary writing on the 29th November, 1915, to the transfer agents that they were issued under Eastwood's option, but understanding and intending to say that they were under Bilsky's, his price being 10 cents. Eastwood sold 4,900 of the shares; and, as he was not making progress, he, on the 9th May, 1916, agreed to hand the balance over to Bilsky if he would get him a release from the company. Eastwood accounted to Bilsky for 4,900 shares, charging against it his expenses, and handed over the certificates for 5,100 shares. Bilsky then paid the company $1,000, i.e., for the whole 10,000 shares, and got Eastwood a receipt from the company, reading as follows: "May 9th, 1916. Messrs J. T. Eastwood & Company. Dear Sirs: Re Shamrock Consolidated Mines Limited. I beg to acknowledge the receipt of payment in full for 10,000 shares of the stock of the above-named company, and you are hereby released and discharged from all claims in respect to same or otherwise whatsoever by the said company. Yours truly, Shamrock Consolidated Mines Limited, per Joseph T. Montgomery, secretary."

Montgomery, the respondent company's secretary, then made the following note in the minutes of the 29th November, 1915, which had referred to the 10,000 shares as being under Eastwood's option: "These shares were delivered to Mr. Eastwood out of the Bilsky option, and paid for by cheque from A. M. Bilsky. J.T.M."

Montgomery states that in the initial discussion he told Eastwood he might get the shares from Bilsky, and that Bilsky agreed to give the 10,000 shares out of his option. Eastwood said that Bilsky promised to get the shares at 10 cents; and, while Bilsky thought the shares were coming out of Eastwood's option, he admits that he guaranteed both Eastwood and the company on the price of 10 cents, thinking Eastwood's option was at that figure. Bilsky has paid for the shares, and is not objecting to them being charged to him on his option, as was done. Montgomery says it was necessary to have these shares cleared up before the transfer of control to Anderson, now secretary of the

company, and that he so stated to Bilsky, who came in and settled for them on the 9th May, 1916.

It is clear that, whatever confusion there was in the minds of the parties as to whose option these shares were to be charged to, there is no doubt that the shares were to be and were issued at 10 cents and paid for at that figure, and that Eastwood was duly released. If the extra one cent a share is due by anybody as part of the purchase-money for these shares, it can only arise as a claim out of and based upon the completion of the transaction.

The shares in any event were paid-up, and there is no irregularity or illegality that I can see affecting their issue. By-law No. 30, dated the 28th September, 1915, duly passed and confirmed, allows the issue of 10,000 shares at 10 cents per share, so that this block of 10,000 shares was well authorised. In the notice to Eastwood as president of the Standard Stock Exchange, dated the 10th July, 1916, no reasons are given, while the respondent company's solicitors, on the 27th June, 1916, in writing J. T. Eastwood & Co. as brokers only, treat the question as one of uncertainty as to which option the shares were to be ascribed to, and mention that notice has been given to the transfer agents "not to transfer this stock until the uncertainty is cleared up." As there were, in the company's stock-ledger, in reference to this very 10,000 shares, no less than seven entries of sales or dealings with this stock, affecting 3,500 shares, all or most of which were approved by Anderson, who was then secretary, as it appears from his evidence, it suggests that the real reason is not the uncertainty, but the fact, alleged, that Bilsky took a cheque on the 13th May, 1916, for $971.15, to which the company now think he was not entitled, or that Anderson, who took control some time in the summer of 1916, is trying to find some reason for reducing the amount of outstanding stock. Of course, if the shares were properly issued, the notice said to have been given to the appellants is of no importance.

It may be noted that Montgomery emphatically denies that he told Anderson in May, 1916, that these shares would come back, or so many of them as were unsold, and says that in the negotiations he said they were actually issued, and that he went with him to the transfer agents to verify this. This gives point to the observation that, having made investigation, Anderson did nothing till the end of June, 1916, and allowed 1,100 shares to be trans-

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ferred before notifying the Stock Exchange, which did not even post his notice.

The judgment in appeal, however, rests also upon the ground that the appellants had no *locus standi*, that they were not the owners of the shares, and that only the real owner could be registered. The issue to be tried is as follows: "The plaintiffs affirm and the defendant denies that the plaintiffs are entitled to the transfer on the books of the company of the said fully paid-up shares of $100 each in the capital stock of the company listed in the share-certificates issued under the corporate seal of the company and the names of the officers, namely" [setting out the certificates by number and the number of shares covered by each.]

The judgment declares that the appellants are not entitled to the transfer of these shares from the name of Gooderham to the name of the appellants.

The evidence discloses that Bilsky, having asked the appellants, as brokers, to sell Shamrock stock, they did in September, 1916, sell for him 1,500 shares. These of course were unidentified. The appellants were paid for them, and then paid Bilsky, who handed them the certificates in question, endorsed by Gooderham in blank. The appellants entered their name on them as transferees, and then applied for registration. This was refused, and the appellants borrowed stock, made delivery to the purchaser, and say they are the holders of the certificates and desire registration. No one disputes their title save the respondent company. Bilsky took care to get paid before he handed these certificates over, so that the appellants' title cannot be questioned by him.

The right of a holder of a share-certificate under our statute has been considered in several cases. Under the Companies Act, R.S.O. 1914, ch. 178, sec. 54, every shareholder is entitled to such a certificate, which is made, by sub-sec. 2, *primâ facie* evidence of his title to the shares mentioned in it.

In *Smith* v. *Rogers*, 30 O.R. 256, Meredith, C.J., now C.J.O., thus states the usage in Ontario (pp. 259, 260): "The proper conclusion upon the evidence is, I think, that according to the usage of the Stock Exchanges in Ontario and Quebec and the course of dealing in or with shares such as those in question in this case, a share-certificate endorsed with a transfer and power of attorney signed by the person named in the certificate as the owner of the

shares, having a blank left for the name of the transferee and attorney, passes from hand to hand and is recognised and treated as entitling the holder of the certificate, so endorsed, to deal with the shares as owner of them and to pass the property in them by delivery of the certificate, so endorsed, or to fill in the blanks with his own name and to cause the shares to be so registered on the books of the company."

In *Castleman* v. *Waghorn Gwynn & Co.* (1908), 41 S.C.R. 88, Duff, J., after discussing the duty of the vendee of shares, sets out the position of a transferee of a share-certificate as follows (pp. 97, 98): "Where the sale is not executory but made by the delivery (in exchange for cash) of a share-certificate with a transfer purporting to be executed in blank by the holder named in the certificate (who is not the vendor) the obligation of the vendor cannot be stated in precisely the same terms. In such a case the vendor must, I think, be taken to affirm that the *jus disponendi* of the shares represented by the certificate is vested in him. He does not represent that he is the legal owner of the shares; for the legal ownership of shares in a company governed by articles such as we have to consider in this case is vested in the person registered as the owner. But the delivery of a share-certificate accompanied by a transfer executed in blank by the registered holder, may pass to the person receiving such documents 'a title legal and equitable which will enable the holder to vest himself with the shares' (*Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267, at p. 277), subject only to any right the company may have to object to register such person as a shareholder; and when a vendor of shares offers such documents for cash he must, I think, be taken by offering them to affirm that such a title (subject to the restriction mentioned) is vested in him by virtue of the certificate and the transfer he thus offers."

There is here no question raised as to the usage being that described in *Smith* v. *Rogers*. As the statute makes the certificate *primâ facie* evidence, that provision dispenses with the necessity of further pursuing the point.

The respondent company has no right to refuse the transfer under the circumstances here: *Re Dominion Oil Co.* (1903), 2 O.W.R. 826, a case somewhat similar to this; *In re Panton and Cramp Steel Co. Limited* (1904), 9 O.L.R. 3; *Re Good and Jacob Y. Shantz Son & Co. Limited* (1910), 21 O.L.R. 153.

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Hodgins, J.A.

No by-laws of the company affecting the matter are alleged or proved, even if that was important. See *In re McKain and Canadian Birkbeck Co.* (1904), 7 O.L.R. 241.

I think the appeal should be allowed, and the issue found in favour of the appellants, and that an order should issue, under sec. 121 of the Companies Act, requiring the company forthwith to register the appellants as the owners of the shares in the books of the company.

The respondent company will pay the costs of the application and of the appeal. *Appeal allowed.*

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PACIFIC COAST COAL MINES LTD. v. ARBUTHNOT.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Dunedin and Lord Sumner, August 3, 1917.

COMPANIES (§ IV G 105)—INTERNAL MANAGEMENT—MEETINGS—NOTICE—VOTING—ACQUIESCENCE—ULTRA VIRES.

The conditions of a statute validating an *ultra vires* agreement to secure debentures subject to the confirmation of the company's acts by a specified majority of the shareholders must be actually and literally complied with to render the agreement *intra vires*, and the fulfilment cannot be inferred from acquiescence; a notice of meeting which does not sufficiently apprise the shareholders of the purpose of the meeting, so that each could judge for himself whether he would consent to the proposals made at the meeting, is insufficient and the resolutions of the meeting are null and void. [31 D.L.R. 378, reversed.]

Statement.

APPEAL by plaintiff from the judgment of the British Columbia Court of Appeal, 31 D.L.R. 378. Reversed.

The judgment of their Lordships was delivered by:

Viscount Haldane.

VISCOUNT HALDANE:—This is an appeal from a judgment of the Court of Appeal of British Columbia, which reversed the judgment of Clement, J. who tried the action. The proceedings were brought by the appellants as plaintiffs to set aside a trust-deed dated March 1, 1911, made between the appellants and the respondents, the British American Trust Co. (Limited), for securing payment of 1,500 debentures of $1,000 each, carrying interest at 6%, and the debentures issued thereunder, and also to recover from certain of the respondents secret profits alleged to have been made by them as vendors to and promoters of the appellant company.

As to the last claim, it was abandoned in this appeal it being admitted that at the time when the properties were acquired by the vendors it could not be shown that they had become promoters, and further that rescission had become impossible. To that extent, at any rate, the judgment which allowed this claim

at the trial cannot stand. The real question which remains is one on the answer to which the validity of the trust-deed depends, viz., whether an agreement can stand which was made on February 11, 1911, between certain of the respondents, the appellant company and other persons. This agreement was undoubtedly *ultra vires* of the appellant company unless it was validated by a Private Act of the Legislature of British Columbia passed subsequently to its date on March 1, 1911. Under this Act the agreement was validated, but only subject to its adoption by resolution passed by a specified majority of the shareholders called for the purpose of adopting it, and of issuing the debentures already referred to. The decision on the appeal really turns on the single question whether the provision thus required by the validating statute was one of internal management only, the non-observance of which could be cured by the acquiescence of the shareholders, or whether it laid down a condition of the agreement becoming *intra vires*. In the latter alternative, and if it was not observed, it is not in serious controversy that no amount of acquiescence by the appellant company and its shareholders should cure the defect.

In order, however, to state intelligibly how the point has arisen, it is necessary to refer to the transactions which led up to the agreement and to the passing of the private Act.

The appellant company was incorporated under the Provincial Companies Acts on March 21, 1908, for the purpose of acquiring and working mining properties and selling the produce. The first directors were the respondents, Arbuthnot, Savage, McGavin, Moran, Reynolds, and two defendants, Wishard and Hodgson, who are not parties to the appeal. The capital of the company was $3,000,000, divided into 30,000 shares of $100 each. The property which the company was incorporated to purchase belonged to the promoters, who were also directors, and remained directors until March, 1911, the date of the agreement in controversy. This property consisted of various blocks of land and government licenses for coal prospecting, carrying with them mining rights. These licenses had been secured by the defendant Hodgson, and by the time the appellant company was incorporated, Arbuthnot and others of the directors had become interested in them along with him. One of the blocks of land had originally

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belonged to Hodgson, for a term under a lease with an option to purchase. He had assigned it to Arbuthnot, who had incorporated a company, the South Wellington Coal Mines (Limited), to which he sold it. This company was under Arbuthnot's control. On the incorporation of the appellant company he transferred to it 3,800 shares which he held in the South Wellington company, as well as his interest in one of the blocks of land for $350,000. Two of the other blocks and the licenses were at the time of the incorporation of the appellant company held by a company called the Vancouver Island Timber Co in trust for the persons interested in them respectively. These persons included Arbuthnot, Hodgson, and others of the directors who are respondents. The promoting vendors appear to have been desirous of so arranging their voting power in the appellant company that they should be able to exercise a steady control. They accordingly transferred a large number of their shares in it to a holding company, incorporated in the Province of Manitoba, by Arbuthnot, who became its president and obtained its proxy. It was named the Pacific Securities Company (Limited). The result of this was to place the controlling power in the hands of the British Columbia group of shareholders, and to leave a body of shareholders in New York, who were represented by the defendant Wishard, in a minority. Hodgson, who was no longer on the board of the appellant company, at this point became dissatisfied. His shares were in the pool and in the hands of the Pacific Securities Co., and he could no longer make his influence felt. He, therefore, in June, 1910, began an action, the purpose of which was to break up the new pooling arrangement. In this action grave charges were launched against Arbuthnot and his associates, in connection not only with the formation of the Pacific Securities Co., but with the promotion of the appellant company. Wishard and two others named Kimball and Mitchener, who also belonged to the group of New York shareholders, were in sympathy with Hodgson, who relied on their co-operation in dethroning the British Columbia group. The latter became alarmed, and the suggestion appears to have emanated from them that the New York group should buy out the British Columbia group by letting them have debentures of the appellant company in place of their shares and, in addition, for the amount due to them under their contracts with the appellant company. One Hartman, a lawyer

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practising in Seattle, was then instructed to act for the New York group in negotiating and preparing an agreement on these lines. This was finally done, with the result that Hodgson's action was dismissed by consent.

The agreement was finally adjusted and entered into on February 11, 1911. The parties to it were the respondents Arbuthnot, Savage, and McGavin, of the first part, representing the British Columbia group; Hartman and Mitchener, of the second part, who were defendants in the present action but did not appear in this appeal, and who represented the New York shareholders; the appellant company of the third part; Hodgson, and an associate, who had an interest in his shares, called Spencer, of the fourth part; and the respondent Reynolds, of the fifth part. The agreement recited the circumstances of the incorporation of the appellant company and the purchase of its properties, the transfer of shares held in it to the Pacific Securities Co. in accordance with a pooling agreement made in 1908; the indebtedness of the appellant company to the Merchants Bank of Canada and a guarantee for this indebtedness given by certain of the directors; the institution of the Hodgson action; and the holding of shares in the appellant company by Reynolds. The agreement then provided, among other things, for the dismissal of the Hodgson action without costs; for the execution of a trust-deed to secure debentures; for the issue of $1,500,000 of such debentures, out of which the members of the British Columbia group, and others whom they represented, were to receive amounts equal to the par value of their respective shares; for the surrender and extinction of such shares, an order of the Court to be obtained if necessary for the purpose; for the consequential reduction of the appellant company's capital to $2,000,000; for the holding of the meeting or meetings of shareholders necessary for the ratification and adoption of the agreement and for carrying out its terms; for the ratification and adoption of all the acts of the Vancouver Island Timber Co. and of the promoters of the appellant company, and for a complete release to the latter of all claims against them in connection with such promotion; for the parties making such use of their votes in respect not only of their own shares but of shares which they represented by proxy, as would give effect to the agreement; for an application to the Legislature of British

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Columbia for an Act to authorise the reduction of capital, the surrender of shares, and the issue of debentures as provided by the agreement, and the agreement itself; and for the resignation of their directorships of the appellant company by Arbuthnot, Savage, Moran, and Reynolds. The agreement contained other provisions less germane to the questions now raised and which need not be referred to specifically.

The provincial legislature was then in session at Victoria, and on February 14, three days after the agreement was signed, a petition for a Private Act was presented. A Bill was introduced which became law on March 1. In anticipation of the passing of the Act, the directors sent out notices from the appellant company's office, calling a meeting of shareholders for that day.

But for this statute the directors, had they desired to obtain the reduction of capital contemplated, must have applied to the Court under the Companies Act, 1910, of British Columbia. The application must have been founded on a special resolution which would have required two meetings, and the Court must have satisfied itself that it was cognizant of all possible claims from creditors, and that these creditors had consented or had had their claim satisfied. It is probable that, having regard to the nature of the story of the Hodgson action, and to other matters referred to on the face of the agreement, the Court, had it been applied to, would have made enquiry and looked carefully before pronouncing the order asked for. It was an advantage which would accrue to the directors if they could obtain a Private Act that they would be dispensed both from delay and further scrutiny.

The provisions of the Act which was passed on March 1 were substantially as follows: After reciting in the preamble the petition for legislative sanction for the reduction of capital, the power to issue debentures, and the validation of the agreement which had been filed with the Registrar of Joint Stock Companies at Victoria, the surrender of shares provided for in the agreement and the reduction of capital to $2,000,000 were authorised. The company was then empowered, subject to obtaining the sanction of a resolution of 75 per cent. of the shareholders present, personally or by proxy, to issue debentures and execute a trust-deed as provided by the agreement. The agreement itself and all its terms were then—

validated, ratified, and confirmed, subject to the same being adopted by a resolution passed by 75% of the shareholders of the company present, personally or by proxy, at any meeting of the shareholders of the said company called for that purpose, and for the purpose of authorising the issue of the said debentures after the 14th day of February, 1911, and upon a copy of the said resolutions being filed with the Registrar of Joint Stock Companies at Victoria.

The first question which arises upon these, the words on the construction of which the appeal, in their Lordships' opinion, turns, is whether they make the adoption of this agreement by resolutions passed by the specified majority at a meeting called for the purpose, a condition without the fulfilment of which the agreement would remain *ultra vires* and therefore incapable of being made the act of the corporation, even if every shareholder joined in attempting to make it so. In their Lordships' opinion this question must be answered in the affirmative. It was argued for the respondents that the procedure directed by the Act was only one of internal management, which had been put within the power of the corporation, and which the members of the corporation could therefore effectively unite, in terms or by implication from subsequent action, to treat as in reality performed, notwithstanding the absence of formalities which were necessary only if a minority was sought to be bound by the decision of a majority. It was said that 4 years had elapsed since the agreement was made and carried out, and that the conduct of the shareholders had shown general and complete acquiescence. The Court of Appeal proceeded on this view of the law. In their Lordships' opinion, it is fallacious. No doubt where some act, such as the granting of an obligation in the course of its business, is put by the constitution of a company within its power, and certain formalities of administration are prescribed by the articles of association which for domestic purposes regulate the duties of the directors to the shareholders, the mere failure to comply with a formality such as a proper appointment or the presence of a quorum of directors, will not affect a person dealing with the company from outside and without knowledge of the irregularity. He is presumed to know the constitution of the company, but not what may or may not have taken place within doors that are closed to him. Lord Hatherley's judgment in *Mahony* v. *East Holyford Mining Co.* (1875) 7 H.L. 869, is for practitioners in company law the classi-

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cal exposition of this principle. But the case stands quite otherwise when the act is one which has not, by the constitution of the corporation, been put within its power excepting on the fulfilment of a condition. In that event the persons dealing with the corporation are bound to ascertain whether the condition has been fulfilled. The question which alternative applies is of course one of construction of the statute authorising the act. Their Lordships are compelled to dissent from the view taken by the Judges of the Court of Appeal on this point, and to hold, wi Clement, J., who tried the action, that unless the condition prescribed by the words cited from the Private Act was literally and in reality fulfilled the agreement remained, what it undoubtedly was, apart from the Act, *ultra vires* of the appellant company.

The question that follows is whether, on the footing of this interpretation, the condition imposed was complied with. To answer this question it is necessary to consider the purpose for which the meeting was directed to be called, the terms of the notice by which this was done, and the circumstances in which the meeting took place.

The trust-deed to secure the debentures was executed on the day the Act passed and was duly registered. It recites that all necessary resolutions of the directors and shareholders had been passed at meetings called to consider them. The shareholders' meeting took place at 3.30 on March 1, just half an hour after the Act had passed. A shareholder who has to receive notice of a general meeting is entitled, under the 55th of the company's articles of association, to have sent to him a 7 days' notice, stating, in the case of special business such as this, the general nature of the business. The notice actually sent was despatched on February 20, before the Act had passed. Having regard to the language of the Private Act, their Lordships think that this anticipation of the passing of the statute was competent to the directors, but what remains to be seen is whether the notice gave the necessary information of the purpose of the meeting, and of the general nature of the special business for which it was called. The notice was to the effect that resolutions would be proposed that the company should ratify and adopt the agreement of the 11th February, and empower the directors to do all things that the Act authorised; that the debentures should be issued and the trust-deed be executed; and that the capital should be reduced by

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cancellation of shares. Now the agreement had not been seen by the shareholders generally before the meeting. It is stated to have been filed with the Registrar of Joint Stock Companies at Victoria. Doubtless it could have been inspected there by shareholders who had hurried from Eastern Canada or the United States. But why should they think that it contained the serious matters it did contain? The resolutions of which notice was given to them merely said that an agreement dated February had been entered into and filed with the registrar. The statement did not inform the shareholders that the debentures proposed to be issued were to be issued to shareholders, some of whom were directors, in exchange for their shares, nor did they refer to the fact, set out in the agreement itself, that Hodgson had brought an action against the directors and the company which was being compromised, and that the agreement contained a release by the company of all claims in respect of promotion which it might have against the directors. If the shareholders were to release possible claims, they ought to have been told of the grave character which Hodgson had attributed to the circumstances out of which he had alleged that they had arisen. Nor was there anything to tell them that as the result of the settlement, Arbuthnot in particular would, under the terms of the agreement, cease to be a director and shareholder and would quit the company with large profits in his pocket. The absence of full notice was particularly inappropriate in the case of those shareholders who had given proxies at dates prior to the agreement, when they could have known nothing of what it was to contain—proxies which were not the less on that account used by the directors at the meeting.

Their Lordships are of opinion that to render the notice a compliance with the Act under which it was given it ought to have told the shareholders, including those who gave proxies, more than it did. It ought to have put them in a position in which each of them could have judged for himself whether he would consent, not only to buying out the shares of directors, but to releasing possible claims against them. Now, this is just what it did not do, and therefore, quite apart from the fact that the meeting was held in half an hour from the time the Act passed and before the shareholders could have had a proper opportunity of learning the particulars of what the legislature had authorised,

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their Lordships are of opinion that the notice was bad, and that what was done was consequently *ultra vires*.

This disposes of the controversy. The judgment of the Court of Appeal must be reversed, excepting so far as it dismisses the claim for profits made by promotion, a claim which was given up at the Bar on this appeal. The judgment of Clement, J., will be restored so far as relates to the first part of its declarations, except that the name of Reynolds will be omitted from the second and third of them, and that the words "pay to the plaintiff company the amount thereof or" will be struck out of the third. The fifth, sixth, seventh, and eighth declarations, which relate to profits made by promotion, disappear. Declarations 9 to 14 inclusive will be restored, as well as the reservation of further consideration.

Their Lordships do not intend, by their judgment, to prejudice rights competent to anyone whose rights do not purport to be dealt with by their decision.

As to the costs, their Lordships think that the appellant company should have the general costs of the action up to and including the trial, excepting that they must pay to the respondents the costs of the issues on which the latter succeeded at the trial. In the Court of Appeal neither party should have any costs. The appellant company will have the general costs of the appeal to the King-in-Council, less half the cost of printing and perusing the record. There will be liberty to apply to the Court of first instance to give effect to this judgment.

Their Lordships will humbly advise Mis Majesty accordingly.

Appeal allowed.

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JOHNSON v. LAFLAMME.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. December 30, 1916.

VENDOR AND PURCHASER (§ II—30)—VENTE À RÉMÉRÉ—REDEMPTION—TIME.

It is sufficient under art. 1550, Civil Code (Que.), that the vendor in a *vente à réméré* signifies, within the time limited for redemption, his intention to redeem. It is unnecessary to take judicial proceedings for redemption within that time.

[32 D.L.R. 401, 25 Que. K.B. 464, affirmed.]

Statement.

APPEAL from a decision of the Court of King's Bench, Appeal Side, for the Province of Quebec, 32 D.L.R. 401, 25 Que. K.B. 464, affirming the judgment at the trial in favour of the plaintiff. Affirmed.

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Mignault, K.C., and *P. H. Coté*, K.C., for appellant.

Girouard, K.C., and *Méthot*, K.C., for respondent.

FITZPATRICK, C.J.:—This is an action brought by the plaintiff, respondent, as assignee of the rights of his brother, Olivier Laflamme, to enforce an agreement entered into between the latter and the defendant, appellant, on October 20, 1904.

By that agreement Olivier Laflamme sold to the appellant a lot of land for the price of $600 subject to a stipulation that the vendor reserved to himself the right to take back the property upon restoring the price of it with interest. The stipulation is expressed in these words:—

> The said vendor doth hereby reserve in his favour the right to redeem the property above described and sold, any time within 10 years from this day, by reimbursing to the said purchaser the said sum of $600, together with interest at 5% per annum, payable yearly up to the full reimbursement of the said sum of $600.

On November 30, 1907, the plaintiff bought for the sum of $800 his brother's right to redeem the land, and he has ever since been in possession, paying taxes, interest, insurance and fulfilling all the other obligations of an owner.

On October 18, 1914, the plaintiff deposited the amount due under the deed of sale ($600), with interest, in the bank to the credit of the defendant and notified him that the money was there at his disposal. On the next day, October 19, 1914, within the stipulated term a regular tender of the purchase price was made in notarial form. The defendant did not categorically refuse to accept the redemption money but suggested that the offer required further consideration; the words used were, according to the notarial deed: "*Je refuse présentement.*" It would appear as if the intention was to throw the plaintiff off his guard. Not having heard further from the defendant, this suit was brought in January, 1915.

The plea to the action is in substance (*a*) that Ol. Laflamme failed to fulfil the conditions subject to which the right of redemption might be exercised; (*b*) that the tender was irregular and the plaintiff did not represent Ol. Laflamme; (*c*) that the tender did not include the amounts paid by the defendant for insurance, taxes, etc.

Issue was joined on these pleadings. No evidence was given of any failure to comply with the conditions of the deed; the plain-

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tiff himself was the only witness examined; and the case was disposed of by the trial Judge in the plaintiff's favour on the written documents.

This would seem to be a very simple case on the pleadings and exhibits and the trial Judge decided it on the assumption that the contract, the subject-matter of the action, was an ordinary enforceable agreement. The obligation of the defendant purchaser under that contract was to perform his promise according to its term which was to retrocede the property to his vendor upon payment by the latter of the purchase price within ten years from the date of the sale. Within that period the plaintiff, cessionnaire of the vendor's rights, offered, in compliance with this undertaking, to pay the purchase price, which the defendant refused to accept. There is no doubt as to those facts. The plaintiff therefore did all that he was bound to do when he tendered payment of the amount due within the stipulated term. But it is said the right of the plaintiff to repurchase must be determined not by the letter of his agreement but by the provisions of art. 1550 C.C., which means that the obligation of the vendor is not that set out in the words of his agreement, to reimburse the purchaser the sum of six hundred dollars any time within ten years from the date of the sale, but to bring a suit for the enforcement of his right of redemption within that period. As was said in a very recent case in the Court of Appeal at Renne, France,

> Cette règle (c'est-dire la règle de l'article 1662 C.N.-1550 C.C.) n'est pas d'ordre public et s'il est stipulé que dans le délai il faudra payer le prix réel et les accessoires, cette clause doit être observée,

Gaz. Trib. 1914, 1er sem. 2, 254. The clear obligation of the vendor was to reimburse the purchase price with interest at any time within ten years from the date of the sale. Is such a stipulation contrary to public policy, and if not, on what principle can it be said that the obligation created is not that clearly expressed in the agreement, but an entirely different and far more onerous one? When the defendant refused to accept the purchase price as tendered he was guilty of a breach of his obligation. And the plaintiff's right to a retrocession of the property only arose thereafter. It was the plaintiff's right under the agreement to redeem *at any time within 10 years*. He had therefore until the last minute of the stipulated term to fulfil his obligation under his agreement which had the force of law over those who were parties to it; *modus*

et conventio vincunt legem. Frank v. *Frank*, 1 Chan. Cas. 84; *Barrett v. Duke of Bedford*, 8 T.R. 602, 605; Broom, Legal Maxims, 8th ed., 538, 540. Toullier states the rule in these terms:—

Pour se prononcer sur de telles questions, le juge devra consulter d'abord les termes du contrat et suivre la loi que se sont faite les parties. De la vente, vol. 2, No. 722.

I can see no reason why we should be concerned with the very learned discussion which we had as to the meaning of art. 1550 C.C. But to avoid possibility of doubt that the views of the majority here are entirely in accord with what the Chief Justice below clearly establishes to be the settled jurisprudence of the Province of Quebec, I will deal with the difficulty which is said to arise out of the fact that the action to enforce the plaintiff's right under the agreement was not brought within the 10 years. Art. 1550 C.C. is relied upon to support the contention that as a result he has lost his rights under the deed of sale and the defendant remains absolute owner of the property.

That article in the French text reads as follows:—

1550. Faute par le vendeur d'avoir exercé son action de réméré dans le temps prescrit, l'acheteur demeure propriétaire irrévocable de la chose vendue (C.N. 1662).

It reproduces *ipsissimis verbis* art. 1662 of the Code Napoléon. At the time this art. 1662 C.N. was incorporated in the Quebec Code to amend the then existing law, the words "son action," *i.e.*, "action de réméré" had been, by the French Courts and the most eminent text-writers, construed to mean that the vendor may use the right of redemption, and do not imply that an action for redemption is necessary (Laurent, vol. 24, para. 397). This was decided by the Cour de Cassation as far back as April 25, 1812. All cases and references to the text-writers will be found collected in Fuzier-Herman, Code Civil Annoté, under art. 1662 C.N. and Revue Trimestrielle de Droit Civil, 1915, at p. 181.

Planiol with his usual lucidity explains the effect of 1662 C.N. in two paragraphs which are worth quoting (vol. 2, 1583):—

La déchéance qui frappe le vendeur à l'expiration du délai donne un très grand intérêt à la question de savoir ce que le vendeur doit faire dans le délai qui lui est accordé pour être considéré comme ayant exercé son droit. Des difficultés nombreuses s'élèvent sur cette question, parce que le plus souvent le vendeur attend au dernier moment, et l'acheteur prétend qu'il s'y est pris trop tard. Que faut-il qu'il fasse pour éviter la déchéance?

L'article 1662 ne précise rien: "Faute par le vendeur d'avoir exercé son action de réméré. . . . ." Ce *n'est pas d'une action* qu'il s'agit: le vendeur est tenu de faire un *remboursement*. Dans la doctrine on admet

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en général que le paiement, ou tout au moins des *offres réelles*, sont nécessaires pour qu'il soit bien établi que le vendeur était en mesure d'opérer le rachat, et que l'acheteur seul l'en a empêché. Mais la jurisprudence se montre beaucoup plus facile pour les vendeurs à réméré. Elle se contente d'une simple manifestation de volonté de leur part; le vendeur signifie à l'acheteur par acte extra-judiciaire sa volonté d'user de son droit de rachat. Cela suffit, dit la Cour de Cassation, parce qu'aucune disposition de la loi ne prescrit au vendeur de faire dans le délai fixé soit un paiement soit des offres.

In their report to the legislature the codifiers of the Quebec Code give in art. 64 the *time* and *mode* of exercising the right of redemption according to the existing law and then say:—

L'article 64 énonce le temps et la manière d'exercer cette faculté de réméré suivant la loi actuelle. Les commissaires croient que le changement fait par le Code Napoléon dans les règles sur ce sujet les simplifie considérablement et les rend plus convenables dans leur application et leur effet. *Ils ont en conséquence adopté quatre articles du Code qu'ils soumettent comme amendement à la loi actuelle. Ils sont marqués 64a, 64b, 64c, 64d.* Ils limitent l'exercice du droit à dix ans et *astreignent strictement les parties à leurs conventions sans permettre aux tribunaux de les étendre, et sans exiger l'intervention d'un jugement pour déclarer le droit éteint.*

It is impossible to more clearly express the intention to adopt the rule of the French Code with respect to the *mode* and *time* of exercising the right of redemption. Art. 64c is now art. 1550 C.C. It is of some importance to note that among the French Commentators referred to by the codifiers are Dalloz, Vente, ch. 1, sec. 4; Troplong, Vente, No. 716; 5 Boileux, art. 1662; 16 Duranton, No. 401; all of whom agree in saying that it is not necessary to bring an action within the delay. The reference to Boileux is specially interesting because he discusses the very question we are now called upon to decide. Boileux says:—

Mais au moyen de quels actes le réméré doit-il avoir lieu? Une action en justice est-elle nécessaire? Il suffit au vendeur de manifester par acte extra-judiciaire, dans le délai prescrit, l'intention d'user du pacte de rachat avec soumission de rembourser tout ce qui peut être légalement dû. La loi voit avec faveur l'exercice du réméré. Ainsi les mots: *faute d'avoir exercé son action en réméré* sont synonimes de deux ci: *faute d'avoir usé du pacte de réméré.*

With that quotation before them (*vide* Bibliothèque du Code Civil, vol. 12, p. 383), the codifiers adopt the language of the French Code. The fair inference, therefore, is that if the expression "son action" was ambiguous when first used in the Code Napoléon, that ambiguity was removed and the term had acquired a fixed definite meaning in the French law when it was incorporated in the Quebec Code in 1866. Since the promulgation of that Code,

as pointed out by the Chief Justice of the Court of Appeal, the Courts of Quebec have invariably construed art. 1550 in the same way as art. 1662 C.N. had been and still is construed. *Walker* v. *Sheppard*, 19 L.C. Jur. 103, is referred to as an exception, but here are the words of the "considérant" in that case:—

D'ailleurs la présente action a été intentée trop tard, vu qu'elle a été rapportée postérieurement à l'expiration du délai fixé pour l'exercice du réméré et *sans offres réelles au défendeur du prix et loyaux coûts.*

Throughout the case seems to turn on the failure to reimburse the price.

If the Courts below had not followed the "doctrine" and "jurisprudence" to which the codifiers refer they would have set at defiance, in principle at least, the salutary advice given by the Privy Council to the Australian Court in *Trimble* v. *Hill*, 5 App. Cas. 342. See also *Casgrain* v. *Atlantic and North-West R. Co.*, [1895] A.C. 282, at 300; Taschereau, J., in *Canadian Pacific R. Co. v. Robinson*, 19 Can. S.C.R. 292, at 316.

If the question was at large one would feel bound by the decisions in the French Courts because, as Laurent says:

Il est de principe qu'il faut interpréter le code par la tradition à laquelle il se rattache quand il la consacre.

(Laurent, vol. 2, 608). *Vide* also *Kieffer* v. *Le Séminaire de Québec*, [1903] A.C. 85, at 96. Dealing with the question at issue in that case, their Lordships say:—"The answer to this question must depend on the requirements of the French law, upon which the Quebec Code is founded." Girouard, J., citing a number of recent French authorities, says in *Connolly* v. *Consumers Cordage Co.*, 31 Can. S.C.R. 244, at 310:—

I feel that I cannot disregard the opinions of those great jurists, who are generally considered in Quebec as the best exponents of our Code. Nor can I ignore the numerous decisions of the Cour de Cassation and other French tribunals.

Vide also *Renaud* v. *Lamothe*, 32 Can. S.C.R. 357, at 366; *Parent* v. *Daigle*, 4 Q.L.R. 154, at 175.

It was argued by Mr. Mignault to explain the course of decisions in France and the opinions of the commentators that in art. 1662 C.N. the word "action" is used interchangeably with the word "faculté" or "droit," whereas in the Quebec Code the word "faculté" is used in contradistinction to the word "action." I have carefully examined the articles of the Quebec Code and compared them with the corresponding articles of the C.N. but

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without being able to reach any such conclusion. On the contrary, I find, as the codifiers say in their report, that the articles to which Mr. Mignault refers are taken from the French Code with slight verbal changes, but the words, "action" and "faculté" are used in the same connection in both Codes. In art. 1650 C.C. it is said:—

Faute par le vendeur d'avoir *exercé son action de réméré* . . .

and then in art. 1552 the words used are:—

Le vendeur peut exercer *cette faculté de réméré* . . .

referring clearly to the "action de réméré" in art. 1550. Again art. 1553 C.C. says:—

L'acheteur d'une chose sujette – la *faculté de réméré* . . .

Art. 1555:—

L'acheteur d'un héritage sujet *au droit de réméré* . . .

and in art. 1556 "*faculté de réméré*" is used in the same sense as "droit de réméré" in art. 1557. The conclusion that the words "droit" and "faculté" are used interchangeably in the whole group of articles concerned seems irresistible.

The real difficulty in this case as it was argued here arises out of the English translation of art. 1550 C.C. I use the term English translation advisedly. It is said that the word "*action*" in the French text is ambiguous and that the language of the English version which removed the ambiguity should be adopted. I understand this to mean necessarily that the English version of art. 1550 is not to be treated as a mistranslation, which it is, of the French text, but as an aid to interpret that text. For a correct translation of art. 1662 C.N. *vide* French Code Annotated by Blackwood Wright. *Vide* also: Civil Code of Louisiana, art. 2548.

It may be that for those who choose to consider art. 1550 C.C. in the French text without reference either to the "doctrine" or "jurisprudence" which prevailed in France when that article was adopted from the C.N. some ambiguity arises out of the use of the word "*action*," but the codifiers had that so called ambiguity present to their minds, as appears by the quotation from Boileux, and the simple way to remove the ambiguity, if it existed, was to alter the language of the French text and not to adopt the extraordinary method of removing the ambiguity in the French text by making the English version serve as a key to the true sense of that text. That the codifiers had no such intention is made clear by their report. When speaking of arts. 65-73 of the report, which are

arts. 1552-1560 of the Civil Code, after saying they adopt 64*a*, 64*b*, 64*c*, 64*d*, from the C.N. they add:—

Quelques changements de mots ont été faits dans les *autres articles* (65-73) pour rendre l'exposition des règles plus complète et éviter les ambiguités signalées par les commentateurs.

Why, if there was an ambiguity in their minds as to the meaning of art. 64*c* did they not adopt the same method and make the necessary verbal changes? Speaking with proper deference I would venture to add that it is not by any means so clear, as Cross, J., finds, that under the provisions of the English version the suit must be brought within the stipulated term. Grammatically the words "within the stipulated term" may perfectly be read as qualifying the words "his right to redemption" which immediately precede them; there is no stop between them such as we should expect to find if "within the stipulated term" had reference to the bringing of the suit; indeed if this was the meaning, the proper reading would be:—

If the seller fail within the stipulated term to bring a suit for the enforcement of his right of redemption.

Moreover, the theory that is now suggested, while it has the charm of novelty, ignores completely the rule laid down by the Code itself in arts. 2615 and 12 C.C. for the solution of the very difficulty that has arisen here. Art. 2615 provides that if there be a difference between the English and the French texts that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded and *if there be any such difference in an article changing the existing laws*, as in this case, that version shall prevail which is more consistent with the intention of the article. Which version is more consistent with the intention of the article if we take into consideration the language of the codifiers who say that their intention was to adopt the article of the C.N., referring at the same time to the commentators who interpret and fix the meaning of the language used: *Freedman* v. *Caldwell*, 3 Que. Q.B. 200; *Naud* v. *Marcotte*, 9 Que. Q.B. 123; *Meloche* v. *Simpson*, 29 Can. S.C.R. 375, at 385, *et seq.*; *Gosselin* v. *The King*, 33 Can. S.C.R. 255, at 268; *Wardle* v. *Bethune*, L.R. 4 P.C. 33, at 52; *Symes* v. *Cuvillier*, 5 App. Cas. 138, at 158?

In *Exchange Bank* v. *The Queen*, 11 App. Cas. 157, at 167, their Lordships say, speaking of art. 1994 C.C.:—

If there be any difference between the French and English versions, their Lordships think that in a matter which is evidently one of French law, the French version using a French technical term should be the leading one.

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See also *Harrington* v. *Corse*, 26 L.C. Jur. 79, at 108-9.

This case affords an apt illustration of the injustice that naturally follows from the strained interpretation which the appellant seeks to put on art. 1550 C.C. The parties live at a considerable distance from the chef-lieu of the judicial district. To bring an action within the ten years the offer to reimburse must be made a sufficient time before the expiration of the redemption period, in this case at least four days, to allow the vendor in case of refusal to proceed to the Court, consult a lawyer, take out a writ and have it served. Why should the vendor lose the benefit of this period when his contract gave him the full ten years within which to exercise his right to redeem?

On the other points raised I agree with the majority below.

The appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—I agree that this appeal should be dismissed with costs.

Duff, J.

DUFF, J. (dissenting):—The fate of this appeal depends, in my view of it, upon the decision of a single point which is a dry point of law and can be stated and discussed without reference to the facts of the particular case before us. The question relates to the construction and effect of art. 1550 C.C. which is expressed in the following words:—

1550. Faute par le vendeur d'avoir exercé son action de réméré dans le terme prescrit, l'acheteur demeure propriétaire irrevocable de la chose vendue.

1550. If the seller fail to bring a suit for the enforcement of his right of redemption within the stipulated term, the buyer remains absolute owner of the thing sold.

And the point to be determined is this—does this article require as a condition of the effective exercise of the vendor's "right of redemption" the commencement of appropriate judicial proceedings for the vindication of that right within the "redemption" term stipulated by the contract of sale?

Reading the two versions together without reference to any context, the construction and effect of them seem not to be open to controversy, although the words in the French version "*d'avoir exercé son action de réméré,*" are not so precise as to be altogether incapable of more than one necessarily exclusive meaning. This cannot be affirmed of the words of the English version "If the seller *fail to bring a suit for the enforcement* of his right of redemption, etc.," words both apt and precise and their one necessary meaning

being that which they convey on the first view, namely, that the taking of legal proceedings by the seller in a Court of justice to vindicate his *droit de réméré* within the stipulated time is a condition of the enforcement of that right in the sense that default in doing so makes the title of the purchaser absolute. This, moreover, though not the only possible reading is the primary and natural reading of the French version; and the slight ambiguity presented by the terms of that version, being removed by the precise and apt words in which the condition is defined by the English version all possibly imputable lack of exactitude in the words—considered in themselves apart from the context and history of the article—disappears.

Is there in the cognate articles, the articles dealing with the same subject—*vente à réméré*—anything which supplies a qualifying context? The answer must be in the negative. Arts. 1545 to 1560 inclusive, speak of *la faculté de réméré*, *le droit de réméré*, and the "right of redemption" but there are no words in any of these articles which could properly be read as controlling the effect of the words of art. 1550.

Is there anything in this construction of art. 1550 so repugnant to the nature of the *droit de réméré* or to the provisions of the cognate articles which requires us to search for some construction more in consonance with general legal principle or with these correlative provisions of the Code? According to the construction indicated, the article may, no doubt, have this effect—the *droit de réméré* must be exercised in such fashion as to enable the vendor to bring his suit within the agreed term; and the consequence (it may be) follows that the vendor must, in order to enable him to do this effectively, at least, manifest his intention to exercise his right at a date earlier by an appreciable time than that at which he would otherwise have been required to do so; in other words, it may be that the effect of art. 1550, read according to the natural construction of the language employed, is necessarily to curtail in some degree the stipulated term and possibly, in rare cases, to curtail it substantially. I do not say that under that construction this is in truth the effect of the article. The just view may be that by force of these articles themselves appropriate legal proceedings can validly be taken simultaneously with the tender, offer or expression of consent necessary to constitute an effective exercise of the *faculté de réméré*.

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Assuming, however, the former to be the consequence of the construction indicated; that, it seems to me, presents no sound reason for refusing to leave to its proper operation the unequivocal language of art. 1550.

Is there anything in the judicial history of that article in the Province of Quebec to create doubts as to its proper construction? Here again the answer must be in the negative. Our attention has been called to three decisions in which the point has been touched upon: *Walker* v. *Sheppard*, 19 L.C. Jur. 103; *Trudel* v. *Bouchard*, 27 L.C. Jur. 218; *Dorion* v. *St. Germain*, 15 L.C. Jur. 316. In the first of these an opinion was expressed favourable to the view now advanced by the appellant. In *Trudel* v. *Bouchard*, 27 L.C. Jur. 218, nothing is said explicitly by Jetté, J., upon the point before us, but from the circumstances of the case and the nature of the judgment the proper inference appears to be that his opinion would not have been unfavourable to the contention of the present appellant. The last of the above mentioned cases does not, so far as one can see, deal with or involve the point although there is a reference to it in the reporter's head-note. There are some observations in the argument of the distinguished counsel who appeared for the appellant unsuccessfully to which one of course cannot attribute the weight attaching to judicial dicta.

There being neither ambiguity in the article itself when read as a whole, nor qualifying context nor anything in the judicial application of the article in the Province of Quebec to create a difficulty, the Court of appeal has found itself constrained to reject or disregard the English version and to give to the French version which is a literal transcription of art. 1662 C.N. the construction and effect which the last mentioned article has unanimously received in France in both *la doctrine* and *la jurisprudence*.

I will state the twofold reason which compels me to hold this course to be inadmissible. First: In France they have proceeded upon the ground that the expression "exerçer l'action en *réméré*" is capable of more than one meaning.

L'expression exerçer l'action en réméré peut avoir un autre sens, celui d'agir c'est-à-dire de faire ce que le vendeur doit faire pour exerçer son droit. says Laurent (vol. 24 Principes de Droit Civil Français, p. 287). And although admittedly it is more natural to read the words "*l'action en réméré*" quoted from art. 1662 as a processual phrase

in the sense according to which they are equivalent to "*action en justice*," it has been held nevertheless that the other less natural but admissible reading indicated by Laurent is more in consonance with the general effect of the provisions of the C.N. dealing with *vente à réméré* (4 Aubry & Rau, 4th ed., p. 409, art. 357, note).

The Courts of Quebec, it is evident, are called upon to decide a very different question from that which confronted the tribunals and the authors in France under art. 1662. In order to parallel in the question presented by art. 1662 the postulates of the question presented here it would be necessary to interpolate in art. 1662 words making that article read "*d'avoir exerçé son action en justice*."

Secondly: It is not within the authority of the Courts in construing art. 1550 to reject or disregard the English version. The Code as an authoritative exposition of the civil law of the Province of Quebec is founded upon statute. There was first an Act of the Province of Canada (20 Vict. ch. 43) authorizing the appointment of commissioners and directing that they should embody in the Code to be framed by them, to be called the Civil Code of Lower Canada, such provisions as they should hold to be then actually in force giving the authorities on which their views should be based, but stating separately any proposed amendments. Then (the commissioners having in due course framed their report and laid it before parliament), there was another Act (29 Vict. ch. 41) declaring a certain roll attested in the manner described in the Act to be the original of the Civil Code reported by the commissioners as containing the existing law without amendments; directing the commissioners to incorporate in this roll certain amendments specified in a schedule; and eliminating and altering the provisions of the Code only so far as should be necessary to give effect to these amendments; and providing that the Code so altered should, on proclamation by the Governor, have the force of law.

The Code thus produced must be read, of course, in view of the fact that it is what it is, namely, a statement made under legislative authority of a system of civil law, a statement speaking broadly, explicit as to specific rules but in some measure as to underlying principles taking effect by implication and inference; particular rules and principles which may no doubt be miscon-

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ceived or misapplied if considered in isolation from the general system of which they are elements. But the rule we are now called upon to put into effect, art. 1550, was one of those incorporated at the suggestion of the commissioners as a new provision in amendment of the existing law, and as an amendment of the existing law it was explicitly adopted by the enactment of the legislature which gave it legal force; and in such cases the Code itself by art. 2615 (which is as follows):—

> If in any article of this Code founded on the laws existing at the time of its promulgation, there be a difference between the English and the French texts, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded; and if there be any such difference in an article changing the existing law, *that version shall prevail which is most consistent with the intention of the article, and the ordinary rules of legal interpretation shall apply in determining* such intention,

indicates the rule by which we are to be guided although art. 1550 is not one of those in which, when properly construed, there is any "difference between the English and the French texts." How, following the ordinary rules of interpretation, is "the intention" to be ascertained? Primarily, of course, from the language employed interpreted by light of the requisite technical knowledge; and where—in such cases—that language construed of course in its entirety is quite without ambiguity and there is no qualifying context, there would appear to be only one course for a judicial tribunal to pursue: (*Robinson* v. *Canadian Pacific R. Co.*, [1892] A.C. 481, at pp. 487-8). The "ordinary rules of interpretation" would hardly sanction the elimination of one version unequivocal in itself and harmonious with the natural reading of the other version in order to give to the article an operation resulting from a rather strained and less natural reading of the second version with which the rejected text could not by any process of interpretation be reconciled.

Two arguments have been addressed to us which deserve to be noticed. First, it is said that since the French version of art. 1550 is a literal transcription of an article of the C.N., the French version must be regarded as the original, and the English version as a translation. On the point of fact, I should say that was self-evident. But the English version no less than the French version is expressed in the language of the legislature or in language adopted by the legislature. Secondly, it is said that the commissioners must be assumed to have known the course of the inter-

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pretation in France and that the report of the commissioners shews their intention to adopt the law laid down in the C.N. (art. 1662) as construed in France. The report of the commissioners can be prayed in aid on the ground that it may be supposed to have been present to the mind of the legislature: *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents*, [1898] A.C. 571, at 575 and 576; and the commissioners must, no doubt, be assumed to have been acquainted with the course of *la doctrine* and *la jurisprudence* in France. But in the last analysis we come to this: the commissioners and the legislature, whatever presumptions are to be made with regard to other matters, must be presumed to have known the meaning of the words they used. Assuming then, that they had the general intention to adopt the law of the C.N.—nevertheless the final and decisive statement of the effect of the concrete provision they did adopt, as they conceived it to be, is to be found in the unambiguous words of the English version. The French version reproduces the C.N.; but the English version supplies a legislative interpretation which the Courts are not at liberty to ignore. In this view the appeal must be allowed and the action dismissed.

Two other grounds of appeal of considerable importance are raised by the appellant. It is not necessary to pass any opinion on these and the only observation I make is this. Having regard to the opinion of Pothier given to the world in the 18th century and the opinion of a very eminent authority (Aubry & Rau) published before the adoption of the Quebec Code, as well as to the unbroken uniformity of *la jurisprudence* in France to the effect that the "right of redemption" reserved to the vendor under a contract of *vente à réméré* is *jus ad rem* only and not *jus in re*, I think it a very disputable question whether the opposite view, though held by almost all the reputable authors in France, including Laurent, ought to be given effect to.

Anglin, J.

ANGLIN, J. (dissenting):—The question presented in this case is whether a vendor subject to right of redemption in order to exercise that right effectually is bound not only to signify to the purchaser his intention to redeem the property, accompanying the signification by a tender of the amount due, but, in the event of a refusal by the purchaser to accept, is further bound to bring action to enforce his right of redemption within the period stipu-

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lated for its exercise. That the right of redemption absolutely terminates upon the expiry of the stipulated term unless it has been effectually exercised within the term and that it cannot be extended by the Court is admittedly the effect of art. 1549. Indeed so strict is the law in this regard that the term runs against all persons including minors and those otherwise incapable in law, reserving to the latter such recourse as they may be entitled to: art. 1551 C.C.

In the present case the stipulated term for redemption was 10 years, the maximum term permitted by law: art. 1548 C.C. Shortly before the expiry of the 10 years the vendor notified the purchaser of his intention to redeem and tendered to him the amount to which he was entitled. Payment not having been accepted, he caused a notarial protest to be made before the expiry of the 10 years. He did not commence his action to enforce his right of redemption, however, until several months after the expiry of the stipulated term.

Art. 1550 of the Civil Code, in the French and English versions, reads as follows:—

1550. Faute par le vendeur d'avoir exercé son action de réméré, dans le terme prescrit, l'acheteur demeure propriétaire irrévocable de la chose vendue.

1550. If the seller fail to bring a suit for the enforcement of his right of redemption within the stipulated term, the buyer remains absolute owner of the thing sold.

In the Court of Appeal it was pointed out that this article in the French version is an exact reproduction of art. 1662 of the C.N. The French authorities have held that the word *action* in the Napoléonic article should be read as meaning *faculté* or *droit*, and that a notification within the term of intention to redeem accompanied by tender is a valid and effectual exercise of the right which may be enforced by action brought after the expiry of the term. No doubt the jurisprudence of the Province of Quebec, with the exception possibly of the case of *Walker* v. *Sheppard*, 19 L.C. Jur. 103, supports the same view of art. 1550 of the Civil Code, and my lord the Chief Justice and my brother Brodeur also adopt it. It is therefore with the utmost diffidence that I venture to express the contrary opinion.

As Mr. Mignault pointed out, however, in his able argument, the construction placed by the French authorities on art. 1662 of the C.N. depends largely upon the use of the term *action* inter-

changeably with the words *faculté* or *droit* in arts. 1664, 1668 and 1669 C.N. (See Beaudry-Lacantinerie, No. 615, 24 Laurent, No. 397) which form the context of art. 1662. On the other hand, in the corresponding provisions of the Quebec Civil Code, arts. 1552, 1556 and 1557, which form the context of art. 1550, we find the words *faculté* and *droit* apparently used in contradistinction to the word *action* used in art. 1550. Thus for the word *action* used in art. 1664 of the C.N. the Quebec Code in art. 1552 substitutes the word *faculté*. Likewise for the word *action* in art. 1668 of the C.N. we find in art. 1556 of the Quebec Civil Code the word *faculté*. In art. 1669 of the C.N. the word *faculté* is used obviously in the same sense in which the word *action* had been used in art. 1689, whereas the Quebec Civil Code in art. 1557 employs the word *droit* as the equivalent of the word *faculté* used in art. 1556. The Quebec Code in arts. 1559 and 1560 likewise replaces the phrase *l'action en réméré* of articles 1671 and 1672 of the C.N. by the phrase *faculté de réméré*. Arts. 1546 and 1547, the provisions of the Quebec Code corresponding to art. 1673 C.N. (which Laurent, vol. 24, No. 397, relies on as conclusive of the interpretation of the phrase *exercer l'action de réméré* in the C.N., because it immediately follows arts. 1671-2 and the phrase "*use du pacte de rachat*" is found in it used, as he says, in the same sense as "*exercer l'action en réméré*" in those articles) are placed at the opening of the section and have there no such significance. Indeed, in the whole section of the Quebec Civil Code intituled "*Du droit de réméré*" (arts. 1546-1560) the phrase "*action de réméré*" occurs only once, viz., in art. 1562. One of the chief reasons, therefore, for the construction placed by the French authors upon the language of art. 1662 C.N. does not exist in regard to art. 1550 of the Quebec Civil Code, and in view of the changes made in the terms in which arts. 1664, 1668, 1669, 1671 and 1672 of the C.N. have been substantially reproduced in the Quebec Civil Code, there seems less reason than in other cases where that occurs for the conclusion that in reproducing art. 1662 C.N. *in ipsissimis verbis* the Quebec codifiers meant to adopt it with the construction placed upon it by the French authors. The phrase "*cette faculté*" in art. 1552 C.C., I think, obviously refers to "*faculté de réméré*" in arts. 1546 and 1548 and not to "*action de réméré*" in art. 1550.

But a stronger argument in favour of the contention of the appellant is presented by the clear and unequivocal terms of the

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English version of art. 1550. Whatever may be said of the meaning of the phrase, *d'avoir exercé son action de réméré*, there can be no room for doubt as to the meaning of the words "to bring a suit." Both the English and the French versions of the Code are of equal authority. The article in question is one which changed the pre-existing law and in such a case where there is a difference between the English and the French texts art. 2615 provides that that version shall prevail which is most consistent with the intention of the article and the ordinary rules of legal interpretation shall apply in determining such intention.

In the present case there is in reality no difference between the English text and the French text if the language of the latter be given its primary meaning. Whatever secondary meaning may be attached to it where the contract seems to require a different construction, the primary meaning of *action de réméré* is "action of redemption." The two versions of the Code must be read together, and, while one may undoubtedly be used to interpret the other, where the language used in each taken in its primary sense means a certain thing and in the English version is not susceptible of any other meaning the fact that French authorities have put another construction on the words of the French version when accompanied by a different context does not seem to afford a sufficient ground for departing from the primary meaning. The language of Lord Herschell in *Bank of England* v. *Vagliano Bros.*, [1891] A.C. 107, is applicable to the Civil Code of Quebec: *Robinson* v. *Canadian Pacific R. Co.*, [1892] A.C. 481, at 487. The comments of the codifiers (vol. 2, pp. 18 & 19) make it clear that it was their intention to amend the old law by doing away with its uncertainties and holding the parties to an agreement for redemption strictly to the term stipulated without allowing the Courts to extend it or requiring a judgment to declare the right extinct. If in determining a question as to whether the English or the French version of the Code should prevail where they differ it is material to know in which language the provision was originally drafted, the fact that in the report of the codifiers the authorities are cited under the English version in the title with which we are dealing would indicate that this portion of the Code had been originally drafted in that language: vol. 2, p. 61.

No doubt it seems a harsh provision that a person entitled to redeem whose tender of the amount due has been wrongfully

rejected should be obliged to bring suit for the enforcement of his right within the stipulated term as a condition of preserving it. Moreover the obligation of bringing suit probably has the effect of curtailing the term within which the tender may be made and puts upon the vendor the necessity of anticipating that his legitimate offer may be wrongfully refused, and of leaving himself in that event, sufficient time to bring his action before the expiry of the term. But the existence of these obvious difficulties does not afford a sufficient reason, in my opinion, for ignoring the explicit and unmistakable language of the English version of art. 1550.

CAN. S. C. JOHNSON v. LAPLAMME. Anglin, J.

I am, for these reasons, with great respect, of the opinion that this appeal should be allowed.

BRODEUR, J.:—This appeal should be dismissed with costs. Brodeur, J.

Appeal dismissed.

Re JACKSON AND IMPERIAL BANK OF CANADA.

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Ontario Supreme Court, Falconbridge, C.J.K.B. April 4, 1917.

LANDLORD AND TENANT (§ II B—10)—COVENANT FOR RENEWAL—PERPETUAL RENEWAL.

A covenant for renewal, in a lease, providing that the "new lease shall contain all the covenants contained in the present lease including the covenant for renewal," creates a right of perpetual renewal and to have the covenant for renewal, as originally worded, repeated in the new lease.

MOTION by Jackson, lessor, under Rule 604, for an order determining the question whether, by the terms of a certain lease, the lessees, the Imperial Bank of Canada, were entitled on the first renewal of the lease to a covenant for the renewal thereof in perpetuity or only to a covenant for renewal for a third term of twenty-five years. Statement.

E. D. Armour, K.C., and *W. E. Raney*, K.C., for the applicant.

FALCONBRIDGE, C.J.K.B.:—Motion under Rule 604, on behalf of the lessor, for an order and declaration by the Court determining whether, by the terms of a certain lease, the lessees are entitled on the first renewal of the said lease to a covenant for the renewal thereof in perpetuity or only to a covenant for renewal for a third term of twenty-five years. The lessor contends that the latter is the true construction. Falconbridge, C.J.K.B.

The lease in question bears date the 31st October, 1889, and purports to be made in pursuance of the Act respecting Short Forms of Leases. It recites that the lessor is the owner of lands and premises . . . . and that he has contracted with the

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lessees to sell the buildings and erections on the said lands to the said lessees absolutely "and to grant and demise unto them a lease of the said lands and premises for a period of twenty-five years and renewable thereafter from time to time in the manner hereinafter mentioned." It further recites an agreement that the lessees and their assigns shall have the right to use and enjoy the north wall of the adjoining building as a party wall for both buildings. Then follows the grant of the buildings, part of which is as follows: "And the said lessor doth hereby grant unto the said lessees and their assigns and doth also reserve to himself and his heirs executors administrators and assigns the right to use and enjoy the said party wall as a party wall as aforesaid during the continuance of said term and all renewals thereof." There is also a provision that, in the event of the said wall or any wall which may during the currency of the said term or any renewal thereof be erected being destroyed or injured the cost of reinstating or replacing the same shall be borne by the lessor and the lessees in equal proportions.

The clause for renewal is as follows: "The said lessor for himself his heirs executors administrators and assigns further covenants with the said lessees and their assigns that at the expiration of the term hereby granted provided the rents hereby reserved and all taxes and assessments aforesaid shall have been fully paid the said lessor his heirs executors administrators or assigns will if so requested by the lessees in writing at least six months prior to the expiration of said term grant a new and further lease of the premises hereby demised or intended so to be for the further term of twenty-five years from the end or determination of the present term at such rental for the said land wholly irrespective of any buildings or other erections or improvements which may then be erected thereon as shall be determined by arbitration in manner hereinafter provided unless otherwise agreed upon between the parties and such new lease shall contain all the covenants provisoes and agreements contained in the present lease including the covenant for renewal except only that the rent to be reserved in said renewal lease shall be at such rate as shall be determined by arbitration as hereinafter provided. Provided always that the rent reserved upon any such renewal shall not be less than the sum of six hundred dollars per annum."

On p. 9 of the lease occurs the following clause: "And it is

further expressly agreed and declared by and between the parties hereto and their respective heirs executors administrators and assigns that the costs charges and expenses of all renewal leases and arbitrations which may be had or granted in virtue hereof shall be equally borne by the lessor and lessees and their respective heirs executors administrators and assigns."

As I said before, the lessor contends that the covenant for renewal gives the lessees the right to two renewals at most; but, in view of the cases, I am unable to give effect to his contention. I was of that opinion after the argument, but thought it desirable, as there is no reported case in this Province on the subject, to write a considered judgment.

"The leaning of the Courts is against perpetual renewals; and therefore, in order to establish this construction, the intention must be unequivocally expressed, and a proviso in general terms, that the lease to be granted shall contain the same covenants and agreements as the lease containing the covenants, has been repeatedly held not to extend to the covenant for renewal:" Woodfall on Landlord and Tenant, 19th ed., pp. 435, 436.

"The covenant may be a covenant for perpetual renewal, but the Court will not give it this effect unless the intention in that behalf is clearly shewn; as, for instance, where the covenant expressly states that the lease is to be renewable for ever. A provision that the new lease shall contain the same covenants as the old lease does not entitle the lessee to have the covenants for renewal inserted, so as to give him perpetual renewal, unless the provision expressly includes 'this present covenant.' The intention to renew perpetually must be clear on the language of the lease; the fact that several renewals have been granted is not admissible to explain the intention of the parties to the lease:" Halsbury's Laws of England, vol. 18, para. 935.

Brown v. *Tighe* (1834), 2 Cl. & F. 396, affords an illustration of the general principle thus enunciated. In *Swinburne* v. *Milburn* (1884), 9 App. Cas. 844, it is held that a covenant to renew will not be considered as giving a right to perpetual renewals unless the intention so to do is clearly expressed.

But particular expressions in a lease may shew that successive renewals are intended. For example, in *Wynn* v. *Conway Corporation*, [1914] 2 Ch. 705, the expression "and so often as every eleven years of the said term shall expire" was held to confer a

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perpetual right of renewal at the expiration of every successive period of eleven years. Similarly in *Swinburne* v. *Milburn* (*ubi supra*) effect was given to the expression "as often as" as negativing the right to a single renewal only, but the covenant was very special in its terms, and, in view of other expressions in the lease which were not appropriate to a right of perpetual renewal, the House of Lords adopted an intermediate construction.

On the other hand, in *Hare* v. *Burges* (1857), 4 K. & J. 45, a covenant for a renewed lease "with like covenants, including this present covenant," was held to give the right of perpetual renewal. The covenant in this case is not distinguishable from the present one.

Necessarily, if the lessees are entitled to have a covenant for renewal repeated *totidem verbis* in the first renewal, on the expiration of the renewed lease, they will be equally entitled to have it repeated in the second renewal, and so on *ad infinitum*. Therefore there may be right of perpetual renewal, although no words of perpetuity such as "for ever" are used. In the present case the result is confirmed by the words in the first recital and in the other parts of the lease, referred to at the beginning of this judgment.

There will be a declaration that the renewed lease shall contain a covenant for renewal in the same words as that contained in the lease, including the covenant for the insertion of the covenant for renewal.

Perhaps, in strictness, the lessees should have their costs of this application; but, in view of the provision in the lease that the "costs charges and expenses of all renewal leases and arbitrations . . . . . shall be equally borne by the lessor and lessees . . . " I may treat this application as ancillary thereto, and make no order as to costs.

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GAMBLE v. EXCELSIOR LIFE ASSURANCE Co.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ. July 14, 1917.

BROKERS (§ II B—12)—*Commissions—Procuring cause of sale—Another agent.*]—Appeal by defendant from a judgment in an action for broker's commissions. Affirmed.

J. N. Fish, K.C., for appellant; *C. M. Johnston*, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—The defendants put certain property in the hands of plaintiff for sale. The plaintiff introduced the property

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to one Weir, who eventually became the purchaser of the same, but at a price lower than plaintiff was authorized to sell.

The defence is that this sale was made by another agent of the defendants who approached Weir subsequently to plaintiff, and without knowing that plaintiff had previously introduced the property to him.

The only evidence at the trial was that of the plaintiff and the correspondence which took place between him and the defendants. Neither Weir nor the agent who is alleged to have sold the property gave evidence.

The only evidence, therefore, is that the defendants employed plaintiff to sell the property, that plaintiff obtained a purchaser who eventually purchased the property. Upon this evidence the plaintiff is entitled to recover. The statement in defendants' letters that an inspector of their company sold the property to Weir and that they paid him a commission is not evidence. There is therefore no evidence to prove the defence set up. The appeal should be dismissed with costs. *Appeal dismissed.*

CRAIG v. TOWN OF QU'APPELLE.

Saskatchewan Supreme Court, Haultain, C.J., and Newlands, Lamont and McKay, JJ. July 14, 1917.

MUNICIPAL CORPORATIONS (§ II C—60)—*Loan by-law—Hotel Act, 1915, sec. 33—Proceedings to quash—Style—Parties.*]—Appeal from a judgment on an application to quash a by-law. Reversed.

W. M. Blain, for applicant; *J. A. Allan*, K.C., for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an application to quash a by-law. There is no doubt, in my opinion, that the loan of $400 by a town council to a hotelkeeper for the purpose of buying furniture is not authorized by sec. 33 of the Hotel Act, (ch. 40 statutes of 1915). Neither, in my opinion, is any such disposition of the moneys of the town authorized by the Town Act. As to the objection that the municipal council and not the corporation of the town is made a party in the heading to the proceedings, I am of the opinion that the names of the parties is mere surplusage.

The proceedings consist of a notice of motion and affidavits. There is no action. By sec. 232 of the Town Act the application to quash is to be made on motion to a Judge. This Judge is the Judge of the District Court, and, in this case, of the District Court of the Judicial District of Regina.

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The proceedings are headed:—

In the District Court of the Judicial District of Regina.

In the matter of a resolution of the municipal council of the Town of Qu'Appelle passed on the 28th day of February, 1917.

Between: William John Craig, applicant, and the municipal council of the Town of Qu'Appelle, Saskatchewan, respondent.

It is therefore intituled in the proper Court and properly states what the application is for, and the notice and affidavits were served on the secretary-treasurer of the town.

In *Hargreaves* v. *Hayes*, 5 El. & Bl. 272 (119 E.R. 483), Lord Campbell, C.J., at p. 274, said:—

I am of opinion that there should be no rule in this case. The placing of the name of the plaintiff and defendant at the head of the affidavit cannot vitiate: it gives information, and can by no possibility do harm. I have no doubt that the party swearing might be indicted for perjury on this affidavit. And there is no inconvenience in this view. If, indeed, there had been a cause in Court, and the affidavit had omitted to name it, that would be bad, because no perjury could then be assigned on the affidavit. But, where there is no cause, the names are still mere surplusage: and you have here the name of the Court,

and this was concurred in by the other Judges of the Court.

This case was followed in *Re Burrowes*, 18 U.C.C.P. 493. Richards, C.J., at p. 502, says:—

Here the affidavits are entitled, "In the Common Pleas. In the matter of a certain cause in the First Division Court for the County of Lennox and Addington, in which one Ezra A. Mallory is plaintiff, and one Barnabas Diamond is defendant."

After the decision of the Court of Queen's Bench in *Hargreaves* v. *Hayes*, I think we cannot properly hold that the affidavits filed on moving the rule should be rejected. The decided opinion expressed by the majority of the Judges in that case, that the words there objected to would not prevent the affidavits being used as the foundation for an indictment for perjury, will apply in this case.

The case of *McLean* v. *Town of St. Catharines*, 27 U.C.Q.B. 603, in which there is a similar decision and which is cited in Harrison's Municipal Manual, p. 241, n. (*j*) as an authority applicable to the application to quash by-laws, was decided on the authority of these cases.

I am therefore of the opinion that the appeal should be allowed with costs. *Appeal allowed.*

NEVILLE v. MACDONALD.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ.
July 14, 1917.

MASTER AND SERVANT (§ I C—13)—*Wages—Leaving employment during term—Farm work.*]—Appeal by plaintiffs from a judgment in an action for wages. Affirmed.

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C. Schull, for appellants; *W. H. B. Spotton*, for respondent.

BROWN, J.:—The plaintiffs are husband and wife, and claim wages from the defendant, a farmer, at $55 per month from March 27, 1916, until June 29 of the same year.

The plaintiffs set up, by their claim, that they hired with the defendant for $55 per month for a period of 8 months; that, having worked until June 29, they demanded payment of their wages, and that, upon defendant refusing to pay same, they left his employ.

The defendant, by his defence, on the other hand sets up that it was understood and agreed that the wages were not to become due and payable until the end of the term of employment.

The trial Judge finds that there was an understanding or agreement between the parties that the wages were not—except as to small amounts needed from time to time—to be paid or become due until the end of the period. I am of opinion, from all the evidence, that he was justified in reaching such conclusion. That being so, the plaintiffs were not justified in leaving as they did and cannot recover. See *La Plante* v. *Kinnon*, 21 D.L.R. 293, 8 S.L.R. 25; *Mousseau* v. *Tone*, 6 W.L.R. 117; *Owen* v. *James*, 4 Terr. L.R. 174.

The appeal should, therefore, in my opinion, be dismissed with costs.

MCKAY, J., concurred with Brown, J.

NEWLANDS, J. (dissenting):—This case, in my opinion, comes under the decision of *Mousseau* v. *Tone*, 6 W.L.R. 117.

The agreement between the parties here was that the plaintiffs were to hire with defendant for 8 months at $55 per month. It was understood between the parties, but not put into the agreement, that defendant could not pay the whole amount of wages until the end of the term but plaintiffs were to get small amounts as they needed them. The plaintiffs would only be entitled to be paid these amounts if they had earned them and the money was coming to them.

In *Mousseau* v. *Tone*, *supra*, Wetmore, J., said in delivering the judgment of the Court:—

> Inasmuch as in this case the hiring was for eight months at $25 per month, the plaintiff is entitled to recover at the end of each month and the only remedy the employer would have would be a counterclaim or cross action for damages for the servant's wrongful leaving.

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The plaintiffs left in this case because defendant would not pay them $30 which they needed on account of the illness of the female plaintiff. As more than this amount was due them, I think plaintiffs were justified in leaving and are, therefore, entitled to judgment for the amount of wages due them. The appeal should therefore be allowed with costs and judgment entered for plaintiffs with costs. *Appeal dismissed.*

WATERLOO MFG. Co. v. R. A. ALLAN.

Saskatchewan Supreme Court, Newlands, Brown and McKay, JJ.
July 14, 1917.

COSTS (§ II—28)—*Taxation—General or small debt procedure—Damage claim—Debt or liquidated demand.*]—Appeal from the judgment of McLorg, J., whereby he gave judgment for plaintiff for $19.27 damages, and $37.88 balance of account, with costs, and refused to allow a counsel fee to defendant Allan. Affirmed.

Russell Hartney, for appellant; *H. P. Newcombe*, for respondent.

Brown, J.:—The only question reserved for consideration herein was as to whether the plaintiffs were entitled to their costs of action under the general procedure of the District Court rather than under the small debt procedure.

The defendant had ordered goods from the plaintiffs, and the same were shipped to the defendant's address, but the defendant having refused to accept delivery they were returned to the plaintiffs. The plaintiffs in consequence were required to pay some $19.27 by way of freight and express charges. This amount of $19.27 constitutes a portion of the plaintiffs' full claim of $57.15 and is sued for as damages, the action being brought under the general procedure of the District Court.

The evidence shews that a statement of the plaintiffs' claim, including these damages, had been rendered to the defendant before action, and that he had on several occasions admitted his liability and promised to pay the same.

Counsel for the defendant contended, on the authority of *Lloyd* v. *Ashdown*, 22 D.L.R. 919, 8 S.L.R. 217, that under the circumstances, the damage claim became a debt before action, and as the plaintiffs' whole claim was thereby a claim for debt and less than $100 in amount, the small debt procedure should have been adopted.

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Upon a more careful examination of the pleadings and proceedings herein, it is not from my point of view necessary to consider this point for the purposes of this case. The plaintiffs sued for the $19.27 as damages. The defendant did not by his pleadings or otherwise in any way suggest that the claim had been converted into a debt or liquidated demand. On the contrary, he traversed the whole of the plaintiffs' claim, both as to damages and otherwise, and denied liability for any portion thereof.

Under such circumstances it was, in my opinion, quite competent for the trial Judge, under District Court rule No. 18, to order the costs to be paid under the general procedure, and, having done so, this Court should not interfere.

NEWLANDS, J., concurred with BROWN, J.

MCKAY, J.:—The appellant's counsel contended that, there being no evidence of the damages, the respondent could only base his claim on the evidence shewing that appellant promised to pay these charges claimed as damages, and the claim thus became a debt, and cited in support of this contention, *Lloyd* v. *Ashdown*, 22 D.L.R. 919, 8 S.L.R. 217, wherein it is stated:—

> If damages become a debt by a judgment, they become a debt equally by agreement between the parties which fixes the amount, and which amount the defendant agrees to pay.

This judgment was given in connection with a garnishee summons, and it would appear, from the report of the case, that the claim was sued for as a debt, whereas in the case at bar the claim for the $19.27 is clearly sued for as damages, the statement of claim expressly so stating. I do not think the Court, in using the words above quoted in the *Lloyd* case, ever intended to say that when a person has a claim for damages against another and that other person promises to pay the same, such claim ceases to be damages and becomes a debt only. In the case at bar, the respondent's account rendered to appellant shewed the claim for balance of account, and for damages, and when the appellant was asked for payment he promised to pay it, and this promise is used as evidence to shew that appellant never disputed the correctness of the account.

In my opinion, there is sufficient evidence of the damages claimed, and the contention should be dismissed.

I am of the opinion that this appeal should be dismissed with costs.

Appeal dismissed.

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LESIUK v. SCHNEIDER.

Alberta Supreme Court, Walsh, J. April 23, 1917.

CONTRACTS (§ 1E—95)—*Sale of land—Statute of Frauds—Insufficiency of memorandum—Receipt.*]—Action for specific performance of agreement for sale of land. Dismissed.

H. A. Mackie and *G. H. Van Allen*, for plaintiff.

A. H. Gibson, for defendant.

WALSH, J.:—The contract of which the plaintiff seeks specific performance is one for the sale, by the defendant to him, of certain land. The verbal agreement which the plaintiff made out to my satisfaction was for the sale of a specified half section, 320 acres, at $30 per acre, making the purchase money $9,600. The plaintiff was to pay $4,000 of this in cash, and to assume liability for the amount still owing by the defendant to the Crown in respect of this land which was said to be between $4,000 and $5,000, and to pay to the defendant the balance of the purchase money at the end of a year. There has been no part performance of this contract sufficient to take it out of the statute and the only written evidence that there is of it upon which the plaintiff can rely to satisfy the statute is the receipt of the defendant's agent for the deposit of $200. That receipt runs as follows:—

MUNDARE, February 12, 1917.

Received of Alex. Lesiuk the sum of $200 as deposit on N. ½ of 29-53-16 W. 4th, at $30 per acre, $4,000 on assigns of agreement, balance according vendor's agreement to the government.

FARMERS REALTY CO., *per* M. Korcyizki.

There are other receipts from this agent for the subsequent payments and a receipt from the defendant himself, for the deposit which the agent paid him, but they are not full enough to help the plaintiff any. The receipt above set out unfortunately omits one of the essential terms of the agreement, namely, that the plaintiff was to have a year in which to pay the balance of his purchase money, a substantial sum which, though never exactly ascertained, would be, I should say, in the neighbourhood of $600. That this was a part of the agreement the plaintiff must concede, for it is established by the evidence of his own witnesses. The receipt, for this reason, falls short of being a memorandum in writing of the contract, that is, of the whole contract, and the plaintiff therefore cannot rely upon it as being a sufficient memorandum to satisfy the statute, for I think it is quite settled that the writing must shew all of the material terms of the agreement, which has been come to, and one of these certainly must be the time and the manner of

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payment of the purchase money if these have been agreed on as was the case here.

Mr. Van Allen, in the course of a carefully prepared and most excellent written argument, which he has submitted, applies for leave to amend his statement of claim by asking rectification of the agreement in this respect and specific performance of the agreement as so rectified. I would gladly allow this amendment if I could, but I do not see how I can. As the matter stands now, there is no enforecable contract at all. It is quite true that the omission of this essential term from the receipt and the plaintiff's acceptance of it in that form were due to the mistakes or oversight of the parties, but it is that very mistake which gives the defendant the right to insist that he is not bound by the contract. By reason of this omission, the plaintiff lacks the written evidence of his contract, which the statute makes necessary, and so there is nothing to reform. It is quite true that the Court has often, by its judgment, made a written contract conform to the real intention of the parties, but only so, I take it, when there is in fact a binding contract between them which by some reason, such as a mutual mistake, does not correctly express the real agreement. It is a very different thing, however, to read an omitted term of a verbal agreement into the written evidence of it so that it may thereby be made to measure up to the requirements of the statute. I do not think that that can be done. To permit it would be to practically set at nought the provisions of the statute.

I am reluctantly compelled to dismiss the action. The equities are all with the plaintiff, but the law is against him. If there was any way in which, by the judicial exercise of my discretion, I could free the plaintiff from the payment of the defendant's costs I would unhesitatingly do so, but I fear there is not. It was quite evident from the start that the real fight in the case arose over the question of the Statute of Frauds. The plaintiff thought his receipt was as binding in law as it undoubtedly should be in morals upon the defendant, and the defendant thought it was not. So far at least the defendant's opinion is justified and simply because he is taking advantage of his legal right, I do not think I would be justified in depriving him of his costs. It is true that in the alternative, the return of the sum of $4,000 paid to the agent under the contract is asked, but it is quite plain that the agent has been holding $3,800 of this all the time and that the

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plaintiff could have got it and the deposit of $200 back at any time for the mere asking.

The action is dismissed with costs in so far as it is for specific performance. I understood at the close of the trial that the plaintiff would experience no difficulty in getting back from the agent the sum of $3,800 paid to him, which is still in his hands. If any difficulty should arise as to this, the plaintiff may apply as he may be advised. The deposit of $200 is in Court. This may be applied upon the defendant's costs, and if any of it remains it will be paid out to the plaintiff. *Action dismissed.*

B. C.
C. A.

DOMINION BED MANUFACTURING Co. v. FITZHERBERT.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. April 3, 1917.

COMPANIES (§ VIF—345)—*Winding-up—Claims—Judgment—Costs.*]
—Appeal by plaintiff from judgment of Macdonald, J. Reversed.

A. C. Brydon-Jack, for appellant; *J. G. L. Abbott*, for respondent.

MACDONALD, C.J.A.:—The respondent, Fitzherbert, is entitled to rank on the estate as an ordinary creditor in respect of the $1,000 judgment and interest mentioned in the statement of facts, but, in my opinion, he is not entitled to be paid his costs of that action in priority to all other claims as declared in the order appealed from. The costs, principal sum and interest recovered in the action are in the same class, and rank alike on the estate.

I would therefore allow the appeal.

MARTIN, J.A.:—So far as the order for costs is concerned, I think it cannot be held that the liquidator adopted the unsuccessful defence, and therefore there was no authority for the direction that they should be paid in full out of the assets of the company. See cases collected in Emden (8th ed.) 130, and Buckley (9th ed.) 339-40.

As regards the plaintiff being entitled to rank as a creditor for his judgment recovered against the company, I am unable to perceive any good ground, in all the circumstances of this case, for refusing to allow him to do so after his success in obtaining rescission, which relates back to the time he began his action. Buckley, *supra*, 101. This is not a case where it can be said, as was the case in *Tennent* v. *Glasgow Bank* (1879), 4 App. Cas. 615, 622, that the company had become insolvent, and had stopped payment at the time of repudiation.

The appeal should be allowed to the extent above indicated.

GALLIHER, J.A.:—I agree with the Chief Justice.

MCPHILLIPS, J.A., agreed. *Appeal allowed.*

Re NASH & WILLIAMS AND EDMONTON, DUNVEGAN & B.C.R. Co.

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Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Walsh, JJ., October 3, 1917.

ARBITRATION (§ III—17)—AWARD—APPEAL—POWER TO REMIT—RAILWAY ACT—COMPENSATION—MINING RIGHTS.

Where, in an arbitration under the Dominion Railway Act, the arbitrators refused, for legal reasons, to entertain a claim, an appellate Court, on appeal therefrom, has power to remit the case to the arbitrators, to be dealt with by them on the merits; the question of compensation if any to be paid for a mining right under a coal lease is one of fact for the arbitrators.

[*Can. North West R. Co.* v. *Moore*, 31 D.L.R. 456, 53 Can. S.C.R. 519, followed; *Davies* v. *James Bay R. Co.*, 26 D.L.R. 450, [1914] A.C. 1043, considered.]

Statement.

APPEAL in an arbitration under the Dominion Railway Act.

H. A. Mackie, for appellant; *S. B. Woods*, for respondent.

Harvey, C.J.

HARVEY, C.J.:—Kelly is the owner of land crossed by the railway company's right of way. There is coal underlying the land and there was a lease of a portion from Kelly to Nash & Williams. Two of the arbitrators, on the authority of *Davies* v. *James Bay Co.*, 13 D.L.R. 912, 28 O.L.R. 544, refused to consider any claim by Kelly or Nash & Williams in respect of the coal and awarded no damages in respect thereof. The third arbitrator would have allowed damages to both in respect of the coal.

Both parties appealed but the appeal of Kelly is not being prosecuted and only the claim of Nash & Williams has now to be considered.

After the award, the decision in the *Davies* case was reversed by the Judicial Committee, 26 D.L.R. 450, [1914] A.C. 1043, and it is clear that the arbitrators should have dealt with the claim for damages in respect of the coal.

Under sec. 209 of the Railway Act the Court of Appeal is to decide any question of fact upon the evidence taken before the arbitrators. It is necessary, therefore, to consider what evidence there is in support of the appellants' claim.

The appellants' rights to the coal arise under a certain agreement called a lease made on December 1, 1909. By it Kelly leases a 10 acre claim for 5 years from December 1, 1909, to December 1, 1914, on the conditions that Nash & Williams shall have a right of coal on said 10 acres for a term of 5 years, that they pay Kelly $1,000 in four annual payments of $250 and pay a royalty of 25c. a ton for screened coal. It also provides that Nash & Williams shall have the right to remove buildings at end

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of the term, and to sink shafts or slopes within a reasonable distance of Kelly's house. It also provides that new work shall be done according to a rough plan referred to.

At the time of the interference by the railway in 1912 there was a tunnel running under the right of way, the workings at that time being beyond the right of way.

An application was made to the Board of Railway Commissioners in November, 1912, by Kelly and Nash & Williams. The order of the Board directed that the coal should be left under the right of way and also under strips 15 ft. and 25 ft. wide outside the right of way in respect to part of the land. The application was in respect to the whole section including much in which Nash & Williams were not interested. Certain conditions for protection of the right of way were imposed. At this time Davis and Clarke were operating under the lease by agreement with Nash & Williams on terms by which the latter received $1 a ton net for each ton of coal mined. Whether this agreement continued in force to the end of the lease is not very clear.

The appellants' contention is that there was coal under the right of way which they were prevented from mining and that they suffered damages from the railway by reason thereof and that the measure of damage is the value of the coal. In my opinion there is no warrant whatever for such a position. The appellants or their assignees had the right to mine as much coal as they wished during the terms of the lease. The evidence shows that they did, and under their method and arrangements could take out only a small percentage of the coal on the property. There had been workings under the portion taken for right of way prior to the railway plans and construction but these had been abandoned for the time being at least, and the coal was being taken out from farther on, no doubt because it was more advantageous to be taken from there. The appellants are not damaged unless they have been prevented from taking out coal which they would probably and could advantageously have taken out during the term of their lease. Their counsel has not referred to any evidence which seems to me at all sufficient to justify the conclusion that they were prevented by the railway from taking any coal whatever which they would otherwise have taken. Certainly there is no evidence that Davis & Clarke would have

taken out any but for the railway. Kelly was himself interested to the extent of a 20c. royalty on every ton taken out and after the lease was at an end was entitled to the whole of every ton not taken out and yet in the arbitration which was to determine his damages as well as those of Nash & Williams he said, "I say the coal is pretty much taken out from under the railroad," and when he is referred to particular places he speaks of them having caved in so as to make it unworkable.

There is evidence of experts also that any coal under the railway could not be taken out profitably, while it is clear there was more coal in the lease that could be taken out profitably than Nash & Williams could mine during its currency.

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I think the weight of evidence is decidedly against the view that the coal under the railway could be mined profitably and overwhelmingly against the view that it could have been mined more profitably than other coal accessible under the lease, in which event only would the appellants be entitled to compensation.

I would therefore dismiss the appeal with costs.

STUART, J.:—The appeal book in this case covers 930 pages and I have read it carefully, only glancing at passages which obviously referred to the claim of Mrs. Kelly and at the rather extended arguments of counsel, all fully reported, upon the admissibility of evidence.

Stuart, J.

The appellants Nash & Williams obtained in December, 1909, a 5 year lease of 10 acres of coal areas belonging to Mrs. Kelly. The railway company's right of way crossed this leasehold. It was obliged to expropriate under the Railway Act. It served notices on Mrs. Kelly and on her tenants, the appellants. It proposed to take by statutory authority, to its own use, certain property belonging to Nash & Williams. Arbitrators were appointed under the Act and Nash & Williams were there represented. The position taken by the railway company, the attitude assumed by them, was in effect this:—"We take your property from you, but it is of no value whatever and we should not be required to pay you anything." It strikes me that a company taking that position assumes a serious burden. Of course railways are allowed to be built and companies are given extraordinary powers in the public interest but there is still left among us much regard for individual rights. They are not lightly to be brushed aside.

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Upon the argument of the appeal it did appear to me that rather a weak case was made out to shew any damage to the appellants. But I think that was due to the enormity of the appeal book and the difficulty of collecting and collating the scattered relevant evidence although the 2 years or so which elapsed between the entering of the appeal and the argument surely made the difficulty surmountable.

There is undoubtedly much contradictory evidence and I find it difficult to be convinced that the appellants were not damaged.

It is true that their lease only had another year to run, or a few months more, when the arbitration took place. It was also true, however, that they had received some 3,000 odd dollars during the previous year from the person with whom they had contracted for the working of the mine and that they had made a similar contract for another year with other persons, viz., Clarke and Steddy. From these people they were to get $1 a ton for all coal mined. The more coal there was mined the more they would get. Whether they had the right to direct the particular places from which the coal should be taken is not clear but it would undoubtedly be to the interest of both to get out as much coal as possible. It is not clear to my mind that no advantage could be gained by these people by working under the right of way for the last season rather than further into the mine. They certainly would have a considerably less distance to draw the coal underground. And there was much evidence to shew that although the order of the Railway Board did not prevent them working south of the barrier pillar, so-called, yet it would have been dangerous to the workmen to do so particularly in view of the passage of trains.

It is true that the husband of the owner of the reversion, who had a quarrel and a law suit with Nash & Williams, said that the coal had been pretty much taken out under the right of way. But, as Mrs. Kelly's counsel said at the conclusion of the hearing before the arbitrators, any interest she had in the small portion of the right of way which passed through the lease was so small in comparison with the larger claim she was making that it was really hardly worth the while bothering with it anyway. In the circumstances I cannot attach really great weight to Robert Kelly's statement.

Thornton, the railway's expert witness, had been only in this one lignite mine in Alberta. His opinion no doubt is of grave importance but I cannot take it as conclusive in the face of the very extended and material evidence which was given on behalf of the appellants. I am unable, therefore, to say that Nash & Williams have not shewn that their property was of any value even assuming that the burden lay upon them of proving its value. But I rather think the burden was upon the railway company to shew that it was of no value if that is the way the matter is to be left. *Primâ facie* I should think a man's coal (and there was admittedly coal there) should be taken as having a value. Of course they were only lessees with a lease shortly to terminate and there was no doubt other coal available which they could mine and enough to keep them employed. But the question was from what source could they get out the most *value* in coal in a given limited time?

Therefore I cannot bring myself merely to dismiss the appeal.

Am I then to attempt to give a decision as to the value of the coal to the appellants, or as to the damages they have suffered by being prevented from having recourse to it during the remainder of their term, upon the very extensive and confused evidence presented in the appeal book?

I think there is another course open and a better one. For the reasons given by Walsh, J., I think the case should be sent back to the arbitrators to be dealt with.

I would, however, go further and say that not only have we power to send the case back but in the present instance that is the only strictly legal thing to do.

It is clear that Nash & Williams could have applied for and obtained a mandamus compelling the arbitrators to deal with their case on its merits.

In Russell on Arbitration, p. 301, it is said: "Mandamus will lie to compel an arbitrator to assess costs on a reference under the Land Clauses Consolidation Act," and *Reg.* v. *Biram* (1852), 17 Q.B. 969, 117 E.R. 1552, is referred to where the power to compel arbitrators to perform their function was not questioned but assumed. See also 26 Cyc., p. 220.

One usual objection to mandamus is that there is another sufficient remedy. In this case the parties have seen fit to appeal

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under the provisions of the Railway Act. But if we cannot send the case back then the appeal is not a sufficient remedy. The appellants had a legal right to have their dispute or claim judged by a board of arbitrators one of whom they had themselves no doubt selected or suggested and one of whom was apparently an expert. They had a right to have that board hear the witnesses, judge of the credibility of their testimony, as they saw them and heard them give it, and to deal with the matter on its merits. That right the appellants have never yet enjoyed and will not enjoy if we should attempt to decide the matters ourselves no matter how carefully we may read the typewritten evidence. The arbitrators might have disbelieved both Kelly and Thornton entirely.

In *C. N. R. Co.* v. *Moore*, 8 A.L.R. 379, at 387, 23 D.L.R. 646, a case, it is true, under the provincial Act but under exactly similar provisions, I said in giving the judgment of the Court (p. 655):

> In the first place, the obligation placed upon the Court to decide the matter itself seems to be confined to the case where the appeal is upon a question of fact.

That case went to the Supreme Court of Canada. Davies, J., clearly said that the similar provisions in the provincial Act in their true construction covered such a power of remitting and as I read his judgment the fact that the present case comes up under the Dominion Railway Act makes no difference. Idington, J., clearly, also, would have dismissed the appeal quite aside from the question of the application of the Provincial Arbitration Act (31 D.L.R. 460).

Both Idington and Brodeur, JJ., treated the case of *Cedars Rapids Mfg. and Power Co.* v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569, as authoritative.

In the case of *C. N. R. Co.* v. *Holditch*, 20 D.L.R. 557, 50 Can. S.C.R. 265, where Duff and Anglin, JJ., the dissenting Judges, doubted the power of the Court to remit the award, the arbitrators had dealt with the matter on the merits. (Affirmed by Privy Council, 27 D.L.R. 15.)

But here, as I have said, there is no decision by the arbitrators on any question of fact, and there is no appeal from them on any question of fact. The arbitrators simply refused, on what at the time appeared to be good legal grounds, to deal with the ap-

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pellants' case at all. It now appears that they were wrong and should have dealt with it. That we should venture to step now into their place is clearly, as I view the matter, a course not really contemplated by the statute. We cannot do what the Judicial Committee in *Atlantic and N. W. R. Co.* v. *Wood*, [1895] A.C. 257, at 263, said the Court ought to do. They said:

> It appears to their Lordships that this was not the intention of the legislature and that what was intended was not that the Court should thus entirely supersede and take the place of the arbitrators, but that they should examine into the justice of the award given by them on its merits on the facts as well as the law.

How can we examine into the justice of an award on its merits on the facts when there has been no award made by the arbitrators?

For these reasons I think the only proper course to pursue is to remit the case to the arbitrators with a direction to deal with the case of Nash & Williams on the merits.

The respondents should pay the costs of the appeal.

Beck, J.

BECK, J.:—This is an appeal from an award of arbitrators under the Dominion Railway Act. The rights of the registered owners of the surface and the mining rights have been disposed of except those of Nash & Williams who held a coal mining lease of 10 acres for 5 years from December 1, 1909, for which they paid $1,000 and a royalty of 20c. a ton of screened coal.

Nash & Williams were served with the notice of expropriation soon after, no doubt, its date, August 22, 1912. The arbitrators began their sittings apparently on June 12, 1913. The award was made by two of the arbitrators on December 23, 1913. These arbitrators, following *Davies* v. *James Bay R. Co.*, 13 D.L.R. 912, 28 O.L.R. 544, held there was no right to award damages in respect of the coal under the railway right of way. The third arbitrator dissented and was of opinion that the lessees Nash & Williams were entitled to $1,118. The case above referred to was subsequently reversed by the Judicial Committee of the Privy Council, 26 D.L.R. 450, [1914] A.C. 1043.

Some time during the currency of this lease Nash & Williams entered into an arrangement with two men Davis & Clarke whereby these latter should work the coal mine, the arrangement being, Nash says, "that they (Davis & Clarke) would furnish everything and get $1.50 a ton over the scales, which left us (Nash & Williams) $1."

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Nash & Williams themselves seem to have worked the mine during the winter seasons of 1909-1910 and 1910-1911. Little was ever done in the mine during the summer months in any year. During the winter of 1911-12 Davis & Clarke seem to have worked the mine, Nash & Williams going into possession again in November, 1912.

It would seem that the arrangement with Davis & Clarke originally for a longer term was then put an end to.

I extract some of the evidence of Nash on this point (pp. 531-2). It is to be remembered that this evidence was given in June, 1913:

Q. You are a partner of Mr. Williams? A. Yes. Q. Lately you operated your mine by contract with Davis & Clarke? A. Yes. . . . Q. What did you receive, you and Mr. Williams, last year,—the money from Davis & Clarke? A. Something over $3,300. Q. Not $3,400? A. No; it was something over $3,300. We had figured it up this spring; I could not tell you to a dollar. . . . Q. The arrangement between Davis & Clarke and Nash & Williams was what? A. That they would furnish everything and get $1.50 a ton over the scales, which left us $1. Q. The year before that you were operating the mine? A. Yes, part of the year. Q. The first part of the year? A. We were there, except along in May, in the spring, until we took possession again in the latter part of November, we were there the rest of the year. Q. That would be the winter of 1911-1912. Were you there during 1910-1911? A. I was there except for a few months during the summer. . . Q. It has been in operation 3 years? A. And a half. . . . Q. You had some trouble with Kelly (the lessor)? A. Yes. Q. You brought a lawsuit against him because he was supposed to have gone in and worked the mine and destroyed part of it? A. He held us out of possession for a year.

The report of Mr. Kerr, assistant engineer for the Board of Railway Commissioners, made in February, 1913, contains the statement that Nash & Williams were then the lessees and operators of the Kelly mine.

I have referred to the facts in relation to this point because it was suggested that Nash & Williams could not have suffered because they had made a contract with Davis & Clarke which gave them $1 a ton for all coal taken out and there was nothing to shew that Davis & Clarke would have paid them less on account of being prevented from taking the coal under the railway right of way. Nash & Williams are shewn to be the lessees and were served as such by the railway company with the notice of expropriation. The evidence not only does not shew that they had ceased to be lessees but, as I take it, shews that while for a portion of the term of their lease they had given not a sub-lease

but a working contract to Davis & Clarke, that contract, whatever its original term, which nowhere appears, had come to an end at the time of the arbitration. Mr. Woods, counsel for the railway, puts the people who worked the mine in this order:—Morvin & White, Stark, Nash & Williams, Davis & Clarke, then Kelly, who had dispossessed Nash & Williams who brought an action against him and got back into possession. Clarke's evidence also appears to shew that Nash & Williams followed Kelly's temporary wrongful occupation.

And throughout the entire evidence I can find nothing to indicate that counsel or the arbitrators had, by suggestion or otherwise, taken the position that there was a contract outstanding between Nash & Williams and Davis & Clarke, which in any way affected the formers' rights; and furthermore, Mr. Parlee, K.C., the arbitrator, who was of opinion that Nash & Williams were entitled to compensation, does not suggest the point.

In a general way the case for Nash & Williams was put by Mr. Mackie thus: First, they were entitled to be paid the full value of all the coal comprised in their lease which the railway prevented them from working and alternatively the value of such part of all such coal as otherwise they could reasonably be expected to take out during the residue of the term of their lease. The first aspect is surely not maintainable.

The conflict between the parties turned upon the pillars of coal, lying adjacent to the main tunnel and to crosscuts, entries to which had been made and the supports of which had been taken out so that the entries had caved. Nash & Williams' case was that they had purposely done this because the mine was wet, the water coming from above, and that by allowing the entries to cave the water would drain away and the coal dry enabling them to return, as they asserted it was their intention to do, after the work had dried out and "split" the pillars; that is, not again open the caved entries but enter the centre of the pillars lying between two caved entries; and that this would enable them to get out the greater part of these pillars which were of very considerable extent and though technically called pillars were in reality layers of coal of large extent; and that this method was less expensive than pushing on the tunnel or crosscuts which required more permanent and more expensive timbering.

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The evidence of Nash & Williams to this effect is supported by the evidence of Edward Anderson, a man who had been operating coal mines; W. H. Carthew, a Dominion and provincial land surveyor; J. A. H. Church, a civil and mining engineer; Norman Fraser, mining engineer.

Mr. Woods in opening the case for the railway, after evidence had been given for the owners and lessees, outlined his case so far as it related to Nash & Williams, and in doing so, it is to be noted that he makes no reference to Davis & Clarke, although they had been referred to in the previous evidence. He said in substance that what he proposed to satisfy the arbitrators of was this: The mine in question had been operated under several short leases like that to Nash & Williams; that naturally and presumably such lessees would work the mine in such a way as to benefit themselves to the greatest extent without regard to the interest of the owner, and would consequently take out the coal most easily obtainable and remove the supports from entries which they did not wish to follow up, using the timbering taken out for further development elsewhere and allowing these entries to cave; that for them to do otherwise was not commercially profitable and consequently the inference was that Nash & Williams had in fact taken from the caved entries all the coal they had intended to take and had left only small pillars which it would not be profitable for them to work and which they had never intended to work; and therefore they had in truth suffered no damage whatever,—that the claim of Nash & Williams was a trumped-up claim.

The evidence by which it was sought to maintain this position was entirely opinion evidence which was not based upon actual examination of any of the caved entries.

I think that counsel for the railway company failed to dislodge the claimants, Nash & Williams, from the position they had taken and, as I think, established. Evidently Mr. Parlee the only one of the arbitrators who had occasion to consider the question was of the same opinion.

It seems to me that Mr. Parlee's basis of estimating this amount is not correct,—that the proper amount is the amount of additional loss, costs, and expenses Nash & Williams were put to by reason of their having to continue the main tunnel and any crosscuts

instead of being able to return and work the pillars which they had left to drain.

It is perhaps possible on the evidence before me to make such a calculation, but even so, it can be much more accurately estimated by the arbitrators, one of whom is a mining engineer, and inasmuch at all events as the arbitrators—or a majority of them—did not profess to deal with the amount of this compensation, they have failed to exercise their powers and to fulfil their duties and therefore they cannot be said to be *functi officio*.

I would, therefore, remit the question of the compensation to be paid to Nash & Williams to the same board of arbitrators.

Beck, J.

I agree, for the purposes of enabling the Court to render an effective judgment, with the conclusions arrived at by my brothers Stuart and Walsh which differ little from my own.

WALSH, J.:—Mr. Ford, K.C., and Mr. Drinnan, two of the three arbitrators adopted the judgment of the Ontario Court of Appeal in the *Davies* case (13 D.L.R. 912, 28 O.L.R. 544) as a correct exposition of the law and awarded no compensation in respect of the coal areas under the expropriated lands. Their award became, of course, that of the Board. The reversal of the judgment of the Ontario tribunal by the Judicial Committee (26 D.L.R. 450, [1914] A.C. 1043) removes the foundation upon which that portion of the award rested and in the light of that judgment there is no escape from the conclusion that the appellants are now entitled to have their claim for compensation disposed of. If it is manifest from the evidence before us that they are not entitled to any compensation it is our plain duty to dismiss the appeal. If on the other hand this is not manifest we must either determine the question ourselves or if we have power to do so remit the matter to the arbitrators in order that they may do so.

Walsh, J.

During the argument of the appeal, I was much impressed with the view that the appellants, by what seemed to me then to be their abandonment of the workings under the right of way and their leaving them in such a condition as precluded the possibility of operations being profitably resumed in them within the term of their lease, had given the most cogent evidence possible that they had suffered no damage by this expropriation and that their appeal might for that reason be very properly dismissed. My subsequent examination of the evidence has

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satisfied me, however, that it would be unfair to dispose of the appeal solely upon that view of it, for there is much in it to justify the conclusion that what the appellants did in this respect was not by way of abandonment of these workings, but with a view to the proper drainage of the mine and in the course of what they conceived to be the miner-like method of operating and with the intention of working back to those pillars and taking the coal from them before their lease expired. There undoubtedly is evidence from which, if believed, the conclusion might very properly be reached that the appellants are entitled to no compensation at all. The Chief Justice has referred to some of it in his judgment and there is other evidence of a like character such as that of the company's expert, Thornton. On the other hand, there is to be found in the evidence referred to in the judgment of my brother Beck, and in that of some of the other witnesses as well, strong support for the other view. I am not prepared to say, without a much more careful examination than I have yet been able to make of the record in this case, running as it does into two bulky volumes containing over 900 pages, that it is at all clear whether the appellants are or are not entitled to compensation. The case strikes me, from the casual examination that I have been able to give the evidence, as one which might with perfect propriety be decided either way. We have no finding of fact from the majority arbitrators, because of the view that they took of the legal aspect of the matter, but the third arbitrator, Mr. Parlee, K.C., has found, as a fact, that there is a considerable amount of coal under the right of way and has expressed the opinion that the appellants lost $1,000 because they were not allowed to mine it. As this is the only finding of fact that we have on the subject from any of the arbitrators it should not be lightly regarded.

The determination of this question of compensation, that is whether or not the appellants are entitled to any, and if so how much, is eminently one for the board of arbitrators rather than for this Court and if we have the power to remit it to them we certainly should do so. They have seen the witnesses and can, therefore, form a much better estimate of the value to be given to their evidence than we are able to. One member of the Board is an engineer who no doubt can appreciate much better than we can the many technical details of mining operations and the many

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mining terms with which the evidence abounds and which to me, at any rate, are most confusing and sometimes unintelligible. These gentlemen were appointed for the purpose of dealing with this question and for a reason which quite justified their failure they have not done so. I think the proper course for us, if we have the power, is to ask them to do it now.

I must confess, however, to a great deal of doubt as to our power to do this. The proceedings are under the Dominion Railway Act, and the appeal to us is under sec. 209, which directs that "upon the hearing of such appeal such Court shall decide any question of fact upon the evidence taken before the arbitrators as in a case of original jurisdiction." In *Canadian Northern Western R. Co.* v. *Moore*, 23 D.L.R. 646, 8 A.L.R. 379, this Court remitted the matter to the arbitrators, the right to do so being based to some extent on the judgment of the Privy Council in *Cedars Rapids Manufacturing Co.*, v. *Lacoste*, 16 D.L.R. 168, [1914] A.C. 569. Our judgment was sustained on appeal to the Supreme Court of Canada, 31 D.L.R. 456, 53 Can. S.C.R. 519, but of the 5 judges who constituted the Court, Idington, J., alone said that it could be sustained on the ground on which we put it, though Brodeur, J., made some remarks which might perhaps justify the conclusion that he shares that opinion. The award then under consideration was made under the Alberta Railway Act and the Chief Justice, Davies and Brodeur, JJ., held that the provisions of the Arbitration Act were incorporated in the section of the Railway Act under which the appeal was taken and that they vest in the Court the power of remitting back for reconsideration awards made under the provincial Railway Act. The Chief Justice expressly guarded himself from expressing any opinion as to whether, in expropriation proceedings under the Dominion Railway Act, the arbitrators, having once made an award, are *functi officio*. Anglin, J., inclined to the opinion that even under the provincial Act there is no power to refer back. The Supreme Court judgment in that case is, therefore, absolutely no authority for the power to remit under the Dominion Act. In *Canadian Northern R. Co.*, v. *Holditch*, 20 D.L.R. 557, 50 Can. S.C.R. 265, a case arising under the Dominion Railway Act and decided since the judgment of the Privy Council in the *Cedars Rapids* case, Anglin, J., held (Duff, J., concurring) that there was no power to refer back.

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The other members of the Court did not refer to the question at all. The Ontario cases mentioned by Anglin, J., certainly support the views that the power to remit under the Dominion Act does not exist. The point is not discussed in the judgment of the Judicial Committee in the *Davies* case, the necessity for referring to it not having arisen because of the fact that the award of the arbitrators was by it restored.

Notwithstanding the doubt upon this question which these authorities have raised in my mind I think that the reasoning upon which we decided the *Canadian Northern* v. *Moore* case applies to this appeal and until it is overruled we must follow it. I, therefore, think that the question of the compensation, if any, to be paid to Nash & Williams must be remitted to the arbitrators.

If I understand the judgment of Beck, J., aright he has reached the conclusion that these claimants have established their right to compensation and the reference back which he directs is simply for the purpose of fixing the amount of it. I am unable to agree with him as to this. I think the arbitrators should deal with the whole question of compensation or no compensation. For instance, there lies at the outset of their enquiry the question as to whether the mining operations were carried on during the period in question by the claimants or by Davis & Clarke. The company's case is that the latter did the mining and that the claimants got as much out of it in royalties as they would have received if the coal had been taken from under the right of way. The Chief Justice is of the opinion that it is not clear whether the Davis & Clarke agreement continued in force to the end of the lease. Beck, J., is of the opinion that the evidence establishes the fact that it did not. I have not attempted to satisfy myself one way or the other as to this. There are many other disputed questions of fact which must be resolved before a proper decision of the question of compensation or no compensation can be reached and, if the former is come to, before the amount of it can be properly determined, and I would not attempt a solution of any of these questions without a much more careful reading of the appeal book and a much closer examination of the plans than is at present possible.

I think the appellants should have the costs of this appeal, taxable under column 2 of the tariff. *Case remitted.*

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SMITH GRAIN Co v. POUND.

Saskatchewan Supreme Court, McKay, J., September 5, 1917.

1. GAMING (§ I—5)—GRAIN TRANSACTION—DELIVERY.
Sec. 231 of the Criminal Code does not apply to a transaction for the purchase and sale of grain in which delivery is intended.

2. BROKERS (§ I—2)—GRAIN—COMMISSIONS—PRIVITY OF PRINCIPALS.
A grain broker who does not procure privity of contract between a seller and a purchaser is not entitled to his commissions as for a sale nor to damages resulting to him from a refusal to deliver by the seller.

Statement.

ACTION to recover damages suffered by plaintiff owing to non-delivery of wheat by defendant, and for a commission. Dismissed.

J. F. Bryant, for plaintiff; *A. W. Routledge*, for defendant.

McKay, J.

McKAY, J.:—The plaintiff company consists of W. K. Smith only, who is a grain commission merchant carrying on business in the City of Winnipeg, in the Province of Manitoba, and is a member of the Winnipeg Grain Exchange.

The defendant is a farmer residing at Aylesbury, in the Province of Saskatchewan.

The plaintiff's claim alleges that on or about July 20, 1914, the defendant as principal requested the plaintiff as agent to sell for the defendant, in accordance with the rules, regulations and customs of the Winnipeg Grain Exchange, 5,000 bushels of wheat at 84cts. per bush. for actual delivery during the month of October, 1914, and agreed to pay the plaintiff a commission of 1% per bush. for handling same. That on or about July 20, 1914, the plaintiff did sell under said instructions the 5,000 bushels of wheat at 84cts. per bush. for actual delivery during the month of October, 1914. That the defendant delivered, on account of the said sale, 898.40 bushels of wheat, but neglected and failed to deliver the balance of the said wheat, and the plaintiff was compelled to purchase 4,100 bushels of wheat to fill the said sale, and on October 29, 1914, the plaintiff purchased 4,100 bushels of wheat for delivery in October to fill the said sale at a price of $1.15 per bush. That, as a result of the failure of the defendant to deliver the said 4,100 bushels of wheat, the plaintiff has suffered damages, and claims, as such damages, the difference between 84c. and $1.15, namely, 31cts., on 4,100 bushels, making $1,271 less $153.20 which plaintiff retained out of the proceeds of wheat delivered (having paid defendant $400 and other charges $129.79), leaving the damages claimed at $1,117.80, and also claims his

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commission of 1% per bush. on 5,000 bush., making the total claim $1,167.80.

The defendant denies plaintiff's claim and sets up several other defences, but the defences relied on at the trial are (1) "that the alleged contract as set out in the statement of claim was a contract by way of gaming in stocks and was illegal and contrary to sec. 231 of the Criminal Code of Canada, being ch. 146 R.S.C. (1906) and Acts in amendment thereof." (2) That the plaintiff did not make privity of contract between two principals.

The defendant also counterclaims for the wheat shipped to plaintiff, alleging that in or about the month of November, 1914, he shipped to the plaintiff one car of wheat, which said car was received by the plaintiff to be sold by the plaintiff for and on account of the defendant. That said car of wheat was sold by the plaintiff, but that the plaintiff has refused and does refuse to account for the proceeds of the said sale other than as to the sum of $500, and the defendant claims that an accounting of the said proceeds be made and that the defendant do have judgment for whatever amount shall be found due.

The plaintiff, W. K. Smith, gave evidence and, in part, stated that the defendant called at his office in Winnipeg on July 14, 1914, and asked him the price of wheat. He told him between 82 and 83cts. Plaintiff's son, M. H. Smith, was present. Defendant told him to sell for him (defendant) 5,000 bushels of wheat, to be delivered in October, 1914, when it reached 84cts. Plaintiff knew defendant was a farmer at Aylesbury. Defendant said he would have 7 or 8 carloads of wheat that year, and wanted a good price for some of it. Defendant said he would have the grain to deliver. The defendant had had one or two transactions with plaintiff before this. Defendant said to draw on him for margins at Aylesbury. That he did this same thing the year before with Peter Jansen Grain Co., and delivered the wheat. Plaintiff stated that this selling of wheat in this way for future delivery in October was known as a "hedge." It protected defendant for 84cts. for his wheat to be delivered in October, that defendant appeared to understand the nature of the deal but that he also explained it to defendant at the time. Plaintiff then, on July 20, 1914, on the Winnipeg Grain Exchange, sold for defendant to C. Goldie, a member of the Winnipeg Grain Exchange, the

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5,000 bushels of wheat at 84cts. to be delivered in October, and plaintiff wrote to defendant, dated July 20, 1914, advising him of the sale, in which plaintiff states: "This is as you know for October delivery, delivery during the month of October." Wheat then went up, and plaintiff put up the margins and drew on defendant for $100 by draft dated July 22, 1914, which defendant accepted but did not pay. Other drafts and letters followed as wheat went up in price, but none of them were accepted or paid.

In August, J. R. Carey, according to Carey's evidence, under instructions from plaintiff Smith, saw defendant and asked him to sign a contract to deliver the wheat; defendant did not sign but said he was going to send the wheat. Later, on Sept. 24, 1914, defendant shipped a car of wheat to plaintiff, which plaintiff sold and put proceeds $553.20 to the credit of defendant's account to offset some of the cash paid out by plaintiff to protect the October delivery deal. Defendant, however, drew on plaintiff for $400 and plaintiff paid this draft, but retained $153.20. The defendant did not deliver any more wheat or pay anything to plaintiff.

In defendant's letter to plaintiff, dated October 26, 1914, the defendant says: "I certainly fully intended to ship you the wheat this fall, etc."

H. M. Smith gave evidence corroborating the testimony of plaintiff as to the conversation with defendant in July.

No evidence was given for the defence.

I refer to the above evidence somewhat fully, as, to my mind, the transaction for which the defendant employed the plaintiff in the case at bar is altogether different from the transactions for which the plaintiffs were employed by defendant in *Richardson & Sons* v. *Beamish*, 13 D.L.R. 400, 23 Man. L.R. 306; 16 D.L.R. 855, 49 Can. S.C.R. 595. In the latter case the Supreme Court of Canada held that "in transactions for the purchase and sale of grain, if it is proved that no grain at any time changed hands, and there is no proof of any *bonâ fide* intention of such a transaction taking place, sec. 231 of the Criminal Code applies to such transactions."

In the case at bar I find from the evidence that at the time the instructions were given by defendant to plaintiff to sell the 5,000 bush. of wheat for October delivery and at the time

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plaintiff sold to Goldie, plaintiff and defendant intended that the wheat was to be delivered, and the transaction in question does not come within sec. 231 of the Criminal Code. This disposes of the defence of illegality.

As to the other defence that plaintiff did not make privity of contract between two principals:

The plaintiff sues as an agent who was employed to sell defendant's wheat; he does not claim that defendant sold the wheat to him. He would, therefore, in my opinion, in order to succeed in his action have to shew that he made a valid and subsisting contract between defendant and a third party, that is, that a third party agreed to buy, whom the defendant could hold liable.

In *Johnson* v. *Kearley*, [1908] 2 K.B. 514, at 528, Fletcher Moulton, L.J., says: "The office of broker is to make privity of contract between two principals."

The evidence on this point is that plaintiff sold the 5,000 bush. of wheat to C. Goldie on July 20, 1914, but after this, according to plaintiff's evidence, plaintiff and Goldie would and did settle their transaction with and through the Clearing House connected with the Grain Exchange, the plaintiff dealing through his broker, Parker, whereby Goldie ceased to be liable to defendant on the sale in question, and no one else substituted for him to whom defendant could look to fulfil the contract.

Plaintiff himself distinctly stated that defendant would have to look to him, that he (defendant) could not look to Goldie, Parker the broker, or the Exchange. That is, owing to the transaction with the Clearing House, as stated in plaintiff's evidence, defendant lost his contract with Goldie without anybody else being substituted for Goldie, which was permitted by the rules of the Exchange. This rule is, I think, unreasonable, and is not binding upon defendant without notice, *Richardson* v. *Beamish*, *supra*, 13 D.L.R. 400, at 404. And the evidence does not satisfy me that defendant knew of it, or that that was the effect of dealing in the Winnipeg Grain Exchange.

There was no evidence submitted to shew that defendant was familiar with dealings on the Exchange, or with the Clearing House, or that he knew the rules thereof. Plaintiff says that defendant appeared to understand the deal he was going into, but all the facts he gives for this conclusion are that he, defendant, told him he had entered into a similar deal the year before with

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Jansen & Co., and that defendant had had two deals on options with plaintiff. And in the plaintiff's cross-examination he had to admit that he did not think defendant knew all the rules, or that he, plaintiff, would have to go to the Clearing House, and there is absolutely no evidence that defendant knew anything about the Clearing House.

The evidence, to my mind, clearly brings this branch of the case within the judgment of Howell, C.J., in *Richardson* v. *Beamish*, above referred to, wherein the Chief Justice held that this rule of the Exchange, whereby the purchasing principal would be wiped out, is unreasonable and not binding upon defendant without notice, and which judgment was confirmed by the Supreme Court of Canada.

I find that the plaintiff did not procure privity of contract between two principals, and fails to establish the performance of the contract for which defendant employed him, and he cannot recover the damages or commission claimed.

With regard to defendant's counterclaim, in my opinion, plaintiff should account for the wheat received. The plaintiff's evidence shews that the wheat shipped to him by defendant was No. 3 Northern, and consisted of 898 bush. and 40 lbs. net, and was sold by him at $1 to Woodward & Co., which would amount to $898.66.

Out of this plaintiff paid:—for freight inspection and weighing $120.80, commission $8.99, to defendant $400 = $529.79, leaving a balance of $368.87.

The plaintiff's action will be dismissed with costs to defendant, and the defendant will be entitled to judgment against plaintiff for $368.87 with costs of defence and counterclaim.

Judgment for defendant.

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Exchequer Court of Canada, Prince Edward Island Admiralty District, Stewart, Local Judge in Admiralty. September 21, 1917.

1. ADMIRALTY (§ II—8)—SEIZURE FOR TOWAGE—"SHIP."
A vessel built for show and not for transportation is a "ship" within the meaning of admiralty law and is subject to seizure for towage.

2. TOWAGE (§ I—5)—SUFFICIENCY OF PERFORMANCE—DIVISIBILITY OF CONTRACT—MARITIME LIEN.
A towage agreement providing for payment *per diem* is a divisible contract as to each day's services performed; but there can be no recovery under the contract in the event of a prolongation of the voyage through the plaintiff's unjustifiable delay. A bond taken as security

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not evidence that the towage was performed on the credit of the master and not of the ship. There is no maritime lien for the towage, only a statutory lien, in the form of a right to seize the tow in satisfaction of the claim.

Statement.

ACTION *in rem* brought by Neville Canneries, Limited, whose head office is in the City of Halifax in the Province of Nova Scotia, to recover $3,275 being balance of a claim for alleged towage services under a contract, claimed to have been entered into between the plaintiff and the captain of the ship "Santa Maria," for the towing of the said ship from Cape Cod Canal in the United States of America to the City of Quebec in the Province of Quebec at a certain rate of payment per day from the time the plaintiff's tug boat should have left Halifax in performance of the contract until she should return thereto after completion of the same.

D. E. Shaw, *A. B. Warburton*, K.C., and *C. J. Burchell*, K.C., for plaintiff.

W. E. Bentley, K.C. and *J. J. Johnston*, K.C., for defendants.

Stewart, L.J. in Adm.

STEWART, L.J., in Adm.:—In terms of an order made on March 12, 1916, Charles Stephenson, of Cambridge, in the State of Massachusetts, and Andrew Kaul, Jr., of Merrill, in the State of Wisconsin, appeared in this case under protest. The case came on for trial on September 4, at Charlottetown, and continued for 4 days when it was adjourned for judgment.

The contract proved at the trial was made and entered into on September 14, 1916, between the plaintiff and the captain of the "Santa Maria" and is embodied in certain telegrams which passed between the plaintiff and the captain on September 13 and 14 of that year. By this contract the plaintiff undertook and agreed to tow, as expeditiously as possible, the "Santa Maria" from Cape Code in the U. S. of America to the City of Quebec in Canada, for the consideration or sum of $75 a day from the time the plaintiff's towboat should have left Halifax for Cape Cod until she should return thereto after completing her contract. Should any accident occur to the "Santa Maria" and she be not in condition to tow, any delay which might occur in consequence should be at the expense of the "Santa Maria." On the same day that the contract was made, the payment of the *per diem* charge of $75 was guaranteed to the plaintiff by the Massachusetts Bonding and Insurance Co.

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It appeared to be taken for granted by both sides, although not proved, that the "Santa Maria" was a replica of the ship on which Columbus sailed from Spain in 1492 on his famous voyage of discovery and in which he discovered America.

She appears to have arrived in America some time in 1893 and was on exhibition in Chicago at the time of the World's Fair in that year, and apparently has been there ever since until she set out on her voyage in 1914. Being at Cape Code in September, 1916, and desiring to return to Chicago by way of Quebec the contract in question was then entered into. The plaintiff in furtherance of its contract sent its tug "Mouton" from Halifax on Sept. 17, 1916, to go to Cape Cod to meet the "Santa Maria." The "Mouton" on leaving Halifax had on board as cargo 129 bbls. and 75 half bbls. pickled fish, and 14 half cases lobsters. She arrived in Boston at 11.30 a.m. on September 19, and there discharged her cargo and took on coal and water. In addition she took on a cargo of 25 tons of anthracite coal and about 40 or 50 empty lobster crates. This cargo, the president of the plaintiff company in his evidence stated, put the tug in good trim to do her towing. The "Mouton" had a gross tonnage of 5,321, a registered tonnage of 36.19 and 106 h.p. engine and would carry about 75 tons. She was built in Liverpool, N.S., in 1913. Length 82 ft., breadth 17 ft., depth of hold 6 ft. 18 ins., and was manned by a captain and 4 men.

She left Boston at 6.30 a.m. on September 21, arriving at Sandwich at mouth of Cape Cod Canal. She left there the same day with the "Santa Maria" in tow and reached Yarmouth at 5.30 p.m. on September 24. Taking in water and coal at Yarmouth she left there on September 25, at 12.45 p.m., and arrived at Halifax at 8 a.m. on September 27. Here she discharged her cargo and took on the following new cargo, namely: 125 bbls. and 75 half bbls. pickled fish. These, the president of the plaintiff company stated, were put on to put the tug in proper trim for towing and were to be carried to Quebec. Left Halifax for Quebec at 10 p.m. on September 28, arriving at Port Hastings at 12.30 a.m. on September 30. Detained at Port Hastings until 10 a.m. of October 3, when she set sail and made for Charlottetown, arriving there at 2 p.m. on October 4. The next day she sailed at 7 a.m. and at 7 p.m. reached 5 miles from Cape Jourimain, and

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on account of alleged heavy head wind ran back to Charlottetown where she remained until October 12, detained, as claimed, by strong winds except on one occasion on October 7, when she was unable to depart by reason of acting Captain Cook of the "Santa Maria" not being on hand. Left Charlottetown at 5 a.m. on October 12, weather fine but had to put back at 11 a.m. on account as alleged of a strong breeze arising, and arrived at Charlottetown at 5 p.m. The tug and tow remained in Charlottetown until October 21. On October 19, which was a fine day, no start was made because, as claimed by the captain of the tug, the acting captain of the "Santa Maria" refused to leave Charlottetown until he heard from Capt. Stephenson. On October 21 Capt. Stephenson discharged the tug from the further performance of her contract and on October 25 she started on return to Halifax, arriving there on October 29 at 8 a.m.

Mr. Bentley in the able argument which he presented to the Court rested his defence on the following grounds:—(1) The "Santa Maria," built by the Sovereign or government of Spain and presented to the government or people of the United States has been cared for and maintained, as the symbol of an important historical event, by the South Park Commissioners of the City of Chicago, who hold it as trustees for the people of that country, it would be an infringement of international comity if condemned and sold by an order of this Court. (2) That the "Santa Maria," built and designed for show purposes and not for transportation, is not a ship within the meaning of admiralty law and practice, and her seizure under warrant was illegal. (3) There is no maritime lien for towage and in the absence of personal liability on the part of the owner for services performed there can be no arrest for towage. (4) The towage was not performed on the credit of the ship or its owners but on that of Capt. Stephenson and his guarantee the Massachusetts Bonding Co. (5) The tug was not sufficient for the requirements of the contract and the plaintiff broke his agreement to perform his contract expeditiously. (6) The contract, being indivisible, must be fully performed before any liability arises. Counsel for the plaintiff, besides opposing all the defendant's grounds, contended that it was part of the contract that the tow should be in good condition, whereas she was leaky, of weak construction, covered with barnacles, had no boat,

no anchors, and no hoisting gear, and could only go out in fine weather.

As to the indivisibility of the contract and the necessity of its completion before any liability can arise it seems to me that the agreement to pay $75 a day for the services of the tug gave the plaintiff a cause of action against the tug for each day's services performed until the whole journey was completed and that he was not obliged to wait until then before enforcing his claim.

Is the "Santa Maria" a ship that can be arrested in such a proceeding as was taken in this case? She is declared to be a replica of the vessel in which Columbus crossed the Atlantic in the year 1492. She had sails, a rudder and masts, but was not built, I would judge, to do the work of transporting either goods or passengers.

The statute, in no manner, limits the jurisdiction of the Court. All claims in respect of towage come under it and no attempt is made to define or limit the kind of craft that towage services may be performed for.

The Admiralty Courts Act, 1861, 24 Vict. ch. 10, gives the following definition of a ship. "Ship shall include any description of vessel used in navigation not propelled by oars."

Similar definitions are given in the Vice-Admiralty Courts Act, 1863, 26 Vict. ch. 24, and the Merchants Shipping Act, 1894.

See also the following cases:—*The Mac* (1882), L.R. 7 P.D. 126; *The Zeta*, [1893] A.C. 468; *The Excelsior* (1868), L.R. 2 A. & E. 268; *The Uhla*, L.R. 2 A. & E. 29 n; *The Sinquasi* (1880), L.R. 5 P.D. 241; *The Malvina*, Lush. 493; *The Clara Killam* (1870), L.R. 3 A. & E. 161.

The Court of Admiralty appears from early times to have exercised an inherent jurisdiction over claims for towage in cases where the services were rendered on the high seas and not within the body of a county and some cases have gone the length of holding that towage on the high seas conferred a maritime lien. *The Isabella*, 3 Hagg. 427; *The Constancia* (1846), 10 Jur. 845; *The Princess Alice*, 3 Rob. 138; *The St. Lawrence* (1880), L.R. 5 P.D. 250.

There has been considerable difference of opinion as to the nature of the inherent admiralty jurisdiction in matters of towage, especially as to whether or not it created a maritime lien.

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By the Admiralty Court Act, 1840, 3 & 4 Vict. ch. 65, sec. 6, jurisdiction was given to the Admiralty Court over all claims and demands in the nature of towage in respect of services rendered whether within the body of the county or upon the high seas, and similar jurisdiction was conferred upon the Vice-Admiralty Courts by sec. 10 of the Vice-Admiralty Courts Act 1863, 26 Vict. ch. 24.

These statutes did not give a maritime lien on the ship but only enabled the plaintiff to enforce his claim in the Admiralty Court by arresting the ship. A claimant proceeding under the Act would have no right against the ship until commencement of his action.

The Court having jurisdiction over the subject-matter by virtue of the statute, the arrest in the action gives precedence to the claim over all except liens existing at the time of the arrest. This is what is known as a statutory lien and gives the claimant no lien upon but only a right to proceed against the ship.

It has been held in several cases that although jurisdiction as to towage was not created by statute but existed before, it conferred no maritime lien. See the *Henrich Bjorn*, L.R. 10 P.D. 44; 11 App. Cas. 270; *Westrup* v. *Great Yarmouth Steam Carrying Co.*, 43 Ch. D. 241. As against this, counsel for the plaintiff cited a case decided in the Privy Council: *Foong Tai & Co.* v. *Buchheister & Co.*, [1908] A.C. 458. But this authority does not question the soundness of the law as declared in the *Henrich Bjorn*, and *Westrup* v. *Great Yarmouth Steam Carrying Co.* cases. The expenditures defrayed by the respondents in that case was in the nature of salvage expenditure.

Fry, L.J., in giving the judgment of the Appeal Court in the *Henrich Bjorn* case, 10 P.D. 44, at p. 54, draws a very illuminating distinction between the right to enforce a lien against a ship and the right to arrest her to enforce a claim that the plaintiff has against the owner; in other words, between a maritime and a statutory lien.

Lord Watson discussing the same point in that case in the House of Lords uses equally apt language. He says, 11 App. Cas. 270, at p. 277, "The former unless he has forfeited the right by his own laches can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an

action *in rem* unless at the time of its institution the *res* is the property of his debtor."

It seems to me that the weight of authority is against the proposition of the existence of a maritime lien for towage.

A good deal of discussion arose as to the necessity of its being shewn that the towage was performed on the credit of the ship.

Language of this kind is frequently used in Admiralty cases by both Judges and counsel.

In *The Perla*, Swab. 353, Dr. Lushington says there is a presumption that credit is given to the ship and to rebut this presumption it must be distinctly proved that credit was given to the individual only whoever he may be.

Other cases decide that necessaries supplied to a ship are *primâ facie* presumed to have been supplied on the credit of the ship and not solely on the personal credit of her owners.

A ship can scarcely be said to be the object of credit. It certainly cannot give or refuse credit. I presume what is meant is this, that the owner of a ship either by himself or his master can so contract either for necessaries or for towage as to make himself alone personally liable; that in the contract by the use of apt words he can exclude the ship from all liability to proceedings *in rem* in Admiralty.

Where the ordinary agreement is made, the presumption is that credit is given to the ship, but this does not mean that the owner may not be rendered liable for the services performed in an action *in personam*.

Contracts of towage are interpreted and construed in the same manner as other contracts.

Where a contract of towage purports to be made on behalf of the owner he, and therefore the ship itself, can only be made liable where it has been entered into by one who was the owner's agent or servant acting within the scope of his authority.

If the owner of a ship divests himself by charterparty or otherwise of all control and possession of his ship for the time being, in favour of another who has all the use and benefit of it, and who appoints and pays the captain and crew, he will not, neither will his ship, be liable for towage performed for the ship by agreement with the charterer or his captain during such time. Before the owner can be made liable for the act of the captain

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they must stand in the relation to each other of master and servant, or principal and agent, or at any rate some such relationship must exist between them.

I will now come to the evidence and the merits of the case. There is no evidence that the "Santa Maria" was either built by the Sovereign or government of Spain or presented by such Sovereign or government to the government or people of the United States or that she is owned by the South Park Commissioners of the City of Chicago. Counsel for both parties at certain stages of the case appear to have assumed something of the kind, but no evidence was given at the trial. No one appeared for the United States Government or the South Park Commissioners.

When I am asked to stay the hand of the Court for fear of trespassing on international comity I would like to have something more substantial than faint assumptions of counsel which, so far as the evidence goes, appear to have no warrant for existence.

I am unable to state from the evidence who the owner of the "Santa Maria" is. I know nothing on that head except that in September, 1916, she was in charge of Capt. Stephenson at Cape Cod who entered into the contract in question with the plaintiff.

Primâ facie the master is the agent of the owner of the ship, and in the absence of evidence that he was the agent of another I find that the contract of towage then entered into bound the owner and enabled the plaintiff to enforce in this Court any claim he has for such towage against the ship.

It is claimed by Mr. Bentley that the plaintiff's counsel in opening the case admitted that Capt. Stephenson had chartered the "Santa Maria" from the South Park Commissioners. The counsel in his opening on this point spoke as follows:

> This ship, the "Santa Maria," is a replica supposed to be a replica of the flag ship of Christopher Columbus with which he discovered America. She was built by the Spanish government in the year 1892 or '93 and was presented to the government of the United States, and she came out to America at the time of the Chicago exhibition in '93, and subsequently she was presented to the City of Chicago or rather a Commission of Chicago who are now the present owners. She has been lying there for some time, I don't know how many years, and shortly before the opening of the Panama Canal, Mr. Stephenson, who appeared as the captain of the ship, made arrangements with the Park Commissioners to get this vessel to take her round to Panama. . . . I don't know upon what terms she was loaned or let or chartered by the Commissioners but I believe there is an agreement which we gave

our learned friends notice to produce which was made between the parties. But at any rate we say that at the time we entered into this contract we did not know or have anything to do with the owners. They were unknown to us and we dealt with the captain upon the credit of the then ship herself.

John A. Nevill, the president of the plaintiff company, in his evidence, stated that he was not aware as to who were the owners of the ship at the time that he dealt with Capt. C. Stephenson, the master of the "Santa Maria," and gave credit to the ship for the towage. He also stated that he knew nothing of an agreement between the South Park Commissioners and the captain at the time the contract was made.

I would not hold, from this evidence, that the captain when he made the contract with the plaintiff had the full and complete control and possession of the ship and had no responsibility whatever to the owner whoever he might be. That he had in other words what was practically a demise of the ship.

See also on the question of the effect of remarks made by counsel in opening the comments of Pollock, C.B., in *Machell* v. *Ellis*, 1 Car. & K. 682.

Besides I don't think the remarks of counsel were intended as an admission. I am inclined to believe that they were prompted by a perusal of a brief filed by the defendants' counsel on a preliminary motion in which similar statements were made and he probably assumed that proofs would be forthcoming at the trial.

The fact that the plaintiff took a guarantee from the Massachusetts Bonding Co. was urged as a circumstance that credit was given to the captain alone and not to the ship, but Mr. Nevill in his evidence stated that he took the guarantee as additional security in the event of the ship being lost on the voyage.

Having disposed of all the preliminary points it is left for me to determine the amount which the plaintiff is entitled to recover in this suit.

There was an implication in the contract that the tug boat which the plaintiff should supply should be sufficient for the performance of the work undertaken, also that each party to the contract would perform his duty in completing it, that proper skill and diligence would be used on board both the vessel and the tug, and that neither party by neglect or mismanagement would create unnecessary risk to the other or increase any risk which might be incidental to the service undertaken.

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I hold on the evidence that the tug was reasonably sufficient for the requirements of the contract. I also hold as against the plaintiff that the tow was under the circumstances in reasonably good condition.

The plaintiff towed her with the tug Atlantic some time before the contract litigated here was entered into from Port Hawkesbury to Portland, Maine, a distance of 345 miles, taking 13 days.

I have the testimony of the captain of that tug who performed the service, that on that trip she pitched, rolled, and sheered badly. When the plaintiff made his contract on September 14 he evidently knew all about the kind of tow he would have and made his charge accordingly.

I also decide that the plaintiff should not have undertaken to carry freight from Halifax to Boston and from Boston to Halifax and from Halifax to Quebec, and hold him liable for all delays in consequence.

If the tug required ballast to fit her for her work it should have been put in and left there till the contract was completed. The tug arrived in Boston on Tuesday, September 19, at 11.30 a.m., and left for Cape Cod on September 21 at 6.30 a.m. The two days in Boston were fine and the only business was to replenish with coal and water for which one day would have been ample. I must conclude that the other day was spent in unloading and perhaps selling cargo, and taking on new cargo. I will deduct from the claim $75, being 1 day's charge.

She left Halifax on September 28 at 10 p.m. after being there over a day and a half and arrived at Port Hastings September 30 at 12.30 a.m. Capt. Paysant, the captain of the tug, states in his evidence that he called at Port Hastings for water. Port Hastings is only a few hours steam from Georgetown and about a day from Charlottetown. It only took him 1 day, 14 hours and 30 minutes, to reach Port Hastings from Halifax. He also stated, and that after careful consideration, that he could run 3 days without requiring to replenish his water supply, and that he carried 16 tons of coal, enough for 8 or 9 days. He had tank capacity for 500 gallons of water. There was no necessity for his going to Port Hastings for water. That was not performing the contract expeditiously. Besides, shortness of water is the reason he gave for being obliged to put into Charlottetown on October 4,

although it was only 1 day and 4 hours since he had taken on water at Port Hastings. He said there was delay at Port Hastings, on account of weather and wind, although his entry in his log states that the wind was southeast, thick, rainy. The wind was quite favourable for either Georgetown or Charlottetown. There was no mention in the log of the wind being high, and if the weather was rainy and thick that would be no obstacle to further progress unless there was a fog which he does not claim, nor does he state when or how long after he arrived it became rainy and thick; evidently not when he went in, because he gives in his evidence, as the cause of his doing so, the need of getting water. But he should have got a supply for at least 3 days at Halifax, and that would have easily carried him to Charlottetown. He further stated he was putting coal in the bunkers at Port Hastings, although, according to his own evidence, he could have taken on enough at Halifax for 8 or 9 days' use. When he was referred by counsel to the wind being favourable for a passage to Charlottetown, he said that it was liable to change any minute, and that that was the reason he remained there, because as he stated the wind was liable to change any moment "we remained there and drift us back to Port Hastings." I will have to deduct from the plaintiff's claim the 3 days lost around Port Hastings.

The captain of the tug remained in Charlottetown from the 4th until the 25th of October with the exception of two abortive attempts made to proceed on the voyage.

I may state here that I am not at all satisfied with his evidence and the manner in which he gave it, and the record of his trip in the log book kept by him bears a somewhat suspicious appearance. He stated in his evidence that 4 miles an hour was a fairly strong breeze and that 6 miles an hour would be a strong breeze—that 6 miles an hour would be a moderate gale and 12 or 14 miles an hour would be a real gale. He also stated that he did not know of any great reason why he didn't proceed upon the trip on the evening of October 7, that the wind did not prevent him doing so.

On October 9 he stated that he had 12 hours wind astern which was favourable to his going and that he could have got up the straits 48 miles in those 12 hours if he had proceeded on his journey on that day but didn't go.

This captain was a man of some experience. He has held

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a master's certificate for 4 years and has had experience at sea since he was 14 years old. I am satisfied from the evidence that he failed to perform expeditiously the contract undertaken, and that the delays in Charlottetown were unjustifiable and for that reason and because the cold weather was approaching when it would be impossible to complete the towage to Quebec except at great risk both of life and property, Capt. Stephenson of the "Santa Maria" was justified in discharging the tug and lying up the tow for the winter. I am of opinion that if the tug had done her duty the contract would likely have been completed in good time and that the many days unwarrantable delays that occurred prevented such completion.

The plaintiff made an absolute and unqualified contract to tow the "Santa Maria" from Cape Cod to Quebec and was receiving good pay for the service. The contract could, I believe, have been completed, if energy, efficiency, courage, and proper expedition had been used by the tug. It should have been completed within a reasonable time. The distance given was about 1,100 miles, and the estimate made by the plaintiff and given to Capt. Stephenson for the performance of the tow was with favourable weather 17 days. It could never have been completed by following the course which the captain of the tug took during the time he was in and about Charlottetown and Port Hastings. The defaults on the part of the tug were such as to defeat the purpose of the contract and so put an end to it.

The plaintiff has only a right to recover compensation for what he has done.

A part of the consideration was to be paid before the entire service was to be performed and a certain portion was to be paid on the completion of the contract, I mean for the days it would take the tug to return to Halifax after completing the voyage to Quebec. This rendered the service *pro tanto* a condition precedent and as this service is not completed by reason of the default and breach of the plaintiff it cannot recover for the four days claimed for the return to Halifax.

The plaintiff has already been paid $1,009.60. I will allow the plaintiff for 12 days while his tug was in Charlottetown. I allow nothing for the days subsequent to the discharge of the tug on October 21. I have deducted 5 days from the time spent in

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Charlottetown previous thereto because I am satisfied that, on the evidence of the captain himself, he could have proceeded with his tow on these days.

I find that the plaintiff is entitled to recover in this action the sum of $940.40 in respect of his claim together with costs, and I condemn the ship "Santa Maria," her sails, apparel, dunnage and equipment, and other articles of value on board, including the Columbus relics, in the said sum and in costs, and declare that the plaintiff has had and still has a valid lien and charge on the said ship, her sails, articles and equipment for the said sum and costs, since her arrest under the warrant issued in this suit, and I order that in default of payment of the said sum and costs, the said ship, her sails, apparel, equipment and other articles on board thereof be sold by public auction by the marshal of this Court, and the proceeds thereof paid into Court to abide the further order of the Court. *Judgment for plaintiff.*

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Nova Scotia Supreme Court, Russell, Longley, Drysdale, JJ., Ritchie, E.J., and Harris and Chisholm, JJ., March 31, 1917.

PRINCIPAL AND AGENT (§ II A—7)—POWER OF ATTORNEY—ACCOMMODATION INDORSEMENT.

A general power of attorney by a married woman to her husband conducting business for her, including the power to make and indorse bills and notes, is sufficient to charge her with liability on an accommodation indorsement signed by the husband on her behalf for the benefit of a third party. (Court divided: see also decision No. 1, 26 D.L.R. 194, 49 N.S.R. 409.)

Statement.

APPEAL from the judgment of Finlayson, Co.Ct.J., in favour of plaintiff, in an action against the defendant Isaac Green as maker and the defendant Jennie Green as indorser of a certain promissory note. Affirmed by divided Court.

J. McG. Stewart, for appellant; *H. Mellish*, K.C., for respondent.

Russell, J.

RUSSELL, J.:—The defendant, Jennie Green, is a married woman doing business as a trader under the provisions of the Married Women's Property Act. She cannot read or write and her husband attends to her business under a power of attorney. She has two sons, Isaac and Arthur, the former of whom was engaged in business and incurred debts due the plaintiff. Arthur is the younger of the two brothers and lives with his mother for whom he writes necessary letters from time to time.

Isaac, being indebted to the plaintiff, as already stated, went

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to Montreal where the plaintiff did business and arranged for an extension of time on a note or notes being given with the security of an indorser. Plaintiff accordingly wrote a letter to the defendant stating that this arrangment had been made on Isaac offering the defendant's indorsement and asking if this was correct. The letter was received and read by Arthur who wrote a reply in defendant's name saying that the arrangement was satisfactory and requesting plaintiff to send the notes which defendant would indorse. The notes were accordingly sent and the one sued on was made by Isaac to the plaintiff. Defendant's name was written on the back purporting to be so written by her husband as attorney. She knew nothing about the transaction and never authorized it unless it was authorized by the power of attorney or impliedly by the course of business. The question is whether it was so authorized?

Considering the question, apart from any authority conferred by the power of attorney, I think the evidence does not shew any authorization. Defendant admits that all her business is done for her by her husband and her son, but limits the effect of this by saying "Of course they do everything in my own business, not somebody else's." Again she says, "I am satisfied with my own business what he does. If he do some business on the side what don't belong to me, I am not satisfied." Her husband admits that he did not tell her about the indorsement of the note and says he did not care to tell her and did not want to tell her. He indorsed the note to do Isaac a favour and believed that Isaac would pay it. The note had no connection with the defendant's business and I think it is very clear that there was no authorization for the indorsement apart from the power of attorney. The operative words of the power of attorney are as follows:—

Harris Green, of Sydney, N.S., is by these presents made, constituted and appointed the true and lawful attorney of the undersigned Jennie Green—of Sydney, N.S.—for and in the name of the undersigned to draw, accept, make, sign, indorse, negotiate, pledge, retire, pay or satisfy any bills of exchange, promissory notes, cheques, drafts, orders for payment or delivery of money, securities, goods, warehouse receipts, bills of lading, securities under sec. 88 of the Bank Act, negotiable or mercantile instruments or securities or written promises to give such warehouse receipts, bills of lading or securities under sec. 88 of the Bank Act, which he may think fit, and to receive and dispose of the proceeds thereof; also from time to time to discount or pledge any commercial paper or other securities, goods or chattels, warehouse receipts

or bills of lading as aforesaid with the Royal Bank of Canada; also to obtain advances or loans from the said bank either alone or jointly with others; also from time to time to draw on the account of the undersigned with the said bank and to overdraw the same if he shall think fit, and generally for and in the name of the undersigned to transact with the said bank any business, matter or thing, he may think fit.

The trial Judge has held that the so-called indorsement was within the authority conferred by this power of attorney.

There is no evidence that the plaintiff ever saw this instrument. Had he seen it and acted on the strength of what he read in it, there might be an argument made to the effect that its large and general words might be interpreted more generously in his favour than they would be if the question arose solely between the immediate parties to the instrument. I am reasoning simply from the light of nature unaided by authority and there may be nothing in the suggestion of such a possible distinction. It is not necessary to dwell on the question. The plaintiff did not see the power of attorney and could not have been prejudiced by it. His rights must depend upon the actual authority which it conferred and that authority is to be determined by the construction of the instrument in the light of the circumstances in which it was made and in view of the objects for which it was given.

I think it is clear from the whole of the evidence that the sole purpose of the power of attorney was to enable the attorney to execute such documents as pertained to the business she was conducting through the agency of her husband and did not authorize the attorney to incur on defendant's behalf the liability of an indorser on the note of his son to the plaintiff which is the effect of the anomalous indorsement written upon this note under the decision of the Supreme Court of Canada. Such a transaction was altogether outside of the business for the purposes of which the power of attorney was given.

It goes without saying that the so-called indorsement purporting to be made by the defendant through her attorney was notice that it was done under special authority. That authority, I suppose, might be either limited or without limitation. I suppose it would be possible to draw a power of attorney that would confer the same authority upon the attorney as that possessed by the constituent. For that reason I prefer to say that the circumstance referred to is notice of a special authority, rather than that it is notice of a limited authority.

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Longley, J.

The appeal should, I think, be allowed and the plaintiff's case dismissed.

LONGLEY, J.:—I concur in the judgment of Drysdale, J. The whole circumstances of the case are to be taken fully into consideration before judgment is given. Robinson saw Isaac Green at Montreal and was assured by him that his mother, Mrs. Jennie Green, would indorse his notes for a certain amount. He first wished to obtain information in regard to that and he addressed the following note:

Mrs. Jennie Green, Sydney, N.S. August 14th, 1912.

Mr. Isaac Green, your son, called the other day and arranged for the extension of his payments, offering your indorsement as security. The amount is $506.28, and I would like to know if this is correct before sending you notes to indorse. Kindly advise me by return mail and oblige. James Robinson.

To which he received the following reply:—

Sydney, C.B., August 20th, 1912.

Your letter of the 14th inst. to hand. The arrangements of Mr. I. Green made with you are satisfactory. Send the notes and I will indorse them. J. Green.

That would undoubtedly be clear evidence to him that those notes would be indorsed. He sent the notes down and they were indorsed by Harris Green, the attorney of Mrs. Green, who had a power of attorney from Mrs. Green to draw, accept, make, sign, endorse, negotiate, pledge, retire and pay all promissory notes, cheques, drafts, orders for payment, securities, goods, warehouse receipts, bills of lading, &c. &c. which he may think fit. When Robinson received the note thus indorsed he had every reason and right to suppose that the matter was attended to properly and fairly. Mrs. Green, it must be understood, is utterly unable to read or write. She entrusted the letter writing to her son, Arthur Green, and he wrote this letter and signed her name to it. She could not have read the letter if she had received it, could have done nothing about it, and there is reason to believe that the Judge below, who found all the circumstances in favour of the plaintiff, believed that Arthur Green had written this letter with her knowledge. It seems to me that the principle adopted by Lord Macnaghten in *Bryant* v. *Quebec Bank*, [1893] A.C. 170, that whenever the act of the agent is authorized by the terms of the power, that is, by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all parties dealing

in good faith with the agent and such persons are not bound to inquire into the facts *aliunde*, the apparent authority is the real authority. I think the power of attorney and the act in question fulfil all above requirements.

I had very great doubts on this question on the previous argument, but since then the evidence of Arthur Green and the power of attorney is put on record, and I think these make it clear that by all principles of law Jennie Green is responsible. I give judgment sustaining the verdict.

Drysdale, J.

DRYSDALE, J.:—The County Court Judge has held that the act of Harris in indorsing the notes in question is authorized by the terms of the power, and in so doing I think he was right. The defendant, Jennie Green, permitted her son Arthur to open and answer plaintiff's inquiry of August 14. This was plaintiff's letter addressed to defendant Jennie at Sydney. The answer was by Arthur in fact, but in the mother's name. It seems the mother cannot read or write and the evidence shows that her husband and Arthur did everything for her. The proper inference to be drawn from the evidence and from the mere fact that a letter addressed to her by plaintiff was permitted to be opened and answered in her name by Arthur is that he was authorized to write it. Acting on the assent contained in the letter of August 20, plaintiff took the note in question with others. The power of attorney under which her name was indorsed, in my view, is wide enough to cover the act of Harris in the act of indorsing these notes. It expressly confers on the attorney, Harris, power to indorse such bills or notes as he may think fit and her name was affixed by the attorney, Harris, after she had permitted her son to open and answer a letter to her inquiring as to her intentions about indorsing and in the answer giving an express promise to indorse. The plaintiff in good faith acted under the letter and the power of attorney and if it can be said that a fair reading of the power of attorney covers the act of Harris, or could cover such act, then defendant ought to be bound. I think, taking the test stated by Lord Macnaghten in *Bryant* v. *Quebec Bank*, [1893] A.C. 170, the act is in itself warranted by the terms used. If so, it is binding on the constituent as to all persons dealing in good faith with the agent and that surely includes plaintiff in this case.

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It is argued here that the power of attorney to Harris is confined to Jennie's alleged separate business. That in indorsing accommodation for Isaac he exceeded his authority. But, as was said in the Privy Council case referred to, the fact that the agent abused his authority and betrayed his trust cannot affect *bonâ fide* holders for value. That notwithstanding this, if by comparing the act done with the words of the power the act is in itself warranted by the words used, such act is binding on the constituent as to all persons dealing in good faith with the agent. There the apparent authority is the real authority. Here we have express words that cover the act, and granting plaintiff's *bona fides*, which is not questioned, I am of opinion the binding English authority referred to concludes the case as against the defendant.

I would dismiss the appeal with costs.

Ritchie, E.J.

RITCHIE, E. J.:—This case comes before the Court for the second time. The previous judgments are reported in 26 D.L.R. 194, 49 N.S.R. 409, where the facts are fully stated. The case comes back on practically the same evidence, except that we now have the power of attorney, and upon the effect of it I think the case depends. I, therefore, only deal with this point.

It is very clear that the power of attorney was given to the husband, H. Green, by the wife Jennie Green, the defendant, for the purpose of transacting banking business with the Royal Bank of Canada in connection with the business which she was carrying on under the Married Women's Property Act. As was pointed out by Sir Wallace Graham in his judgment, the form of signature to the indorsement of the note was notice to the plaintiff that the authority of the attorney was limited, and therefore the defendant Jennie Green is only bound if the attorney was acting within the limits of his actual authority. Lord Ellenborough, more than 100 years ago, laid down a sound rule of construction. It is as follows:

> It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus;* every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done.

In construing this power for the purpose of getting at the intent, which is the object of all construction, I take every part of it into consideration. I see on its face, taking it as a whole, that it is the ordinary power of attorney required by banks when

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a mercantile firm is doing its business through an agent; I see from the evidence that the power was filed with the bank; that it was given for the purpose of carrying on the banking transactions incident to the business which Jennie Green was carrying on, and I come to the conclusion that it was given for the purposes of the business and for those purposes only. The indorsing of accommodation paper for a third party was no part of the business and I think that upon the true construction of the power in the light of the surrounding circumstances which I have mentioned the power to indorse accommodation paper is not given. The words of the first part of the power of attorney, it is true, are very wide, but not more so than in the power of attorney in *North River Bank* v. *Aymar*, 3 Hill 264, where the power of attorney was to indorse

> any promissory note or notes, bills of exchange or drafts, to accept all bills of exchange or drafts, or in my name to draw any note or notes, to enter merchandise at the custom house, etc., and to manage and negotiate any business from time to time in the same manner as if I was personally present.

In dealing with this power of attorney Cowen, J., said:—

> There is nothing in the effect or nature of such a power which authorizes the attorney to use it for his own benefit or the benefit of any one excepting the principal.

The power of attorney in *Stainer* v. *Tysen*, 3 Hill 280, gave power to indorse notes and then ended with a clause: "giving and granting to my said attorney free power and authority about premises as fully to all intents and purposes as I might or could do if personally present." I think it cannot be successfully urged that the power of attorney in the case at bar is in wider terms.

But the New York Court, which decided the two cases to which I have referred against the right to make accommodation paper, would, I think, in this case, have decided in favour of the plaintiff apart from any question about the power of attorney, because that Court in *Commercial Bank of Lake Erie* v. *Norton*, 1 Hill 501, held that where a man was the general agent of a firm, and entrusted with the sole charge of their business, and as such had been in the habit of drawing drafts and making notes and indorsements for them in the course of their business, it could be inferred that he had authority to bind his principals by an accommodation acceptance. I am unable to agree. The case is at variance with the decision of this Court previously given

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in this case, and it is also at variance with *Gullich* v. *Grover*, 33 New Jersey Law 33. There the wife was the general agent of the husband in conducting a business in his name, and had power to make notes in his name; it was held that she had no power to make accommodation notes. The authorities cited by Mr. Mellish, in my opinion, are distinguishable.

In the *Bank of Bengal* v. *Fagan*, 7 Moo. P.C. 61, at 72, 13 E.R. 802, the words of the power were to

sell, indorse, and assign, or to receive payment of the principal according to the course of the treasury—and to receive the consideration money and give a receipt for the same.

It was contended that the words "sell, indorse and assign" were used conjunctively and could not be used in the disjunctive and that there was no power to indorse without selling, that the only power to indorse was one ancillary to selling. This contention was not upheld. I cannot see how the question decided under that power of attorney affects the question to be decided under the power of attorney in this case. In *President* v. *Corner*, 37 N.Y. 320, the plaintiff was held to be a *bonâ fide* holder for value without notice. In this case the plaintiff knew that the indorsement was an accommodation indorsement and that it was made by an agent. The case of *Cooper* v. *Blacklock*, 5 A.R. (Ont.) 535, is distinguished by Mr. Stewart as follows:—"In that case the husband had formerly sworn that his wife knew of the notes and authorized him to make them. The wife would not swear that she had not authorized the notes, or that she did not know of them. The jury found that as a matter of fact the husband had actual authority apart from the formal power of attorney. It was further inferred, from the wife's refusal to give evidence on any point but the making of the formal power of attorney, that she had in fact authorized this transaction."

The distinction is, in my opinion, well drawn. Of course, I do not dispute that the apparent authority is the real authority, but where I, with very great respect, differ from the learned Judge below is that, taken as a whole, I think the power of attorney does not disclose apparent authority to make accommodation paper. In *Bryant* v. *Quebec Bank*, cited in the judgment, the bank was a *bonâ fide* holder for value.

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

HARRIS, J.:—This case was before the Court last year when a new trial was ordered. 26 D.L.R. 194, 49 N.S.R. 409.

It has been retried and His Honour Judge Finlayson has given judgment for the plaintiff and there is another appeal. The evidence is practically the same as before except that we have the power of attorney held by the Royal Bank of Canada.

The question is whether the defendant can be held liable on an accommodation indorsement made by her attorney in her name, the plaintiff having accepted it knowing that it was signed by an attorney and that it was for the accommodation of a third person.

I think the authorities clearly decide that the making or indorsing of a promissory note for the accommodation of a third person is not covered by a power of attorney even of the general character of that given by the defendant in this case, so as to enable a person accepting such a note with full knowledge of the facts to recover on it.

In *Gulick* v. *Grover*, 33 New Jersey Law 463,97 Am. Dec. 728, Depue, J., in delivering the judgment of the Court, said:

> I take the rule to be well settled that the authority to sign accommodation paper or as security for a third person must be specially given unless the authority of the agent is one of universal agency and will not flow from any general authority to transact business for the principal. The making of accommodation paper or the loan of one's name as security for another does not fall within the ordinary business in which persons engage. The authority to use a principal's name for that purpose is not established by proof of an agency however general in the transaction of the principal's business even though in connection with such business it be shown that the agent was authorized to make notes in the name of his principal. To validate such paper it must be shown that the agent was authorized to make use of his principal's name for that purpose; and his authority must either be express or implied from proof that he was accustomed with the principal's consent to use his name for the accommodation of others. An agent who is authorized to draw and indorse notes and to draw, indorse and accept bills of exchange can act under such authority only to the extent of his principal's business and is not authorized to draw, indorse to accept them for the accommodation of mere strangers.

In Story on Agency, par. 69, the rule is stated in the same language. See Story on Agency, pars. 21 and 62.

In 2 Corpus Juris, p. 642, the rule is thus stated:—

> The broadest possible authority to make and indorse paper presumptively is to be exercised in the principal's interest only and does not impliedly extend to making or indorsing paper for the accommodation of third persons and still less for the agent himself.

See also *Stainer; v. Tyson*, 3 Hill N.Y. 279.

Here the plaintiff had notice by the signature itself that it

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was signed by an attorney and he knew that it was an accommodation indorsement, and he was bound at his peril to ascertain that the authority covered the indorsement in question.

Of course, *bonâ fide* holders of negotiable instruments signed by an attorney with apparent authority can recover, but here the plaintiff knew the note was indorsed for the accommodation of another than the principal and he is not within that class.

It is this knowledge on the part of the plaintiff which takes the case out of the rule laid down in the *Westfield Bank* v. *Cornen*, 37 N.Y. 322, adopted by the Judicial Committee of the Privy Council in *Bryant* v. *Quebec Bank*, [1893] A. C. 170. See *Hambro* v. *Burnand*, [1904] 2. K.B. 10, *per* Collins, M.R.

As to the letter of August 20, 1912, which Arthur Green wrote and signed in his mother's name, I am unable to see that the evidence on the second trial improved the plaintiff's position in any way, and I adhere to the views expressed by me on the previous appeal (49 N.S.R. 416, 417, 26 D.L.R. 194, 197), to which I have nothing to add.

I agree with my brother Ritchie that the case of *Cooper* v. *Blacklock*, 5 A.R. (Ont.) 535, is distinguishable and does not help the plaintiff.

I think the appeal should be allowed with costs and judgment entered in the Court below dismissing the action with costs.

Chisholm, J.

CHISHOLM, J.:—I agree with Drysdale, J., that the defendant's appeal should be dismissed and the judgment of the Judge of the County Court affirmed. This is the second appeal in this case. The report of the decision in the first appeal will be found in 26 D.L.R. 194, 49 N.S.R. 409. On the first trial it appears that Arthur Green, a son of the defendant and the writer of the letter to plaintiff in answer to his of August 14, 1912, was not called. This letter was written by Arthur in his mother's name, and, with respect to it, the Chief Justice said in the course of his reasons given in the first appeal:—"Of course if the letter could be traced to her directly or indirectly and the plaintiff acted upon it to his prejudice that ought to dispose of the case."

As I read the evidence taken on the second trial, I do not think that the defendant can be heard to say that the letter mentioned was not hers. Although counsel had difficulty in

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nailing both witnesses down firm and hard to definite statements on the point, the evidence of defendant and of Arthur Green shows that the latter with his mother's knowledge and consent received all the correspondence that came addressed to her, read, it and dealt with it; no matter whether it was what they refer to as "business" correspondence or any other kind of correspondence.

Arthur Green not only wrote to plaintiff the letter of August 20, 1912, but he wrote several other letters to plaintiff in his mother's name. He was obliged to admit that he did so when he was confronted with seven of them. I cannot find in the evidence any trace of any letters written in defendant's name which were not written by Arthur. If then she permitted him to receive, read and answer all her letters, and permitted innocent third parties to act upon them, if they might, to their detriment, as the plaintiff undoubtedly did in this case, we can, I think, deal with the letter of August 20, 1912, as if it were written by the defendant's own hand.

There are numerous cases in which the principal is held responsible to innocent third parties for the conduct of his agent when the latter acts within the apparent scope of, although in fact in excess of, his authority. A recent and apt summary of the law on the point will be found in 2 Corpus Juris 461-463.

> The same acts and conduct on the part of the principal that, when so intended, work an implied appointment often estop the principal to deny an appointment when no actual agency is intended. Accordingly it is a general rule that when a principal by any such acts or conduct has knowingly caused or permitted another to appear to be his agent either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances, although no consideration moved to the alleged principal, and although there was no actual fraud on the part of such principal, as the estoppel may be allowed on the ground of negligent fault on his part, on the principle that where one of two innocent parties must suffer loss, the loss will fall on him whose conduct brought about the situation. This rule is particularly applicable where the principal has knowingly by such acts and conduct recognized the agency through a long course of dealing or in many transactions and the rule has accordingly been very frequently applied in a great number and variety of transactions.

If the plaintiff were aware that the letter to him was not written by the defendant herself and believed it to be written by an agent, his argument in support of his claim would have to be that Arthur Green's act in writing the letter in his mother's name

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was within the apparent scope of Arthur's authority as her agent; that he (plaintiff) acted upon the letter as a letter authorized by the defendant; and, that even if Arthur had exceeded his authority, the defendant is estopped to deny that Arthur had authority. One who leads an innocent party to rely on the appearance of another's authority to act for him will not usually be heard to deny the agency to that other party's prejudice.

However successful or otherwise an argument along those lines might be, it appears to me that in this case the plaintiff is not driven into a controversy over Arthur's authority as agent or to contend that defendant is estopped to deny Arthur's agency. The estoppel is not as to the agency, but as to the authorship of the letter. The plaintiff does not know any agent in the matter; he believes he is dealing with the defendant herself. He sent his letter of August 14, 1912, to the defendant, properly addressed and posted, asking her whether she was willing, as her son Isaac represented, to indorse his (Isaac's) notes, and in due course he received an answer that she was willing. The plaintiff's letter making the inquiry was received by Arthur and answered by his hand in his mother's name; Arthur had already written numerous letters to plaintiff in his mother's name; and the plaintiff would naturally regard the letter of August 20, 1912, written by the same hand as were those he had previously received, to have come from the defendant's own hand.

How was this circumstance brought about? Was it not due to the defendant's own negligence? She permitted her son, Arthur, to receive her letters and to answer them in her name, without apparently any supervision over his action in that regard. I think her conduct in relation to her letters—her neglect in not getting them herself—in not having them brought to herself and in not having them read to her—her further neglect in not seeing that the proper answer was made to them—estops her to deny that the letter of August 20th is her own letter. By her conduct she produced the state of affairs which could have no other result than to convince the plaintiff that the letter of August 20th came from her own hand; and it would, in my view, be most unjust and inequitable that the loss should fall on the plaintiff and not on the defendant.

There was no negligence on the part of the plaintiff. When

the notes came to him with the indorsements from which he could see that they were indorsed by an agent, he should, it is argued, have inquired as to the authority of the agent to indorse. Such an inquiry would doubtless elicit another letter written by Arthur Green in his mother's name, stating that the note was indorsed with defendant's approval. But the plaintiff had that assurance already, and he took every reasonable precaution in the premises. Besides being a trader under the provisions of the Married Women's Property Act, the defendant was the owner of real estate and had means and property outside of the trading business. It was not the conveniently organized Jennie Green, a trader under the Married Women's Property Act, with agents acting under powers of attorney, having limited authority, whose acts she could repudiate or not as might be to her advantage, from whom the plaintiff sought to know whether Isaac Green's representations were true; it was the real Jennie Green herself, and the separate trading under the Act may be eliminated from the case. If the real Jennie Green erected a barrier between herself and the public; if she permitted her son to deal with the letters addressed to her by innocent third parties who were making proper inquiries, as she must knowingly have done, and innocent third parties have suffered in consequence, I think she must be made responsible for the consequences of her conduct.

There is authority that where both parties are equally without fault, and one must suffer by the wrong of a third person, the loss must fall upon the one who put it in the power of the wrongdoer to cause the loss. *Lucan* v. *Owens*, 113 Ind. 521.

In the Pennsylvania Railroad Company's Appeal, 86 Pa. St. 80, Sharswood, J., said:—

> There certainly was negligence on the part of the appellee. As executrix, she placed the certificates in the hands of Creely as her attorney, with the blank powers indorsed uncancelled. Thus, by her act, he was enabled to commit this fraud. The equities of the respective parties are not equal. Where one of two parties who are equally innocent of actual fraud must lose, it is the suggestion of common sense, as well as equity, that the one whose misplaced confidence in an agent or attorney has been the cause of the loss shall not throw it on the other. As King, J., expressed this principle in the *Bank of Kentucky* v. *Schuykill Bank*, 1 Parsons Eq. Rep. 248, "the true doctrine on this subject is that where one of two innocent persons is to suffer from the tortious act of a third, he who gave the aggressor the means of doing the wrong must alone bear the consequences of the act."

The appellee in this case selected the attorney. She had entire con-

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fidence in him. She placed these certificates with the blank powers in his hands. He proved unworthy of the trust reposed in him . . . . On what principle of equity can she be allowed to throw off from herself on to the appellants the loss which has resulted from the dishonesty of her own agent?

In *Brooke* v. *N.Y. & C.C. R. Co.*, 53 Am. Rep. 453 (*n*) the Court said:—

It is contended that inasmuch as no authority, real or apparent, to issue bills of lading without receiving the goods mentioned therein had actually been given by the railroad company to Weiss, it is not in any manner responsible for his unauthorized act, even as to third parties who were misled and injured thereby. We cannot assent to this proposition. As between principal and third parties the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested; but as between the principal and agent, the true limit is the express authority of instruction given to the agent.

In the case of *Bartlett* v. *First National Bank*, (1910), 247 Mich. 490, Hand, J., observed at 498:

Where one of two innocent parties must suffer loss by reason of the wrongful acts of a third party, the rule is almost universal that the party who has made it possible, by reason of his negligence, for the third party to commit the wrong must stand the loss.

And in a more recent case, *Allen* v. *Powell* (1917), 115 N.E. R. 96, Caldwell, J. said:—

It is a familiar principle in equity that where one of two innocent persons, each guiltless of an intentional moral wrong, must suffer a loss occasioned by the wrongful conduct of another, the loss must be borne by that one of the two persons who by his conduct enabled the involved injury to be inflicted.

Applying this principle to the case under consideration, and assuming that both parties are innocent of wrong—the plaintiff undoubtedly is—the loss must fall on one or the other, should surely be borne by the defendant who placed it in the power of Arthur Green to create the injury.

I would dismiss the appeal with costs.

Appeal dismissed; Court divided.

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New Brunswick Supreme Court, Appeal Division, McLeod, C.J., Crocket and Grimmer, JJ. June 22, 1917.

DRAINS AND SEWERS (§ III—15)—CREATION OF DISTRICTS—PRESUMPTION—ASSESSMENTS—JURISDICTION OF COMMISSIONERS—MAJORITY.

Where certain marsh lands appear to have been recognized as a district within the jurisdiction of the Commissioners of Sewers acting under the provisions of ch. 159, C.S.N.B. 1903, the fact that no record can be found to shew the creation of the district will not rebut the *primâ facie* presumption that it was legally constituted as such (*Ex parte Dixon* (1911), 41 N.B.R. 133, followed); if owing to resignation or refusal to act, or a refusal of the proprietors to elect, the Board of Commissioners is without a majority, a commissioner acting alone has the power to carry out the work as that of the majority, and to make valid assessments therefor, which are a lien upon the lands and enforceable as such.

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Statement.

APPEAL from the judgment of White, J., in Chancery, in favour of plaintiff, in an action brought by the plaintiff as a creditor of the Commissioners of Sewers for the Parish of Hopewell, Albert Co., to recover an amount due him for money lent to the commissioners, and used by them in paying for labour and materials in repairing dikes and aboideaux of the marshes within their jurisdiction, largely on the Boyd dike or district No. 4 in the said parish, and for work and materials supplied by the plaintiff for the like purposes and for other relief. For these claims, as well as those of all other creditors, assessments in fact have been made by the commissioners under the provisions of ch. 159, C.S.N.B.

The defendants, other than the commissioners, were made such on behalf of themselves and other proprietors of marsh in the different districts, as above mentioned, by order of White, J., made under the provisions of O. 16, r. 9.

All the defendants appeared and defended, except the commissioners themselves, against whom judgment was given by default.

By their pleadings, the defending defendants denied the plaintiff's claim in fact. They also say that the assessments are illegal, not being made according to sec. 18 of the Act. Also, there were no commissioners elected or existing at the time the action was brought, to collect the assessments, and that they could not be collected from the proprietors by the Court.

M. B. Dixon, K.C., for defendants, appellants; *M. G. Teed*, K.C., for plaintiff, respondent.

McLeod, C.J.

MCLEOD, C.J.:—I have carefully read the able judgment given in this case by White, J., before whom it was tried, and I entirely agree with him. The fact that the Commissioners of Sewers for the Parish of Hopewell, Albert County, as such commissioners were indebted to the plaintiff and others, does not appear to be seriously disputed by the defendants. The proprietors, however, of the marsh lands in districts Nos. 3, 4 and 5, claim that the assessments made by the commissioners cannot be enforced. First, they say that district No. 4, commonly known as the Boyd marsh, the district on which the destroyed dike was built, was not within the jurisdiction of the commissioners. The Judge has found that that question cannot now be raised, because he says it was settled in a case that had already been before the

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Courts, *Ex parte Dixon* (1911), 41 N.B.R. 133, but in addition to that case I think the facts proved in evidence shew that it was within the jurisdiction of the commissioners.

It appears that somewhere about 1860, a majority of the proprietors petitioned the Commissioners of Sewers for the Parish of Hopewell to have the Boyd marsh diked. The commissioners acted on the petition and had the marsh diked, assessing the proprietors under the Act then in force for that, and they continued to exercise control over it down until at all events 1 or 2 years before the commencement of this action.

In 1903, the county council recognized the existence of this marsh as a district by re-numbering all the nine districts then under the jurisdiction of the commissioners, and designating the Boyd marsh as No. 4. The Judge in his judgment says that the evidence, as it stood, given on behalf of the plaintiff, would raise a *primâ facie* presumption that this marsh was legally constituted a district, but he says that such presumption as to the question of fact is rebuttable, and he suggests that the fact that Mr. Peck, who was secretary-treasurer of the municipality of Albert County, had gone through the record books of the sessions from 1850, down to the instituting of the county council in 1877, and through the records from that time forward, without finding any record of the creation of the marsh into a district, might be sufficient to rebut that presmuption.

In my opinion, the facts, as detailed and given in evidence by the plaintiff, are sufficient to shew that the Boyd marsh had been erected into a separate district, and the simple fact that the secretary-treasurer of the county was unable to find any record of the creation of the marsh is not sufficient to rebut the presumption that is created by the evidence given, so that in my opinion both in fact and in law it appears that the Boyd marsh is a part of the district.

The second objection is that the assessment being made by only one commissioner was illegal. The Judge has found against that, and I think correctly so found. The fact that the proprietors declined to elect commissioners, or that the commissioners so elected resigned or refused to act, would not prevent the commissioner that was duly elected and was acting from making the assessment. The defendant relies strongly on sec. 18 of ch. 159 of the C.S.N.B. 1903, which says:—

No rate shall be made without the consent of a majority of the commissioners; but one commissioner so elected may superintend work in progress, and employ workmen for that purpose.

The section in the original Act corresponding to sec. 18, reads as follows:—

No rate shall be made without the consent of a majority of the commissioners. Not less than two shall be a majority for making any rate.

In the subsequent amendments "Not less than two shall be a majority for making any rate" was left out, and the section stands as I have quoted.

It is provided by the Act that if any commissioner elected, resigns or refuses to act, the remaining commissioners may act. In this case only two commissioners were elected for the whole district, one commissioner resigned and refused to act. Under those circumstances I do not think that the work of the commission would be stopped. The commissioner so acting being duly qualified would have power to do all that was necessary to keep the dikes in proper repair, therefore, I think the assessments were properly made. At all events they have not been attacked, and are standing as valid assessments.

The proprietors further claim that this Court had no jurisdiction to enforce the payment of these assessments. I cannot possibly think that this Court is so powerless that where an assessment is duly and properly made, the rates being a lien on the lands of these proprietors, that they, the proprietors, can prevent the collection of them simply by refusing to appoint a collector to collect them, or to elect commissioners to enforce the assessment, the assessment having been made. It seems to me that it is one of the cases in which this Court will interfere, and provide the necessary machinery to collect the assessments so made.

The case was argued by the defendants' counsel as though it consisted of two parts—an action against the commissioners of the Parish of Hopewell, and an action against the proprietors. That is not the case. The Commissioners of the Parish of Hopewell made a levy on the proprietors to pay for certain work that had been done on these dikes. By the Act of the Legislature that assessment is made a lien on the lands of these proprietors. The proprietors themselves refuse to elect commissioners to collect this assessment, and thereby seek to relieve themselves of the liability thus legally imposed upon them. This Court, therefore,

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creates no new liability against the proprietors—it simply provides machinery whereby the amount assessed by the commissioners may be recovered from the proprietors, and in my opinion the Court has power to do that.

The appeal will be dismissed with costs.

GRIMMER, J., concurred with McLeod, C.J.

CROCKET, J. (dissenting):—I fully concur in the conclusions of White, J., upon the questions of the jurisdiction of the Commissioners of Sewers for the Parish of Hopewell to undertake the work of rebuilding the Boyd aboideau, and the validity of the plaintiff Downey's claim against the commissioners, but I regret that I find myself unable to agree with the trial Judge upon the question of the validity of the assessments which Commissioner McGorman himself purported to make on November 7, 1911, and on March 9, March 11, and April 5, 1912. I find it impossible to convince myself that it was ever the intention of the legislature that one commissioner, elected by one of several districts, could, either by the failure of other districts to elect commissioners, or by the death, resignation or refusal to act of elected commissioners, alone become and constitute "a majority of the commissioners" within the meaning of sec. 18 of ch. 159 of the C.S.N.B. 1903.

The general rule of law is, that, where a power of a public nature is given to a definite number or a definite portion of an indefinite number of persons, such power, in the absence of clear and express provision to the contrary, cannot be exercised but by a majority of such persons, and that if a majority of such body does not exist at the time when any act is to be done, the power cannot be legally executed. See judgment of Lord Kenyon in *Rex* v. *Bellringer* (1792), 4 T.R. 810, 821, (100 E.R. 1315) and judgment of Bayley, J., in *Blacket* v. *Blizard* (1829), 9 B. & C. 851, 109 E.R. 317; and further, that no contumacy upon the part of the persons composing the majority can have the effect of transferring to the minority the right to exercise the powers and duties of the body. See judgment of Lord Truro, in *Gosling* v. *Veley* (1853), 4 H.L.C. 679, at pp. 801 and 808 reversing the judgment of the Court of Exchequer upon a writ of error from the Queen's Bench in this case as reported in 7 Q.B. 406.

In this case the power to tax the proprietors of marsh lands is given to the Commissioners of Sewers. The number of commis-

sioners is not defined by the statute or by the county council, which is authorized by the statute to constitute districts, but once the districts are constituted each has the right to elect a commissioner, who upon being elected and sworn becomes one of the body known as "The Commissioners of Sewers" for the parish in which the district is situated. Although the number of districts is subject to change by the constitution of new districts and the withdrawal of existing districts, the number is always known, and I do not think, if there were no such provision in the statute as that contained in sec. 18, that it could be properly held that any number of commissioners, short of a number representing a majority of commissioners of all existing districts entitled to elect commissioners, could exercise the powers or duties conferred and imposed by the statute.

The Act, I think, clearly contemplates the existence of several districts each with the right to elect one commissioner as above stated. Sec. 5 provides that the county council shall fix the time and place for the meeting of proprietors of marsh for *a general election of commissioners of sewers* and may on the failure of the proprietors of any division or district to elect on the day appointed, at the request of any proprietor, appoint another day for such election in manner aforesaid. Sec. 6 provides that at the time and place fixed by the county council the proprietors of any district in any parish or division then assembled may elect one commissioner, and that the commissioners shall hold office for the period of 3 years, and provides also for succeeding general elections on the expiration of every 3 year period. Sec. 7 provides that the persons so elected after being sworn, shall be "The Commissioners of Sewers for the whole parish or division in which the districts lie." Sec. 8, which, I think, is the important section for the determination of the point in question, is as follows:—"If the proprietors of any such district fail to elect a commissioner, the remaining commissioners shall act and shall be 'The Commissioners of Sewers' for such parish or division for the period for which they are elected."

Sec. 17 provides in case of death or refusal to act of "the person elect," for the calling by the town clerk of a public meeting of the proprietors of the district to elect another commissioner, and that the commissioner so elected shall hold office only until the next general election; and sec. 18 is as follows:—

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No rate shall be made without the consent of a majority of the commissioners; but one commissioner so elected may superintend work in progress, and employ workmen for that purpose.

It will be seen by an examination of these sections that the statute contains ample provision for securing to each constituted district in the parish its continuous representation on the Board of Commissioners if it so desires. There is, however, no doubt in my judgment that sec. 8, above quoted, does away with the necessity of a majority representing a majority of all districts, for it expressly provides, if the proprietors of any district shall fail to elect a commissioner, not only that "the remaining commissioners shall act" but that they "shall be the Commissioners of Sewers for such parish or division for the period for which they are elected." In that event the remaining commissioners are in fact and in law the corporation for the period for which they are elected. In the year 1911, there was a general election of commissioners. It does not clearly appear exactly how many districts existed at that time, but there is no doubt that there were at least 5. Only 3 districts elected commissioners. One of these declined to take the oath of office. The other two, McGorman and Peck, were duly sworn. I take it that, in these circumstances sec. 8 operated to constitute a Board of Commissioners of 3 persons for a period for which these 3 persons were elected, with the right under sec. 17 to the proprietors of any of the districts which elected them, should "the person elect" die or refuse to act, to elect another commissioner to take his place during that term until the next general election. The corporation or body became a definite body of 3 persons. One of the persons refused to act by declining to take the oath, and the body became reduced to 2. This vacancy might have been filled but was not. I do not think a failure of the proprietors to elect a commissioner to take the place of one who has been elected for a definite 3-year period, and after his election has died or resigned or refused to act can have the effect of making the survivors the entire body and corporation; if this were so, in the event of a vacancy created by death or resignation and the proprietors not electing a successor, say until the lapse of 6 months after the creation of the vacancy, "the remaining commissioners" would be the corporation only during the 6 months for which there had been a failure to elect and not as the section declares "for the period for which they are elected." Furthermore it will be noticed

that the words of the section are "if the proprietors of any such district fail to elect a commissioner" the remaining commissioners shall, &c., not as they were in the original Act of 1850, "In case the proprietors in any such district should fail to elect a Commissioner of Sewers or on the refusal of any commissioner to act or in case of his death," the remaining commissioners, &c. I think, therefore, that for the 3 year period for which commissioners were elected at the general election of commissioners in 1911, the corporation was a body of 3 persons, and that under the rule of law above stated, none of the powers or duties vested in or imposed upon the corporation could legally be exercised but by a major part of that body, that is to say 2 members, and that, if during the period for which these 3 districts in 1911, elected commissioners a majority of the 3 did not exist, the corporation would thereby be rendered incapable of exercising its powers until by the filling of at least one vacancy a majority was re-established. Apart from this, I cannot think that when McGorman, on November 7, 1911, at a "meeting" held by himself alone with the commissioners' clerk, accepted the resignation of the only other existing commissioner, Peck, and proceeded at the same meeting himself to adopt a resolution for the assessment of several districts, even though in one case he purported to act in obedience to a mandamus issued out of the Supreme Court against the Commissioners of Sewers for the parish, he could in any view properly be deemed to have been "a majority of the commissioners" within the meaning of the express provision of the statute as set out in sec. 18. It is true that a word in the plural may, under sec. 10 of the Interpretation Act, be read in the singular, but this provision cannot enure to transfer to one person powers which the statute, as I read it, clearly contemplates shall be vested in and exercised by more than one acting as a body, and I cannot conceive how, under any rule or principle of construction, unless it is first clearly and distinctly provided that 1 person alone is in certain contingencies to be deemed as constituting an entire group or body of persons, it is possible for one commissioner alone to constitute "a majority of the commissioners." The word "majority" itself imports the existence of a number or group of persons, and accords with all the other provisions of the Act, as I read them, as indicating that it was never in the contemplation of the legislature that but one commissioner, elected by one of a number of districts entitled to

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representation on the Board of Commissioners, could himself constitute the entire corporation with the power to assess the marsh owners of any and all districts.

I have, therefore, with much reluctance, arrived at the conclusion that all the assessments made by Commissioner McGorman alone in 1911, and 1912, are illegal and void, and that for this reason this appeal should be allowed. *Appeal dismissed.*

NOVA SCOTIA PHARMACEUTICAL SOC'Y v. RIORDAN

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Nova Scotia Supreme Court. Sir Wallace Graham, C.J., and Drysdale, Chisholm and Harris, JJ. March 24, 1917.

1. DRUGS AND DRUGGISTS (§ I—10)—QUALIFICATION LAWS—KEEPING SHOP WITHOUT CERTIFICATE—SEPARATING CHARGES.

Where a statute provides penalties for keeping open a drug store without a qualifying certificate, only one penalty is incurred up to the time when proceedings are commenced for the infraction of the statute unless there be express provision for a separate penalty for separate periods.

[*Garrett* v. *Messenger*, L.R. 2 C.P. 583 and *Marks* v. *Benjamin*, 5 M. & W. 565, applied; *Apothecaries Co.* v. *Jones*, [1893] 1 Q.B. 89, 67 L.T. 677, 17 Cox C.C. 583, referred to.]

Statement.

APPEAL from the judgment of a County Court Judge in favour of the plaintiff society in several actions against defendant to recover penalties for violations of the Pharmacy Act, Statutes of Nova Scotia for 1912, ch. 11. Varied.

Jas. Terrell, K.C., for defendant, appellant.

V. J. Paton, K.C., for plaintiff, respondent.

Graham, C.J.

SIR WALLACE GRAHAM, C.J.:—The defendant is not registered as a qualified proprietor under the Pharmacy Act. He had a qualified clerk or assistant; but this was not sufficient and the plaintiff society sent to his shop a person named Mott to make purchases so that they could proceed against him for the penalties. There were four of these transactions, namely, a sale to Mott on June 23rd, June 30th, July 9th, and August 9th. But there are four County Court actions brought against the defendant and a superstitious pleader has made out sixteen charges under the Pharmaceutical Act at $40 each as second offences. Of course it was usual to set out offences in different ways for greater caution, but it was never supposed they would be all added together in the judgment.

The County Court Judge has given judgment on all of these for a penalty of $40 in respect to each charge, no doubt through inadvertance in some cases. I do not intend to deal with them all.

There is a charge of "not being registered did sell" coupled with a charge of "not being a chemist did sell." It was admitted that one of these must be eliminated. That applied to two actions, namely, numbers 733, 734 and 794. Again there is a charge of carrying on business under a fictitious name without adding his own name as proprietor, coupled with the charge of "not being registered called his place of business a pharmacy." In respect to these plaintiff's counsel agreed that these two charges should be considered as one claim. That applies to actions 733, 734 and 794. Selling and keeping for sale on the same date cannot under the evidence both be supported. One charge must thus be eliminated in actions 733, 734 and 794.

Again in the second action number 734 which really relates to the transaction of selling 23rd June, 1915, on which the purchaser Mott bought iodine, the paragraph is as follows:—

"The plaintiff claims against the defendant the further sum of $40 by virtue of the provisions of secs. 21 and 27 and the other sections of ch. 11 of the Public Statutes of Nova Scotia for the year 1912, being the Pharmacy Act, under the following state of facts: the defendants previous to, on and since the 23rd day of June, A.D. 1915, and without being registered as a pharmaceutical chemist under said Pharmacy Act did sell all or some of the articles mentioned in Schedule "A," Parts I. and II., of the said Pharmacy Act."

A date was fixed by the particulars in respect to that charge as to the sale.

But there is a further paragraph to this effect:—

"The plaintiff claims against the defendant the sum of $40 by virtue of the provisions of secs. 21 and 27 and the other sections of ch. 11 of the Public Statutes of Nova Scotia for the year 1912, being the Pharmacy Act, under the following state of facts:

"The defendant not being registered as a pharmaceutical chemist under said Pharmacy Act, and not being the holder of a certificate of registration as a pharmaceutical chemist under said Pharmacy Act, on and previous to the 23rd day of June, A.D. 1915, did open and continuously keep open at Halifax in the county of Halifax a certain shop known as "The Windsor Street Pharmacy" for retailing, dispensing and compounding all or some of the drugs and medicines and articles mentioned in schedule "A", Parts I. and II., of the said Pharmacy Act."

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I am of opinion that the charge of keeping open a shop for retailing in the last paragraph constitutes but one offence for the whole period. Mott's evidence of a purchase on that date is not sufficient proof of this charge.

But it is contended that the plaintiff may at the hearing of this appeal by shifting this charge to a different date or amending support the recovery of the penalty.

True, Mott is confined to the 23rd of June, 1915, the date of his purchase, but then D. L. Tremaine, the defendant's assistant, was called by the plaintiff, no doubt, to corroborate Mott, which in this kind of case is sometimes advisable, or to give evidence, as to a previous conviction; and it is now contended his evidence will support an offence for a different date. For this indulgence of shifting to another date, great reliance is placed on the general words in the count "on and previous to the 23rd day of June, 1915."

Turning to this phase of the case, one must first look at the statute. The provision on which this charge is founded is N.S. Laws 1912, ch. 11, sec. 21:—

"No person . . . shall sell or . . . keep open shop for retailing, dispensing poisons, drugs or medicines or sell or keep for sale or attempt to sell any of the articles mentioned in Schedule 'A' . . . unless such person is registered as a pharmaceutical chemist under this Act, and is the holder of a certificate of registration as a pharmaceutical chemist under the provisions of this Act for the time during which he is selling or keeping open shop for retailing, dispensing or compounding poisons, etc."

Section 27 provides that:—

"Every person who, by act or omission, violates any of the provisions of this Act, shall for the first offence be liable to a penalty of $20 and for every subsequent offence shall be liable to a penalty of $40.

"2. Every such penalty may be sued for as a private debt at the suit of the Council or the Society in a County Court . . . or before any stipendiary magistrate . . . which penalty and costs . . . may be enforced by execution, provided . . . that the Council or Society may at their option . . . recover such penalties under the Nova Scotia Summary Convictions Act."

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There is no express provision in this Act in respect to penalties in respect to each day.

For the opinion that the provision against which the second charge is aimed does not contemplate a penalty of $20 for each day the person keeps open shop, but is for the whole period previous to the action, I rely upon two cases, particularly *Garrett* v. *Messenger*, L.R. 2 C.P. 583, and *Marks* v. *Benjamin*, 5 M. & W. 565. In the latter, Parke B. says: "There must be something like an habitual keeping of it which, however, need not be at stated interval."

In *Garrett* v. *Messenger*, L.R. 2 C.P. 583, the statute provided that every person keeping such house (for public dancing, music) without such license as aforesaid (an annual license) shall forfeit the sum of £100 to such person as will sue for the same, etc.

Declaration that the defendant was indebted in the sum of £100 for keeping a house for public dancing and music without the requisite license. Another action was brought by Frailing, also a common informer. These actions were tried by Willes, J., and a verdict was taken for the plaintiff in *Frailing's* case. And Willes, J., ruled that the penal powers of the Act were exhausted by the recovery of one penalty and he directed a verdict to be entered for the defendant.

The argument for the plaintiff was, under this statute:

"A penalty is incurred for each day on which the house is kept open for the prohibited purpose . . . Here the evidence showed a continuous keeping open the house for music and dancing, for a very long period of time and during two licensing periods. The defendant committed a fresh offence on each day that he allowed the music to go on. . . There is nothing to prevent a second action being brought by another person for a separate and distinct offence."

"Bovill, C.J.:—I quite concur in the view taken by brother Willes, namely, that one penalty only was incurred by the defendant for keeping open his house for a purpose prohibited by the statute and that he did not thereby subject himself to cumulative penalties from day to day. If the legislature had intended that there should be more than one penalty that intention would, no doubt, have been expressed in clear and unequivocal terms. The question whether an additional penalty was incurred for

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keeping open the house for music and dancing during the second licensing year does not arise in this case."

Byles, J., also delivered an opinion and Keating and Montague Smith, JJ., concurred.

In *Milnes* v. *Bale*, L.R. 10 C.P. 595, Brett, J., says:—

"In *Garrett* v. *Messenger* (L.R. 2 C.P. 583) the offence charged was keeping open an unlicensed place. It is not keeping it open for an hour that is the offence. The offence is the keeping a house to be used as a house of entertainment without a license, which is a comprehensive offence to be proved by many acts.

According to the case of *Marks* v. *Benjamin*, 5 M. & W. 565, it is necessary in the case of a charge of this sort to give evidence of more than having the house open for a short period or in a particular instance. In such a case a penalty cannot be imposed for each act, because each act is not a separate offence. So in *Pilcher* v. *Stafford*, 4 B. & S. 775, the ground of the decision was that there was only one offence, namely, leaving a child unvaccinated for a certain period and consequently there could only be one penalty. Again, in *Crepps* v. *Durden* (2 Cowp. 640), the offence contemplated was exercising the ordinary calling on Sunday. It was not the doing of one isolated act that would be evidence of the committal of the offence, but several acts might be given in evidence to prove one offence."

I also refer to *Apothecaries Company* v. *Jones*, [1893] 1 Q.B. 89, where the language of the statute was:—

"Any person who shall act or practise as an apothecary without a certificate is liable to a penalty for every such offence." Held, that the words 'act' or 'practise' as an apothecary were directed against an habitual or continuous course of conduct and the defendant was not guilty of a separate offence in attending each of the three persons and was only liable to one penalty.

Of course that case, like *Crepps* v. *Durden* (2 Cowp. 640), related to several charges or offences on one day, but the reasoning is quite applicable to the phraseology here.

The headnote of *Pilcher* v. *Stafford*, 4 B. & S. 775, already mentioned, is another case; it is as follows:—

"Where a parent or person having the care, nurture or custody of a child has incurred and paid the penalty for neglecting to have it vaccinated within the time specified by statute (mentioning it)

a continuous neglect to have it vaccinated is not a further breach of the statute."

Now I think that the language of the statute which I have quoted is like that of some of the cases cited, if not all of them.

There is nothing expressly providing a penalty for every day of keeping open shop as there is for sitting in Parliament, for instance, *Forbes* v. *Samuel*, [1913] 3 K.B. 708; it is not implied. He is to hold a certificate for the time during which he is keeping open shop for retailing, etc. And I think this case is within *Garrett* v. *Messenger* (L.R. 2 C.P. 583), which supported the opinion of Willes, J., a great Judge.

I can understand now, if this is so, why the learned County Court Judge ordered particulars of dates and so on for the several offences of selling, but none under this charge, namely, because it was but one offence.

If this is the correct view, then there is no notice for a day to which this offence charged can be shifted.

I think that it is much too great an indulgence in an action for penalties to allow the plaintiff in order to recover more penalties to shift to another date on the strength of language in a pleading going for a penalty containing such words as "before and after."

I say that the pleading for that other day is not in law a sufficient allegation or notice for that other day.

This defendant may possibly be tried again. I notice in these proceedings that later actions do go for earlier penalties. What day is fixed that will enable him to set up as a defence a previous recovery against him?

That is not sufficient notice under any system of pleading. The spirit of the Judicature Act requires at least fair notice. It is like the case of *R.* v. *Dixon*, 10 Mod. 335, mentioning a date and adding "and on divers other days and times," etc., "as well before and after, kept a common gaming table." There the statute expressly provided for 40s. per day. *The Court:* "Keeping a common gaming house any part of the day is enough, indeed more days might have been laid; for the time is so uncertain as to all but one day, that only 40s. recoverable."

The "divers days and times" are considered mere surplusage: *Wells* v. *Commonwealth*, 12 Gray 328.

It is suggested that these penalties being recoverable as debts by the statute itself and being sued for under the Judicature

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Act, a decision in respect to a penalty recoverable by a criminal proceeding does not apply. I do not assent to that view. While the penalties are recoverable as debts it is an action of a penal nature and the requirements might be quite as strict in the one case as the other.

In *Forbes* v. *Samuel*, [1913] 3 K.B. 738, an action to recover penalties for sitting in Parliament when disqualified as a contractor with the government, it appears that the wrong statute was referred to. Scrutton, J., said:—

"But it is said that since the Judicature Act pleadings need only contain facts and not law and that the misrecitals and claims under the Act of 1782 are merely surplusage and the Court is bound to know under what public Act the penalty is really claimed. I am disposed to think that if the informer for a penalty merely stated facts and claimed a penalty his claim would either be struck out as embarrassing or he would be ordered to state under what statutes he claimed and that if he did allege a claim under the wrong statute his claim would fail at the trial . . ."

An amendment was applied for.

"But he then applies for an amendment . . . I do not wish to lay down that no amendment should ever be allowed in a claim under a penal statute . . . He thought he had a discretion to amend but refused it and he cites *Ex parte Swift*, 3 Dowl. 636.

I may add that in the later case there were particulars in the statement of claim of the dates the defendant sat and voted in the House of Commons.

On this hypothesis particulars were refused by the Judge upon this charge in the case when they should have been ordered; and as the plaintiff must have been the means of defeating the applications, I think he ought not to be allowed on the appeal to shift his charge to a date other than the one fixed date given, on the strength of "before and after" (and which counsel on the other side would understand to be the one he was really going for), to some other date to meet the exigency of the necessity of securing another penalty.

In the fourth action, No. 794, there are also six charges in respect to a sale of creosote, *i.e.*, on June 30th, 1915, and the charges are stated in the same way as in the actions just dealt with by me, namely, the second action No. 734 except that the

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date is different and the sale was of creosote instead of iodine. The evidence is the same for all the actions. It is not necessary for me to repeat what I have just said in respect to these charges.

In the result there will be a penalty for selling in the action number 733, $40.

In action No. 734 there will be a penalty for selling $40, and one for $40 for carrying on business under a fictitious name without using his own name, or calling the place a "Pharmacy" at plaintiff's election. I think the evidence is very slight.

What Tremaine says is, "Before the company took it over it was known as the 'Windsor Street Pharmacy'; and even Mott only says, 'I understood it was called the Windsor Street Pharmacy.'"

There is nothing in the evidence of either that he, the defendant, did "call his place of business a pharmacy." Burbidge says, "He first came and introduced himself as Mr. Cornelius A. Riordan, Windsor Street Pharmacy . . . He told me himself that he was Cornelius Riordan of the Windsor Street Pharmacy." But on what date?

In action 793 there will be a penalty for selling of $40.

In action 794 a penalty for selling $40 and a penalty of $40. (Same alternative as in action No. 734.)

The appeals will be allowed in the four actions and the judgment varied as I have intimated. The costs will be distributed. Where the plaintiff recovers but $40, his costs will be taxed on the lower scale but the defendant's will be on the higher scale.

I agree that there can be only costs for plaintiff in two actions and but one argument, also one trial.

Drysdale, J.
Chisholm, J.

DRYSDALE and CHISHOLM, JJ., concurred.

Harris, J.

HARRIS, J.:—The plaintiffs sued the defendant in the County Court at Halifax for the recovery of penalties for various breaches of the "Pharmacy Act," ch. 11 of the Acts of the Legislature of Nova Scotia for the year 1912 as for second offences in each case. There were four actions and they were all tried together. In the first action, which was A. No. 733, there were two claims: (a) For a penalty of $40 under secs. 21 and 27 of the Act for selling all or some of the articles mentioned in Schedule A. of the Act on July 9th, 1915, and, (b) For a penalty of $40 under secs. 18 and 27 of the Act for dispensing and compounding prescriptions of

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duly qualified medical practitioners and for selling all or some of the poisons, drugs, and medicines included in the schedule of the Act on the 9th July, 1915.

In both cases it was alleged and proved that the defendant was not registered as, and was not, a pharmaceutical chemist under the Act.

The evidence was that on the 9th July one Harold Mott had bought from the defendant half a dozen aspirin tablets.

The learned County Court Judge, on this evidence, gave judgment for two sums of $40, one under each of the claims. On argument of the appeal it was admitted by counsel for the plaintiffs that the claim for dispensing and compounding could not be upheld.

There were appeals in the four actions and they were all heard together. In my opinion, none of the objections urged affect the judgment for the $40 for selling under (a), which was paragraph 2 of the plaintiff's statement of claim, and the plaintiff company is entitled to judgment for that amount.

In the second action, No. 734, there were six claims:—

(a) A penalty of $40 under secs. 21 and 27 of the Act for that the defendant did on and previous to the 23rd June, 1916, open and continuously keep open at Halifax a shop . . . for retailing, dispensing, and compounding drugs, etc.

(b) A penalty of $40 under secs. 21 and 27 of the Act for selling all or some of the articles mentioned in the Schedule to the Act on the 23rd day of June, 1915.

(c) A penalty of $40 under secs. 21 and 27 of the Act for keeping for sale all or some of the articles mentioned in the schedule to the Act on the 23rd day of June, 1915.

(d) A penalty of $40 under secs. 19 (2) and 27 of the Act for carrying on business under a firm or fictitious name, without the name of the proprietor or manager being added or publicly or conspicuously displayed on the premises on and previous to and since the 23rd day of June, 1915.

(e) A penalty of $40 under secs. 21 and 27 of the Act for calling his place of business the "Windsor Street Pharmacy" on and since the 23rd day of June, 1915.

(f) A penalty of $40 under secs. 18 and 27 of the Act for dispensing and compounding prescriptions of duly qualified prac-

titioners and selling all or some of the poisons, drugs, etc., included in the schedule on the 23rd June, 1915.

In all these cases it was alleged and proved that the defendant was not registered as, and was not, a pharmaceutical chemist under the Act.

The evidence was that of the witness Mott, that he had on the 23rd day of June, 1915, bought ten cents worth of iodine from the defendant at his store called the Windsor Street Pharmacy. There was also evidence of D. L. Tremaine, a registered druggist, continuously in the employ of the defendant at the time and for eleven months before, who stated with reference to the defendant's store that it is and was a drug store: "Has all the appearance of a drug store. The usual drug stock is kept there, including iodine, creosote and tablets." He also said that there was no certificate in the building to shew that the defendant was a chemist or certified clerk, and that there had not been any such certificate during the eleven months he was employed in the shop. There was also evidence as to the name, Windsor Street Pharmacy, and that the name of the proprietor was not exhibited.

The learned County Court Judge gave judgment against the defendant on this evidence for $40 in respect to each of the six charges.

Counsel for the plaintiff on the appeal admitted that only one penalty could be collected in respect to the charges (b) and (f). He made the same admission respecting (d) and (e). This disposes of two of the six claims.

It is, I think, clear that a person is not liable for selling and also for keeping for sale when the only evidence of keeping for sale is that of the sale upon which he has been convicted. In *Regina* v. *Marsh*, 25 N.B.R. 372, Allen, C.J., in giving the judgment of the Court, said:—

"A man may be convicted for keeping liquor for sale though he has never sold any. But as the selling of liquor would involve the keeping it for sale, if a person was convicted for selling liquor on a particular day we think he could not afterwards be convicted on the same evidence for keeping it for sale on that day—the evidence of his keeping it for sale being that he had sold it."

It was argued that Tremaine's evidence shewed a keeping for sale on other days, but the plaintiffs delivered particulars and

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they are limited by their particulars to a keeping for sale on the 23rd day of June, 1915, of the one article, iodine. The evidence of Tremaine is perfectly consistent with the idea that the only iodine kept for sale on that day was that sold to Mott and in respect to the sale of which a penalty has already been imposed, and I am, therefore, of opinion that the penalty for keeping for sale cannot be imposed.

With regard to the first charge in this action, that of keeping open a shop for retailing, dispensing and compounding drugs on and previous to the 23rd June, 1915, it is, I think, clearly proved by the evidence of Tremaine. As the charge is laid for an offence on and previous to the 23rd June, 1915, it is unnecessary to consider whether if the only evidence had been of keeping open a shop on the 23rd June, 1915, the defendant would have been liable. I express no opinion on that. It does not arise. The charge is not restricted to that day but includes days previous to the 23rd June and the evidence of Tremaine clearly establishes an offence.

There remains the question as to whether the defendant is liable under the charges (d) or (e), that is, for carrying on business under a firm or fictitious name, without the name of the proprietor being conspicuously displayed, or for calling his place of business the "Windsor Street Pharmacy." It will be seen that under one paragraph the offence is charged as having been committed on and previous to and since the 23rd day of June and in the other paragraph the allegation is "on and since the 23rd June."

Under the evidence of Tremaine I think the defendant is liable for the offence charged and that it is impossible to say that it is covered by any of the other charges in respect to which a penalty has been imposed. The period after June 23rd and before the issue of the writ has not been covered by any of the other charges.

It is suggested that the decision in *Garrett* v. *Messenger*, L.R. 2 C.P. 580, and similar cases governs this case, but I am unable to agree with that contention. In that case there was only one offence covered by the Act, *i. e.*, keeping a house without a license, and once a penalty was inflicted for that offence the Court held the Act to be exhausted. With the greatest deference I am unable to agree that this has any application where as here the legislature has expressly specified several distinct and separate offences and prescribed penalties for each. In my opinion, if a

penalty is imposed for a sale on a particular day of drugs in contravention of the Act, that does not exhaust the Act so as to prevent a conviction for previously (on other days) keeping open a shop for selling drugs without being registered, nor does it prevent a conviction for subsequently (on later dates) violating another section of the Act.

I, therefore, decide that defendant is liable to a penalty of $40 for violation of charge (d).

The result is that in this action the defendant is held liable to three penalties of $40 each under paragraphs 2, 3, and 5 of the statement of claim, and that the judgment as to the penalty under the other three paragraphs, 4, 6, and 7, of the statement of claim will be set aside.

In the third action, No. 793, there were two claims: (a). For a penalty of $40 for selling aspirin on the 9th August, 1915.

(b). For a penalty of $40 for dispensing and compounding aspirin on the 9th August, 1915.

The evidence showed a sale of aspirin by the defendant to Mott on the 9th August, 1915.

The learned County Court Judge gave judgment for a penalty of $40 on each charge.

On the argument counsel for the plaintiff admitted that the judgment under (*b*) could not be upheld. The charge under (*a*) was proved, and in respect to that the judgment ought to stand.

A question was raised in this case that on the date of the sale in question the business was carried on by a joint stock company and that the company and not Riordan was liable. The business was transferred to the company about the 20th July, 1915.

Section 21 (1) of the Act provides that "no person whether proprietor or employee shall sell, etc." and (2) provides that "An incorporated company shall be deemed to be a person under this section, etc., unless a majority of the directors of such company are duly registered as pharmaceutical chemists under this Act, etc., etc."

A majority of the directors of the company were not duly registered as pharmaceutical chemists and the company is to be deemed a person under 21 (1) and the defendant is, I think, clearly liable as an employee. I think the objection fails.

In the fourth case, No. 794, there were six claims—exactly

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the same as in the second action, that numbered 734, except that the date of the offences was given as "June 30th, 1915," instead of "June 23rd, 1915."

There was evidence that Mott had on June 30th, 1915, purchased creosote from the defendant and the evidence of Tremaine already referred to was relied upon.

The learned County Court Judge gave judgment for the plaintiff for $40 in respect to each of the claims.

On the argument of the appeal the same admissions were made and all that I have said with regard to the various claims in the action No. 734 (subject to the change of dates) applies to this action and the various claims.

The result is that the defendant is relieved of the same three of the penalties as in the action 734, and the judgment as to the other three will stand.

A number of questions raised on the argument were disposed of at the time. There is one, however, referred to in the decision of the learned County Court Judge about which I think I should say something. On the trial it appeared that Mott, the witness in all the cases, had been sent by Mr. George A. Burbidge, the registrar of the plaintiff society, to make the purchases for the purpose of getting information upon which to base the actions. Mr. Burbidge was a registered chemist, but he swears that the drugs in question were bought for the plaintiff society. Section 24 (1) of the Act permits sales to be made to a duly qualified chemist by an unlicensed person and it was contended that as Mott was sent by Burbidge the sale was really to Burbidge and was therefore permitted under sec. 24 (1). The short answer, I think, is that it was a sale to the plaintiff society through Burbidge as an officer of the society, and not to Burbidge personally, and the section therefore has no application to it.

There remains for consideration the question as to the costs of the actions. The two actions, 733 and 734, were commenced on July 12th, 1915, and the other two were commenced on August 12th, 1915. There should, in my opinion, have been only two actions instead of four. If a plaintiff sees fit to bring two actions where one is sufficient, he can, of course, succeed in the actions, but he can get only one set of costs. The plaintiff company should, therefore, have no costs in the actions No. 733 and 793 but should get declaration costs in Nos. 734 and 794 (except on

the issues upon which it has failed). The defendant should have costs on the issues on which he has succeeded in 733 and 793 on the summary scale and in 734 and 794 on the higher scale, and the defendant's costs should be offset against the plaintiff's judgment in each case.

The defendant having been compelled to appeal, and having substantially succeeded, should, I think, have the costs of the appeal, but only one set of costs as the cases were all heard together. *Judgment below varied.*

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. July 19, 1917.

BILLS AND NOTES (§ V B—135)—ALTERATION—"APPARENT"—HOLDER IN DUE COURSE.

An unauthorized insertion of an interest clause in a promissory note after the making thereof, is a material alteration, but will not affect the rights of a holder in due course acquiring the note after the insertion if the alteration is not "apparent" within the meaning of sec. 145 of the Bills of Exchange Act, R.S.C. 1906, ch. 119.

APPEAL from a judgment for plaintiff in an action on promissory notes. Affirmed. Statement.

I. Pitblado, K.C., and *H. P. Grundy*, for defendant.

W. P. Fillmore, for plaintiff.

HOWELL, C.J.:—The plaintiffs are the holders in due course of the promissory notes, the subject matter of this suit. Howell, C.J.M.

After the making of the notes, and before the negotiation thereof, a clerk, apparently without authority, changed the notes by writing in each one the words "with interest at the rate of eight per cent." These words were inserted in the proper place in the form if interest was originally intended to be provided for in the notes. A close examination of the notes, it seems to me, would show that these words are in a different handwriting from the remainder in each of the notes, but to discern this would require a close careful scrutiny. I do not think that I would notice this if my attention was not called to it.

Now, under those circumstances, is the plaintiff entitled to recover under the last clause of sec. 145 of the Bills of Exchange Act?

In the case of *Leeds Bank* v. *Walker*, 11 Q.B.D. 84, at 91, Lord Denman laid down a proposition of law which I do not understand. Some Judges have taken it to greatly restrict the meaning

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of the word "apparent" in that section. In the decision of that case it was not in any way necessary to construe the corresponding English section of the Bills of Exchange Act, nor to give any meaning to the word "apparent" therein, and Armour, C.J., in *Cunnington* v. *Peterson*, 29 O.R. 346, refused to follow it, and the same course was apparently taken in *Maxon* v. *Irwin*, 15 O.L.R. 81, 87, and in *Scholfield* v. *Londesborough*, [1894] 2 Q.B. 660, 663.

Parliament in using the words "Provided that where a bill has been materially altered, but the alteration is not apparent" was endeavouring to protect the ordinary holder in due course in the ordinary business of life. The transferee is not required to apply a microscope nor to call in someone skilled in handwriting to see if there had been some alteration. In this case I do not think the alteration is apparent, and it was not at all likely to attract attention. The language in the last sentence I have copied from the case last above referred to at p. 666.

After looking carefully at the note, I think the alteration is not apparent within the meaning of the Act, and in using this language I am but repeating language used in the Ontario Divisional Court in *Maxon* v. *Irwin*, 15 O.L.R. 81, 87.

These cases give a meaning to the word "apparent" used in the Act and justify me in holding that the plaintiff is entitled to recover.

The appeal is dismissed with costs.

Perdue, J.A.

PERDUE, J.A.:—By an agreement dated December 16, 1912, the plaintiffs Black, Robertson and Dagg agreed to sell to the East Winnipeg Industrial Properties, Limited, which I shall refer to as the company, certain lands in the Roman Catholic Mission property, St. Boniface, Manitoba. On December 16, 1913, there fell due, under the terms of the agreement, an instalment of principal and interest, amounting to the sum of $37,190. There was also owing on the agreement, but not yet due, the further amount of $118,896, with interest at 6% per annum. The company applied for an extension of time for payment of the moneys overdue, and an agreement, dated April 13, 1913, was executed between the parties by which an extension was granted by the plaintiffs on certain terms which the company agreed to fulfil.

The company agreed, in consideration of the extension, to pay the amount in arrear by instalments commencing on August 15,

1914, and ending on May 15, 1915, with interest at 8% per annum. Terms of payment for the moneys not yet due were also set forth in the agreement. The company agreed to give the plaintiffs three promissory notes made by itself payable at 4, 6 and 8 months for sums amounting in the aggregate to $20,000, bearing interest at the rate of 8% per annum. The company further agreed, as one of the terms of the extension, to transfer, indorse and deliver to the plaintiffs certain promissory notes made by certain persons, which notes should be approved by the plaintiffs, to the amount of $16,750, payable respectively, 4, 6 and 8 months after their respective dates. Nothing was said as to interest upon these notes. All the notes were to be taken by the plaintiffs as collateral security for the payment of the moneys owing under the original agreement and the extension agreement. In accordance with this term of the agreement, notes of certain persons payable to the company and indorsed by it were delivered to the plaintiffs. These notes amounted in the aggregate to the above last mentioned amount. Three of these notes amounting to $1,000 were signed by the defendant and are the notes in question in this suit.

The main defence in this action is that after the defendant had signed the notes a material alteration was made in them without his authority or consent thereby rendering them void. The alteration claimed to have been made was the insertion of the words "with interest at the rate of eight per cent." in the body of the note immediately after the word "dollars."

By the first part of sec. 145 of the Bills of Exchange Act a material alteration in the bill voids the instrument except against the person who made, authorized or assented to the alteration, and subsequent endorsers. The alteration in the present case was a material one. See *Warrington* v. *Early*, 2 El. & Bl. 763 (118 E.R. 953); *Bank of B.N.A.* v. *Robertson* (1917), 36 D.L.R. 166. It was shewn that the alteration was made in the notes after they had been signed by the defendant, but before delivery to the plaintiffs. The alteration was made by a clerk in the office of the secretary and solicitor of the company. The evidence does not shew why the alteration was made, or who, if anyone, directed it to be made. The defendant denies that the words relating to interest were in the notes when he signed them and states positively that he never authorized the alteration.

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The plaintiffs to succeed must bring themselves within the proviso to sec. 145. This is as follows:—

> Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

The alteration made in the notes in question in the present case is made in a handwriting which so nearly resembles that of the original notes as not to be distinguishable from it except upon a close scrutiny. An examination of the notes such as would ordinarily be made by a person purchasing or dealing with them would not disclose the difference in the handwriting. Mr. Pentland, the manager of the Royal Bank in this city, who had wide experience in dealing with promissory notes, made a careful examination of the notes such as would be made if they had been brought to him by a customer. In giving evidence he stated that the notes appeared to be regular in every way. It appeared to him that the handwriting in the words referring to interest was the same as that in the body of the notes. He was of opinion that in one of the notes the capital letter "L" of the signature had been written over a part of the letter "h" in the word "the" one of the words contained in the alteration. I think that anyone making a careful examination of the note by ordinary vision, without the aid of a microscope, would be of the same opinion, and would be led to the conclusion that the note was signed after the word referring to the interest had been written in it. A person examining the notes carefully and looking for irregularities might by the appearance of the signature in the above note be led to conclude that the note was regular, and, if one note was regular, that the others were regular also.

Defendant's counsel relied upon a dictum of Lord Denman in *Leeds Bank* v. *Walker* (1883), 11 Q.B.D. 84, as to the meaning of the word "apparent" in sec. 64 of the English Act, corresponding to our sec. 145. He said: "By the word 'apparent' I do not think it is meant that the holder only should not have had the means of detecting the alteration. If the party sought to be bound can at once discern by some incongruity on the face of the note, and point out to the holder that it is not what it was, that is to say, that it has been materially and fraudulently altered, I think the alteration is an apparent one, even if it is not an obvious one to all mankind." I think there are two reasons why that broad interpretation is not

applicable to the present case. In the first place, it was a mere dictum, and not necessary to the decision of the case, which was disposed of upon other grounds. In the next place, the instrument under consideration was a Bank of England note in which the number and date had been altered by some person who had previously been in possession of the note. If the dictum were made applicable to the maker of a promissory note the alteration would at once be "apparent" to him when the note was presented, because he would know that an alteration had been made in it after he had signed it. The protection to holders in due course provided by the section would therefore be defeated in all cases where the party sought to be bound was the maker of the note.

The dictum of Lord Deaman in the *Leeds Bank* case was not followed in *Scholfield* v. *Earl of Londesborough*, [1894] 2 Q.B. 660, [1896] A.C. 514, and was disapproved of by the Divisional Court in *Cunnington* v. *Peterson*, 29 O.R. 346, and again in *Maxon* v. *Irwin*, 15 O.L.R. 81.

I think that where an alteration in a promissory note is not disclosed by the ordinary inspection made by a man who is giving value for it, and who exercises ordinary care and possesses ordinary faculties, then the alteration is not apparent in the sense of sec. 145. It is not necessary that an expert should be on hand provided with a powerful microscope. If I am right in this view of the section the plaintiffs are entitled to the protection provided by it. They were taking over a considerable number of promissory notes, which were furnished by the company in accordance with the terms of the extension agreement. They had no reason to suspect fraud or illegality, or to specially scrutinize the notes to discover irregularities.

The decision in *Hébert* v. *La Banque Nationale*, 40 Can. S.C.R. 458, does not assist the defence in the present case. There, the alteration in the note was made by one of the joint makers with the knowledge of the bank. The party making the alteration falsely represented to the bank that the other joint maker had assented to the alteration, and the bank relied on that representation. The proviso in sec. 145 did not, therefore, apply and was not relied upon.

It was urged by the defence that it was a suspicious circumstance that the notes sued on should bear interest when the agree-

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ment did not require them to bear interest, and that this should have put the plaintiffs on enquiry as to why the interest clause was inserted. But the agreement does not say the notes shall be without interest. It is merely silent on the matter of interest, so far as the personal notes are concerned, but it states that the notes to be given by the company shall bear interest at 8% per annum. The recollection of the party receiving the notes on behalf of the plaintiffs may have been confused as to which set of notes bore interest, and he may therefore have received the notes in good faith and without his attention being attracted to anything that might arouse suspicion.

I think the evidence establishes that the plaintiffs were holders in due course.

It was urged very strongly on the part of the plaintiffs that even if the unauthorized alteration had been made in the notes by the company's solicitor's clerk, his act, being that of a stranger, did not avoid the notes, and that they might be sued upon in their original form, relying upon *Waterous* v. *McLean*, 2 Man. L.R. 279; 2 Corp. Jur. 1233-1237. I think that much may be said in favour of this contention, but I do not think it necessary to fully consider it, as the appeal can be disposed of under sec. 145 of the Bills of Exchange Act.

I would dismiss the appeal with costs.

Cameron, J.A.

CAMERON, J.A., concurred with Perdue, J.A.

Haggart, J.A.

HAGGART, J.A.:—This case depends upon the interpretation we should give to three sections of the Bills of Exchange Act, ch. 119, R.S.C. 1906.

The sections in question are secs. 56, 145 and 146. Sec. 56 enacts that:—

> A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—
>
> (*a*) that he became a holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact;
>
> (*b*) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

Under sec. 146 there is no question that the addition of the words "with interest at the rate of 8 per cent." would constitute a material alteration.

Now, it seems to me the important question is here, does the proviso in sec. 145 protect the title of the plaintiff? To have

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reached the conclusion arrived at, the trial Judge must have found that the plaintiff became the holder in due course, that he became such holder *bonâ fide* for value without notice, and there is evidence to support such findings.

The alteration, I do not think, was apparent. The banker gave evidence to that effect, and the trial Judge accepted that evidence.

The extension of time for the payment of the instalments of the purchase money was valuable consideration, and under that proviso the plaintiff, being a holder in due course, is entitled to enforce payment of the notes according to their original tenor, which was the judgment entered by the trial Judge.

Such being my conclusion, I do not think it necessary to consider the other grounds urged by the appellant.

I would dismiss the appeal. *Appeal dismissed.*

B.C. ELECTRIC R. Co. v. CITY OF VICTORIA; Re PANDORA Ave.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin and McPhillips, JJ.A. June 5, 1917.

MUNICIPAL CORPORATIONS (§ II H—265)—LOCAL IMPROVEMENTS—NOTICE OF ASSESSMENT—SUFFICIENCY.

A notice of assessment for local improvements is sufficient if when published it signifies, as required by statute, an "intention of making such assessments," and those affected are benefited by the proposed work of improvement.

Statement.

APPEAL by plaintiff from the judgment of Clement, J., refusing an order for prohibition. Affirmed.

H. B. Robertson, for appellant; *McDiarmid*, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A. (dissenting):—I think the order for prohibition should go. The improvements in question were initiated by the council under the provisions of the Municipal Clauses Act as it existed at the time, namely, 1911. The statute required notice of the proposed assessment to be published in a newspaper. A notice was published, but in my opinion, it was not a sufficient notice. It merely stated a proposal to extend Pandora Ave. from Fernwood Road to MacGregor St., and to widen it at Chambers St. The appellants' lot is situated 4,400 feet from the proposed extension, though a lesser distance from the proposed widening. There is nothing in the notice from which the appellants or their predecessor in title ought to have inferred that it was proposed to assess their lot for the cost of the improvements.

No notice was served personally upon the owners of lots pro-

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posed to be assessed, and hence it cannot be said that the published notice was supplemented by service of a notice upon owners. Such service is not required by the Act, but it appears to have been suggested in argument that there had been such. The evidence clearly disproves this.

When the council initiates an improvement of the kind in question and publishes a proper notice that it is proposed to assess certain lands in connection therewith, the owners have the right to petition against the same and may defeat the scheme altogether. In the face of a sufficient petition the council would have no jurisdiction to undertake the work as a local improvement. The notice in question is required for the purpose of apprising owners that they are affected by the scheme, so that they may have an opportunity to petition against it. It therefore appears to me that a proper notice lies at the very threshold of the council's jurisdiction to proceed with the work, or at all events to assess the cost of it against adjacent owners' lands.

The general local improvement by-law does not purport to assess the lands embraced in the local improvement scheme. It contemplates the passing of another by-law to effectuate this, and that by-law is usually passed before the work is undertaken. In this case, however, the council thought it best to wait until the work should have been completed and the total cost ascertained before passing such a by-law.

By-law 215, the one in question in this appeal, simply authorized the work to be done. It made no provision for assessment or the levying of a special rate, or the raising of the necessary fund by the issue of debentures.

If, therefore, the council were proceeding under the law as it stood before the passing of the Local Improvement Act (1913), ch. 49, they were under the necessity of passing an assessment by-law, when, and when only, could the assessment be brought before a Court of Revision for review. Such a by-law has never been passed.

The council were permitted by sec. 55 (2) of the above mentioned Act to continue proceedings commenced before the Act under the provisions of the former Acts applicable thereto, and their counsel stated at bar that the respondents were proceeding under the local improvement clauses of the Municipal Act and

not under the Local Improvement Act. If that be accepted as the fact, then, apart from the insufficiency of said notice, the Court of Revision has no jurisdiction in the premises because the necessary assessment by-law is lacking.

If, on the other hand, counsel for the respondents are mistaken, which I think they are, in thinking that the proceedings are being carried on under the Municipal Act—not under the Local Improvement Act, and assuming that the latter Act is applicable, though I do not so decide, it being unnecessary in view of the conclusion to which I have come, and in view of the course of argument before us, undesirable to do so, then no assessment having yet been made, the Court of Revision is asked to review a *proposed* assessment. Contrary to the procedure under the Municipal Act, but in conformity with that under the Local Improvement Act, it would be the Court of Revision which would make the assessment, not the council. The argument therefore addressed to validating sections in the statutes, and to laches or acquiescence are beside the mark. The appellants come promptly to oppose a threatened assessment by attacking the jurisdiction of the Court of Revision on the ground that conditions precedent to its jurisdiction were not performed.

The Judge, from whose order this appeal is taken, thought that prohibition was not the appropriate remedy. It appears to me, however, that the want of jurisdiction in the Court of Revision is patent on the proceedings—the insufficiency of the notice is patent upon its face; but even if not so, it would not, in my opinion, be an unwise exercise of discretion to stop a proceeding at the outset—a proceeding which, if I am right in my view of its illegality, would entail multiplicity of actions, and perhaps, in view of sec. 38 of the Local Improvement Act, make other resistance difficult, if not impossible.

Martin, J.A.

MARTIN, J.A.:—Several questions are raised on this appeal but from my point of view it is only necessary to consider one of them because I am of the opinion that the notice, which is the chief ground of complaint, is a sufficient compliance with the statute which only requires that the council shall publish "a notice signifying its intention of making such assessment." That intention clearly appears from the notice, and it is as clear to me that the appellants are among those who would be benefited

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by the contemplated work of improvement. It is always a question of fact and degree to determine in each case the extent of the benefit to the owners; in some cases it would have a very limited extent, such as in a street which was a *cul de sac*, while in others, as here, the conversion of a crooked street which branched off and lost itself in the suburbs, into a straight main trunk highway connecting two municipalities would extend its benefits to a great length, and would unquestionably cover the appellants' property which is only some 3,500 feet from the point where the first part of the work (the straightening of Pandora Ave. at the corner of Chambers St.) began.

It follows that the appeal should be dismissed.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I have arrived at the same conclusion as my brother Martin—that the appeal should be dismissed.

Appeal dismissed.

MAN.
K. B.

HANEY v. CANADIAN NORTHERN R. Co.

Manitoba King's Bench, Curran, J., July 17, 1917.

ARBITRATION (§ III—16)—AWARD—AMALGAMATION OF COMPANIES—TENDER OF CONVEYANCE—RAILWAY ACT.

An amalgamation under the Dominion Railway Act (R.S.C. 1906, ch. 37, secs. 361-3) will not affect a pending arbitration proceedings under a provincial statute, and the award may be enforced against the amalgamated company; a tender of a conveyance of the expropriated land is not a statutory pre-requisite to the validity of the award.

Statement.

ACTION to enforce an award.

O. H. Clark, K.C., for defendant.

Curran, J.

CURRAN, J.:—The plaintiff is the owner of the lands in question which are crossed by a line of railway operated by the defendant company. Construction of this railway was authorized by special Act of the Manitoba legislature, ch. 122, 5 & 6 Edw. VII., intituled An Act to Incorporate the Winnipeg and Northern R. Co., assented to on March 16, 1906, from some terminal point on the east side of the Red River in or near the City of Winnipeg northwards and on the east side of the Red River to a point at or near East or West Selkirk and from there to Fort Alexander, touching, if desired, any point or points on Lake Winnipeg, etc.

The several clauses of the Manitoba Railway Act and of the Manitoba Expropriation Act were by sec. 13 incorporated with and deemed to be a part of the Act, except insofar as they may be inconsistent with the express enactments thereof.

Sec. 13*a* of the special Act provides that the company "shall

make fair and full compensation to all owners of property which may be taken, used, flooded or injuriously affected by any of its works and shall have the right to use and acquire all such properties on payment therefor the amount or amounts to be ascertained and determined under the provisions of the said Railway Act and the said Expropriation Act, so far as they can be made to apply in the event of a disagreement as to price;" subject to certain specified exceptions, which do not apply here.

Powers of amalgamation were conferred by sec. 23, and in case of amalgamation the amalgamated company was to be vested with all rights of exercising the powers, privileges and franchises and rights of the companies entering into the amalgamation agreement.

The company was not organized until 1911 and had no assets except its charter, and nothing had been paid on the stock subscribed for.

In June, 1911, an arrangement was made between Capt. William Robinson, who had secured, paid for and virtually owned this charter, and Sir Wm. Mackenzie, president of the Canadian Northern Railway Co., to turn over to him, or to that company, it is not clear which, the charter, for what it had cost him, namely, $1,033, on condition that construction of the railway would be proceeded with at once.

A cheque of Mackenzie, Mann & Co., Ltd., for the $1,033 was sent to Capt. Robinson by Hugh Sutherland, the executive agent of the C. N. R., by a letter on June 16, 1911, and the terms of the arrangement appear in this letter. These terms were subsequently complied with and the construction of the first 50 miles of the road from a point on the C. N. R. near Bird's Hill to a point on Lake Winnipeg commenced in the Spring of 1911 under an arrangement or understanding with Mackenzie, Mann & Co., for that purpose.

This arrangement or understanding was formally ratified and confirmed by the agreement, which appears to have been approved by the shareholders of the railway company at a meeting held on April 28, 1913.

Construction was thereafter proceeded with until the Fall of 1914, when the use of the constructed road for commercial purposes was authorized.

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The constructed line of railway crosses the plaintiff's lands entitling him to compensation under the provisions of the company's special Act.

Failing to reach an agreement as to the amount of compensation to be paid, resort was had to arbitration under the provisions of the Manitoba Expropriation Act, ch. 61, the special Act, and the Manitoba Railway Act, ch. 145, in January, 1912.

Arbitrators were duly appointed as follows: D. H. Cooper, for the railway company, *i.e.*, the Winnipeg and Northern Railway; J. D. Hunt, for the plaintiff, and the third arbitrator, G. Patterson, was appointed by a Judge of this Court, on February 26, 1912, as the two arbitrators so chosen were unable to agree upon their choice of a third.

The first meeting of arbitrators was held on March 12, 1912. Many subsequent meetings, adjournments and extensions were had after that date, prolonging the proceedings until January 29, 1914, when the proceedings were closed and an award made, all three arbitrators concurring, by which the plaintiff was found to be entitled to compensation for the taking of his lands for the purposes of the Winnipeg and Northern Railway in the sum of $10,259.50. This award was taken up by Mr. Clark, of counsel for the railway company, and the plaintiff now sues the defendant company for the amount of the award.

On May 12, 1913, an agreement was entered into between the defendant Co. and the Winnipeg and Northern R. Co. for an amalgamation of the two companies under the name of the Canadian Northern Railway Co., the same having been previously sanctioned and approved by the shareholders of the latter company at a special general meeting of shareholders held on April 28, 1913. The Board of Railway Commissioners for Canada, on May 17, 1913, recommended that such amalgamation should be sanctioned by the Governor-in-Council, which was accordingly done by order-in-council dated June 2, 1913.

The first intimation to the arbitrators of the fact of the amalgamation having taken place was made to them by P. A. Macdonald, of counsel for the railway company, at a meeting held on January 28, 1914, as appears from Patterson's note-book, p. 118, in these words: "Mr. Macdonald announces that the W. & N. Ry. has been taken over by the Can. Nor. Ry. Co."

It would appear that no further evidence was taken by the arbitrators subsequent to this announcement, but that the argument of counsel on both sides did proceed and the arbitrators proceeded to consider and make their award as if the amalgamation had not taken place.

Plaintiff in his evidence before me as to this announcement swore that Mr. Macdonald stated to the arbitrators when making it that he did not think the amalgamation made any difference to the proceedings, and that he, plaintiff, relied on this statement and gave the legal situation which might be affected by the change of position no further consideration. This evidence is not contradicted.

Upon the foregoing state of facts, can the plaintiff succeed in enforcing the award against the defendant?

Reliance is placed by the plaintiff, largely, but not wholly, upon secs. 362 and 363 of the Dominion Railway Act, ch. 37, R.S.C. 1906. These sections deal with amalgamation agreements. It seems clear that the amalgamation agreement in question was sanctioned under sec. 361.

The defendant, however, contends that inasmuch as the award was made after the amalgamation had been effected, that it, the award, is a nullity insofar as fixing liability on the defendant is concerned, and while admitting that the defendant ought to compensate the plaintiff, contends that it cannot now be forced to do so except by resort to arbitration as provided for by the Dominion Railway Act. In short, that all the proceedings previously had and taken under the Provincial Acts, including the award, are nugatory, because of the amalgamation, and must all be done over again before arbitrators to be appointed and acting under the Dominion statute, whose award only, it is contended, can bind the defendants.

To support this contention, defendant's counsel cited *Darling* v. *Midland R. Co.*, 11 P.R. (Ont.) 32; *Fargey* v. *Grand Junction R. Co.*, 4 O.R. 232; and that the award is bad as made after amalgamation: *Demorest* v. *Midland R. Co.*, 10 P.R. (Ont.) 73; *Barbeau* v. *St. Catharines, etc., Co.*, 15 O.R. 586.

I have read these cases and think they are all distinguishable.

In the *Darling* case the proceedings to obtain compensation under the machinery of a provincial statute were begun after the

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railway in question had ceased to be a provincial railway and had become, by statute, a Dominion road. It was held under such circumstances that the procedure provided by the Dominion Consolidated Railway Act applied to the proceedings, and that an appeal against the award under the Ontario Railway Act could not be prosecuted. The judgment of Boyd, C., contains the following very significant passage: "As to proceedings initiated before May, 1883 (that is, whilst the railway was still a provincial railway), it may well be that the forms of procedure provided by the Revised Statutes of Ontario should govern, but after that date all proceedings for compensation under the statute are controlled, in my opinion, by the Dominion legislation." The distinction between this case and the case at bar seems to me important. Here the arbitration proceedings were initiated and much of the evidence taken before the amalgamation was effected and further proceedings were allowed to proceed by counsel for the railway company after the amalgamation had taken place without objection on his part or intimation to the arbitrators or to the plaintiff of the fact of amalgamation until all the evidence had been completed and the argument nearly so, as before stated. Practically all that remained to be done after the announcement of amalgamation was the making of the award, whereas in the *Darling* case the railway had ceased to be a provincial railway and had become a Dominion road before the proceedings were even commenced. The passage from the judgment of Boyd, C., cited seems to me to indicate that in the opinion of that Judge this fact did make a difference.

In the *Fargey* case the plaintiff sought to enforce against the amalgamated company a decree obtained against the other company before complete amalgamation. The Court held that as the old company had not ceased to exist when the decree was made, such decree was therefore legal and valid and enforceable against the amalgamated company. I fail to see how this case can be considered as an authority in point, except perhaps upon the principle that the converse of the propositions of law laid down by the judgment is equally true and good law, a thing which I am not bound to assume. The sole question there to be determined was, could a valid decree against the old company be enforced by action at law against the amalgamated company? At p. 245 of the judgment, the Court said:

If the former action had been pending in the sense of not having arrived at final judgment, when the amalgamation of the companies was effected, I have no doubt the name of these defendants might, on *ex parte* application, have been substituted for that of the Belleville & North Hastings R. Co.

Thereby, it seems to me, intimating that proceedings, initiated against the former company before amalgamation, could be continued after amalgamation against the amalgamated company so as to render the amalgamated company liable for their outcome.

The *Demorest* case does not seem to me to be in point at all, because the proceedings there were taken whilst the defendant company was still a provincial railway and, as such, subject to the provincial statutes.

In *Barbeau* v. *St. Catharines, etc., R. Co.*, 15 O.R. 586, the plaintiff sought an injunction to restrain the defendant from applying to a County Judge under the provisions of the Ontario Railway Act for a warrant of possession, on the ground that the Ontario Railway Act did not apply to the defendants' railway, because it had been declared a work for the general advantage of Canada, and the Court upheld the contention, and decided that the defendant company was no longer within the operation of the Ontario law. Here, again, the distinction exists that the proceedings were begun after the railway had become a Dominion road and had ceased to be a provincial road.

No case has been cited to me where the proceedings had been begun as here before amalgamation.

It seems clear from the cases I have referred to that where the proceedings are begun, after the railway has become a Dominion railway, that they must conform to the Dominion legislation upon the subject, but I cannot see my way clear to apply this rule to the present case. It would be strange, indeed, if the Winnipeg & Northern R. Co. could, by the simple process of amalgamation with a Dominion railway, defeat and render useless expensive arbitration proceedings initiated by itself under the provincial law which then governed, and compel a person whose land it had involuntarily taken under authority of a purely provincial Act to resort *de novo* to another tribunal constituted under a Dominion statute. I cannot think that amalgamation under the Dominion Railway Act has any such effect. I think that where an amalgamation has been effected under that Act, as here, after so much

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had been done towards settling the amount of compensation to be paid by the original company for the land taken by it, the new company ought to be bound by what had been so done properly and lawfully towards this end.

However this may be, I think the defendant is bound to compensate the plaintiff to the same extent as the old company would have been bound to do if amalgamation had not taken place. Sec. 362 not only vested in the amalgamated company the right of way over the plaintiff's land, which, at that time, had actually been taken and used by the old company, subject to the plaintiff's right to compensation, but rendered it liable for all claims, demands, obligations, contracts, agreements or duties to as full an extent as the old company was at or before the time of amalgamation.

Now, I think there was a claim, obligation and duty, if indeed not a contractual liability, resting upon the former company at this time and before to compensate the plaintiff. The Winnipeg & Northern R. Co. had invoked the statutory provisions in that behalf by giving the plaintiff notice of expropriation, specifying the land taken for the purposes of its railway; its right of way plans had been filed, and all steps taken to indicate with precision the location of its line of railway and the lands crossed thereby and to be taken for its right of way or other purposes. By giving the notice to the plaintiff the relation of vendor and purchaser was created: *Stone* v. *Commercial Railway Co.*, 4 My. & Cr. 122 (41 E.R. 48), and specific performance may be decreed: *Walker* v. *Eastern Counties R. Co.*, 6 Hare 594 (67 E.R. 1300), where the Court said, p. 600:—

> After that notice, the only thing to be ascertained was the amount of the purchase-money; and as the mode of ascertaining that is prescribed by the statute, it is in contemplation of law certain, although it remains to be ascertained . . . . The contract is a contract to purchase on the terms prescribed by the Act of Parliament, and those terms the Court has the means of applying so as to get at the price.

See also *Regent's Canal Co.* v. *Ware*, 23 Beav. 575 (53 E.R. 226).

It has been held that land is "taken" in the statutory sense when the plans and specifications are filed and the notice to treat is served, and not when the land is actually entered upon: *Hanna* v. *City of Victoria*, 27 D.L.R. 213, 22 B.C.R. 555.

Again, it has been held in the American Courts where amal-

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gamation has taken place pending expropriation proceedings, that the rights in land acquired by condemnation proceedings survived and passed to the new corporation and that corporation may be lawfully substituted as appellee in the Circuit Court and the cause proceed to trial: *Day* v. *New York, etc., R.* Co., 34 Atl. 1081. In this case the Court was considering the effect of an amalgamating statute very similar in terms to sec. 362 of the Dominion Railway Act. Proceedings had been instituted by a railway company to acquire lands for its road by condemnation and the report and award of damages had been made by the commissioners appointed for that purpose, from which the landowner appealed to the Circuit Court. While this appeal was pending the railway was merged and consolidated with the defendant company under a general statute. The Court permitted the substitution of the new company as appellee and allowed the appeal to proceed. This case is very instructive and I think, had it been consulted, would have suggested to the defendant company here a way of appeal against the award in this case, the lack of which right, it is alleged by the defendant's counsel, is the reason why the defendant is contesting this action, because it says the award is excessive in amount and based upon wrong principles of law. It is to be observed here that the old company, the Winnipeg & Northern Railway, did give a notice of appeal against the award, but the appeal was abortive owing to the decision in *Van Horne* v. *Winnipeg & Northern Ry.*, 18 D.L.R. 517, 24 Man. L.R. 626.

I can see no merit in any of the defences raised. Some of them are of a highly technical character, such as, for instance, the objection that the plaintiff did not tender a conveyance; citing *Howell* v. *Metropolitan District R. Co.* (1881), 19 Ch. D. 508, where the Court held that purchase-money found on verdict of a jury to be due a landowner by a railway company under the English Land Clauses Act of 1846 was not a debt due or accruing to a judgment debtor capable of being attached by garnishee before execution and tender of a conveyance by the landowner to the railway company, following the decision in *Guardians of East London Union* v. *Metropolitan R. Co.*, L.R. 4 Ex. 309.

In the case at bar, I think, even if a tender of conveyance was *primâ facie* necessary to render the amount of the award an absolute debt for which the defendant could be sued at law, such

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tender was excused because of the attitude of the defendant towards the award. The defendant's counsel admitted at the trial that the defendant always considered the award invalid and refused to be bound by it. The law does not compel the doing of unnecessary and useless acts. Certainly a tender of conveyance to the railway company would have been futile and productive of no results to anybody, a fact which was well known to the plaintiff; and it seems to me, under these circumstances, that to defeat the plaintiff's just claim to compensation upon such a technical ground would not be in the interests of justice.

At all events, under our statutes, both Dominion and Provincial (I refer to sec. 215 of the Dominion Railway Act, and sec. 24 of the Manitoba Railway Act) upon payment or legal tender of the compensation awarded to the party entitled to receive the same the award shall vest in the company the power forthwith to take possession of the lands or to exercise the right or to do the thing for which such compensation has been awarded,—in effect enabling a railway company upon payment or tender of the compensation awarded to obtain a statutory title to its right of way, or, at all events, a possessory title that would to all intents and purposes be sufficient.

The English Land Clauses Act of 1845, under which the two cases lastly referred to arose, contains no such provisions as those found in our Railway Acts. On the contrary, the English statute provides for payment into a bank or to a trustee of the amount of compensation and, upon that being done, expressly required the owner to duly convey the lands to the promoters of the undertaking or as they should direct, and in default thereof, or if he fail to produce a good title, the promoters were empowered to execute a deed poll to themselves: see sec. 76 of the English statute. The English courts accordingly held, in considering this statute, that the common rule laid down in *Laird* v. *Pim*, 7 M.& W. 474 (151 E.R. 852), applied to a case of purchase under statutory powers and that a plea that plaintiff had not executed any conveyance of the premises to the defendants was a good plea. In view of the difference between the statute law of the two countries, which I have pointed out, I think these English cases may be distinguished, and are not controlling in the case at bar.

The plaintiff also contends that independently of the Rail-

way Act the defendants are liable upon the principle of estoppel. He argues that the defendant has possession of his land and is operating its railway over it; that it acquired power to obtain possession of that land to build its railway and to commence operations under the provisions of the Manitoba statutes, which are a part of the contract between the parties, and contends that the defendant cannot take advantage of the powers thereby acquired and exercised without assuming the burthen and liability attaching to them when first exercised; namely, the burthen imposed by the Manitoba Acts. The case of *Edwards* v. *Grand Junction R. Co.*, 1 My. & Cr. 650 (40 E.R. 525), is cited to support this view, amongst a number of other cases.

Scott v. *City of Winnipeg*, 11 Man. L.R. 84, was also cited upon this point.

I think there is a good deal of force in this contention, and I view it with considerable favour. But I prefer to base my findings that the plaintiff is entitled to succeed upon the effect which I think ought to be given to the arbitration proceedings under the provincial statutes, which, having been lawfully commenced by the former company whilst it was purely a provincial railway, and subject solely to the provincial law, should not be, and cannot be rendered abortive and of no effect by the simple act of amalgamation effected with the defendant, an act which was unknown to the plaintiff and the arbitrators and was in fact concealed from them by the defendant, or those who acted for it until the final stages of the proceedings had been reached.

I use the term "concealed" advisedly. Mr. Clark, who was an officer of the Winnipeg & Northern R. Co. and was also general counsel for the defendant, knew of the amalgamation proceedings and should in all fairness to the plaintiff and to the arbitrators have promptly notified them of the fact if he intended to take the position he now takes, namely, that the arbitration could not legally be proceeded with owing to the amalgamation having taken place. He did not do this, but for nearly 7 months allowed the arbitration to proceed without questioning the arbitrators' power or the legality of the proceedings. His doing so now seems to me an after-thought. From Mr. Macdonald's statement to the arbitrators it is quite clear that he, at all events, had no idea that the fact of amalgamation in any way prejudiced or affected

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the arbitration proceedings. It was only after the Winnipeg & Northern, nominally, but really the defendant, desired to appeal against the award and taking the wrong steps put themselves out of Court, that the idea occurred to question the legality of the award and the proceedings leading up to it. This was not the plaintiff's fault. He had gone to great expense in presenting his case to the very tribunal which the old company had itself brought into being.

Through duplication of offices in the two companies and from the admissions of Mr. McLeod, the chief engineer of both companies, made at the trial, from Mr. Mitchell's evidence, and from the documents put in as exhibits, it is hard to avoid the conclusion that the Winnipeg & Northern Railway was in fact, though a separate legal entity, part and parcel of the defendant company or its system, and that since the amalgamation the defendant took part in the arbitration proceedings as the successors in interest of the old company. If this is not so for whom then did Mr. Macdonald, Mr. Clark's partner, appear after amalgamation? For whom was he acting during those 7 months when the arbitration proceedings were gone on with after amalgamation? Certainly he was not appearing for the old company because it had ceased to exist. Mr. Clark's knowledge of this fact ought, I think, to be imputed to his partner. The only interest then that Mr. Macdonald could have represented after the amalgamation was the defendant's interest, and yet not a word of objection was taken as to the possible change in the legal status caused by the amalgamation. Again, for whom did Mr. Clark take up the award? It seems to me the answer is conclusive that the award was taken up by the defendant company. The old company had long since ceased to exist. Admittedly, the officers of the old company, after the acquisition of its charter by Sir W. Mackenzie were all officers or servants or nominees of the defendant company. Mr. Clark, himself the general counsel of the defendant company, was its president, and for a time Hugh Sutherland, executive agent of the defendant company, was its secretary-treasurer. It seems to me it would be a travesty on justice to permit the defendant at this stage and under these circumstances to disavow participation in and responsibility for the arbitration proceedings and the binding effect of the award upon it.

MAN.

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I can see no reason why the defendant could not have appealed in its own name against the award. Not having done so, and it being now too late to do so, it resists liability upon grounds which to my mind are purely technical, without legal force and certainly without merit.

There will be judgment for the plaintiff for $10,259.50, the amount fixed by the award, with costs, which will include costs of any discovery examinations had in the action.

Judgment for plaintiff.

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S. C.

New Brunswick Supreme Court, King's Bench Division, McKeown, C.J.K.B. March 30, 1917.

TAXES (§ I F—90)—MUNICIPAL ASSESSMENT—NON-RESIDENT—EXEMPTION —GOVERNMENT SERVANT—RESIDENCE.

A non-resident carrying on business in the city is liable to assessment under the Fredericton Assessment Act, 1907; but is exempt therefrom if he be a government employee whose duties are necessarily performed in the city. Residing at a place for the purpose of doing such government work does not make one a "resident" for assessment purposes.

[*Ex parte Howe*, 11 D.L.R. 713, 41 N.B.R. 564, applied.]

MOTION to quash assessment. Granted.

Statement.

McKeown, C.J.

MCKEOWN, C.J.:—On motion of the Attorney-General I directed the issue of a rule ordering the assessors of taxes for the City of Fredericton to send before me, at a time and place mentioned, a certain assessment for the sum of $38 for taxes in respect to personal estate and income assessed against the applicant David F. Maxwell, as a resident of the City of Fredericton in the year 1915, with a rule *nisi* to shew cause why such assessment should not be quashed.

The rule was granted on two grounds:—(1) That the said D. F. Maxwell is exempt from taxation in the City of Fredericton under s.-s. 11 of s. 3, of 7 Edw. VII. c. 84 (City of Fredericton Assessment Act), as a non-resident employed in a government office. (2) That the income of the said D. F. Maxwell, being derived from an office or place under government, is only taxed where he resides under s. 30 of c. 21, 3 Geo. V.

On return of the rule the Attorney-General appeared in support and R. B. Hanson, K.C., *contra*.

Dealing first with ground No. 2, it is to be noted that the applicant relies on s. 30 of c. 21, of the Acts of 3 Geo. V. (1913), which is a general enactment consolidating previous Acts respecting rates and taxes, and the section so relied upon reads:—

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The incomes of journeymen, mechanics and labourers, incomes derived from an office or place in or under government or in connection with any department of the public service, and ratable incomes from all other sources whatsoever, shall be assessed in the parish where the person resides.

S. 1 of this Act, moreover, is as follows:—

This Act shall extend and be applicable to all parishes, incorporated town and cities, except so far as special provisions inconsistent herewith may exist, or may be made in reference to the assessing and levying of rates and taxes in any of such parishes, cities or towns.

S. 34 of the Fredericton Assessment Act provides that:—

For the purposes of assessment, any person carrying on business or having any office or place of business, or any occupation, employment or profession within the city of Fredericton, shall be deemed and taken to be, and is hereby declared to be, an inhabitant and resident of the said city, and shall be assessed accordingly; provided, that any person whose actual domicile is out of the city, shall not be assessed on a poll tax within the city.

Along with the last above quoted section must be read s.-s. 11 of s. 3 of said Act, which deals with exemptions and is as follows:—

Incomes of non-residents being members of the executive government of the province, or non-residents employed in the City of Fredericton in government or county offices, whose duties are necessarily performed in Fredericton, shall be exempt from taxation under this Act.

I think the effect of the above quoted sections resolves itself into this: If the applicant be a resident of the City of Fredericton as defined by the above s. 34, he is properly taxable there, notwithstanding the provisions of s. 30 of c. 21, 3 Geo. V. On the other hand, if he be a non-resident employed in a government office, whose duties therein are necessarily performed in Fredericton, the exemption provided by s. 3 (11) of the Fredericton Assessment Act would operate to relieve him from the liability sought to be imposed. I do not think the rule can be supported on the second ground, and thus the matter narrows itself down to a question of residence to be determined by the facts disclosed, and by the interpretation of the Assessment Acts.

As far as the facts are concerned, they must be looked for in the affidavits submitted. What is shewn in these affidavits is: That the applicant is a civil engineer, and since May 1, 1912, had been exclusively devoting himself to the duties of inspecting engineer on the construction of the St. John Valley Railway in the employ of the government of the province; that the performance of such duties has necessitated the applicant's attendance at Fredericton for a certain portion of his time, the balance—

or a part of the balance—of which he has expended along the lines of the railway as it was, and is, being constructed; that while in Fredericton applicant occupies an office wherein he does his work solely as such inspecting engineer as aforesaid, which office is put at his disposal and all expenses thereof paid by the government, and in which he carries on that part of his work as is necessarily performed at Fredericton where he has to meet with members of the government from time to time; that during all this time the applicant has maintained his family residence at St. Stephen where he was assessed for the year 1914, but whether for the amount involved in the assessment before me does not appear; that the government pays applicant's travelling expenses to and from St. Stephen, and that during the years in question he has never had any intention of becoming or being a resident of the City of Fredericton, and says that he has never been at any time a resident of said city.

Affidavits in reply supporting the assessment were made by Alexander A. Sterling, the principal assessor of the city, and by G. R. Perkins, treasurer thereof. In par. 2 of Sterling's affidavit he says that the Board of Assessors rated the applicant in the year 1912 "as they had reason to believe that the said D. F. Maxwell had, in addition to his income, personal property within the City of Fredericton, and continuously and almost daily appeared on our streets, and was living at a private boarding house in this City of Fredericton and carrying on business here, and this Board had also reason to believe that during some portions of either the year 1912 or 1913 the wife and son of the said D. F. Maxwell were also living with him in this city, and we looked upon him as a resident of this city and therefore liable to be assessed on his income, personal property in this city and poll."

Perkins in his affidavit says that in the years 1912, 1913 and 1914, the applicant was assessed in various sums (naming them) which assessments applicant paid, but the assessment for the year 1915, which is the one in question, was not paid, and in par. 6 of his affidavit he says:—

That the said David F. Maxwell, during the year 1912, rented from the agent of the Inches estate the residence formerly occupied by Mrs. John Black, No. 692 on Queen St., in this City of Fredericton, and furnished the said apartments and removed his place of business to the said dwelling and

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occupied these rooms as his business office and dormitory from June 1, 1912, until July 1, 1915.

In reply to the above the applicant filed a further affidavit which is in its material part as follows:—

I say that I paid taxes to the City of Fredericton in the years 1912, 1913 and 1914 under protest in each case, and I further say that the apartments occupied by me, as set out in said affidavit, consisted of two rooms only, and were not used as living apartments for my family but constituted an office necessary for my business as government engineer in one room, while I slept in the other room only occasionally. When I rented these rooms I spoke to S. L. Morrison, the agent for the property, and ascertained what rent he wanted, of which fact I notified the Minister of Public Works, the Hon. J. Morrissy, who told me to engage the rooms. The furniture for the same was also purchased by the Public Works Department of New Brunswick and is now stored in the cellar of the Parliament building. The rent, heat and light were all paid directly by the Public Works Department of New Brunswick, etc.

I am not asked to say where the applicant's legal domicile is. I think as a matter of fact it is at St. Stephen, but the Supreme Court of the province, in the case of *Ex parte Howe*, 41 N.B.R. 564, at 570, 11 D.L.R. 713, in discussing the latter part of s. 34 of the Fredericton Assessment Act, which says, "that any person whose actual domicile is out of the city shall not be assessed on a poll tax within the city," put a construction upon these words "actual domicile," by which, of course, I am bound; and such construction was that the words "actual domicile," as so used in the section, "can have no other meaning than 'actual residence' as distinguished from the constructive residence created by the section for the purposes of assessment:" Barker, C.J., at the page above cited.

It seems to me that the definition of the word "resident" for the purposes of the Assessment Act, as given in s. 34, is broader than the meaning attached to that term in its ordinary legal significance. In other words, I am of opinion that a non-resident (using the word in its ordinary meaning) can under many circumstances carry on business in a city, or have an office or place of business therein, or engage in some occupation, employment or profession therein, without necessarily becoming a resident. If a person does any of these things in Fredericton he is, by the Act, declared to be "an inhabitant and resident of the said city," and therefore liable to assessment. That is to say, it was apparently recognized by the legislature that doing these things above specified would not necessarily make a man a resident, and so

by legislation he was declared to be such, as it was desired to tax him. But the whole Act must be read together, and the proviso of s-s. 11 of s. 3, in substance says that non-residents may be employed in government offices in Fredericton without having to pay a tax upon their incomes. If the applicant had done for a private corporation the things he did for the government, no doubt he would be liable to the assessment. But being a government official, if the city have a right to tax him, he must be a resident, not according to the definition of s. 34, but as a matter of ordinary legal interpretation. I think that is the effect of the sections when read together.

Now what is a resident in the ordinary legal interpretation of the word? In the A. & E. Encyclopædia of Law, vol. 24 (2nd ed.), at p. 692, it is said: "To 'reside' means: 'To dwell permanently or for a considerable time; to have a settled abode for a time; to abide continuously; to have one's domicile or home; to remain for a long time.'"

And on p. 696 of the same volume it is remarked: "It has been said that the word 'residence' is an elastic word of which an exhaustive definition cannot be given, but that it must be construed in every case in accordance with the object and intent of the statute in which it occurs;" citing *Lewis* v. *Graham* (1888), 20 Q.B.D. 780, and *Ex parte Breull* (1880), 16 Ch.D. 484. This canon of construction (if I may so term it) was clearly expressed in the case of *Blackwell* v. *England* (1857), 8 El. & Bl. 541, 120 E.R. 202, by Campbell, C.J., and Coleridge, Wightman and Erle, JJ., in which all were agreed that the word "residence" should be construed according to the object which the legislature had in mind in passing the Act containing such word. Coleridge, J., is thus reported at p. 545:—

> It is said, however, that residence is a word having a definite technical meaning, and that, when used in an Act of Parliament, we must give it that meaning. But I think that it has not any definite technical meaning, and that the word varies in its construction according to the object for which the residence is required. In one set of Acts, the object is to ascertain the settlement of a pauper; there he resides where his head lies at night. In another class of Acts the object is to ascertain the jurisdiction of the Court; with reference to that object domicile may be important.

And Lord Campbell, C.J., says, p. 544:—

> There are enactments concerning residence where the object of the legislature will not be attained unless the word be taken to mean the place where the person dwells with his family. That is so where the object is to regulate the franchise.

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In the case of *Lambe* v. *Smythe* (1846), 15 M. & W. 433, 153 E.R. 919, Pollock, C.B., said, referring to the statute then being construed: "The 'residence' mentioned in the statute must be read in the sense of a man's home."

Now the enquiry before me is: For the purpose of assessment where does the applicant reside? I have already explained what, in my view, is the effect of s. 34 and s. 3 (11) of the Fredericton Act. Now s. 29 of c. 21 of the Acts of 1913 *re* Rates and Taxes says:—

> Incomes derived from any trade, profession, occupation, employment or calling (other than the income of journeymen, mechanics and labourers) and the income derived from any office or place (other than an office in or under government, or in connection with any department of the public service) shall be assessed in the parish where such trade, profession, occupation, employment or calling is carried on, or such place or office is filled or executed as the case may be.

The next following section has been already set out and it says in substance that the receiver of such income from the government shall be assessed in the parish where he resides. These two sections establish this point clearly, that residing in a place for the purpose of doing such government work does not, *ipso facto*, make one a resident of such parish for assessment purposes, and that is really the contention which, in my view, the assessors are driven to assert and maintain. But it seems to me these sections provide that for assessment purposes this government-earned money is to be the subject of taxation in the place where the recipient is otherwise taxed. It is amply shewn that the applicant's whole residence in Fredericton was for the purpose of doing the work which the government engaged him to do.

For the reasons above set out I think the applicant is not liable to assessment and the rule to quash will be made absolute. No order is made as to costs. *Assessment quashed.*

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Re NOVA SCOTIA TEMPERANCE ACT.

Supreme Court of Nova Scotia, Sir Wallace Graham, C.J., and Russell, Longley, Drysdale, Harris and Chisholm, JJ. March 24, 1917.

1. INTOXICATING LIQUORS (§ II D—50)—ANNULMENT OF EXISTING LICENSES. So much of sec. 3 of ch. 22 of the Nova Scotia Acts of 1916 as purports to annul liquor licenses is *intra vires*.
[*Royal Bank of Canada v. The King*, 9 D.L.R. 337 (annotated), referred to.]
2. INTOXICATING LIQUORS (§ II D—50)—N.S. LAWS 1916, CH. 22—EFFECT OF. Liquor licenses granted in Nova Scotia and which had not expired by lapse of time when sec. 3 of N.S. Acts 1916, ch. 22, came into force, were annulled by that legislation.

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3. INTOXICATING LIQUORS (§ I C—30)—PROHIBITORY LEGISLATION.

Part II. of the Nova Scotia Temperance Act is in force both in the City of Halifax and in the County of Halifax.

[*Re Bradbury*, 27 Can. Cr. Cas. 68, 30 D.L.R. 756, 50 N.S.R. 298, followed.]

4. INTOXICATING LIQUORS (§ I B—28)—PROHIBITORY LAW AS TO BREWERS KEEPING FOR SALE IN THE PROVINCE.

The effect of the Nova Scotia Temperance Act is to prohibit a brewer in Nova Scotia from keeping for sale or selling in Nova Scotia intoxicating liquors which have been manufactured by such brewer who holds a brewer's license granted under the Inland Revenue Act; and such prohibitory provisions are *intra vires*.

[*Attorney-General of Manitoba* v. *Manitoba License Holders*, [1902] A.C. 73, followed.]

Statement.

QUESTIONS referred pursuant to ch. 166 of the Revised Statutes of Nova Scotia, 1900, by the Lieutenant-Governor of Nova Scotia by and with the advice of the Executive Council, by Order-in-Council, dated the 4th day of December, 1916, to the Supreme Court of Nova Scotia for hearing and consideration relating to the validity and interpretation of certain provisions of the Nova Scotia Temperance Act, 1910, and amendments thereto.

The questions submitted are set out in full in the opinion of Sir Wallace Graham, C.J.

Stuart Jenks, K.C., Deputy Attorney-General, for the Crown.

H. Mellish, K.C., for the Licensed Victuallers' Association.

R. H. Murray, K.C., for the Nova Scotia Temperance Alliance.

Graham, C.J.

SIR WALLACE GRAHAM, C.J.:—The Lieutenant-Governor in Council has, under the Revised Statutes of Nova Scotia, 1900, ch. 166, referred to the Court for decision the validity and interpretation of certain provisions of the Provincial Statutes, known as the Nova Scotia Temperance Act, 1910, and amendments.

These are the questions submitted:—

(1) Is so much of sec. 3 of ch. 22 of the Acts of 1916 as purports to annul liquor licenses *intra vires?*

(2) Are liquor licenses granted under the provisions of the Nova Scotia Temperance Act avoided by the provisions of said section?

(3) Is Part II. of the Nova Scotia Temperance Act in force (*a*) in the city of Halifax (*b*) in the county of Halifax?

(4) Do the provisions of said Act prohibit a brewer in Nova Scotia from keeping for sale or selling in Nova Scotia intoxicating liquors which have been manufactured by such brewer who holds a brewer's license granted under the Inland Revenue Act? If so, are such prohibitory provisions *intra vires?*

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(5) Can a resident of another province sell or keep for sale intoxicating liquors in the Province of Nova Scotia?

They relate principally to the city of Halifax, but in part relate to other portions of the province.

Since 1895 in the province (I exclude from mention those municipalities in which the Canada Temperance Act had been in force, now inconsiderable in number, namely Digby, Yarmouth, and Guysboro) the matter of selling intoxicating liquor had been dealt with by an Act known as the Liquor License Act, to be found in its revised form in Revised Statutes, 1900, ch. 100. That was a license Act in name but it was really a prohibition Act.

Owing to the inability of the vendors to obtain the signatures of a very large majority of ratepayers in a municipality required by its provisions before they could get licenses, Richmond county, Halifax county, and Halifax city alone have been really the only municipalities in which licenses have been granted.

It is necessary to refer to some of the provisions of that Act before coming to the Temperance Act.

The Liquor License Act, ch. 100, provided, sec. 6, for the issuing of:—

(1) Hotel licenses,

(2) Shop licenses, and

(3) Wholesale licenses, and the appropriate license fees.

By sec. 14 it was provided that nothing in that chapter should prevent any brewer, distiller or other person licensed by the Government of Canada under the laws respecting Inland Revenue to manufacture fermented, spirituous or other liquors or from keeping or having any liquor manufactured by him in any building where said manufacture was carried on. But he was required to take out from the municipal council a wholesale license (there were as well wholesale licenses under the Act for others than brewers and distillers). The brewer or distiller was required to pay a fee for such license, but was not required to obtain any petition of a large proportion of the ratepayers required in respect to licenses other than that for the brewer or distiller, which was the feature of that Act. And it could, in fact, be obtained at any session of the council.

Then in the year 1910 a Prohibition Act was passed known as the Nova Scotia Temperance Act, and in subsequent years there were many amendments. As to Richmond and Halifax

county it in brief provided that after the current licenses had expired there should be no more licenses. As to the city of Halifax, the outline of the provision in respect to it is indicated in *Re Carrie Bradbury*, 50 N.S.R. 298 at 301, 303, 30 D.L.R. 756, 27 Can. Cr. Cas. 68, and I do not repeat what I said there.

Part IV. of the Act, however, related specially to the city of Halifax. It apparently looked forward to the obtaining of a plebiscite of the ratepayers in favour of prohibition and in the meanwhile the license system was to be continued.

Section 62 contains definitions.

Section 63 provides that after a census of the people, to be taken in 1911, the number of hotel and shop licenses should not exceed one for every thousand, and in no case exceed seventy licenses in all.

Section 64 provided for the creation of a Board of License Commissioners for Halifax, designating the officials.

I may interpolate that under the Liquor License Act licenses have been granted by the city council.

Section 65 provided for the organization of the Board and sub-sec. (4) was as follows:—

(4) The Board may divide the city of Halifax into districts for the purpose of granting licenses, and in all the provisions of the Liquor License Act, being ch. 100 of the Revised Statutes, 1900, and amendments thereto, relating to the granting of licenses in said city, the expression "polling district" or district shall mean a district so established by the Board.

Sec. 66 provided that:—

(1) All applications for license shall be made as heretofore, and shall be subject to all the requirements of the Liquor License Act and Acts in amendment thereof heretofore applicable.

(2) The council shall without any other action thereon refer all such applications to the Board and shall hand over to the Board all reports to the council in respect to such applications and all objections thereto and all papers deposited or filed in reference thereto.

(3) The Board shall, as soon as may be thereafter, meet and hear and determine the said applications and objections, and shall decide what applications shall be granted and what applications shall be refused; such meeting shall be open to the public.

Section 67 provided as follows:—

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(1) All the powers hitherto vested in the council as to the hearing and determining of such applications are hereby vested in the Board, and all the provisions of the Liquor License Act and amendments thereto heretofore applicable in respect to the hearing of such applications by the council shall apply to and be observed by the Board at the hearing before the Board in respect to such applications.

(2) Upon all applications having been determined as aforesaid the Board shall file with the city clerk a report signed by the chairman stating what applications are by the Board granted and what refused.

Section 68 provided as follows:—

68. The council shall meet within ten days after the filing of the said report, and shall by resolution authorize the issuing to each applicant whose application for license has been so reported to be granted by the Board, a license as heretofore issued, according to his application, upon compliance by such applicant with all the requirements and conditions imposed by the Liquor License Act and amendments thereto in that behalf, and the payment of the required fees.

Section 69 provided that excepting as aforesaid no shop or hotel license shall issue to any person in the city of Halifax.

Sections 70 to 79 provided for the taking, after the census of 1911, of a plebiscite of the citizens and the procedure to determine whether licenses should thereafter be granted or not.

Then follows sec. 80:—

80. All Acts and parts of Acts to the extent to which they are inconsistent with this Part are hereby repealed, and the Liquor License Act, being ch. 100 of the Revised Statutes of Nova Scotia, 1900, shall be read and construed as if this Part formed a portion thereof.

In 1916 a short Act was passed the principal section of which seriously affected the city of Halifax. It repealed sec. 81 of the Temperance Act under which the city of Halifax by way of exception had been granting licenses under the Liquor License Act.

No provision was ever made for compensation or a return in whole or in part of the license fees just paid. The promoters had the patience to wait for the expiration of current licenses in the case of the counties of Halifax and Richmond. The plebiscite

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in the result had failed in Halifax to displace the application of the Liquor License Act as amended to the city of Halifax. The legislation in this section of 1916 took the bull by the horns and not only repealed the Liquor License Act and amendments but destroyed the licenses then current as it is contended. This is the section, 1916, ch. 22, sec. 3:—

3. Section 81 of said ch. 2 of the Acts of 1910 is hereby repealed, and the following is substituted therefor:—

81. The Liquor License Act, being ch. 100 of the Revised Statutes of Nova Scotia, 1900, and all the amendments thereto are hereby wholly repealed, and all licenses issued under the provisions of said ch. 100 shall immediately upon this Act coming into force become and be null and void and of no force and effect.

(1) The first question is about those licenses which were then current, and which then had several months to run.

If, as has been decided by the Judicial Committee of the Privy Council, in *The Attorney-General for Ontario* v. *The Attorney General of Canada*, [1896] A.C. 251; and *The Attorney-General of Manitoba* v. *The Manitoba License Holders*, [1902] A.C. 73, a provincial legislature by reason of the British North America Act, sec. 92, item 13 (Property and civil rights in the province) and item 16 (Generally all matters of a merely local or private nature in the province), or one of them has in a province the power to enable by its legislation licenses to sell intoxicating liquor to be granted and also to prohibit the granting of such licenses and the selling of intoxicating liquors it has the power to destroy those licenses when granted. I quote a sentence from the judgment in *Royal Bank of Canada* v. *Rex*, [1913] A.C. 283 at 296, 9 D.L.R. 337, 108 L.T. 129, namely:

"They agree with the contention of the respondents that in a case such as this it was in the power of the legislature subsequently to repeal any Act which it had passed."

There is not as there is in the United States in respect to the State legislature a dominant check to prevent the local legislatures from destroying contracts created within the province. There is a power of disallowance vested in the Government of Canada which must have been intended to prevent acts of injustice of that kind. It appears, however, that that power to disallow provincial Acts has lately fallen into disuse and was in this case withheld and I say nothing further upon that subject.

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I answer that question in the affirmative.

(2) The second question is a matter of construction. The current licenses, it will be noticed, are spoken of in sec. 3 of the Act of 1916, already quoted, as issued under the provisions of said ch. 100, that is, the Liquor License Act.

I am trying to give an outline of the argument against the destruction of the licenses made by Mr. Mellish, K.C.

Now, as is pointed out, there were, under that Act, wholesale licenses both to brewers and distillers, and to others which continued to be issued by the municipal authorities. They did not apparently come under the provisions of the Temperance Act of 1910, which expressly dealt with hotel and shop licenses only, and were issued by the Board of License Commissioners under its provisions, so he contended that the reference in the third section of the Act of 1916 is to those wholesale licenses still outstanding; that the words in it thus have an office, and they do not destroy the shop and hotel licenses, which, he contended, were really granted under the Temperance Act. In fact, the second question submitted to us is framed on that assumption, that the current licenses were issued under the Temperance Act.

Further, it will be noticed, there is a sharp contrast in sec. 3 of the Act of 1916 as to the repealing of former statutes and the annulling of the licenses, namely, "Chapter 100 . . . and all the amendments thereto are hereby wholly repealed." But as to the annulling of licenses those "issued under the provisions of said ch. 100 shall immediately . . . become and be null and void, etc." There is no reference to the amendments.

If the Temperance Act is an amendment of the Liquor License Act then it is repealed by the first provision of the section. In order that it shall be preserved the idea of its being an amendment has to be negatived. If it is not an amendment it will not do to read in after the words "under the provision of said ch. 100" the provisions of the Temperance Act as an amendment. It is a fairly well established dilemma. Therefore, the shop and hotel licenses granted under the fourth part of the Temperance Act are not aptly described in sec. 3 of 1916.

Also, it was contended, as the destruction of those licenses without compensation or restitution of the fees would be such an injustice, that it was not intended to destroy them. Such a construction is to be avoided.

I must confess that in the drafting of legislation one would expect to find the Liquor License Act "and amendments" if that was the intention. The title would shew the relationship of the two Acts and not have two such distinct titles if the latter is but an amendment of the former.

I am disposed, however, to think that this legislation will not bear that benign character.

Unfortunately for that argument, I think the express provisions of the Temperance Act, Part IV., and particularly sec. 80, are too strong to be overcome. The latter is as follows: "And the Liquor License Act, being ch. 100 of the Revised Statutes of Nova Scotia, shall be read and construed as if this part (that is Part IV.) formed a portion thereof."

The idea seems to have been in respect to Halifax city to continue the use of the Liquor License Act, furbishing it up a bit by providing an independent Board for the consideration of the applications for licenses in the place of, I suppose, some committee of the council as before and carrying on as before. I think on the whole that the current licenses could properly be described as having been issued under the provisions of ch. 100, and would not properly be described as having been issued under the Nova Scotia Temperance Act.

I answer question 2 as follows: The licenses current in Halifax on the 30th day of June, 1916, under the legislation then in force were annulled by sec. 3 of ch. 22 of the Acts of 1916.

(3) In respect to question 3, the Bradbury case, *Re Bradbury*, 50 N.S.R. 298, 27 Can. Cr. Cas. 68, 30 D.L.R. 756, determines that Part II. of the Nova Scotia Temperance Act is in force in the city of Halifax. And by the same reasoning the Act came into force in the municipality of the county of Halifax after the expiration of the last licenses existing in the municipality, whenever that was.

I answer that question in the affirmative.

(4) In respect to question 4. The provisions of the Temperance Act, in my opinion, prohibit a brewer in Nova Scotia from keeping for sale in Nova Scotia or selling in Nova Scotia intoxicating liquors which have been manufactured by such brewer, notwithstanding he holds a brewer's license under the Inland Revenue Act of Canada. These provisions mainly follow

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the provisions of the Manitoba Liquor Act, 1900, Acts of Manitoba, 1900, ch. 22, and they have been under review.

The question is also asked, if so, are such prohibitory provisions *intra vires?* The case of *Attorney-General of Manitoba* v. *The Manitoba License Holders Association*, [1902] A.C. p. 73. bears upon this question.

It appeared that at the time of the passing of the Manitoba Liquor Act there were Manitoba brewers and malsters duly licensed under the Inland Revenue Acts of Canada by the Dominion Government, and there was a reference to the Court in Manitoba as there now is here. I refer to *Attorney-General of Manitoba* v. *The Manitoba License Holders*, [1902] A.C. 73. At page 74 it is said:—

"The legislature of the Province of Manitoba, on July 5, 1900, passed an Act known as 'The Liquor Act' (63 & 64 Vict. ch. 22). The preamble of the Act is in these words: 'Whereas it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor, therefore, etc.' The enactments purport to prohibit all use in Manitoba of spirituous, fermented, malt and all intoxicating liquors as beverages or otherwise than for sacramental, medicinal, mechanical, or scientific purposes, and they include divers prohibitions and restrictions affecting the importation, exportation, manufacture, keeping, sale, purchase, and use of such liquors."

On February 23, 1901, the Court, on a reference thereto by the Lieutenant-Governor, expressed its unanimous opinion that the said Act was unconstitutional; that the legislature of Manitoba had "exceeded its powers in enacting the Liquor Act as a whole."

The following facts were by the submitting Order-in-Council laid before the Court for consideration in dealing with the submission:—

"(a) That at the time of the passing of the Liquor Act there were, and now are, in Manitoba, brewers and maltsters, duly licensed under the Inland Revenue Act of Canada and amendments, by the Government of the Dominion of Canada, to carry on the trade or business of brewers and maltsters in Manitoba, and who then were and are now engaged under their said respective licenses in manufacturing malt liquors and malt both for sale

within and export from Manitoba, and selling within and exporting from Manitoba malt liquors and malt;

"(b) That at the time of the passing of the Liquor Act there were and now are in Manitoba a number of wholesale liquor dealers engaged in buying and selling liquors by wholesale within the province, and in importing liquor by wholesale into the province from other provinces and countries and in exporting from such province liquor so bought and imported.

"(c) That at the time of passing the said Act many transactions took place and still take place in purchasing and selling liquor between residents of Manitoba and residents of other provinces and countries, both by way of import into Manitoba and export therefrom, and the Government of Canada derive revenue both from the importation of liquor into Canada and the manufacture of liquor therein."

At page 79 Lord Macnaghten said:—

"The judgment of this Board in the case of the *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348, has relieved the case from some, if not all, of the difficulties which appear to have presented themselves to the learned Judges of the Court of King's Bench. This Board held that a provincial legislature has jurisdiction to restrict the sale within the province of intoxicating liquors, so long as its legislation does not conflict with any legislative provision which may be competently made by the Parliament of Canada, and which may be in force within the province or any district thereof. It held, however, that there might be circumstances in which a provincial legislature might have jurisdiction to prohibit the manufacture within the province of intoxicating liquors and the importation of such liquors into the province. For the purposes of the present question it is immaterial to inquire what these circumstances may be. The judgment, therefore, as it stands, and the report to Her late Majesty consequent thereon, shew that in the opinion of this tribunal matters which are "substantially of a local or private interest in a province—matters which are of a local or private nature from a provincial point of view." to use the expressions to be found in the judgment—are not excluded from the category of "matters of a merely local or private nature," because legislation dealing with them, however carefully it may be framed, may or

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must have an effect outside the limits of the province, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades.

The Liquor Act proceeds upon the recital that "it is expedient to suppress the liquor traffic in Manitoba by prohibiting provincial transactions in liquor." That is the declared object of the legislature set out at the commencement of the Act. Towards the end of the Act there occurs this section:—

"119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Manitoba, except under a license or as otherwise specially provided by this Act, and restrict the consumption of liquor within the limits of the Province of Manitoba, it shall not affect and is not intended to affect *bonâ fide* transactions in liquor between a person in the Province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly."

Now that provision is as much part of the Act as any other section contained in it. It must have its full effect in exempting from the operation of the Act all *bonâ fide* transactions in liquor which come within its terms. It is not necessary to go through the provisions of the Act. It is enough to say that they are extremely stringent—more stringent probably than anything that is to be found in any legislation of a similar kind. Unless the Act becomes a dead letter, it must interfere with the revenue of the Dominion, with licensed trades in the Province of Manitoba and indirectly at least with business operations beyond the limits of the province. That seems clear. And that was substantially the ground on which the Court of King's Bench declared the Act unconstitutional. But all objections on that score are in their Lordships' opinion removed by the judgment of this Board in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion* [1896], A.C. 348."

I suppose that since the repeal of the Liquor License Act a brewer or distiller manufacturing in Nova Scotia will not require a wholesale license or any license for the sale of his product to a person residing in another province or abroad. I refer to *Brewers and Maltsters* v. *The Attorney-General of Ontario*, [1897] A.C. 231.

I answer the fourth question in the affirmative.

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(5). The fifth question is not clear and the example has been set in the higher Courts of appeal of avoiding any answer to general questions like that. But during the argument one could obtain some notion of concrete cases in respect to which the opinion of the Court was desired.

Before the Nova Scotia Temperance Act had been passed a most important utterance had been made by the Judicial Committee of the Privy Council. *Attorney-General for Ontario* v. *Attorney-General of Canada*, [1896] A.C. 348. One of the questions submitted was as follows:—

"(4). Has a provincial legislature jurisdiction to prohibit the importation of such liquors (spirituous, fermented or other intoxicat ng liquors) into the province?"

Lord Watson, at page 364, said:—

"The only enactments of s. 92 which appear to their Lordships to have any relation to the authority of provincial legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exculsive jurisdiction (1) 'Property and civil rights in the province,' and (2) 'generally all matters of a merely local or private nature in the province.' A law which prohibits retail transactions and restricts the consumption of liquor within the ambit of the province and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject matter of the transactions if they were not prohibited, and also the civil rights of persons in the province. It is not impossible that the vice of intemperance may prevail in particular localities within the province to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor, a matter of a merely local or private nature, and therefore falling *primâ facie* within No. 16."

Later, page 368:—

"Manufacturers of other liquors within the district, as also merchants duly licensed, who carry on an exclusively wholesale business, may sell for delivery anywhere beyond the district, unless such delivery is to be made in an adjoining district where the Act is in force. If the adjoining district happened to be in a different province it appears to their Lordships to be very doubtful whether even in the absence of Dominion legislation a restriction of that kind could be enacted by a provincial legislature."

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Later, he says, page 371:—

"Answer to question 4. Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion parliament."

I have quoted the words in Lord Watson's judgment upon which sec. 119 in the Manitoba Liquor Act and sec. 4 of the Act of 1910 are founded.

With this decision before it, shewing that the rights of a provincial legislature to prohibit or regulate the traffic in liquors was restricted to "(13) Property and civil rights in the province" or "(16) Generally all matters of a merely local or private nature in the province" as herein mentioned, the legislature proceeded to pass this Nova Scotia Temperance Act.

Of course there had been many other decisions.

It enacts, among other provisions, as follows:—

Section 4. "This Part" (Part I., Application, *i.e.*, the prohibition enactment) "shall not affect *bonâ fide* transactions in respect to liquor between a person in any portion of the province in which this part is in force and a person in another province or in a foreign country."

This section made great play in the Manitoba Act, s. 119, and received special mention in the judgment on the reference as just quoted. I shall have to return to this provision.

Section 9 shews that a person was prohibited from directly or indirectly sending or bringing into any municipality in which Part I. was in force liquor from any place in the province; not from outside.

Section 10 shews that common carriers, express companies, or other carriers were prohibited from accepting any package of liquor for carriage or delivery to any person in any municipality in which Part I. was in force from any person in any part of the province.

I think that a through transportation from other provinces or countries outside was not included in that prohibition.

Again, the provisions for search and destruction of intoxicating liquors, Acts 1910, ss. 46, 47, 48, 50; 1912, c. 67, s. 4, are limited to the cases of liquors sold or kept for sale in dwelling houses, etc.,

contrary to the provisions of Part I, therefore kept for sale within the province.

The Act of 1911, c. 33, s. 36, dealing with the case of liquor in transit or in course of delivery upon the premises of any carrier or at any wharf, warehouse, or other place if the inspector reasonably believes that such liquor is to be sold or kept for sale in contravention of the Nova Scotia Temperance Act, that is, within the province, he may seize the same. Sub-secs. (2) and (3) to this effect when liquor has been seized as kept for sale in contravention of the Act, the magistrate is to issue his "summons directed to the shipper, consignee or owners of the liquor if known, calling him to appear to shew cause why such liquor should not be destroyed." Of course that means shipper, consignee, or owner within the province, the limit of the magistrate's jurisdiction.

Sub-sec. (6). At the time and place named, etc., any person who claims that the liquor is his property and that the same is not intended to be sold or kept for sale in violation of the Act may appear, etc.

Sub-sec. (7). If there is default or it is found "that it was intended such liquor was to be sold or kept for sale in contravention of the Nova Scotia Temperance Act it may be ordered to be destroyed."

Sub-sec. (8). "If the magistrate finds that the claim of any person to be the owner of the liquor is established and that it does not appear that it was intended to sell or keep such liquor for sale in contravention of the Nova Scotia Temperance Act, he shall dismiss the complaint and order that such liquor be restored to the owner."

Sub-sec. (9). "If it appears to the magistrate that such liquor or any part thereof was consigned to some person in a fictitious name, or was shipped as other goods, or was covered or concealed in such manner as would probably render discovery of the nature of the contents of the vessel, cask or package in which the same was contained more difficult, it shall be *primâ facie* evidence that the liquor was intended to be sold or kept for sale in contravention of the Nova Scotia Temperance Act.

I refer to two cases: *The King* v. *Publicover*, 49 N.S.R. 85; 24 Can. Cr. Cas. 1, 21 D.L.R. 203; *Kelley & Glassey* v. *Scriven*, 50 N.S.R. 96, 26 Can. Cr. Cas. 187, 28 D.L.R. 319.

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If those decisions are correct in a case as between inhabitants of municipalities *a fortiori* they are correct in a case between inhabitants of Provinces.

If there is anything clear from these provisions to which I have referred, it is, first, that there may be within this province intoxicating liquor in the lawful possession of others than the official vendor, druggists, etc. Second, intoxicating liquor, if seized and the case tried must in certain contingencies be restored to the owner. Third, there may be intoxicating liquor in transit or in course of delivery upon the premises of any carrier or at any wharf, warehouse or other place which is not liable to seizure and destruction.

Now I think that a resident of another province may sell and ship directly to be delivered in this province to a consumer for the private use of him and his household in this province but not for sale within the province, and may keep that intoxicating liquor after such a sale within this province and while in transit for such delivery for such a use.

(2). That the resident of another province or country may sell and ship directly liquors to a person resident in this province to be exported into another province or country outside of this province.

(3). That a resident of another province may contract with carriers, etc., for shipment in order to deliver to the consumer in case or to the exporter in case, intoxicating liquors.

(4). In neither case should there be any liability to have the liquor seized or destroyed while in this province, nor any liability should the vendor after any such transaction has taken place come temporarily into this province, to any of the penalties of the Nova Scotia Temperance Act in respect to any such transaction. Nor should the common carrier, the express company, or other carrier employed by the resident of the other province be liable to any penalties under the Act in respect to the transactions mentioned in (1), (2) and (3).

It seems to me that the concrete cases I have put (there may be others) would be under the Temperance Act, sec. 4, *bonâ fide* transactions in respect to liquor between a person in this province and a person in another province or in a foreign country.

An illustration of the invalidity of a provision by the legislature

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of one province legislating in derogation of the rights of persons in another province under contracts is afforded by *Royal Bank* v. *Rex*, [1913] A.C. 283 at 296, 108 L.T. 129, 9 D.L.R. 337.

I do not, as already intimated, think that I can profitably add anything to what I have here said in answer to question 5.

RUSSELL, J.:—The first question submitted for our opinion is whether so much of sec. 3 of ch. 22 of the Acts of 1916 as purports to annul liquor licenses is *intra vires*. The section of the Act of 1916 referred to substitutes a sec. 81 for the section so numbered in the Temperance Act, 1910. This sec. 81 repealed the Liquor License Act, ch. 100 of the Revised Statutes, with a proviso saving certain licenses in the city of Halifax and the county of Richmond. The Liquor License Act is now, by virtue of the Act of 1916, wholly repealed and all licenses issued under the provisions of that Act are annulled. I do not see how there can be any answer to the question other than that the legislature had plenary power to annul these licenses on whatever conditions it saw fit and without compensation to the holders or any return of the license fee in whole or in part. The morality of the matter is not for the Court, and it is a question upon which opinions must be allowed to differ. I express none.

2. The second question is whether liquor licenses granted under the provisions of the Nova Scotia Temperance Act are avoided by said sec. 3 of the Act of 1916. The answer, I think, is that there are no licenses issued under the provisions of the Nova Scotia Temperance Act. The only licenses that could be issued after the passing of that Act were issued under the unrepealed provisions of the Liquor License Act, ch. 100 of the Revised Statutes. Sections 63, 67 and 80 of the Nova Scotia Temperance Act preserved the Liquor License Act in force for the purpose of making it possible to issue licenses in the city of Halifax, and of preserving for a named period the licenses existing in the county of Richmond and the municipality of the county of Halifax. If it be held that any licenses were granted under the provisions of the Nova Scotia Temperance Act, I am of opinion that the clear intention and effect of the Act of 1916 was to annul them, but I should prefer to say that no licenses were issued under the Temperance Act and that those issued under the Liquor License Act have been annulled.

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3. The question whether Part II. of the Nova Scotia Temperance Act is in force in the city of Halifax has been decided by the case of *Re Bradbury*, 50 N.S.R. 298, 27 Can. Cr. Cas. 68, 30 D.L.R. 756, and I understand that the *ratio decidendi* of that case applies equally to the county.

4. The Manitoba case in the Privy Council has decided that the Act of that province was *intra vires* and it contained provisions of the same kind as that in question here. Brewers, therefore, cannot keep intoxicating liquors for sale in Nova Scotia. They may keep them for sale outside of the province subject, of course, it goes without saying, to the provisions of the Doherty Act, so called, [6-7 Geo. V. Can., ch. 19.]

5. A resident of another province cannot sell intoxicating liquors in the Province of Nova Scotia, nor can he keep them in Nova Scotia for sale in Nova Scotia. A person in another province can there sell liquor to be consumed in the Province of Nova Scotia, unless prohibited by the law of such province, and under sec. 4 of the Temperance Act a contract can be made in this province with a person outside of the province for liquor to be brought into the province. Such liquor, when brought into the province, cannot be kept here for sale in the province, but may be kept here for sale outside of the province.

Longley, J.

LONGLEY, J.:—The Government or Executive Council of Nova Scotia by Order-in-Council dated 4th December, 1916, referred to the Supreme Court of Nova Scotia for hearing and consideration certain questions which are as follows:—

1. Is so much of sec. 3 of ch. 22 of the Acts of 1916 as purports to annul liquor licenses *intra vires?* A. Yes.

2. Are liquor licenses granted under the provisions of the Nova Scotia Temperance Act avoided by the provisions of said section? A. Yes.

3. Is Part II. of the Nova Scotia Temperance Act in force (a) in the city of Halifax, (b) in the county of Halifax? A. Yes, in respect of both.

4. Do the provisions of said Act prohibit a brewer in Nova Scotia from keeping for sale or selling in Nova Scotia intoxicating liquors which have been manufactured by such brewer who holds a brewer's license granted under the Inland Revenue Act? If so, are such prohibitory provisions *intra vires?* A. Yes.

In regard to the last question asked in question four, "If so, are such prohibitory provisions *intra vires*," I answer, "Yes."

5. I find it is impossible to answer satisfactorily question 5 in its present form.

DRYSDALE, J.:—I would answer the first question in the affirmative. Drysdale, J.

2. As to the second question, I am of opinion that the licenses dealt with were issued under the Liquor License Act as amended by the Temperance Act, and were avoided by the Act of 1916.

3. Under the doctrine of *stare decisis* I am obliged to answer this question in the affirmative.

4. Under the decision of the Privy Council in the Manitoba case, I am obliged to answer the 4th question in the affirmative.

5. This question as stated I cannot answer except by saying under some circumstances, yes; under some circumstances, no.

HARRIS, J.:—The following questions have been submitted by the Lieutenant-Governor-in-Council to this Court for consideration, pursuant to ch. 166 of the Revised Statutes of Nova Scotia (1900), viz. Harris, J.

(The questions have already been set out in full.)

1. In answer to the first question I think the answer should be in the affirmative. This was the opinion expressed by me *In re Carrie Bradbury*, 50 N.S.R. 298, 27 Can. Cr. Cas. 68, 30 D.L.R. 756, and I have seen no reason to change it.

2. The second question seems to assume that the provisions of Part IV. of the Nova Scotia Temperance Act repealed the Liquor License Act (ch. 100 of the Revised Statutes of Nova Scotia, 1900), and that thereafter licenses were not issued under the Liquor License Act but under the Nova Scotia Temperance Act. It is, I think, clear, that all Part IV. of the Nova Scotia Temperance Act did, was to amend the Liquor License Act by substituting a new licensing authority in the place of the City Council. A perusal of secs. 80 and 81 of the Nova Scotia Temperance Act, in my opinion, makes this perfectly clear. The former section provides that the Liquor License Act is to be read and construed as if Part IV. formed a portion thereof and the latter section provides that the Liquor License Act was to remain in force in the city of Halifax for the time being. There were

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not two licensing Acts in force in the city of Halifax after the Nova Scotia Temperance Act was passed, but one only, and that was the Liquor License Act as amended by the Temperance Act, and all licenses, thereafter as before, were issued under the Liquor License Act. It is, I think, not correct to refer to licenses as having been issued under the Temperance Act. If this fact is clearly borne in mind the argument that ch. 22 of the Acts of 1916 does not avoid licenses in force in the city of Halifax requires little or no answer. If we look at sec. 3 of ch. 22 of the Acts of 1916 we see that it expressly repeals the Liquor License Act and all the amendments thereto and it then goes on to declare null and void and of no force and effect all licenses issued under said ch. 100. If I am right in holding that there was only one licensing Act in force and that was the Liquor License Act, it follows that the licenses in question are expressly annulled by the Act of 1916.

There is no doubt that the statute in question is one which encroaching, as it does, on the rights of the subject, should be strictly construed. In fact, we should not construe it so as to confiscate these licenses, or to encroach on the rights of persons without compensation, unless the legislature has plainly and beyond reasonable doubt so declared. Here the legislative intent is, I think, plain and beyond reasonable doubt and we have no option.

3. Both parts of the third question are answered by the decision of this Court *In re Carrie Bradbury*, 50 N.S.R. 298, 27 Can. Cr. Cas. 68, 30 D.L.R. 756.

4. I have had an opportunity of perusing the opinion of the learned Chief Justice, Sir Wallace Graham, as to the fourth question, and I agree with his conclusions and his reasons therefor and do not feel that I can add anything to what he has said.

As the fifth question is ambiguous I do not think it should be dealt with.

Chisholm, J.

CHISHOLM, J.:—I concur in the opinion read by the Chief Justice and would answer in the same way the questions submitted for our decision.

Answers in affirmative to questions (1), (3) and (4); special answers to questions (2) and (5).

O'LEARY v. KEUFELL & ESSER Co. of NEW YORK.

QUE.
C. R.

Quebec Court of Review, Demers, Greenshields and Lamothe, JJ. April 27, 1917.

CONTRACTS (§ IV D—360)—PERFORMANCE—SUBSTITUTION OF MATERIAL—ACCEPTANCE—CERTIFICATE.

Where a contract calls for an article of a specified type, and the purchaser knowingly receives and uses another, he is liable for the contract price, despite the non-approval of the furnished article by the purchaser's architect.

Statement.

APPEAL from the judgment of the Superior Court rendered by Monet, J. Affirmed.

The plaintiff contracted with the defendant for the installation of four panel electric boards, according to the specifications prepared by the defendant's architect, for the sum of $290. The work was completed about May 15, 1914, and the plaintiff received $150 on account. The defendant refused to pay the balance on the ground, that these panel boards were not those mentioned in the specifications, the plaintiff having substituted the "Monarck panel boards" to the "Crouse-Hinds" mentioned in the contract, and also because the plaintiff never produced a certificate from defendant's architect to the effect that the work was duly completed, the said architect not only refusing to give such certificate, but protested the plaintiff to carry out the contract according to the specifications. The plaintiff, on August 20, 1914, sued the defendant for the balance of $140, alleging that the defendant has accepted the electric installation made by him and used it since May 15, 1914. The defendant pleaded the above reasons as a justification to refuse to accept the works. The Superior Court maintained the action.

Hibbard & Gosselin, for plaintiff.

Beaubien & Lamarche, for defendant.

The judgment in review was delivered by

Greenshields, J.

GREENSHIELDS, J.:—My view of this case may be briefly stated.

The plaintiff had a contract for certain electrical work, among others, the installation of four panel boards of the type known as "Crouse-Hinds" having a capacity of 100 amperes. The number of the panel board as appearing in "Crouse-Hinds" catalogue was given. That number might well have been mentioned in order to show the type; it certainly was not intended that that exact panel board, bearing that number, should be installed, because it had only the capacity of 60 amperes.

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Now the plaintiff proceeded to do his work: he was paid $150 on account, and when he had completed the work he sent the bill for the balance: he installed three of the panel boards called the "Monarck" which had a capacity much over 100 amperes.

After all this work had been done, and these panel boards installed, the plaintiff received a letter on May 21, 1914, from the defendant's architect, in which he said, in part—

> The panel boards you have installed are not those specified in the official specifications, and were installed contrary to the intent of the specifications and I must, therefore, ask you to instal the panel boards in this building that were specified. You are to make the correction to your work with the least possible inconvenience to the owners.

Nothing was done, apparently, until the 4th of August following, long after the defendant had taken possession of these panel boards, and were using them for the purposes of their business, and using them with perfect satisfaction. Upon that there is no doubt.

On August 4, the plaintiff wrote to the defendants—

> Your architect has refused us a certificate because he claims we should have installed panel board manufactured by the Crouse-Hinds Company. His specifications called for a Crouse-Hinds type of panel board, and there is no fault . . . . and unless you pay, we will have to take proceedings.

A copy of that letter was on August 10, sent by the defendant to their architect, and in which the defendant states, in part, as follows:

> There is still due this firm $140, which we are holding back for the reason that they have not installed the panel boards as called for in our specifications.

On August 11, the architect wrote to the plaintiff, in part, as follows:—

> I regret to give you notice that if I have not received from you by Friday the 14th, a written statement that you will complete the work as instructed, and as specified, putting in the panel boards called for and completing your entire work as intended by the specifications, I shall employ other contractors to carry out the remainder of your contract, and shall deduct the cost of such work from the balance due you.

The plaintiff took no notice whatever of this letter: that is to say, he did not do the work, made no changes whatever and no changes were made, but the defendant has continued to use these panel boards, and so far as the record shows, is still using them.

Now, what is the position? The defendant says: "We still owe the plaintiff $140, we are holding it back on account of these panel boards." The architect says to the plaintiff:—"Remove

these panel boards and put in others, or we will do the work and charge the expense to you."

The plaintiff refused to do the work.

The defendant, if it thought the work was defective, could have done it: it did not do it, and yet they are using them and they do not pay. They must pay, and I tell them to pay.

Judgment affirmed.

McCORMACK v. GALLAGHER.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. April 20, 1917.

HUSBAND AND WIFE (§ I B—40)—AGENCY OF HUSBAND—TO EMPLOY BROKER FOR WIFE'S PROPERTY.

A husband managing a hotel belonging to his wife has no implied authority to employ a real estate broker to lease the property, and she is not liable for the brokerage commissions, in the absence of proof that she adopted the broker's work.

Statement.

APPEAL by defendant from a verdict for plaintiff in an action tried in the Westmorland County Court, to recover $365 commissions claimed to have been earned by plaintiff as real estate broker. Reversed.

P. J. Hughes, for defendant, appellant.

J. Friel, K.C., for respondent.

The judgment of the court was delivered by

Grimmer, J.

GRIMMER, J.:—It appears the plaintiff was a real estate broker and insurance agent, having an office in the City of Moncton.

The defendant was the owner of the Minto Hotel in Moncton, at which the plaintiff had lived for some years while it was managed by Patrick Gallagher, the husband of the defendant. The plaintiff claims that in May, 1915, Patrick Gallagher asked him to sell or rent the hotel, for which he would give him a handsome commission, and that if he found a buyer to bring him in, and he would do the business; that he did find a man, one McInerney, who was looking for an hotel, and he introduced him to Patrick Gallagher; that negotiations were entered upon between these parties, and after a time the hotel was leased to McInerney at a rental of $3,650 per year, and as a result of this leasing the plaintiff claimed a commission at 10%. The defendant did not appear or take any part in the negotiations which resulted in the lease, neither is there any evidence establishing any agency between the defendant and her husband, or connecting her with the trans-

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action, or that she in any way ratified or confirmed the same, or knew there was any agreement or contract to pay a commission.

There is also no evidence that the defendant authorized the making of the agreement in respect to the payment of a commission, or that if such was made by Patrick Gallagher that he was acting within the scope of his authority as agent of the defendant; in short, the whole case is barren of any evidence connecting the defendant with the alleged agreement.

From the fact that the Gallaghers lived together at the hotel, and that Patrick Gallagher apparently had charge thereof and managed the same, and on a previous occasion had leased the same and sold some furniture through another man, who had received a commission; that the plaintiff introduced McInerney to Patrick Gallagher, and that the hotel was subsequently leased to him; the County Court Judge decided there was presumptive evidence of authority in Patrick Gallagher to act as agent of his wife in the making of the agreement of so strong a nature as to at least place upon the defendant the burden of showing that no such authority ever existed, and that, because she did not furnish evidence to shew that the agency never existed, or contradicted the presumption he found had been created by the evidence, therefore, substantially, the agency was proved. This is what I gather is the substance of the judge's charge from the return filed, with which I am unable to agree.

The vital question in the case is whether or not the defendant authorized her husband to act for her in making the alleged agreement; and it is a fact which must be proved, not presumed, and the plaintiff entirely failed to provide or produce any evidence of that fact. Further, Patrick Gallagher on the stand declared he not only had not made the alleged agreement but that he had no authority from the defendant to make it in her behalf, or bind her in any way, and did not act as her agent in any negotiations he had with the plaintiff.

There was no direct finding by the jury on the question, and I think it may fairly be said it was not left to them by the court, but even if it had been left to them to find, in my opinion there was absolutely no evidence from which they could infer authority to make the alleged contract.

It should be ordered that this appeal be allowed with costs, and that the plaintiff have leave to discontinue on payment of

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defendant's costs, including the costs of this appeal, and that unless the plaintiff so discontinue and pay such costs on or before the first day of June next, judgment be entered for the defendant with costs, and that the case be remitted to the court below to proceed accordingly. *Appeal allowed.*

WOODSIDE v. LANDS & HOMES Co.

MAN.
K. B.

Manitoba King's Bench, Mathers, C.J.K.B. June 15, 1917.

CO-TENANCY (§ III—18)—JOINT OPTION—ACCEPTANCE BY ONE—ACCOUNTING.

The relation of joint holders of an option on land is not that of partners, but of joint owners, and the exercise of it by one enures to the benefit of the other, and an account of the profits realized must be made.

ACTION for half the profits made on a resale of land purchased by defendant under joint option with plaintiff.

G. A. Elliot, K.C., and *M. G. Macneil*, for plaintiffs.

E. J. McMurray, for defendant.

Mathers, C.J.K.B.

MATHERS, C.J.:—In the beginning of June, 1912, Brown & Barringer, of Emmetsburg, in the State of Iowa, who owned 5,515 acres of farm lands in this province, offered the same for sale to the defendant at $6 per acre, payable one-fifth cash and the balance in 5 annual payments and for a down payment of $1,000 to hold the offer open for 30 days from June 7, 1912. If within the 30 days the balance of the cash payment was made, an agreement to sell would be entered into; if not, the $1,000 paid would be forfeited. The defendants communicated the offer to the plaintiffs, and it was eventually agreed that the plaintiffs and the defendants should each pay one-half of the $1,000 down payment and purchase an option good for 30 days in the name of the defendants. Pursuant to this agreement the plaintiffs paid to the defendants $500, to which the defendants added $500 more and paid to Brown and Barringer $1,000, and received in exchange the following document:

Know all men by these presents: That Land and Homes of Canada, Limited, has paid to Brown and Barringer, of Palo Alto County, Iowa, the sum of $1,000 for the privilege of purchasing within 30 days from June 7, 1912, the certain lands of the said Brown and Barringer described in the attached schedule at the rate of $6 per acre net to them according to the acreage as shewn in the records in the Land Titles Office at Winnipeg, payable one-fifth in cash and the balance of the purchase price in 5 equal annual payments with interest from June 7, 1912, to maturity at 6% per annum, payable annually, the remaining terms and conditions of such purchase to be as specified in the form of contract hereto attached and made a part of this agreement.

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Such right to purchase if exercised shall be exercised within 30 days from June 7th, 1912, by paying to Brown and Barringer at Emmetsburg, Iowa, the said cash payment of one-fifth of the purchase price (less said sum of $1,000) with interest from the seventh day of June, 1912, at 6% per annum and executing contracts in the attached form dated June 7, 1912. The vendee or vendees named in and executing such contract to be designated by Land and Homes of Canada, Ltd. If not so exercised within 30 days from June 7, 1912, these presents to be null and void, and the said sum of $1,000 to be retained by Brown and Barringer as compensation for the privilege hereby given. Brown and Barringer are to pay no commissions and are to be at no other expense for the making of such sale.

Dated at Emmetsburg, Iowa, this 15th day of June, 1912.

Signed: Brown & Barringer, by M. L. Brown.

It was the expectation of all parties that the lands could be sold at a profit within the 30 days for which an option to purchase had been secured and that no more than the $1,000 would have to be raised. A purchaser, however, was not obtained and a few days before the expiration of the 30 days it became apparent that the balance of the cash payment would have to be raised or the $1,000 already paid forfeited. Some negotiations took place between the plaintiffs and the officers of the defendant company with respect to borrowing the amount required upon a joint promissory note, but nothing came of it. The plaintiffs complain that they were induced to relinquish their efforts to raise the amount required by the assurance of one of the defendant's officers that he had succeeded in doing so. The option was for 30 days from June 7, and would thus expire on July 7, which was Sunday. At 10 o'clock on the morning of Saturday July 6, the plaintiffs were told by two of the defendant's officers that unless they, the plaintiffs, paid over to the defendants their half of the balance of the first payment, amounting to about $2,500, before 12 o'clock noon of that day, they would be entirely out of the transaction. The plaintiffs did not pay over the amount required by the hour named. They contended that they had until Monday to make the payment and they did not agree that the defendants had a right to count them out for failure to pay by noon on Saturday. At 12 o'clock the defendant's officers declared that the plaintiffs were no longer in the transaction and the conference broke up.

Prior to this the defendants had, unknown to the plaintiffs, made arrangements with a man named McDonald to advance $2,500. The defendants say that McDonald was brought in to

take the plaintiffs' place when they failed to raise their share of the money. It does not seem to me that it makes any difference to the plaintiffs' rights whether the defendants raised the whole amount themselves or obtained a portion of it from McDonald, or what the arrangements between the defendants and McDonald were. The interests of the plaintiffs as joint owners of the option could not, without their consent, be transferred by the defendants to McDonald or any person else.

Before the expiration of the 30 days the defendants exercised the option to purchase by paying over to the vendors the whole of the cash payment, less the $1,000 paid for the option, and received an agreement to purchase dated June 7, 1912. In the agreement the purchase price is stated to be $33,090, and the payment of the cash payment of $6,618 is acknowledged, leaving a balance of $26,472, to be paid in 5 equal annual payments of $5,294.40, with interest at 6% per annum.

On December 24, 1912, the defendants entered into an agreement for the re-sale of the lands to Sparling, of Saskatoon, for the price of $66,180.

The president of the defendants says about half of this sum has been paid and that the interest upon the balance has also been paid. He also says that about half of the purchase price payable to Brown & Barringer has been paid.

The plaintiffs sue for half of the profits made upon the re-sale to Sparling. They contend that a partnership had been entered into between themselves and the defendants for the purchase of these lands on the basis of equal shares and they ask for a declaration to that effect and that the defendants took and held the lands and all benefits and profits for itself and the plaintiffs equally.

I do not think the plaintiffs and the defendant were partners in the transaction. It appears to me their relationship in the first place was that of joint owners of an option to purchase these lands. The option was contained in a written contract entered into between Brown & Barringer and the defendants, acting therein for the plaintiffs as well as for themselves. The defendants thereby became trustees of a one-half interest in the option for the plaintiffs. The defendants, within the time limited, converted the option into an agreement to purchase by paying the cash payment stipulated for, less $1,000, half of which had been

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contributed by the plaintiffs. They now deny that the payment so made enures to the benefit of the plaintiffs. There is no doubt but that an option to purchase owned jointly by the plaintiffs and the defendant was taken up in compliance with its exact terms, but it is contended that the plaintiffs have no interest in the lands so agreed to be purchased, because they did not pay to the defendants half of the money to be paid over in order to exercise the option before it expired by effluxion of time. The demand of the defendants was that it should be paid in before 12 o'clock noon on the last day. The option did not expire until 12 o'clock midnight, but the defendants seem to have thought that they could arbitrarily fix an hour for payment and that the plaintiffs' interest in the option would automatically become extinct if payment was not made by the hour so named. Clearly the defendants had no such right. The plaintiffs' title to the option had not been extinguished when the option was taken up and it attached to the resultant agreement to purchase. The fact that the defendants paid all the money did not effect an assignment to them of plaintiffs' title. It requires more than the mere exercise of the will of the transferee to accomplish such a transfer. Had the option expired the interest of the plaintiffs would have expired with it and their $500 would have been lost, but the option did not expire, and the plaintiffs' interest was preserved.

I know of no way by which the defendants could exercise this option upon their own behalf and for their own exclusive benefit without the consent of the plaintiffs, who owned a half interest in it. Even if before doing so they had tendered to the plaintiffs the $500 paid in by them they would not have legally improved their position unless the plaintiffs accepted their money so tendered. They made no attempt to buy the plaintiffs out and to proceed with the transaction themselves. They seem to have thought that if at any stage of the proceedings the plaintiffs failed to raise their share of any payment to be made they, the defendants, were at liberty to make the whole payment and thereby vest the entire ownership in themselves freed from any claim of the plaintiffs even to the extent of the moneys previously invested.

I asked the defendants' counsel what right the defendants

had to the benefit of the $500 contributed by the plaintiffs, and he candidly admitted that they had none.

The conclusion I have arrived at is that the payment made by the defendants to take up the option enured to the benefit of the plaintiffs. I have seen no decided case on the subject, but in 21 A. & E. Encyc. 934, reference is made to *Clark* v. *Harmer*, 5 App. Cas. (D.C.) 114, which is given as authority for the statement that when an option is held by two, the exercise of it by one of the two enures to the benefit of the other and is presumably upon their joint account and for their joint benefit. I think the plaintiffs had a half interest in the lands purchased in common with the defendants, and that the defendants are bound to account to them for their dealings with the lands to the extent of that interest.

As the whole purchase price upon the sale to Sparling has not yet been paid, the plaintiffs are not entitled to a judgment for the payment forthwith of the value of their interest. They are, however, entitled to a declaration that they had a half interest in the lands purchased, and have now a like interest in the agreement of sale to Sparling and in the moneys paid and unpaid thereunder, and to an account of the defendants' dealings with the land, for which purpose it may be referred to the Master, if desired.

In taking the accounts the plaintiffs will be charged with amount of the purchase price paid by the defendants over and above their proportion and interest at 5%.

The plaintiffs are entitled to the costs of the action to be paid forthwith after taxation. *Judgment for plaintiff.*

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REX v. ELLA PAINT.

N. S.
S. C.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Longley, Drysdale, Harris and Chisholm, JJ. March 10, 1917.

INTOXICATING LIQUORS (§ III H—90)—SEARCH WARRANT FOR LIQUORS—ILLEGAL SEARCH OF PERSON.

A search warrant for liquors issued under the Nova Scotia Temperance Act, 1910, sec. 42, does not authorize the officer or his assistant to search the person of the occupant of the premises wherein liquor is suspected of being unlawfully kept for sale; a compulsory search of the person at the time of searching the premises referred to in the search warrant is punishable as a common assault, if no liquor was found on the premises, and there was no authority to arrest the party searched.

Statement.

CASE stated by a justice under Cr. Code sec. 761.

Defendant was tried before George H. Fielding, Esquire, Stipendiary Magistrate in and for the City of Halifax, charged

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with committing an assault upon one Annie Garnier. It was admitted that defendant, who was an officer of the Society for the Prevention of Cruelty, had gone to the premises occupied by Garnier in company with a sergeant of the city police and at his request to assist him in making a search for liquor and in the course of such search and at the request of the police sergeant, searched the person of Garnier. No evidence was given of any other search warrant having been issued under the Nova Scotia Temperance Act. The stipendiary magistrate dismissed the summons, but at the request of counsel for the prosecution stated for the opinion of the Court the following question: "Should I have convicted the defendant of assault?"

J. Terrell, K.C., for the prosecution; *R. H. Murray*, K.C., for defendant.

Harris, J.

HARRIS, J.:—I agree with the conclusion reached by Mr. Justice Chisholm that upon the facts disclosed in this case the stipendiary magistrate should have convicted the accused of common assault.

I wish, however, to say that in so deciding I am not to be understood as holding that under no circumstances whatever can a search of the person be made under the warrant to search the premises. On the argument I put to counsel the question whether or not if a constable armed with such a warrant upon entering the premises found the occupant concealing bottles of liquor about his person such liquor could not be removed from the person of the occupant. This would involve a search of the person. It is clear, I think, that a warrant to search the person under sec. 48 does not cover such a case and it may be that such a search is not authorized by the warrant in this case. The point does not arise and I express no opinion on it either way, but I wish to leave myself free to consider such a case (should it arise) untrammelled by this decision.

Chisholm, J.

CHISHOLM, J.:—This case is stated for the opinion of the Court under the provisions of the Criminal Code, sec. 761, and following sections, by George H. Fielding, Esquire, stipendiary magistrate in and for the city of Halifax.

An information was laid before the magistrate by one Annie Garnier charging the accused, Ella Paint, with common assault. The assault complained of was that the accused searched the

person of the complainant for the purpose, as appeared, of ascertaining whether she had any intoxicating liquor concealed about her.

The accused sought to justify her act (1) by claiming the right so to search under a warrant issued by the magistrate directing a search of the premises of the complainant, and (2) by claiming the right to make the search under the common law.

The magistrate dismissed the summons and this case has been stated on the application of the complainant.

Chapter 2 of the Acts of the Legislature of Nova Scotia for 1910, sec. 46 (which is amended in part by ch. 33 of 1911, sec. 14) authorizes the magistrate, if satisfied upon oath that there is reasonable ground for the belief that any liquor is sold or kept for sale contrary to the provisions of the Act at any place, to issue a warrant to search for such liquor at such place. The officer to whom the warrant is directed must act on the warrant within ten days from the date thereof; and power is given to him under this section to break open doors, locks, closets, cupboards, etc., and if liquor is found, to arrest the occupant. It was under sec. 46 that the warrant to search the premises of the complainant was issued. The warrant is as follows:—

"To all or any of the constables, police officers in the city of Halifax aforesaid.

"Whereas William Palmer, of the city of Halifax, in the county of Halifax aforesaid, Sergt. of Police, has this day made oath before me the undersigned stipendiary magistrate in and for the said city of Halifax, that he has just and reasonable cause to believe and does believe that intoxicating liquor is unlawfully kept for sale in the shop and premises of Mrs. Louis Garnier, No. 158 Upper Water Street in the said city of Halifax contrary to the provisions of Parts I. and II. of the Nova Scotia Temperance Act and Acts in amendment thereto then in force in the city of Halifax.

"These are therefore in the name of our Sovereign Lord the King to authorize and require you and each and every one of you with necessary and proper assistance to enter at any time or times within ten days from the date hereof into the said shop and premises of the said Mrs. Louis Garnier in the said city of Halifax, and there diligently search for intoxicating

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liquor, and if the same or any part thereof can be found on such search that you shall bring the intoxicating liquor so found and also the vessels of any kind whatever containing the same before me to be disposed of and dealt with according to law.

"Given under my hand and seal at the city of Halifax in the said county of Halifax this 28th day of October, A.D. 1915. "(Sgd.) George H. Fielding (Seal).

"Stipendiary Magistrate in and for the city of Halifax."

The accused acted as assistant to the officer who was executing the above warrant.

Section 48 of ch. 2 of the Acts of 1910 authorizes the issue of a warrant to search the vehicles or "persons" of pedlars. But the accused cannot and does not rely on that section as there was no warrant issued thereunder.

At common law the dwelling of the subject is held to be immune from intrusion, unless there is express authority to justify the intrusion, and the "person" of the subject is held equally sacred. The right of the subject in this regard is thus stated in *McClary* v. *Brenton*, 123 Iowa 368, 65 L.R.A. 519, per Weaver, J.:—

"The right of the citizen to occupy and enjoy his home, however mean or humble, free from arbitrary invasion and search, has for centuries been protected with the most solicitous care by every Court in the English speaking world from *Magna Charta* down to the present, and is embodied in every bill of rights defining the limits of governmental power in our own republic. The mere fact that a man is an officer, whether of high or low degree, gives him no more right than is possessed by an ordinary private citizen to break in on the privacy of a home and subject its occupants to the indignity of a search for the evidences of crime, without a legal warrant procured for that purpose. No amount of incriminating evidence, whatever its source, will supply the place of such warrant."

In 35 Cyc. 1265, the principle of law is thus stated:—

"Nothing will justify searching a dwelling for stolen property without a warrant for that purpose, unless made with the consent or by invitation of the owners."

The jealousy with which the law regards the rights of the subject is good ground for construing with some strictness statutory

provisions which authorize searches to be made on private premises and hence it is that we find it laid down in 35 Cyc. 1266, 1267, that:—

"The warrant must describe with particularity the place sought to be searched (*McLeod* v. *Campbell*, 26 N.S.R. 458) and the persons or things sought to be seized."

What the warrant in this case authorized was a search of the "shop and premises" of the complainant, "158 Upper Water street in the city of Halifax." In prosecuting his search the statute enables the constable to break doors, locks, closets, cupboards, etc. But nothing is said about searching the "persons" of the occupants. If it were contemplated to authorize so unusual a proceeding, one would expect the legislature to say so definitely and precisely; for, to search the person of the occupant is pushing farther the invasion of one's privacy than breaking open a door or closet. It is not necessary to point out the results which would follow if the Court held that under a warrant to search a defined place or premises, the officer might search the "person" of anybody who might at the time be found within such defined place or premises. I have been unable to find any case where so wide a construction has been given to the power of search. There are cases where express power to search the "person" has been given, as for example, the English Betting Act of 1853, sec. 11 (see *Anderson* v. *Hume*, 46 J.P. 825): but Mr. Murray has not directed our attention to any case, probably because none can be found, where the right to search the person has been established by implication from the power to search the premises.

There are cases where parties under arrest have been searched: *Rex* v. *O'Donnell*, 7 C. & P. 138. This is for the purpose of securing evidence of a crime already committed; or for the purpose of preventing further mischief by the prisoner or some like purpose. Such cases are quite distinguishable from a case where there has been no arrest, nor where, so far as any evidence shews, no offence has been committed.

I think the stipendiary magistrate should have convicted the accused of common assault. She no doubt acted in good faith and the penalty should be nominal.

SIR WALLACE GRAHAM, C.J.: I agree.

DRYSDALE, J.:—I agree with Chisholm, J.

Judgment for prosecutor.

N. B.

S. C.

LONG v. LONG.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Grimmer, JJ. April 20, 1917.

COURTS (§ I B—125)—JURISDICTION—TORT—LAND—LEX LOCI.

The court will not entertain an action for tort committed in a foreign jurisdiction, in connection with land situated therein, unless it is alleged and proved that it is actionable by the laws of the place where committed.

[*Campbell* v. *McGregor* (1889), 29 N.B.R. 644, distinguished.]

Statement.

APPEAL by defendant from the judgment of Barry, J., in favour of plaintiff, in an action for damages for the carrying away by defendant of pulpwood and logs and converting it to his own use. Reversed.

P. J. Hughes, for defendant, appellant.

A. Lawson, for respondent.

The judgment of the court was delivered by

Grimmer, J.

GRIMMER, J.:—The plaintiff and defendant are both residents of the Province of New Brunswick, and each was, by the government of the Province of Quebec, allotted land in that province, being respectively lots numbered 31 and 32 in the County of Temiscouata. The lots were not granted, but apparently were allotted under the regulations governing the settlement of Crown Lands, of which, however, no evidence was given. During the summer of 1913 the plaintiff began cutting pulp-wood on his lot No. 31, and somewhat later in the same season, the defendant commenced similar operation on his lot No. 32. No line of division had been established between the lots, and for their present convenience the parties spotted some trees for a short distance, and agreed to cut on either side of the line so established until a true and proper line could be surveyed, when if it was found either of them had cut on the other's property, the one so offending would "return the wood." An attempt was made to run a correct line, which, however, seems to have proved abortive, and no surveyor having been obtained, the line has never been run.

The action was brought to recover damages for unlawfully depriving the plaintiff of his goods, consisting of logs, lumber and pulp-wood, and for wrongfully entering on plaintiff's land and cutting down and removing his trees and lumber and pulp-wood, the plaintiff's statement of claim was framed in trover thus making it, so framed, an action for conversion of the logs and pulp-wood.

The cause was tried before Barry, J., without a jury, who

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ordered a judgment for the plaintiff for $334.62, for logs and pulp-wood, from which judgment the defendant appeals.

At the trial the jurisdiction of the court to entertain the action was challenged on behalf of the defendant, and later on it was urged that for want of proof of a division line between the lots the plaintiff should fail.

In my opinion on either or both of these objections the defendant should have succeeded. In respect to the first objection as stated, the lands are situate and the logs and wood were cut in the Province of Quebec, quite without and beyond the jurisdiction of this court. The claim to ownership in the logs must be based upon the ownership of the land, and the claim of title in the land and in the logs cannot be separated. Any dispute in respect thereto must be decided by the *lex loci*. The trend of the opinions in all the recent decisions is, as I am able to deduce them, that under circumstances such as prevail in this case, the courts of this province would not have jurisdiction, as it is clearly held that if the contested claim is based upon the right to land, and must be determined by the *lex loci rei sitae*, and the only ground for instituting proceedings in this country is that the defendant resides here, the courts of this country have no jurisdiction. The judge who tried the case was of the opinion that the courts of this province could not exercise jurisdiction over lands in another province, and stated that if it had not been for the decision in *Campbell* v. *McGregor*, 29 N.B.R. 644, he would have found for the defendant.

This case is, however, in my opinion distinguishable from the present one, particularly as the question of jurisdiction is raised here as the main objection in the case, while it is only incidentally raised in the other, and is only referred to by one of six judges who heard the appeal and took part in the judgment, and he seems to have regarded and treated it as being raised in relation to personal torts generally, without reference to the difference which exists when the tort arises in respect to lands situate without the jurisdiction.

In this respect I am also of the opinion the plaintiff, in order to be successful, should have alleged and proved that the action would lie and could be maintained in the Province of Quebec under its existing laws, and as this was not alleged or proved, and

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this court being unable to assume that the laws of the province in which the lands are situate, corresponds with the laws of this province, the objection of want of jurisdiction should have prevailed at the trial. As to the second objection, the judge states in his judgment that "it will be seen from the evidence that the dividing line between lots Nos. 31 and 32 is in dispute between the adjoining owners, and it is so asserted in the statement of defence, and the effect of my finding is practically to decide that disputed question."

I am unable to accept or adopt this declaration of fact, as, in my opinion under the evidence, with all due respect, if one thing more than another stands out prominently in this suit, it is the fact that the dividing line between the two lots had never been ascertained or run, and the parties do not now know where the same should be, or how much wood has been wrongly cut. There is nothing in evidence by which the line may be located, and no sufficient proof of the quantity of wood wrongfully cut. This, it seems to me, is the gist of the whole suit, and after a careful study of the evidence I am unable to arrive at the same conclusion as the trial judge. Without the true or correct line, no just claim to the wood or logs can exist or be presented, and as no such line has been run, fixed or established by a competent surveyor, and no complete conventional line fixed or agreed upon, if a trespass has been committed it is quite impossible to determine the fact or the extent thereof.

In my opinion this appeal should be allowed and a verdict entered for the defendant with costs.

Cases considered: *British S. Africa Co.* v. *Companhia de Mocambique*, [1893] A.C. 602; *Henderson* v. *Bank of Hamilton* (1894), 23 Can. S.C.R. 716; *Harrison* v. *Harrison* (1873), L.R. 8 Ch. App. 342; *Burns* v. *Davidson*, 21 O.R. 547; *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1, at 28; *The M. Moxham* (1876), L.R. 1 P.D. 107; *Papageorgiouv* v. *Turner*, 37 N.B.R. 449. *Appeal allowed.*

ONT.
S. C.

U.S. FIDELITY AND GUARANTY Co. v. UNION BANK OF CANADA.

Ontario Supreme Court, Clute, J. April 11, 1917.

1. BONDS (§ II B—21)—FIDELITY—BANK EMPLOYEE—PECUNIARY LOSS FROM THEFT.

Money stolen by a bank clerk, and used by him to make up shortages which occurred before a fidelity bond was given, is not a "pecuniary loss" sustained by theft within the meaning of the bond.

[*Gwynne* v. *Burnell* (1840), 7 Cl. & F. 572, distinguished.]

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Statement.

2. MISTAKE (§ III—20)—PAYMENT UNDER MISTAKE OF FACT.

Money paid by a surety under a mistake as to the identity of the person covered by the bond is payment under mistake of fact and may be recovered back.

ACTION to recover $2,010 alleged to have been paid by the plaintiff company to the defendant bank, under a mistake of fact, upon a surety bond issued by the plaintiff company to the defendant bank.

The defendant bank denied liability, and claimed over against the Canadian Surety Company, made a third party, upon an indemnity bond issued by it.

G. Lynch-Staunton, K.C., and *C. W. Bell*, for plaintiff; *W. B. Raymond*, for defendant bank; *A. E. Knox*, for third party.

Clute, J.

CLUTE, J.:— The facts are as follows: On the 1st August, 1914, the plaintiff issued to the defendant two surety bonds, numbered respectively 1737-14 and 1738-14, insuring and protecting the defendant against loss through the fraud or dishonesty of the defendant's employees, upon the terms and conditions therein set forth, and according to which the plaintiff was to reimburse the defendant for loss so incurred during the life of the said bonds. On the 23rd September, 1914, the defendant discovered that its office at Hamilton had been robbed by one McKinnon, who was at that time manager of its branch in the east end of the city of Hamilton; and the losses were ascertained to be the sum of $12,500, which the said McKinnon admitted had been stolen by him, and a further sum of $6,570 which had been in the custody of the said McKinnon and which had disappeared, but which he denied having stolen. The loss of the $12,500 had all been incurred between the end of March and the end of July, 1914, not covered by the plaintiff's bond. The package containing $6,570 was said by McKinnon to have been made up by him at the east end branch of the defendant's bank at Hamilton, and delivered to the main branch at Hamilton, somewhere between the 31st August, 1914, and the 3rd September, 1914. At the main branch office it was said that this package had never been delivered.

McKinnon was put upon his trial in December, 1914, pleaded guilty to the theft of $12,500, and was convicted of the theft of the package containing $6,570.

Subsequently, upon demand, the plaintiff paid to the defendant, on or about the 5th March, 1915, the said sum of $6,570.

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About the 10th September, 1915, it was discovered that McKinnon had not stolen the said package of $6,570, but that it had in fact been stolen by one Desjardins, teller of the main branch of the defendant's bank at Hamilton. Desjardins, being placed upon trial, pleaded guilty to the theft of this money, and stated that it had been applied by him in covering shortages of his own with the bank; and shewed, upon reference to the books of the defendant, that on the 3rd September, 1914, upon which date he had misappropriated the said package, he was in default to the extent of $2,010, and that he had been in default to that amount and more since before the bonds of the plaintiff came into being. On the 3rd September, the said Desjardins applied $2,010 of the moneys contained in the said package to cover his shortage of that amount, and converted the balance, amounting to $4,560, to his own use; in consequence of which the total loss to the defendant during the life of the bonds was $4,560 only.

On the 13th September, 1915, the plaintiff demanded the return of the $2,010, with interest, overpaid to the defendant by mistake, which demand was refused; and this action is brought to recover the same.

The facts in the case are not in dispute, but the defendant and the third party contend that immediately Desjardins appropriated the $2,010 the theft was complete, and the plaintiff became liable upon its bond. Desjardins, who was a witness, stated that when he took from the bag which contained the $6,570 the amount to cover his shortage, he intended to steal the same, and in this manner to appropriate it to his own use, which he did by depositing it with the funds of the bank and so wiping out his shortage.

I think it clear beyond question that the theft of the $2,010 so applied was complete, and if that fact constitutes a defence the plaintiff must fail. But the question turns upon the form of the bond. The plaintiff by its bond "guaranteed to pay to the Union Bank of Canada, the employer, such pecuniary loss as the employer shall sustain . . . . by theft etc." In this case, although the theft was complete, there was no pecuniary loss by reason of the theft. It was immediately paid in to the bank, but all the time it was the bank's money, even while in the hands of Desjardins. Suppose the bag containing the money had been carried to the private house of Desjardins and there recovered by an officer

of the bank. In such case it is clear beyond argument that the bank could not recover upon the bond, because it had suffered no pecuniary loss; and what was done here is in effect the same, indeed rather stronger in favour of the plaintiff, for the money never in fact left the custody of the bank, although the theft was complete. It makes no difference, as between the plaintiff and the bank, that Desjardins applied it to cover a shortage. The plaintiff was not in fact liable for the shortage of Desjardins, which took place before the plaintiff's bond to the defendant was given.

Mr. Knox urged strongly that the case was governed by authority, and relied upon *Gwynne* v. *Burnell* (1840), 7 Cl. & F. 572. In that case it was held that a bond given by a collector and his sureties to the Commissioners of Land and Assessed Taxes, under 43 Geo. III. ch. 99, is broken if the taxes collected in any one year are not duly paid up by the collector to the account of that year. A breach of the condition of the bond, it is said, is equally complete, and the sureties are equally liable, though all the moneys collected in the year for which they are sureties should be in fact paid in, if any part of them should be appropriated by the collector, and received by the Commissioners, in satisfaction of the arrears of a former year. Such appropriation of part of the moneys of one year to payment of the arrears of a former year, will not prevent the Commissioners from maintaining an action on the bond against the sureties for the year in which the money collected has been so misappropriated. The *Gwynne* case turns upon the exact wording of the bond, and is clearly distinguishable from the present case. At p. 590, the questions proposed for the opinion of the Judges are stated. It there appears: (1) that the bond contained a condition to the effect that A.B., the collector, should pay or cause to be paid unto the Receiver-general of the said taxes, all such sums of money as should come to his (A.B.'s) hands, "upon the days and at the times by the said Acts appointed for the payment thereof, and according to the true intent and meaning of the said Acts." The collector paid the money which came to his hands as such collector for the year 1828, at the proper days and times mentioned in the condition, and appointed by the Acts of Parliament for payment; but he did not pay all those sums to the account or service of that year, but a part only, and the residue he paid to the account or service of former years for which he

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had been collector; but the defendant was not surety for the former years; and by such payment the account of former years was paid up and satisfied. The question was: "Was this conduct of A.B. a breach of the condition of the bond?" It was held that it was. Mr. Justice Williams, at p. 613, says: "I think that the payment of part of the money received by the collector for the year 1828 to the account or service of former years, was a clear breach of the condition of the bond. It seems to me that such application of the money differs in no respect from the payment by the collector of any other debt contracted at any other time and in any other manner."

It will be observed that the application to the former year by the collector was held to be a payment by the collector of his debt of that former year. It is true there was a shortage, apparently, of the collector; but there was a breach of the bond, because the bond was in effect for the due discharge by the collector of the duties of his office; and improperly applying the money collected in one year to what was due in respect of a former year was a breach of his duty, and it was held to be a breach of the bond. I think it clear that the *Gwynne* case has no application to the facts of this case. There was a breach of the bond in that case; there was no breach of the bond in this case.

The plaintiff is entitled to recover $2,010 with interest from the day of payment.

The defendant seeks to recover against the third party the amount for which it is liable to the plaintiff, under a bond which extended to and was inclusive of the 6th August, 1914, the bond covering any theft or defalcation, during its period, of the said Desjardins. It is not disputed by the third party that its bond covered the period during which Desjardins stole the various sums amounting to $2,010, nor was it seriously argued that, if the defendant was liable to the plaintiff, the third party was not liable to the defendant. The defendant is entitled to recover from the third party, the Canadian Surety Company, of Toronto, $2,010 with interest, together with the costs for which they are liable to the plaintiff, and any further costs by reason of the defence of the third party.

By the judgment as settled and issued it was adjudged: (1) that the plaintiff do recover from the defendant the sum of $2,220.47, and its costs to be taxed; (2) that the third party do pay to the defendant the sum of $2,147.11;

and (3) that the defendant do recover from the third party its costs of the defence of this action and its costs incurred by reason of the defence of the third party, together with the costs for which it is liable to the plaintiff, forthwith after taxation thereof.

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See *King* v. *Federal Life Assurance Co.* (1895), 17 P.R. 65; *Hartas* v. *Scarborough* (1889), 33 Sol. Jour. 661.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff and Anglin, JJ. March 26, 1917.

APPEAL (§ II A—35)—JURISDICTION—SUPREME COURT ACT—FUTURE RIGHTS —REVENUE.

A dispute between legatees as to which of them is liable to pay the succession tax does not involve a question of revenue or sum of money payable to His Majesty "where rights in future might be bound," within the meaning of sec. 46 (*b*) of the Supreme Court Act (R.S.C. 1906, ch. 139), and is therefore not appealable to the Supreme Court of Canada; the phrase applies conjunctively to each of the class of cases enumerated in the section.

Statement.

MOTION to quash for want of jurisdiction an appeal from the judgment of the Court of King's Bench, appeal side, 25 Que., K.B. 532, affirming the judgment of the Superior Court, District of Three Rivers, maintaining the plaintiffs' action with costs. Appeal quashed.

Belcourt, K.C., for the motion, on behalf of respondents.

J. J. Denis, K.C. *contra*.

Fitzpatrick, C.J.

FITZPATRICK, C. J.:—This is a motion to quash for want of jurisdiction. The facts are not in dispute. An action was brought by the present respondents, collectors of revenue for the Province of Quebec, to recover from the defendants, Dame Louise Olivier and Dame Alice Mailhot, in their quality of universal legatees to the succession of Mailhot, J., a tax imposed by the Province of Quebec of 2% upon the estate. There is no dispute that the amount of the tax due to the plaintiffs was $1,808.46. The husband of the defendant, Dame Alice Mailhot, in response to plaintiff's demand, paid one-half of the tax; the defendant, Louise Olivier, widow of the testator, contested the plaintiff's claim to recover any portion of the tax from her, on the ground that the declaration which is required to be made under art. 1380 of the R. S. Q. by one of the universal legatees, had been made by her co-defendant, Dame Alice Mailhot, and that, under the law, it is the person who makes the declaration alone who is bound to pay all the taxes due from the succession. The amount claimed in the present action is $904.23, and the respondents now claim

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that the case is not appealable as it does not fall within sec. 46 of the Supreme Court Act.

In short, the point in dispute between the parties may be stated as follows; the appellants contend on the one hand that, if the matter in controversy relates to revenue or sum of money payable to His Majesty, the Court has jurisdiction. The respondents say "no," the matter in controversy must not only relate to revenue or a sum of money payable to His Majesty, but must be a matter *in which rights in future must be bound*. In other words, they contend that the words "rights in future might be bound" in this section apply to each of the items, fee of office, duty, rent, revenue etc.

In my opinion, the case is clearly governed by authority. In 1886, the Supreme Court gave judgment in the case of the *Bank of Toronto v. Le Curé, etc. de la Nativité*, 12 Can. S.C.R. 25. At that time the provisions of the present sec. 46 of the Supreme Court Act were contained in sec. 8 of 42 Vict. ch. 39, which reads as follows:—

> No appeal shall be allowed from any judgment rendered in the Province of Quebec in any action, suit, cause, matter or other judicial proceeding, wherein the matter in controversy does not amount to the sum or value of $2,000, unless such matter, if less than that amount, involves the question of the validity of an Act of the Parliament of Canada, or of the legislature of any of the provinces of Canada, or of an Ordinance or Act of any of the councils or legislative bodies of any of the territories or districts of Canada, or relates to any fee of office, duty, rent, revenue, or any sum of money payable to Her Majesty, or to any title to lands or tenements, annual rents or such like matters or things where the rights in future might be bound.

In that case, Taschereau, J., analyzes this section and makes use of the following language:—

> From the Province of Quebec four classes of cases are only appealable under 42 Vict. ch. 39, sec. 8: (1) Any case wherein the matter in controversy amounts to the sum or value of $2,000; (2) Any case wherein the matter in controversy involves the question of the validity of an Act of Parliament, or of any of the local legislatures; (3) Any case wherein the matter in controversy relates to any fee or office or any duty or rent or revenue payable to Her Majesty, where the rights in future might be bound. These last words must be read as qualifying all this third class as well as the next. If, for instance, a fee of office is claimed, but the right to it is denied by the defendant, the case is appealable, but if in an action for a fee of office, the defendant pleads payment, the case is not appealable if under $2,000; (4) Any case wherein the matter in controversy relates to any title to lands or tenements, or title to annual rents or such like matters or things where the rights in future might be bound.

The statutes were revised in 1886 and sec. 8 became sec. 29,

R.S.C. ch. 135. The only alteration made in the old section being that the letters (*a*) and (*b*) are made use of to subdivide the two paragraphs which defined the class of cases in which an appeal would lie. In the revision of 1906 the language of the statute of 1886 was verbally reproduced with the same subdivision except that the amendment which was made, in 1893, by 56 Vict. ch. 29 was inserted, viz., the words,

such like matters or things where the rights in future might be bound

were made to read

other matters or things where the rights in future might be bound.

The section was next considered, in 1889, in the case of *Gilbert* v. *Gilman*, 16 Can. S.C.R. 189. In that case the Court was mainly concerned in construing the words "such like matters or things where rights in future might be bound" in connection with the doctrine of "*noscitur a sociis*." In that case Strong, J., says:—

Not only must future rights be bound by the judgment in order that an appeal may be admitted, when the amount in controversy is less than $2,000, but further the future rights to be so bound must relate to some or one of the matters or things specified in the sub-section in question, viz., fee of office, duty, rent, revenue or sum of money payable to Her Majesty, or to some title to lands or tenements or to some like matters and things where the same consequence will follow, viz., when future rights will be bound.

Also in *Chagnon* v. *Norman*, 16 Can. S.C.R. 661, Sir W. J. Ritchie, speaking for the Court, says:—

Neither is the case appealable as relating to a fee of office where the rights in future might be bound.

The decision in *Larivière* v. *School Commissioners of Trois-Rivières*, 23 Can. S.C.R. 723, is also instructive because it was decided on the statute after the amendment which substituted "other matters or things, etc.," for "such like matters or things, etc." This amendment was assented to by parliament on April 1, 1893, and I find on reference to the records in the Supreme Court office that the action was instituted on 8th April of the same year. In that case the judgment of the Court concludes with the following language:—

The words "where rights in future might be bound" in sub-sec. (*b*), sec. 29, govern the preceding words, "any fee of office, etc."

In these three cases the Court in construing the words

fee of office, duty, rent or revenue or sum of money payable to His Majesty, etc.

held that they were governed by the concluding clause of the paragraph

where the rights in future might be bound.

In view of this uniform jurisprudence of the Supreme Court ex-

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tending over 30 years even if we were not satisfied with the construction which has been placed upon this section, I do not see that at this late date we are justified in overruling it. I have serious doubts whether in this case there is a matter in controversy which relates to a sum of money payable to the Crown within the meaning of the statute, because all parties agree the tax to be paid on this estate is $1,808.46. It is only a question as to which of these two ladies shall pay the balance of $909.23, but in any event there is certainly no "revenue payable to His Majesty, where rights in future might be bound."

I would grant the motion to quash with costs.

Davies, J.

DAVIES J.:—Whatever I might think the true construction to be of subsec. (*b*) of sec. 46 of the Supreme Court Act if I was called upon to determine it without binding authority—I am of the opinion that such binding authority exists and that it is not now open to us to reverse it. The cases are collected in Mr. Cameron's book of Practice, at pp. 211-12. These cases determine that the latter words of the subsection "where rights in future may be bound" apply as well to controversies relating to any fee of office duty, rent, or any sum of money payable to His Majesty as to the words following "any title to lands, etc.," in other words, that they apply to and control the whole subsection.

Parliament has not seen fit since these decisions were given to change the subsection and I feel it is not open now for us to put a different construction upon it from that which in the cases I refer to has been placed upon it.

Under these circumstances, I would allow the motion to quash for want of jurisdiction. Costs should follow the result.

Idington, J.

IDINGTON, J. (dissenting):—The amount in controversy does not entitle the appellant to seek relief here. But the official suing must certainly be held to rest his case upon a claim to revenue payable by appellant to His Majesty and therefore I think the application to quash should be refused with costs.

Duff, J.

DUFF, J. (dissenting):—This is an appeal from the judgment of the Court of King's Bench in Quebec in which the appellant was adjudged liable to pay a certain sum of money as succession duty under the Quebec statute, 4 Geo. V. ch. 9. The respondent is the collector who sued on behalf of the Crown and the controversy relates to the question of the appellant's responsibility for

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the sum demanded which he has been adjudged liable to pay under the provisions of the statute. It seems to me to be very clear that the "matter" thus in "controversy" "relates to a duty . . . revenue or . . . sum of money payable to His Majesty" and that the judgment is consequently appealable under sec. 46 (*b*) of the Supreme Court Act. Mr. Belcourt argues, however, that the words "any fee of office, rent, revenue, or any sum of money payable to His Majesty" are governed by the phrase at the end of the clause "where rights in future might be bound." The contention, in my opinion, is quite without substance; and to make that clear it is only necessary to reproduce the subsection in full. These are the words:—

> Relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound.

The meaning of these words according to the grammatical construction is unmistakable. The disjunctive "or" separates the whole of what follows from all of the first limb of the subsection succeeding the word "relates." The precise meaning of the subsection would be explicitly given by inserting the word "relates" between the words "or" and "to" in the second line. The phrase relied upon very clearly does not qualify any of the words of the first limb. Strange as it may seem, however, Mr. Belcourt is not without the support of judicial opinion in the contention he raises. As regards the opinions relied upon I will only say that, in my judgment, having regard to the circumstances in which they were expressed, I am under no obligation to give effect to them.

Anglin, J.

ANGLIN, J.:—Sec. 46 of the Supreme Court Act restricts, in cases from the Province of Quebec, the general right of appeal conferred by sec. 36. If untrammelled by authority I should certainly hold that the earlier words in clause (*b*) of sec. 46, "any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty," are not governed by its concluding words, "where rights in future might be bound." The repetition of the preposition in the unmistakable disjunctive "or, to" by which those earlier words are immediately followed, precludes the application to them of the concluding words of the clause. The arrangement of the corresponding provision of the Quebec Code of Civil Procedure, likewise based on 9 Geo. III. ch. 6,

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sec. 30, as now found in art. 68 of the Code of Civil Procedure, makes it, if possible, still more plain that this is the proper construction of the section.

Nor should I have found any great difficulty in distinguishing the decisions of this Court in *Bank of Toronto* v. *Le Curé, etc.*, 12 Can. S.C.R. 25; *Gilbert* v. *Gilman*, 16 Can. S.C.R. 189, and *Chagnon* v. *Norman*, 16 Can. S.C.R. 661, both because of essential differences in the nature of the subject-matters of those cases and because of the material change in the statute made, after they were decided, by 56 Vict. ch. 29, sec, 1, whereby the words of the original section "such like matters or things" were replaced by the words "other matters or things."

After that amendment, however, in *Larivière* v. *Three Rivers*, 23 Can. S.C.R. 723, the Court refused to allow security for an appeal in an action by a school-mistress to recover $1,243 as fees due to her collected by school commissioners, holding (*a*) that the position of school-mistress is not an "office" within the section, and (*b*) that, if it were, as the plaintiff had ceased to hold it, no rights in future would be bound, adding that "the words 'when rights in future might be bound' . . . govern the preceding words 'any fee of office.'" With the utmost respect, while the judgment in *Larivière* v. *Three Rivers, supra*, was no doubt right on the first ground, I am of the opinion that the second ground was clearly erroneous. Moreover, it was unnecessary for the disposition of the appeal. Yet, inasmuch as it is distinctly made a *ratio decidendi* by the Court it cannot be treated as a mere dictum (*New South Wales Taxation Commissioners* v. *Palmer*, [1907] A.C. 179, 184; *Membery* v. *Great Western R. Co.*, 14 App. Cas. 179, 187. I therefore reluctantly bow to its authority.

Appeal quashed.

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Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. April 13, 1917.

MORTGAGE (§ IV—53)—ASSIGNMENT—RIGHTS OF ASSIGNEE—COVENANT—DEFENCES.

The usual covenant in a mortgage for payment of the mortgage-debt is enforceable by an assignee of the mortgage, as an independent obligation, notwithstanding any defences arising from the transaction in which the mortgage was given; the assignment of a covenant is not an assignment of a chose in action contemplated by the Conveyancing and Law of Property Act (R.S.O. 1914, c. 109, s. 49); nor does an assignment *pendente lite* put an end to the action, but merely prevents proceeding with it without an order to proceed.

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APPEAL by defendant from the judgment of Kelly, J. in an action to recover mortgage-moneys alleged to be due from the defendant by virtue of the covenant for payment contained in the mortgage-deed, dated the 13th October, 1913. Affirmed.

The judgment appealed from is as follows:—

KELLY, J.:—Julius Weil and Morris Cohen, the owners of the equity of redemption in lands on the north side of College street in Toronto, having a frontage of 246 feet 10 inches, entered into a contract with the defendant in September, 1913, for an exchange of the westerly 100 feet of this land.

There was at the time upon the whole 246 feet 10 inches a mortgage from a predecessor in title of Weil and Cohen to one Lett.

Before the agreement for exchange, Weil and Cohen had conveyed the equity of redemption in the easterly 146 feet 10 inches to other persons, subject to the Lett mortgage, or, it is said, to a proportionate part of it. The agreement for exchange provided for a conveyance to the defendant of the westerly 100 feet, which was to be taken by him "subject to a mortgage incumbrance of $7,332.60." This had reference to the Lett mortgage, which was for a very much larger sum than the $7,332.60. It was also agreed that Weil and Cohen would, in the deed to the defendant, covenant that the defendant would not be "called upon at any time to pay more than his said proportion of the mortgage" (referring to the Lett mortgage), "and will further assign to Dr. Wright a mortgage which Fraser and Craik gave to Weil and Cohen on the 146 feet 10 inches they bought, and which was given as security to Weil and Cohen to secure them in case they should pay to Lett more than their proportion of the said Lett mortgage." On this provision and the vendor's covenant in the deed, much of the present controversy turns. From the agreement it also appeared that in the adjustment on the exchange there was in Weil and Cohen's favour a balance of $267.40 (difference in the value of the equities), and that, as it was part of the agreement that Weil and Cohen were to pay the defendant $3,000 in cash, the defendant would give them a mortgage (subject to the Lett mortgage) on the 100 feet for $3,267.40—the difference in the value of the equities, plus this $3,000 then advanced by Weil and Cohen. The present action is to recover upon the defendant's covenant in this mortgage.

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The conveyance by Weil and Cohen to the defendant, dated the 15th October, 1913, was made subject to the assumption by the grantee of $7,332.60, being 26/16 per cent. of the amount unpaid on the Lett mortgage, and the grantee covenanted to pay this amount and interest thereon, and the grantors covenanted with the defendant that he would not "be required to pay off on the said mortgage" (the Lett mortgage) "a greater sum than $7,332.60 and interest due or to become due."

Two payments of $62.50 each on account of principal, as well as interest to the 15th October, 1915, were made. The remaining part of the principal is unpaid, all of it being overdue since the 15th October, 1915. On the 29th October, 1915, the plaintiff became assignee of the mortgage, though it is in evidence that she holds not only for herself, but for the original mortgagees as well. The plaintiff's counsel admits that, for the purposes of the action, the plaintiff does not claim to be in any better position in respect to the mortgage than were the original mortgagees.

The action was commenced on the 13th December, 1915, and it is admitted that taxes upon the property were then overdue and unpaid.

On the 22nd September, 1915, the defendant conveyed the 100 feet to a third party, subject to a proportion of the Lett mortgage, on which it was then stated there was chargeable against the 100 feet $7,302.10 and interest, and subject also to the mortgage now sued upon. In the conveyance it was expressly declared that the purchaser did not assume these mortgages.

The defendant continued to make payments upon the Lett mortgage, or rather upon the portion of it which he had assumed, for a considerable time; but, when the holder of that mortgage refused to apply further payments exclusively upon that portion (evidently in consequence of default on the part of the owner of the other 146 feet 10 inches in making payments), the defendant then discontinued paying.

At the time of maturity of the mortgage now sued upon, there was default in interest and in instalments of principal upon the Lett mortgage, and the whole balance of principal having become due on the 28th February, 1916, an action for foreclosure was begun on the 1st June, 1916; and, when the proceedings reached the Master's office, the defendant was served with the usual notice to incumbrancers.

The defendant now sets up that, in the circumstances which have arisen, his covenant cannot be enforced against him; that this covenant is merely a carrying out of a term of the agreement for exchange; that the covenants in that agreement are mutually dependent; so that any obligation of his is not enforceable unless the mortgagees or the plaintiff perform their covenant that he is not to be called upon to pay more than the proportion referred to of the Lett mortgage.

In cases of this kind the circumstances must be looked at in order to see whether or not the contract is one of the nature now contended for by the defendant. The rule of law applicable in such cases has been laid down more than once by the highest Courts of England. In *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co.* (1884), 9 App. Cas. 434, Lord Blackburn, at p. 443, states this rule to be that "where there is a contract in which there are two parties, each side having to do something . . . , if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'"

The covenant sought to be enforced here is one usually found in mortgages. It is not made subject to qualification. By the agreement between the parties which preceded the mortgage it was provided that such a mortgage should be given; and it was likewise by the same agreement provided that the conveyance to the defendant should contain (and it did contain) a covenant that he would not be required to pay more than a specified proportion of the Lett mortgage. But I fail to follow Mr. Elliott's argument to the effect that, assuming that there is a breach of the vendors' covenant in the deed, that went to the root of the transaction so as to entitle the defendant to resist payment on the covenant in the mortgage. The covenants are, it seems to me, separate and distinct.

Had the contract been such as to make the performance of Weil and Cohen's covenant in the deed a condition precedent, or such that the covenant in the mortgage or the payment of what it contracted for depended upon performance of that covenant in the deed, then the situation would have been of a very different

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kind. I cannot see that that was or is the effect of the contract the parties entered into. If it was their intention that their bargain for the exchange should have that effect, they should have so expressed it. It may be that Weil and Cohen are liable upon their covenant in the deed, if that covenant has been broken, but that is not for determination here.

There is also this further circumstance which should be considered, but which was not touched upon in the argument, that with the exception of the small balance of $267.40, difference in the values of the equities, the whole principal secured by the mortgage represented an actual cash advance made at the time by the mortgagees to the defendant. On this first ground the defendant cannot succeed.

Then he sets up non-compliance with sec. 49 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, in the giving of the notice of assignment to the plaintiff. On the 20th September, 1915, Julius Weil, one of the mortgagees, assigned his undivided one-half interest in the mortgage to Bessie Weil, and on the 29th October, 1915, Bessie Weil and the other mortgagee, Morris Cohen, assigned the mortgage to the plaintiff. On the 30th October, 1915, notice was given, through the plaintiff's solicitors, that Weil and Cohen, "to whom Dr. Wright gave a mortgage on College street, have assigned the same to Flora Neveren." It is not questioned what mortgage was referred to. It is now set up that this notice was insufficient, inasmuch as it should have stated that Weil had assigned to Bessie Weil, and that Bessie Weil and Cohen had assigned to the plaintiff. I cannot accept this contention. The notice makes it clear that the plaintiff has become the assignee of the mortgage; and, in the circumstances, I think it is not essential that, with the knowledge the defendant and his solicitors then had, each step by which the plaintiff so became assignee should be set out.

One further objection is taken. On the 28th December, 1915, the plaintiff assigned this mortgage to one Fussell, the assignment being registered on the 30th December, 1915; and on the 2nd March, 1916, Fussell re-assigned it to the plaintiff. The explanation in the evidence is, that a transaction had been entered into between these two parties involving an assignment of this mortgage to Fussell; that, in anticipation of the carrying out of the transaction, the assignment of the 28th December, 1915, was ex-

ecuted and registered; that the assignee failed to carry out his bargain; that no money was paid upon or for the assignment; and, in consequence, the transaction fell through, and the mortgage was re-assigned.

There is no reason for doubting the truth of this. The defendant, relying upon Rule 300*, contends that, on the assignment by the plaintiff, the action was subject to being dismissed or stayed. In my opinion, that is not the case. In *Naiman* v. *Wright* (1915), 8 O.W.N. 492, my brother Middleton held that an assignment such as this, made under conditions not more favourable to the mortgagor's position, was not a reason for dismissing or staying the action. That view was not disturbed on appeal (see *S.C.* (1915), 9 O.W.N. 165).

Were it necessary to dispose of the assignee's interest, that might be done by making him a party to the action. That, however, is unnecessary, any possible interest he may have acquired in the mortgage having re-vested in the plaintiff while the action was at issue and waiting trial.

It is admitted that interest has been paid to the 15th October, 1915, on the plaintiff's claim ($3,142.40).

Judgment will be in favour of the plaintiff for $3,142.40 and interest from the 15th October, 1915, in the terms of the mortgage, and costs.

W. J. Elliott and *J. J. Greenan*, for the appellant.

J. M. Ferguson, for the plaintiff, respondent.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—If we separate, as we may and should, the mortgage transaction, upon which alone this action is based, from the somewhat complicated transaction between the same parties, which resulted in the exchange of lands made between them, at the same time, this case becomes quite simple, and indeed solves itself.

The mortgagees lent to the defendant the moneys secured by the mortgage, except the comparatively small amount $267.40: the mortgage was given and taken for the separate and sole purpose of securing the repayment of that loan, and that small sum was added to it. It may be, it no doubt is, a fact that the exchange of lands would not have taken place but for the loan: but

*300. If by reason of death (when the cause of action survives or continues) or by assignment or conveyance any estate, interest or title devolves or is transferred the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

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that cannot affect the mortgagees' right to repayment. The money lent formed no part of the value or price put by either party upon his lands in making the exchange: the money was no part of the consideration on either side. The case is just the same as it would be if the amount lent was any other sum of money; and as if the defendant had given his promissory note, or no writing at all, in evidence of the debt.

Then what substantial defence can there be to this action to recover the money, now overdue?

The fact that the mortgagees, in the exchange transaction, contracted to pay off part of a first mortgage upon the land they conveyed to the defendant, and have not done so, and that that mortgage is in process of foreclosure, cannot be a defence to this action. It does give a right of action which might be enforced by counterclaim in this action, under which substantial justice can be done between the parties, though the covenants may be quite independant the one of the other; a right of action for damages for breach of that contract, if the defendant really have sustained any such damages.

But no such claim is made; and there may be, indeed there must be, some good reason for it. The defendant also contracted, with the other parties to the exchange of properties, that he himself would pay off part of that first mortgage, which covered other land than that which he got in the exchange: and in his depositions are to be found these significant words: "I kept the interest up and made certain payments, and was able to meet all payments up to the time the war started; after that I was placed so that I couldn't." The defendant could not compel the other parties to pay their share if he were not able to pay his. But what position the case should assume if the mortgage in question had been given substantially for part of the purchase-money, instead of for money lent, over and above all purchase-money, we have not to consider.

Then in regard to the formalities upon which the appellant relies:—

The case is not one of an assignment of a chose in action, such as the Conveyancing and Law of Property Act provides for, but is an assignment of a covenant made by the defendant with the mortgagees, their "heirs, executors, administrators, successors, and assigns." A transfer of the mortgage-security alone would

effect in equity a transfer of the debt, and notice of it would not be necessary except for the purpose of intercepting payments which might be made, in ignorance of its assignment, by the mortgagor.

Soon after the commencement of this action, the plaintiff appears to have made an absolute assignment of the mortgage in question to one Fussell, the assignment being duly registered in the proper registry office; but, some months afterwards, Fussell, it is said, reassigned the mortgage to the plaintiff. No order for leave to proceed was obtained after either assignment. Proceeding without an order was in each case irregular: and an irregularity which is not to be ignored upon the mere assertion that the contract for the absolute assignment to Fussell fell through, and in consequence of that he reassigned. It is not said that the land and covenant did not pass to Fussell; that could not be asserted in the face of the writings. Both passed to him and repassed to the plaintiff if what is asserted be true: but the Courts are not to act on assertion without proof. When the property passes, an order for leave to proceed is necessary: it is not a mere matter of form: a defendant is very much concerned in the question: and it is the duty of the Court to be assured upon proper proof of the change of right before making an order. It must not be looked upon as a mere matter of form by any one: the time to consider whether an actual change has taken place is, in the first place, upon an application for leave to proceed, before the parties go to trial, and it should not be left unti then to find out that the proper persons are not before the Court.

If no proceedings were taken during Fussell's ownership, there was no need for an order until the plaintiff acquired title again, but an order should have been applied for then: the defendant was entitled to have the question of these transfers investigated and to have it proved that the property was really revested in the plaintiff: and, if there were any doubt about it, Fussell should have been made a party so as to bind his interests, if any. There has been a good deal of shuffling with this mortgage, on the part of the mortgagees. The plaintiff's depositions in regard to her rights are indefinite and unsatisfactory: from them I gather that the action is being carried on in her name for the benefit of the mortgagees or others only.

Under all the circumstances, the defendant is entitled to be

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made secure by the addition, as parties to the action, of the mortgagees and of the assignees, at any time, of the mortgage, in such a manner that, if they have any interests in matters in question, such interests may be bound by the judgment in the plaintiff's favour.

Upon that being done, at the respondent's cost, the appeal should be dismissed with costs.

Riddell, J.

RIDDELL, J.:—F. A. Lett, being the owner in fee of (1) the east 12 ft. 10 in. of lot 1 and (2) lots 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 on plan 673, sold to Miss Clapp and took from her a mortgage for $28,347.85, interest at 6 per cent.

Miss Clapp sold to Weil and Cohen, real estate dealers.

Weil and Cohen sold to Fraser and Crake (1) the east 12 ft. 10 in. of lot 6, and (2) lots 7, 8, 9, 10, 11, and 12, for $22,300, "and subject to $20,950 of the mortgage in favour of Frederick A. Lett now registered against these with other lands."

Weil and Cohen sold to the defendant: (1) the easterly 12 ft. 10 in. of lot 1; (2) the westerly 7 ft. 2 in. of lot 6; and (3) lots 2, 3, 4, and 5 (i.e., the remainder of the land sold to Miss Clapp), by way of exchange. In the deed are found the clauses: "Subject further to the assumption by the grantee of a proportion of a certain mortgage for $28,347.85 from F. M. Clapp to Frederick Augustus Lett, said proportion being $26\frac{1}{6}$ per cent. of the whole amount chargeable and on which $26\frac{1}{6}$ per cent. there remains unpaid $7,332.60." "The said grantee covenants with the said grantors that he will assume and pay off . . . the sum of $7,332.60 together with all interest thereon . . . and the said grantors covenant with the said grantee . . . that he will not be required to pay off on the said mortgage . . . a greater sum than $7,332.60 and interest . . ."

On the exchange it appeared that, taking into account the existing mortgages on the various properties and the values placed upon the properties, a sum of $267.40 was due from the defendant. The defendant had, however, stipulated for a payment in cash to him of $3,000—accordingly he gave a mortgage for the sum of $3,267.40 to Weil and Cohen, which is the subject of the present action. In this mortgage the defendant covenants in the usual form to pay the mortgage-money and interest.

Though two mesne conveyances, this mortgage has become the property of the plaintiff.

The former of these conveyances was from Weil, who was of the firm of Weil and Cohen, to his wife, Bessie Weil, and the latter from Bessie Weil and Cohen to the plaintiff.

The plaintiff, on the 30th October, 1915, gave the defendant a notice in writing that "Messrs. Weil and Cohen, to whom Dr. Wright gave a mortgage on property on College street, have assigned same to Flora Neveren . . ."

A specially endorsed writ of summons was issued on the 13th December, 1915, claiming on the covenant—the affidavit of the defendant (and, I presume, the appearance) bears date the 22nd December, 1915.

On the 28th December, 1915, the plaintiff assigned the mortgage and all money due thereon to one Fussell. No order to proceed or other step was taken in the action, but, on the 2nd March, 1916, Fussell reassigned to the plaintiff.

The defendant had, before the assignment of the mortgage to the plaintiff, and on the 22nd September, 1915, conveyed the land to one Spiro, "subject to proportion of a blanket mortgage registered against this and other lands in which there is now $7,302.10 chargeable against these lands, and subject to a second mortgage for $3,142.40 and interest, which mortgages the purchaser does not assume."

The defendant had made trifling payments on the mortgage to Lett's agents, who had been informed of his assumption of $7,332.60 of the original mortgage and rendered him statements of the aliquot amounts he should pay. But Weil and Cohen had not kept up their proportion; and Lett's agents demanded the whole amount then due. The defendant offered to pay his proportion, but that was refused as a payment of his proportion, and it was said that, if paid, it would be applied on the whole mortgage, as "Mr. Lett absolutely refused to deal with a part of the mortgage." The defendant was told that, unless he paid the whole amount due, he was liable to be foreclosed and lose his property. It is admitted that that was the position taken by Lett: "He was not interested in the division: he wanted payment for the whole thing." The defendant refused: the payment of his mortgage to Weil and Cohen was demanded by solicitors for Weil and Cohen, on the 18th October, 1915; he had, as we have seen, conveyed the land to Spiro, the previous month.

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Proceedings by way of foreclosure were taken in 1916 by Lett against Miss Clapp, two persons by the name of Moore, and a Miss Keating (who had become the owners of the lots sold to Fraser and Crake), and Spiro—a foreclosure judgment was made on the 19th June, 1916; and this has become absolute.

The trial of this action took place on the 9th February, 1917, before Mr. Justice Kelly, and resulted in a judgment for the plaintiff. The defendant now appeals.

At the time of the issue of the writ herein (which is the time as of which the rights of the plaintiff are to be determined) the state of affairs was:—

1. The defendant had made his covenant to pay the amount mentioned in his mortgage to Weil and Cohen.

2. The defendant had assumed of the Lett mortgage $7,332.60.

3. Weil and Cohen had covenanted with the defendant that he would not be required to pay more of the Lett mortgage.

4. The defendant had been required to pay more than the said amount on the Lett mortgage.

The effect of these facts does not seem to me to depend upon any law peculiar to mortgages, but upon whether the covenants are dependent or independent.

The mortgage sued on provides for payment of $62.50 on the 15th April, 1914; $62.50 on the 15th November, 1914; $62.50 on the 15th April, 1915; and the balance on the 15th October, 1915.

The mortgage, against all but $7,332.60 of which Weil and Cohen covenanted to protect the defendant, was payable, $250 on the 28th February and 28th August of 1914 and 1915, and the balance on the 28th February, 1916. It was therefore in contemplation that the whole of the mortgage to Weil and Cohen should be paid before the time came for paying the bulk of the original mortgage; the former time might come before the owners of the remainder of the property failed to pay their proportion of the mortgage-money, and therefore before the covenant of Weil and Cohen came into operation.

The rule long laid down is: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other

act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a consideration precedent:" Serjt. Williams' note on *Pordage* v. *Cole* (1670), 1 Wms. Saund. 548, 551 (1 Saund. 320 *b*), cited with approval in *Dicker* v. *Jackson* (1848), 6 C.B. 103, at p. 114, *per* Wilde, C.J., delivering the judgment of the Court.

Holt, C.J., giving the judgment of the Court in *Thorp* v. *Thorp* (1700), 12 Mod. 455, at p. 461, puts it thus: "If there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do, for another thing, and that day happens to incur* before the time the thing for which the promise, agreement, or covenant is made, is to be performed by the tenor of the agreement; there, though the words be, 'that the party shall pay the money,' or 'do the thing for such a thing,' or 'in consideration of such a thing,' after the day is past the other shall have an action for the money or other thing, although the thing for which the promise, agreement, or covenant was made be not performed . . . they are in that case left to mutual remedies."

Later cases shew that, instead of saying "that day happens," the Chief Justice, to be strictly accurate, should have said "that day may happen:" *Dicker* v. *Jackson*, *ut supra*.

With this test, it seems plain that, as the time at which any liability should attach on the covenant of Weil and Cohen might be after the day fixed for the defendant to pay "by the tenor of the agreement," the covenants are independent, and an action lies against the defendant.

It is, however, urged that the action cannot succeed for two reasons: (1) by reason of absence of notice of assignment; and (2) by reason of the conveyance to Fussell *pendente lite*.

Notice was given to the defendant's solicitors "that Messrs. Weil and Cohen, to whom Dr. Wright gave a mortgage on property on College street, have assigned same to Flora Neveren" (the plaintiff). This was proved at the trial; no objection was

*The use of the word "incur" as practically synonymous with "happen," "occur," is quite obsolete; but it was not uncommon in good English till about the end of the 17th century. Murray notes no instance as late as this, and I know of none later. The word was used in the sense of "accrue" as late as the second decade of the 19th century. In Latin "*incurrere*" was used in the best ages and by the best writers in the sense of "happen," "occur." (This note is made by RIDDELL, J.).

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taken there or on the argument of the appeal to want of strict proof that these solicitors were in fact solicitors for the defendant: the defendant does not, in his affidavit of merits, raise the objection that he did not receive notice of the assignment—see Rule 56—and it must be taken that he did receive such notice, through his solicitors, before action.

But it is said that those "to whom Dr. Wright gave a mortgage on property on College street" did not assign to the plaintiff, but that one of them, Julius Weil, assigned to Bessie Weil, and that Bessie Weil and Cohen then assigned to the plaintiff. It requires no violence to the language of the law to say that Julius Weil assigned to the plaintiff by mesne conveyances; and certainly Cohen did assign direct. I do not think this objection valid: and, even if, to enable the assignee to sue alone, under Rule 85, it requires notice of the assignment to be given, I think the requirement is met.

In any case we could add the assignors as parties and work out the rights of all parties—the plaintiff's counsel admits that the plaintiff is in no better position than the original mortgagees—or we might make a declaratory judgment upon which the plaintiff could succeed, on giving mere formal notice. No one can desire such a proceeding, useless in every way, except to heap up costs.

(2) The assignment and reassignment *pendente lite* are explained at the trial as resulting from an attempted sale which fell through: the solicitor for the proposed purchaser, Fussell, refused to pass the title, and had a reconveyance made of the mortgage.

Assuming, however, that the conveyances were effective, the assignment of the 28th December, 1915, did not *ipso facto* put an end to the action: Rule 300. The language "put an end to the action" and the like, is not infrequent in the cases, but it must be read with caution; it does not mean that the action is *ipso facto* terminated by the assignment, but that it should not be proceeded with without an order to proceed; and, if an order to proceed be not applied for within a reasonable time, the defendant may move to dismiss the action.

For example, in *Wolff* v. *Van Boolen* (1906), 94 L.T.R. 502, Kekewich, J., says (p. 503): "If he (the plaintiff) had assigned any debt he could not recover it, and it would put an end to the action;" but in that case, after holding that there had been an assignment (by act of law), he did not dismiss the case forthwith

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or hold that the action was at an end, but ordered that, if the assignee did not obtain an order to proceed within a time mentioned (38 days), the action should be dismissed with costs. See also *Naiman* v. *Wright*, referred to by Mr. Justice Kelly.

If the mortgage-debt ever became the property of Fussell, the proper course for him to pursue would have been, within a reasonable time, to apply for and obtain an order to proceed under Rule 301—then, six months after the 2nd March, 1916, when the present plaintiff received the reassignment, she would take out another.

Before any further proceedings were to be taken, however, the title had returned to the plaintiff; and it seems to me that it would have been a useless expense to take out the two orders.

If it were necessary for the success of the plaintiff, we should even now allow the formal orders to be taken out *nunc pro tunc*. The defendant would have no right to complain: he has not moved to dismiss the action: *Ardagh* v. *County of York* (1896), 17 P.R. 184.

Another point was attempted to be made by the appellant, viz., that the mortgagor, on paying off his mortgage-money, is entitled to a conveyance of the property; and the facts are such here that he cannot have an effective conveyance of the land. The answer to this is twofold: (1) he has conveyed his equity and consequent right to redeem to Spiro, retaining his liability on his covenant; and (2) it is not his mortgage upon which foreclosure has taken place, and the plaintiff can give him an effective conveyance of all the interest he ever had in the land, namely, a right subject to the blanket-mortgage.

I think the appeal should be dismissed with costs.

LENNOX, J., agreed that the appeal should be dismissed. Lennox, J.

ROSE, J., agreed with Riddell, J. Rose, J.

Appeal dismissed.

HOLMESTED v. CITY OF MOOSE JAW AND CANADIAN NORTHERN R. Co.

SASK.

S. C.

Saskatchewan Supreme Court, Brown, J. April 12, 1917.

EXPROPRIATION (§ III E—180)—COMPENSATION—LOSS OF ACCESS—HIGHWAY—RAILWAY.

The obstruction of natural, proximate and direct approaches to land by the construction of a railway, across existing streets, entitles the owner to compensation for depreciation in the value of the land, as against the railway company, but not against the city agreeing to the location.

[*Holmested* v. *C.N.R. Co.*, 29 D.L.R. 761, 9 S.L.R. 327; *Holditch* v. *C.N.O.R.*, 27 D.L.R. 14, [1916] 1 A.C. 536, followed.]

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HOLMESTED v. CITY OF MOOSE JAW AND CANADIAN NORTHERN R. CO.

Brown, J.

ACTION against defendant railway company and city for injury to plaintiff's land.

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

J. N. Fish, for railway company.

W. A. Beynon, for City of Moose Jaw.

BROWN, J.:—In the early part of 1911, the plaintiff purchased a portion of the N.W. ¼ 28-16-26 W. 2nd, in the Province of Saskatchewan, for subdivision purposes. At the time of the purchase, the land was adjacent to the southern limit of the City of Moose Jaw, and in the month of June, 1912, it was added to and became a part of the city.

In carrying out the purpose which he had in view in purchasing the property, the plaintiff, during the year 1911, proceeded to have the land surveyed and subdivided into blocks and lots for residential purposes. At the time of the purchase there was great activity in real estate in and near the city, and this property had a number of features about it that tended to make it attractive as a subdivision for residential purposes. The plaintiff's proposed plan received the approval of the council of the city in December, 1911. It was approved by the Department of Public Works for the province in December, 1912, and was registered in the proper land titles office in July, 1913. A number of lots were sold under this plan early in the year 1912, after the plan had been approved by the city and long before it had been registered in the land titles office.

The property so subdivided consists of some 90 acres, situated in a valley formed by what is known as the Moose Jaw Creek, and this creek traverses the property in a very winding course, but in general running from the south-west corner to the north-west corner of the property. The property being in a valley is surrounded in nearly all directions, and more especially to the north, by a high and precipitous embankment. That portion of the property situate west of the creek had a number of streets and avenues of the city reaching to its limits. On the north side there were 10th, 11th and 12th Ave's and Elsom St., and Mansfield, Bank, Grant and Main Sts. to the west side. To the north, 11th Ave. was the most natural approach—and the most capable of being made a reasonably good approach—to the city. To the west, Grant St., leading into Main, and Main St. itself were the natural approaches.

The plaintiff, in subdividing his property and providing for

ingress and egress, kept in view these features as to natural approach.

Insofar as the property east of the creek is concerned, any approach to the city was cut off by the creek itself, but the plaintiff constructed two bridges across the creek; one north to Park Drive, a street leading to the city from the east side of the property and one west, to Grant St., extended into the property.

The defendant railway company, being desirous of extending their line of railway into the city, opened up negotiations with the city council with that end in view in the summer of 1911, and made several surveys, one of which was through the plaintiff's property, in the fall of 1911. On February 22, 1912, the company, having settled on the location of their right-of-way and having prepared a plan thereof, entered into an agreement with the city, whereby it was arranged that the city should close certain streets to be traversed by the company's proposed right-of-way.

On May 9, 1912, the Board of Railway Commissioners made an order authorizing the company to close and divert certain of the city streets and avenues in accordance with and subject to the terms set out in the agreement so made with the city. As yet none of these streets have been closed by the city.

The company, however, started constructing their railway in the summer of 1912, and had the rails laid on the grade by December, 1913, and are at the present time operating the road, running their trains thereon. The railway, as so constructed, is carried along the brow of the hill immediately north of the plaintiff's property and traverses blocks "H" and "14" thereof. The railway, as so constructed, completely obstructs 11th and 12th Ave's and Elsom, Mansfield, Bank and Grant Sts., so that there is now no direct access whatever from the plaintiff's property by way of these highways to the city. A highway has been graded into the plaintiff's property by way of 10th Ave. This avenue, however, as so graded, is almost unserviceable for general traffic because of the steepness of the grade, and because of a sharp and dangerous turn in the grade.

The railway is also constructed across Main St. west of the plaintiff's property at a very high grade, necessitating a diversion in Main St. and a subway at the southern point of the diversion. The only direct access to Main St. from the plaintiff's property is

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at the said subway. Owing to the elevation of the grade of the railway at this point, the view of anyone leaving or entering the plaintiff's property here is completely obstructed, necessitating great caution and creating a real danger of accident.

The weight of evidence goes to shew that 11th Ave. was the most natural approach from the city to the plaintiff's property west of the creek and that this avenue, with a certain amount of grading done on it, could have been made a very serviceable highway.

In view of the facts as above set out and in the light of the evidence, there is no doubt that the plaintiff's property has substantially depreciated in value. The railway company's liability, under the circumstances, in my opinion is amply supported by the following authorities: *Caledonian R. Co.* v. *Walker's Trustees*, 7 App. Cas. 259; *Holmested* v. *Moose Jaw*, 29 D.L.R. 761, 9 S.L.R. 327; *North Shore R. Co.* v. *Pion*, 14 App. Cas. 612; *Parkdale* v. *West*, 12 App. Cas. 602; *Holditch* v. *C.N.O. R. Co.*, 27 D.L.R. 14, [1916] 1 A.C. 536.

Insofar as blocks "H" and "14" are concerned, the damage to them is the subject of arbitration under the Railway Act.

Lots 5 to 10, inclusive, in bl'k 17 are reserved for school site purposes, and lot 5 in bl'k 19 has not been valued, either by the city on its assessment roll or by the plaintiff in his evidence, and I assume, therefore, that it is valueless.

With reference to that portion of the subdivision east of the creek, I am disposed to take the view that was taken by my brother Newlands when this matter was under consideration by him. The natural approach to that portion of the subdivision is by Park Drive, and, while the approaches west of the creek all serve this property, they are not, in my opinion, so direct or proximate as to entitle the plaintiff to any compensation.

It is undoubtedly a difficult matter at times to ascertain the line of demarcation and state with certainty just when a right of access is proximate and direct and when indirect and remote, and, in consequence, there must often be room for difference of opinion, but under the circumstances of this case it seems to me that the creek may well be adopted as the dividing line. In my view, therefore, all that portion of the subdivision west of the creek is properly a subject for compensation. The various blocks and lots have been damaged in varying degrees, and, in arriving at the amount

of compensation to which the plaintiff is entitled, I must ascertain the value of the property at the time the railway was constructed and then the percentage of loss due to the obstruction.

The plaintiff, as already indicated, beginning in the early part of 1912, has, from time to time, sold various portions of the subdivision, but in each case he reserved to himself all right to compensation that might arise by virtue of the construction of the railway. A large number of lots were sold east of the creek to one Henry T. Taylor, and a large number west of the creek to a brother of the plaintiff.

In view of the terms and conditions of these two last mentioned sales and the circumstances surrounding them, I find they are of little assistance in fixing values. The sales that were made in 1912 and 1913, to other parties, many of them Moose Jaw residents, and the evidence of the various witnesses at the trial, lead me to the conclusion that the values as fixed by the assessment roll of the city for the years 1912 and 1913, with a 25% reduction, may be taken as fairly representing the value of the property for the purpose of assessing damages. I say a 25% reduction, because I am of opinion, under the evidence, that the assessed value was unreal and inflated to that extent. I accept the evidence of A. W. Mayberry as giving a fair estimate of the damage to the various blocks to which the plaintiff is entitled.

On this basis the values and percentage of depreciation are as follows: Blocks 10, 11 and, lots 1 to 4, inclusive, in bl'k 17 are valued at $7,125, and damaged to the extent of 15% of their value, which amounts to $1,068.75; blocks 12, 16, 18 and lots 1 to 4, inclusive, in bl'k 19 are valued at $29,737.50 and damaged to the extent of 20% of their value, which makes $5,947.50; blocks 13, 15, and lots 6 to 14, inclusive, in bl'k 19 are valued at $26,287.50 and damaged to the extent of 25% of their value, which makes $6,571.85; block "J" is valued at $150 and damaged to the extent of its full value, or $150.

This makes a total of $13,738.10, and there will be judgment against the defendant railway company for that amount with costs of action.

As the plaintiff's right to the aforesaid damages is based on the existence of the railway as a permanent obstruction, I am of opinion that his action as against the city must fail, and there will be judgment in favour of the city with costs against the plaintiff.

Judgment for plaintiff.

ALTA.

S. C.

STEWART v. THORPE.

Alberta Supreme Court. Harvey, C.J., and Stuart, Beck and Simmons, JJ. April 24, 1917.

MONOPOLY AND COMBINATIONS (§ II B—16)—BUYING OUT COMPETITOR—COMBINATION IN RESTRAINT OF TRADE—CR. CODE SEC. 498.

An arrangement between coal companies for the purpose of buying out a competitor is not illegal under sec. 498 (*d*) of the Criminal Code as tending to unduly prevent or lessen competition. That sub-section applies to arrangements among persons who remain in the business, as to the method by which they will carry it on and to regulations among themselves so as to lessen competition, and not to an arrangement to buy out the property of a competitor who is left free to acquire other properties and so to continue in competition with his vendees.

[*Stewart* v. *Thorpe*, 27 Can. Cr. Cas. 409, varied.]

Statement. APPEAL by plaintiff and cross-appeal by defendant from the judgment of Walsh, J., in an action by a shareholder for the annulment of an agreement and for an injunction. See *Stewart* v. *Thorpe* (No. 1), 27 Can. Crim. Cas. 409.

A. M. Sinclair, for appellant.

J. E. A. Macleod, for respondents.

The judgment of the Court was delivered by

Stuart, J. STUART, J.:—The plaintiff is a shareholder in the Canadian Anthracite Coal Company Limited, one of the defendants, and sues on behalf of all the shareholders of that company. That company is the owner in fee simple of certain very extensive coal lands and coal deposits near Canmore, Alberta. The defendant, the Canmore Coal Company Limited, holds a lease from the former company of these coal deposits and operates a coal mine there and is engaged in selling the coal so mined. The defendant the Georgetown Collieries Limited holds leases from the Crown of certain coal lands in the same neighbourhood, operated a mine there, and was also engaged in selling coal. The plaintiff is the largest individual shareholder in the Canadian Anthracite Coal Company Limited if we take into account certain shares not standing in his name but controlled by him. He is also a shareholder in the defendant the Canmore Coal Company Limited but does not sue in that capacity. The Canadian Anthracite Coal Company Limited is the owner of a majority of the shares of the Canmore Coal Company Limited. The individual defendants Thorp, Ingram, Weyerhauser, Crane and Coffin are the directors of the Canadian Anthracite Coal Company Limited.

The individual defendants, Neale, Thorp, Weyerhauser, Ingram and Thorne are the directors of the Canmore Coal Company, Limited.

In his statement of claim the plaintiff alleges and the facts are that the two coal mines referred to are the only mines on the main line of the Canadian Pacific Railway Company in Alberta producing coal for steam purposes and in particular for the requirements of that Railway Company and that the two said mines, or rather the two companies operating them, have been competitors in the coal trade.

The plaintiff further alleges that during the year 1916 the two defendant companies, the Canadian Anthracite Coal Company Limited and the Canmore Coal Company Limited unlawfully conspired, combined, agreed and arranged with each other to unduly limit the facilities for producing, supplying and dealing in coal of the quality and grade produced from the respective mines of the defendant companies and in that portion of Alberta along the line of the said railway by inducing the defendant company, the Georgetown Collieries Limited, to limit the amount of its production.

He also alleges that the first two companies unlawfully conspired, combined, agreed and arranged with each other and with the Georgetown Collieries Limited to unduly prevent or lessen competition in the production, sale and supply of coal of the said grade and quality by entering into an agreement with the Georgetown Collieries Limited that the latter company would not offer coal from its mine to the principal customer thereof, namely, the said railway company.

He also alleges a similar unlawful conspiracy and combination between the first two companies for a similar object by entering into an agreement with the Georgetown Collieries Limited for the purchase by the two first companies, or one of them, of the mines and deposits of the latter company for the purpose of closing down and abandoning the mines of the latter company and removing all the machinery and equipment therefrom and by agreeing to pay the latter company sums of money belonging to the two first companies aggregating $100,000, a sum, so he alleges, in excess of the value of property agreed to be bought.

He also proceeds to allege similar conspiracies among the directors of the first two mentioned companies and alleges that in furtherance thereof they have caused their respective companies to enter into the agreements and arrangements with the Georgetown Collieries Limited above referred to.

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He also alleges that the coal deposits owned by the two first companies are extremely large and more than sufficient to supply all their requirements for a long period of years without acquiring any further or other properties; that the mines of the Georgetown Collieries Limited have been improperly worked and coal cannot be economically mined therein and that the said mines, in anticipation of the said agreement, have been partially abandoned and now have no commercial value; that the defendants have, by their said acts, rendered the two first companies liable to a fine under sec. 498 of the Criminal Code and that the said contract is *ultra vires*.

He therefore claims:—

(1) A declaration that the said purchase agreement is illegal, unlawful and *ultra vires*,

(2) Injunctions restraining the said agreement and the payment of moneys thereunder,

(3) An accounting by the directors of each of the first two companies for any moneys paid by either company to the Georgetown Collieries Limited and judgment for the money so paid.

The defences filed, as might be expected in the case of such an action, consist largely of general details.

The action was tried by Walsh, J., who dismissed the action at the close of the plaintiff's case as against the defendants the Georgetown Collieries Limited. He, however, after hearing the evidence of the defence, directed judgment to be entered and a formal judgment was entered accordingly, declaring that the arrangements between the other two companies for the purchase by them of the coal deposits of the Georgetown Collieries Limited are illegal, tending to unduly prevent or lessen competition in the production, sale and supply of an article which may be the subject of trade or commerce as provided in sec. 498 of the Criminal Code, but not otherwise in contravention of the said section, and also declaring that the directors of the Canmore Coal Company Limited are liable to the said company for any moneys paid by that company in respect of the agreement in question. A reference was ordered to ascertain the amounts and the judgment ordered the defendants Thorp, Neale, Thorne, Weyerhauser and Ingram to repay the amount so found to the said company; otherwise the action was dismissed and no injunction was granted.

From this judgment the plaintiff appeals and the defendants Thorp, Ingram and Neale and the two first mentioned companies cross-appeal.

The main question involved in the appeal is whether what was done by any of the parties amounts to a violation of sec. 498 of the Code, which embodies and doubtless extends the common law rule.

The learned trial Judge found that the Georgetown Collieries Limited was entirely innocent and that what that company had done was perfectly legitimate. That the owner of a coal mine, which, according to the plaintiff's allegation, could not be worked economically should sell out his property to a neighbouring coal proprietor is something which it is rather surprising to have called in question. The learned trial Judge also found that the Canadian Anthracite Coal Limited, in so far as the contract with the Georgetown Collieries Limited for the purchase of its property was concerned, had not infringed the Act. He said:—

"It follows from this, as I have also held, that the contract itself is free from taint of illegality under the section. There are but two parties to it and to bring them within the penalties of the section because of this contract they must have conspired, combined, agreed or arranged with each other to do one of the prohibited acts. This, obviously, neither of them could be convicted of doing if one of them was innocent of the offence, no matter with what guilty intent it was that the other party entered into it."

With this view I would venture also heartily to concur.

But it appears that the directors of the Canadian Anthracite Coal Company Limited, which company holds a controlling interest in the Canmore Coal Company Limited and could therefore dictate its action entirely in any case, entered into an arrangement with the latter company whereby it was agreed that the former company should make the perfectly innocent purchase contract with the Georgetown Collieries Limited and that the Canmore Coal Company Limited, though not at all a party to that agreement, should pay one-half of the price. It was this arrangement between these two companies which the trial Judge considered to be a violation of the provisions of sec. 498 (*d*) of the Code. That section, omitting the parts which the trial

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Judge held to be inapplicable and those which are immaterial here, reads as follows:—

"(*d*) Every one is guilty of an indictable offence . . . who conspires, combines, agrees or arranges with any other person or with any railway, steamship, steamboat or transportation company . . . to unduly prevent or lessen competition in the production or manufacture, purchase, barter, sale, transportation or supply of any article or commodity which may be a subject of trade and commerce."

After discussing the intimate relations which existed between the two companies and shewing how advantageous to both it was considered to be that the Georgetown Collieries Company Limited should be eliminated and after referring to consultations between their respective officers and the resolution of the directors of the Canmore Coal Company Limited to assume one-half of the obligations of the contract the learned trial Judge said: "and so it is undoubted that these companies did conspire, combine, agree and arrange between them *to buy out* the Georgetown Company for the avowed purpose of lessening or preventing competition in the sale of their coal." He then asked the question: "Was that done to unduly lessen or prevent competition?" After referring to the views expressed by the different Judges of the Supreme Court of Canada in *Weidman* v. *Shragge*, 20 Can. Cr. Cas. 117, 2 D.L.R. 734, 46 Can. S.C.R. 1, and discussing the effect of the elimination of the Georgetown Collieries Company upon the coal trade he said:

"The arrangement which brought about its disappearance was founded admittedly on the desire of those whose profits it was affecting to be rid of its competition and this was, I think, in the circumstances an *undue* lessening of competition.

The result was that, although the contract itself could not be interfered with, being perfectly legitimate, the arrangement between the two companies that one of them should enter into it and the other, the subsidiary controlled company and lessee, should pay one-half of the purchase price was illegal and forbidden by the statute with the result merely that the directors of the subsidiary company should be ordered personally to pay back to that company any money that that company might have paid under the arrangement. Even to this meagre degree of success on the part of the plaintiff there would seem in my view to be

this very serious objection that the plaintiff, though a shareholder in fact in the Canmore Coal Company Limited, does not come into Court in that capacity, but states merely that he is suing on behalf of the shareholders of the Canadian Anthracite Company. With much respect I fail to see how the shareholders of the latter company have any right to a judgment ordering the directors of another company to pay back money to that other company. This in itself would be sufficient in my opinion to justify the cross-appeal. But it is perhaps better to deal with the whole matter as if an amendment in the style of cause and in the pleadings had been allowed, particularly as there does not appear to me to be any chance of such an amendment leading to a different result.

It seems to me that the decision of the trial Judge has extended the meaning of sec. 498 (*d*) farther than has ever been done before and beyond the real meaning of its words. We have here not an agreement between persons remaining in the trade to fix prices or otherwise limit competition among themselves but an arrangement between two persons jointly interested in a coal mine to buy out a competing mine owner altogether. An examination of all the cases decided under sec. 498 will shew that this is apparently the first time that the section has been so extended. So far as noted in Crankshaw, these cases are as follows: *R.* v. *Elliott*, 9 Can. Cr. Cas. 505, 9 O.L.R. 648 (a person organizing an association of retail coal dealers to control the business and prevent others getting coal from the wholesale dealers): *R.* v. *Gage*, 13 Can. Cr. Cas. 428 (an agreement among grain dealers on the Winnipeg Exchange in regard to prices to be paid, no conviction being made): *R.* v. *Central Supply Association Ltd.*, 12 Can. Cr. Cas. 371 (an agreement between a plumbers' association and an association of dealers in plumbers' supplies for the purpose of regulating prices): *R.* v. *McMichael*, 18 Can. Cr. Cas. 185 (an agreement between an association of plumbers and an association of jobbers in plumbers' supplies intended to prevent members of the jobbers' association from selling to non-members of the plumbers' association and *vice versa*: *R.* v. *Clarke*, 1 A.L.R. 358 (a lumber trade association fixing a regular price for lumber and attempting to prevent persons engaging in the trade except with the association's control and approval): *Wampole* v. *Karn Co. Ltd.*, 11 O.L.R. 619 (an agreement between manufacturing chemists with certain wholesale

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dealers that the latter should not sell below a stated price and then only to such retailers as had made similar agreements): *Weidman* v. *Shragge*, 20 Can. Cr. Cas. 117, 2 D.L.R. 734, 46 Can. S.C.R. 1 (an agreement between two junk dealers who controlled the trade in Western Canada as to prices and profits.)

These are all the cases cited by Crankshaw under the section, and I can find no others in the reports in which a conviction has been made and even among those cases cited by Crankshaw where there has been an acquittal I cannot find one in which such an arrangement as is here in question has been attacked. In *Hartley* v. *Elliott*, 9 O.L.R. 185, all the coal dealers in a certain town combined into an association to regulate prices.

If we go beyond the question of criminality and look into the cases in which contracts in restraint of trade have been held illegal we shall find the great majority of them dealing with covenants not to carry on a certain kind of business contained in an agreement for the sale of a business.

In neither of the two English cases which were much canvassed by the Supreme Court of Canada in *Weidman* v. *Shragge*, *ubi supra*, viz: *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfeldt*, [1894] A.C. 535, and *Mogul Steamship Co.* v. *McGregor Gow & Co.*, [1892] A.C. 25, was there any question of an arrangement merely to buy out a competitor completely.

In the former case a patentee and manufacturer of guns and ammunition for purposes of war covenanted with a company to which his patents and business had been transferred that he would not for twenty-five years engage except on behalf of the company, either directly or indirectly, in the business of manufacturing guns or ammunition and the House of Lords held that agreement valid and binding.

In the latter case certain shipowners formed an association to regulate the number of ships sent to a loading port, and the division of cargoes, and the freight to be demanded. Certain shipowners, not members of the association, sent ships to the port but were so far underbid by the members of the association that they had to carry at unremunerative rates. They brought an action for damages for conspiracy and failed. From this case it would appear that if the Canadian Anthracite Coal Co. Ltd. or the Canmore Coal Company Limited had agreed so to reduce the price of coal as to kill the trade of the Georgetown Company

it would have been perfectly legal (aside of course from the provisions of our Code) but under our Code, if the judgment under review is correct, it is illegal even to arrange to buy out a competitor.

In *Weidman* v. *Shragge*, *supra*, Duff, J., after quoting from several of the judgments in the *Nordenfelt* case, said:—

"It is quite clear that all of these eminent Judges had in view the possibility of a state of circumstances arising in which the public interest in restraining encroachments upon freedom of competition might have to be maintained at some sacrifice of the public interest in freedom of contract even in such common commercial transactions as the sale of a business."

It is evident that Mr. Justice Duff was here thinking of the covenant usually or at least often made by the vendor on the sale of a business not to engage in the same business. What he would have thought of the suggestion that a mere purchase of a business, without any covenant by the vendor not to engage in the same trade, might, if arranged for by the purchaser with some one else whose assistance in the purchase he required, involve a violation of the criminal law does, of course, not appear.

But it seems to me that there is a clear and broad line of distinction between the cases which have come up under sec. 498 and in which a conviction has been made and the present case. In every one of them persons engaged in a trade have entered into an agreement to restrict their own actions in competing with each other for the very purpose of limiting competition while they still all remained in the trade. In the present case a lone and struggling competitor thought it the best course to sell out its property to a neighbour. It made no covenant as to what it would do thereafter. It was free to acquire other coal areas and go on running if it chose. The company which bought the property admittedly did nothing illegal in buying it. But because that purchasing company owned a controlling interest in a third company and arranged, and of course in reality directed that other company to assist in the purchase, it is said that such an arrangement comes within the evil struck at by sec. 498.

It may be the case that two persons engaged in a certain business must not arrange to form a company to buy out a third who is a competitor, if they can be led to confess that the purpose of the purchase is to lessen competition and the result can be

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shewn to be an *undue* lessening of it. No other case so far as I can discover has yet decided that that is the law and I doubt if sec. 498 is wide enough, or was ever intended, to cover such a case. But however that may be, it seems to be clear that the present case goes even much farther than that. For here one of the two persons is subject to the control of the other and I think sec. 498 refers to persons who are free agents and in control of their own actions, which really was not the case here.

If one competitor can legitimately buy out another for the purpose of merely lessening competition it would be strange indeed if the purchasing competitor must not seek the assistance of any one else in his project. Even his banker, who might often be much interested in getting his customer's competitor out of the way, must not arrange to lend him some money for that purpose.

I think sec. 498 (*d*) is clearly intended to apply to agreements or arrangements among persons who remain in the business as to the method and plan by which they will carry it on, and as to regulations and rules among themselves so as to lessen competition in the sale, etc., of any article of commerce and not to an arrangement to buy, out and out, the property of a competitor.

For these reasons I think the appeal should be dismissed with costs, and the cross-appeal allowed with costs, the judgment below set aside and the action dismissed with costs.

Plaintiff's appeal dismissed; cross-appeal allowed.

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SHAW v. HOSSACK.

Ontario Supreme Court, Clute, J. April 26, 1917.

1. INTEREST (§ II B—65)—USURIOUS RATE—MONEY-LENDERS ACT—RECOVERY.

One who carries on the business of money-lending in connection with another business is a "money-lender," within the meaning of the Ontario Money-Lenders Act, R.S.O. 1914, c. 175, though not registered as such and also the Dominion Money-Lenders Act (R.S.C. 1906, c. 122); an exaction of interest in excess of the statutory rate does not invalidate the transaction as a whole, but prevents recovery of the excess.

[*Bellamy* v. *Timbers*, 19 D.L.R. 488, 31 O.L.R. 618, followed.]

2. BILLS AND NOTES (§ I—4)—CONTEMPORARY AGREEMENT.

A contemporary agreement in respect of a promissory note may be valid, whether oral or in writing.

Statement.

ACTION upon four promissory notes made by the defendants, husband and wife.

W. J. McCallum, for the plaintiffs.

J. M. Ferguson and *D. J. Coffey*, for the defendants.

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CLUTE, J.:—The action is upon four promissory notes: the first dated the 15th September, 1915, for $275, payable three months after date; the second dated the 4th October, 1915, for $325, payable on the 15th October, 1915; the third dated the 22nd November, 1915, for $950, payable on demand; the fourth dated the 26th October, 1915, for $2,500, payable one month after date.

The plaintiffs claim interest upon each and all of the notes at 2 per cent. per month, but only one of the four notes produced bears interest at that rate, namely, the $950 note.

Dealing in the order the evidence was given, and taking the last note first, it appears from the plaintiffs' evidence that the original note for $2,500, of which the one sued on for that amount is a renewal, was dated the 26th November, 1914, payable in six months, no rate of interest being stated upon the face of it. Contemporary with the original note was an agreement of the 26th November, 1914, made between D. C. Hossack and the plaintiffs, reciting that no rate of interest is stipulated upon the note, and it is agreed between the parties thereto that the plaintiffs "are to have 2 per cent. per month upon the money advanced, namely, $2,500;" and there is a covenant on the part of D. C. Hossack to pay the note in six months from the date thereof, and to pay 2 per cent. per month upon $2,500. The plaintiffs agreed to accept $2,500 at the expiration of three months, upon ten days' notice, and agreed that interest should cease upon payment of the principal sum at any time after the expiration of three months from date, upon payment of $2,500 with accrued interest thereon. There is no mention of a renewal, nor that the sum shall bear interest at 2 per cent. per month after it becomes due.

Various securities owned by the defendant D. C. Hossack were assigned to the plaintiffs in security for this loan, after their value had been inquired into by the plaintiffs. The plaintiff John E. Shaw states that upon the note falling due the defendants desired to renew the same at the same rate of interest, to which the defendant D. C. Hossack agreed, and it was renewed several times accordingly until the note sued on was given.

The $950 note is a renewal of one dated the 22nd July, for $950, payable one month after date, made up of an earlier note of $450 due on that date and retired by the new note, and other

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loans. In a letter by the defendant D. C. Hossack on that date he states that the note is accompanied by collateral in the form of an agreement and interest in certain lands in the west, and a certain other note as collateral. "The interest on said note for $950 is to be paid at the rate of 2 per cent. a month until paid." It does not appear whether the note of the 22nd July was renewed prior to the note sued on, nor is there any other agreement in respect of the payment of 2 per cent. per month.

The $325 note does not state any rate of interest, but was accompanied by a letter of the same date, stating that: "The interest on note for $325 dated October 4th, 1915, due October 15th, 1915, is to be at the rate of 2 per cent. per month." Certain securities were assigned to the plaintiffs as collateral to this note.

On the $275 note no mention was made of interest. The money was advanced, as the plaintiffs state, three months previous to the date, at 2 per cent. per month, and the defendant D. C. Hossack gave as security his interest in two lots in North Toronto of $550 value. In respect to this loan the defendant D. C. Hossack offered the plaintiffs their money, which they refused unless all their claims against the defendants were paid. He then offered the whole purchase-money of $550, the balance over and above this note to be applied on the defendants' indebtedness. This also the plaintiffs refused unless the whole indebtedness on this and other notes was paid.

There are no pleadings in the case. The defendant D. C. Hossack raises the defence to a specially endorsed writ by his affidavit, in which he states that the amount sued on is made up of money lent by the plaintiffs to the defendant D. C. Hossack, in which they have charged interest at 2 per cent. per month, and that he has paid large sums for interest at the above rate to the plaintiffs. He claims that the interest charged is excessive, and that the transaction is harsh and unconscionable, and desires the Court to relieve him from payment of any sum in excess of the sum adjudged by the Court to be fairly due, after computing the same at what the Court may consider a reasonable rate of interest, and asks for an account.

By consent of the parties, judgment has been entered for the principal advanced; and it is agreed that, if the Court finds that there is any sum due in respect of overcharges of interest, the same shall be deducted from the judgment.

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The defendant D. C. Hossack is a barrister, but is chiefly engaged in transactions in the purchase and sale of land in Ontario and Saskatchewan and Alberta. Owing to depeciations in his holdings prior to the transactions in question, he became pressed for money, and these loans were made under such pressure.

The plaintiffs formerly were builders and contractors, and are now engaged in manufacturing hats. They also carry on money-lending, in addition to their other business, and have made other loans at 2 per cent. per month.

John E. Shaw, one of the plaintiffs, gave evidence. He seemed to be well-acquainted with business matters in connection with money-loans, and satisfied himself in each instance as to whether the securities offered were satisfactory. I was not entirely satisfied with this plaintiff's evidence. His conduct in respect of the loans was oppressive. He refused to accept payment of any particular loan and deliver up the securities unless all the other loans made to the defendants were paid. There were other transactions not disclosed in this case—loans from the plaintiffs to the defendant D. C. Hossack, for which security is held in Saskatchewan and Alberta, at the same rate of interest. These securities were worth three or four times the amount of the loans, but the plaintiffs refused to accept payment and deliver up the securities unless payment was made of all sums due, they amounting to about $9,000.

I think the plaintiffs are money-lenders within the meaning of the Ontario Money-Lenders Act, R.S.O. 1914, ch. 175, although not registered as such, and also within the meaning of the Dominion Money-Lenders Act, R.S.C. 1906, ch. 122. I find that the transactions in which the notes sued on were given were harsh and unconscionable, under sec. 4 of the Ontario Act; and that, having regard to the risk and to all the circumstances, the cost of the loans and each of them was excessive. Section 6 of the Dominion Act limits interest on loans under $500 to 12 per cent., and 5 per cent. after judgment. Section 7 gives power to the Court to inquire into transactions where the original loan is under $500, wherein it is alleged that the amount of interest exceeds the rate of 12 per cent., with power to reopen the transactions and take accounts between the parties, notwithstanding any statement or settlement, and relieve the person under obligation from payment

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of any sum in excess of 12 per cent., and the Court may order repayment of such excess and set aside transactions either wholly or in part or revise and alter any security given in respect to the same.

In *Bellamy* v. *Porter* (1913), 28 O.L.R. 572, 13 D.L.R. 278, it was held by Mulock, C.J. Ex., and Sutherland, J., that the stipulation in a promissory note for payment of interest after maturity at 2 per cent. per month until paid was a violation of the prohibition contained in sec. 6 of the Dominion Act, and an indictable offence, and that the stipulation, being illegal, was void, and the note, if not rendered void by the alteration, must be construed as containing no contract for the payment of interest; *per* Clute, J., that the note was void as having been made in contravention of sec. 6 of the Money-Lenders Act.

In *Bellamy* v. *Timbers* (1914), 31 O.L.R. 613, 19 D.L.R. 488, it was held that the statute did not render the whole transaction represented by the note void (see sec. 7), but merely vitiated it so far as it contravened the provisions of sec. 6 with regard to interest, and that the defendant was entitled to be relieved from the payment of excessive interest.

Following this case in respect to the two loans under $500, the transaction in each case from the beginning should be opened up and the interest charged limited to 12 per cent., and the judgment entered in respect of these two notes should be reduced to a sum not exceeding the principal advanced and 12 per cent. interest.

In respect of the other loans of $950 and $2,500, I find that both these transactions should be opened up, and interest allowed also at the rate of 12 per cent., and all proper deductions made in respect of the sums above that amount, the same to be deducted from the judgment already entered.

In case the parties cannot agree upon the amount of interest to be allowed under the above direction, the case is to be referred to the Master to take an account, having regard to the above directions.

The defendants are entitled to the costs of their defence and counterclaim subsequent to the entry of judgment, and to the costs of the reference, if any.

In reaching the conclusion above indicated, I rule that a contemporary agreement in respect of the note may be valid whether

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oral or in writing: see Maclaren on Bills and Notes, ed. of 1909, pp. 46, 47, and 48; *Young* v. *Austen* (1869), L.R. 4 C.P. 553; *Brown* v. *Langley* (1842), 4 M. & G. 466; *Salmon* v. *Webb* (1852), 3 H.L.C. 510.

Judgment for plaintiff.

REX v. HING HOY.

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Alberta Supreme Court, Appellate Division, Harvey, C.J., and Stuart, Beck and Walsh JJ. May 23, 1917.

1. GAMING (§ I—1*a*)—PROVING ELEMENT OF CHANCE.
There must be evidence or admissions to shew that the game being played is one in which there was the element of chance before a magistrate can find the place to be a common gaming house under Cr. Code sec. 226. The fact that money, buttons and chips were found on a police raid does not make out a *primâ facie* case where there was no proof that the game of fan-tan was an unlawful one.

2. GAMING (§ I—1*a*)—STATUTORY PRESUMPTION FROM FINDING GAMING EQUIPMENT—PROVING SEARCH ORDER.
Where sec. 985 of the Criminal Code is relied upon to create a statutory presumption from the finding of instruments of gaming used in playing any unlawful game, the search order or warrant should be proved by its production. (*Per* STUART, J.).
[See annotation, 24 Can. Cr. Cas. 443.]

3. GAMING (§ I—1*a*)—COMMON GAMING HOUSE—ROTATION AS BANKER.
The provisions of Code sec. 226, sub-sec. (*b*) as to what constitutes a common gaming house notwithstanding that there is no proof of gain by the keeper, do not apply to a game in which, though a bank is kept, the chances of being banker are equal to all the players. (*Per* BECK, J., concurring in quashing the conviction.)
[*R.* v. *Hung Gee* (No. 1), 21 Can. Cr. Cas. 404, 13 D.L.R. 44, referred to; *R.* v. *Petrie*, 3 Can. Cr. Cas. 439, 7 B.C.R. 176, approved by BECK, J., and disapproved by HARVEY, C.J.]

Statement.

APPEAL by defendant from the decision of Simmons, J., refusing to quash a summary conviction of being found without lawful excuse in a disorderly house, to wit, a common gaming house.

J. McKinley Cameron, for the accused.

J. J. Trainor, for the Crown.

Harvey, C.J.

HARVEY, C.J. (dissenting):—The offence is one under sec. 229. There was no evidence for the defence and the objection to the conviction is that there was no evidence that the place in which he was found was a common gaming house.

A common gaming house is defined by sec. 226 as:—

"(*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; or,

"(*b*) A house, room or place kept or used for playing therein at any game of chance or any mixed game of chance and skill in which,—

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"(1) A bank is kept by one or more of the players exclusively of the others; or

"(2) 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."

In the evening the Chief of Police with several assistants made a raid on the place in question and arrested sixty-five Chinamen whom they found in a room, ten or twelve others escaping. Several of these were charged with being keepers of a common gaming house under sec. 228 and evidence was taken on the charge, which was dismissed. Mr. Cameron, who appeared as he states for the present defendant and the other Chinamen as well as the ones being tried, then stated that he was prepared to have the evidence given on the charge of keeping taken as the evidence on the charge of being found, and he states that all were convicted. On the charge of keeping, three of the Chinamen taken by the police on the premises were called as witnesses. At the time Mr. Cameron objected to their being examined against their will, but their evidence was given, and when he proposed that the evidence given should be the evidence on the charge of being found, no objection or exception to any part of the evidence was made.

He states that they were all tried together or would have been all tried together if evidence had been taken and that these three being themselves charged could not be called to give evidence against themselves. As far as the record goes, however, there is nothing to shew that they were not treated separately. We have a record of the conviction of the applicant only. Both in the information and conviction he alone is mentioned and there is no doubt that the evidence of the three Chinese witnesses was competent evidence against him and they were compellable witnesses on the charge against him.

The evidence of the policeman shews, in addition to the facts I have already stated, that to reach the room in which the Chinamen were found it was necessary to pass through four doors, that at one of the doors a man was standing who was pushed aside, and when the police entered there was a rush and a scramble and money and chips were scattered over the floor and tables. There

were seven tables and twelve chairs and there was a crowd around each table, some standing. They were using the chips which one of the policemen says are used for playing fan-tan. He also states that the room had the appearance of being used as a gambling joint. Each table had a black cover, chips or buttons and a small bowl. The chips and bowls were exhibited before the magistrate. The doors through which entrance is made to the room were fitted with springs and locks, and there were ropes for closing them, and evidence was given that on other occasions a man was seen to be on watch.

The evidence of the Chinamen was that a game of fan-tan was being played, and one of the witnesses attempted to give a partial explanation of the game. He said: "If you want to put so much out and put the cup over, and the man puts in so much on the game—a dollar—twenty-five cents—five or ten cents, and then puts the money in each corner." When asked, "You play against the bank?" he said, "No, we have no banker, anybody can be banker." Some of the further explanation is as follows: "It is this way, here are four corners and you bet on all the corners or each of them. Q. Who is the banker down there? A. I don't know who the banker is, anybody can be banker. One man for one table, and any time they want to change it they can change it. Q. Supposing you are banker and the players beat the banker, who pays them? A. The banker pays it. Q. Supposing a man puts up $2 on No. 2 and there were two left, he would win. A. Yes. Q. Would the banker give him $2? A. Yes, he would take No. 4, because 4 would lose. Q. Would the banker have one, three and four? A. Oh, yes.

. . . . . .

"Q. Were you there before? A. Sometimes. Q. And you saw games there? A. Yes. I saw games. Q. It is run as a regular gambling house? A. Well, yes, for games."

A consideration of sec. 226 shews that there are two distinct classes of gaming houses, one a house or room kept for gain, and one in which the element of gain for the keeper may be entirely absent.

The ordinary game of cards in which there is a chance in the deal of the cards as to the value of the hands dealt to each player is a game in which chance and skill are combined, and that is no doubt what is meant by the expression "mixed game of chance

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and skill." Consequently, a house or room used for the playing of such games, no matter how harmless in themselves and regardless of the fact that no money is wagered is a common gaming house if it is kept for the purpose of gain to the keeper.

On the other hand, a house or room used for the playing of the class of games specified in paragraph (*b*) in which a bank is kept by one or more exclusively of the others, or in which the chances are unequal, is a common gaming house regardless of the fact that the proprietor of the house derives no benefit. It is evident, therefore, that in this second class it is the character of the game which is material. It is prohibited to use a room for the purpose of playing such games. The game is thus impliedly prohibited and is therefore an unlawful game.

There is no evidence in the present case that the room was kept for gain. The question is—is the game above described an unlawful game? Or at least is there any evidence from which it may be reasonably inferred that it is a game coming within paragraph (*b*).

The word "bank" is not defined in the Code, but it seems quite clear that it is not the bank that is authorized by the Bank Act, nor is "banker" in this section the keeper of such a bank, though the word "banker" is defined "as including any director of any incorporated bank or banking company." That definition may, I think, be discarded for the purposes of this section as it is clear that the "context otherwise requires."

Webster's New International Dictionary defines "bank" as a gaming term as meaning "the sum of money or the checks which the dealer or banker has as a fund from which to draw his stakes and pay his losses," and Murray's New English Dictionary defines it as follows: "In games of hazard the amount or pile of money which the player who plays against all the others, *e.g.*, the proprietor of the gaming table, has before him."

It is true that the witness in this case says there is no bank, but he also states that there is a banker, and if there is a banker it seems to follow there must be a bank. His explanation of the game is far from clear, but it is by no means necessary to learn from it how to play the game. All that is necessary is to determine whether there is a bank which is kept by one or more of the players exclusively of the others. It may be noted that the witness is one who expressed his unwillingness to give evidence and

Harvey, C.J.

who was himself guilty of an offence if the game comes within the section. He says that anybody can be banker and the players can change at any time. The question is, does that mean that the bank is not kept exclusively by one or more of the players? He also says that there can be only one banker for one table. I am of opinion that the prohibition of the statute is not limited to cases in which one person, who would probably be the proprietor, excludes all the other players from the privileges of keeping the bank during all the time. If it is an element of the game that the bank is kept by one or more to the exclusion of the others it appears to me that it clearly falls within the natural meaning of the words of the section regardless of the fact that the one or more who keep it may change from time to time.

This view is in accordance with the view expressed by all the members of the Supreme Court of British Columbia in *The Queen* v. *Petrie* (1900) 3 Can. Cr. Cas. 439, 7 B.C.R. 176, though it is at variance with those expressed by my brother Beck in *Rex* v. *Hung Gee*, 21 Can. Cr. Cas. 404, 14 D.L.R. 44, where he declined to accept the views expressed in the earlier case. With respect, I find myself unable to accept his view, the other appearing to me to be the correct one.

I am, therefore, of opinion that there is evidence from which it may be concluded that the game of fan-tan as described here was an unlawful game being one prohibited by paragraph (*b*), and that in consequence the house in question was a common gaming house.

I would, therefore, dismiss the appeal.

Stuart, J.

STUART, J.:—It is simply impossible from the evidence in this case to discover how the game in question was played. I do not think there is the remotest possibility of anyone being able to make a reasonable inference from the evidence that there was any chance in the game which was being carried on. I think it is necessary to know that before it can be decided that it was a mixed game of chance and skill and therefore within the section of the Code under which the charge was laid.

I do not think that Parliament intended that Judges of the Courts of law should take judicial notice of the way in which so-called gambling games are played. In *Reg.* v. *Petrie*, 3 Can. Cr. Cas. 439, 7 B.C.R. 176, the method of play was described in detail by admissions of counsel.

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Neither do I think we can safely go to dictionaries for information. Murray's dictionary defines "fan-tan" as "a Chinese gambling game in which a number of small coins are placed under a bowl and the players then bet as to what will be the remainder when the pile has been divided by four." Here there is no mention of cards at all. Nevertheless, in *Rex* v. *Jung Lee*, 22 Can. Cr. Cas. 63, 13 D.L.R. 896, 5 O.W.N. 80, Middleton, J., speaks of "cards necessary for playing fan tan."

There is, in my opinion, not the slightest iota of evidence inconsistent with the possibility that what was being played was a pure game of skill. Where the element of chance came in I am unable to discover.

For this reason I think the appeal should be allowed and the conviction quashed.

I also have grave doubts whether the facts of the case come within sec. 226 (*b*) (i) of the Code. It depends somewhat upon what is meant by the term "game." Does the word mean, as it does in some games of cards, a mere single "round" or "deal" of the cards, or does it mean, as it often does, a whole series of such deals or rounds? I should desire to have a description of the game being played on the premises before attempting to apply the word "game" in sec. 226 (*b*) to it. With a narrow application of the word "game" it might be said that the bank was kept exclusively by one or more players, while with a wider application, treating it as meaning a continuous series of "rounds" or whatever word one may use to describe successive parts of the play, then it could not be said that the bank was kept exclusively by one or more players.

The evidence is too obscure, in my opinion, for any reasonable inference unfavourable to the accused to be drawn from it.

With respect to the *primâ facie* case which may be established under sec. 985 of the Code I think the evidence adduced was not proper or sufficient to enable the Crown to take advantage of it. All that the policeman said was that he had a "gambling warrant" issued by the magistrate who was hearing the evidence. The warrant was not produced nor its absence accounted for. Much as I dislike to interfere where omissions have been made in Police Courts perhaps owing to the rush and hurry of the work there, I cannot on the other hand refrain from expressing the view, and acting upon it, that extraordinary statutory powers of interference

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with personal liberty and property ought to be exercised strictly according to the statute creating them and also that extraordinary presumptions of guilt derived by force of a statute from certain circumstances ought not to be made unless the proper proof of those circumstances has been given. A warrant is a written document and its contents should be proved by its production. In this case the contents were not proven even by oral evidence.

BECK, J.:—In order to prove that a game comes within the provisions of sec. 226 of the Criminal Code it is, no doubt, not necessary that the evidence should disclose a complete description of the way in which the game is played; it would be sufficient, doubtless, to shew that it comprised an element against which that section is directed.

There is evidence that a game called "fan tan" was played in the place in question, but there is, in my opinion, no evidence that it is a game such as that section contemplates. The Crown witness—a Chinaman—who said that a game of fan tan was being played said in answer to the question, "You play against the bank?" "No, we have no banker, anyone can be banker," and in answer to the question, "Who is the banker down there?" said, "I don't know who the banker is. Anybody can be banker. Only one man for a table and any time they want to change it they can change it."

He also says there are different kinds of fan tan. No cards were found and there is no evidence that cards were used. There is evidence that money, buttons and chips were found, but it is impossible from the evidence to say how they were used.

It is admitted by the Crown that the charge can be sustained only under sub-sec. (*b*) of sec. 226, which necessitates proof either (1) that a *bank* is kept by one or more of the players *exclusively* of the others, or (2) the chances of the game are not alike favourable to all the players including the banker or other person by whom the game is managed or against whom the other players stake, play or bet.

Neither of those things was proved if my interpretation of the section as given in *Rex* v. *Hung Gee* 21 Can. Cr. Cas. 404, 13 D.L.R. 44, is correct, and I still adhere to the opinion there expressed. I there held, declining to follow *The Queen* v. *Petrie* (1900), 3 Can. Cr. Cas. 439, 7 B.C.R. 176, that the provisions I have referred to are not directed against a game

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in which, though a bank is kept, the chances of being banker are equal to all the players.

I would, therefore, allow the appeal.

WALSH, J., concurred with Stuart, J.

Conviction quashed, HARVEY, C.J., *dissenting*.

BLACK v. CARSON.

IMP.

P. C.

Judicial Committee of the Privy Council, Lord Dunedin, Lord Moulton, Lord Parker of Waddington, and Lord Sumner. May 6, 1914.

COMPANIES (§ V C—189)—*Agreement by promoters as to disposition of stock—Trust—"For the purpose of providing funds."*]—Appeal from the decision of the Quebec King's Bench, 7 D.L.R. 484, 22 Que. K.B. 217. Affirmed.

The judgment of the Board was delivered by

LORD DUNEDIN:—The question raised here is a very short one.

A certain set of gentlemen saw their way to acquire a mine. They subscribed between themselves certain sums of money which were sufficient to pay the deposit which was necessary in order to make a tender to the government, and at the same time they entered into an agreement between themselves which provisionally foreshadowed the arrangement which they would make, assuming that their tender was accepted. Their Lordships need not go particularly into that agreement, because in the sequel it was entirely superseded by a formal agreement which was made. Their tender was accepted, and they then entered into an arrangement between themselves which was of this character: they agreed that a company should be formed, and that they, the trustees in whose name the offer had been made to the government and had been accepted, should transfer the mine which they had got from the government to the company in return for the whole of the shares of that company. The shares were to be of a nominal value of nearly two million dollars. They then arranged as to how these shares of the company were to be dealt with. They were to be dealt with practically in three portions, one portion was to be given to the original subscribers to the syndicate in proportion to the amounts which they had subscribed; another portion was to be disposed of in order to pay to the government the balance of the price still due, without which, of course, it would not have been possible for the syndicate to get the transfer of the mine, or to make the transfer to the

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company; then a third portion, the balance, was to be dealt with in the way in which the agreement particularly provides by art. 7 which is as follows:

It is further agreed that the balance of the said stock, namely, 569,950 shares, shall be transferred by the said trustees to the directors of the company for the purpose of providing funds for the organising of the said company, and for working capital, as the said directors may deem prudent from time to time.

Now it must be remembered what the condition of the company at this time was. The condition of the company was that it had got the mine, but that it had parted with all its shares, and had therefore no means whatsoever of raising money for the moment from the public. It was therefore absolutely necessary that it should have a working capital. Accordingly this clause not unambiguously provides that it shall get these 569,950 shares as working capital.

Now the present suit is brought by the gentlemen who either were, or are now the representatives of, the original subscribers, and they seek a declaration that that portion of the 569,950 shares which had not been disposed of should be declared to be held in their interest, and not in the interest of the company. They back that up by saying:

You have disposed of all the shares that you found it necessary as a matter of fact to dispose of in order to provide a working capital; you are very prosperous, and there is no prospect in the future that you will need any more working capital, and therefore there is a resulting trust in favour of us.

Their Lordships agree with the view that has been taken in the Court below, that this is not really a case of a trust at all; that the phrase "for the purpose of providing funds" simply shows the way in which those funds are to be used and the reason why those funds were given, but do not put any limitation upon the beneficial interest which was transferred. If that is so, the whole case fails, and their Lordships will humbly advise His Majesty to dismiss the appeal with costs. *Appeal dismissed.*

DEMERS v. CITY OF NORTH MONTREAL.

QUE.
S. C.

Quebec Superior Court, Duclos, J. April 28, 1917.

APPEAL (§ V D—275)—*Procedure—Jurisdiction of lower Court until filing of security—Merits of appeal—Final or interlocutory judgment.*]—Motion to dismiss appeal. Refused.

Pélissier, Wilson & St. Pierre, for plaintiff.

Pelletier & Létourneau, for defendant.

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S. C.

DUCLOS, J.:—On April 11 the defendant moved for permission to file a supplementary plea, which motion was granted imposing certain conditions. The defendant finding these conditions too onerous, inscribed in appeal, *de plano*, and gave notice that security would be given on the 20th instant. The plaintiff on the 19th instant presented a motion asking this Court to reject the inscription in appeal, on the ground that the judgment sought to be appealed from is an interlocutory judgment, and permission to appeal should have first been obtained from one of the Judges of the Court of King's Bench.

Objection is made that this Court has no jurisdiction to hear this motion which should be made to the Court of King's Bench. Art. 1220, C. P.

The motion was presented before the defendant had had an opportunity of giving security and thus completing its appeal, and it is urged that until the security has been furnished this Court still has jurisdiction.

In support the plaintiff cites the following authorities:—*Marsan* v. *Hochelaga Bank*, 7 Que. Q.B. 40. In that case a motion was made to the Court of King's Bench to dismiss an appeal because security had not been given, and it was held that such a motion should have been made to the Superior Court. This was an incident to the perfecting of the appeal and cannot apply to the present motion.

In *Guerin* v. *Devine*, 1 Que. P. R. 171, motion by respondent for provisional execution: held that the Court of King's Bench had no jurisdiction to hear said motion until the record had been transmitted to it. This only shows that the respondent's motion was premature.

In *La Compagnie de Chemin de fer de Quebec and Vallières.* 23 Que. K.B. 22, it was held that as soon as security has been given, the Court of King's Bench has alone jurisdiction to decide questions of procedure connected with the appeal.

I am of opinion that the jurisdiction of the Superior Court over appeals, during the period between the filing of the inscription and the giving of the security, extends only to questions affecting the procedure necessary to perfect said appeal, such as the sufficiency of the sureties offered, the transmission of the record, etc., but not to any question affecting the merits of the appeal.

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S. C.

In this case if I entertained the motion, I should have to decide whether the judgment sought to be appealed from is final or interlocutory, a question which, in my opinion, the Court of King's Bench alone has jurisdiction to decide. C. P., art. 1220.

The case of *Tourangeau* v. *le Bureau des Commissaires de la cité de Montreal*, 17 Que. P.R. 81, was pressed upon me with great force, but with all the respect which I have for the learned judge who rendered that judgment, I am unable to accept his conclusions.

The plaintiff will take nothing by motion.

LECLERC v. MARTI.

Quebec Court of Sessions of the Peace, Langelier J.S.P. April 19, 1917.

S. P.

ASSAULT (§ I—1)—*What constitutes common assault—Tramway conductor and juvenile passenger.*—Trial of a summary prosecution for common assault.

Oscar Morin, K.C., for complainant.

J. P. A. Gravel, for defendant.

LANGELIER, J., held that undue interference with a child of seven years on the part of a tramway car conductor to whom she was a stranger by engaging her in prolonged conversation and tickling her while she was travelling on his car may be an assault although she did not resent it at the time, and particularly so where there was a regulation of the transportation company forbidding its conductors to converse unnecessarily with the passengers. The learned Judge quoted with approval the following extract from Stephen's Criminal Law, p. 109:—

"The first principle which runs through the whole law on this subject is that any interference whatever with the person of another, or with his personal liberty, requires special justification."

The duty of a conductor is to be polite and courteous to the passengers he has in charge; he has no right to become familiar with them and to neglect his duties. In the present case, the familiarity which the defendant took with the child was out of place. The parents who place their children on board of a tramway rightly expect that they will be protected and respected. If they knew they are exposed to familiarities with the conductors, they would not let them travel on the cars.

The defendant is fined one dollar and costs.

Defendant convicted.

SASK.

S. C.

BUGG v. CANADIAN NORTHERN R. Co.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, Brown and McKay, JJ. July 14, 1917.

RAILWAYS (§ II D—70)—*Injury to animals at large—Owner's negligence.*]—Appeal by defendant from a judgment for plaintiff in action to recover for injury to animals by trains. Reversed.

J. N. Fish, K.C., for appellant; *G. E. Taylor*, K.C., for respondent.

NEWLANDS, J.:—The trial Judge found the facts in this case as follows:—

Prior to and at the time herein referred to plaintiff owned and occupied the east half of 19-46-19, in the Rur. Mun. of Battle River, No. 438, and about a mile from defendant's line of railway.

On or about the morning of February 29, 1916, a mare and a gelding belonging to him were struck by one of the defendant company's trains on the company's right-of-way through section 18-46-19, W. 3rd, within the limits of the above municipality. There are public highways on the east and west sides of sec. 18, intersected by the railway, and the horses were struck about half way between the two crossings. The right-of-way through sec. 18 was fenced on both sides. At that time the cattle guards at these crossings were not in place and had been up for some weeks. The wing fence on the south side of the track at the west crossing was completely down and there was and had been for some time nothing to prevent animals from getting on the line of railway at either crossing. There was no by-law of the municipality restraining animals from running at large. The plaintiff had turned out the horses in question, and at this time they were running at large. There was no one in charge of them from the time when the plaintiff turned them out until they were killed. There is some evidence that they got on the right-of-way at the crossing on the east side of sec. 18, there is no direct evidence as to how they were injured, but counsel for the defendant did not in his argument touch upon this, and upon all the evidence, I am satisfied that the freight train which the witness Sayer saw on the morning of the 29th struck them, killing one and so injuring the other that it was afterwards killed by one of the defendant's sectionmen.

For the reasons given by me in *Anderson* v. *C.N. Ry. Co.*, 35 D.L.R. 473, the appeal should be allowed with costs and judgment entered for the defendant with costs.

HAULTAIN, C.J., LAMONT and MCKAY, JJ., concurred with Newlands, J.

BROWN, J.:—The facts in this case are so similar to those in *Anderson* v. *C.N. Ry. Co.*, 35 D.L.R. 473 (annotated), that the two cases were argued at the same time.

The plaintiff had turned his horses out on the prairie, and they were running at large at the time they got on the defendant's railway. Under such circumstances the plaintiff cannot succeed and the appeal should be allowed, with costs. *Appeal allowed.*

ROBERTSON v. SPRINGBROOK SCHOOL DISTRICT.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., and Brown, Elwood and McKay, JJ. July 14, 1917.

SCHOOLS (§ I V—70)—*Erection of new school—Debentures—Validity of proceedings—Injunction—Ratepayer.*]—Appeal by defendant School Board from an order of injunction. Varied.

J. H. Allan and *P. H. Gordon*, for appellants.

G. H. Barr, K. C., and *C. M. Johnston*, for respondent.

The judgment of the Court was delivered by

ELWOOD, J.:—In my opinion the proceedings provided by the Act for the acquisition of what may be termed the *new* school site not having been complied with, those proceedings cannot be taken to have had any effect, and it, to my mind, follows that the resolution of February 15, 1917, under which it was determined to build on the old site, did not give the ratepayers the right to appeal from that decision. That resolution was merely confirming what already existed and it was an unnecessary resolution. It would, therefore, follow that there could be no right to have arbitrators appointed.

It does appear, however, that the by-law for raising money for the construction and equipment of the new school was submitted to the ratepayers, and did contain a recital shewing the purposes for which the money was to be raised. It is true that that recital was unnecessary, but it is conceivable and indeed the evidence shews that on account of the recital and on account of the belief then existing that the school was to be erected on the new site, some, at least, of the ratepayers voted for the by-law who would have voted against it had the resolution not been there and had it not been the intention to erect the school on the new site.

Under these circumstances, I am of the opinion that the plaintiff, who was one of those who so voted, has a right to restrain the district from spending any of the money so voted on erecting a school on the old site. I would, therefore, vary the judgment appealed from by ordering that the School Board be restrained from expending any of the money raised by the debentures sold on the erection or equipment of a school building on the old site. The school district should not be directed to call a meeting of the ratepayers for the purpose of appointing an arbitrator.

While it is true that the result of varying the judgment is to deprive the plaintiff of an arbitration to determine the site,

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yet, by restraining the school district from spending any of the money voted for erecting a school on the old site, the actual effect of the appeal will probably be to prevent a school being erected on the old site without a further vote of the ratepayers. Under the circumstances, I therefore think that the proper disposition of the costs will be to allow no costs to either party of this appeal.

Judgment varied.

SULIS v. ARMSTRONG.

N. S.
S. C.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Harris, and Chisholm, JJ. April 21, 1917.

ADVERSE POSSESSION (§ I B—5)—*Fencing in lot around blacksmith shop—Deed—Description of land.*]—Appeal from the judgment of Longley, J., in favour of defendant, in an action for trespass to land and ejectment. Affirmed.

W. E. Roscoe, K.C., and *H. L. Dennison*, K.C., for appellant.

F. Jones, for respondent.

The judgment of the Court was delivered by

HARRIS, J.:—The plaintiff sued in trespass and later added a claim in ejectment. The father of the defendant formerly owned a block of land in Digby and had, on one corner of his property, a blacksmith shop. The defendant took over his father's business in 1891 and the father retired. The defendant says that his father was to convey to him the lot on which the shop was situate and the land used in connection therewith, but the father died in 1894 before the conveyance was made. On July 18, 1894, the defendant joined the other heirs in a deed to his mother, and on April 24, 1896, the mother re-conveyed the lot on which the shop was situate to the defendant.

This deed to the defendant described the property as 34 ft. on King St. and 65 ft. deep. In 1891, when the defendant went into occupation of the shop he had erected a fence on the south side of the lot enclosing an area 45 ft. on King St. The blacksmith shop was on the north side of the lot and within a foot or two of the north line. It was 24 ft. wide and there was a space between the south side of the shop and this fence on the south side of the lot of about 20 ft. This space the defendant occupied in connection with his business as a blacksmith, heating tires and storing iron, waggons, etc., on it.

In 1896 or 1897 the defendant built a shed on a part of this

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S. C.

space between his shop and the fence, and has continued to occupy both the shed and the land up to the fence on the south side line ever since.

He claims title, under his deed, as to 34 ft. and, by possession, as to the other 11 ft. The plaintiff admits the defendant's possession as to the portion covered by the shed built on the south side of the shop, but disputes his possession as to the balance.

The trial Judge found in favour of the defendant on the issue as to possession.

In my opinion, the evidence is beyond question, and it is uncontradicted, that the defendant from 1891 had exclusive possession of the whole lot 45 ft. wide. It was argued that when he conveyed to his mother in 1894, he gave her all his right to the property, including his possessory rights.

Assuming this to be so, he still continued, after 1894, to occupy the whole lot and he has, since giving the deed, more than twenty years' possession as against her and the plaintiff who acquired title from her.

The trial Judge also found that the description in the deed, which mentioned the blacksmith shop as standing on a part of the premises conveyed, was sufficient to vest in the defendant a lot at least 40 ft. wide on King St. The blacksmith shop, at the time of the deed to defendant, covered less than the 34 ft. mentioned in the deed, and under these circumstances I cannot agree that the deed can be read as conveying more than the lot 34 ft. in width.

But on the ground that the defendant had more than 20 years exclusive possession of the lot 45 ft. wide, the judgment is clearly right and the appeal should be dismissed with costs.

Appeal dismissed.

HOPE AND SON v. CANADA FOUNDRY CO.

ONT.
S.C.

Ontario Supreme Court, Meredith, C.J.C.P., Hodgins, J.A. and Riddell and Lennox, JJ. September 28, 1917.

CONTRACTS (§ IV B—330)—*Supply of manufactured material for building—Delay from unavoidable cause—"Strike of workmen"—Reasonable time—Third party procedure.*]—Appeal by the defendants from the judgment of LATCHFORD, J., 12 O.W.N. 168. Affirmed.

J. A. Paterson, K.C., for appellants.

George Wilkie, for plaintiffs, respondents.

M. K. Cowan, K.C., for the third parties, respondents.

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RIDDELL, J., in a written judgment, said that the third parties had a contract for the erection of a building at Calgary, and, desiring certain material, made a contract with the defendants (of Toronto) for the same. The defendants made a contract for the supply to them of the material by the plaintiffs in England. By reason of the delay in supplying this material, the third parties cancelled the contract with the defendants, whereupon the defendants notified the plaintiffs of the cancellation of the plaintiffs' contract. Neither the plaintiffs nor the defendants accepted the cancellation. The plaintiffs sued the defendants for damages, whereupon the defendants brought in the third parties by the practice provided by the Rules. The judgment at the trial was in favour of the plaintiffs against the defendants, and in favour of the third parties upon the claim over of the defendants. The defendants appealed both as to the plaintiffs' judgment and as to the dismissal of their claim over.

The learned Judge said that he agreed with the conclusion of the trial Judge in respect of the claim of the plaintiffs; and had come to the conclusion that the case was not one in which the third party Rules applied, and there was no power to grant any relief to the defendants against the third parties in this action unless by consent.

When the third parties cancelled their contract, the cause of action in the defendants against them was complete, and they might have brought their action at once. The damages they could claim (assuming the contract to have been broken and the cancellation wrongful) would be the difference between what the third party promised to pay and the cost to the defendants. Nothing done by the third parties was the cause of the damages sought in this action by the plaintiffs against the defendants. The loss of the defendants was due to their own act, and not to any act by the third parties—there was no case for indemnity or contribution or relief over. What the defendants must pay was the difference between the amount they agreed to pay to the plaintiffs and the cost to the plaintiffs of supplying the goods. What the defendants must claim from the third parties had nothing to do with this—it was calculated on different facts and a different principle: Campbell v. Farley (1898), 18 P.R. 97; Wynne v. Tempest, [1897] 1 Ch. 110.

The regular course would be to dismiss the appeal of the

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defendants against the third parties, without prejudice to an action being brought by the defendants against the third parties; but, as all parties desired their rights to be disposed of in this action, and the trial Judge had entertained and disposed of the third party claim, and his judgment thereon was right, both appeals should be dismissed with costs.

HODGINS, J.A., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., in a written judgment, said that it was quite clear from the evidence that, but for the strike of the plaintiffs' workmen, their contract would have been performed within a time quite satisfactory to all persons concerned. It could not be found that the plaintiffs had exhausted their reasonable time for the performance of their contract at the time when the strike took place; and the time during which that strike lasted was not to be counted against the plaintiffs: Hick v. Raymond & Reid, [1893] A.C. 22; *Sims & Co.* v. *Midland R. W. Co.*, [1913] 1 K.B. 103. No fault could be found with the judgment of the trial Judge on this branch of the case.

On the other branch, the finding was, that the defendants had not within a reasonable time performed their contract with the third parties, and so could not enforce it. No time was fixed for the performance of this contract. From the 7th July till the 19th September the defendants did nothing effectual towards performance; and it could not be said, under all the circumstances of the case, that the trial Judge erred in his finding that they had failed to supply the material within a reasonable time, and so were guilty of a breach of their contract, and could not enforce it or recover damages for a breach of it.

Both appeals should be dismissed.

LENNOX, J., agreed with the Chief Justice.

Appeals dismissed.

REX v. BOILEAU.

Ontario Supreme Court, Masten, J. February 22, 1917.

JUSTICE OF THE PEACE (§ III—10)—*Jurisdiction—Prosecution under Temperence Act.*]—Motion by the defendant to quash a conviction made by a Justice of the Peace.

T. N. Phelan, for defendant.

J. R. Cartwright, K.C., for the Crown.

MASTEN, J.:—The conviction is under the Ontario Tem-

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perance Act, 1916, 6 Geo. V. ch. 50, and the motion to quash is based on the fact that the conviction was made by a single Justice of the Peace, sitting alone, which is claimed to be in violation of the provisions of sec. 61, sub-sec. (3), of the Act. That sub-section reads as follows: "All prosecutions under this Act, whether for the recovery of a penalty or otherwise, shall take place before two or more Justices of the Peace or a Police Magistrate having jurisdiction, except in the case of a licensee or for any offence committed on or with respect to licensed premises, which may be tried by one Justice of the Peace."

The conviction is supported by the Crown on the ground that the defendant as the keeper under license of a standard hotel is a "licensee" within the meaning of the clause just quoted, or in the alternative that the offence was committed on or in respect to licensed premises.

It is not disputed that the defendant is the keeper (whether as owner or as a tenant does not appear) of a building licensed under the provisions of the Ontario Temperance Act as a standard hotel, and it is contended by the Crown that he is in consequence a "licensee" within the meaning of sec. 61 (3) above quoted.

By sec. 2 (*e*) of the Act in question, it is declared that "'Licensee' shall mean a person holding a license under this Act, and 'Vendor' shall have the same meaning." Two kinds of licenses are mentioned in the Act: first, a license for the sale of liquor, the issue of which is governed by secs. 3 to 6 of the Act; second, a license of a "standard hotel," the issue and character of which are governed by sec. 146 of the Act. From a consideration of the statute it appears to me that the first is a license of a person, the second a license *in rem* of certain premises, but not of the keeper personally. I am informed by counsel that as a matter of fact the license does issue as a personal license to the keeper of the standard hotel; but, as at present advised, I think the only statutory authority is an authority to license the premises; and, even if there is authority to license the keeper, there is in the present case no evidence of a personal license to this defendant.

The above are the only two licenses that I find referred to in the Act. It is not suggested that the defendant is a holder of the first kind of license, and I am unable to say that as a keeper of a standard hotel he is a "licensee" within the meaning of sec.

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61 of the Act. He may be the employee or the lessee of the person to whom the license issued. On the contrary, considering the definition of "licensee" above quoted, whereby "licensee" is made the equivalent of "vendor," I think that "licensee" in sec. 61 is confined to a person holding a license as a vendor of liquor. I have perused and considered all the sections of the Act to which I have been referred, namely, 3, 5, 7, 13, 33, 61, 81, 92, 115, and 146, with the result of confirming the view above expressed. There is no evidence that the offence complained of was committed on or with respect to licensed premises. The liquor, the having of which was complained of, was stored in a barn unconnected with the hotel, and distant more than a quarter of a mile therefrom.

Even if the defendant, as the keeper of a standard hotel, is a "licensee" within the meaning of the Act, it seems to me that the offence here complained of was not committed by him in that quality or capacity, but rather in his quality or capacity as a private individual. It follows that the Justice who made the conviction sitting alone exceeded his jurisdiction, and the conviction must be quashed.

No costs. Usual order for protection of the magistrate.

Conviction quashed.

Re WILLIAMSON.

Ontario Supreme Court, Middleton J. April 16, 1917.

EXECUTORS AND ADMINISTRATORS (§ IVA—85)—*Moneys made by sheriff under execution before administration order—Rule 613 (b)—Creditors Relief Act, R.S.O. 1914 ch. 81—Priorities—Trustee Act, R.S.O. 1914 ch. 121, sec. 63(1).*]—Motion by a sheriff for leave to pay into Court moneys realised by him under execution.

MIDDLETON, J.:—Williamson died leaving some property and many creditors.

His executors, instead of taking any proceedings to prevent the creditors suing pending realisation of the estate—Rule 613 (*b*) gives the Court power to make an administration order so that all actions by creditors will be stayed while the executor continues his administration and realisation—allowed the goods of the deceased to be sold, and the sheriff is in possession of the money realised, some $1,760. The sale was on the 14th October. An entry was made under the Creditors Relief Act, R.S.O. 1914, ch.

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81, on the 21st October. On the 3rd November, an order was made for administration. In the administration proceeding, the Master has assumed that this money will be available for distribution; and this, with certain other money arising from the sale of some lands, will pay 17 per cent. of the creditors' claims proved.

Those execution creditors having executions in the sheriff's hands within 30 days, seek to have the money distributed under the Creditors Relief Act, and so to obtain this priority over the other creditors. The sheriff, desiring relief for the other creditors, maintains that all assets must be distributed *pari passu* among all the creditors.

As long ago as *Bank of British North America* v. *Mallory* (1870), 17 Gr. 102, it was determined that the statute (the Trustee Act) now found as R.S.O. 1914, ch. 121, sec. 63 (1), abolished all priority among creditors in administration of the estates of deceased persons; and that any lien derived from an execution against the executor, placed in the hands of a sheriff, gave to the creditor no priority over the other creditors.

The assets of a deceased person became, in the hands of his representative, a trust for the benefit of the creditors; and this trust had, by virtue of this statute, priority over and prevailed against any execution.

The Creditors Relief Act does not make any change: the provisions of that Act are for the purpose of regulating the rights of execution creditors among themselves— instead of priority being given to the first, those who place their executions with the sheriff in a reasonable time share *pro ratâ*.

This can have no effect upon the superior right of the creditors as a whole to have the assets dealt with as the statute directs.

The case referred to shews that, when a creditor by diligence obtains under an execution more than his due share, the Court will, at the instance of other creditors, compel repayment and a *pro ratâ* distribution. Much more is it the duty of the Court, while the fund is yet in its hands, to see that the fund is duly administered.

The fund will be paid by the sheriff into Court to the credit of the administration proceeding, where it will be dealt with under the report, and will be distributed under the administration order.

The sheriff may deduct his costs from the fund. The creditors who sought to obtain priority ought in strictness to bear the ex-

pense; but, as the point has not been raised since the Creditors Relief Act, justice will probably be done by making no order as to costs save that relating to the sheriff's costs, which I fix at $40.

Re TOWNSHIP OF ASHFIELD AND COUNTY OF HURON.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, Hodgins and Ferguson, JJ.A. April 3, 1917.

COSTS (§ I—2c)—*Proceeding under Municipal Act—County Court Judge—Power to award costs—Judges' Orders Enforcement Act—Costs of appeal.*]—Motion by the township corporation to vary as to costs the terms of the order of this Court of February 7, 1917, 34 D.L.R. 338, 38 O.L.R. 538. Granted.

W. Proudfoot, K.C., for the township corporation.

W. Lawr, for the county corporation.

The judgment of the Court was read by

MEREDITH, C.J.O.:—This is a motion on the part of the township corporation to vary the terms as to costs of the order of this Court made on the appeal of the county corporation from an order of the Judge of the County Court of the County of Huron, declaring the bridge in question to be a county bridge.

Mr. Proudfoot contended that neither the Judge of the County Court nor this Court had jurisdiction to award costs in a proceeding under sec. 449 of the Municipal Act; and that, if there was jurisdiction, the case was one in which, in view of the decided cases which, he argued, supported the view taken by the Judge of the County Court, one at least of them having been, as he contended, overruled by the judgment pronounced by this Court in the present case, the discretion of the Court should have been exercised by giving no costs to either party.

We have no doubt that the first of these contentions is not well-founded.

The County Court Judge was acting as *persona designata;* and, where he so acts, sec. 2 of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79*, gives him jurisdiction to award costs; and it is not open to question that this Court had jurisdiction to pro-

*2. Where jurisdiction is given to a Judge as *persona designata*, and no other mode of exercising it is prescribed, he shall have jurisdiction as a Judge of the Court to which he belongs and the same jurisdiction for enforcing his orders, as to proceedings generally, as to costs and otherwise, as in matters under his ordinary jurisdiction as a Judge of such Court.

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nounce the order which the Judge below should have pronounced, as well as to deal with the costs of the appeal.

We think, however, that the application should be granted. The question of costs was not argued; and, upon further consideration, and in view of what has probably been the practice of County Court Judges in dealing with applications under sec. 449, which is said to be not to award costs to either party, we think it not unreasonable that neither party should pay or receive costs in respect of the proceedings before the County Court Judge or in respect of the appeal to this Court.

There will be no costs of the application to either party.

SMITH v. MERCHANTS BANK OF CANADA.

Ontario Supreme Court, Meredith, C.J.C.P., Magee, J.A., and Riddell and Rose, JJ. September 28, 1917.

JUDGMENT (§ II B—76)—*Res judicata—Former actions dismissed for non-compliance with orders for security for costs—Stay of proceedings—Condition of being allowed to proceed.*]—Appeal by the plaintiff from an order of Masten, J., in the Weekly Court, directing a perpetual stay of proceedings in this action, on the grounds that it was frivolous and vexatious and an abuse of the process of the Court.

Gideon Grant, for the appellant.

G. L. Smith for respondents.

RIDDELL, J., in a written judgment, said that the plaintiff, more than 20 years ago, was a produce-dealer at Prescott and had dealings with the defendants, chartered bankers. In 1895, he brought an action against the defendants, alleging that in 1892, 1893, and 1894, he sold hay in Britain and made drafts on persons in England which with cash cabled he placed in the defendants' bank, and claiming on that account $978.39 as owing him by the defendants; he also made other claims against the defendants for various sums by way of damages and otherwise, and asked for an account, payment, etc. The defendants denied all charges of impropriety, set up that accounts had been stated from time to time, and counterclaimed on promissory notes and a judgment. The action and counterclaim were tried at Brockville in April, 1897, and judgment was given for the plaintiff for $58 and $5 costs and for the defendants for $18,877.74 and $595.71 costs. There was no appeal. At the time the present action was brought,

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more than $10,000 was unpaid on the judgment recovered against the plaintiff.

In 1913, the plaintiff brought an action against the defendants in a Quebec Court for substantially the same causes as those for which the present action was brought. That action was dismissed with costs for non-compliance with an order for security for costs.

In June, 1916, the plaintiff began an action in the Supreme Court of Ontario for the same causes of action; it was also dismissed with costs, for the same default.

In February, 1917, the present action was brought for the same causes of action as the Quebec action and the Ontario action of 1916. The order staying proceedings was made in April, 1917.

A dismissal of an action for want of complying with an order for security for costs is not a bar to another action for the same cause: Seton on Judgments, 7th ed., vol. 1, pp. 134, 136; *In re Orrell Colliery and Fire-Brick Co.* (1879), 12 Ch. D. 681, 28 W.R. 145; *In re Riddell* (1888), 20 Q.B.D. 512, 518; but the Court has inherent power to stay the second action until the costs of the former action are paid.

In this action the plaintiff charged fraud on the part of the manager of the defendants' bank, and claimed several specific sums, $200,000 damages for fraud, an account, and general relief.

All the claims made in this action, save one, were new, at least in form, and were not specifically disposed of by the judgment entered in 1897—there was no res adjudicata apparent concerning them. The defendants could, if so advised, plead res adjudicata as to those claims also. As to the relief denied in the former action, it was open to the plaintiff to move to impeach the judgment, on the ground of fraud subsequently discovered (Rule 523), but he was not bound to do so—he might proceed by action: *Leeming* v. *Armitage* (1899), 18 P.R. 486; *Wyatt* v. *Palmer*, [1899] 2 Q.B. 106; *Cole* v. *Langford*, [1898] 2 Q.B. 36.

The plaintiff had pursued the proper course; it was open to the defendants, if so advised, to plead res adjudicata; and the plaintiff might then amend by setting up fraud and claiming to have the former judgment set aside pro tanto.

The appeal should be allowed and the plaintiff permitted to proceed, on paying the costs of the former actions—the Quebec

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action and the Ontario action of 1916; and the plaintiff should be allowed to set off the costs of this appeal and of the application in the Weekly Court.

The plaintiff may amend as advised. Nothing is now finally decided as to what was decided in the judgment of 1897.

MAGEE, J.A., and ROSE, J., agreed with RIDDELL, J.

MEREDITH, C.J.C.P., dissented, for reasons stated in writing.

Appeal allowed; MEREDITH, C.J.C.P., *dissenting.*

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ETTINGER v. ATLANTIC LUMBER Co. Ltd.

Nova Scotia Supreme Court, Sir Wallace Graham, C.J., and Russell, Longley and Chisholm, JJ. July 13, 1917.

DEEDS (§ II C—31)—*Description — Boundaries — Natural monuments—Tree—River—Blazed line—Annexed plan—False description—Onus.*]—Appeal by defendant from the judgment of Ritchie, E.J., in favour of plaintiff, in an action for trespass to plaintiff's land, by cutting down and removing a large quantity of timber growing and being thereon and destroying and injuring a large number of trees. Reversed.

V. J. Paton and *J. A. Hanway*, for appellant. *W. E. Roscoe*, K.C., and *H. W. Sangster*, K.C., for respondent.

The judgment of the Court was delivered by

GRAHAM, C.J.:—This is an appeal by the defendants from a judgment for $4,000 damages for trespass to timber land, cutting down and removing timber. The timber was cut on an area 80 chains by 10 chains and the question is whether this 10-chain strip belongs to the Sarah Campbell lot of 200 acres under whom the plaintiff claims or to the Grizzie Campbell lot, also 200 acres, adjoining the former on the south, under whom the defendants claim. That depends on the locality of the line between the lot which is in dispute. Each party has, as a witness, a surveyor who has made a plan in favour of the theory of each. Both lots are part of a number of lots granted August 10, 1811, to the Campbell family, in all 4,067 acres in extent.

The description of the lots in the Campbell grant is as follows:—

> In the following tracts, lots and proportions . . . beginning at a pine tree blazed and mark C. at the distance of 10 chains measuring in a right line from the rear line of a tract of land granted Allen Greeno, etc.

There is a plan of the block of lots, not a regular figure, but this plan is made part of the grant. To locate the line between

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the two lots of Sarah and Griselda respectively upon the ground —the burden, of course, is upon the plaintiff. There is nothing on the ground either of external or internal lines of this grant which can to-day be identified with any boundary or mark mentioned in the grant.

But the external lines of the tier of 6 lots with a seventh subtending those of the 6 is resorted to.

The attempt is made by both parties to shew that certain marked trees or lines now to be found on the ground must be the true lines of the original lots and according to the deductions of one party or the other the locality of the disputed line is sought to be determined. None of these trees or blazes are called for in the grant.

Moreover the blazes in the lines mentioned in the testimony are all much later than the date of the original survey for the grant. For locality of these two lots or the external lines of the grant one must locate the tract of land granted to Allan Greeno. The beginning of this description is a pine tree marked C, measuring in a right line 10 chains distance from the rear line of that grant.

First there is no pine tree to be found on the ground. I ought to say also that there is no grant to Allan Greeno forthcoming. But there is a grant to the heirs of Allan Greeno, Malcolm Campbell Greeno and James Campbell Greeno, dated November 27, 1813, which happened in consequence no doubt of the applicant Allan having died before the issuing of the grant on the original application, and necessarily bears the later date.

In the ordinary course the reference in the Campbell grant to "a tract of land granted to Allan Greeno" would be construed to cover this grant to Malcolm and James. Allan Greeno having applied for it would of course entitle him and his heirs to have the grant from the Government.

This is the description then in the Greeno grant which is referred to in the Campbell grant for the latter boundary:—

Beginning on the southern bank of side of the River Kennetcook at the eastern bound of William Church's farm lot from thence to run S. 10 degrees E. along the line of said lot 178.00 chs. thence N. 80 degrees E. 15.00 chs. or until it comes to land of J. B. Franklin; thence N. 10 degrees W. 173.00 chs. along the line of said land or until it comes to the Kennetcook River aforesaid; thence westerly by the course of said river until it meets the place of beginning containing two hundred and fifty acres.

Further, upon the plan annexed to the Campbell grant at the

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corner of the Lucy Campbell lot, the most northerly one of this tier there is marked, "beginning pine tree," then prolonging the end lines of the tier of lots 10 chains, the extension line is marked ten chains. There is a line at right angles marked, "Allan Greeno's rear line." So that the description I have quoted and the plan indicate that the Campbell grant and the Greeno grant are within 10 chains of each other and that the rear line of the Greeno grant must be 178 chains from the Kennetcook River at a given place on that river. With a fixed point, a natural boundary like a river, to measure from, the distance to measure being given, namely, the Greeno grant 178 chains, then ten chains from the rear line of that grant being called for there can be no mistake where you are to begin: 4 A. & E. Enc., pp. 780, 804.

I refer also to *Wellesly* v. *Truro*, 9 Allen 137; *Cleaveland* v. *Flagg*, 4 Cushing 76.

In *Bartlett* v. *N.S. Steel Co.*, 38 Can. S.C.R. 336, the description of plaintiff's lease was as follows:—

Beginning on the east margin of the east branch of the East River at a corner stone placed there and marked P.C.J.C.J., etc., north 75 degrees 10 minutes east 5 links from a marked maple tree on the south line of lands originally granted to Peter Grant 1784, thence etc.

At p. 362, Maclennan, J., said:—

The evidence is that when the lease was made there was neither a marked maple tree, nor corner stones, by which the demise could be located. It follows that the only means of doing so was by ascertaining the Peter Grant south line. The description of the lease does not begin where a marked maple tree and marked corner stone had stood at some former time, but at a point where these objects were to be found at the making of the lease. Not only was there no corner stone at the supposed point of commencement, at the making of the lease, but there was none at any of the other three corners as described in the lease, and the only part of the description by which the land could be located, either at the making of the lease, or at any time afterwards, was the Peter Grant line, and the bearings and measurements. The tree and stones may be rejected as false demonstration, but the Grant line, and the bearings and measurements, would still be sufficient to save the lease from being void. Under these circumstances I think the onus was cast upon the plaintiff to establish the Grant line, and to shew that the workings were south of that.

In this case the line was not found nor was its former situation identified and there is nothing but the distance from the Greeno grant which by reference incorporates the distance from the river: *W. W.* v. *Graham*, 27 Am. Dec. 226, at 227.

Now the trial Judge in this case has found as follows: he says, and on this turns the judgment for the plaintiff:—

On the Grant plan the Lucy Campbell lot, the first of the tier of lots, is shewn to begin ten chains from Allan Greeno's rear line as shewn on that plan.

Stabb, who made the plaintiff's plan, testifies that he found a line on the ground corresponding with the line marked on the Grant plan "Allan Greeno's rear line," that he also found on the ground running northerly towards the Greeno line the ends of lines ten chains distant from the Greeno line. I accept his evidence in this regard. He fixes ten chains to the south of the Greeno line on the ground as the north line of the tier of lots in the Campbell grant."

Later he says:—

I further find that the starting point taken by Surveyor Stabb is correct.

There are two serious objections to these findings. The blazed line found by Stabb and adopted by the Judge, viz., line 1-2 on Stabb's plan as Allan "Greeno's rear line," 10 chains from which you are to begin, measures according to Stabb, p. 10, line 1, from the Kennetcook River to what he calls the rear line of the Greeno grant, about 248 chains; whereas by the description in the Campbell grant, by reference to the Greeno grant, that line ought to measure but 178 chains. So that the beginning point of the blazed line on the ground is several chains out. In respect to this point which would put the place of beginning of the Campbell grant in another place, it may be urged that this is a false demonstration.

I have applied the maxim "*falsa demonstratio non nocet*" very often. But how can it be applied here? There is nothing on the ground or in the Campbell grant or plan so far as the evidence shews in conflict with that dimension of the distance from the Kennetcook River incorporated by reference in the Campbell grant 10 chains from which you are to begin. The acreage of the Greeno grant about corresponds with the chainage mentioned in it. A river is a natural boundary and controls other boundaries. The tract of land referred to for a boundary controls.

It is no use to pick up a blazed line on the ground not called for in the document and say, "this controls; I reject the highest class of boundary, a natural monument, for this blazed line." If by measuring other fixed boundary lines you can find anything in conflict with the reference to the Greeno grant running 178 chains from the Kennetcook River you might ask a Court to reject that distance or that reference to the Greeno grant as misdescription. But this evidence leaves it bare and regard must be had to the call even to the losing of the lot if Maclennan, J., was right in the passage which I have quoted from him. It is clear law that the party to the action who asks you to reject a boundary as misdescription has the burden on him.

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The second objection is that the blazed line does not correspond to the rear line (with its details) of the Greeno grant.

I must premise what I have to say by stating a legal point, that is, that these blazed trees, and in one instance a stake and stones now to be found on the ground, for not one of the blazes involved in this dispute—(I know that the Nugent line is older but that is not really relevant)—is over 54 years old, hence junior to the survey for the grant, is called for in the grant, and are not in law, evidence.

These blazed trees are but *ex parte* private acts of the man who employs the surveyor. There may be contentions about where the true line is and as here each one employs his own surveyor and he runs according to the theory of the employer. It is different from even a straight fence on or near the supposed line, which though not called for in the deeds might support an inference perhaps that both parties had participated in constructing the partition fence between them under the statute, hence an admission. In this very case a "bogus" line is found, run in mistake and frankly admitted by the surveyor afterwards to be bogus. A blazed line is not sufficient indication of ownership to satisfy the Statute of Limitations. I cannot remember a case in which a line where there were rival lines was wholly dependent on mere indistinct blazes on trees not connected in the proof, with the original survey. The plaintiff must give evidence identifying the land with his title in order to shew his ownership.

I think the plaintiff must fail because he has not proved by evidence sufficient in law that the land in dispute is within the limits of his documentary title.

The appeal should be allowed and the action dismissed with costs. *Appeal allowed.*

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MURPHY v. MONCTON HOSPITAL.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., White and Crocket, JJ. April 20, 1917.

COMPANIES (§ IV A—35)—*Hospital—Election of trustees—Charter—By-law.*]—Appeal from the judgment of Grimmer, J., 35 D.L.R. 327, 44 N.B.R. 464. Affirmed.

J. Friel, K.C., for plaintiff, appellant.

M. G. Teed, K.C., *contra.*

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The judgment of the Court was deli ed by

CROCKET, J.:—This appeal involves the question of the validity of a by-law passed by the defendant corporation, under and by virtue of which the plaintiff appellant was elected a trustee of the corporation.

The whole question turns upon the validity of the by-law under which the election of trustees was held. There can be no doubt that the by-law would effect an alteration in the constitution of the corporation, and that it must therefore be held to be void if the constitution, as fixed by the legislature, has not itself authorized the corporation to make it. It is argued in behalf of the appellant that that authority is to be found in the provisions of the amending Act of 1901 restricting, as it is contended, the appointing power of the trustees in case of vacancies occurring in the board to "temporary" vacancies, and empowering the corporation to make such by-laws as may be deemed necessary for "the annual election or appointment of trustees to succeed retiring trustees." This is the one substantial question upon which the determination of this appeal depends. So far as the amendment is concerned to sub-sec. 3 of sec. 1 of the original Act relating to the power of the trustees to appoint persons to fill vacancies, I do not think that the insertion of the word "temporary" was intended in any way to restrict the appointing power of the trustees. It is true that as the subsection originally stood it expressly authorized (without any qualification) and made it the duty of the remaining trustees to fill any and all vacancies, and in this respect expressly and conclusively indicated the intention of the legislature to leave the perpetuation of the corporation and of its Board of Trustees solely in the hands of the original incorporators and trustees. Had this sub-section, however, been entirely omitted the effect in law of the first section of the incorporating Act with only subsecs. 1 and 2, would have been the same, that is to say, that the constitution of the twelve persons named and the persons to be appointed by the medical staff and the city council as provided, "and their successors," as the body politic and corporate, and of the same persons "and their successors" as the trustees, would have been equally effective to place the perpetuation of the corporation and of its Board of Trustees in their hands, for in the absence of any express provision for continuing their existence,

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otherwise the right to do so could reside only in the members of the corporation. The legislature, however, in this case made the express and specific provision in the original Act as stated, and it is argued that no reason can be assigned for the amendment of 1901 inserting the word "temporary" except upon the assumption that it was intended to restrict the trustees' appointing power, which had previously extended to any and all vacancies, to only such vacancies as may be temporary. Whatever the intention may have been, "temporary" appears at best not to be an apt word to apply to vacancies which could only occur by death, resignation or refusal to act, and which therefore could not in any sense, so far as the vacancies themselves are concerned, be properly said to be limited as to time, otherwise than by the expiration of the term for which the trustee, dying, resigning or refusing to act, had been appointed. The original Act did not in any way limit the tenure of office of the individual trustees, and had it not been for the amending Act of 1901, providing for the retirement each year of three trustees and the appointment or election of others to succeed them for a term of 4 years, it would have been quite impossible to give any effect to the insertion of the word "temporary." Having regard, however, to this amendment limiting the tenure of the trustees to 4 years, and the words which sec. 2 of the amending Act added to sub-sec. 4 of sec. 1 of the original Act, viz.: "And any trustee so appointed shall hold office for the balance of the term of the trustee whose place he or she is appointed to fill," it is clear, I think, that "temporary" was intended to apply to the balance of any 4-year term which might be left by the death, resignation or refusal to act of any trustee during the course of the period of the 4 years for which he had been elected, and that the whole sub-section, as thus amended, was intended to authorize the remaining trustees to elect or appoint trustees for a shorter period than 4 years, in case of vacancies thus occurring, notwithstanding the provision of sec. 1 of the amending Act that "hereafter all appointments or elections of trustees shall be for a term of 4 years." In this view it is impossible, I think, to construe sec. 2 of the amending Act as restricting or limiting the appointing power of the trustees only to the appointment or election of trustees for terms of less than 4 years. Under sec. 1 of the amending Act, failing any express provision to the contrary, the trustees would have the same right to appoint or

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elect trustees for 4-year terms as they unquestionably would have had under the original Act to appoint or elect trustees for indefinite periods to fill vacancies occurring from time to time by death, resignation or refusal to act. Sec. 2 does not in any way affect this power, but expressly gives the trustees the additional right to appoint or elect trustees for terms shorter than 4 years in case of vacancies occurring in the course of the four years for which trustees have been elected. Certainly no authority is to be found in sec. 2 of the amending Act empowering the trustees to transfer the right of appointment or election of trustees for 4-year terms to any body composed wholly or in part of persons outside the corporation, and thus to change the constitution as fixed by the legislature. This being so the appellant must rely for such authority, if any such authority exists, upon sec. 3 of the amending Act, which empowers the corporation to make such by-laws, rules and regulations as may be deemed necessary for "the annual election or appointment of trustees to succeed retiring trustees." These words cannot, I think, properly be held to authorize the corporation to alter its constitution by by-law, which the by-law above quoted unquestionably purports to do, by transferring the right of appointment or election of trustees to a body of electors which may be composed in much the greater part of persons outside the corporation, and of which the trustees would form but a small minority, which was in fact the case with the body of electors by whom the plaintiff was elected. They cannot, in my judgment, reasonably be construed as going beyond the making of by-laws relating to the mode or method of election or appointment. It may be true, as the appellant's counsel argued, that it would not have been necessary to give any specific authority for such a purpose, as the vesting of the right of election or appointment in the trustees would itself have carried such authority as incidental to such right. It is to be borne in mind, however, that the Act of 1901 effected a radical change in the constitution of the corporation and that before the passage of that Act, the appointments or elections of trustees, having been made only as vacancies occurred and for indefinite terms, there was no such thing as "annual election or appointment of trustees to succeed retiring trustees." This Act, having thus created the necessity for such an annual election, it can easily be understood that the legislature deemed it wise to insert in

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the enumeration of the matters with reference to which the corporation had been expressly authorized to make by-laws this new and all-important matter of the annual election of trustees to succeed retiring trustees. It would seem to be necessary that there should be some by-law fixing the time when such annual election should take place, as this by-law in fact did, and it might be thought necessary also to specifically prescribe by by-laws the manner in which the appointment or election should be made, as this by-law also in fact did, whether separately by resolution or by nomination and ballot. Due effect can be given to the words of sec. 3 of the amending Act by thus limiting them. To carry them beyond this and to the extent contended for would appear to me to be unwarranted by any rule or principle applicable to the construction of statutes or the government of corporations. The by-law under which the plaintiff was elected a trustee of the defendant corporation, is therefore, in my opinion, *ultra vires*, and void, insofar as it extends the franchise beyond the members of the corporation.

The plaintiff's action was rightly dismissed and this appeal should be dismissed with costs. *Appeal dismissed.*

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JOHNSTON v. SALMON.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Gallihcr and McPhillips, JJ.A. April 3, 1917.

SALE (§ III A—50)—*Remedy for non-acceptance—Re-sale.*]—Appeal by defendant from the judgment of McInnes, Co. J., in favour of the plaintiff, in an action for the price of goods. Affirmed.

J. A. Russell, for appellant; *W. D. Gillespie*, for respondent.

MACDONALD, C.J.A.:—I would dismiss this appeal.

MARTIN, J. A. (dissenting):—This is an action for the balance due on a sale of goods after the seller had resold them a year after the buyer had returned them, finally refusing to accept them, after some negotiations for settlement upon complaints made after they had been delivered, 24 days before the return, the defendant swearing that he had "immediately protested" to the plaintiff against the goods as not being those contracted for, but could not "get satisfaction," and so, after waiting as aforesaid, returned them all. It is clear to me that there was no acceptance of the goods in these circumstances (Benjamin on Sales, 5th ed.,

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207 *et seq.*) and that the form of action is misconceived, and, if maintainable at all after such long delay, in the lack of notice to re-sell, without power reserved (as to which see Benjamin, *supra*, pp. 949-50), it should have been one for damages—for the seller cannot sue for the price after a re-sale—Benjamin, *supra*, 950; *Maclean* v. *Dunn* (1828), 4 Bing, 722, 728, 130 E.R. 947; Sale of Goods Act, sec. 64; *Lamond* v. *Davall* (1847), 9 Q.B. 1030, 115 E.R. 1569; *Page* v. *Cowasjee Eduljee* (1866), L.R. 1 P.C. 127 at 145. The goods were not of a perishable nature and the plaintiff, the unpaid seller, did not give notice to the buyer of his intention to re-sell: *cf.* sec. 62 of the Sale of Goods Act; 25 Hals. 263-4. In *Maclean* v. *Dunn*, *supra*, it is said:—

> Where a man, in an action for goods sold and delivered, insists on having from the vendee the price at which he contracted to dispose of his goods, he cannot, perhaps, consistently with such a demand, dispose of them to another; but if he sues for damages in consequence of the vendee's refusing to complete his contract, it is not necessary that he should retain dominion over the goods; he merely alleges that a contract was entered into for the purchase of certain articles, that it has not been fulfilled, and that he has sustained damage in consequence. There is nothing in this which requires that the property should be in his hands when he commences the suit; and it is required neither by justice nor by the practice of the mercantile world.

And see review of this leading case and others in Benjamin, *supra*, 941 *et seq.*

A dispute arises on the point as to whether or no the defendant returned all the goods, but it is really immaterial because the plaintiff kept no account, or at the trial gave no proof of, the nature or amount of the goods that it did re-sell, so it is not in a position to prove its case, and the matter is left at large where it must be definite. All it says about the re-sale is in its letter of 3rd April, 1916 (more than two years after the sale), "You have been given credit for $157.66 for certain goods returned," which means those re-sold, but no particulars are given thereof.

The appeal, therefore, must be allowed, because in my opinion the action is "not properly founded," no alternative case for damages being set up—*Sells* v. *Thomson Stationery Co.*, 17 D.L.R. 737, 19 B.C.R. 400.

GALLIHER, J.A.:—I would dismiss the appeal.

MCPHILLIPS, J.A.:—This is an appeal from the judgment of McInnes, J., in the County Court of Vancouver—and although the Court has had addressed to it an able argument by the counsel for the appellant upon the law of the sale of goods, with deference,

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in my opinion upon the evidence as adduced at the trial the whole question is one of fact. A sale took place of certain merchandise the agreed upon price therefor being $456.52, the sale being made by one Vivian, who assigned the moneys due in respect thereof to the respondent; the goods were inspected previous to purchase. Delivery of the goods was made, and after retaining same for some 28 days the appellant returned a portion of them, stating that he had purchased the dry goods in the Vivian store, but not the "small stuff," and his statement was that he returned all the goods sent him. The evidence for the plaintiff, though, was that only a portion of the goods were returned. As the appellant refused to accept the goods, the goods were warehoused for a time, and the appellant duly advised and asked repeatedly to take delivery thereof, but the appellant refused to accept delivery thereof; later the goods were sold. The trial Judge has given no reasons for judgment, but his judgment was for $393.64, not allowing interest or costs to the plaintiff. It can be only assumed upon the figures that the trial Judge arrived at the conclusion that there was a wrongful refusal to accept the goods, and that the goods so returned were rightly sold at a fair or market price as the amount realised therefrom has been deducted from the total sale price of the goods. That the respondent was entitled to adopt this course by reason of the refusal of the appellant to complete his contract of purchase is well settled by the decision of this Court in *Hammond* v. *Daykin* (1913-14), 18 D.L.R. 525, 19 B.C.R. 550, affirmed by the Supreme Court of Canada in principle, but reducing the amount of the damages allowed (8 W.W.R. 512). In strictness the action should have been for damages for the non-acceptance or refusal to take delivery of the goods. The dispute note of the appellant was a defence setting up the right of refusal of acceptance of the goods not being the goods agreed to be purchased, and the action was tried out apparently on this issue, *i.e.*, an action for damages for non-acceptance of the goods. Possibly it may be said that, upon the question of pleading, the case may be said to be within *Cook* v. *Newport Timber Co.* (1913), 18 B.C.R. 624. In that case my brother the Chief Justice said, at p. 626:—

> The plaintiff's pleading was not as specific as it ought to have been but the defendants in their statement of defence pleaded what the plaintiff ought to have pleaded and therefore when the case went to trial the issues were clearly enough defined on the pleadings. When I say that, I am not to be taken

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as approving of this manner of pleading, I think I pointed out a short time ago that sufficient attention was not being paid by practitioners to the question of pleading, and sufficient attention is not being paid, I am sorry to say, to keep the parties within their pleadings at the trial or to amend if an amendment should be necessary. I think the course of the trial also shews that the parties intended to fight it out under the Employers Liability Act.

It would be deplorable upon the particular facts of this case and considering the course taken at the trial and evidently no objection there taken that the pleading of the plaintiff was not specifically for damages for non-acceptance of the goods although the amount claimed was really based upon such a claim, and the trial Judge in his judgment also proceeded upon that apparent assumption—that effect now be given to this objection (*Mylius* v. *Jackson* (1895), 23 Can. S.C.R. 485, at 487). This case, in my opinion, should not be deemed a precedent or to in any way affect the decision of this Court in *Sells Limited* v. *Thomson Stationery Co.* 17 D.L.R. 737, 19 B.C.R. 400, at 403.

I would dismiss the appeal. *Appeal dismissed.*

ROYAL BANK OF CANADA v. HODGSON.

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Alberta Supreme Court, Blain, Master-in-Chambers, Edmonton. April 12, 1917.

GARNISHMENT (§ I C—15)—*Of taxes due municipality—"Debt"*]—Garnishee summons on a taxpayer for taxes due a township. Dismissed.

H. H. Hyndman, for plaintiff; *Parlee*, K.C., *contra.*

BLAIN, M.:—The plaintiff having an unsatisfied judgment against the defendant the Town of Grouard issued a garnishee summons and duly served same on the garnishee, a taxpayer, who it was alleged owed taxes to the town. By its answer, the garnishee denied that any debt was due or accruing due to the town, and took the alternative position that if any sum was due it was for taxes levied under the Town Act 1911-12, ch. 2, and was not a debt nor attachable.

The plaintiff moves for an order directing an issue to try the questions raised by the answer of the garnishee. On the application I was asked to dispose of the question whether or not such taxes are a debt and attachable. This being a question of law and one which, I think, should be determined before the trial of any issue is directed, I appointed a time under rule 654

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for argument of this question. On the argument it was assumed for the purposes of the motion that all proceedings in connection with the assessment and levy of the taxes were regular and proper, and I deal with it on this assumption. Under our garnishee proceedings the service of a garnishee summons on the garnishee binds *the debt*, if any, due or accruing due from the garnishee to the judgment debtor, r. 649. Only a debt can be attached and in order that the summons be effective the garnishee must be indebted to the judgment debtor. It becomes important then to ascertain whether or not taxes are a debt.

Sec. 305 of the Town Act says:

> the taxes due upon any land may be recovered with costs from any owner . . . . and such taxes shall be a special lien upon the land and shall be collectable by action or distress . . . .

and sec. 306 says:

> The production of a copy of so much of the roll as relates to the taxes payable by any person in the town certified as a true copy by the secretary-treasurer shall be *primâ facie* evidence of *the debt*.

Nowhere in the Act do I find taxes declared to be a debt, and the only place in which I find "debt" used is sec. 306.

The town is authorized to bring an action for the recovery of the taxes and if it desires to recover them in this way it may sue (as for a debt) and the roll shall be *primâ facie* evidence of the debt. The words "as for a debt" are not in the Town Act, but the Village Act, ch. 5 of the statutes of 1913, sec. 125, provides that taxes due a village "may be recovered by suit in the name of the village *as a debt* due the village," and sec. 306 of the Rural Municipality Act, ch. 3 of the statutes of 1911-12, contains a similar provision. These, it seems to me, throw light on the intention of the legislature in passing the provisions in the Town Act for recovery of taxes by suit. The action if resorted to must be in the form of an action for a debt, for this is the only form in which the action could be brought and for the purpose of the action the taxes are a debt. The very fact of the legislature considering it necessary to provide for the recovery of taxes by action would shew that that body did not consider taxes a debt. If taxes were a debt then no provision was necessary to enable the town to sue. Cooley on Taxation, 3rd ed., at p. 19, dealing with the question of whether or not taxes are a debt, states (citing

American authorities in support of his statements) taxes are not contracts between party and party either express or implied: but they are the positive acts of the government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent individually is not required. They do not draw interest, as do sums of money owing upon contract; but only when it is expressly given. They cannot be assigned as debts, or be proved in bankruptcy as such; nor, if uncollected, are they assets which can be seized by attachment or other judicial process and subjected to the payment of municipal indebtedness. They are not the subject of set-off either on behalf of the state or the municipality for which they are imposed, or of the collector, or on behalf of the person taxed as against such state, municipality or collector. Taxes are not within a statute exempting certain timber claims from debts; nor are proceedings to enforce them barred by the ordinary statutes of limitation. The law abolishing imprisonment for debt has no application to taxes; and the remedies for their collection may include an arrest if the legislature shall so provide.

Dillon on Municipal Corporations, 5th ed., vol. 4, at p. 2478, states that taxes are not debts in the ordinary acceptance of the term, and in a note on the same page says:

> In an important case in the Supreme Court of the United States Field, J. states, with clearness, the distinction between "taxes" and "debts." *Taxes are not debts.* It was so held by this Court in the case of *Lane County* v. *Oregon*, 7 Wall 71. Debts are obligations for the payment of money founded upon contract express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States . . . an action of debt may be instituted for their recovery. The form of procedure cannot change their character.

In *Lynch* v. *Canada N. W. Land Co.*, 19 Can. S.C.R. 204, at p. 208, Ritchie, C. J., says:

> It is abundantly clear that taxes are not contracts between party and party, either express or implied, but they are the positive acts of the government through its various agents binding upon the inhabitants, and to the making or enforcing of which their personal consent, individually, is not required.

He then quotes from Dillon on Municipal Corporations and cases therein cited. And again, on p. 210, he says

> We cannot attribute to the legislature an intent to include taxes under the term debts without something more than appears in the acts to shew that intention.

In *Canada Permanent L. & S. Co.* v. *School District of East Selkirk*, 9 Man. L.R. 331, the plaintiffs having recovered a judgment against the School District sought to attach under garnishee

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proceedings rates and taxes imposed for school purposes. The Referee directed the trial of an issue as to whether, on a date named, any sum of money was *owing* from a garnishee to the judgment debtor. An appeal from this order by the judgment debtor was heard by Killam, J., who allowed the appeal, holding that these rates and taxes did not constitute *a debt, obligation or liability* which could be attached under the Garnishment Act to answer a claim against the School District.

An appeal from the decision of Killam, J., to the full Court was dismissed, the Chief Justice of that Court not dealing with the question whether or not taxes are a debt, Dubuc, J., holding with Killam, J., that taxes were not attachable and Bain, J., concurring in the dismissal. The provisions of the Manitoba Act, under which the garmishee proceedings were had, were much wider than the provisions of our rule. That Act provided for the attachment of "*all debts, obligations* or *liabilities due, owing, payable* or *accruing due.*" Whereas our rule provides only for the attachment of a debt.

In *Pipestone* v. *Hunter*, 28 D.L.R. 776, Mathers, C.J., held that taxes were not barred by the Statute of Limitations. In the course of his judgment he says "a municipal tax is not a debt in the ordinary sense of that term," citing Dillon on Municipal Corporations and *Lynch* v. *Canada N.W.L. Co.*, already referred to.

I must hold that taxes are not a debt attachable under garnishee proceedings and the application of the plaintiff will be dismissed and the garnishee summons set aside with costs. There will be a stay for 15 days to enable the plaintiff to appeal if so advised.

Application dismissed.

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WORDS AND PHRASES—*continued.*