Dominion Law Reports

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CASES REPORTED

IN THIS VOLUME.

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CLARKE v. FOX.

Saskatchewan Supreme Court, Newlands, J. January 9, 1913.

1. APPEAL (§ I B—11)—COSTS AND FEES—TAXATION OF—RIGHT TO REVIEW BY LOCAL MASTER.

Application by defendant to review the plaintiff's bill of costs as taxed by the local registrar, is in the nature of an appeal and the Local Master has no authority to entertain it.

[Rule 620, sec. (*c*) Saskatchewan Rules of Court, 1911, referred to.]

Statement

IN this case the defendant Edna Anna Fox applied to the Master in Chambers to review the taxation by the local registrar at Arcola of the plaintiff's bill of costs herein. The Local Master, being in doubt whether he had the power to entertain this appeal, referred the question to a Judge of the Supreme Court sitting in Chambers. The powers of a Local Master are defined in sec. 620 of the rules of Court which provides in part as follows:—

> A Local Master, in regard to all actions brought or proposed to be brought in the Supreme Court in his judicial district, including proceedings in the nature of a *quo warranto* under the Municipal Act, may transfer all such business and exercise all such authority and jurisdiction in respect to the same, as under the Judicature Act, or these rules may be transacted or exercised by a Judge at Chambers, except to the following proceedings and matters, that is to say—
>
> (*c*) Appeals and applications in the nature of appeals and applications concerning the hearing of appeals.

MacKenzie, Brown & Co., solicitors for defendant Fox.
Allan, Gordon & Bryant, solicitors for plaintiff Clarke.

Newlands, J.

NEWLANDS, J.:—A review of taxation is an appeal from the decision of a taxing officer. It therefore comes under the exceptions (*c*) to rule 620, "Appeals and applications in the nature of appeals." As it is not called an appeal by the rules it is certainly an application in the nature of an appeal.

Judgment accordingly.

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WARD v. WRAY.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute and Sutherland, JJ. January 3, 1913.

1. CANCELLATION OF INSTRUMENTS (§ I—1)—PROMISSORY NOTE—MISREPRESENTATION AS TO IDENTITY OF ORIGINAL MAKER.

Where the payee of a note agreed to accept a renewal note executed by the original makers to replace a note which he held and in which the makers were father and son, and the renewal note was executed by the son and a woman who the payee honestly believed was the son's mother, while, as a matter of fact, it was executed by the son's wife, of whose existence the payee had no knowledge; but the payee knowing that the mother was a responsible party, was content to accept her in lieu of her husband as one of the makers, the payee is entitled on discovering the error to have the cancellation of the original note set aside, as made under an honest mistake of fact, and to sue the father and son on the original note.

Statement

APPEAL by the defendant George Wray senior from the judgment of the Judge of the County Court of the County of Lambton, in favour of the plaintiff, in an action against George Wray senior and George Wray junior, father and son, to set aside the plaintiff's cancellation, made by mistake, of a promissory note made by the defendants in favour of the plaintiff and discounted by him, and to recover the amount owing on the note, viz., $141.

The appeal was dismissed.

A. Weir, for the appellant.

R. I. Towers, for the plaintiff.

Mulock, C.J.

The judgment of the Court was delivered by MULOCK, C.J.:—The plaintiff conducts a banking business at the town of Sarnia, and the defendant George Wray senior resides there. His son resides in the United States. The note sued on bears date the 21st April, 1910. It was made by the two defendants, payable to the plaintiff's order six months after date. A day or two before its maturity, the father called upon the plaintiff and paid the interest which had accrued on the note, and told him that he had not heard from his son about the matter, but expected to hear shortly. The note became due on the 24th October, 1910, and, not having been attended to, the plaintiff on the 11th November, 1910, wrote to the father as follows:—

"Sarnia, November 11th, 1910.

"George Wray, Esq., Senior, Sarnia, Ontario.

"Dear Sir,—The other day when you paid the interest on that note of your son and yourself you did not say what you wished done with the note. If a renewal is wanted I herewith enclose one for six months which please send to your son and have him sign it and get it back as quickly as possible signed by yourself and son, and oblige,

"Yours truly,

"W. H. WARD."

In this letter the plaintiff enclosed a renewal note. The father received this letter with the intended renewal note, and he, or his wife at his instance, mailed it to the son for his signature. The letter, if any, which accompanied it, was not produced. The son and his wife, Laura, signed this renewal note and sent it to the father or his wife, and the latter, with the knowledge of her husband, mailed it in Sarnia to the plaintiff, no letter accompanying it. On receipt of this renewal note, the plaintiff called his clerk's attention to the fact that it was not signed by the father, when the clerk informed him that the father's wife had signed it. The plaintiff was under the impression that the son was an unmarried man, and was satisfied with his clerk's assurance that the signature was that of the father's wife; and, acting upon this belief, accepted this renewal, and shortly thereafter his clerk returned to the father the original note, marked "cancelled," accompanied by a letter worded as follows:—

"Sarnia, December 3rd, 1910.

"George Wray, Esq., Sarnia, Ontario.

"Dear Sir,—I herewith enclose you cancelled your note $132.50 retired by renewal note yourself and Mrs. Wray just received."

This letter was evidently intended for the father, it being directed to Sarnia, whilst the son, as the plaintiff knew, at that time resided in the United States. By some error, the plaintiff refers to the renewal note as signed by the father and Mrs. Wray. He knew it was not signed by the father, and must have intended in dictating the letter in question to have described the renewal as made not by "yourself" but "your son" and Mrs. Wray, meaning the father's wife.

Shortly before the maturity of the renewal note the plaintiff's clerk sent a notice to the father's wife reminding her of the due date of the note, to which she sent the following answer:—

"April 19, 1911.

"Mr. W. J. Ward, Banker.

"Dear Sir,—I sent your note to George Wray himself last time you sent it here and him and his wife both signed it themselves so you had better send this notice to George himself and he will attend to it. His add. is Warroad, Minn., C/o. E. Grevell,

"Yours, Mrs. Wray."

Then, for the first time, the plaintiff discovered the mistake which had resulted in the cancellation of the original note, and from which cancellation he now seeks relief. That the plaintiff never intended to accept a note by the son and his wife in exoneration of the father's liability is abundantly clear. He knew that the son was not a resident in Canada and supposed him to

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be an unmarried man, thus readily accepting his clerk's assurance that the signature of Mrs. Laura Wray was that of the father's wife. In his letter of the 11th November, to the father, the plaintiff requests the father to have the renewal note signed by himself and his son; but, when it came back signed by the son and Laura Wray, he, knowing that the father's wife was a woman of property, was content to accept her in lieu of her husband as one of the makers.

It was argued by the defendants that the father was a surety for his son, and was relieved by the giving of time without his consent. There is no evidence that the plaintiff knew him to be a surety. It is true that the son first discussed with the plaintiff the proposed loan, and that the plaintiff said he would require his father's signature; at the same time the plaintiff thought the father had some interest as principal debtor in the transaction, and the form of the note sustains that view, the father being one of the makers. Thus, quoad the plaintiff, the father was one of the principals, not a surety. Further, even if he was in fact and to the plaintiff's knowledge a mere surety, he was a consenting party to the renewal.

Thus, in brief, the facts of the case are that under an honest mistake of fact the plaintiff accepted the renewal note signed by a woman of whose existence he had no knowledge, mistakingly believing her to be the appellant's wife, and in consequence cancelled the note sued upon. But for the mistake he would not have cancelled it.

Under these circumstances, I think the plaintiff is entitled to be relieved from his mistake, and that this appeal should be dismissed with costs.

Appeal dismissed.

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GUISE-BAGELEY v. VIGARS-SHEIR LUMBER CO.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute and Sutherland, JJ. January 3, 1913.

1. LANDLORD AND TENANT (§ II B 1—10)—LEASE—COVENANT FOR PRE-EMPTION—TERMINATION UPON NON-PAYMENT OF RENT.

A lessee's right of pre-emption, under a lease containing a covenant that the lessee may "at any time during the stated term exercise his right of pre-emption of the said premises," terminates upon the determination of the lease through a failure of the lessee to pay the stipulated rent, notwithstanding that the term of years during which the lease was to run had not come to an end.

Statement

APPEAL by the plaintiff from the judgment of the Junior Judge of the District Court of the District of Thunder Bay dismissing an action for specific performance of an agreement for the sale of certain lands.

The appeal was dismissed.

C. A. Moss, and *Featherston Aylesworth*, for the plaintiff.

N. W. Rowell, K.C., for the defendants.

The judgment of the Court was delivered by MULOCK, C.J.:—The plaintiff and his father owned the lands in question, subject to a mortgage thereon in favour of one James Bergin. The father was also indebted to the defendants in the sum of $809.20, for which a judgment had been recovered. Default having been made under the Bergin mortgage, the mortgagee was proceeding to sell the lands under the power of sale contained in it, when the plaintiff and the defendants entered into an agreement bearing date the 27th October, 1908, whereby the plaintiff granted to the defendants his equity of redemption in the lands, and which instrument provided that the defendants should purchase the lands when sold under the mortgage, and, upon obtaining a conveyance thereof, should lease the same to the plaintiff "for a term of five years at the annual rent of," etc., "the said lease to contain all the usual clauses, provisoes, and conditions, including a power of re-entry upon non-payment of rent for one calendar month after the same becomes due, and a covenant by the lessee to pay all taxes and other outgoings and to insure the buildings in their full insurable value in the names of the lessor and lessee, and also a covenant to keep the buildings on the said lands in good and substantial repair, and a proviso that in default the lessors may pay the same taxes and insurance and do repairs; and the said lease shall also contain a covenant and proviso on the part of the lessors that the lessee may at any time during the said term exercise his right of pre-emption of the said premises . . . at the fixed price of," etc., "and that thereupon the lessors will convey the same respectively to him in fee simple free from incumbrances, and also a proviso that after the first three years the lessors may sell the said premises free from the said lease, on giving one calendar month's notice in writing of their intention so to do, but that the lessee shall have the option of becoming the purchaser at the price and terms agreed to be paid by the proposed purchaser, on signifying his intention so to do in writing before the expiration of the said month and on proceeding without delay to complete his purchase."

The defendants became purchasers of the said lands sold under the Bergin mortgage, and on the 30th November, 1908, obtained from the mortgagee a conveyance thereof. Thereupon it became the duty of the parties, in pursuance of the agreement between them, to enter into a written lease of the lands, but they did not do so. When the agreement of the 27th October, 1908, was entered into, the plaintiff was in possession, and so remained until March, 1909, when he abandoned possession, re-

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fused to pay rent, and the defendants took possession and leased the property to a third party.

It must be assumed that the plaintiff was in possession by virtue of the agreement, that is, as lessee. The rights of the parties must be determined as if a formal written lease, within the meaning of the agreement, had been actually entered into; and under such a lease the conduct of the plaintiff would have operated as a forfeiture; so that, as a matter of law, the term provided for by the agreement came to an end in March, 1909.

The question then is, whether the plaintiff's option to purchase the lands also then ceased?

The plaintiff contends that, nothwithstanding the determination of the lease, his right of pre-emption continues throughout the period of five years from the time when the defendants acquired their conveyance, subject to the qualified right of the defendants, after the three years, to sell to a stranger.

The question is, what did the parties mean when by the agreement they said that the "lease shall contain a covenant and proviso on the part of the lessors that the lessee may at any time during the said term exercise his right of pre-emption," etc.? It does not say during five years, but during the said term—that is, whilst the said term is still subsisting.

If the plaintiff's contention is adopted, then at any moment during the five years, although the lease had ceased to exist, the plaintiff, on exercising his option, would be entitled to a conveyance of the lands in fee, and, with it, immediate possession.

In the meantime what use could the defendants make of the property? They or their tenants could hold it only on sufferance, being liable to be ejected at a moment's notice. It is inconceivable that the parties contemplated a tenure so precarious and destructive of the value of the use of the property. Practically it would mean that during the continuance of the option the defendants should not be in a position to make any reasonable use of the property, that is, the plaintiff might abandon its user as lessee, and yet the owners could not, either by themselves or others, make a reasonable use of it. In the meantime the defendants would be obliged to pay the taxes, insurance, and upkeep, with no income to meet these charges, and with no right under the contract to add interest to the purchase-money. This result is wholly inconsistent with the scheme of the parties. Practically, though not as a matter of law, the right of re-purchase was intended to give to the plaintiff the benefit of redemption, the purchase-price being the amount of the defendants' judgment, the prior mortgage, and the disbursements which the defendants might properly incur for taxes, insurance, and upkeep—the rental payable by the plaintiff taking the place of interest on the defendants' claim until the plaintiff purchased.

If, notwithstanding these consequences, the parties contracted to the effect contended for by the plaintiff, then we have nothing to do with consequences; but, when an ambiguous set of words is used, the circumstances assist in making clear the sense in which both parties so expressed themselves.

Then the proviso that "after the first three years the lessor may sell the premises free from the said lease," etc., shews that they contemplated the lease as subsisting.

Then further on it is provided that "the lessee shall have the option of becoming the purchaser at the price," etc.—not that the plaintiff shall have the option, but the "lessee."

Thus, throughout the whole instrument dealing with the option there runs the prevailing idea that the plaintiff qua lessee only is to be entitled to exercise the option.

I, therefore, am of opinion that the proper interpretation to place upon the instrument in question is, that the plaintiff's right of pre-emption ceased when the lease came to an end; and, therefore, this appeal should be dismissed with costs.

Appeal dismissed.

Re McGILL.

Ontario Supreme Court, Kelly, J. January 7, 1913.

1. WILLS (§ III H—170)—LEGACY — ENJOYMENT — TIME FOR PAYMENT OF CORPUS.

A direction in a will that the executors "shall exercise control over the bequest in favour of my said daughter and shall invest the same as to them seems best and pay the income thereof to my said daughter until such time as they consider that she can control the corpus of the said bequest providentially and well" is inoperative to restrict the right of the legatee to payment of the corpus of the bequest, especially where she is also the residuary legatee.

[*Re Johnston*, [1894] 3 Ch. 204, specially referred to; *Re Rispin*, 2 D.L.R. 644, 25 O.L.R. 633, affirmed *sub nom. Re Rispin, Canada Trust Co. v. Davis*, 46 Can. S.C.R. 649, applied; *Re Hamilton*, 8 D.L.R. 529, 4 O.W.N. 441, applied.]

Statement

MOTION by Margaret McGill, upon originating notice, for an order determining a question arising upon the construction of the will of Jane McGill, deceased.

W. R. Meredith, for the applicant.

H. B. Elliott, K.C., for the executors.

Kelly, J.

KELLY, J.:—Jane McGill by her will dated the 21st August, 1903, bequeathed to her daughter Margaret McGill $645; she also made bequests to each of five other daughters, and directed that, in the event of the death of any of her daughters during the lifetime of the testatrix, her share should be divided amongst the others in proportion to the bequests specifically made. Fol-

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lowing this, there is this provision: "I hereby direct that my executors herein named shall exercise control over the bequest herein contained in favour of my said daughter Margaret McGill and shall invest the same as to them seems best and pay the income thereof to my said daughter Margaret McGill until such time as they consider that she can control the corpus of the said bequest providently and well."

The residue of the estate (amounting to between $200 and $250, without deducting the executors' compensation) is given to the daughter Margaret. She is over twenty-one years of age.

The testatrix died on the 25th January, 1912; the only payment made to the daughter Margaret from the corpus of her bequest is $25.

The question raised on this application is, whether Margaret McGill has a present right to payment of the corpus of the bequest, notwithstanding the control and discretionary powers attempted to be given to the executors by the provision quoted above.

The executors, relying on that provision, have refused to pay over that corpus.

My view is, that they have not that right. The bequest is not made dependent on the discretion of the executors; it is an absolute bequest, followed by an indication of the mode in which it should be enjoyed. There is no gift over to any other person, nothing to shew that any one but Margaret McGill is entitled in any way to the bequest; and, moreover, she is the residuary legatee.

In *Re Johnston*, [1894] 3 Ch. 204—a case much resembling the present one—Stirling, J., at p. 208, said: "Does the law permit the testator to vest such a discretion in his trustee or executor? I have no doubt that the discretion was intended to be conferred by the testator for most excellent reasons, which, indeed, seem to be justified by the events, and I should be very glad to uphold it if I could; but it does seem to me that it is really an attempt by the testator to fetter the enjoyment by a person of a benefit to which he has become absolutely entitled under the will. The testator might (if he had been well advised) have effectually provided for the same object by making the gifts entirely dependent upon the discretion of the trustee. For example, he might have given to the legatees such sums only as the trustee, in the absolute exercise of his discretion, thought ought to be given to them. That would be one way. Another mode of effectually doing it would have been to make in some shape or form a gift over, so as to benefit other persons beside the sons, and in such a way that the legatees in question could not be deemed to be the sole persons interested in the funds. He has not chosen to take advantage of any such mode of gift, but has in each case

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made the son in question the sole person to take the benefit of the fund which he has directed to be set apart. Under these circumstances, the case seems to me to fall within the class of cases which have been referred to, in which the law has been laid down that a testator is not to be allowed to fetter the mode of enjoyment of persons absolutely entitled to a fund. . . . When the words of the will are looked at, the testator is simply pointing out the mode in which these sums, which he had actually given to his sons, should be enjoyed by them. In that class of cases, of which *Re Skinner's Trusts*, 1 J. & H. 102, is an example, the Court has said that it will not insist on the benefit intended for the legatee being taken by him modo et forma as the testator prescribes."

This view of the law has been followed in our own Courts in recent cases, such as *Re Rispin*, 2 D.L.R. 644, 25 O.L.R. 633,* and *Re Hamilton*, 8 D.L.R. 529, 4 O.W.N. 441. In the latter, the Chancellor points out the methods by which only a bequest such as this can be made subject to the discretion of the trustees as to the time and mode of payment. Neither of these methods was adopted by the testatrix in this instance.

The restriction attempted to be put on the bequests to Margaret McGill, by virtue of which the executors seek to defer or withhold from her payment of the corpus of these bequests, is, in my opinion, inoperative.

The costs of the application will be paid out of the estate.

Judgment accordingly.

WEST et vir. v. CITY OF MONTREAL and RECTOR AND CHURCHWARDENS OF ST. MARTIN'S CHURCH (defendants in warranty).

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Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. December 13, 1912.

1. MUNICIPAL CORPORATIONS (§ II G 5—260)—LIABILITY FOR DAMAGES—NOTICE CONDITION PRECEDENT TO LIABILITY—IRREGULARITY LIBERALLY CONSTRUED, WHEN.

Where by statute notice of claim must be served on a municipal corporation within a fixed delay from the date of the accident which notice should contain particulars as to time, place and date, and a notice is served, the corporation cannot escape liability by pleading an irregularity in the notice which has not caused it any prejudice, more particularly where the plaintiff gave notice of his having fallen opposite a public building fronting on two streets and the name of one street is added after the designation of the building, and after the expiry of the delays for serving the notice the plaintiff amends the notice by stating he fell opposite the same building, but on the other

**Re Rispin*, 2 D.L.R. 644, 25 O.L.R. 633, was affirmed by the Supreme Court of Canada *sub nom. Re Rispin, Canada Trust Co.* v. *Davis*, 46 Can. S.C.R. 649.

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street, his action will not be dismissed for want of notice, especially where the corporation has obtained full possession of the facts and proceeded in warranty for indemnity against the owners of the building opposite which the plaintiff fell.

2. MUNICIPAL CORPORATIONS (§ II G 5—260)—LIABILITY FOR DAMAGES—NOTICE OF CLAIM, PURPOSE OF.

The statute requiring notice of action against a municipal corporation was not enacted to allow corporations to escape liability on technical grounds, but to enable them by investigation to come into possession of all facts, so as to either compromise or properly prepare its defence.

Statement

APPEAL by the plaintiff from the judgment of the Superior Court, Dunlop, J., rendered on April 10th, 1911, dismissing with costs her action in damages against the city of Montreal for injuries received by falling on a slippery sidewalk.

The appeal was allowed.

C. H. Stephens, K.C., for plaintiff, appellant.

J. A. Jarry, for the city of Montreal, respondent.

Campbell Lane, for the Rector and Churchwardens of St. Martin's Church, respondents.

The judgment of the Court was delivered by

Greenshields, J.

GREENSHIELDS, J.:—This case is before the Court for revision of a judgment by which the plaintiff's action was dismissed.

The action is one in damages resulting from a fall on the sidewalk, the plaintiff alleging the defective and dangerous condition of the sidewalk at the time. The accident happened on the 12th of January. On the 14th of January the plaintiff's husband, acting for his wife, to comply with the charter requirements, gave notice to the city of Montreal. The notice is in the following words:—

To the City of Montreal:

Take notice that the undersigned, whose office is in the Canada Life Building, 189 St. James street, have been instructed by David Hodge, residing at 51 Guilbault street, to claim from the city the sum of $1,999.99, for damages suffered by him through an accident to his wife, who fell on the sidewalk opposite St. Martin's Church, St. Urbain street, about half-past five in the afternoon of the 12th of January instant, thereby breaking her leg and suffering other severe injuries; the said accident having occurred in consequence of the condition of the sidewalk where she fell.

(Signed) STEPHENS & HARVEY,
Attorneys for David Hodge.

Subsequently, and more than fifteen days after the 12th of January, it appears that Mr. Stephens, one of the attorneys for the plaintiff, having been informed that the plaintiff fell on Prince Arthur street, went to the city hall; saw the clerk of the city who had the care and custody of notices of this kind; notified him that a mistake had been made, and asked to be allowed to amend the notice by erasing the words "St. Urbain" and inserting "Prince Arthur." The clerk consented to the

amendment; the notice was amended, and the amendment initialled by the clerk. This amendment was made before the action was taken.

The defendant pleads to the merits, denying responsibility, and in answer to par. 7 of plaintiff's declaration, wherein it is alleged "That on the 14th of January the plaintiff caused to be served on defendant a notice of the present action, in accordance with the requirements of the city charter," the defendant contents itself with a denial.

The learned trial Judge dismissed the plaintiff's action on the ground that the notice was insufficient and not a compliance with the statute. The judgment *a quo* in part is as follows:—

> Considering that it appears from the notice given by the plaintiff, and served on the 14th of January, 1910, on the defendant, at a time when the plaintiff should have known where the accident occurred, that the place where plaintiff's wife fell is stated to be on the sidewalk opposite St. Martin's Church on St. Urbain street;
>
> Considering that it appears from the evidence, including principally that of the female plaintiff herself, that she fell on the sidewalk opposite St. Martin's Church on Prince Arthur street;
>
> Considering that afterwards, to wit, on the 31st of January, 1910, at the suggestion of Mr. Stephens, one of the plaintiff's attorneys, a clerk in the employ of the defendant, attempted to amend the said notice by striking out the words "St. Urbain street" and inserting in lieu thereof "Prince Arthur street," initialling and dating the same the 31st of January, 1910;
>
> Considering that such amendment cannot bind the city of Montreal, having been made long after the expiration of the fifteen days after the date of the accident, and by a clerk who had no authority to make such amendment;
>
> Considering that the right of action in all cases such as the present is based primarily on the sufficiency of the notice as to the place where the accident occurred.

If in the notice originally given by the plaintiff, no street had been mentioned, but a simple statement that the accident happened on the sidewalk opposite St. Martin's Church, I have not the least doubt it would have been a sufficient notice. Now, the notice says, "opposite St. Martin's Church, St. Urbain street." On the 31st of January that was changed by erasing the words "St. Urbain" and inserting the words "Prince Arthur." St. Martin's Church is on the corner of St. Urbain and Prince Arthur streets. Now, the proof is, that the accident happened at least very near the corner of St. Urbain and Prince Arthur streets, almost opposite St. Martin's Church. The very next day the sexton of St. Martin's Church was notified of the accident, and the city, after receiving the notice of the 14th of January, made enquiries; notified the sexton of the church, and one of its constables, Fafard, made a report to the city as to the sidewalk, after having notified, as above stated, the sexton of the church.

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All this was done before the plaintiff's action was taken, and immediately upon it being taken the city took an action in warranty against St. Martin's Church, and St. Martin's Church refused to take up the city's defence, but joined issue in the action in warranty.

Notwithstanding the pretensions insistently urged by the learned counsel for the city, that on a question of the sufficiency or insufficiency of a notice required to be given, the matter of prejudice should not be considered, I am of opinion that we should distinguish between this case and a case where no notice had been given.

If no notice whatever was given, and no valid reason shewn, I should think the question or prejudice should not be considered; but where a notice has been given, which notice is slightly at variance with a fact, as in the present case, I am of opinion that the Court is bound to consider the question of prejudice. In the case under consideration, no possible prejudice was suffered by the city. Full investigation was made by the city; an action in warranty was taken by the city against the parties responsible, and the fullest opportunity was given the city to make its defence.

I concur fully with the remarks recently made by one of the honourable Judges of this Court, when he stated that the statute requiring a notice was not enacted to enable the city of Montreal on technical grounds to escape liability, but to enable the city to become, by investigation, in full possession of the facts, in order that it might, to save litigation, either compromise with a claimant or properly prepare its defence.

A careful examination of the proof convinces me that this accident was due to gross neglect in the care of the sidewalk upon which the plaintiff fell. It convinces me that the plaintiff has a just claim against the city, and this Court is unanimous in declaring that the city cannot repudiate its liability for such neglect owing to a slight irregularity in the notice, when no prejudice was suffered. The judgment under revision must be reversed.

The plaintiff's thigh was broken as a result of the fall; she was confined to her bed for three months, and was unable to walk without crutches for at least six months. Fortunately, the record does not shew any permanent injuries; her out-of-pocket expenses have been proved to amount to some $290. We assess the damages at $500. Personally, I would have awarded a larger amount, but accept the figure decided upon by the majority of the Court, and judgment will go in favour of the plaintiff for $500, with interest and all costs.

By the judgment in warranty, now rendered, the city will be indemnified by St. Martin's Church.

Appeal allowed.

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Ontario Supreme Court, Middleton, J. January 8, 1913.

1. BROKERS (§ II B 1—13*a*)—REAL ESTATE BROKERS—RIGHT TO COMPENSATION—SALE AFFECTED BY PURCHASER'S MISREPRESENTATIONS AS TO KNOWLEDGE OF AGENT.

Where a real estate broker is engaged by the owner to sell an undivided lot of land and he succeeds in selling half of the lot and is paid his commissions for that sale, and later, with the knowledge of the owner, engages with a prospective purchaser for the sale of the other half, but the parties cannot agree as to the price, and several months later the prospective purchaser goes to the owner and offers him a price which offer he tells the owner is made independently of the agent, and the owner believing he would have no commissions to pay, accepts the offer, the owner is liable for commissions at the ordinary rate, where it appears that the instructions of the agent had never been countermanded and all that the agent did was consistent with a contract of agency between himself and the owner.

[*Burchell* v. *Gowrie and Blockhouse Collieries, Ltd.*, [1910] A.C. 614; *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, followed; see also Annotation, 4 D.L.R. 531.]

Statement

ACTION by land agents to recover a commission upon a sale of the defendant's land.

Judgment was given for the plaintiffs.

I. F. Hellmuth, K.C., for the plaintiffs.

R. H. Greer, for the defendant.

Middleton, J.

MIDDLETON, J.:—The plaintiffs are real estate agents in Toronto. Prior to the circumstances giving rise to this action, the defendant owned a parcel of land fronting upon Queen street, Toronto. In the negotiations the plaintiffs were represented by Mr. Maclaren.

During the summer of 1910, Mr. Maclaren was employed in the office of the Assessment Department of the City of Toronto, and saw Mr. Wagstaff with a view to arrange, if possible, for the purchase of part of his property to add to a city park immediately adjoining it. Nothing came of this negotiation. Shortly thereafter, Mr. Maclaren left the service of the city corporation and joined the plaintiffs' firm. Being acquainted with Mr. Wagstaff and his property, Mr. Maclaren saw him with a view of obtaining authority to offer the property for sale. The accounts of this interview given by Wagstaff and Maclaren differ widely. Maclaren says that he then received authority to list the whole property for sale at the price of $45,000. This is denied by Wagstaff, who says that Maclaren asked only for authority to sell the east half of the holding, and that he instructed Maclaren to offer only the east half for sale, as he did not desire nor intend to sell the whole parcel.

Maclaren placed the property before Mr. Charles Millar, and the result was that in January Millar purchased the east half for $24,000. Upon this Wagstaff paid the plaintiffs com-

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mission, $600. Millar subdivided this parcel of land, and, it may be assumed, made some profit.

Wagstaff had his residence on the west half of the land, fronting upon Queen street. The land in the rear was not level, and there was some doubt as to the possibility of subdividing it with advantage, owing to the difficulty in securing fall for the sewers. Maclaren assumed that he had some right to sell this remaining property. He says that Wagstaff authorised him to sell it at $35,000. This is denied by Wagstaff.

Maclaren says that he tried to interest Millar, but that Millar would have nothing to do with the property at that price. Some time later, Maclaren desired to obtain a survey, so as to indicate how the land might be subdivided. He says that he saw Wagstaff and asked him if he had a survey or plan, was told that he had not, and then offered to have a survey made at his own expense, to which Wagstaff assented. Wagstaff denies all this; but the fact is that Maclaren had a survey made and a sketch prepared, which he submitted to Mr. Millar.

Millar subsequently went to the property with Maclaren for the purpose of purchasing, if a price could be arranged. Some doubt and uncertainty exist as to whether there was more than one interview. Maclaren says that there was. Millar and Wagstaff agree that there was one interview only. There is also some doubt as to the date, but I do not think it material. The one thing that is clear is, that Millar offered to buy at $36,000, and Wagstaff refused to sell at that price.

Maclaren was present on that occasion; and, as far as I can see, Wagstaff must have understood that he was present because he supposed himself to be acting as agent in the negotiation. I cannot understand how Wagstaff could have any other impression. The agent who had sold the east half to Mr. Millar, and who had received a commission, brought Millar again to make an offer for the west half; and I do not think Wagstaff could have failed to suppose that Maclaren was contemplating the payment of further commission.

Shortly after this, Millar left Ontario for a trip, and did not return for several months. On his return, the matter came again to his mind. He went out and saw Wagstaff, went with him over the property, and satisfied himself that there was no real difficulty connected with the drainage. He then attempted to buy, and ultimately did buy at $45,000. No doubt as an inducement to Wagstaff to sell, Millar pointed out to him that this sale was being made quite independently of any agent, and that there would be no commission to pay.

I have no doubt that Mr. Millar believed this; but neither side asked him the foundation for his belief. I assume from what he did say that his belief rested upon the fact that he had

gone to Wagstaff on this occasion, and made this offer, entirely apart from any real estate agent.

I have come to the conclusion that I must accept Mr. Maclaren's statement as to this employment as agent. All that he did is consistent with this. The statements he made to Millar, as testified to by Millar, agree with this. The preparation of the plan and the endeavours to induce Millar to buy would never have been undertaken if Maclaren had not believed himself to be authorised.

Maclaren is an intelligent and experienced agent. I do not think he would have undertaken to deal with the property without first satisfying himself as to his position.

I believe Wagstaff honestly thought when he sold to Millar that because the sale was being made without an agent being present there would be no commission to pay; and he now keenly resents a claim which he believes to be unjust. Yet I fear that he is liable for a commission.

In some respects Mr. Wagstaff's memory has proved itself treacherous. I think the original instructions applied to the whole lot. I have no doubt that at different times he thought of subdividing the property and selling it himself; but I do not think that he ever went so far as to countermand the instructions given to Maclaren. He had given somewhat similar instructions to McLaughlin; he had given him a price upon the whole lot; and he never countermanded these instructions.

I do not think anything would be gained by a discussion of the cases. The law is plain enough; it is authoritatively expounded for me in *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, and in *Stratton* v. *Vachon*, 44 Can. S.C.R. 395; with which must be read the equally important and authoritative judgment in *Toulmin* v. *Millar*, 58 L.T. 96.

I think there was here a contracted relationship, and that Maclaren was instrumental in bringing about the sale by Wagstaff to Millar, although he had nothing to do with the actual making of the particular contract by which Millar purchased.

There will, therefore, be judgment for the plaintiff for commission at the ordinary rate of two and a half per cent.—$1,125—and interest from the date of the writ, 11th May, 1912, with costs.

Judgment for plaintiff.

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Dec. 31.

FORTIN v. PERRAS.

Quebec Court of Review, Saint-Pierre, Greenshields, and Chauvin, JJ. December 31, 1912.

1. GOODWILL (§ III—10)—SALE OF.

Where a trader sells his route in which he had previously supplied goods (*e.g.*, milk) and binds himself not to sell to any of these customers under a forfeiture of $25 each, and he does subsequently sell, the penal clause can be immediately invoked by the purchaser and the vendor's plea to the effect that such customers had left the purchaser and solicited him to supply them again will be of no avail.

[*Lea* v. *Whitaker*, 8 L.R.C.P. 70; *Wallace* v. *Smith*, 25 L.J. Ch. 145, applied.]

2. CONTRACTS (§ III E 2—285)—COVENANT NOT TO ENGAGE IN BUSINESS—PENALTY FOR—FORFEITURE OF.

A penal clause becomes operative the moment proof of violation of the contract is made, and the entire penalty becomes exigible without any proof of wrongful intention or damages suffered being required. This is different from the "*concurrence déloyale*" where the vendor of a stock-in-trade and goodwill proceeds to solicit his old customers.

Statement

THIS was an appeal from the judgment of the Superior Court, Martineau, J., rendered on April 9, 1910, dismissing the plaintiff's action for $950, amount of damages claimed in virtue of a penal clause in a contract for the sale of milk customers.

The appeal was allowed.

J. A. Bonin, K.C., for plaintiff, appellant.

A. Duranleau, for defendant, respondent.

The opinion of the Court was delivered by

Greenshields, J.

GREENSHIELDS, J.:—The plaintiff seeks the reversal of a judgment rendered on the 9th day of April, 1910, dismissing his action, with costs.

The plaintiff alleges, in brief, that by a writing, *sous seing privé*, dated the 24th of March, 1908, the defendant sold to him among other things a list of customers to whom the defendant had previously supplied milk, to the extent of from eighty to one hundred gallons per day; and also sold sixty to sixty-five milk cans, and bound and obliged himself by said agreement not to sell to any of the customers transferred or ceded to the plaintiff, under the penalty or forfeit of $25 for each customer to whom he should sell any milk; and, moreover, engaged to go with the plaintiff to indicate the residences and domiciles of the customers transferred; that about the first of May, the defendant went with the plaintiff and indicated the persons to whom he had supplied milk previously, and whose custom he had sold to the plaintiff: that the plaintiff delivered during the first days of May from eighty to one hundred gallons of milk to the different persons mentioned and indicated by the defendant, a list of which the plaintiff produces as exhibit No. 2; that

a short time afterwards the plaintiff perceived that the quantity of milk taken by the customers which he had bought from the defendant decreased, and that the defendant continued to sell milk to the customers transferred to the plaintiff; that, as a matter of fact, the defendant did sell to thirty-eight of the customers so transferred to the plaintiff, and thereby incurred a penalty of $25 for each, amounting in all to $950; that seventeen of the milk cans sold by the defendant to the plaintiff were the property of others, and the defendant was unable to give to the plaintiff a title to the same; that the consideration of the sale was the sum of $500, which the plaintiff paid in cash; that the value of the seventeen cans not delivered is $35, which, added to $950, makes a total sum of $985, for which the plaintiff prays judgment.

The defendant pleads, confessing judgment for $21.25, representing the value of the cans not delivered; and further pleads in effect: that it is false that he continued to sell milk to the customers transferred to the plaintiff, or that he was the cause of certain customers ceasing to take milk from the plaintiff; that verbal agreements between the parties at the time the exhibit No. 1 was signed were to the effect that if the defendant took a customer from the plaintiff among those transferred, he engaged to pay the sum of $25 for each customer taken; that exhibit No. 1, although lacking in certainty of expression according to usage in the milk trade, can be interpreted only in the manner interpreted by the defendant, as stated in paragraph six of his plea. The defendant then denies that he sold to certain specific customers mentioned in the list filed by the plaintiff; that, if he did sell to any customers mentioned in the list transferred to the plaintiff, he commenced to serve such customers only long after they had abandoned the plaintiff and had refused to take milk from him.

By an inscription in law, paragraph six of the defendant's plea, alleging a custom, was struck out.

The judgment of the learned trial Judge maintained the defendant's plea, and declared the confession of judgment sufficient, and dismissed the plaintiff's action.

It will at once be seen that the serious defence of the defendant to the action is, that he did not solicit the customers which he had transferred to the plaintiff, but that because the service by the plaintiff to the customers which he had acquired from the defendant, was unsatisfactory, and the milk supplied was of an inferior quality, the customers abandoned the plaintiff and solicited the defendant to renew his supply of milk to them. The learned trial Judge found that this was proven, and that, under the agreement, no responsibility was created as against the defendant.

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I am of opinion that there is error in the judgment, the error arising from a misinterpretation of the law applicable to an agreement such as the one under consideration.

The agreement itself, in my opinion, is perfectly clear; is a perfectly legal agreement, and is a law between the parties, and must be enforced.

By the agreement the defendant cedes and transfers for all time the customers included in the agreement, and by the defendant indicated to the plaintiff. In clear terms the defendant says: "I transfer for the consideration of $500, these customers to you, and I bind and oblige myself, under the forfeiture of $25 each, not to sell to any of the customers for whose custom you have paid me the sum of $500." Nothing can be clearer.

Article 1013 of our Code provides: "Where the meaning of the parties in a contract is doubtful their common intention must be determined by interpretation rather than by an adherence to the literal meaning of the words of the contract." It cannot in any sense be said that the intention of the parties in the contract under consideration is doubtful. The plaintiff intended to buy; the defendant intended to sell, and the defendant bound himself, under the forfeiture of $25 for each customer, not to sell to them or any of them.

The contract itself is in no way in restraint of trade; in no way creates a monopoly; is in no sense against public order or good morals, and, as above stated, is the law between the parties. If the old customers of the defendant wished to buy from him after the date of the contract, and he wished to sell to them because they asked him, he was at liberty to do so, but he did it subject to the payment of the stipulated penalty.

If the contract was interpreted in the manner in which the defendant seeks to interpret it, it would simply mean that all the defendant had to do was to find out a customer, who, for one reason or another, well founded or whimsical, wished to leave the plaintiff, commence delivering milk to him, and thereby avoid the payment of the penalty or forfeit, and substantially and effectively defeat the whole purpose and intention of the contract.

The judgment *a quo* seems to confound what is known in the French law as the "*concurrence déloyale,*" with the enforcement of a penal clause. The difference between the two is so manifest that it requires merely a simple statement. If a person sell his stock-in-trade and goodwill of his business to another, and then proceeds to solicit the old customers, it is a "*concurrence déloyale,*" which might give rise to a restraining order or injunction, and to an action in damages. The proof would rest upon the plaintiff to shew that the seller had sought

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to induce his old customers to leave the purchaser; but where a person sells his business and his goodwill and there is a clause in the contract that for a fixed period of time, or in a certain locality, he will not engage in a similar business, under the penalty of paying a certain amount of money if he does, all the plaintiff, in such a case, has to prove, is the contract and its violation, by the carrying on of business during the specified time and in the prohibited locality by the seller. That proof being made, the penalty is due in its entirety. No proof is required of damages to enable the seller to recover it, and the Court cannot increase or lessen the amount. (C.C. 1135).

The English law is the same upon the subject: *Lea* v. *Whitiker*, 8 L.R.C.P. 70. In this case the defendant sold to the plaintiff, trade fixtures, etc., of a public house, with certain stipulations and conditions, among others in the contract was the following clause: "By way of making this agreement binding, each of the above contracting parties have deposited in the hands of 'H.' the sum of £40; each and either party failing to complete this agreement, shall forfeit to the other his deposit money as and for liquidated damages." The defendant failed in his contract. The plaintiff sued for damages over and above the £40, which had been deposited. The Court held, that his claim was limited to the £40, and that no greater sum could be recovered.

Wallis v. *Smith*, 52 L.J. Ch. 145. In this case, in a contract between the parties it was stipulated that failure to fulfil or carry out the contract entailed the payment of £5,000, as liquidated damages. The English Court of Appeal held that upon proof of the breach, the sum of £5,000 was due without any proof of the *quantum* of damages suffered, and the learned Master of the Rolls, stating the English law at great length, practically stated the provisions as contained in our Code.

A careful consideration of the evidence convinces me that the proof is clear that the defendant after the first of May sold to at least twenty-three of the customers which he had ceded to the plaintiff, thereby rendering himself liable to the payment of $25 for each customer, amounting in all to the sum of $575. The defendant confesses judgment for $21.25—short delivered cans.

The judgment *a quo* must be reversed, and the defendant condemned to pay to the plaintiff the sum of $596.25.

Appeal allowed.

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Jan. 13.

MITCHELL v. HEINTZMAN.

Ontario Supreme Court, Clute, Sutherland, and Kelly, JJ.
January 13, 1913.

1. EVIDENCE (§ XI G—800)—DAMAGES—PERSONAL INJURY—EMPLOYER'S LIABILITY INSURANCE—RELEVANCY.

The rule that in an action for damages against an employer for personal injuries there must be no intimation to the jury that an insurance company with which the employer has an employers' liability insurance against such claims is the real defendant in interest, is not violated where the only reference on this point that was brought to the jury's attention was (*a*) plaintiff's testimony that he thought that a certain doctor who examined him told him that an insurance company sent him there, (*b*) the testimony of defendant's doctor brought out, upon cross-examination by plaintiff's counsel, that he was sent to examine plaintiff by a certain insurance company, (*c*) reference by plaintiff's counsel, in the examination of another witness, to the effect that this doctor was the doctor who examined the plaintiff "on behalf of the insurance company;" and where no reference to such insurance was made by plaintiff's counsel in his address to the jury.

[*Loughead* v. *Collingwood Shipbuilding Co.*, 16 O.L.R. 64, distinguished.]

2. NEW TRIAL (§ II—7)—ADMISSION OF EVIDENCE—DAMAGES—EMPLOYERS' LIABILITY INSURANCE—EMPLOYER AND EMPLOYEE.

Where nothing was brought out during the course of the trial of an employee's personal injury action from which the jury could reasonably infer that an insurance company was the real defendant in interest, a new trial will not be granted because of references made during the course of the trial that a physician called for the defence had examined the plaintiff on behalf of a certain casualty insurance company if his cross-examination by the plaintiff's counsel in this respect went no further than to attempt to shew that the physician was not disinterested by reason of his employment by the insurance company and his possible bias on account thereof.

[*Loughead* v. *Collingwood Shipbuilding Co.*, 16 O.L.R. 64, distinguished.]

Statement

APPEAL by the defendant from the judgment of Boyd, C., in favour of the plaintiff, on a general verdict of a jury for $1,000, in an action for damages for personal injuries sustained by the plaintiff by being struck, upon a public street in the city of Toronto, by a motor vehicle owned by the defendant.

T. N. Phelan, for the defendant.

J. P. MacGregor, for the plaintiff.

Clute, J.

The judgment of the Court was delivered by CLUTE, J.:—On the 15th January, 1912, at about 11 o'clock at night, the plaintiff and one Simpson were returning home from a social club, walking up the west side of Yonge street, and crossed the street to take the car near the intersection of Shuter street with Yonge.

The plaintiff states in his evidence that, while he and his friend were standing looking down Yonge street, the Yonge street car came first and then the College car, and he (the plaintiff) stepped out as the car was coming to a stop and was

knocked down by the defendant's automobile. The witness Simpson, who was with the plaintiff, says that they crossed over to get a car at Shuter street, and were scarcely come to a standstill, just enough to see that there was a car, and the plaintiff said, "There is a Yonge street car," which he was to take, "and a College car, which was suitable for me;" that a motor car came up Yonge street just when the plaintiff stepped out on Yonge street, and knocked him down. Simpson says he saw it just when it was opposite the College car, and shouted "Look out!" but by that time the plaintiff was knocked down. The College car was immediately behind the Yonge car. It was just back far enough to be safe. As to speed, he says that the motor car came all of a sudden, so fast that he had just time to shout "Look out!"

The plaintiff was hit on the left thigh and knocked over, his left shoulder hitting the pavement. He was laid up for some five weeks, and then returned to his work, and received the same pay as he had received before the accident. For some days he spat blood. He complains that he still suffers from the effect of the injury, being unable to lift any heavy weight, and his doctor confirms this, and says that he is uncertain as to how long this weakness of the arm may continue. A doctor called for the defence states that, as far as he could see, the plaintiff has fully recovered. The question is one for the jury.

Section 7 of the Motor Vehicles Act declares that any person who drives recklessly or negligently or at a speed or in a manner dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highways, is guilty of an offence under the Act, irrespective of the clause regulating speed. Upon a careful reading of the evidence, it is quite clear that the case is not one which could have been withdrawn from the consideration of the jury, notwithstanding the question of the onus of proof, which in this case, under sec. 7 of the Act, was upon the defendant. Upon this point the charge was in favour of the defendant, as no special reference was made thereto. I see no objection to the charge read in connection with the evidence.

The principal objection argued was, that, under the authority of *Loughead* v. *Collingwood Shipbuilding Co.*, 16 O.L.R. 64, there should be a new trial, upon the ground that evidence was submitted to the jury in proof of insurance carried by the defendant against accident; and that counsel in his address to the jury was allowed to emphasise the fact that the action was not being defended by the defendant, but by a certain insurance company. Affidavits were offered on both sides by counsel who attended the trial as to what took place. These were not received, but the usual practice was followed, permitting counsel

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to state what had occurred, and reference was also made to the Chancellor as to what took place.

As to the admission of evidence, there is nothing appearing upon the notes which would warrant a new trial, under the authority relied on. All that we can find as to the admission of evidence is at pp. 4, 46, and 71. On p. 4, during the examination of the plaintiff, he was asked:—

"Q. Did you ever have any other doctor examine you? A. I had. Dr. Wallace Scott came over and examined me.

"Q. Did you send for him? A. No, sir.

"Q. Do you know how he came to come? A. I think he told me that the insurance company had sent him there.

"Q. You don't know that for a fact? A. I don't know that for a fact.

"Mr. Phelan: I object to that evidence

"His Lordship: No, that is not evidence."

On the cross-examination of Dr. Wallace Scott, called by the defence, he was asked:—

"Q. When did Mitchell send for you? A. He did not send for me.

"Q. How did you come to go there? What was your authority for going there? On what representation did you make this examination? A. Am I to be spoken to in this way, my Lord?

"His Lordship: Q. You are asked how you came to be there?

"Mr. Phelan: We will take the consequences of telling him, my Lord.

"His Lordship: And I take the consequence of telling him to answer.

"Mr. MacGregor: Q. He did not send for you? A. No.

"Q. Who sent for you? A. I went in response to a telephone or a letter from Mr. Hull. Mr. Hull is connected with the Travelers Insurance Company.

"His Lordship: Q. You were sent on behalf of the Travelers Insurance Company? A. Yes.

"Mr. Phelan: I now take the objection that your Lordship should dispense with the jury, under the authorities.

"His Lordship: We will get the authorities later. The jury is dealing with it now, and they want the facts of the case.

"Mr. MacGregor: Q. Doctor, it was in answer to those directions that you were permitted to examine Mitchell? A. It was."

At p. 71, Dr. Cook was recalled by the plaintiff in reply, and Mr. MacGregor in his question used this expression: "Q. Dr. Scott, who was called a moment ago by the defence, and who examined Mr. Mitchell on behalf of the insurance company," etc., etc.

This is all that appears on the notes with reference to the evidence. There is no statement that any insurance company

was the real defendant, or that Dr. Scott made the examination at the instance of the defence; for all that appears, the plaintiff may have been examined with reference to his own insurance. The jury could not, I think, from this infer that the Travelers Insurance Company was the real defendant.

Mr. MacGregor argued that his questions were put in order to shew that Dr. Wallace Scott was not a disinterested witness, but was sent by an insurance company to examine as to the extent of the injuries the plaintiff had received, and so might be biassed in favour of his employer. I think he had the right to do this, carrying the questions no further than was necessary for that purpose, and without intimation to the jury that the insurance company was the real defendant.

Then as to what occurred in the address of Mr. MacGregor to the jury, the note is this: "Mr. MacGregor then addressed the jury. During the course of his address, Mr. Phelan protested against Mr. MacGregor saying anything to the jury about Mr. Heintzman not being the defendant, but the insurance company, and asked that the reporter make a note of his objections. His Lordship: Mr. MacGregor, you had better not place much emphasis upon that. Mr. MacGregor: I accept your Lordship's ruling." And nothing further was said with reference to it.

On reference to the Chancellor, we find that he does not recollect distinctly what Mr. MacGregor said to the jury; and counsel do not agree. The Chancellor, however, was not of opinion that any substantial wrong or miscarriage had been occasioned by the reception of the evidence relating to the insurance company, or, as far as he heard, by what counsel said. We think this case distinguishable upon the facts from *Loughead* v. *Collingwood Shipbuilding Co.*, 16 O.L.R. 64, and that a new trial should not be granted upon this ground.

A further question is that of the damages, which, the defendant contends, are excessive. Upon a careful reading of the evidence, we think this ground is well taken; and, unless the plaintiff will consent to have the damages reduced to $800, there should be a new trial. If he consents to such reduction, the appeal will in other respects be dismissed without costs. If the plaintiff does not consent, the costs of the former trial and of this appeal should be costs in the cause.

Judgment varied.

BUSHBY v. TOWN OF NORTH SYDNEY.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, Drysdale and Ritchie, JJ. January 14, 1913.

1. POOR AND POOR LAWS (§ I—1)—PAUPERS—POOR RELIEF ACT, NOVA SCOTIA—INCORPORATED TOWN—LIABILITY AFTER NOTICE.

An incorporated town being a poor district under the provisions of the Poor Relief Act, R.S.N.S. 1900, ch. 50, secs. 22, 23, 29, on receipt of notice requiring provision to be made for the support of a pauper within the limits of the town, is bound to take steps under secs. 22 and 23 of the Act to ascertain the place of settlement of the pauper, and, in the event of failure to do so, will be required to recoup the person by whom the notice is given and who has furnished the pauper with necessary support.

Statement

ACTION under the Poor Relief Law of Nova Scotia.

Argument

W. F. O'Connor, K.C., for appellant:—There is no statutory right to recover where the pauper has no settlement in the district: The Poor Relief Act, R.S.N.S. 1900, ch. 50, secs. 2 (*b*), 11, 22; the Towns Incorporation Act, R.S.N.S. 1900, ch. 71, sec. 167. Under the former Act, sec. 29, there can be no recovery unless the pauper is entitled to relief. The statement of claim is defective, disclosing no cause of action and the defendant therefore should not be made to pay costs.

H. Mellish, K.C., for the respondent, was not called on.

Townshend, C.J.

The judgment of the Court was delivered by

SIR CHARLES TOWNSHEND, C.J.:—We are all of opinion that this appeal must be dismissed with costs. By sec. 29, ch. 50, any person who provides for the relief of a pauper, who is not liable for his support, is entitled, after notice to the overseers, to recover any expenses necessarily incurred. If the person relieved had not a settlement in North Sydney, then under secs. 22 and 23, the overseers, who were the town council, should after notice have taken the proper steps to find out the pauper's proper place of settlement and have him removed. The council did not do so. It did nothing except to tell the plaintiff to turn the pauper out of doors. She was not obliged to do so and the liability of the town continued until it took the proper legal proceedings to have the pauper removed or provided for him elsewhere.

Appeal dismissed with costs.

MacDONELL v. DAVIES.

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Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith and Magee, JJ.A. January 15, 1913.

1. LANDLORD AND TENANT (§ II B—10)—LEASES—COVENANTS IN.

In interpreting ambiguous terms of a lease, as to the right to renew, the extraordinary and one-sided character of the agreement under one interpretation, is a feature which may be taken into consideration by the court in favour of the other interpretation more consistent with the usage in such transactions and with the conduct of the parties prior to the dispute which led to the litigation.

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Statement

Appeal by the defendant from the judgment of Latchford, J., at the trial, in favour of the plaintiff's claim and dismissing the defendant's counterclaim.

The plaintiff claimed to recover possession of certain lands and $4,600 damages for the defendant's use and occupation thereof after the 3rd September, 1910, and also damages for deprivation of possession.

The defendant claimed the right to a renewal of his lease, and, if necessary, reformation thereof.

E. D. Armour, K.C., and *M. H. Ludwig*, K.C., for the defendant.

G. H. Watson, K.C., for the plaintiff.

Meredith, J.A.

The judgment of the Court was delivered by Meredith, J.A.:—However one-sided the writing may be, if the right of renewal appertained to the lessor only, it cannot be extended to the lessee also; it is not now the time for making, but is the time for interpreting only, the agreement between the parties evidenced by the lease in question; but, if the writing be ambiguous, the extraordinary one-sided character of the agreement, as contended for by the respondent, may well be taken into consideration and easily turn the scale against that contention.

The term of 21 years certain, and the provision for re-entry at its expiration, and the other provisions of the lease, are all subject to the agreement, contained in it, for the renewal of it "forever," in like terms of 21 years.

For the plaintiff it is contended that this right of renewal pertains to him only; and that, although he can have a renewal only in the event of his declining to pay to the lessee the value of the building on the demised property, yet the lessee has no right of renewal whatever, but must yield up possession of everything without compensation if the lessor so chooses at the end of any of the terms of 21 years; in other words, that, if the lessor give the notice which the lease provides for giving, he must renew or pay compensation; but that, if he do not give such notice, he may have the property back again without payment of anything for any buildings or improvements, though the lessee had been bound to expend, and had expended, thousands of dollars in such improvements.

Of course, the parties were legally competent to make such an extraordinary one-sided bargain; but one can hardly imagine a lessee in his sober senses doing so; and I cannot think the words which the parties used to evidence their bargain by any means compel us to consider that they did.

There is much, no doubt, in the writing that looks that way, but the governing words seem to me to be "renewable forever;" it is true that they are preceded by the words "which said lease shall be;" but it seems to me that these words may be as well

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applied to the lease itself as to renewal leases; I can imagine no reason why they should not be made by the parties so applicable, and cogent reasons why they should be are obvious; and it will be observed that, where a renewal lease is plainly meant, it is described as the "said renewal lease," "the further lease," and "renewal term," and also that in these clauses of the lease "this present demise" is mentioned, to which the words "which said lease" might have literal reference; and I can have no doubt that they were meant to have actual reference to the lease in which they appeared, as well as to every renewal of it. It seems impossible to believe that the parties meant that, if the landlord required a valuation, he must pay for the buildings and improvements; but that, if he did not, he could take them without giving any kind of compensation.

The conduct of the parties was quite in accord with the view I have taken, and entirely inconsistent with the present contention of the landlord, until the matter came into the hands of the landlord's solicitors, with a view to an arbitration under the lease, when the uncertain words of the lease were seized upon to gain for the landlord the extraordinary advantage sought in this action and given effect to at the trial.

The result is, that the effect of this loosely drawn lease is, that it was a demise for 21 years renewable forever in like terms, but determinable by the lessor only at the end of any of these terms, in manner provided for in the lease, including payment for improvements as therein provided; also subject, at the option of the lessor only, to a reconsideration of the question of the amount of the rent, in the same manner and at the same time as the valuation of the improvements; the parties to be bound by the amount of the new rent if the lessor did not elect to pay for the improvements and take back the land.

There is, as I have said, a good deal that literally favours the interpretation of the trial Judge; but there is, I think, more to support the interpretation I have considered right, which is also favoured by the fact that the rent is described as a ground rent.

Appeal allowed.

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Jan. 17.

Re GOLD and ROWE.

Ontario Supreme Court, Sutherland, J. January 17, 1913.

1. DEEDS (§ II E 1—45)—REAL PROPERTY—ESTATES CREATED BY DEED — CONSTRUCTION.

A deed of land by a person having an estate tail purporting to convey the fee simple and aided by an *habendum* clause in the following form, "to have and to hold unto the said party of the second part, her heirs and assigns, to and for her and their sole and only use forever," is sufficient to bar the entail.

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2. DEEDS (§ II E 1—45)—ESTATE CREATED — "IN FEE SIMPLE" WITHOUT USE OF WORD "HEIRS," EFFECT OF.

The mere use of the words "in fee simple" without the use of the word "heirs" in some part of the deed by a tenant in tail is ineffective to bar the entail and pass the fee.

3. DEEDS (§ II E 3—55)—ESTATES TAIL—USE OF WORDS "IN FEE SIMPLE" READ WITH HABENDUM CLAUSE—CONSTRUCTION—BAR OF ENTAIL.

The use of the words "in fee simple" in a deed by a tenant in tail though ineffective to convey a fee absolute under R.S.O. 1897, ch. 122, sec. 29, is, however, suggestive of the estate intended to be conveyed, and where the *habendum* clause contains sufficient words to satisfy the statute shews that the intention of the grantor was to grant an estate in fee simple absolute, the two together will be held to bar the entail.

[See Norton on Deeds, 1906, p. 229, 290.]

Statement

APPLICATION by Mary T. Gold, the vendor, under the Vendors and Purchasers Act, 10 Edw. VII. ch. 58, for a declaration that a deed of the 8th December, 1906, from W. S. Gold to his wife, the applicant, was sufficient to bar the entail created by the will of David L. Reed.

J. A. McEvoy, for the vendor.

Eric N. Armour, for the purchaser, Frederick T. Rowe.

Sutherland, J.

SUTHERLAND, J.:—One David L. Reed was the owner of the property in question, and died on the 27th September, 1887, having previously made his last will and testament, dated the 30th September, 1885, wherein he devised and bequeathed the said lands to his grandson "William Scott Gold and the heirs of his body." Letters probate were duly issued on the 7th October, 1887.

On the 8th December, 1906, the said devisee, W. S. Gold, by deed under the Act respecting Short Forms of Conveyances, did grant unto the said party of the second part (in fee simple) the said lands. The grantee was his wife, Mary T. Gold. The habendum in the said deed is as follows: "To have and to hold unto the said party of the second part, her heirs and assigns, to and for her and their sole and only use forever."

The vendor contends that the said deed was a sufficient one to bar the entail.

The contention of the purchaser, on the other hand, is, that R.S.O. 1897 ch. 122, an Act respecting Assurances of Estates Tail, sec. 29, applies, and that the disposition of the lands under this Act by a tenant in tail could only be effected by some one of the assurances (not being a will) by which such tenant in tail could, before the Ontario Judicature Act, 1881, have made the disposition, if his estate were an estate at law in fee simple absolute. He argues that the words "in fee simple," following the grant in the deed as indicated, before 1881, would be ineffective without the use of the word "heirs"

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to pass the fee; and, consequently, the deed in question cannot be said properly to bar the entail.

It seems to me that, apart from the possible effect of the habendum in the deed, this contention would be correct; but I think the habendum clearly aids in so construing the deed as to give effect to the contention of the vendor that the entail has been effectively barred.

If we treat the words "in fee simple" as entirely ineffective, and so as though eliminated from the deed, then we have a simple grant by the tenant in tail to his wife, the party of the second part in the deed.

In Norton on Deeds, 1906, p. 290, it is said that the mere mention of the grantee's name in the premises does not give him any estate inconsistent with the estate limited by the habendum, whatever that estate may be. And at p. 229: "The office of the habendum is properly to determine what estate or interest is granted by the deed, though this may be performed and sometimes is performed in the premises. In which cases the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the estate granted in the premises."

I think, therefore, it is clear that the habendum explains the estate the grantor intended to convey, and it shews that the intention of the grantor was to grant an estate at law in fee simple absolute.

On the other hand, the very use of the words "in fee simple," though ineffective to carry such an estate under the statute applicable to it, is suggestive of the estate intended by the grantor to be conveyed, and the habendum is consistent therewith and explanatory thereof.

The purchaser must, I think, therefore, accept the deed as sufficient to bar the entail.

No costs are asked, and there will be no order as to costs.

Judgment accordingly.

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Jan. 23.

CITY OF HULL v. BERGERON.

Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Carroll, and Gervais, JJ. January 23, 1913.

1. MUNICIPAL CORPORATIONS (§ II G 1—195)—LIABILITY FOR DAMAGES—RAISING STREET AND SIDEWALKS TO INJURY OF ADJOINING OWNER.

A municipal corporation is liable in damages to owners, where property abuts on streets or sidewalks, the level of which is raised, thereby causing depreciation to their property, such change of level in effect constituting a sort of expropriation entitling interested parties to indemnity.

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2. ACTION (§ I B 1—5)—PREMATURE—CONDITIONS PRECEDENT—ARBITRATION BEFORE ACTION, EFFECT ON RIGHT OF ACTION—STATUTE—COMMON LAW.

Where a statute provides for indemnity to be fixed by arbitration, such recourse does not deprive the injured party of his common law recourse, if he has any, and thus he may sue in damages without any reference to arbitration.

[*Williams* v. *Township of Raleigh*, 21 Can. S.C.R. 103, 131, referred to.]

Statement

APPEAL from a judgment of the Superior Court for the district of Ottawa, Weir, J., rendered on January 19th, 1912, maintaining the respondent's action in damages for $350 as a result of a change of level in the sidewalk bordering on his property.

The appeal was dismissed.

J. W. Ste. Marie, for appellant.

H. A. Fortier, for respondent.

The opinion of the Court was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J. (translated):—This is an action in damages for $500. The respondent obtained judgment against the appellant for $350.

The respondent is the owner of his residence on Laurier avenue, in the city of Hull.

In 1910 the city replaced the wooden sidewalk in front of respondent's residence by a concrete sidewalk; and in so doing raised the level of the sidewalk by two feet, as well as the level of the street itself.

The respondent claims that such change of level of the street, and of the sidewalk, diminished the value of his property, and such diminution of value he now claims by way of damages.

The appellant's plea admits the construction of the new sidewalk, but adds that this was only done at the request of the property owners, including the respondent himself; that the work was done according to all the recognized scientific rules, and that far from diminishing the value of the property of the respondent, it has increased the same. The appellant also pleads that the respondent should have had his damages established by arbitration before taking the present action.

I shall first of all dispose of this last contention. The charter of the city of Hull, 56 Vict. ch. 52, says that the council may by resolution regulate and alter the level of any street, provided that if any person suffer thereby any real damages he be indemnified *à dire d'arbitre* (art. 149). The same provision is enacted as regards sidewalks by art. 157. These dispositions of the charter of the city of Hull do not deprive interested parties of their common law recourse.

As was stated by Patterson, J., in the Supreme Court case of *Williams* v. *Township of Raleigh*, 21 Can. S.C.R. 103, 131, "the provision of a statute which enables disputes to be settled by arbi-

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tration does not of itself cut off the remedy by action when, as in this case, the right infringed is a common law right and not one created by the statute." The same principle was sanctioned by this Court in 1906, in the case of *Leclerc* v. *Dufault*, 16 Que. K.B. 138. In the present case, even though arts. 149 and 157 of the charter of the city of Hull did not exist, the corporation would be none the less responsible for any damages caused to private parties by a change in the level of the sidewalks or streets. It would be responsible in virtue of art. 1053 C.C. The act of the appellant may also be considered as a partial expropriation of the respondent's rights, who, under art. 407 C.C. would have his recourse in indemnity.

I have, therefore, only the question of fact left for examination.

The learned Judge then reviewed the evidence, concluded that the respondent's property had suffered by such change, and that the appreciation of the trial Judge as to the quantum should not be disturbed.

The appeal is, therefore, dismissed, with costs.

Appeal dismissed.

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Dec. 14.

REX v. Fred GRAVES, Alfred GRAVES, and Harry GRAVES.

(Decision No. 2)

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, Drysdale, and Ritchie, JJ. December 14, 1912.

1. APPEAL (§ XI—721)—GRANTING LEAVE TO APPEAL—MISDIRECTION IN CRIMINAL CASE.

Leave to appeal will be granted the accused in a homicide trial involving the responsibility for the accidental discharge of a gun in the hands of the deceased if the appellate Court considers that the jury has not been properly instructed on the question of the causal connection between the acts of the accused and the discharge of the gun.

[The conviction was subsequently affirmed on an equal division of the Court differently constituted: *Rex* v. *Graves* (No. 3), 9 D.L.R. 175.]

2. APPEAL (§ XI—721)—GRANTING LEAVE TO APPEAL—INSTRUCTING JURY ON MALICE—CRIMINAL CASE.

Leave to appeal will be granted the accused where the general effect of the instruction to the jury in a murder charge is, in the opinion of the appellate Court, to deal with the question of malice as if it were sufficiently proved by shewing ill-feeling on the part of the accused towards the deceased, where the circumstances were such as to make such definition prejudicial to the accused by reason of the meagreness of any evidence of unlawful intent in respect of the crime charged as distinguished from mere ill-will.

[The conviction was subsequently affirmed on an equal division of the Court differently constituted: *Rex* v. *Graves* (No. 3), 9 D.L.R. 175.]

3. APPEAL (§ XI—721)—LEAVE TO APPEAL—JURY INSTRUCTION ON PROVOCATION AND ITS MITIGATION—GRUDGE.

Leave to appeal should be granted the accused on a conviction for murder if the appellate Court thinks that the instruction given to the jury as to the possible mitigation of the offence by provocation was, in effect, limited so as to exclude acts done by the accused in carrying out a grudge.

[The conviction was subsequently affirmed on an equal division of the Court differently constituted: *Rex* v. *Graves* (No. 3), 9 D.L.R. 175.]

4. HOMICIDE (§ III B—28)—SELF-DEFENCE—DANGER—PLACING IN FEAR OF VIOLENCE—COUNTER ATTACK.

Where the deceased took a gun to drive away several persons who had unlawfully congregated and were causing a disturbance in front of his house, and in handling the gun, took it by the barrel and used it as a club, its accidental discharge upon himself when so used, although resulting in his death, is not sufficient, where it does not appear that the deceased had been placed in any fear of violence from the accused, to charge the disturbers with murder, even if their acts prior thereto technically constituted an assault. (Dictum *per* Graham, E.J.)

5. APPEAL (§ XI—721)—GRANTING LEAVE TO APPEAL—CRIMINAL CASES—FAIRLY ARGUABLE GROUNDS.

The appellate Court on an application for leave to appeal in a criminal case should grant the leave if the questions raised are fairly arguable. (Dictum *per* Ritchie, J.)

6. HOMICIDE (§ II—17)—MURDER—MANSLAUGHTER—PROVOCATION.

If the defendants had no intention, when they assembled in front of the residence of the deceased, beyond that of annoying him and his family, against whom they had some ill-feeling, and if, being drunk, their passions were inflamed by the production by the deceased of a loaded gun, and the deceased used the gun as a club and was mortally wounded by its accidental discharge, and if the death was hastened by the subsequent battery of the deceased by defendants in sudden and uncontrollable passion on seeing the gun and hearing its discharge, which caused them to think they had been shot at and that one of them had been wounded by the shooting, although in fact he had only been hit with the stock of the gun, the crime of the defendants, if any, was manslaughter, and not murder. (Dictum *per* Russell, J.)

7. TRIAL (§ II A—40)—CRIMINAL CASE—INSTRUCTIONS TO JURY—SLIGHTING OF PRISONER'S DEFENCE IN SUMMING UP.

It is a serious flaw in a criminal case if the directions to the jury are not as carefully put in regard to the prisoner's case as is the case of the prosecution. (Dictum *per* Ritchie, J.)

[*Rex* v. *Walton*, 1 Cr. App. R. 227, approved.]

Statement

THE defendants were indicted, tried and convicted for the murder of H. Kenneth Lea at Town Plot, in the county of Kings.

Roscoe, K.C., for the prisoners, at the conclusion of the trial asked for a reserved case, and in order to give an opportunity to consider the questions to be reserved, further time was allowed to present them formally for the consideration of the Court.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—After considering the points submitted, the Court declined to grant a reserved case on the ground that none of the points submitted raised any question of law respecting which there could be any reasonable doubt, and most of them raised no question of law unless it were some

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objection to the general character of the charge in commenting on the facts in evidence to the jury.

From this decision the present appeal was taken.

Leave to appeal was granted, MEAGHER and DRYSDALE, JJ., dissenting.

W. E. Roscoe, K.C., in support of application:—Misstatement of the facts in the charge to the jury is ground for setting aside the verdict and granting a new trial: *Hawkins* v. *Snow*, 29 N.S.R. 444; *Taylor* v. *Ashton*, 11 M. & W. 401, 417; *Solarte* v. *Melville*, 7 B. & C. 435; *Smith* v. *Dart*, 14 Q.B.D. 105, 108; *Rex* v. *DeMarco*, 17 Can. Cr. Cas. 497; *Bridges* v. *Directors of The North London R. Co.*, 7 E. & I. App. 213, 234; *Commonwealth* v. *Poisson*, 157 Mass. 510; *Cunningham* v. *People*, 195 Ill. 550, 567. If the Judge's charge did not amount to misdirection, it was at least undue advocacy in favour of the Crown: *Hurdman* v. *Putman*, Cameron's Sup. Ct. 115; *Linn* v. *Commonwealth*, 96 Pa. 286. The facts were not put before the jury that were pertinent to the case of the accused: *Dupuis* v. *Chicago & N.W. R. Co.*, 115 Ill. 97; *Rex* v. *Nicholls*, 1 Cr. App. R. 167.

Inferences should not be drawn unless there is some substantial theory upon which to base them. They cannot be drawn from circumstantial evidence: *U.S. Fidelity Co.* v. *Des Moines Bank*, 145 Fed. Rep. 273, 279; *Ruppert* v. *Brooklyn Heights R. Co.*, 145 N.Y. 90; *Dunn* v. *State*, 106 Ind. 697; *Manning* v. *Insurance Co.*, 100 U.S. 693; *People* v. *Van Zile*, 143 N.Y. 368.

The jury should not be directed to return a verdict of murder or manslaughter according as they find the facts.

Mere trespass upon a person's property is not an excuse for the use of a deadly weapon: *R.* v. *Sullivan*, Carr. & Marsh. 209; *Wild's Case*, 1 Lewin 214; *Roberts* v. *State*, 55 Am. Dec. 97, 101; *State* v. *Morgan*, 38 Am. Dec. 714.

The burden is on the Crown of proving that the death of Lea was caused sooner than it otherwise would have been, had the kicking by the prisoners not taken place. This proof is wanting. Evidence of experts as to what may happen in the future should not be admitted as conclusive when it is merely speculative: *Briggs* v. *N. Y. Central and Hudson R. R. Co.*, 177 N.Y. 59; *Atkins* v. *Manhattan R. Co.*, 57 Hun 102; *Johnson* v. *Manhattan R. Co.*, 52 Hun 111; Wharton on Criminal Evidence (ed. 1912), 620.

The burden of proving the proximate cause of death is on the Crown: *Commonwealth* v. *Costley*, 118 Mass. 1; *R.* v. *Longbotham*, 3 Cox C.C. 439; *Miller* v. *State*, 37 Ind. 432-439; *R.* v. *Price*, 8 Cox C.C. 96; *R.* v. *McIntyre*, 2 Cox C.C. 379; *Epps* v. *State*, 102 Ind. 539; *Commonwealth* v. *Hackett*, 2 Allen 136, 141. Subsequent acts must be the efficient cause of death: *John-*

son's Case, 2 Lewin 164; *R.* v. *Martin*, 5 C. & P. 128; *Cunningham* v. *People*, 195 Ill. 550, 572; *R.* v. *Martin*, 11 Cox C.C. 136; *R.* v. *Pym*, 1 Cox C.C. 339. The Criminal Code, secs. 256, 258, was wrongly interpreted to the jury. As to the grounds upon which inferences may be drawn: *Hazel* v. *People's Pass. R. Co.*, 132 Pa. 96, 101; *Taylor* v. *Yonkers*, 105 N.Y. 202, 209; *Scales* v. *Manhattan R. Co.*, 101 N.Y. 661; *Leonard* v. *Miami Min. Co.*, 148 Fed. Rep. 827; *Whitehouse* v. *Bolster*, 95 Maine 458; *Montreal Rolling Mills* v. *Corcoran*, 26 Can. S.C.C. 595, 600; *Wakelin* v. *L. & S. W. R. Co.*, 12 App. Cas. 41 at p. 45.

It is not sufficient to say that it was the unlawful act of the accused which caused deceased to handle the gun in the way he did. There must have been something in the way of necessity or compulsion or well-grounded apprehension: *R.* v. *Donovan*, 4 Cox C.C. 399; *R.* v. *Pitts*, Carr. & Marsh. 284; *R.* v. *Hickman*, 5 C. & P. 151; *R.* v. *Evans*, 1 Russell on Crimes 666.

The direction as to Lea having died as the result of the original injuries was calculated to mislead. Nothing was left to the jury. If the prisoners did not go to Lea with the intention of doing him bodily injury likely to cause death, but with the intention merely to annoy him, that is not malice which would make the offence murder within the Code, secs. 259, 260.

The jury were misdirected as to "shock." The preponderance of the medical evidence was to the effect that the wound was one that would have been mortal in any case. The facts should have been put to the jury and it should have been left to them to draw a deduction.

The comment on the fact that formerly prisoners were not permitted to give evidence, was unfair to the prisoners. The reference to former convictions and character as affecting their evidence was unfair. The criterion of the value of a man's evidence is the probability of his speaking the truth, and this is not affected by a conviction for the non-support of his wife or for an assault committed while drunk.

The evidence shewed that the deceased had not the symptoms indicating shock. Evidence was improperly received as to the effect of kicking in producing shock.

The jury should have been asked whether the prisoners knew or were likely to have known the consequences of their acts. The law was not stated to them: Code, sec. 260.

There was no sufficient instruction in view of the intoxicated condition of the prisoners as shewn by the evidence. What the deceased did in striking with the gun is an element that should be considered in dealing with drunken men: *People* v. *Rogers*, 72 Am. Dec. 484; *R.* v. *Thomas*, 7 C. & P. 817, 820; *R.* v. *Savage*, 76 J.P. 32.

The charge introduced irrelevant matters, such as blackening

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the good name of the province, and was calculated to inflame the minds of the jury against the prisoners.

Misdirection and non-direction are one and the same in criminal cases: *R.* v. *Gibson*, 18 Q.B.D. 537; *R.* v. *Brooks*, 11 O.L.R. 525; *R.* v. *Farrell*, 20 O.L.R. 182, 187; *R.* v. *Blythe*, 15 Can. Cr. Cas. 224; *R.* v. *Theriault*, 2 Can. Cr. Cas. 444; *Prudential Ins. Co.* v. *Edmunds*, 2 A.C. 507; *Hawkins* v. *Snow*, 29 N.S.R. 444; *Bisbing* v. *Third National Bank*, 93 Pa. 79.

H. Wickwire, K.C., and *S. Jenks*, K.C., Deputy Attorney-General, *contra*:—The evidence shews ill-feeling and threats on the part of the prisoners towards deceased. There is evidence from which an inference can be drawn of an assault upon Lea before the discharge of the gun, such as the finding of a hole in the door, which was not there before, and a bottle inside.

There is no evidence that the prisoners were too drunk to know what they were doing. There is an inference that they were not telling the truth from their denial that they kicked Mrs. Lea, and their failure to make such denial when they were tried for the assault committed upon her. The effect of the evidence is to shew that Lea died from shock. No conviction will be set aside or a new trial ordered simply because some evidence has been improperly admitted or because something not according to law was done on the trial, unless some material miscarriage of justice has resulted: (1907) L. R. Statutes 101, sec. 4; *Allen* v. *Rex*, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331.

The rule for granting a new trial where there has been misdirection, although there may have been sufficient evidence to warrant the jury in convicting, is not the same as where evidence has been improperly admitted, thus usurping the functions of the jury.

Unfair summing up is not a sufficient ground for granting a new trial: *Hepworth's Case*, 4 Cr. App. R. 128; *Beeby's Case*, 6 Cr. App. R. 138; *Cohen's Case*, 2 Cr. App. R. 197.

The question is not whether the jury might, but whether they would have given a different verdict: *Donoghue's Case*, 3 Cr. App. R. 187; *Edward Hay's Case*, 2 Cr. App. R. 70; *Smith's Case*, 2 Cr. App. R. 214.

If issues in substance are put to the jury in the summing up the omission of the defence is no ground for a new trial: *Bradshaw's Case*, 4 Cr. App. R. 280.

The question is, Did the error influence the jury? *Stoddart's Case*, 2 Cr. App. R. 217, 245; *Norton's Case*, 5 Cr. App. R. 65, 76; *Atherton's Case*, 5 Cr. App. R. 233; *R.* v. *Swyryda*, 15 Can. Cr. Cas. 138; *R.* v. *Collins*, 12 Can. Cr. Cas. 402; *R.* v. *Lew*, 1 D.L.R. 99; *R.* v. *Higgins*, 36 N.B.R. 18; *R.* v. *Craig*, 7 U.C.C.P. 239; *R.* v. *Sylvester*, 1 D.L.R. 186, 45 N.S.R. 525, and on appeal in the Supreme Court of Canada (not yet reported); *R.* v. *Michaud*, 17 Can. Cr. Cas. 86; *R.* v. *Paul*, 18 Can. Cr. Cas. 219.

The accidental discharge of the gun was the result of the assault committed by the accused: *Fenton's Case*, 2 Lewin 179; *Curley's Case*, 2 Cr. App. R. 109.

As to causation, Wharton on Homicide, sec. 22; *Adams* v. *The People*, 50 Am. Reps. 617; Bishop's Criminal Law, vol. 2, 7th ed., sec. 658; Code, sec. 61; *Pockett* v. *Pool*, 11 Man. L.R. 275.

The defence was properly put as regards every matter in favour of the accused. As to the definition of murder: Taschereau's Crim. Code 207. Questions that could not be put to an expert witness a year ago may be permitted to-day through the advance in scientific knowledge. There is no such thing as legal relevancy in English law.

Evidence of rough treatment and abuse of deceased was properly received. There is no evidence that death was accelerated by removal to Halifax, that will not apply to the acceleration of the death by kicking. There is evidence that the death of deceased was accelerated by his treatment by accused subsequent to the gunshot wound.

Roscoe, K.C., in reply.

Graham, E.J.

GRAHAM, E.J.:—The three defendants have been convicted of the murder at Town Plot, in King's County, of H. Kenneth Lea.

Misdirection mainly is complained of. There was a refusal to reserve or state a case and there is an appeal.

It is difficult to discuss the question of misdirection without referring to the provisions of the Criminal Code applicable to homicide, murder and manslaughter.

By sec. 252

> Homicide is culpable when it consists in the killing of any person either by an unlawful act or by an omission without lawful excuse to perform or observe any legal duty, or by both combined; or by causing a person by threats or fear of violence (or by deception) to do an act which causes that person's death, or by wilfully threatening a child or sick person.

Sec. 259. Culpable homicide is murder

(*a*) If the offender means to cause the death of the person killed.

(*b*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death and is reckless whether death ensues or not.

Sec. 260 has an application to this case, but exists in lieu of the old formula as to murder by killing without intent in the course of committing a felony, but now differing materially from that formula.

These two sections Crankshaw (page 279) has condensed as follows:—

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The effect of the above sections is to divide murder into two classes. One class includes cases in which the offender means either to cause death or to cause bodily injury to his knowledge likely to result in death.

And the other class includes cases in which in order to facilitate the commission of any of the offences specified in sec. 260, the offender, whether meaning or not meaning to cause death, and whether knowing or not knowing that death is likely to ensue, inflicts (*a*) grievous bodily injury upon, (*b*) administers drugs to, or (*c*) stops by any means the breath of anyone and thereby causes death.

262. Culpable homicide not amounting to murder is manslaughter.

The deceased died within two days after the casualty from shock produced by a gunshot wound in the groin, plus, according to the theory of the Crown, bodily injuries alleged to have been committed by the defendants after the discharge of the gun and the shot wound had taken place.

I will refer to these more specifically afterwards.

Mrs. Lea says (I quote nearly all of her examination-in-chief):—

Q. Did you see these people? A. Yes, they were on the lawn.

Q. What were they doing? A. Dancing and singing.

Q. Were they within the lawn shewn on G/2? A. Yes, they were.

Q. What were they doing? A. Singing, dancing, swearing, and making a great noise.

Q. What did you do? A. After I saw one of them come near the house I went to fetch my husband.

Q. Which one was that? A. Harry.

Q. Did you find your husband? A. I found him in the lane behind the barn.

Q. What did he do? A. He came with me to the house.

Q. What did he do then? A. He stayed in the house for some minutes.

Q. During this time what was going on outside? A. Still the same noise.

Q. Then what did Mr. Lea do? A. He went out and asked them to go away.

Q. Did you see him go out? A. Yes.

Q. Did you hear what he said? A. Yes, I heard him ask them to go.

Q. What did they say? A. They said they were as good as he was and that they were not on his land.

Q. Where were they then, having regard to the photograph? A. They were at the point marked X on G/2.

Q. What did Mr. Lea do then? A. He came back into the house.

Q. Did you see the prisoners after he came back? A. Yes, they were pretty much in the same place.

Q. How long did Mr. Lea remain in the house? A. Five or ten minutes, perhaps.

Q. Then what did he do? A. He went out again and ordered them to go off.

Q. Did you see him go out? A. Yes.

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Q. Did you hear what he said? A. Yes.

Q. Tell us as near as possible what he said? A. I think he said, "You fellows must be off."

Q. What did they do? A. They swore at him.

Q. Where were they then? A. They were nearer the house.

Q. What did Mr. Lea do then? A. He came back into the house.

Q. How long was he there? A. Some minutes.

Q. What did he do then? A. He took his gun and loaded it.

Q. What sort of a gun was it? A. A double-barreled one; one barrel for shot and one for ball.

Q. What did he put in it? A. He put in a cartridge.

Q. Did you see him? A. Yes.

Q. What did he do then? A. He went out again.

Q. Where did he go; through what door? A. Through the front door.

Q. The front door shewn on G/2? A. Yes, that is the door.

Q. Where from there did he go? A. To the head of the steps.

Q. You saw him? A. Yes.

Q. Did you see the prisoners then? A. Yes, I did.

Q. Where were you? A. By the dining-room door.

Q. That is the door on the east of G/2? A. Yes.

Q. Where were the prisoners then? A. They were about three yards from the steps.

Q. What did you see or hear then? A. I heard Mr. Lea say, "I will give you one more chance to go or I will fire."

Q. What did they say? A. Fred said, "Fire away, I am not afraid to die."

Q. Had they anything on the lawn? A. They had a bottle.

Q. What were they doing with it? A. They were drinking out of it.

Q. What occurred after you heard Fred say "Fire away"? A. I heard a rush of feet and loud talking.

Q. What is there at the bottom of these steps? A. There is a plank walk.

Q. Where did you hear the rush of feet? A. On the wood.

Q. Anything more? A. Then I heard the report of the gun.

Q. How many reports did you hear? A. Only the one.

Q. What did you do? A. I rushed out on the verandah through the dining-room door.

Q. Where was Mr. Lea? A. On his back on the verandah.

Q. Where were the Graves? A. They were all round him kicking him.

Q. What else occurred there? A. They tried to pull him up and let him fall back. Then they dragged him to the verandah railing.

Q. Look at G/1 and tell me which railing it was? A. That is the one at the point marked X.

Q. Who dragged him to the railing? A. I think all three.

Q. What did you do? A. I tried to defend him.

Q. What occurred? A. They tried to stop me.

Q. Who? A. I cannot say who; one or more of them.

Q. What did they do? A. They pulled me and kicked me and tried to pull me away; they tried to put him over the rail.

Q. Where was his head? A. It was outside the railing.

Q. What occurred after that? A. I don't know anything else until I saw him on the grass.

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Q. Did you see Florence Wright and Edith Horne? A. I saw Florence. Edith was there; I can't say when.

Q. What was the next that you know of Mr. Lea? A. He was lying on the grass.

Q. Look at G/1 and tell us where he was? A. He was about where the plank is on G/1 south of the house.

Q. Where were the prisoners? A. They were all round him.

Q. What were they doing? A. They were still kicking him.

Q. What did you do? A. I knelt by my husband and tried to stop the bleeding.

Q. Did they do anything more? A. One of them kicked me and tried to pull me away.

Q. Were they saying anything on any of these occasions? A. They were still making a noise, a confused shouting and swearing.

Q. When you first went out did you hear Mr. Lea say anything? A. Yes, he said, "I clubbed the gun; I clubbed the gun."

Q. When you were on the ground, trying to staunch the blood, they kicked you again? (Objection to repeating evidence.)

The Court here adjourned until 2 p.m.

On resuming:—

Q. You had a maid at the house? A. Yes.

Q. What was her name? A. Florence Wright.

Q. Was she there at this time? A. Yes, she had just got back.

Q. Did you see her shortly after you went out on the verandah? A. Yes.

Q. What did she do? A. She went to the neighbours for help.

Q. Did anyone come? A. Yes, Mr. Tobin and Mr. Starr.

Q. Who came first? A. Mr. William Tobin.

Q. What Mr. Starr came next? A. Mr. Richard Starr.

Q. Did anyone else arrive after that? A. Yes, old Mr. Tobin—Mr. John Tobin and Mr. Merritt.

Q. What became of Mr. Lea after they came? A. He was carried into the house.

Q. Through what door was he taken in? A. The front door.

Q. That is the door facing east? A. Yes.

Q. To what part of the house was he taken? A. To the parlour.

Q. Who carried him in? A. Richard Starr and Fred Graves.

Q. Did you see the prisoners in the house after Mr. Lea was taken in? A. Yes, I saw them all.

Q. Did anything occur there as far as they were concerned? A. They would not go out when they were asked to.

Q. From the time you came out the front door at first until Mr. Lea was removed from where he lay on the grass, did you hear the prisoners say anything? A. Yes, I heard Harry Graves say that he had had a lot against Mr. Lea for a long time, that he had got him now, and would have him straightened out before to-night.

Q. What doctor first arrived? A. Dr. Morse, from Port Williams.

Q. Do you know how he came? A. No.

Q. What became of the prisoners after they went out of the house? A. They were in the yard making a noise.

Q. What doing? A. Shouting and generally making a noise.

Q. Did Mr. Lea say anything about the occurrence shortly after he was taken into the house? About how this occurred?

(*Mr. Roscoe*, K.C., objects to evidence unless made in view of approaching death.)

Q. (By *Mr. Roscoe*) How long after the shooting or the report of the gun did this intended conversation take place? A. I cannot tell you how long it was after the report of the gun, but I can tell how long it was after he was taken into the house. I think it was between five and ten minutes after he was taken into the house. It was as soon as the men had gone out.

Q. What men? A. The Graves.

Mr. Roscoe, K.C.:—What the deceased said at the time the thing was going on is part of the thing itself and is admissible, but a narration after the thing occurred is not part of the *res gestae*.

Mr. Wickwire, K.C.:—I tender the evidence as part of the *res gestae*: *Gilbert* v. *The King*, 38 Can. S.C.R. 288.

THE COURT:—Do you press the question?

Mr. Wickwire, K.C.:—I do not consider it of sufficient importance to take any risk.

THE COURT:—My impression is that it is a continuous matter, and that being my impression, I will allow you to ask the question if you run the risk.

Mr. Wickwire:—I will not press it.

Q. Did you see them again? A. I saw Fred.

Q. Where? A. He tried to get in the front door.

Q. What did he do? A. He rang the bell. The door was locked.

Q. Were there other medical men there? A. Yes, Dr. Moore of Wolfville, and later Dr. Moore of Kentville.

Q. Did you see anything on the verandah? A. I saw two things. I saw the gun broken and I saw a bottle lying there.

Q. What sort of a door was on the dining-room? A. A wire screen.

Q. In what condition was it when you came out? A. It had a hole in it.

Q. Before that how was it? A. It was intact—there was no hole.

Q. What else did you notice then? A. Fred Graves was streaming with blood. I did not see Mr. Lea bleeding then.

Q. Did you see any blood subsequently? A. Later in the evening, yes.

Q. Looking at G/1, what is on the south side of the verandah? A. A flower bed.

Q. How is it kept up? A. There is a piece of wood holding the bed and stakes in that.

Q. On G/1 you indicated by an X where you saw Mr. Lea on the rail; directly under that was there a stake? A. Yes, there was one.

Q. Did you examine the board there and the stake?

(*Mr. Roscoe*, K.C., objects to leading.)

Q. I asked if you examined that board and stake? A. I did that evening.

Q. What was the result of your examination? A. There were blood stains on it.

Q. Who were in your house that night? A. Mr. and Mrs. Harry Brown, Richard Brown, and Dr. Moore of Wolfville.

Q. What was done the next morning? A. They took my husband to Halifax by the early train.

Q. Where to? A. To the infirmary.

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Q. How long did he live? A. Twenty-four hours from the time we took him to Halifax.

Q. What have you to say of his previous physical condition? A. He was a man in excellent health.

Q. Previous to the time you have referred to, had you seen the prisoners the Sunday before? A. No.

Cross-examined:—Q. I said there was a discussion about their being on his property and you said no? A. I misunderstood you.

Q. There was such a discussion? A. Yes.

Q. Was that the first or the second time he went out? A. I think it was the first time.

Q. How long after that was it before Mr. Lea went out with his gun? After the discussion about their being on his land? A. It may have been twenty minutes or a quarter of an hour.

Q. Where were you then, when he went out with the gun? A. In the dining-room.

Q. Where was the gun kept? A. In the hall.

Q. Could you see the Graves when he went out with the gun? A. Yes.

Q. From where you were sitting in the dining-room? A. From where I stood in the dining-room.

Q. Did you remain where you were until you heard the report of the gun? A. Yes.

Q. How far was that, where you were standing, from the east verandah? A. I was close to the door leading to the east verandah.

Q. Were you looking out? A. Yes.

Q. The next you saw of Mr. Lea, after he went out with the gun, he was lying on the verandah? A. I saw him on the verandah with the gun.

Q. Where were you when you screamed? A. I was on the verandah.

Q. Did you call for any person? A. I called for Florence Wright.

Q. Harry said to Lea, You have killed Fred? A. Yes.

. . . . . .

Edith Horne, who was in the house visiting the maid, as to the bottle and the hole in the door, says she went on the verandah when she heard the report of the gun.

. . . . . .

Q. Which way did you go out? A. Through the front door.

Q. Did you notice the door? A. Yes.

Q. What about it? A. There was a hole in it.

Q. Was there anything there? A. There was a glass bottle.

Q. Where? A. Inside the dining-room door.

Q. Was it there before that? A. I don't think.

Q. What did you see after you got out? A. I saw Mrs. Lea and Fred Graves on the verandah.

Florence Wright, the maid, as to the bottle and the hole in the door, says:—

Q. What sort of a door goes on the verandah from the dining-room? A. A wire screen door.

Q. In what condition was it before this? A. It was quite intact.

Q. Were there any holes in it? A. No.

Q. Did you notice it then? A. Yes.

Q. In what condition was it? A. There was a great hole in it.

Q. Did you see anything else? A. I saw a bottle inside the door.
Q. Having regard to the hole in the door, where was the bottle? A. It was just inside.
Q. What condition were the men in? A. They were very drunk.
Q. All of them? A. Yes.

The hole in the screen door spoken of by the witnesses was caused, according to the theory of the Crown, by the throwing of a bottle, out of which the defendants had been drinking cider in front of the house. It is not shewn at what time the hole was caused by the bottle, if it was caused in that way. It may have been after the discharge of the gun or before; that was all for the jury. In the summing up the incident is sometimes referred to as if the bottle had been thrown at Lea and sometimes as if it had been used to strike at him with. But there is no evidence other than the existence of the hole in the screen door and a bottle on the verandah to support the theory of an assault before the discharge of the gun, and there was no battery or it would be unlikely that the bottle caused the hole.

In the summing up none of these provisions of the Code which I have quoted, or their effect, were mentioned or explained to the jury. Some of the other provisions were read. Instead the old definition for the distinction between murder and manslaughter were used. Thus:—

> The crime of murder is defined by our best legal authorities as the killing of a human being with malice aforethought express or implied. The crime of manslaughter is defined as the unlawful killing of another without malice aforethought either express or implied. You will observe that the distinguishing feature between the two crimes is the existence or non-existence of malice on the part of the accused towards his victim.
>
> I will now call your attention to another rule of law which is of importance in connection with this case. It is that where one is killed by another in doing some unlawful act not amounting to felony or naturally tending to cause death or great bodily harm, without malice, or unintentionally, it is manslaughter.
>
> The prisoners were unlawfully on Mr. Lea's property and were creating a disturbance there by their disorderly conduct, and that is in itself an offence in law. Although they could not have contemplated that the gun would be discharged as the result of their action, yet as in the result it did they would be responsible for it and it would constitute the crime of manslaughter, provided there was no malice on their part in doing what they did. On the other hand, if a party while engaged in the commission of a felony kills another, it becomes murder and not manslaughter. What is meant by that is this: Suppose these men had come there at night for the purpose of committing burglary, and in the course of the commission of that act Mr. Lea had been killed, that would be murder because they then would have been there committing a felony. If a man breaks into your house at night and you are killed in the defence of your house, whether by the discharge of a gun in your own hands or not, the burglars are respon-

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sible as for murder, because they are there at the time engaged in the commission of a felony. In the case of a mere trespass, as this might be, it would amount to manslaughter. Now, if one commits an assault upon another not likely to cause death, but death ensues, it is manslaughter. I hope that I am impressing the law upon you, because this case is a difficult one. It is difficult for the Judge to make clear to the jury these nice distinctions, and perhaps, for that reason, I had better repeat what I have said. If a man goes on the property of another as a mere trespasser and in the course of such trespass commits an assault or anything of that kind upon the owner of the property and death results, although he may have had no malice, if he is there unlawfully he is guilty of manslaughter. If, on the other hand, he went there with some wicked purpose, or with the intention of committing a felony, it would be murder. That is the distinction that the law draws between the two offences. The rule that will reduce the crime of killing another from murder to manslaughter is the absence of malice or ill-feeling towards the deceased. If there was no malice or ill-will the crime would be manslaughter. If the evidence satisfies you that the accused, although not intending to kill the deceased, in what they did, were actuated by malice and ill-will, and that his death resulted as a consequence of their unlawful conduct, it will be murder and not manslaughter.

I am not now urging an objection to the use of the old definitions in a summing up if it can be carried out successfully.

The common law is pretty much the same as the Code in this part.

But the formulas of the Code are just the formulas which have been used in England by the Judges, although they have no Code. The word "malice" had to be avoided because of its meaning. This is what happened here. The word "malice" was defined to the jury in its popular sense of ill-will, spite, or grudge; in fact, the words "malice or ill-will" is a common expression throughout, while the citations of or references to the common law of course contained that word in its legal sense in connection with homicide.

I quote from the instruction in the summing up:—

The jury here retired, but later requested directions on the subject of malice. Having returned:—

THE COURT:—I thought I had defined that fully. "Malice" is where a man has ill-will towards another—any kind of wicked feeling towards his neighbour. If you come to the conclusion that what these men did resulted from hatred or dislike, or ill-will, that would make it murder. If there is evidence to satisfy you that these men were influenced by spite or ill-will, that with the other facts would constitute murder. But you must not find them guilty of murder unless you are satisfied from the evidence that they had a grudge, or spite or ill-will against Mr. Lea.

A Juryman asked for further directions as to premeditated murder and malice.

THE COURT:—Premeditated murder would be an agreement to commit murder before they went there. There is not the slightest evidence

of that. But if the grudge was there and they went there without any premeditated intention, if their acts were induced through ill-feeling, that would constitute murder. If you are satisfied that what they did was not done through ill-will, that would be manslaughter.

A Juryman:—Then we do not need premeditation; all we need is malice?

THE COURT:—All you need is malice.

A Juryman asked for further instructions as to the distinction between murder and manslaughter.

THE COURT:—It is enough if they did the acts with malicious intent. If in carrying out the acts that they did after they got there there was malice, that would be malice sufficient to constitute murder. There is no evidence of premeditation here. I think that when they went there they had no intention of doing anything of the kind, but it arose from what occurred afterwards.

The jury then retired.

Roscoe, K.C.:—I think your Lordship should say to the jury that if the final acts causing the death of Mr. Lea, so far as defendants were concerned, were committed in the heat of provocation by acts of Mr. Lea, the killing of Mr. Lea would not be murder.

THE COURT:—I explained to them about provocation. However, I will recall them.

The jury having been recalled:—

THE COURT:—After you were here, Mr. Roscoe called my attention to something that he would like me to say to you in reference to provocation. I think I went fully into that question, as to when provocation would reduce the crime from murder to manslaughter. However, Mr. Roscoe wants me to draw your attention to the fact that if you think that at the time when they assaulted Mr. Lea there was such provocation on the part of Mr. Lea to them as took away their judgment, then it would reduce the crime from murder to manslaughter. That is correct. But if after they got there they were carrying out a grudge, if they had it, it constitutes murder.

A Juryman:—If they had malice it is as bad as if they had premeditation?

THE COURT:—Yes.

A Juryman:—Would they have to have that malice at the time he was shot?

THE COURT:—Yes, they would have to have the malice at the time. If they had these malicious feelings or this antipathy towards the deceased, it must have existed at the time they did what caused his death, even though they had no intention of doing it before they went there. You must gather the existence or non-existence of malice from what they did at the time. You must take into consideration the threats made beforehand, although I do not know what value you will put on them, to show bad feeling towards Mr. Lea.

A Juryman:—Is it necessary to prove that just before the crime was committed—a few minutes before—they had malice?

THE COURT:—What I have told you is that if there was malice you can gather it from the facts of the whole transaction. If you think from the facts proved that they had this ill-feeling during the time that they were doing the injuries, then it is malice.

The jury then retired.

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The meaning of "malice aforethought" in its legal sense may be learned from the report of the eminent commissioners who prepared the Draft Code of England, from which the Canadian Criminal Code is copied, viz., Lord Blackburn, and Barry, Lush, and Fitzjames Stephen, JJ.

Page 23:—"The present law may, we think, be stated with sufficient exactness for our present purpose somewhat as follows: Murder is culpable homicide by any act done with malice aforethought. Malice aforethought is a common name for all the following states of mind:—

"(*a*) An intent preceding the act to kill or to do serious bodily injury to the person killed, or to any other person.

"(*b*) Knowledge that the act done is likely to produce such consequences, whether coupled with an intention to produce them or not.

"(*c*) An intent to commit any felony.

"(*d*) An intent to resist an officer of justice in the execution of his duty."

At page 15 of their report they said: "We have avoided the use of the word 'malice' throughout the Draft Code, because there is a considerable difference between its popular and its legal meaning. For example, the expression 'malice aforethought' in reference to murder has received judicial interpretation which makes its use positively misleading."

In this case the use of the word "malice" not only led to what I think is confusion, but in the circumstances here was prejudicial to the prisoners, as I shall presently shew.

Then the word "felony" is a dangerous word to use as it was used unless it is explained to a jury, and in this case its introduction was unnecessary because the acts were not committed in the course of committing a felony, and sec. 260 of the Code, which specifies those crimes in lieu of felony did not apply at all to the case.

But to associate it thus:—

> If, on the other hand, he went there with some wicked purpose or with the intention of committing a felony, it would be murder,

is very misleading to the lay mind.

I shall deal with the subject of the gunshot wound first.

It was caused by the deceased striking one of the defendants, Fred Graves, a severe blow on the head with a gun which the deceased had clubbed and which was loaded and cocked, the concussion causing the gun to be discharged into his own body. The gun was broken in two pieces by the blow. Mrs. Lea says: "Fred Graves was streaming with blood."

In the ordinary way of speaking one would say that the gunshot wound was caused by the discharge of a gun produced, controlled and discharged by the deceased, a free agent, rather than by the defendants, one of them supplying only the head

against which the concussion was produced; that the voluntary act of the deceased supervened upon a condition, not a cause.

But it is contended in effect that the defendants caused the deceased to strike Fred Graves on the head with the gun, or at least caused the discharge of the gun.

The only provision of the Code at all applicable to such a case is the last part of sec. 252, already quoted, namely, causing a person by threats or fear of violence to do an act which caused that person's death. That provision covers an indirect killing.

In respect to this branch of the case, the learned Chief Justice who tried the cause said, in part, to the jury. The passage follows the last extract which I have quoted:—

> I will next draw your attention to the law bearing upon one of the most important features of the case. There is a common idea, or I have heard it said, that because Mr. Lea held in his own hand the gun the discharge of which inflicted the wound which proximately contributed to his death, the accused are not responsible for that part of the affray. I have heard that—and probably you have—that they did not shoot him. It would be a sorry business if that were the law. It would be absurd if such were the law. They are responsible if they caused Mr. Lea to do the act which resulted in the discharge of the gun as much as if they seized the gun and discharged it into him. Did they rush at him with the intention of assaulting him, and did Mr. Lea then use the gun? If so they are as responsible as if they seized the gun and discharged it into him.
>
> "A person may be responsible for the death of another either as murder or manslaughter, provided it was caused by his unlawful act resulting in corporal injury."
>
> The unlawful act there, as I have pointed out, would be the men assembling in a disorderly way and trespassing on Mr. Lea's property and refusing to go away when asked. They would not be responsible unless their unlawful act contributed to his death, but the unlawful act need not be the sole cause of his death. It is not necessary that the shooting alone should be the cause of his death, but if it resulted in his death the prisoners are responsible for either murder or manslaughter according as you find the circumstances. In a legal work of great authority it is laid down as follows:—
>
> "If the direct cause of his death is an act of the deceased himself, reasonably due to the accused's unlawful conduct, as in the case where a person by actual assault or threat of violence causes another to do an act resulting in death, then the accused is responsible."
>
> Was Mr. Lea's act in taking hold of the barrel of the gun due to the attempt of the accused to assault him? That is for you under the evidence. The best way of conveying to you the meaning of this rule is to apply it to what occurred here. If it was the unlawful act and conduct of the deceased which caused Mr. Lea to handle the gun in the way he did, taking the barrel in his hands and using the stock to defend himself against their assault, they are responsible for the consequences. That that is the law is clear as day. There are two or three cases in the English reports which will illustrate the point, and I have taken the precaution to get every authority which I thought

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would illustrate the point or help you to reach a conclusion. In one of these cases the deceased was assaulted and forced to jump into a river, whereby he was drowned. There the accused was held responsible for his death. Although the accused did not force the deceased into the river, yet his unlawful act caused him to jump into the river, and so he was drowned. Here the unlawful act of these parties in assaulting Mr. Lea, if you find that they did so, caused him to use the gun in the way he did, and the gun going off caused his death.

I will read you another case from the English reports, and you must remember to the English authorities we look. In this case the deceased was riding on horseback when he was assaulted by the accused. The deceased put spurs to his horse in order to escape, which caused the horse to wince, and he threw the deceased and killed him. The prisoner in that case was held responsible for the death of the deceased.

In another case threats of violence against his wife caused her to get out of a window in order to escape, when she fell to the ground and was killed. In that case the accused was held responsible for the death of his wife. He did not make her get out of the window or cause her to fall, but he did an unlawful act which resulted in her jumping out of the window and being killed.

Now I should think with these illustrations and what I have said on this part of the case you should be clear in your own minds as to what the law is.

And in dealing with another matter he said: "What I mean is that although one of them only may have struck a blow, or caused the gun to go off, they are one and all responsible, etc."

The three cases mentioned in the summing up are: *R.* v. *Pitts*, Carr & Marsh. 284 (jumping into the river); *R.* v. *Evans*, 1 Russell Cr. Law 666 (jumping out of the window), and *R.* v. *Hickman*, 5 C. & P. 151 (thrown from a horse on fleeing, having been assaulted and struck with a stick). They have found a place in the provision of the Code just mentioned and are all founded upon the condition of a deceased being put in a state of fear by the violence of the defendant, namely, that the deceased, in doing the act which caused his death, was moved by a well-grounded apprehension of immediate violence. Under such circumstances the theory is that the act of the deceased cannot be regarded as voluntary, but is merely the exercise of a choice between two evils, and so is directly dependent upon the act creating the condition which required the election. Although a defendant's act was not the immediate cause of the homicide, and the act of the deceased was, yet the later intervening cause is neutralized because the preceding act took away the power of volition from the deceased.

In respect to the two quotations in this passage from vol. 21 Cyclopedia of Law and Procedure 694, 697, in the first one the writer of the article is not, as the context shews, dealing with the cause of a cause at all, but any direct cause.

In the second quotation the writer is dealing with the subject which is provided for in the provision of the Code just men-

tioned, and for it he cites in the note a note of the three English cases to which I have already referred and some American cases. But all of these, as far as I can gather, like the English cases, proceed on the ground of fear, causing in the one instance a person to jump from a railway train, or directly causing the person's death by forcing him to take a course directly tending to his death. With us the law is all in this provision of the Code. I prefer it and I think it is fairly easy to construe. There must, I should think, be a well-grounded fear and apprehension of immediate danger. The cases insisted on that. The expressions "causing" and "cause" mean, I think, "directly causing" or "cause," not remotely "causing" or "cause." I refer to *Reg.* v. *Tower*, 12 Cox C.C. 530; *Reg.* v. *Bennett*, 1 Bell C.C. 1.

I notice that the word "forcing" is used in respect to this class of cases in more than one text-book; also the word "compelling."

I think also that this provision as to causing a person through fear of violence was a necessary addition to sec. 252 and is not already included in the earlier part of the section.

In this summing up the question of a state of fear from violence was not put before the jury at all. The evidence, indeed, does not shew that kind of a case. It was put forward as law that if it was some unlawful act, as an assault on the part of a defendant which resulted in the deceased's act causing the gun to be discharged into his body, then the defendant would be responsible; that the intervening voluntary act of the deceased was not to be taken as the direct cause of his death, but the earlier act was the cause. Take this extract, for example:—

> Here the unlawful act of these parties in assaulting Mr. Lea, if you find that they did so, caused him to use the gun in the way he did and the gun going off caused his death.

I think with deference that without the element of fear called for by the provision of the Code, there is no sufficient causal connection.

If the attempt of the learned counsel for the Crown to establish an assault from the bottle and door matter was due to the desire to make the case fit the passage in 21 Cyc. 698, namely:—

> If the direct cause is an act of the deceased himself reasonably due to defendants' unlawful conduct as in the case where a person by actual assault or threat of violence causes another to do an act resulting in death.

I think the law fails as well as the facts.

The provision of the Code does not contain that expression either "unlawful conduct" or "actual assault." There must be produced a "fear of violence." Of course it may be produced by an assault. But unlawful conduct or assault without that is not there.

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We are not to have two laws on this subject, I suppose, the provision of the Code and the passage in the Cyclopedia. An actual assault, apart from fear of violence, may be good American law, but it is neither the English common law nor the Code law.

The learned counsel for the Crown sought to uphold this view, namely, that irrespective of the question of fear and of the provision quoted, there was in this case a chain of causation from the defendants' illegal act. For this he urged and seemed to require the fact of an assault. I suppose on the strength of the bottle and the door incident down to the shot wound. I do not agree. Whether it is to be regarded as caused by the final act voluntary on the part of the deceased or as an accidental discharge of the gun, any chain of causation was severed by that final act of the deceased.

In *Rex* v. *Waters*, 6 C. & P. 328, a charge of manslaughter, the first witness for the prosecution swore that the deceased's boat being alongside the schooner, the prisoner pushed it with his foot and the deceased stretched out over the bow of the boat to lay hold of a barge to prevent the boat from drifting away, and, losing his balance, fell over and was drowned. On that day the prisoner and the deceased had some dispute about paying for spirits, and, both being intoxicated, a good deal of rough joking had taken place between them.

Park, J., after consulting with Mr. Justice Patterson, said that his learned brother and himself were

> of opinion that if the case had rested on the evidence of the first witness it would not have amounted to a case of manslaughter.

Campbell, C.J., in *People* v. *Rockwell*, 39 Mich. 503, where there had been a conviction of manslaughter, said:—

> The death occurred during a dispute concerning the possession of a horse. Rockwell was shewn to have struck Wilber with his fist and knocked him down. It was not shewn directly how he was killed, but it appeared distinctly this blow did not kill him. The facts indicated either that Rockwell kicked him after he fell or else that he was killed by the horse trampling on him.

The jury came in and asked the Court to instruct them

> whether the respondent would be guilty if he knocked Wilber down and the horse jumped on him (Wilber) or kicked him and thus killed him.

The Judge reiterated what he had already instructed them, namely:—

> That if the blow was not justifiable and Wilber so fell that the horse jumped and struck Wilber and killed him with his feet or kicked him, respondent was guilty.

The Court reviewing the conviction said:—

> It is impossible to maintain such a charge without making everyone liable, not only for natural and probable consequences, but for all pos-

sible consequences and circumstances which immediately follow a wrongful act. There was no necessary connection between the act of respondent and the conduct of the horse, which he cannot be said from the record to have been responsible for.

And the prosecution was carried no further by direction of the Court. I also refer to *Reg.* v. *Ledger*, 2 F. & F. 857; *Kelly's Case*, 2 Lewin 193; *Thompson's Case*, 2 Lewin 194; and to Wharton on Homicide, 3rd ed., p. 30:—

> As a general principle we may hold that to create criminal responsibility for homicide, the death must have resulted from the malicious or negligent conduct of the defendant through the ordinary agency of physical laws, and must not have been caused by the interposition of an independent human will, not acting in concert with the defendant, or by extraordinary casualties.

I think that the contention of the learned counsel for the Crown carries responsibility for an illegal act too far. The boys in that part of the country who visit orchards by night for apples run great risks. The proprietor may produce a gun to frighten them away, and if it becomes discharged the discharge may kill them, but if with a boomerang or petard effect he is killed, and there has been any ill-will, howsoever old, they are apparently liable to be hanged for murder.

I do not believe that is in accordance with the law.

Surely, too, the jury should be asked whether the defendants, when they did the act, whatever it was, contemplated as reasonable and responsible men that death or grievous bodily harm was likely to result to the deceased.

And the learned Chief Justice himself had said in another part of his summing up:—

> Although they could not have contemplated that the gun would be discharged as the result of their action, yet as in the result it did they would be responsible for it and it would constitute the crime of manslaughter, provided there was no malice on their part in doing what they did.

(Of course the implication was that if there was malice then it was murder.)

There was no battery shewn or to be inferred before the shooting took place. The inference from the bottle and the hole in the screen door amounted to nothing unless that hole was shewn to have been produced before instead of after the discharge of the gun, when the other injuries were effected.

And there is nothing but a technical assault at most. And in the jury's mind the trespass to the land, the noise and profanity, owing to the summing up, would be considered as illegal acts.

This brings me to the law on the question of intent on this branch of the case.

Sec. 260, as I said, does not apply. Further, it cannot be

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successfully contended, I think, that they "meant to cause the death of the deceased." I think that was conceded.

The Crown is driven to this provision:—

> Culpable homicide is murder . . .
>
> (*b*) If the offender means to cause the person killed any bodily injury which is known to the offender to be likely to cause death and is reckless whether death ensues or not.

Now, even supposing there was a chain of causes and that the defendants were to be held responsible for a constructive killing, I think that in a case like this, when this shooting is the reverse of what would ordinarily result, and no doubt a great surprise to both parties, and the alleged assault if any was so remote, and a similar casualty so seldom happens, it is difficult to see in what way the defendants are brought within that provision as to intent. Their minds could not have gone along with an action which was so completely beyond their wills and was so unintended.

As to the effect of the misdirection upon the verdict, it is very clear that the jury by their questions evinced concern about one point only, namely, "malice or ill-feeling."

They seemed, in consequence of the summing up, to have taken it for granted that the defendants were responsible in law for the shooting.

I think they were also misled by not having placed before them the matter necessary to deal with the question of intent as defined in the provision (*b*) just quoted, instead of having their attention turned only to malice, an unfortunate word, used so many times and never occurring in these provisions.

With great deference, I think that the use of the word malice in the summing up was prejudicial. It may be more favourable to the prisoners in some cases to define it as ill-will or spite or grudge than to use the Code definition of intent, but I think in this case it was not. The jury asked for instructions as to malice.

Now in the legal sense of malice there was, in my opinion, on this branch of the case nothing worth submitting to a jury.

But in the popular sense of the word the Crown would have more of a case.

It had happened that one of the Graves had married a servant of Mrs. Lea's, and the maid had left her for the Graves without notice and both the deceased and she had warned their maids against the Graves, which fact, of course, had reached the Graves' ears.

Then there were two separate witnesses who detailed something which one of the Graves had said eight or nine months before the casualty and another something that another Graves had said seven or eight months before, each remark evincing a dislike of the deceased, and these things were no doubt con-

spicuously before the minds of the jury. And the jury thus had the way made easy. First, that in law the defendants were responsible for a killing. Then all the jury had to do was to add to that the ill-feeling above indicated and there would be a crime of murder.

The second branch of this case is founded upon the provision as to the acceleration of death, namely, section 256:—

> Everyone who by any act or omission causes the death of another, kills that person, although the effect of the bodily injury caused to such person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause.

And the evidence tends to shew a battery committed by the defendants or some of them after the discharge of the gun into the body of the deceased took place.

It consisted of kicking and, as it is alleged, putting him over the verandah railing, when he fell to the ground, and pressing their knees into him on the ground. No weapon was used. The doctor found four or five bruises and an injury probably from falling on the stake of the flower-bed. The defendants deny putting the deceased over the railing and say that he fell over. Mrs. Lea said that she knew of her husband being wounded about two minutes after she got to him on the verandah; also that she went on the verandah when she heard the discharge of the gun, p. 37.

It was on the verandah he told Mrs. Lea "I clubbed the gun" and afterwards, on the lawn, that he was bleeding to death.

Apparently the defendants or one of them, Fred, closed in towards the deceased when he produced the gun. The Crown contends that they all rushed towards him when he produced the gun and defendants contend that there was no closing in until the gun was discharged. In any case they would not likely know that the other barrel was not loaded.

As I have said Fred received a serious blow on the head and it was bleeding and they claim the blow knocked him down. At any rate the defendants claim that at first they thought it was Fred who was shot and that the deceased was knocked down by the recoil of the gun. Whether this is so or not the fact that they at first claimed that Lea had shot him was a circumstance that lends some probability to their version, because if false its falsity would appear then and there. But whether they thought he was shot or only had his head injured by the stock of the gun it was bleeding profusely and it seems to have attracted more attention at first than the wound of the unfortunate deceased. Mrs. Lea bound it up on the lawn and then or later told him to go to a doctor. At any rate, as I said, they closed in on the deceased and kicked his body and they did it apparently on account of the injury Fred had received.

Expert opinions of doctors were given tending to shew in effect that death was accelerated.

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Then if the terms of the Code had been used, 259 (*b*), the question would have been whether this bodily injury, succeeding the shooting, was known to the defendants to be likely to cause death and were they reckless whether death ensued or not.

Did they know of his condition when even his wife apparently did not know of it until afterwards on the lawn when he told her he was bleeding to death, although in fact he was not? And did they know, or should they contemplate what the expert doctors now say in their opinions that their acts would tend to increase shock and so on?

Assuming, as I have contended, that there was not responsibility for the gunshot wound, or whether there was or not, this part of the case required very careful submission to the jury. The question of the acceleration, that is the apportionment of what was due to the gunshot wound and what if any to the subsequent battery, the opinions of the doctors being largely speculative, and so on, were matters to be carefully weighed by the jury.

The following is a statement which conveys a decided opinion on the facts to the jury, and the last sentence might be taken for a direction in law:—

> It is known that shock, even in operations, will cause death, and there can be no doubt that all the doctors testified that Mr. Lea died as the result of the shock to his system resulting from what transpired at his home on that Sunday afternoon. Now, as I understand it, but for this brutal treatment, there was a fair chance of his recovery from the gunshot wound, but it is of little consequence whether he would or not. The unfortunate man died and it was the result of the conduct of the accused.

These injuries, the gunshot wound and the battery, should have been separated in case there was no responsibility for the former.

The use of the word malice in connection with this branch of the cast, and I have already mentioned it in connection with the other, was, I think, prejudicial to the prisoners. I have already quoted one passage at the outset, namely:—

> If the evidence satisfies you that the accused—although not intending to kill the deceased—in what they did were actuated by malice and ill-will in what they did, and that his death resulted as a consequence of their unlawful conduct, it will be murder and not manslaughter.

There are three other passages:—

> Now as I said before, you must judge their motives from their conduct, whether they were actuated by malice, spite and ill-will in this inhuman treatment of Mr. Lea. Does the evidence satisfy you that in acting and behaving there as they did they were gratifying an old grudge that they bore towards Mr. Lea? If you find that they were actuated by malice and ill-will in going there and behaving as they did, even though they did not intend to injure him, the crime is murder, but it depends entirely upon what you as honest men under the evidence

believe as to the facts, whether you should find the prisoners guilty of murder or the lesser crime of manslaughter. Was it revengeful feelings that led them to maul him as they did after he had received the gunshot wound? If so, they are guilty of murder.

Now, just a few words in conclusion. I have explained to you as fully as I could the difference between murder and manslaughter. I have told you that if you believe these men were actuated by ill-will or malice towards Mr. Lea, and did what has been detailed here, that would be murder, and that all of them should be found guilty. On the other hand, if you think that there was no such ill-feeling, that it was a mere fracas, without previous ill-feeling, then your verdict should be manslaughter. I have called your attention to the various witnesses who have come here and testified to different expressions of ill-will towards Mr. Lea, and you have heard the expressions that they used on this occasion. You must weigh these. If you believe them it is evidence of malice and it is for you to consider them.

If you think that the expressions which the prisoners are proved to have used from time to time were mere talk and nothing else—that they did not amount to anything real, and that there was no real malice or ill-will, in that case your verdict should be manslaughter. I have explained the circumstances under which you should act in either case, and I need not go over them again. I leave the matter in your hands without another word.

I think that this case is too serious a one to leave it to a jury to find for murder or manslaughter according as they find whether there was or was not malice in the sense of ill-feeling. That is the direction to them. I cannot see that the jury applied their minds to anything else, and there were very important questions to determine outside of that.

Moreover, I think that this case should not have been submitted to the jury as if there was no alternative but one of either murder or manslaughter. I have dealt with the gunshot wound. If there was no acceleration there was an alternative of acquittal. Because in the summing up this appears:—

Before further commenting on the facts I will draw your attention to the law on the subject of murder and manslaughter, because your verdict should be one or the other according as you find the facts.

I think it would be difficult for the jury to deal with the question of "the heat of passion caused by sudden provocation" without a reference in the summing up from first to last, to this blow on the head which the deceased gave to Fred. Indeed it might have called for mention in connection with the cause of the gun being discharged.

But at any rate, the learned Chief Justice in the summing up, dealing with the subject of provocation, after quoting the provision of the Code, sec. 261, says:—

These are the circumstances under which you may find the crime to be manslaughter and not murder; that is, assuming always that malice and ill-will are not present. Now these clauses require some explana-

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tion and comment. Manslaughter differs from murder in this, that though the act which occasions death is unlawful or likely to be attended with bodily mischief, yet if there was no malice, express or implied, it amounts to manslaughter only. When, therefore, death ensues from sudden transport of passion or heat of blood, if there is a reasonable provocation by the deceased and no malice, it will be manslaughter only. Where, however, the provocation is sought by the prisoner, it is no answer to the charge of murder.

It will be for you to say whether these men had any provocation to do these acts on the part of Lea. If they had it would be manslaughter and not murder. Now what were the acts, or what did Lea do to put them into a transport of passion so that they had no control over themselves. That is for you. I should be sorry if in any way I mis-stated the law to you, because it would be lamentable if this trial should be made abortive through any misdirection of mine. I have therefore presented to you the authorities that are binding upon us shewing what is murder and what manslaughter. You see, therefore, that if there was any provocation on the part of Lea, the crime can be reduced. But the provocation must be something that a man feels and resents on the instant. If he had time to cool or there is evidence of malice, it would be murder. I take that from a legal work. Applying these rules of law to the facts of this case, where was the provocation on the part of Lea that caused the accused to act as they did? That is for you. If you think that the crime can be reduced from murder to manslaughter, you will ask yourselves what did Lea do to cause these men to do what they did? What provocation did he offer to them? They were unlawfully on his premises, behaving in a provoking manner; the deceased had twice requested them to depart and they not only refused to do so, but continued their conduct. Lea then got his gun, thinking to frighten them. They jeered at him and it is for you to infer whether one of them did or did not attempt to strike him with a bottle, when Lea raised the gun and injured himself. Who then was the provoker of the assault? Did Lea do anything to palliate their conduct? Remember that he was acting in defence of his home and his wife and children against these men, who, without right or justification, were assailing him in it, just as if you were defending your home from a gang of rowdies who surrounded it.

As to the facts, I suggest that before any battery on the part of the defendants, there was the production of the gun and cocking it (and putting it to his shoulder, if it was put to his shoulder) and the striking Fred Graves on the head with it, even assuming that preliminary to this there was a closing up by the defendants and the bottle and the door incident (call it an assault) had occurred. There then was a case of provocation to be submitted to a jury.

I think the jury would be required to pass on this also to say whether the use of the gun and the blow struck with it, even in defence of his house (if it was used for that, or merely to drive them away because they were annoying him and his household) was or was not excessive.

In *Regina* v. *Brennan*, 27 O.R. 659, there was evidence that

just before the killing the prisoner had called at the house of the deceased to see the latter, who ordered him out and immediately laid hands on him and put him out of the house, when the prisoner drew a revolver and shot the deceased. The Judge at the trial directed the jury that deceased

> "when he ordered him out and then took hold of him to put him out, was doing that which he had a legal right to do," and that therefore there was no provocation.

Held misdirection, for whether or not the deceased

> at the time he was shot was doing what he had a legal right to do depended upon whether if the jury accepted as true the statement of the defendant given in evidence as to the circumstances attending the shooting the deceased had before laying hands upon him ordered him to leave his house, and whether, if he had done so, the prisoner had refused to leave, and whether if violence was used in putting him out, it was greater than was necessary; and the deceased was clearly not doing what he had a legal right to do if the facts were found in favour of the prisoner's contention on these points.

As to the defendants seeking the provocation, I think the proviso refers to a case of a defendant inciting a deceased into an act of provocation just for the purpose of providing the defendant with an excuse for killing or hurting him, a merely colourable provocation, and it does not apply to a case of a defendant who because he struck the first blow or is wrong in the quarrel is to be barred of the reduction of the offence.

There is apparently some confusion in this part of the summing up owing to the unfortunate use of the word malice throughout all of the summing up and I do not know that I follow it. It would appear as if the learned Chief Justice laid down the law, malice is essential to murder; if that is not present the homicide is but manslaughter; provocation will reduce murder to manslaughter, but only when there is no malice. If he meant that, provocation would play rather a useless role in all such cases. But I think (he says "I take that from a legal work") that the writer meant that in dealing with facts the provocation which was manifested on a given occasion and the passion evinced would not probably be depended on to reduce the homicide to manslaughter if there was evidence of the existence of "malice" previous to the incident, i.e., malice in the sense of a premeditated design to kill the person. The killing would be due to the design rather than to the passion or seeming passion produced by an act of provocation.

But the learned Chief Justice also said:—

> There is no evidence of any premeditation here. I think that when they went there they had no intention of doing anything of the kind (i.e., the acts they did after they got there), but it arose from what occurred afterwards.

Also:—

> There is nothing in the evidence to indicate that these men—per-

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haps I am stating it too favourably to them—went to the residence of Mr. Lea with the formed intention of killing him, or even of doing him bodily harm. I may safely say that, except for the evidence which I will point out to you, shewing that they bore him malice or ill-will.

That shews it was a case where passion from provocation was a most important element for consideration. And handicapping it with a proviso "provided there is no malice" was not giving effect to the provision of the Code. The jury would be misled to a wrong conclusion because when was there ever a battery or an affray without ill-will being present?

I think *Stedman's Case*, 1 East's P.C. 234, is helpful:—

> The prisoner who was a soldier, was indicted for the murder of one Macdonel, a woman. It appeared that a friend of the deceased, being fighting with another in Covent Garden, and the prisoner running towards them, the woman said to him, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" Upon which the woman gave him a box on the ear, and then Stedman struck her with the pommel of his sword on her breast. Thereupon she fled and he pursued and stabbed her in the back with the sword. It seemed to Holt, C.J., that this was murder, the box on the ear by the woman not being a sufficient provocation for the killing her in that manner, and after he had given her the blow in return for the box on the ear. And it was agreed to have this found specially by the opinion of all the Judges there. But it afterwards appearing in the progress of the trial that the woman had struck the soldier with a patten on the face with great force, so that the blood flowed, it was holden clearly to be only manslaughter. The smart of the wound, says Mr. Justice Foster, and the effusion of blood might possibly keep his indignation boiling to the moment of the fact.

This case is used as an illustration in Stephen's Digest of Criminal Law, p. 187.

Then in connection with this subject of provocation I think several witnesses for the Crown speak of the defendants being drunk. The defendants themselves, on cross-examination, deny it. It only shews that being "drunk" is a relative term. But if there was any degree of intoxication it ought to be mentioned to the jury in that connection because a person in liquor may more readily give way to passion on receiving provocation: *Rex* v. *Thomas*, 7 C. & P. 817.

Of course the summing up must be looked at as a whole. It is fallacious to pick out a small passage and look at it apart from its context. And it is also fallacious in dealing with one passage to pick out another one not germane to the matter and not curative at all in its effect and argue that this other passage is correct or this other matter was submitted to the jury. At this argument we had perhaps a little of this. I append to this opinion the whole summing up, that it may be referred to as a whole.

A point was raised as to the regularity of the hypothetical questions which were submitted to some of the doctors, inasmuch

as they did not contain precise statements of fact that could afterwards, there being a dispute, be put to the jury, but contained such vague terms as (1) "and afterwards kicked and abused"; (2) "kicking and brutal treatment"; (3) "rough handled and pounded about"; (4) "kicked and pulled about," when there was a dispute in the evidence as to the pulling of the deceased over the verandah and dragging on the lawn, which these vague terms might cover and might not cover. I think they were irregular.

In my opinion there was within the meaning of the 1019th section of the Code a substantial wrong or miscarriage occasioned on the trial by the misdirection and matters which I have dealt with. There were other questions raised at the hearing which in my opinion were very arguable, and the prisoners should have a full opportunity of being heard upon them, if they may have to appeal.

In my opinion the leave to appeal applied for should be granted and a case should be stated which will enable the prisoners to raise the questions involved in their application to the learned Chief Justice upon the ground therein mentioned, that is to say from ground 4 to 36 inclusive but omitting 35, which is hardly a question of law. There are many repetitions but it is not easy to recast them into a few points covering the whole matter complained of.

RUSSELL, J.:—The three defendants, who are brothers, met near the residence of the late Mr. Lea, at Port Williams, on Sunday afternoon, the 23rd of June. It is not proved that they met by appointment,—at least it is not so proved beyond a reasonable doubt, although it was put to the jury somewhat emphatically that they had come from different quarters by appointment for the execution of some common purpose. There is no evidence as to the purpose, if any, for which they came to the premises of the deceased except such as is afforded by their conduct when they were there. They all had been drinking and their conduct was such as greatly to annoy and exasperate the deceased and his family. Mrs. Lea says that they were upon the lawn in front of the house, while the evidence for the defendants is that they were upon the roadway. There can be little if any doubt that the statement of Mrs. Lea is correct. The deceased requested them to leave, but they remained and continued their annoying conduct. He retired into the house, or, as the trial Judge informs us, to the barn, "to avoid them in the hope that the men would depart when no notice was taken of their outrageous conduct." From his retirement in the house or barn, as the case may be, he soon after returned to the verandah, and this time he ordered the defendants to leave. They did not go away and the deceased again retired into the house, from which he shortly afterwards reap-

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peared upon the verandah with a loaded gun into which he had inserted a cartridge while in the house. We have no means of knowing whether he aimed the gun at the prisoners or not, but it seems probable that the gun was cocked. The learned Judge assumes that it was the purpose of the deceased merely to frighten the defendants. If this had been his object there was no necessity for his loading the gun and it is extremely probable that if the gun had not been loaded the unfortunate victim of the tragedy would still be living. It is in proof that he threatened to shoot, when one of the defendants in effect challenged him to do so, saying that he was ready to die. Immediately after this there occurred what the learned Judge describes as a "dash at the house" of which the defendants' counsel, however, contends there is no evidence, but which would be the most natural thing in the world to happen if the two defendants who were not so "ready to die" as their brother, assumed that the latter was about to be shot by the deceased. There is positively no evidence whatever of any assault at this stage of the proceeding nor any evidence whatever to warrant a finding that the defendants had any intention beyond that of disarming the deceased. Of course there was no evidence of that intention either. All that we know about the matter is that one of the defendants received a blow on the head which inflicted a serious wound and that the deceased was shot in the groin by the accidental discharge of the gun which he was using as a club with the muzzle in his hands. The wound was one which, in the opinion of the doctors, or one or more of them, would not necessarily have resulted fatally; but the prisoners, according to the evidence of the witnesses for the Crown, at once proceeded to kick the deceased in a brutal manner, to throw him over the railing of the verandah and drag him some feet or yards along the ground to a place where they continued or renewed their brutal and inhuman treatment. After some neighbours who had been sent for arrived upon the scene, the deceased was carried into the house with the assistance of the prisoners or one or more of them and his wounds were attended to by Drs. Morse and Moore. The next morning he was taken for treatment to Halifax and placed in the Infirmary, where he died of shock resulting from his injuries or his removal or both on Tuesday morning.

The prisoners have been found guilty of murder and if there has been no error in the trial, I imagine there will not be many persons found to shed tears over their fate. But it is more than possible that they were not guilty of murder at all. It is altogether possible, and I should judge it highly probable, that the deceased inflicted a mortal wound upon himself by his manner of using the gun which resulted in its accidental discharge. It is also possible, though it will perhaps be considered improbable,

that the fatality resulting from the wound was not accelerated by the conduct of the defendants any more than it was by the removal of the patient to Halifax,—a removal which of course was nevertheless entirely justified by the circumstances of the case.

If the defendants had no intention when they went to the residence of the deceased, or when they stopped at his place on their way to the river for a swim, beyond that of annoying the deceased and his family, against whom they certainly had ill-feelings, arising out of circumstances which need not be enlarged upon at this point, if, being in a state of intoxication their angry passions were inflamed by the production of a loaded gun, if apprehending an assault by the defendants who according to the construction put upon the evidence by the learned Judge, made a rush towards or upon the verandah, the deceased made use of the loaded gun as a club, and was fatally wounded by its accidental discharge, if the subsequent conduct of the defendants, however brutal and inhuman, and however justly it aroused the indignation of the learned Judge, did not cause the unfortunate victim to die any sooner than he would have died from the gun shot wound and the long and tedious railway journey to Halifax, or even if their conduct accelerated the fatal issue, but was caused by the sudden and uncontrollable gust of passion aroused in them by the discharge of the gun which seems to have led the prisoners to suppose that they had been shot at and to have the impression upon the mind of one of them that his brother had been wounded, then the crime of the prisoners, if my reading of the law can be relied on, was not murder, but manslaughter at the most.

If these considerations had been placed before the jury and they had been invited to weigh them fairly and dispassionately, and if, after giving them deliberate consideration, they had come to the conclusion that the defendants were guilty of murder as charged in the indictment, although I do not myself understand how these hypotheses could have been rejected by the jury without more than a merely reasonable doubt, I should nevertheless, in all probability, have felt that it was impossible to disturb their verdict. But I have read the charge of the learned Chief Justice without being able to discover that the hypotheses I have suggested in favour of the defendants or any of the obvious possibilities that might be urged as reducing the crime from murder to manslaughter were ever presented for their consideration. The jury might very well have understood from the language of the learned Judge that if the defendants, without any intention whatever of killing the deceased, had made an assault upon him and the deceased in using his loaded gun as a club had been killed by the accidental discharge of it in his own hands, the

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accused would be guilty of murder. He says as much as this in the following words:—

> Did they rush at him with the intention of assaulting him and did Mr. Lea then use the gun? If so they were as responsible as if they had seized the gun and discharged it into him.

If they had seized the gun and discharged it into him they would undoubtedly have been guilty of murder and I cannot find that the learned Judge has anywhere in connection with this branch of the case instructed the jury in such a way as to make it clear to them that they could not find the prisoners guilty of murder simply because of the accidental wounding of the deceased by the discharge of the gun, without reference to any subsequent ill-treatment of their victim. He did, it is true, indicate to them that there was a distinction between murder and manslaughter, but it is not clear from the charge by what criteria he instructed them to make the distinction in the present case. In one part of the charge it seems to be made to depend upon the question whether the act of the defendants which led to the result was a felony or a misdemeanour, although the latter word is not explicitly used. But the distinction between these two things was not explained to them; they were not informed that the distinction had been abolished by the Criminal Code, nor was any explanation given them as to the manner of applying this distinction under the changed conditions brought about by our amendment of the common law. In another paragraph his Lordship seems to make the question depend upon the existence or non-existence of malice, but there is no clear explanation to them of what was to be understood in this connection by this exceedingly slippery expression which has been purposely omitted from the definition of murder in the Criminal Code because of the difficulty of explaining it to a jury and the moral certainty of its being misunderstood, as it almost certainly was by the jury in this very case. If the jury may have gathered from the expressions of the learned Chief Justice that it was open to them to find the defendants guilty of murder because of the gunshot wound received from the gun in his own hands, I have little doubt that this was an error which vitiates the result of the trial.

I also think the defendants were entitled to have the benefit of an instruction as to the possible mitigation of their offence in their treatment of the deceased after he fell upon the verandah wounded by the discharge of the gun. They were intoxicated, beyond doubt, and of course the fact of their intoxication does not furnish an excuse for their crime. But there is good authority for the proposition that a smaller degree of provocation in the case of a drunken man than in the case of a sober man, will produce that state of sudden and uncontrollable passion the existence of which will reduce to manslaughter the

crime that would otherwise be murder. No considerations of this kind were ever put before the jury. On the contrary, when the jury were recalled for the purpose of having their minds directed to this aspect of the enquiry, they were instructed in the following terms:—

> Mr. Roscoe wants me to draw your attention to the fact that if you think that at the time when they assaulted Mr. Lea there was such provocation on the part of Mr. Lea to them as took away their judgment, then it would reduce the crime from murder to manslaughter. That is correct. But if after they got there they were carrying out a grudge, if they had it, it constitutes murder.

I think the jury must have been led to understand from these expressions that no matter what was the effect of any provocation received from Mr. Lea, no matter if these defendants, without any premeditation of murder on their part, were thrown into such transports of rage by the presentment of a loaded gun and the belief that one of their number had been shot, that they lost all control of their passions for the moment, their crime could not be reduced from murder to manslaughter if they had a grudge against Mr. Lea when they assembled on his lawn as they undoubtedly had. This view of the law is so clearly erroneous that if there were no other reasons for complaining of the charge the ends of justice would require that the prisoners should have another trial.

While I have thus dealt with what seems to me to be the cardinal objections to the charge of the learned trial Judge, I ought to add that having carefully read the opinion of Mr. Justice Graham I agree with everything therein contained except the conclusion. I do not think that there should be or need be any further argument of the matter. The counsel for the Crown and the prisoners have been fully heard on every possible point in the case and both consent and desire that judgment should be given on the points argued as if a case had been reserved by the trial Judge, and there is a good precedent for this course. Why there should be any suggestion under these circumstances to depart from this common sense disposition of the cause is beyond my comprehension.

Ritchie, J.

RITCHIE, J.:—This is an application for leave to appeal from the learned Chief Justice's refusal to reserve a case upon certain questions submitted to him by Mr. Roscoe, K.C., on behalf of the defendants. The defendants were convicted of murder.

Question 28 is as follows:—

> Whether the law applicable to the case was stated sufficiently to enable the jury to determine whether if the defendants were guilty of homicide such homicide was murder and the facts applicable to such law pointed out.

Section 259 of the Code provides as follows:—

> Culpable homicide is murder:
>
> (*a*) If the offender means to cause the death of the person killed.

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(*b*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not.

Section 255 is as follows:—

Homicide may be either culpable or not culpable. Homicide is culpable when it consists in the killing of any person, either by an unlawful act, or by an omission without lawful excuse to perform or observe any legal duty, or by both combined, or by causing a person by threats or fear of violence, or by deception, to do an act which causes that person's death, or by wilfully frightening a child or sick person. Culpable homicide is either murder or manslaughter.

I think that in this case in order to state the law sufficiently it was necessary to charge the jury not in respect to malice, ill-will or spite, but in regard to the matters set out in sub-sections (*a*) and (*b*) of section 259. Did the defendants mean to cause the death of Mr. Lea? Did the defendants mean to cause Mr. Lea bodily injury knowing it to be likely to cause death and were they reckless as to whether death ensued or not?

These questions were not put to the jury. Of course in investigating the thing which makes the crime murder, namely, the intention to kill and the intention to cause bodily injury knowing it to be likely to cause death and being reckless as to whether death ensued or not, malice, spite, ill-will, etc., are most important factors for the jury in arriving at the intention. The learned Chief Justice was charging under the Code. He put to the jury the different sections dealing with homicide except that he did not put to them or in any way refer to section 259, which defines the crime of murder and lays down what constitutes the crime. Therefore I think the law was not sufficiently stated.

Question 12 is as follows:—

Whether the law read and stated to the jury in the case of the man forced to jump into the river, or the man thrown by his horse or the woman getting out of the window, and stated to be applicable were, so applicable and the direction in that behalf correct.

The three cases referred to I take to be *Regina* v. *Pitts*, Carr. & Marsh. 284; *Rex* v. *Hickman*, 5 C. & P. 151; *R.* v. *Evans*, 1 Russell on Crimes 666.

The rule laid down in *Regina* v. *Pitts* was that in order to make the prisoner liable there must have been on the part of the deceased apprehension of immediate violence well founded from the circumstances by which the deceased was surrounded, and that the jumping into the river was a step which a reasonable man might take under the circumstances.

The principle of *Rex* v. *Hickman*, 5 C. & P. 151, is that the prisoner was liable because the deceased from a well-grounded apprehension of a further attack upon him which would have endangered his life spurred on his horse. I think this case

is distinguishable from the case at bar. Where a man on horseback is assaulted, if he does not want to fight, the very obvious, reasonable, natural thing to do is to give his horse the whip or the spur. Therefore if the horse excited by the spur throws the rider and kills him the assault is in law the proximate cause of death. I think it cannot be said that it is a reasonable or natural thing for a man to point the barrel of a gun which he knows to be cocked and loaded at his own body and strike at another with the stock.

The rule laid down in *R.* v. *Evans*, 1 Russell on Crimes 666, was that if the woman was constrained to jump from the window by her husband's threats of further violence and had a well-grounded apprehension of his doing such further violence as would endanger her life the accused was responsible.

Whether these cases are applicable or of any assistance depends upon two things:—

(*a*) Was what Mr. Lea did a reasonable step for a man to take under the circumstances?

(*b*) Was fear of violence the cause of Mr. Lea handling the gun as he did?

Fear on the part of Lea, caused by the defendants, is the thing which would make the defendants responsible and the question of fear was not put before the jury at all. They were given the facts and that the accused were held responsible but not the grounds or principles upon which that responsibility rested, and this I think was dangerous and likely to mislead. If the principle of these cases had been given to the jury their minds would at once have been brought to the vital questions, was Mr. Lea's action with the loaded cocked gun reasonable? Did he think his life was in danger or was he in fear of violence if he did not do as he did? A jury might answer these questions in the negative and in that event the cases would be clearly distinguishable and have no application whatever.

Question 9:—

> Whether the direction that the defendants were responsible if they rushed at Lea with the intention of assaulting him, and Lea then used the gun, as much as if they had seized the gun and discharged it into him is correct.

The learned Chief Justice, in another part of the charge, puts the same view before the jury in the following words:—

> If it was the unlawful act and conduct of the accused which caused Mr. Lea to handle the gun in the way he did, taking the barrel in his hand and using the stock to defend himself against their assault, they are responsible for the consequences. That that is the law is as clear as day.

I understand this to be the law, provided that what Mr. Lea did was done under a well-founded apprehension of immediate serious violence.

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Apart from this under the cases which the learned Chief Justice referred to at the trial I do not understand it to be the law. The qualifications I have mentioned and which are mentioned in the cases were not put to the jury and therefore I think there was error in the direction.

Question 3:—

> Whether the facts pertinent to the defendants' case were put before the jury in the trial Judge's charge.

Assuming that the treatment by the defendants after the gun went off was the cause of or accelerated death the case is one of murder or manslaughter. In my opinion the case of the defendants as to provocation reducing murder to manslaughter was not put to the jury in the way that they were entitled to have it put. There is very strong evidence that the defendants were under the bona fide belief that one of their number had been shot. They saw him bleeding. As a matter of fact he had been struck on the head with the stock of the gun and Mr. Lea had threatened to shoot if they did not go away and they had heard the gun go off. I think these facts were very pertinent to be put before the jury. They were not put, but, on the contrary the trend of the learned Chief Justice's remarks rather pointed towards there being no evidence of provocation.

I agree with the remark made by Mr. Justice Walton in *Rex v. Warner*, 1 Crim. App. R. 227, which was as follows:—

> I think it is a serious flaw in a summing up if it does not put the case for the prisoner as carefully as the case for the prosecution.

I am of opinion that a case should be stated in respect to the questions which I have dealt with.

I think these questions are all arguable and when questions are fairly arguable I understand that it is proper to have them stated for the opinion of the Court.

I also agree that the questions referred to by my brother Graham at the conclusion of his opinion are questions which should be stated.

Drysdale, J. (dissenting)

DRYSDALE, J. (dissenting):—This is a motion for leave to appeal from a refusal of the learned Chief Justice to reserve questions of law that arose on or in connection with the trial of the three defendants on a charge of murder. As I understand our procedure it is only a question of law that can be considered on this motion, and that question must be one arising either on the trial or on the proceedings preliminary, subsequent or incidental thereto or arising out of the direction of the trial Judge. If such Judge refuses to reserve for the Court of Appeal any such question then this Court is empowered to hear the appeal from such refusal and if leave to appeal is granted in respect to any such question of law a case shall be stated for the opinion of the Court of Appeal as if the trial Judge had at first reserved such question.

The alleged questions of law herein that were submitted to the learned trial Judge after the trial, with a request for a reserved case are 36 in number, some of these containing a number of sub-paragraphs. All of these the trial Judge refused to reserve on the ground that none of them raise any question of law respecting which there can be any reasonable doubt, and that most of them raise no questions of law unless it be some objection to the general character of his charge in commenting on the facts.

The question, then, I take it, and the only question before us is as to the correctness of the learned trial Judge's refusal to reserve any of the 36 points so submitted. Was the refusal right as to all of them? If not, in respect to which one or more was he wrong? Should we decide his refusal was wrong in respect to any of these points submitted to him for reservation, then the case can be stated as to such points and the points or questions of law so stated, and such points only, can be considered.

There was a disposition on the part of counsel on both sides in the case to dispose of it in its present shape on the footing of a case stated, and an Ontario authority was cited for such a course of procedure. Such a method of dealing with a case that only involved, say, one serious question I can understand —even then I doubt the jurisdiction—but to attempt a disposition of this case where 36 different and specific questions are brought forward for reservation, all of which have received the considered refusal of the learned Chief Justice, and many of which, on their face, are not in my opinion questions of law at all within the meaning of "questions reserved" in the Code, would, I think, only lead to confusion in subsequent proceedings if any there be. For myself I must decline to consider any disposition of the motion before us except in regular order, and this leads me to a consideration of the learned trial Judge's refusal to reserve any of the questions submitted on the ground that none of them was proper for reservation. In this connection I may say that in criminal trials, if a serious point of law is mooted or urged on behalf of a prisoner, and raised *bona fide*, I think the correct practice for the trial Judge to adopt is to reserve such a question, even although he has a strong opinion against the contention, provided in his judgment it raises an arguable question.

Applying this rule, which I myself have invariably tried to follow, to the case in hand, I would be disposed to have a case stated in respect to question 28 and hear argument thereon, simply on the ground that it may fairly, perhaps, be said to be arguable. This question, to my mind, raises the only one of any moment and really covers the lengthy argument made

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before us in so far as such argument was pertinent to a question of law raised before the learned Chief Justice, the only thing properly before us.

This means the question of misdirection, and if misdirection there was, was there in the opinion of the Court of Appeal some substantial wrong or miscarriage thereby occasioned on the trial.

As intimated, I would be disposed to have a case stated on this one point and such point regularly brought before us. We sit here as a Court of Appeal with statutory powers only and a regular procedure is laid down which, if followed, permits of the proper disposition of any question of law raised on behalf of a prisoner. Disputed questions of fact and the proper inferences to be drawn from proved circumstances are not before us, except in so far as we examine the facts in proof to ascertain whether or not there was misdirection in law.

I emphasize this regularity in procedure because of the apparent disposition of counsel in argument to treat the facts in dispute as wide open and as if this were an application for a new trial on any and every ground that could be suggested. In this proceeding before us disputed questions of fact and every inference that could properly be drawn from proved circumstances are forever closed by the finding of the jury against the prisoners unless there was misdirection in law. As the merits on the only question of law that I would have properly here, viz., the question as to misdirection, are being considered, I feel bound to examine the charge and consider the same.

The charge was one of murder against the three prisoners. It seems the prisoners, one Sunday afternoon in June, invaded the home of a peaceable citizen in Port Williams, one Mr. Lea. They were in a state of intoxication, more or less, and in a most offensive manner entered upon Mr. Lea's private grounds surrounding his house, and were guilty, without a doubt, of the most offensive conduct towards Mr. Lea and his household that could by any possibility be imagined. After being requested and ordered to leave the premises, their insulting and insolent conduct became worse, if possible, and so outrageous were their proceedings that Lea finally brought out a loaded gun, no doubt with a view to intimidate them. By this time Lea was on his verandah, with his wife, children and maids inside. The prisoners were each carrying bottles from which they were drinking. The case for the Crown is that when Lea was on his verandah with his gun the three prisoners determined to assault and beat him and with bottles, that the three of them rushed on his verandah and attacked him; that on this unlawful and unprovoked assault he clubbed his gun rather than fire and attempted to defend himself; that in so doing the gun which he was using as a club was discharged into his body; that there-

upon the prisoners continued to beat, kick and abuse Lea in his injured condition, dragged and pulled him over the rail and off the verandah on to the lawn, and for some time continued to beat, kick and ill-use him in his wounded condition. Lea died from shock within 40 hours. The Crown charges murder on two broad grounds. First, that in the assault on Lea, with intent to do him serious injury they are responsible for his death even if the direct cause of death was an act of the deceased himself, because it was reasonably due to the prisoners' unlawful conduct. And, secondly, because if not responsible for the discharge of the gun their conduct in the brutal treatment of Lea, wilfully administered by prisoners after the gun's discharge, accelerated or hastened death.

These two broad propositions were for the jury, and if the facts and circumstances in proof were such, under proper directions as to support either of these contentions on the part of the Crown, the verdict of guilty would be warranted.

These main features of the Crown's case were supported by a very respectable body of evidence and the only controversy over questions of fact arose from the prisoners taking the witness-stand in their own behalf and in some particulars controverting statements relied upon by the Crown.

In the light of this I turn to the charge and examine it and ask myself where if at all the learned Chief Justice was guilty of error in law. I may first remark in pursuing this enquiry that it is obviously necessary to read and re-read the charge as a whole in order to ascertain how he guided the jury on the principles of law applicable to the facts in hand. It is and would be manifestly unfair to pick out isolated passages taken from a charge and read and consider them apart from the context. The test, I take it, is, can the charge, when taken in its entirety, be considered on the whole as sound and not calculated to mislead on any matter of substance. It was argued here that the learned Chief Justice expressed his own views strongly as to men and matters. The answer to this is, he had a right to, provided always he let the jury clearly understand that their views on questions of fact were to prevail, not his. The importance of reading this charge as a whole, and not isolated passages, is so apparent that I annex the whole charge hereto. The leading attack on the charge is that the trial Judge did not properly instruct the jury, inasmuch as he did not read to them the Code definition of murder.

The first thing I would say about such a contention is that, in my view, it would be a very poor way for any Judge to attempt to explain the law to a jury by reading the Code. In practice it is not usually done and for the very sound reason that except to the mind of a trained lawyer the reading of the Code would only create confusion and almost certainly in the

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mind of an ordinary juryman. On this point the learned Chief Justice took, I think, the wiser course of propounding in popular and easily understood language the principles of the common law as handed down to us by expressions unmistakable of eminent English Judges and of assuming that the Code is declaratory only of such principles. I am not aware that the English decisions applicable to such a state of facts as we have here are not authoritative and binding and I am clearly of opinion that our Code does not alter the law in this respect. Under this head of attack it was said the trial Judge referred to the English decisions based on the distinction between felony and misdemeanour, a distinction abolished by our Code. Even so, this was only by way of illustration and a fair reading of the whole charge, I think, will at once dispel any question of doubt that might arise by a reference to such cases. In the final result the learned Chief Justice was clear and unmistakable on what should guide them in the matter of considering the death of Lea if attributable directly to the gunshot wound; and when he took from a standard work of authority the statement I will quote as the law for their guidance I am of opinion he was on absolutely sound ground. It will be observed that the learned trial Judge, on this branch of the case, gave them a certain and definite direction in the following words:—

> It is not necessary that the shooting alone should be the cause of his death, but if it resulted in his death the prisoners are responsible for either murder or manslaughter according as you find the circumstances. In a legal work of great authority it is laid down as follows: "If the direct cause of his death is an act of the deceased himself, due to the accused's unlawful conduct, as in the case where a person by actual assault or threat of violence, causes another to do an act resulting in death, then the accused is responsible."

This was, I think, on this branch of the case, the guiding principle inculcated by the Chief Justice and apparent on his whole charge. His illustrations were apt and the English cases he referred to in detail simply emphasized this rule. I think this statement is a correct exposition of the law as administered in England and I accept it without hesitation or qualification as the law in Canada. The acts of the deceased in directly causing his death must, in order to make the accused responsible, be reasonably due to the accused's unlawful conduct. Whether it is so reasonably due or not is a question of fact for the jury. If the act of Lea in discharging the gun into himself was reasonably due to the unlawful acts of the prisoners in brutally assaulting him then they are responsible. This was wholly for the jury and I have no intention of usurping the functions of the jury in this respect or of expressing myself in favour of or against such a finding.

The charge plainly shews that the question whether or not

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there was a serious assault on Lea by the prisoners was properly left wholly open for the jury's consideration. They may very properly have taken the view that the evidence established such circumstances as wholly warranted the finding of a deliberate and brutal assault. The inference would be very obvious that one could fairly ask a jury to draw from undoubted facts. Mrs. Lea heard a rush on the verandah; then the gun report; she goes out at once; the three prisoners are on the verandah in the attack on Lea and continue it not only on Lea but on herself; a bottle has been driven through the screen door and one on the verandah floor; Lea was down, his glasses broken, even the gold or metal rims. If Mrs. Lea's statement were accepted by the jury then the only question for the jury to consider to bring the prisoners within the rule quoted was whether the clubbing of the gun, obviously in self-defence, was a reasonable thing to do under the circumstances, and was it reasonably due to their unlawful attack. They could very properly say it was, and more than that I do not feel called upon to say.

If the jury so found acting on this instruction and were properly instructed as to the governing rules that distinguish murder from manslaughter then I would unhesitatingly say that on this branch of the case there was no misdirection and that the verdict was warranted.

On the other branch of the case, viz., that even if the prisoners were not responsible for the discharge of the gun still they caused or hastened his death by brutally assaulting and mauling him in his wounded condition, the evidence for the Crown was that death was due to shock and the allegation was that there was a fair chance of recovery from the wound had it not been for the mauling and beating subsequently. The charge in this respect seems unobjectionable and under the evidence it was quite open to the jury to take the view that death was hastened if not directly caused by the subsequent unlawful proceedings on the part of the prisoners. That Lea was kicked and beaten on the verandah subsequent to the wound is obvious. That he was dragged and pulled around the verandah in his wounded state and ultimately thrown or pulled over the rail and fell on a stake receiving serious injury, is reasonably clear. And that he was then dragged along the grass and further brutally treated is supported by a body of evidence that the jury could do nothing but properly accept. If this conduct accelerated the death of Lea the prisoners are liable. In this connection the learned trial Judge quoted to the jury section 256 of the Code and properly stated, I think, that it covered this branch of the case and when he further added the instruction to the effect

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that although the prisoners may not have been responsible for the infliction of the gunshot wound, if they hastened his death by their rough treatment and ill-usage of him subsequently, they are responsible for murder or manslaughter, according as you find that malice was or was not present.

I think he made his meaning clear beyond a question and in my view stated a sound proposition of law whether considered either from the standpoint of the common law or the Code.

Under these circumstances it seems to me that it was quite open to the jury to find that the prisoners were responsible criminally for the death of Lea on either branch of the Crown's case.

Then it is obvious the question would arise, should the verdict be one of murder or manslaughter, and in this connection I have to examine the charge to determine whether the rules that may reduce murder to manslaughter were clearly and reasonably stated to the jury. I find the learned trial Judge in the charge in this respect dealt exhaustively with the rules that must be in view in determining murder or manslaughter as applied to the circumstances here, and after the best consideration I am enabled to give to the case I fail to find any error in this respect in the charge. The question of provocation, if any, by Lea was fairly discussed and I think fairly left for the jury's consideration. One complaint was urged by counsel for the prisoners against the charge in this connection. It was said that if the prisoners were drunk—that is, very drunk—the jury should have been instructed that on the question of provocation the prisoners were entitled to say that because they were drunk ordinary rules should not apply to them. That is, the jury should have been instructed that if they were under the influence less would be considered as provocation in their case than in that of a sober man. In other words, that a person in liquor may more readily give way to passion on receiving provocation and that the jury should give a person in liquor this special consideration that would not apply to a sober man. A case of *Rex* v. *Thomas*, 7 C. & P. 817, was relied upon for this doctrine. I must decline to subscribe to any such doctrine, and I must also say that in my view there is no English authority for any such proposition. The question of what immunity a person who voluntarily makes himself drunk is entitled to has been recently carefully and fully considered by the Court of Criminal Appeal in England in *Rex* v. *Meade*, [1909] 1 K.B. 895. This case is instructive. On the facts it was one of beating. There the prisoner whilst drunk ill-used a woman by beating her with his fist. A blow by the prisoner ultimately caused death. The Court stated broadly that if he did do this (strike such a blow) and she died of the injury, and he intended to inflict serious bodily injury on her he was guilty of murder. It was con-

tended on the trial that the presumption that the prisoner had this intent was rebutted because by reason of drunkenness he had no such intent. Under these circumstances it became necessary to consider the cases, ancient and modern, on the subject, and the Appeal Court, after expressly guarding themselves against being considered as saying anything that will confer any greater immunity on persons who voluntarily get drunk than they now enjoy, explicitly limited the immunity to a stated rule in words as follows:—

> We desire to state the rule in the following terms: A man is taken to intend the natural consequences of his acts. This presumption may be rebutted in the case of a man who is drunk by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury.

This I take to be the English law to-day and should be followed here.

I have examined the directions of the Chief Justice on this point and am of opinion the charge in this respect was unobjectionable. It is hard to appreciate an argument in this case from the prisoners' counsel to the effect that the prisoners were drunk, and by reason thereof were entitled to some special instructions in their favour on that account, and because it was not given they should have a case reserved on the point, especially as the trial below was conducted on their part on the theory that they were all sober at the time in question. Indeed the prisoners took the stand and swore to their sobriety on the occasion. Nevertheless, I suppose that if they lied and the jury so thought, they were entitled to have the correct rule of the immunity as to drunken persons correctly stated, and this I find the learned trial Judge did in express terms.

The question of malice had to be dealt with and in my opinion was clearly, fully and correctly explained.

It is one of the leading rules found in all text-books that provocation will not avail to reduce murder to manslaughter where express malice is proved, and I think the question of malice under a full and correct explanation of its meaning in law was left for the consideration of the jury and found against the prisoners.

In connection with the attack on the charge herein, made by picking out isolated passages thereof, and, apart from the context, subjecting the same to criticism, I would call attention to what has often been said in the English Courts in that regard, and lately repeated by the English Court of Criminal Appeal in words as follows:—

> But it is necessary to repeat what has often been said before in this Court, viz., that when a Judge sums up to a jury he must not be taken to be inditing a treatise on the law. He addresses himself to

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the particular facts of the case then before the jury, and no Judge can affect in those circumstances to give an exhaustive definition or one which applies to every conceivable case. It is enough if he gives a sufficient definition and rightly directs the attention of the jury to the facts of the case before them.

I would deny the motion.

Meagher, J. (dissenting)

MEAGHER, J., delivered a short opinion in which he said:—I concur entirely with my brother Drysdale's well-reasoned opinion. My opinion is that leave should be refused.

Leave to appeal granted, MEAGHER, *and* DRYSDALE, J.J., *dissenting.*

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Jan. 7.

HERTLEIN v. HERTLEIN.

Saskatchewan Supreme Court. Trial before Johnstone, J. January 7, 1913.

1. LIBEL AND SLANDER (§ II E—55)—PRIVILEGE — RELATIONSHIP — REPETITION OF HEARSAY WITHOUT INVESTIGATION—EXCESS OF PRIVILEGE.

A plea of privilege is not sustained by reason of relationship where the defendant wrote his brother an anonymous letter repeating allegations of adultery which he had heard concerning the latter's wife without making any inquiries about the credibility of his informers or to ascertain whether or not they had any sinister motives in formulating or circulating such a report.

Statement

ACTION for libel.

Judgment was given for the plaintiff.

H. V. Bigelow, for plaintiff.

J. A. M. Patrick, for defendant.

Johnstone, J.

JOHNSTONE, J.:—The plaintiff is the wife of James Hertlein, a brother of the defendant.

The defendant wrote an anonymous letter to his brother, charging the brother's wife with having committed adultery with one Adolph Becker.

This action, one of libel, is the outcome of the letter referred to.

The defendant in his defence denied publication of the alleged libel and defamatory meaning and pleaded privilege and justification.

I had little or no doubt in my mind at the trial that the defendant had failed in all his defences except as to that of privilege, as to which I had some doubt.

Upon further consideration I have arrived at the conclusion that the defendant failed in making good his defences, and the plaintiff must succeed.

The evidence adduced in support of the defendant by way

of justification, in so far as it supported such defence, and which proved very disappointing to the defendant, was wholly unreliable.

I think the course pursued by the defendant in sending the letter to his brother, the husband of the plaintiff, a most extraordinary one. On hearing the charge against his sister-in-law, one would expect from the defendant a wholly different course. In the first place, he should have informed himself of the probable truth of the charge through inquiries as to the friendly or unfriendly relations between Becker and his accusers and as to the reputation of the accusers for truthfulness. Had he done this, it is very likely he would have discovered that little or no credence could be given to their statements. And moreover, the defendant was anything but straightforward in writing the letter in the way in which he did. His brotherly love (which should have suggested different action on his part) did not dictate an anonymous letter impugning the plaintiff's character as proper. This letter fortunately failed in its mission.

There will be judgment for the plaintiff for $250, together with costs of the action on the Supreme Court scale.

Judgment for plaintiff.

Annotation—Libel and slander (§ I—9)—Repetition—Lack of investigation as affecting malice and privilege.

Annotation.

Libel and slander—Repetition.

In what cases will a defendant be privileged in going of his own accord to the person concerned, and giving him information for which he has not asked? Odgers (Libel and Slander, 5th ed., 259) says: "In one class of cases it is clear that it is not only excusable, but that it is imperative on the defendant so to do; and that is where there exists between the defendant and the person to whom he makes the communication such a confidential relation as to throw on the defendant the duty of protecting the interests of the person concerned."

Such a confidential relationship exists between husband and wife, father and son, brother and sister, guardian and ward, master and servant, principal and agent, solicitor and client, partners, or even intimate friends: in short, wherever any trust or confidence is reposed by the one in the other. In other words it will be the duty of A. to volunteer information to B., whenever B. could justly reproach A. for his silence if he did not volunteer such information.

Thus it is clearly the duty of my steward, bailiff, foreman, or housekeeper to whom I have entrusted the management of my land, business, or house, to come and tell me if they think anything is going wrong, and not to wait till my own suspicions are aroused, and I myself begin asking questions. So my family solicitor may voluntarily write and inform me of anything which he thinks it is to my advantage to know, without waiting for me to come down to his office and inquire. But it would be dangerous for another solicitor, whom I have never employed, to volunteer the same information; for there is no confidential relation existing between us. So a father, guardian, or an intimate friend may warn a young man against

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Annotation

Libel and slander—Repetition.

Annotation (*continued*)—Libel and slander (§ I—9)—Repetition—Lack of investigation as affecting malice and privilege.

associating with a particular individual; or may warn a lady not to marry a particular suitor; though in the same circumstances it might be considered officious and meddlesome, if a mere stranger gave such a warning: Odgers, Libel and Slander, 5th ed., 260.

If the statement complained of as libel is a privileged communication, then, to make it libellous, there must be actual as distinguished from legal malice: *Winnipeg Steel, etc., Co.* v. *Canada Ingot, etc., Co.*, 7 D.L.R. 707.

Malice as applied to the use of defamatory words may be described as any improper motive which induces the defendant to defame the plaintiff; any direct motive other than a sense of duty; any corrupt motive, any wrong motive, any departure from duty. It is not necessary that the defendant should be actuated by any special feeling against the plaintiff in particular: *Latta* v. *Fargey* (1906), 9 O.W.R. 231, affirmed, 9 O.W.R. 601.

Evidence of malice may be either extrinsic—as of previous ill-feeling or personal hostility between plaintiff and defendant, threats, rivalry, squabbles, other actions, former libels or slanders, etc., or intrinsic—the violence of defendant's language, the mode and extent of its publication, etc. But in either case, if the evidence adduced is equally consistent with either the existence or non-existence of malice, the Judge should stop the case; for there is nothing to rebut the presumption which has arisen in favour of the defendant from the privileged occasion: *Somerville* v. *Hawkins*, 10 C.B. 590, 20 L.C.J.P. 131, 15 Jur. 450; *Harris* v. *Thompson*, 13 C.B. 333; *Taylor* v. *Hawkins*, 16 Q.B. 308, 20 L.J.Q.B. 313, 15 Jur. 746. Mere inadvertence or forgetfulness or careless blundering, is no evidence of malice: *Brett* v. *Watson*, 20 W.R. 723; *Kershaw* v. *Bailey*, 1 Exch. 743, 17 L.J. Ex. 129; *Pater* v. *Baker*, 3 C.B. 831, 16 L.J.C.P. 124. Nor is negligence or want of sound judgment: *Hesketh* v. *Brindle* (1888), 4 Times L. R. 199; or honest indignation: *Shipley* v. *Todhunter*, 7 C. & P. 690. That the words are strong is no evidence of malice, if on defendant's view of the facts strong words were justified: *Spill* v. *Maule*, L.R. 4 Ex. 232, 38 L.J. Ex. 138, 17 W.R. 805, 20 L.T. 675. That the statement was volunteered, if it was defendant's duty to volunteer it, is no evidence of malice: *Gardner* v. *Slade*, 13 Q.B. 796, 18 L.J.Q.B. 336. That the statement is now admitted or proved to be untrue, is no evidence that it was made maliciously: *Caulfield* v. *Whitworth*, 16 W.R. 936, 18 L.T. 527; though proof that defendant knew it was untrue when he made it would be conclusive evidence of malice: *Fountain* v. *Boodle*, 3 Q.B. 5; *Clark* v. *Molyneux*, 3 Q.B.D. 237, 47 L.J.Q.B. 230; Odgers, Libel and Slander, 5th ed., 345.

A niece wrote to her aunt, with whom she was on terms of great intimacy and whom she was in the habit of staying with, a letter making, on the authority of a correspondent, statements derogatory to the character of a clergyman well known to niece and aunt, who was a frequent visitor at the aunt's house, and it was alleged on one side and denied on the other that in the letter, which had been destroyed, the niece told the aunt "to spread this about the town at once." It was held that such a moral and social duty existed as made the communication a privileged one; and that though a direction to spread the statement about would be some evidence of malice, it should have been left to the jury to say whether the direction had been in fact given: *Fenton* v. *Macdonald*, 1 O.L.R. 422 (C.A.).

In an action for libel, where the occasion is privileged, malice in fact

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Annotation

Libel and slander—Repetition.

Annotation (*continued*)—Libel and slander (§ I—9)—Repetition—Lack of investigation as affecting malice and privilege.

may be proved in two ways: (1) by inference to be drawn from the excessive language of the document itself; and (2) by recklessly stating what was untrue or stating that which defendant knew to be untrue: *Winnipeg Steel, etc., Co.* v. *Canada Ingot, etc., Co.*, 7 D.L.R. 707.

The question of wilful blindness or of an obstinate adherence to an opinion, may be tests by which a jury may be led to consider whether the defendant did or did not really believe the statements he made: *per* Bramwell, L.J., in *Clark* v. *Molyneux*, 3 Q.B.D. 237, at 248.

In the same case however, it is pointed out by Bramwell, L.J., that "the conduct of the defendant on the whole is not to be complained of on the ground of rashness, improvidence, or credulity, but in his letter he certainly made use of expressions in excess of the communication he had received" (3 Q.B.D., at 244). The preliminary statement of facts, in the same report, summarizing the result of the *nisi prius* hearing, mentions that the defendant *bonâ fide* believed what he had been told "on the respectability of his informant."

Lord Justice Cotton said in the same case:—

"In order to shew that the defendant was acting with malice, it is not enough to shew a want of reasoning power or stupidity, for those things of themselves do not constitute malice: a man may be wanting in reasoning power, or he may be very stupid, still he may be acting *bonâ fide*, honestly intending to discharge a duty. The question is not whether the defendant has done that which other men as men of the world would not have done, or whether the defendant acted in the belief that the statements he made were true, but whether he acted as he did from a desire to discharge his duty": *Clark* v. *Molyneux*, 3 Q.B.D. 237, at 249. A new trial was directed in that case on the ground of a misdirection of the jury whereby it was left to them to understand that, although the defendant did believe the statements, yet if his belief was founded on wrong reasoning, he was not within the protection of the privilege (3 Q.B.D. 248).

Where the occasion is privileged upon which the defamatory information was repeated in good faith by the defendant concerning a person whom he did not know, and where no motive could be suggested why the defendant should have a vindictive feeling against such person, a want of care in instituting inquiries will not justify asking the jury in a defamation action whether the defendant was actuated by indirect motives in making the statements: *Clark* v. *Molyneux*, 3 Q.B.D. 237; *Brown* v. *McCurdy*, 21 N.S.R. 201.

When words actionable *per se* are spoken of a married woman, she may either sue alone, or she may join her husband as co-plaintiff; in the latter case, he will be entitled to recover in the same action for any special damage that may have occurred to him. When the words are not actionable *per se*, she may sue, provided she can shew that some special damage has followed from the words to her. That special damage has accrued to her husband in consequence of such words will not avail her; he alone can sue for such damage, although it is her reputation that has been assailed.

Hence, if words not actionable *per se* be spoken of a married woman and damage ensue to the husband, none to her, she cannot sue, but he can. The damage to him is in fact the sole cause of action: Odgers, Libel and Slander, 5th ed., 568.

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Annotation

Libel and slander—Repetition.

Annotation (*continued*)—Libel and slander (§ I—9)—Repetition—Lack of investigation as affecting malice and privilege.

Slander is a cause of action for damages under Quebec law only when uttered with intent to injure or through malice. The presumption of malice, arising from the slander itself, disappears in the face of evidence establishing good faith or justification. When a person is visited at his house by one who comes to ask a favour he has a qualified privilege in respect to his response and when he proves that though it was injurious it was inspired by a sentiment of his duty in the matter, or by an interest serious, urgent and legitimate, which barred any other idea from his mind, he is discharged from all liability for the consequences: *Belley* v. *Labrecque*, Q.R. 20 K.B. 79.

Whether an alleged libellous article is to such an extent excessive that it might be held by the jury to be in excess of the privilege is a question for the trial Court: *Winnipeg Steel, etc., Co.* v. *Canada Ingot, etc., Co.*, 7 D.L.R. 707; *McQuire* v. *Western*, [1903] 2 K.B. 100.

If it can be shewn that the mode and extent of publication on a privileged occasion was purposely and deliberately made more injurious to the plaintiff than necessary, this is evidence of malice in the publisher. The defendant should do all in his power to secure that his words reach only those who are concerned to hear them. Words of admonition or of confidential advice should be given privately; not shouted across the street for all the world to hear: *Wilson* v. *Collins*, 5 C. & P. 373.

Odgers (Libel and Slander, 5th ed., 364) says:—In deciding the question of malice or no malice the jury must not ask themselves merely, "Should we have acted as the defendant has done in such circumstances?" for different people act differently in similar perplexities. Moreover the matter has been thoroughly investigated by the time it comes before the jury, and what to the defendant at the time seemed matter of serious suspicion has all been explained away in Court. The jury must place themselves in the position of the defendant at the time these suspicious circumstances were brought to his knowledge, when first the question arose in his mind, "Ought I not to inform A.?" It may well be that another man would have said, "It is no concern of mine," and would have done nothing (which is always the safer course). But that does not prove that defendant was wrong in acting as he did. The jury should find for the defendant if they are satisfied that he honestly felt that he could not conscientiously allow A. to continue in secure ignorance, but that he must communicate to him that which he was so much concerned to know. It is not necessary that before making such statement the defendant should himself have thoroughly investigated the reports which had reached him. The fact that he acted on hearsay, is no evidence of malice: *Maitland* v. *Bramwell*, 2 F. & F. 623; *Coxhead* v. *Richards*, 2 C.B. 569, 15 L.J.C.P. 278; *Lister* v. *Perryman*, L.R. 4 H.L. 521, 39 L.J. Ex. 177, 23 L.T. 269. But the total absence of all inquiry may be some evidence of malice: *Elliott* v. *Garrett*, [1902] 1 K.B. 870, 71 L.J.K.B. 415, 50 W.R. 504, 86 L.T. 441. "And it is obvious that, if the information upon which he acted was procured from a person or persons who could not possibly know anything about the matters in question, and he nevertheless published the statements complained of as if they were based on sufficient information, that might be cogent evidence of malice": *per* Collins, M.R., in *White & Co.* v. *Credit Reform Association, etc., Ltd.*, [1905] 1 K.B. 658.

BANCROFT v. RICHARDS.

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Jan. 17.

British Columbia Court of Appeal, Irving, Martin, and Galliher, JJ.A. January 17, 1913.

1. LANDLORD AND TENANT (§ III D 3—110)—DISTRESS FOR RENT—COSTS OF DISTRESS—POUNDAGE CHARGES.

A sheriff acting as the landlord's bailiff in a distress for rent is not entitled to poundage or commission under the Distress Act, R.S.B.C. 1911, ch. 65, where all that he does after distraining the goods is to hold possession of them for a day; his lawful charges are in such case the fee for levying and for a man in possession.

2. SHERIFF (§ I—3)—BAILIFF—DISTRESS FOR RENT—CHARGES—SCHEDULE A, R.S.B.C.

Where a sheriff, acting as a bailiff, distrains for rent, he is entitled to charge only the same fees as a bailiff or other person would be entitled to under schedule A of ch. 65, R.S.B.C. 1911, and not to the usual sheriff's fees in a proceeding to collect money.

3. LANDLORD AND TENANT (§ III D 3—110)—DISTRESS FOR RENT—SETTLEMENT NOT EQUIVALENT TO SALE.

Where the tenant distrained upon for rent settles the claim and costs by payment before the expiration of the limited time for which the goods must be held before the landlord can legally proceed to a sale thereof, such payment by the tenant is not equivalent to a re-sale by the landlord or his bailiff to the tenant so as to entitle the landlord's bailiff to a commission in the nature of poundage upon their value.

Statement

THE plaintiff (respondent) is a shopkeeper in the city of Victoria, and the defendant (appellant) is the sheriff for the county of Victoria: *Greenwood* v. *Bancroft* (1912), 2 D.L.R. 417, 17 B.C.R. 151.

The defendant was handed a warrant to distrain on the goods and chattels of the plaintiff for rent due, $3,000, and proceeded, as bailiff, to execute the same in due course of law. He distrained after having demanded payment, which was refused, and was proceeding to make the necessary inventory of the goods and chattels distrained. On the request of the plaintiff not to continue making the inventory until he had seen his solicitor with a view to settlement, defendant refrained from continuing to take the inventory. After having been in possession for the day, during which time negotiations for payment took place, the amount of rent due was paid to the landlord by plaintiff's solicitor, and the sum of $2 for levying distress, and $2 for the man left in possession was tendered to defendant. Defendant refused to accept said amount, or to withdraw from possession unless paid poundage or commission according to the statute in that behalf. Plaintiff's solicitor, under protest, thereupon paid the amount claimed for poundage or commission. Delivery of the goods and chattels was then made by defendant to the plaintiff, who commenced proceedings for its repayment. Bancroft gave a receipt for the delivery up of the goods distrained.

The action came on for hearing at Victoria on September 11, 1912, before Lampman, Co.J., who gave judgment for the plaintiff with costs.

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From this judgment defendant appealed, and the appeal was argued at Victoria.

Argument

Bass, for appellant:—We submit that there was only one of two courses open to the tenant to recover possession. He must either (1) replevy (sec. 7 of the Distress Act, ch. 65, R.S.B.C. 1911), within five days, or (2) the sale must proceed. He cannot replevy unless the distress is wrongful, or that he does not owe the money. He admitted the debt, and he did not object to the distress. The bailiff cannot proceed to take the necessary steps to make a sale until the five days have elapsed. The tenant at once entered into negotiations for a settlement, and settled by paying the full amount due the same day. We therefore submit that a sale has been effected to him of the goods distrained, and he has thereby contracted himself out of the statute so as to prevent his setting up that we have been wrongfully paid.

Aikman, for respondent, was not called upon.

Irving, J.A.

IRVING, J.A.:—I think this appeal must be dismissed. The sheriff, the defendant in this action, seems to have been impressed with the idea that he and the bailiff were entitled to similar sort of poundage, just as he would be if he were sheriff. That is a misunderstanding of his position. His rights here, as bailiff, are governed entirely by the Act we have had before us, ch. 65. That statute prescribed certain things, on which he shall be entitled to make certain charges. Sec. 21 of that statute declares that he shall not be paid for anything mentioned in the schedule unless actual performance shall have been made. What he wants to do is this, he wants to contend that he made a sale of the property because he was withdrawn. Now that is not a sale, in my opinion, within the meaning of the schedule, and he is not entitled to charge it; and the only things that he is entitled to charge are these two items, the fee for levying varying with the amount, and the man in possession. I do not think there is any fee provided for his going out of possession. That is all he is entitled to.

Martin, J.A.

MARTIN, J.A.:—I concur. It does seem somewhat strange that all this large sum of money could be recovered for three or four dollars. I think he would have a very strong case to have that schedule revised, to meet this sort of thing, or else he should have a distinct understanding on every seizure that he should receive something more, because that is surely not a proper remuneration, $2 for possession, where a corporation labourer gets $3. However, that is aside the question. I only mention that to shew that I am not leaving it out of consideration.

Galliher, J.A.

GALLIHER, J.A.:—I agree that the appeal must be dismissed.

Irving, J.A.

IRVING, J.A.:—I would add a note to what I have already said, namely, that it is a matter for the Legislature to remedy.

Appeal dismissed.

Re PHILLIPPS & WHITLA.

(Decision No. 3.)

Manitoba King's Bench, Metcalfe, J. January 28, 1913.

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Jan. 28.

1. SOLICITORS (§ II C—33)—SETTLEMENT NEGOTIATIONS — REMUNERATION.

A "fee on settlement" is a proper item in a solicitor's bill in respect of negotiations out of court to settle pending litigation, and while the remuneration of the solicitor is not to be regulated by a percentage or commission apart from contracts made under sec. 65 of the Legal Profession Act, R.S.M. 1902, ch. 95, a lump sum may be allowed for the settlement negotiations upon a *quantum meruit* basis and an allowance by the taxing officer of a fee approximating $8,000 will not be disturbed in a proper case involving large financial interests.

[*Re Phillipps & Whitla*, 1 D.L.R. 847, 22 Man. L.R. 154, and *Re Johnson*, 3 O.L.R. 1, specially referred to.]

Statement

APPEAL by client from the certificate of the taxing officer on the taxation of a second bill of costs delivered subsequent to the judgment in *Re Phillipps and Whitla* (No. 2), 1 D.L.R. 847.

The appeal was dismissed.

A. B. Hudson, for solicitors.

G. W. Jameson, for the client.

Metcalfe, J.

METCALFE, J.:—The solicitors having rendered to their client a bill of costs, the bill was taxed, and coming before Robson, J., by way of appeal from the certificate of the taxing officer, the learned Judge allowed the appeal: *Re Phillipps and Whitla*, 1 D.L.R. 847, 22 Man. L.R. 154.

The solicitors again rendered a bill, and the same being taxed, now comes before me by way of appeal upon the following grounds:—

(*a*) The bill of costs is not a bill of costs within the meaning of the King's Bench Act.

(*b*) The said bill of costs is not an itemized bill of costs delivered in pursuance of the said order of Mr. Justice Robson.

(*c*) That the item, "fee on settlement as per negotiations, October 18th to October 24th, $8,480.11," charged in the said bill taxed, is not a proper charge and is not taxable under the rules of this Court.

(*d*) That the said bill of costs is not taxable in that it does not contain details of services rendered for which the charges contained therein are made.

Counsel for the solicitors objected that counsel for the client had not taken before the taxing officer any objection to the want of items or details in the bill. Counsel for the client stated that he did take such objection before the taxing officer. I have been referred to no record of any such objection having been made. The material does not shew any such objection.

During the argument counsel for the client stated that he objected only to the items $225 on p. 5, and $8,480 on p. 11.

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He admitted that the other items were taxable and properly taxed.

I have very little to add to the judgment of Robson, J., upon the prior bill. Counsel for the client contends that the fee on settlement charge must be itemized. I do not so understand the judgment of Robson, J. That judgment proceeds upon the ground that the taxing officer had exercised a wrong principle in assessing the costs on a commission basis. The learned Judge points out that he thinks the remuneration should be substantial.

The taxing officer took evidence and read the correspondence. He has now taxed a fee not upon a commission basis, but apparently upon a *quantum meruit* for the work done, and which he justifies upon the clause of the tariff relating to general fee.

I think in doing so he followed the law as laid down in the judgment of Robson, J.

Without expressing an opinion as to the quantum of remuneration which ought to be allowed in this case, I would say that I think in this country, where a barrister is usually a solicitor or in partnership with a firm of solicitors, and practises, therefore, in both capacities, the client generally obtains the services of counsel without any special retainer or special arrangement. This matter was of great importance, received much careful attention, and was, through the efforts of the solicitors, acting both as counsel and solicitors, brought to a most satisfactory conclusion.

In the words of Mr. Justice Robson:—

> There can be no doubt that the solicitors exercised skill and diligence, in fact pertinacity, in their employment, and that their efforts brought about advantageous results for their client.

After the litigation had been brought to a satisfactory conclusion, and after the client knew that the solicitors had in their hands $3,875 of his money, he wrote to Mr. Hugh Phillipps the following letter:—

> I have yours of the 13th inst. Surely your charge is away beyond what are liberal charges in such matters, but I don't want to discuss that now, as I never intended to confine you to your regular legal fees. If I get the amount mentioned in your letter, $3,500 per foot or thereabouts, I could afford to be liberal. I never expected to have to take the property back, and having had to do so, it has taken all my ready cash to finance it.
>
> I expect within a few months to realize on some of my properties, when I will see you in respect to the matter.

From that letter I would gather that because of the nature of the litigation it was not intended that the solicitors should be confined to the ordinary tariff. I would further gather that when he says:—

> I never expected to have to take the property back, and having had to do so, it has taken all my ready cash to finance it,

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he puts that forward by way of excuse for not paying something further upon account. I would further gather that when he says:—

> I expect within a few months to realize upon some of my properties, when I will see you in respect to the matter,

he intends to convey to the mind of Mr. Phillipps, that when he has sold some properties and has some money in his pocket, he will see Mr. Phillipps about a compromise of a balance owing to his firm over and above the moneys then in the possession of that firm.

I have no doubt that the client intended to pay Messrs. Phillipps and Whitla, whom he employed not only as solicitors, but as counsel, a more than liberal fee for services rendered, and somewhat in excess of the $3,875 then in their hands.

It is true that this intention of the client, even if communicated to the solicitors, could not be made the basis of a new contract; but I think it may be evidence as to the value of the services upon a *quantum meruit* basis.

While Mr. Justice Robson distinguished *Re Johnston*, 3 O.L.R. 1, I take it that he accepted the principle there laid down. A lump sum had there been charged, and, as Mr. Justice Robson says, a *quantum meruit* was allowed.

The Ontario tariff in this respect is similar to ours: see Cameron on the Law of Costs in Canada, 392.

I think that, under the Canadian authorities, the bill is sufficient.

After examining the evidence and correspondence filed, and in view of *Re Johnston*, 3 O.L.R. 1, and the authorities there cited, I cannot find that the sum allowed is either exorbitant or so excessive as to justify my interference.

If I am correct in this view, it is not necessary that I should deal with the disputed question as to whether a sufficient objection was taken before the taxing officer or not.

The appeal will be dismissed with costs.

Appeal dismissed.

Re WADDINGTON and TORONTO AND YORK RADIAL R. CO.

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Jan. 15.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, and Magee, JJ.A., and Middleton, J. January 15, 1913.

1. STREET RAILWAYS (§ I—3)—FRANCHISES — CONSTRUCTION — AGREEMENT BETWEEN RAILWAY AND COUNTY—JURISDICTION OF PROVINCIAL BOARD—USE OF HIGHWAYS.

It is within the jurisdiction of the chairman of the Ontario Railway and Municipal Board to construe an agreement between a county corporation and a railway company granting power to enlarge the number of switches operated by the railway company upon a highway.

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2. STREET RAILWAYS (§ I—3)—FRANCHISES — CONSTRUCTION — AGREEMENT WITH MUNICIPALITY—SWITCHES—USE OF HIGHWAYS.

A stipulation in an agreement between a county corporation and the railway company which deals in several respects with the entire line of an electric railway, that the company, may construct, put in, and maintain such switches, and turn-outs, as may from time to time be found necessary for the operating of the company's line of railway on a named street, is to be construed as of general application to the whole of the line upon the street named and not merely to the line of extension of the railway on that street which the agreement authorized.

Statement

APPEAL by the Corporation of the Town of North Toronto and the City of Toronto from paragraphs 1 and 2 of an order of the Ontario Railway and Municipal Board of the 2nd October, 1911, declaring that the railway company had the right, under the agreement of the 6th April, 1894, between the Corporation of the County of York and the Metropolitan Railway Company, to construct and put in and maintain such switches and turn-outs as might be necessary for operating their line, carrying freight, etc., and that the Board had the right to make such an order.

The appeal was dismissed.

I. F. Hellmuth, K.C., and *T. A. Gibson*, for the appellants.

C. A. Moss, for the railway company.

R. McKay, K.C., for Waddington and Winter.

Meredith, J.A.

The judgment of the Court was delivered by MEREDITH, J.A.:—The substantial, and the only substantial, questions involved in this appeal are: (1) whether there is any power in the Railway Board to permit the railway company to enlarge their switches and increase them against the will of the appellants; and (2) whether the railway company has a general right to carry freight.

The first question was dealt with by the Chairman of the Board as if depending upon a proper interpretation of the several agreements made between the company and the Corporation of the County of York; and I purpose so dealing with it in the first place, because, if his interpretation was right, as I think it was, it will be unnecessary to discuss other questions.

Then, as to the first point. In the earliest agreement there was a plain restriction as to the number and length of switches; but afterwards, from time to time, there were extensions of the railways so that it has become quite a different and more extensive undertaking than that originally provided for; and so one is not surprised to find in a subsequent agreement—that of the 28th June, 1889—an enlargement of the company's rights respecting switches; it is there provided that "the company may alter the location of or extend culverts, switches, and turnouts as may be found necessary from time to time for the

efficient and economical working of their said railway or tramway."

The agreement of the 17th December, 1889, in no way restricts these additional rights, but relates to switches of another character—branching into other highways and to the company's power-house.

It is true that under the agreement of the 20th October, 1890, the restriction as to number and length of the switches was again imposed, but only as to the addition to the railway provided for in that agreement.

But again in the last of the agreements—dated the 6th April, 1894—general power was again conferred upon the company in these words: "The company for the purpose of operating its railway may . . . construct, put in, and maintain such culverts, switches, and turn-outs as may from time to time be found necessary for the operating of the company's line of railway on Yonge street . . . and the company may from time to time alter the location of such culverts, switches, or turn-outs."

These words seem to extend again the company's right so as to overcome the restriction contained in the agreement of the 20th October, 1890, and to put the company on the same footing in regard to all switches throughout the whole length of the line; but it is contended that that is not so—that these words ought to be held to apply only to the addition to the road provided for in that agreement.

But why so? The words are general: "for the operation of the company's line on Yonge street;" not only a part of that line, the part provided for in the agreement of the 6th April, 1894. And no reason has been suggested why the same right should not apply to all parts of the railway; why there should be any difference in regard to the portion provided for by that agreement. The agreement of the 6th April, 1894, dealt with the whole road, not only in that respect, but also several respects; there can be no reasonable contention that it is altogether restricted to the part of the railway provided for in it.

I have no doubt the Chairman was quite right in his interpretation of the agreements in this respect; and the question was one within his jurisdiction.

On the other point, the appellants' contention is, that these agreements deprive the company of the right to carry freight.

But there is really no substantial weight in that contention. On the contrary, the agreements fully recognise that right, the first of them, that of the 25th June, 1884, reciting that the company was empowered by legislation "to take, transport, and carry passengers and freight."

The agreement of the 28th June, 1889, and that of the 6th

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April, 1894, each, contain a provision that the company shall carry certain freight at certain rates to be fixed as therein provided; thus not only recognising the power of the company to carry freight, but requiring them, in certain events, to do so.

To imply from these provisions an obligation on the part of the company to carry no other freights, or an abandonment of their legislative rights in that respect, or an attempt to transfer the power in that respect to the municipal corporation, would be entirely unwarranted; they, obviously I would have thought, gave, as far as the company had power to give, a right to compel them, as therein provided, to exercise the right to carry freight.

And so I find nothing in the agreements purporting to restrict the right which the Board has expressed its intention to exercise regarding switches or freight; and so I agree with the Chairman of the Board in his interpretation of the agreements in this respect; and, that being so, it is unnecessary to consider any other question of law which was, or might have been raised, before the Board; merely finding nothing in the agreements staying the hands of the Board; without considering what would be the effect of such an agreement if it in fact existed.

The Board properly constituted can now go on and deal with the questions of fact properly arising upon the application before them; as, from the Chairman's certificate, it now appears it was intended to do.

Appeal dismissed.

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Jan. 10.

Re McCOUBREY and CITY OF TORONTO.

Ontario Supreme Court, Kelly, J. January 10, 1913.

1. MUNICIPAL CORPORATIONS (§ II C 4—112)—BY-LAWS—CLOSING HOURS FOR SHOPS—REQUIREMENT OF SIGNATURES OF THREE-FOURTHS OF OCCUPANTS—VALIDITY.

The provisions of sub-sec. 3 of sec. 44 of the Ontario Shops Regulation Act, R.S.O. 1897, ch. 257, giving the council of a municipality the right to pass a by-law regulating the closing hours of certain classes of shops within the municipality where the council is satisfied that an application therefor is signed by not less than three-fourths in number of the occupiers of shops within the municipality belonging to the class to which the application relates, must be strictly complied with and, if it appears that the three-fourths requirement has not been complied with, the by-law is invalid.

2. MUNICIPAL CORPORATIONS (§ II C 4—112)—BY-LAWS OF—CLOSING HOUR OF BARBER SHOPS—VALIDITY OF BY-LAW DEPENDENT UPON NUMBER OF SIGNATURES—SIGNATURE BY AGENT.

Where one of the names to a petition, praying for the passing of a by-law regulating the closing hours of barber shops, in pursuance of sub-sec. 3 of sec. 44 the Ontario Shops Regulation Act, R.S.O. 1897, ch. 257, providing for the passing of such a by-law by the local council of a municipality if it is satisfied that the petition is signed by not less than three-fourths of the occupiers of shops within the municipality belonging to the class to which the application relates,

that of a person who did not sign the petition but whose name was affixed thereto by his employee without the employer's authority, the name is not properly attached to the petition and should be rejected from the count of signatures.

3. MUNICIPAL CORPORATIONS (§ II C 4—112)—BY-LAWS—CLOSING HOURS OF SHOPS—VALIDITY OF BY-LAW DEPENDENT ON NUMBER OF SIGNATURES—EFFECT OF RATIFICATION OF SIGNATURE OF AGENT AFTER MOTION TO QUASH.

Where one of the names to a petition, praying for the passing of a by-law regulating the closing of certain shops in pursuance of sub-sec. 3 of sec. 44 the Ontario Shops Regulation Act, R.S.O. 1897, ch. 257, to the effect that a local council may pass such a by-law if it is satisfied the petition is signed by not less than three-fourths of the occupiers of shops within the municipality belonging to the class to which the application relates, was affixed to the petition without authority, a subsequent ratification by the person whose name was thus affixed, made after a motion to quash the by-law in question, is inoperative.

[*In re Gloucester Municipal Elections Petition*, [1901] 1 K.B. 683, referred to; and see 31 Cyc. 1284, note 41.]

4. MUNICIPAL CORPORATIONS (§ II C 4—112)—BY-LAWS—CLOSING HOURS FOR SHOPS—VALIDITY OF BY-LAW DEPENDENT UPON NUMBER OF SIGNATURES—EFFECT OF OBTAINING SIGNATURE BY FRAUD.

If the name of one of the signers to a petition, praying for the passing of a by-law regulating the closing of certain shops pursuant to sub-sec. 3 of sec. 44 the Ontario Shops Regulation Act, R.S.O. 1897, ch. 257, giving the local municipal council the right to pass such a by-law if it is satisfied that the petition is signed by not less than three-fourths of the occupiers of shops within the municipality belonging to the class to which the application relates, is obtained by deception it should be rejected in the count of signatures.

5. CONSTITUTIONAL LAW (§ I D 4—101)—DELEGATION OF POWER TO MUNICIPALITY—REGULATION OF CLOSING HOURS OF SHOPS.

The legislature has the right to give power to a municipality to pass a by-law regulating the closing hours of certain shops within the municipality.

[*City of Montreal* v. *Beaucais*, 42 Can. S.C.R. 211, and *Re Robertson and Township of North Easthope*, 16 A.R. 214, referred to.]

6. MUNICIPAL CORPORATIONS (§ II C 4—112)—BY-LAWS—CLOSING HOURS FOR SHOPS—VALIDITY OF BY-LAW DEPENDENT UPON NUMBER OF SIGNATURES—TAKING NAMES FROM DIRECTORY IS NOT COMPLIANCE WITH ORDINANCE.

Under sub-sec. 3 of sec. 44 of the Ontario Shops Regulation Act, R.S.O. 1897, ch. 257, giving a local municipal council the right to pass a by-law regulating the closing hours of certain classes of shops if the council is satisfied that the application therefor is signed by at least three-fourths in number of the occupiers of shops of the class to which such application relates, it is not an accurate method to rely merely on the taking of names from the city directory in order to ascertain the number of persons who conduct shops of the class in question. (Dictum *per* Kelly, J.)

Statement

MOTION to quash by-law 6167 passed by the Council of the City of Toronto on the 8th August, 1912, under the provisions of the Ontario Shops Regulation Act, R.S.O. 1897 ch. 257, as amended by 4 Edw. VII. ch. 10, sec. 61. The by-law provided as follows: "From and after the 19th day of August, 1912, all barber shops in the city of Toronto shall be closed and remain closed on each and every day of each week throughout the year except Saturday and the day immediately preceding a public holiday

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Statement

. . . from the hour of eight o'clock in the afternoon of one day to the hour of six o'clock in the forenoon of the next day."

Sub-section 3 of sec. 44 of the Shops Regulation Act provides that if any application is received by or presented to a local council, praying for the passing of a by-law requiring the closing of any class or classes of shops situate within the municipality, and the council is satisfied that such application is signed by not less than three-fourths in number of the occupiers of shops within the municipality and belonging to the class or each of the classes to which such application relates, the council shall pass a by-law giving effect to the application, etc.; and by 4 Edw. VII. ch. 10, sec. 61, this sub-section was expressly made to apply to barber shops.

The council acted upon a petition which was duly presented and found by the city clerk to contain 273 names, that is, three-fourths of the names of all the barbers having shops in the city.

The application to quash was on the grounds: (1) that the petition was insufficiently signed; (2) that certain of the signatures appearing on the petition were obtained by misrepresentation; (3) that certain persons whose names appeared on the petition did not in fact sign it; (4) that the city clerk and the city council erred in the method adopted to ascertain the number of shops and the number of occupiers thereof.

The application was granted and the by-law quashed.

T. J. W. O'Connor, for the applicant.

Irving S. Fairty, for the city corporation.

Kelly, J.

KELLY, J.:—Under the provisions of the Ontario Shops Regulation Act, R.S.O. 1897, ch. 257, as amended by 4 Edw. VII. ch. 10, sec. 61, the city council of Toronto, on August 8th, 1912, passed a by-law (No. 6167), enacting that:—

> From and after the 19th of August, 1912, all barber shops in the city of Toronto shall be closed and remain closed on each and every day of each week throughout the year except Saturday and the day immediately preceding a public holiday . . . from the hour of eight o'clock in the afternoon of one day to the hour of six o'clock in the forenoon of the next day.

Sub-section 3 of sec. 44 of ch. 257, under which the proceedings were taken, is:—

> (3) If any application is received by or presented to a local council, praying for the passing of a by-law requiring the closing of any class or classes of shops situate within the municipality, and the council is satisfied that such application is signed by not less than three-fourths in number of the occupiers of shops within the municipality and belonging to the class or each of the classes to which such application relates, the council shall, within one month after the receipt or presentation of such application, pass a by-law giving effect to the said application and requiring all shops within the muni-

cipality, belonging to the class or classes specified in the application, to be closed during the period of the year, and at the time and hours mentioned in that behalf in the application.

By 4 Edw. VII. ch. 10, sec. 61, this sub-section was expressly made to apply to barber shops. A petition was presented asking the city council to enact a by-law to have barber shops closed during the hours mentioned therein. The affidavits of execution of the original petition indicate that it was signed not later than June 6th, 1912. From a letter of the city clerk to the president and members of the Board of Control, dated 4th July, 1912, I learn that on June 10th the Board requested the city clerk

> to examine a petition signed by the barbers of the city asking that a by-law be passed to provide for the early closing of barber shops. The letter then explains the procedure adopted in checking over the signatures to the petition, and concludes by stating that the statute provides that the council shall pass the by-law if satisfied that the petition in favour is signed by not less than three-fourths of the proprietors of barber shops in the municipality.

The city clerk, having communicated with those in favour of the petition and those opposed to it, was called upon by Leon Worthall, the representative of the Barbers' Union, and on the clerk explaining that he had no accurate list of the barbers doing business in Toronto, it was agreed between him and Worthall that the best method of checking the petition would be by using the list of barber shops as appearing in the last city directory, making any amendments thereto necessary by reason of changes of occupancy, etc. This method was adopted, and on it appearing to the clerk that the petition was probably not sufficiently signed, at Worthall's suggestion further time was obtained from the Board of Control to secure additional signatures. Plaintiff, who had represented the opponents of the by-law wrote the clerk on June 12th, in reply to a request for a conference, that he had decided not to attend any further meetings on the subject, and stating that he had the names of 105 master barbers, who had decided not to recognize any by-law that might be passed. A supplementary petition was afterwards received by the city clerk, who, on examination of it, found the petition to be still not signed by the necessary three-fourths, his finding then being that the number of these shops named in the directory was 339, the number of proprietors of barber shops signing the petition, not in the directory, 21; in all 360, and that the number who had signed the petition was 254. A still further supplementary petition was sent in; the city clerk made a further examination, and on July 19th, 1912, wrote as follows:—

> T. L. Church, Esq. (Acting Mayor) President,
> and members of the Board of Control.
>
> Gentlemen,—In compliance with the order of the Board, I beg to say that I have received and examined supplementary petition sub-

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mitted by Mr. Leon Worthall, representative of the Barbers' Union, in favour of the early closing of barber shops.

I now find the number of barbers to be, as per the city directory, 339, the number signing the petition not in the directory, 24; making in all, 363.

Three-fourths of this number is.....273

Number of names counted on the petitions 273

It appears to me that the petitions are signed by three-fourths of the proprietors of the barber shops doing business in the city.

I may add that there are a number of names on the petitions which have not been counted, as it has not yet been made clear to me that they had a right to sign. In several cases this could not be done owing to the absence of the parties from the city. If any of these names were counted, it would, of course, add to the number in favour of early closing.

I return herewith the petitions.

Your obedient servant,

W. A. LITTLEJOHN,
City Clerk.

The city council passed the by-law on August 8th.

The present application is to quash the by-law on the following grounds:—

(1) That the petition was insufficiently signed;

(2) That certain of the signatures appearing on the petition were obtained by misrepresentation;

(3) That certain persons whose names appear on the petition did not in fact sign it;

(4) That the city clerk and the city council erred in the method adopted to ascertain the number of shops and the number of occupiers thereof, in determining whether three-fourths in number of the occupiers of such shops had signed the petition.

On the application there was filed an affidavit of the solicitor who represented the opponents of the petition, to the effect that on the day on which the by-law was passed, he requested the council to defer for two weeks the passing of the by-law in order that those opposing it might have an opportunity of shewing that the petition was not properly and fully signed, within the meaning of the statute; that no reply was given his request, and that later on the same day the by-law was passed. The council may have been, and very probably was, influenced by the advice which one of the members thereof stated he had received from the city solicitor, namely, that the council had no option in the matter if the petition were sufficiently signed. Referring to the statement of the city clerk in his letter of the 19th July, that there were a number of names on the petition which were not counted, as it had not been made clear to him that they had a right to be signed, a number of instances occurred where the same person signed twice, and the duplicates of these signatures were properly rejected. Two names were

signed, not by the proprietors themselves, but by others for them, and it was not shewn that the parties who signed had any authority to sign. These signatures also were properly rejected. The city clerk also rejected the signatures of two whose names do not appear among the names of barbers in the city directory; evidently he was not satisfied that they had any right to sign. In still another instance, the foreman of the shop, in the absence and without the knowledge or authority of the proprietor, signed his own name as foreman of the shop, but without even mentioning the name of the proprietor. In this case it was contended on the argument that the signing should have been allowed. The only evidence, however, to support the contention is an affidavit made by the proprietor, Beamish, on November 21st, 1912—months after the passing of the by-law, and about two weeks after these proceedings were begun—that he was absent at the time the petition was signed by his foreman, and that he is in favour of the objects asked for in the petition and ratifies the action of the foreman in signing the petition. This signature was properly rejected in the count made by the city clerk.

My view is, that none of the signatures rejected in the count were entitled to be allowed. This leaves to be dealt with the 273 names counted by the city clerk as being of persons entitled to sign.

The propriety of the method resorted to of arriving at the number of proprietors of barbers' shops in the city—that is, by the use of the city directory—may well be questioned. While I do not now pass upon the question, I am not to be taken as approving of that procedure. The actual number might have been ascertained by some more accurate method.

But, assuming the correct number to be 363, as stated by the city clerk's report (and it is not shewn affirmatively that there were not then more than 363), it was necessary that at least 273 should sign in order to give authority to pass the by-law; if even one of the 273 was improperly allowed, then the petition fell short of having the required number of signatures.

One of the 273 signatures purported to be that of Thomas Rackstraw, an occupier or owner of a barber shop at 43 Jarvis street. His signature was not affixed by himself, but by his employee in his absence and without his instructions, authority, or sanction. Rackstraw was examined vivo voce on the 14th November, 1912, and his evidence is part of the material used on the motion. I quote the following from his examination:—

7. Q. Do you remember signing a petition to the council of the corporation of the city of Toronto? A. No, I didn't sign it. I can explain that.

8. Q. You know a by-law has been passed by the city of Toronto re-

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cently for the closing of barber shops at the hour of eight o'clock on certain evenings during certain hours? A. Yes.

9. Q. Then I ask you if you signed a petition to the council of the corporation of the city of Toronto, and you said no. I am referring to a petition in the following words (reads the heading of petition). Now I see on that petition appears the name Thomas Rackstraw, 43 Jarvis street. It is spelled "Tomas Rackstraw." Did you sign any such petition, Mr. Rackstraw? A. No, I didn't sign any such petition, but I would like to explain that.

10. Q. I will allow you, in a moment. I produce the original petition, handed me by counsel for the city of Toronto, and I ask you if the signature appearing there as being yours is your signature? A. Oh, no, I know it is not by looking at it, and I know it is not as well.

10*a*. Q. Do you know who signed that petition? A. Oh, yes, I know who signed it.

11. Q. Who did it? A. It was my man.

12. Q. Did you tell him to do it? A. Oh, no.

Then in answer to counsel for the city he goes on to speak of his own practice of closing at 8 o'clock, and that the man who signed his name thought that he (Rackstraw) would be willing to sign the petition. He adds that he was not in the shop at the time; that he was not in favour of the petition, and that he told his man he would not have signed. Then he was asked:—

16. Q. However, you were not there yourself? A. No, I was not in the shop, myself. I wouldn't have been in favour of it at all, but, of course, he signed the petition thinking it was all right, on account of my closing at 8 o'clock. We never had a word on the subject at all; never spoke about it. Of course, he belongs to the Union, and naturally he would sign it on account of being there.

27. Q. You still are opposed to it? A. I am opposed to shutting anybody else up. I believe in a man running his own business. And then he says the man signed honestly, and not thinking there was anything wrong.

On the 20th November, 1912, Rackstraw made an affidavit which was filed by the respondents, in which, after referring to his having been examined, he says that since the examination he has been more fully apprised of the facts in relation to the petition and its effect upon the outlying barber shops, and he states that he is now in favour of the petition, and he attempts to ratify the action of his foreman in signing it.

It is urged, for the respondents, that the attempted ratification by Bearish and Rackstraw entitled them to be counted amongst the signers of the petition. In my opinion, this attempted ratification was inoperative. Rackstraw, at the time the by-law was passed and as late as the 14th November, 1912, was not in favour of the petition; he did not authorise any one to sign it for him, and not only did he not approve of it, but he expressly disapproved. His name is not properly attached to

the petition, and should not have been counted among the 273 signers.

As was said by Hagarty, C.J., in *Taylor* v. *Aimslie*, 19 U.C. C.P. 78, at 85, "the doctrine of ratification is not without important qualifications." One such qualification is in respect of the time of the attempted ratification. In *Bird* v. *Brown* (1850), 4 Ex. 786, Rolfe, B., at 798, says:—

> But the authorities shew that in some cases where an act which, if unauthorized, would amount to a trespass has been done in the name and on behalf of another but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done to take advantage of it and to treat it as having been done by his direction. But this doctrine must be taken with the qualification that the act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies. Thus in Lord Audley's case (*Audley* v. *Pollard*, Cro. Eliz. 561), a fine with proclamation was levied of certain land, and a stranger within five years afterwards, in the name of him who had right, entered to avoid the fine. After the five years, and not before, the party who had the right to the land ratified and confirmed the act of the stranger. This was held to be inoperative, though such ratification within the five years would probably have been good. The principle of this case appears to us to govern the present. There, the entry to be good must have been made within the five years; it was made within that time, but till ratified it was merely the act of a stranger and so had no operation against the fine. By the ratification it became the act of the party in whose name it was made, but that was not till after the five years. He could not be deemed to have made an entry till he ratified the previous entry, and he did not ratify until it was too late to do so.

It seems to me that the acts of ratification relied on by the respondents were too late.

A further authority against ratification relating back, where persons other than the contracting party have acquired interests prior to ratification, is found in *Re Gloucester Municipal Elections Petition*, [1901] 1 K.B. 683. The same view of the law is also found in Lord Halsbury's Laws of England, vol. 1, p. 181 (sec. 389). And in 31 Cyc. 1284, we find it stated that if a third person has a complete cause of action or defence when a suit is commenced, he cannot be deprived thereof by the subsequent ratification of an act without binding force without such ratification.

Following these authorities, the acts of ratification relied upon here are ineffectual.

The circumstances under which the names of Edward Harper and William Batte appear on the petition—they being two of the 273—make their allowance open to objection.

It is evident from Harper's affidavit and his cross-examination thereon that he at no time intended to sign the petition,

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and that he absolutely refused to sign it. After this refusal, he was approached about signing a memorandum relating to an increase in prices, which was submitted to him; this he agreed to sign; and his evidence is, that what he read over before signing referred only to prices and not to early closing; and that, if it turns out that his name appears as having been signed to the petition for early closing, it is improperly there.

Worthall, an active promoter of the petition, who presented it to Harper for signature, admitted that, at the time Harper signed, he (Worthall) had with him another petition relating to an increased scale of prices; that the two petitions were handed by him to Harper, one lying above the other, but not attached to it, and that, on examination, after Harper had signed, he found Harper's signature to the petition for early closing. He admits, too, that it is possible, though not probable, that Harper signed the petition which he did sign, in error; and he repudiates the suggestion in Harper's evidence that any deceit was employed in obtaining the signature.

I find it difficult to escape the conclusion that Worthall did not act candidly towards Harper, and that as a result Harper was misled as to what he was signing; for I have no doubt that Harper never intended to sign the petition for early closing, and he signed in the belief that he was signing for quite a different object. In the circumstances, his signature should be rejected.

In the case of William Batte, there is such doubt as to the means by which his signature was obtained that I would hesitate to allow his name to be counted amongst the necessary 273.

It is apparent that there was difficulty in obtaining the signatures of the requisite number.

The by-law, if passed, would not only restrict the rights of the minority opposed to it, who, in many instances, would suffer financial loss in being deprived of the right to keep open after 8 p.m., but also would cause inconvenience to those who have but little opportunity of patronising barber shops during the hours permitted by the by-law. Others than barbers would be effected by it. By this I do not mean that such a by-law should not be upheld if the proper and necessary means were adopted of bringing it into effect.

The right of the Legislature to give power to municipalities to pass such a by-law is not questioned: *City of Montreal* v. *Beauvais*, 42 Can. S.C.R. 211. But the necessary formalities should be strictly complied with.

In *Re Robertson and North Easthope*, 16 A.R. 214, an appeal from the judgment of Street, J., refusing to quash a by-law where the condition precedent necessary to give the council jurisdiction was that a petition be presented signed by a majority of those entitled to sign, Hagarty, C.J., at p. 216, said: "We

cannot be too careful and we think the council should be equally careful in requiring that this essential foundation should always exist before such very serious interference with the rights of owners of property should be undertaken. The majority is allowed the right of binding the minority, but there should be no reasonable doubt allowed to exist as well of the existence of such majority and of its being signified in the manner required by law," and, again, at p. 219: "In all cases of this kind—largely invading the rights of private property—it should, I think, be incumbent upon the council to be certain beyond speculation or guess-work that a majority of those interested had clearly sanctioned the proposed work so as legally to found jurisdiction to bind a dissentient minority."

The passage of a by-law such as is now under consideration is a somewhat violent interference with the rights of a considerable body of persons engaged in a legitimate business. The promoters of the by-law and the city council have no cause for complaint if they are held to the strictest compliance with each and every of the conditions and terms imposed upon them by the statute; the rights of the minority should not be curtailed, and inconvenience be imposed upon the public by such curtailment, if any reasonable doubt exists that the necessary three-fourths of the proprietors signed the petition, or that those who did sign signified their wishes as required by law.

I have no difficulty in arriving at the conclusion that the petition was not signed by the necessary three-fourths in number of the proprietors, and that the by-law cannot be upheld.

Had I not reached this conclusion on the grounds I have stated, I would still feel bound to quash the by-law for the reasons on which the Divisional Court based its judgment in *Re Halladay and City of Ottawa*, 15 O.L.R. 65—a case where the Judge of first instance quashed a by-law passed under the Ontario Shops Regulation Act, by which it was sought to provide for early closing of retail grocery stores in the city of Ottawa: *Halladay* v. *The City of Ottawa*, 14 O.L.R. 458. The procedure there adopted to ascertain if the petition was properly and sufficiently signed was much the same as in the present case, and what is said in that judgment may well be applied here.

The by-law is quashed with costs.

By-law quashed.

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Jan. 16.

Re GILLESPIE.

Manitoba King's Bench, Galt, J. January 16, 1913.

1. PARTNERSHIP (§ III—14)—SAME OWNERS OF TWO PARTNERSHIPS—CREDITORS.

In the distribution of assets by the assignee of two partnership firms composed of the same individuals, where it appears that although two businesses were carried on under separate names and with separate books of account, separate bank books and separate letterheads, they were really one firm, a debt due from one business to the other need not be considered in the distribution.

[*Banco de Portugal* v. *Waddell*, 5 A.C. 161, applied.]

2. ASSIGNMENTS FOR CREDITORS (§ V—41)—PARTNERSHIP—INDIVIDUAL ASSETS—WHAT PASSES TO ASSIGNEE.

Where an assignment is made by two partners and each of the partners transfers individual property "in accordance with rights of the joint or separate creditors as the case might be," the separate creditors of each partner individually are entitled to payment out of the separate property which that partner contributed to the estate, the remainder going into the estate and forming part of the partnership property to be wound up.

Statement

APPLICATION by the assignee for advice in respect of certain facts which were set forth in a statement of facts agreed upon by counsel.

J. Galloway, appeared for the assignee.

A. B. Hudson, for Winnipeg Supply Company.

J. W. E. Armstrong, for St. Paul & Western Coal Company.

P. J. Montague, for Sootless Coal Company.

A. C. Ferguson, for Union Lumber Company.

C. Isbister, for Hanbury Manufacturing Company, Vulcan Iron Works and Brown and Mitchell.

E. Frith, for Manitoba Bridge & Iron Works.

Galt, J.

GALT, J.:—It appears that Malcolm Gillespie and Joseph Hugh Ross Gillespie, both of the city of Brandon in Manitoba, commenced business as contractors in the said city of Brandon, under the firm name of "The Gillespie Elevator Construction Company" on or about the 18th day of May, 1909, and continued to carry on the said business under the said name up to the 5th day of March, 1912. A declaration of partnership relating to the said business was duly filed under the statute. Then one John R. Brodie commenced business as a coal dealer and coal merchant in the said city of Brandon on or about the 1st day of August, 1909, under the name of "The Standard Coal Company," and a declaration thereof was filed in the office of the deputy clerk of the Crown and Pleas on August 17, 1909. On or about the 1st day of October, 1910, the said Brodie sold the said business to the said Malcolm Gillespie and Joseph Hugh Ross Gillespie by an indenture bearing that date.

Upon the said 5th day of March, 1912, each of said businesses and the said partners being insolvent, the said partners made

two separate assignments, one in each of said firm names, for the benefit of their creditors under the Assignments Act, to James William Gordon Watson, of all the assets of the said partners, excepting their property exempt from sale or seizure under execution. And it is said that the two separate assignments were made as a result of some discussion between creditors.

The said businesses were carried on by the said partners under the said two firm names respectively and the several transactions of each business were recorded in separate sets of books of account and bank books, and the said partners used separate letterheads for each business. Both of said businesses were alike owned and conducted by the said partners and separate books were kept as aforesaid to enable them to record and ascertain the progress and results of each of the two lines of business in which they were engaged.

It appears from the auditor's statement of the affairs of the insolvents prepared from the said books, there is an indebtedness of $1,566.31 of the Gillespie Elevator Construction Company to the Standard Coal Company, of which the items are given.

Besides the partnership assets as shewn in said books of account transferred to the said assignee the said partners have each transferred to the said assignee by separate transfers absolute in form, certain individual properties of each consisting of real estate in Brandon and Ninette. This was done with the intention that those properties should be applied in accordance with the rights of the joint or separate creditors as the case might be.

The questions on the above statement of facts on which the assignee desires the advice of this Court are as follows:—

1. Does the fact that the said two partners carried on business under two separate firm names under the circumstances above recited make them in fact and law members of two different co-partnerships within the meaning of sec. 27 of the Assignments Act, and must partnership assets be treated as two partnership estates and wound up accordingly?

I think that nearly all the questions which arise in this application are covered by the case referred to by Mr. Ferguson on the argument, viz., *Banco de Portugal* v. *Waddell*, 5 A.C. 161, and cases cited therein. In that case two persons of the name of H. carried on trade in Portugal as wine exporters, under the style of H. Brothers, and the same two persons carried on trade in London as wine merchants, under the style of H. & Sons. The practice of the business was for H. Brothers to draw bills on H. & Sons, etc. It appeared in that case that bankruptcy proceedings were taken in England against H. & Sons, and almost simultaneously proceedings were taken in Oporto, Por-

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tugal, against H. Brothers, and the creditors in Portugal had attached all the assets of the firm there and had received dividends therefrom. Afterwards they applied in England for liberty to rank for the balance due to them on the assets in England. In delivering judgment Earl Cairns, Lord Chancellor, points out that in such a case as that the foreign creditors have a perfect right to retain all the dividends or assets which they managed to lay hold upon in the foreign country; but if they came to England to rank there they would have to bring into account all the dividends that they had received before they would be entitled to rank in England. Then he quotes the statute relating to the matter: "If any bankrupt is at the date of the order of adjudication liable in respect of distinct contracts as member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of such contracts against the properties respectively liable upon such contracts" and proceeds to say, "That supposes a case which it seems to me is perfectly foreign to the present. This is simply the case of one bankrupt firm. It happens to be two persons trading together in Portugal and in England, but it is just the same case as if it were one person trading in Portugal, and the same person trading in England; the two persons do not constitute different firms because they trade in Portugal and also in England; and there is not that diversity which is necessary to bring the section of the Act of Parliament which I have just read into operation." Consequently he finds that H. & Sons and H. Brothers constituted a single partnership, but, owing to the circumstance that some of its business was being conducted in Portugal, he pointed out the peculiarity of the rights of the foreign creditors there to get all they could out of the assets in Portugal.

In the present case the partners had just one place of business. They were the sole owners of both branches of the business; they occupied the same building apparently and the same rooms. They had different books; but that circumstance does not alter their position. The same circumstance existed in the *Waddell* case. It seems to me, therefore, that the two businesses carried on by the two Gillespies under separate names were just branches of the same firm, and that all the creditors of each of those businesses, so to speak, are simply creditors of the one firm. Consequently the partnership assets should be, to use the language of the statement of facts here, "pooled and wound up as a single partnership estate."

That sufficiently disposes of the next question as to the sum of $1,566.31, which is expressed this way: "If there are two distinct partnership estates, should the sum of $1,566.31 be paid

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by the Gillespie Elevator Construction Company estate to the Standard Coal Company estate before distribution?" As I have found that there is only one partnership, the money will belong to the firm.

The next question is, in what order should the following classes of creditors, namely, creditors of the business of the Gillespie Elevator Construction Company; creditors of the business of the Standard Coal Company, and creditors of Joseph Hugh Ross Gillespie, individually, share in the following classes of assets respectively, etc.

The creditors of either or both of the businesses are entitled to share in the partnership assets of the partnership. The separate creditors of Joseph Hugh Ross Gillespie are entitled to payment out of the separate property of Joseph Hugh Ross Gillespie.

There do not appear to be any separate creditors of Malcolm Gillespie, so that the property assigned by him will simply go into the estate and form part of the partnership estate to be wound up.

I think that the questions submitted have been reasonable to be asked, and that the costs of all parties should be paid out of the estate.

Judgment accordingly.

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Dec. 10.

Manitoba King's Bench. Trial before Metcalfe, J. December 10, 1912.

1. MECHANICS' LIENS (§ II—9)—RIGHTS OF LIENOR'S ASSIGNEE OR SUBSTITUTE—CREDITORS' REPRESENTATIVE COMPLETING CONTRACT ON CONTRACTOR'S DEFAULT.

The representative of the creditors of a building contractor who contracts with the owner to take over, as the nominee of the contractor, the work of completing the contract, and obtains from the owner a stipulation whereby all moneys earned or to be earned under the contract were to become payable to such representative in the place of the original contractor, is entitled to file a mechanic's lien for the amount due on completion of the work in like manner as would the original contractor, notwithstanding that there was no express assignment in writing of the right to such lien from the latter.

[As to parties entitled to file mechanics' liens, see Annotation at end of this case; as to liens of sub-contractors, see *Rice Lewis Co.* v. *Harvey*, next following in this volume.]

2. MECHANICS' LIENS (§ II—9)—COMPLETION OF WORK BY CONTRACTOR'S CREDITORS—FURNISHING PROOF THAT NO OTHER LIENS ARE CHARGEABLE.

The nominee of the contractor's creditors who by agreement with the owner takes over the unfinished contract and completes the same on the contractor's default, with a stipulation that he shall be entitled to the same amount as would be coming to such contractor had he himself completed the work, will not be held, in an action brought by him to enforce a lien, to a strict compliance with a clause of the original contract requiring the contractor, before action brought, to supply

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evidence that no other undischarged liens than his own remain a charge on the property, if in fact there were no such liens and the owner raising such objection had knowledge that the creditors other than the plaintiff had agreed with the latter not to file mechanics' liens.

[*Brown* v. *Bannatyne*, 2 D.L.R. 264, and 5 D.L.R. 623, referred to.]

3. CONTRACTS (§ IV D—363)—BUILDING CONTRACT—CERTIFICATE AS TO EXTRAS.

Where a stipulation in a building contract leaves it to the architect to settle what extras should be allowed and the value thereof by his final certificate, such certificate is binding upon the parties as an award, until set aside for cause.

4. CONTRACTS (§ IV D—364)—APPLICATION TO ARCHITECT FOR CERTIFICATE —NOTICE.

It is no defence to an action for the balance due for the erection of a building that no notice was given the owners of the contractor's application to the architect for a final certificate where the contract was silent in that regard and required the architect upon notice from the contractor that the latter considers the work complete, to issue a final certificate and to make deductions from the price for unfinished work.

[*Brown* v. *Bannatyne*, 2 D.L.R. 264, 5 D.L.R. 623, followed.]

Statement

THE plaintiffs William P. Alsip and John D. Sinclair claim as assignees of the right to a mechanics' lien of the contractors Gibbons & Harris, for balance due under a contract in writing, made between Ernest Gibbons, as contractor, and the defendant Martha A. Monkman, as owner, whereby it was contracted that the contractor, under the direction and to the satisfaction of James Chisholm & Son, architects, would provide all the materials and perform all the work mentioned in the specifications and shewn on the drawings and details prepared by the architect, and in accordance therewith, for the excavations, sewer and drains, concrete, stone-work, brick-work, tile-work, carpentering, painting and glazing, electrical work, plastering, iron-work, and bricking-in of boiler, and furnish all materials required therefor, being all the work and materials necessary to complete the building for the owner at the corner of Langside and Ellice streets, excepting the plumbing and heating and galvanized iron work and roofing. The drawings and specifications were identified by the signatures of the parties. The plaintiffs also claim a lien as against Clements, a mortgagee.

The action was dismissed as to one defendant (Clements) and a reference ordered as to defendant Monkman.

T. R. Ferguson, K.C., and *E. K. Williams*, for plaintiffs.

J. B. Coyne and *F. K. Hamilton*, for defendant Monkman.

C. J. H. Locke, for defendant Clements.

Metcalfe, J.

METCALFE, J.:—Under the contract it was, amongst other things, provided: That alterations might be made only on the written order of the architect, who was to compute the value; the amount so computed to be added to or deducted from the contract price. See art. 3.

That upon certain specified defaults of the contractor the owner might terminate the contract and employ others to finish the work. See art. 5.

That the contract would be completed before June 1st, 1909, and for any delay occasioned solely by the contractor's default, the contractor was to pay to the owner as liquidated damages, eight per cent. per annum on the total contract price. See art. 6.

That should the contractor be delayed through the fault of the owner, the time for completion might be extended. The duration of such extension was to be certified to by the architect.

I think in order to avail himself of this provision the contractor should, under the provisions of the contract, and under the circumstances, have made a definite claim therefor. See art. 7.

That the owner agreed to provide all materials not included in the contract, so as not to delay the material progress of the work, and in the event of unreasonable failure so to do, thereby causing loss to the contractor, that she would reimburse the contractor for such loss, the amount of which was in every case to be fixed and determined by the architect. See art. 8.

That eighty per cent. of the value of the work was to be paid on progressive estimates of the architect. See art. 9.

It was further provided in art. 9 as follows:—

> The final payment shall be made within twenty days after the contractor has substantially fulfilled this contract, if the contractor shall have given satisfactory evidence that no mechanics' lien other than his own or liens of which he holds discharges exist in respect of the said works; otherwise the final payment shall be made within two days after the time for filing mechanics' lien has elapsed. The contractor may, if he considers he has completed the works, notify the architect in writing to that effect, and the architect shall, within seventy-two hours thereafter, issue a final certificate that the works are completed and the last payment due under this contract and indicating the amount thereof, or state in writing in what respects the works are incomplete and his decision should be final. If the portion of the said work then remaining incomplete may be then readily completed by the contractor the same shall be done before he is entitled to ask for his final certificate, but if for reasons not within the contractor's control, he cannot then complete the same, the architect shall forthwith deduct the actual value of the incomplete portions together with fifty per cent. thereon (of the propriety of which deduction and the amount thereof the architect shall be the judge) from the contract price and issue a final certificate that the works are completed and the last payment due and indicating the amount thereof. Any such final certificate shall be conclusive evidence of the fulfilment of this contract by the contractor within the meaning hereof. . . . All payments shall be made only upon the written certificates of the architect to the effect that such payments are due unless the architect is in default in issuing the same.

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Article 12 of the contract is as follows:—

> In the event of Dallaire, Charette and Daoust withdrawing from contract to do the plumbing, heating and galvanized iron work and roofing as required by said plans and specifications at the contract price of $2,715, the contractor will perform the said plumbing, heating and galvanized iron work and roofing at the same price and the said price shall be deemed added to the contract price mentioned in art. 9.

The printed form of contract used contained originally the provisions for arbitration usually found in such contracts. These provisions were struck out and the contract as executed contains no provision for arbitration.

In the fall of 1908 Gibbons built the foundation of the building. It would seem that the plumbers had only put in the basement trap and such under-connections as were necessary therefor.

Nothing more was done under the contract until the spring of 1909, when Harris became the partner of Gibbons, and thereafter was recognized as such by the architect and the owner.

In the spring 1909, the architect and the owner told Gibbons & Harris that they did not think the building covered the whole lot. Accordingly a new survey was made and it was found that the measurements originally intended did not cover the whole lot. The building was subsequently enlarged by a few inches. Apparently the side walls of the basement were not changed, but some front pier-work had to be taken down and rebuilt, and thereafter the building was built a few inches larger than called for by the specifications. There were some other alterations and some additions, none of which were authorized by the owner or architect in writing.

After the survey Gibbons & Harris went on with the brickwork. The owner was supplying the steel. There was some delay in the steel arriving and Gibbons & Harris, who were contractors in a large way, removed their men from this contract, but never notified the architect or owner in writing that they would claim damage by reason of such delay, although the owner in a letter of July 14th, 1909, by her agent, A. Monkman, wrote:—

> You intimated you had a claim and would furnish it without delay to the architect; he tells me you have not done so. I want to get my account with the western iron people adjusted without delay, and would like you to present your claim if you have one, so that the architects may consider same and report.

At this time Gibbons & Harris knew that the contractors who furnished the iron had really caused the delay and that the owner might have a claim over against them for breach of contract, yet the said Gibbons & Harris replied to the letter of the 14th by theirs of July 16th, making no reference whatever to their claims for delay.

On the 28th of August the architect wrote to Gibbons, saying:—

> I am instructed by Mr. A. Monkman, agent for M. A. Monkman, to notify you that on the expiration of three days as per terms of contract, that he will proceed to complete your contract for completing the building for him on the corner of Ellice and Langside streets, and charge the cost of same to you.

On October 1, 1909, the architect wrote to the owner as follows:—

> After repeated and continued efforts the past two or three months with the contractor Mr. E. Gibbons, who is erecting the block on the corner of Ellice and Langside, under contract with you as agent for the same, to get the said work completed, I find from the spasmodic efforts, and delays, that, should you wish the building rushed on to completion there is apparently no other course to be pursued but to proceed under clause, or article 5, of the contract, and complete the work, retaining any moneys due or accruing to the said contractor and applying it on the completing of the building.

And on the same day, A. Monkman, as agent for the owner, wrote to Gibbons as follows:—

> The architect of the building on corner Ellice and Langside covered by contract between you and myself having certified that you have made repeated and continuous default in proceeding with the contract, and being duly notified under art. 5 have still unreasonably defaulted and delayed furnishing materials and proceeding with the work and that such refusal, neglect and delay is sufficient ground for terminating such contract.
>
> I hereby give you notice that such contract is terminated and that I intend to proceed under its terms to complete the work and demand possession forthwith.

On the 2nd of October, Ferguson & Richardson, solicitors for the contractors, wrote to A. L. Monkman, the agent of the owner, as follows:—

> Your letter of Oct. 1st to Mr. Ernest Gibbons, contractor, has been handed to us with the request that we reply thereto.
>
> Mr. Gibbons has men working on the contract referred to in your letter, and has continuously and properly carried on the contract, and if there have been any delays, it has been through your or the owner's default and neglect and not through any fault of Mr. Gibbons, and he declines to be dismissed from the contract or to give it up. It is his intention to proceed and properly carry out the contract to completion, and he denies your right, as set out in the letter, to dismiss him.
>
> If you persist in this, we are instructed to take an action for damages against you. Please let us know what you propose to do by return mail.

About this time Gibbons & Harris got into trouble with their creditors, and were apparently unable to proceed with any of their contracts. After some negotiation with their creditors, the Alsip Brick, Tile & Lumber Co., Ltd., who were then creditors of

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Gibbons & Harris, entered into an agreement with the owner as follows:—

Winnipeg, Oct. 4th, 1909.

The undersigned agree that the whole of the works yet to be done on the building mentioned in the contract between Ernest Gibbons, contractor, and Martha A. Monkman, owner, will be fully and finally completed on or before the 25th day of the present month and that that portion of the works required to complete the west store in said building will be fully and finally completed on or before the 14th day of the present month. All such work to be done and completed as required by and to the satisfaction of Jas. Chisholm & Son, architects. In the event of Gibbons & Harris completing the agreements now verbally agreed upon by them with their creditors within two days we will take charge of the said building and the work to be done in the interests of the creditors having furnished materials and done work on said building and of those furnishing materials and doing the work necessary for the completion thereof and indemnify the owner against any liability for any work or materials as per schedule endorsed hereon in respect of the Gibbons contract beyond her liability under such contract. In the event of said agreement not being signed and delivered within two days we will take charge of and complete the works for the owner within the time above mentioned on her behalf, the owner agreeing to repay us for material to be supplied and work to be done and completed and ten per cent. of the net value of material supplied and placed and work done on and from this date for superintendence and that from the present time a competent man shall be put in charge and the said works proceeded with all possible dispatch. It is understood that the employment of the contractor is terminated and is only to be reinstated when the agreement above referred to with the creditors has been duly executed by Gibbons & Harris and delivered. The owner, Mrs. Martha A. Monkman, agrees that in the event of the contract being finished by or through Gibbons & Harris that the entire balance including extras, if any, payable to them in respect of the said contract will, upon the written order of Gibbons & Harris, be paid to W. P. Alsip and John D. Sinclair as the committee representing the creditors of Gibbons & Harris, after deducting any moneys the owners may be justly qualified to deduct for damages or delay and for liens for materials or wages, the intention being that she will pay the same amount as if Gibbons had duly completed his contract and as provided in such contract.

Witness: ALSIP BRICK, TILE AND LUMBER CO., LTD.
A. Monkman. *per* W. P. Alsip, *Vice-President.*
M. A. MONKMAN.

Schedule referred to within contract.

Liability assumed, those undertaken by owner for wages to Morley & Son, for swing scaffold. W. G. F. Stephens, for paints, etc., to Rat Portage Lumber Co. and Consolidated Plate Glass Co. for materials and Menzies & McIntyre Co., for stone to be delivered since Sept. 29th, '09.

Witness: A. B. T. & L. CO., LTD.
A. Monkman. *per* W. P. Alsip, *Vice-President.*
M. A. MONKMAN.

Gibbons & Harris did complete this agreement with their creditors and it was duly executed and delivered. By virtue of this agreement, bearing date October 5th, 1909, the creditors:—

(*a*) agreed with Gibbons & Harris to assist them in carrying out various building contracts, including the contract with the defendant Monkman;

(*b*) waived their right of lien;

(*c*) agreed to supply such material as was necessary to complete;

(*d*) agreed to allow from proceeds sums sufficient to pay the workmen; and

(*e*) appointed Alsip and Sinclair as a committee to represent them.

By a further provision Gibbons & Harris, for the purposes of the agreement assigned, transferred and set over unto the said committee all their right, title and interest in all the moneys then earned or thereafter to be earned by them in respect of the said building contracts.

The work afterwards progressed with Gibbons & Harris in charge, but subject to the supervision of Alsip and Sinclair. All payments were afterwards made by Monkman to the committee upon the written order of Gibbons & Harris.

The owner occupied the building before completion. After many interviews between Sinclair and Monkman and letters, the architect, in March, 1910, indicated some work yet to be done and such work was done on or about the 28th March, 1910. I think that the building was then substantially completed.

It is objected by the defendants that the plaintiffs have no assignment in writing of the right to a mechanics' lien. I think it was clearly the intention of the parties that the committee should guarantee the fulfilment of the original contract in writing, and for that purpose that they should stand in the shoes of the original contractors Gibbons & Harris. While the agreement of October 5, 1909, does not in terms assign the right to a mechanics' lien, it does assign all the moneys then earned or thereafter to be earned. I think it was clearly intended that the committee should have all the rights of the contractors under the contract. I think the intention of the parties may be looked at, and that the assignment, under the circumstances, is sufficient to entitle the committee to a lien.

The defendants further object on various grounds, that the action is premature. It is true the plaintiffs have not shewn that they produced any evidence that there were no mechanics' liens filed other than their own. No such liens were in fact filed. The agreement with the creditors, to the knowledge of Monkman, provided that the creditors would not file liens. As was said by Mathers, C.J.K.B., in *Brown* v. *Bannatyne*, 2 D.L.R. 264, 5

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D.L.R. 623, 21 W.L.R. 80, 827, this defence at best is technical, and under the circumstances I will not give it effect.

The architect, on the 4th day of June, 1910, gave the plaintiffs his final certificate. This fact was not communicated to the defendants until after action was commenced. For that reason the defendants urge there was in reality no certificate. I think the defendants' contention cannot be upheld: see *Brown* v. *Bannatyne*, 2 D.L.R. 264, 5 D.L.R. 623, 21 W.L.R. 80, 827.

There has been a great deal of evidence and much discussion concerning extras. Unless the owner waived the provision as to writing or unless the plaintiffs prove a new contract they cannot recover for such work. But in any event I think the contract provides that the value of such items must be settled by the architect. He has given his certificate and has dealt with extras. Gibbons & Harris made the contract with their eyes open. I see no real hardship in the contract. It is not to be expected that the owner should be familiar with all the details and specifications of a building. Neither is it to be expected that he desires to get into a legal tangle over disputes concerning matters of which he knows nothing. Where, therefore, he says that these are matters which must be left to the architect, the contractor may take such a contract at the price, or he may leave it. The name of the architect is specified. He knows the architect. He must take his chances. If, under these circumstances, he makes the contract, I think he is bound by the findings of the architect. The architect has here certified not only as to the extras, but as to their value. The subsequent negotiations and agreement with their creditors contemplates that in the event of the creditors taking over the works, they shall continue the contracts as they stood and to the satisfaction of the architect in charge. I do not think the subsequent dealings amount to a waiver as claimed by the plaintiffs. So long as the certificate stands, I think it is a bar to the plaintiffs' recovery for extras.

The owner says she has a counterclaim against the amount found to be due by the architect. This she deducts and pays the balance into Court. I think she has a claim against the contractor by reason of his breach regarding the plumbing contract, and it may be for the item of heating. There will be a reference to ascertain the amount for which the owner should receive credit.

There will be a verdict for the defendant Clements with costs.

Reference ordered.

N.B.—See Annotation following, on page 105.

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Annotation

Mechanics' liens

Annotation—Mechanics' liens (§ II—5)—What persons have a right to file a mechanic's lien.

By R. L. REID, K.C., of Vancouver, B.C.

This note is written with respect chiefly to the Mechanics' Lien Acts in force in the provinces west of the Great Lakes, and especially the Mechanics' Lien Act of the province of British Columbia, but the writer trusts that it may be of use in construing the statutes in the eastern provinces as well.

The statute alone must be looked to when it is desired to know the rights of persons to a mechanics' lien against land. These rights being purely statutory, the Courts will not travel outside the statute to assist persons not clearly entitled to a lien under its express provisions. When mechanics' lien legislation first came in force, the Courts were extremely technical in construing the Acts, holding that they were in derogation of the common law: *Edmonds* v. *Tiernan* (1892), 21 Can. S.C.R. 406; *Haggarty* v. *Grant* (1892), 2 B.C.R. 173; *Smith* v. *McIntosh* (1893), 3 B.C.R. 26.

Later decisions, however, while confining the rights of parties to the provisions of the statutes, do not construe them so strictly. With few exceptions the Courts treat them as remedial statutes and endeavour to sustain the liens, if the provisions of the Acts will by a fair reading permit and will not allow the protection given by the Act to be frittered away by technicalities: *Craig* v. *Cromwell* (1900), 27 A.R. (Ont.) 585. In this case, Osler, J.A., at page 588, says of a notice of intention to claim a lien: "It may be thought if the notice were to be read as pleadings, civil and criminal, were read fifty years ago, fatal defects might be picked out in it. But it is not intended to be the subject of subtle criticisms and trifling objections. If it is such a notice as, reasonably read, ought to convey to a reasonably intelligent man the information which I have shewn that this notice does convey, it conveys all that the statute requires." See also, *Barrington* v. *Martin* (1908), 16 O.L.R. 635, at 639; *Coughlan* v. *National Construction Co.* (1909), 14 B.C.R. 339.

The lien created by the Mechanics' Lien Acts, while it is an interest in land, *Stewart* v. *Gesner* (1881), 29 Gr. 329, is not analogous to a vendor's lien, but is merely a charge as created by the statute against the land which it affects: *King* v. *Alford* (1884), 9 O.R. 643; and creates no personal liability where independently of the statute there would be no liability. It does not interfere with, or deprive a person of, any other remedy, but is cumulative and under most Acts a personal judgment may be taken in the lien actions against the parties personally liable.

LIENS FOR LABOUR.

The wording of the provisions of the Mechanics' Lien Acts of the provinces as to what entitles a person to file a lien for labour are very nearly alike. Most of them give the right to any one "doing or causing work to be done upon" or "performs any work or service upon." There seems to be little difference in the construction of Acts using the word "work" alone, and those using the words "work or service," as it was held in Ontario when the Act used only the word "work" that services rendered by an architect as such were within the meaning of the Act and entitled him to file and enforce a mechanic's lien: *Arnoldi* v. *Gouin* (1876), 22 Gr. 314.

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In this case, Proudfoot, V.-C., says that "the man who designs the building and superintends its erection, as actually does work upon it, as if he had carried a hod." The wages of a labourer may be by time or piece work and the British Columbia Act specifically provides that a person doing manual or mental work for wages cannot be included under the term "sub-contractor." In order to have a lien for labour, while such labour need not be performed on the site of the building or on the land on which the lien is claimed, but may be performed elsewhere, as in the shop of the contractor, it must be directly connected with the improvement and be such as to forward its construction. If the work is merely a step in making the materials which are afterwards used in the construction of the building or is a provision for the health or comfort of the men engaged in construction, no lien arises. For example, making cement for use in making the concrete in a building would give no lien on the building to the workman who made the cement; while mixing the concrete and pouring it into the building in the course of construction would. A blacksmith engaged in sharpening tools for drilling in a mine is entitled to a lien, but a cook employed to feed the men, is not: *Davis* v. *Crown Point M. Co.* (1901), 3 O.L.R. 69, followed in *Bradshaw* v. *Saucerman* (1912), 4 D.L.R. 476. And where a person was employed to sharpen picks to get out stone to build a lime kiln while he might have a lien on the quarry it was held that he had no lien on the lime kiln. *Allen* v. *Harrison* (1908), 9 W.L.R. 198.

The term "person" extends to and includes both natural and artificial persons—see Interpretation Act of B.C., R.S.B.C. 1911, ch. 1, sec. 26, subsec. 19. In the province of British Columbia, if the company claiming a lien is a foreign corporation, it would be necessary for it to be registered in the province under the provisions of the Companies Act relating to the registration of foreign companies and, so far as this provision is concerned, all companies not incorporated under the provisions of the British Columbia Act are included in the term "foreign companies:" *Northwestern Construction Co.* v. *Young* (1907), 13 B.C.R. 297; *Waterous Engine Co.* v. *Okanagan L. Co.* (1908), 14 B.C.R. 238; *John Deere Plow Co.* v. *Agnew* (1912), 8 D.L.R. 65; *Kominick* v. *B.C. Pressed Brick Co.* (1912), 8 D.L.R. 859.

A person clearing land for the purpose of cultivation would probably be entitled to a lien under most of the Mechanics' Lien Acts, notwithstanding the case of *Black* v. *Hughes* (1902), 22 C.L.T. 220. When this case was decided the statute in force in British Columbia, did not include "land" in the general part of the section (R.S.B.C. 1897, ch. 132, sec. 4, amended 1900, ch. 20, sec. 7), and afterwards in the said section the words used were "or doing or causing work to be done upon or in connection with the clearing, excavating, filling, grading, draining or irrigating any land in respect of a railway, mine, sewer, drain, ditch, flume or other work," thus narrowing the right to a lien for clearing land to clearing for the particular purposes mentioned. However, in the Act as now in force (R.S.B.C. 1911, ch. 154, sec. 6), the limitation is cut away and the right to a lien in such a case is absolute. A person claiming a lien other than as a contractor is not bound to produce an architect's certificate, even if the original contract for the construction of the work requires it: *Lundy* v. *Henderson* (1908), 9 W.L.R. 327.

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Wages to labourers for not more than six weeks are subject to no limitation, but the owner is responsible therefor, notwithstanding any limitation contained in the Act. The provisions is the same in the other western Acts, except Saskatchewan and Manitoba, where the unlimited liability extends only to wages for thirty days. Under the British Columbia Act, where a wage earner does not earn wages at a rate exceeding five dollars per day, he can not contract out, and in Saskatchewan no agreement by a wage earner contracting out of the Act is of any force. In Manitoba and Alberta all persons have a right to agree that the Act shall not apply to cover the amount due them in respect of any work or improvement.

The question of the rights of persons hauling materials for a building seems not to have been decided in Canada. The cases in the United States are hopelessly conflicting. It would seem that the materialman would be entitled to include it in his lien as part of the costs of the material, but it would be doubtful if the teamster would have a lien. If the hauling were done by order of the contractor or the owner, the teamster would probably have a lien. Persons carrying materials upon the building or from one portion of the building to another in the course of construction would, without doubt, be entitled to a lien. An architect is entitled to a lien and so also is a superintendent of construction: *Arnoldi* v. *Gouin* (1876), 22 Gr. 314; *Sickler* v. *Spencer* (1912), 17 B.C.R. 41, 19 W.L.R. 557.

MATERIALS.

All moveable property is included under the term materials. Persons supplying materials have a lien by virtue of the statute. This provision was excluded from the British Columbia Act, of 1891, but was restored in 1900. The lien extends only to persons "placing or furnishing." Such persons have a lien upon the land "upon which such material is placed or furnished to be used." In order, therefore, that there should be a valid lien for materials, such materials must be actually placed upon the land on which the lien is claimed and it is not sufficient that they have been ordered by the contractor or are actually in course of conveyance to the site where construction is taking place: *S. Morgan Smith Co.* v. *Sissiboo P. & P. Co.* (1904), 35 Can. S.C.R. 93; *Ludlam-Ainslie Lumber Co.* v. *Fallis* (1908), 19 O.L.R. 419.

To give the supplier a lien, the material must be supplied for the construction of a particular building. It is not sufficient that it is supplied on a general debtor and creditor account and is afterwards used in the construction of a building: *Sprague* v. *Besant* (1885), 3 Man. L.R. 519.

Where the supplier received an order stating that "we have secured contract for hotel which requires above goods," it was held that building was sufficiently identified to give lien: *Dominion Radiator Co.* v. *Cann* (1904), 37 N.S.R. 237.

In the United States, it has been held that where the materials were sold on the representation of the buyer that they were to be used by him in a particular building, but were actually used in the construction of another, the supplier had a lien on the building in which they were actually used: *Taggard* v. *Buckmore*, 42 Maine 77.

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"Del credere" agents supplying goods have such an interest therein as will entitle them to take advantage of the provisions of the Mechanics' Lien Act and to file and enforce a lien for the price thereof: *Gorman et al.* v. *Archibald* (1908), 1 A.L.R. 524, 8 W.L.R. 916.

In the British Columbia Act, protection is given to the owner by the provision that a person supplying material, relying on his lien to ensure payment of his account, must notify the owner, either before delivery or within ten days thereafter, of his intention to claim a lien therefor. Such notice may be given either in respect of any specific delivery or of all deliveries made within ten days before the notice is given and all deliveries subsequent thereto. Under this section, it was held by Grant, County Judge, that where the material was supplied by the contractor under a lump contract for labour and material, no notice was required: *Gidney* v. *Morgan* (1910), 16 B.C.R. 18. McInnes, County Judge, however, in a case decided January 7th, 1913, not yet reported, *North Pacific Lumber Co.* v. *McKay*, held that unless notice was given pursuant to the Act there would be no lien for material even when it was supplied on the order of the owner himself. His decision is as follows:—

> A supplier of material, in order to avail himself of the unusual remedy provided by the Mechanics' Lien Act, must comply strictly with the provisions of the said Act. Proviso to sec. 6 of the said Act states that "no lien for material supplied shall attach or be enforced unless the person placing or furnishing the same shall, before delivery or within ten days thereafter, give notice in writing of his intention to claim such lien, etc." In this case the plaintiffs' claim is entirely for material and it is admitted that the plaintiffs gave no such notice as required by said section six. Under these circumstances, I am of the opinion that the plaintiffs are not entitled to a lien, notwithstanding the fact that the material was ordered by and supplied to the owner. I therefore order that the lien be cancelled with costs of the lien application to the defendants.

But *contra*, *Duncan* v. *Brunelle*, 10 Que. P.R. 268, under a somewhat similar provision. Notice of a somewhat similar nature is required under sec. 12, sub-sec. 4, of the Ontario Act and an informal letter apprising the owner of the intention to claim a lien was held sufficient: *Craig* v. *Cromwell* (1900), 27 A.R. (Ont.) 585.

Where a materialman supplies lumber to a contractor for the erection of several distinct buildings owned by different persons the onus is on him to shew what material for which he had not been paid has gone into each particular building, and if he cannot do this he cannot enforce a lien against any of such buildings: *Dunn* v. *McCallum* (1907), 14 O.L.R. 249; *Barr & Anderson* v. *Percy & Co.* (1912), 7 D.L.R. 831, 21 W.L.R. 236; *Fairclough* v. *Smith* (1901), 13 Man. L.R. 509.

But where one owner enters into an entire contract for the supply of material to be used upon several buildings all of which are his property, the lien may follow the form of the contract and be for an entire sum upon all the buildings. In such case if the owner desires to have the lien upon any building confined to the indebtedness incurred for the material going into that building, the onus is on him to shew the facts and not on

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the contractor. If the owner has sold one or more of the buildings the equities which have arisen by reason of the mechanics' lien on all may be worked out on the principles which are applicable in cases where a part of a property, subject to a mortgage, is sold and the mortgagee seeks to enforce his remedy against all parcels: *Ontario Lime Association* v. *Grimwood* (1910), 22 O.L.R. 17, but see *A. Lee Co.* v. *Hill* (1909), 2 A.L.R. 368, 11 W.L.R. 611.

Although a materialman has a lien under the Act, he may waive it or may by his actions estop himself from claiming it. Thus, when the owner's architect rang up the plaintiff and asked him about his account and was told that the contractor's liability was good enough for him, it was held that the lien was waived: *J. Arbuthnot Co.* v. *Winnipeg Mfg. Co.* (1906), 16 Man. L.R. 401, 4 W.L.R. 48.

And where receipts were signed by the claimant shewing payments as made, which were not in fact made, in order that the contractor might obtain from the owner further payments on account, it was held an estoppel *pro tanto*: *Coughlan* v. *Nat. Construction Co.* (1909), 14 B.C.R. 339; *Ringland* v. *Edwards* (1911), 19 W.L.R. 219.

SUB-CONTRACTORS.

The definition of a "sub-contractor" is set out in the Acts in terms substantially the same and is defined to be a person not contracting with or employed by the owner or his agent, but contracting with or employed by the contractor or under him by another sub-contractor to do the whole or a certain portion of the work. The B.C. and Manitoba Acts go further and say specifically that a person doing manual or mental work for wages shall not be deemed to be a sub-contractor.

The sub-contractor in some particulars may have larger rights to a lien than the original contractor and will not be bound to shew that all the terms and conditions set out in the contractor's contract with the owner have been fulfilled. For instance, where the original contract has a provision requiring production of an architect's certificate before a payment is due he need not shew that the contractor has procured such a certificate: *Lundy* v. *Henderson* (1908), 9 W.L.R. 327, but he must, however, in order to have a lien shew a substantial performance of his own contract with the contractor unless such performance is waived or prevented in some way by the owner or principal contractor: *Mallett* v. *Kovar* (1910), 14 W.L.R. 327. Under the Ontario, Saskatchewan and Manitoba Acts the lien of a sub-contractor is a charge only upon the money due the contractor and when, by reason of the contractor's default, no money ever becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had, and their lien fails: *Farrell* v. *Gallagher* (1911), 23 O.L.R. 130.

In this section the words used are "limited to the amount owing." The Acts of British Columbia, Alberta and Saskatchewan have a section providing that save as in the Act set out the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor. This would, in any case, be the fact as far as the original contractor is concerned, but the question has often arisen as to

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how far this provision limits the amount to be recovered by the sub-contractor or other lien holders whose claim is other than directly from the owner. In *B. C. Mills Timber and Trading Co.* v. *Horrobin* (1906), 12 B.C.R. 426, a lien was allowed to the materialman although the owner had paid the contractor already much more than the contract price. The Court, however, does not discuss in the judgment the effect of the limitation contained in what is now section 8 of the B.C. Act and seems to have totally disregarded it. So also in *Lemon* v. *Dunsmuir* (1907), 5 W.L.R. 505, the Court speaks of the hardship on the owner, so that, evidently, he was made to pay more than was owing to the contractor, but, again, no specific reference was made to this section. A similar provision has also been thoroughly discussed in a number of cases in the Supreme Court of Alberta, and it has been held there that, on the true construction of section 19 and 32 of the Alberta Act, when the lien attached by the furnishing of material or the doing of work, the amount *then* unpaid, which then, or later, the owner may legally be required to pay, is the limit of the amount for which the lien-holder may have recourse against the owner, but that, so far as that amount is concerned and to the extent of the sum owing to the lien-holder, no subsequent payment to the contractor will relieve the owner. See the full discussion of this question in the elaborate judgment of Mr. Justice Harvey in *Ross Brothers, Ltd.* v. *Gorman* (1908), 1 A.L.R. 516, 8 W.L.R. 413. In that case the learned Judge admits that this may involve the taking of accounts, in many cases at different periods, because, of course, the lien is limited to the amount owing to the lien-holders and that amount may change from time to time. So also the amount due from the contractor will change from time to time. This case follows a decision given by Mr. Justice Stuart in the previous year: *Swanson* v. *Mollison* (1907), 6 W.L.R. 678, and is concurred in in a number of cases in the same Court, and upheld in the full Court of Appeal: *Gorman* v. *Henderson* (1908), 8 W.L.R. 422; *Union Lumber Company* v. *Porter* (1908), 8 W.L.R. 423, (1908), 9 W.L.R. 325; *Ross Bros. Ltd.* v. *Gorman* (1908), 1 Alta. L.R. 109, 516, 9 W.L.R. 319; *Lundy* v. *Henderson* (1908), 9 W.L.R. 327; *McCauley* v. *Powell* (1908), 7 W.L.R. 443. The case of *Travis* v. *Breckenridge Land, Lumber and Coal Co.* (1910), 43 Can. S.C.R. 59, in no way overrules or weakens the authority of these cases as the lien was disallowed by the Supreme Court of Canada in that case on the express finding that there was no "sum owing and payable to the contractor by the owner *at the time when delivery of the materials was made* by the plaintiffs."

The Court of Appeal in British Columbia in a case of *Turner* v. *Fuller*, not yet reported, has lately given a decision which it is necessary to consider on this point. In this case one Beach contracted to erect a house for the defendant (appellant), Turner, plaintiff (respondent); Fuller was a sub-contractor for the plastering. In each case the contracts covered both labour and material and were for lump sums. Beach's contract was for $8,500, and, after payment of $1,600, the defendant, under a provision in the contract took it over from Beach, who had assigned for the benefit of creditors, and completed it at a cost of more than $2,400. At the time that the contract was taken over by the defendant the plaintiff had almost

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completed his contract. The Court held that, as there was no amount due by Turner to Beach when he took over the contract, the limitation in section 8 applied, and the lien failed. It is to be regretted that no reference was made to the earlier British Columbia decisions or to the Alberta cases, and the right of the owner to bar the sub-contractors lien after the work had been wholly or in part done by some act without the consent of the sub-contractor, more fully discussed. Either the law of B.C. must be taken to be changed by this decision or the case must stand on its own peculiar facts.

In Saskatchewan, however, it has been held that unless there was something due the contractor from the owner when the lien of the sub-contractor was filed, the sub-contractor cannot recover: *Smith* v. *Bernhart* (1909), 11 W.L.R. 623.

In Ontario (Mech. Lien Act, sec. 12), the owner may pay up to 80 per cent. (85 per cent. where the amount of the contract exceeds $10,000) to the contractor and so discharge himself, *pro tanto*, of liens unless the sub-contractor serves him with a notice that he claims a lien for the amount due him. This notice may be informal so long as it is sufficient to give the owner warning that he cannot safely make any further payments to the contractor on account of the contract price even within the margin prescribed by the statute owing to the fact that a lien is claimed and which, without the notice, he would not be concerned with: *Craig* v. *Cromwell* (1900), 27 A.R. (Ont.) 585.

A similar provision exists in the Saskatchewan Act (sec. 11, sub-sec. 2), and the Manitoba Act (sec. 9, sub-sec. (c)), but not in the B.C. Act. The Alberta Act (sec. 32) has a provision peculiar to itself as to notice, but as seen above is construed in accordance with the older decisions under the B.C. Act.

Where the owner under a clause permitting such procedure, dismisses the contractor and arranges with the sub-contractor to complete the work, such arrangement makes a new and independent contract, whereby the sub-contractors become contractors and thereby become entitled to a lien for the amounts falling due under such new and independent contracts: *Petrie* v. *Hunter* (1884), 10 A.R. (Ont.) 127.

In an action by a sub-contractor to enforce his lien the contractor and any sub-contractor through which the plaintiff claims must be made parties to the action as well as the owner: *Dunn* v. *Holbrook* (1900), 7 B.C. R. 503.

Under section 15 of the B.C. Act, and section 17 of the Alberta Act the sub-contractor is under the same obligation as the contractor, where the price exceeds $500, to post a copy of receipted pay roll on the works from noon to one p.m. on the first legal day after pay day and to deliver to the owner the original pay roll receipted in full by all the labourers (and in British Columbia the materialmen also), and in default of so doing he cannot succeed in enforcing his lien. Under the Alberta Act this is not necessarily fatal to the lien and the Judge may relieve against the omission, but there is no such power given to the Judge under the B.C. Act. It has been held in Alberta that this section is intended solely to protect the labourers and to afford the owner the means of securing

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himself from liability to the labourers and non-compliance by the contractor or sub-contractor with the provisions of this section will not prevent his lien from coming into existence or nullify a lien already existing or prevent a lien-holder from keeping it alive by commencing proceedings in accordance with the Act: *Spears* v. *Bannerman* (1907), 1 Alta. L.R. 98.

The provisions as to posting the pay rolls do not appear in the Manitoba and Saskatchewan Acts. An attempt was made in *Sickler* v. *Spencer* (1911), 17 B.C.R. 41, to deprive an architect of his lien owing to pay rolls not having been posted but as the point was not raised in the pleadings the Judge refused to consider the point. It would seem, however, especially under the B.C. Act that the obligation was not tenable as an architect is a person doing mental work for wages as wages are defined in the Act and, therefore, not within the definition of "sub-contractor" as therein defined.

The case of *Turner* v. *Fuller* (B.C. Court of Appeal, not yet reported) above referred to, also refers to this section. That case holds that, while this section protects labourers and materialmen, it does not protect a person supplying both. Macdonald, C.J.A., says: "I do not think this section helps the plaintiff: he is not within it. The section protects only labourers and materialmen. For some time I was puzzled by the peculiar wording of the first part of the section above quoted, particularly the words, 'Persons placing or furnishing materials who have done work.' It seemed to me at first sight that three classes were included in the first part of the section and two classes only in the second part above quoted, but on examining the original section, being sec. 12 of the Revised Statutes of 1897, which extended only to labourers, it now seems plain that the words 'who have done work' must relate to labourers, not to persons placing or furnishing materials. The manner in which the original section was amended gave rise to the apparent difficulty in construing it." It will be interesting to see if, and how far, this will be hereafter held to apply to section 6 and if the Courts will hold that a person entering into a lump contract for labour and material is entitled or not to any lien whatever.

In British Columbia and Alberta, a sub-contractor's lien is subsequent to all other liens except other sub-contractor's lien, all of which rank *pari passu*, and is preferred to the sub-contractor's lien (B.C. sec. 36 and Alta. sec. 30). In Saskatchewan and Manitoba the labourer is preferred to the extent of thirty days' wages—other lien-holders rank *pari passu*, except where contractors or sub-contractors make default (Sask. secs. 13 and 14; Man. secs. 11 and 12). Where part of the contract price was to be paid in lots the sub-contractors doing the work and proving a lien were held to be entitled to have such lots sold and the proceeds of such sale applied in payment of their claims. *William Head Company* v. *Coffin* (1910), 13 W.L.R. 663.

A stipulation in a contract that there shall be no right to a lien against the property will not affect the liens of sub-contractors or other persons doing work or furnishing materials unless it can be shewn that they expressly assented to such arrangement: *Anly* v. *Holy Trinity Church* (1885), 2 Man. L.R. 248.

And even then in B.C. it would not affect wage earners earning less

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than $5 per day (sec. 4, sub-sec. 2) and in Saskatchewan any person performing manual labour (sec 3). In Alberta (sec. 3) and in Manitoba (sec. 6) anyone can contract out but cannot be deprived of a lien by any agreement to which he is not a party.

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This term is defined in the Acts and includes any person contracting directly with the owner whether for labour or material or both. He has a right to a personal judgment against the owner for the amount of his claim as well as a lien against the land on which the work or improvement is done. It is, however, incumbent on him to prove that his contract is fully complied with and if such contract prescribes any condition precedent to recovery, such as the procurement of a certificate from an engineer, architect or surveyor, such certificate must be produced or his claim, including his lien, will fail entirely: *Walkley* v. *City of Victoria* (1900), 7 B.C.R. 481; *Leroy* v. *Smith* (1900), 8 B.C.R. 293; *Whiting* v. *Blondin* (1904), 34 Can. S.C.R. 453.

He will only be excused from complying with such condition precedent by shewing that the owner has, by his own act, prevented such compliance: *McDonald* v. *Mayor of Workington* (1892); Hudson on Building, Contracts, 2nd ed., vol. 2, p. 222; *Canty* v. *Clarke* (1879), 44 U.C.Q.B. 505.

Where the final arbiter under a contract was described as the chief engineer of a company not a party to the contract and he turned out to be the engineer of the employer, the contractor was held not to be bound by the condition: *Dominion Construction Co.* v. *Good* (1899), 30 Can. S.C.R. 114.

And where an agreement provides for the certificate of an architect and no architect is appointed, the provision is inoperative: *Degagne* v. *Chave* (1895), 2 Terr. L.R. 210.

The duty of a contractor to post receipted pay rolls and the effect of non-compliance with the statute has been discussed under the head of sub-contractors.

The lien of a contractor under the B.C. and Alberta Acts by the express terms of the statute ranks after all other liens and probably the same rule holds good in the other provinces.

In British Columbia, if the general contractor supplies materials and desires to claim a lien for the same he must notify the owner to that effect in accordance with the terms of sec. 6 of the Act as any other materialman. See *North Pacific L. Co.* v. *McKay*, *supra*.

Where a municipal by-law passed two days after the signing of a building contract rendered the carrying out of the contract illegal, the contractor could not recover: *Spears* v. *Walker* (1884), 11 Can. S.C.R. 113.

And if a contractor is prevented by an Act of Parliament from carrying out his contract he has no recourse against the owner: *Samson* v. *The Queen* (1888), 2 Can. Ex. R. 30.

ASSIGNEES OF CLAIMS.

The Acts of all the Western Provinces provide that the right of a lienholder may be assigned in writing. Before this right was given when a

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mechanic assigned his claim to the plaintiff and the plaintiff, in order to enable the mechanic to register his claim re-assigned it, it was held that the registration was good. *Currier* v. *Friedrick* (1875), 22 Gr. 243, and in *Grant* v. *Dunn* (1883), 3 O.R. 376, an assignment was held good. As to an assigned claim under the B.C. Act, see *Sickler* v. *Spencer* (1911), 17 B.C.R. 41, which held that the lien being assignable every remedy for its enforcement went with it.

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RICE LEWIS & SON, Ltd. v. HARVEY et al.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, and Magee, JJ.A. January 15, 1913.

1. MECHANICS' LIENS (§ VI—47)—OF SUB-CONTRACTORS AND MATERIALMEN—EXTENT OF LIEN ON CONTRACTOR'S FAILURE TO COMPLETE.

The property owner is entitled under the Mechanics' Lien Act, 10 Edw. VII. (Ont.) ch. 69, to deduct from the sums for which he is liable to his contractor on progress certificates while the work is going on, twenty per cent. thereof (or fifteen per cent. where the contract price exceeds $15,000) for the protection of persons entitled to liens as sub-contractors; and the owner is not entitled as against the sub-contractor to apply such percentage to answer the cost of completing the work on the contractor's default.

[*Russell* v. *French*, 28 O.R. 215, approved; *Farrell* v. *Gallagher*, 23 O.L.R. 130, and *McManus* v. *Rothschild*, 25 O.L.R. 138, doubted.]

2. MECHANICS' LIENS (§ VI—47)—STATUTORY PERCENTAGE TO BE RETAINED TO PROTECT SUB-CONTRACTORS—TRUSTEESHIP.

By virtue of the Mechanics' Lien Act, 10 Edw. VII. (Ont.) ch. 69, the property owner is, as regards lien-holders holding claims against the principal contractor, a trustee of the twenty per cent. of payments which become due to the latter under the contract during the progress of the work; and the owner will be liable for such percentage, so far as may be required to satisfy the unpaid lien claims, although by his contract he was to pay and did pay the contractor only 80 per cent. of the value of work as certified by progress certificates of the architect, where the contractor afterwards abandoned the work and the 20 per cent. retained of the value so certified by the architect was insufficient to pay the cost of completing the contract.

[As to parties entitled to file mechanics' liens, see the next preceding case and Annotation to same.]

3. MECHANICS' LIENS (§ VI—47)—SUB-CONTRACTORS AND MATERIALMEN—WAGE-EARNERS.

The special provision for priority of wage-earners introduced into the Mechanics' Lien Act (Ont.) whereby it is declared that as against wage-earners the percentage required to be retained by the owner to answer liens shall not be applied by the owner to the completion of the contract on the contractor's default nor to the payment of damages for non-completion (10 Edw. VII. (Ont.) ch. 69, sec. 15) does not affect the other provisions of the Act regarding mechanics' liens generally; and it is not to be implied from such prohibition that the owner may in cases other than for wages so apply the statutory percentage towards the cost of completion as against the liens of materialmen or sub-contractors in the event of the contractor's default.

[*Farrell* v. *Gallagher*, 23 O.L.R 130, and *McManus* v. *Rothschild*, 25 O.L.R. 138, doubted.]

Statement

APPEAL taken to the Court of Appeal for Ontario from the judgment of J. A. C. Cameron, Official Referee, in a mechanics' lien action.

The appeal was allowed.

Mr. Cameron's decision was as follows:—

The contract price in this case was $12,000. The extras allowed by the architect in charge of the work to the contractors amount to $329.50, making a total of $12,329.50. At the time the contract was abandoned by the contractor the owner had paid the sum of $9,536.52 on account. I find that the owner had properly paid out to complete the contract according to the plans and specifications the sum of $3,419.08—this amount is subject to variation on the final settlement of judgment. As the amount paid direct to the contractors added to the costs of completion exceed the amount of the contract price and extras, I must find, following the judgment of the Divisional Court in *Farrell* v. *Gallagher*, 23 O.L.R. 130, that there is no money in the hands of the owner available for distribution among the lien-holders who have proved their liens.

In addition to the items above referred to as to the cost of completion, viz., $3,419, there is a further amount to be added under the contract in the nature of damages for non-completion which I fix at the sum of $200. This amount is properly recoverable in this case. See *McManus* v. *Rothschild*, 25 O.L.R. 138. The lien-holders are entitled to personal judgment under section 49 of the Act against the contractors for the amount of their claim with costs, which I will fix when formal judgment is taken out. The owner is entitled to judgment against the contractor for the difference between the amount of the contract price and extras and the amount paid to the contractor prior to the abandonment of the contract, plus cost of completion and damages above referred to with costs.

There will be no further order for costs.

F. E. Hodgins, K.C., for the appellant lien-holders.

I. F. Hellmuth, K.C., and *F. J. Dunbar*, for Mrs. Harvey, defendant, respondent.

MEREDITH, J.A.:—When rightly understood, the case of *Russell* v. *French*, 28 O.R. 215, seems to me to have been well decided; and when the facts of this case are rightly understood, the question involved in it is easily solved, even without the aid of that case. Meredith, J.A.

Under the Act "twenty per cent." is to be deducted from "any payment to be made" on the contract; sec 12; and the amount of such deductions is to be retained for the benefit of the lien-holders.

Under the contract in question, eighty per cent. of the value of the work done, to be estimated at contract-prices, was to be paid, from time to time, on progress certificates, by the owner to the contractor; and a very considerable sum became thus payable to him; which, if it had not been paid, he could have re-

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covered in an action, except as to "twenty per cent." of it, which the Act required the owner to retain for the benefit of others who were putting their labour and building materials into his building, and might have liens for them.

To the extent, then, of twenty per cent. on these payments, at least, I would have thought it obvious that the owner is liable to lien-holders; and, if, over and above the amount of these progress certificates, any sum ever became payable by the owner to the contractor, twenty per cent. of that also is available to lien-holders.

How is there any way of escape from that conclusion? And why should there be? If the Act opens such a way—if the owner's contentions be right—it would not be an Act for the benefit of lien-holders, but would be an Act for the relief of owners against their contracts to pay. In this the Act puts no additional liability on the owner; it accepts his own obligation, contracted by himself, to pay, as the basis of lien-holders' rights, and provides merely that out of the amounts he has bound himself, and has become liable, to pay, unconditionally, to his contractor, he shall retain twenty per cent. for lien-holders.

There is nothing harsh or unjust to him in that; it would be harsh and unjust if the Act enabled him, for his own benefit only, to disregard his own contract to pay. Nor is it unreasonable that he should be made a trustee of a reasonable portion of the money he ought otherwise to pay to the contractor, retained for the one purpose of preventing sub-contractors and others putting work and material into the building, which is his, from being "done out" of their pay for it by the contractor.

All this accords with every one of the provisions of the Act respecting lien-holders; such twenty per cent. is to be deducted and retained from "payments to be made by him in respect of the contract": sec. 12 is "limited to the amount owing to the contractor": sec. 11 is not out of any "greater sum than the sum payable by the owner to the contractor": sec. 10; and is "limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing . . . by the owner: sec. 6.

Different considerations would apply if there had been no contract to pay except on fulfilment of the contract on the contractor's part.

The Act, thus understood, creates no hardship on the owner; if he choose to pay when he is under no obligation to pay, he pays at his own risk as to the ultimate result; if he retain twenty per cent. out of every payment he has made himself liable for by his contract, he does that which the Act requires and is as well off as if the Act had never been passed; whilst, if he fail to do as the Act requires, if he do not retain the twenty

per cent. for lien-holders, he runs the risk of having to pay over again—a very reasonable penalty for defiance of the plain law of the land.

As it is, the Referee has given to the owner, to secure him against the default of his contractor, not only the twenty per cent. which, by his contract, in agreeing to pay eighty per cent. only, he had retained for that purpose; but also the twenty per cent. of which the Act made him trustee for lien-holders; an obviously (I would have thought) erroneous result; reached, perhaps by reason of not quite grasping all the facts and circumstances of the case.

But, driven to the last ditch, the respondent contends that the provisions of sec. 15 of the Act, respecting liens for wages, are inconsistent with this view, and ought to prevent effect being given to it; because there express provision is made that the twenty per cent. shall apply to contract not completely fulfilled, and shall be calculated on the value of the work and materials, having regard to the contract price, if any; and shall not be applied, in case of default in completing the contract, to the completion of the contract, or to damage for non-completion, "as against a wage-earner claiming a lien": a contention, however, in my opinion, of no sort of conclusive effect when applied to an enactment made up of different provisions enacted at different times, and as to this particular section an enactment prepared doubtless with the mind much more intently set on making a sure and most favourable provision for the earners of wages—whose liens would generally be comparatively very small—than upon just how this provision might fit in with the rest of the Act, or affect it. It seems to me quite certain, however that may be, that there was no intention, in adding that section, to affect the other provision of the Act respecting liens for things other than wages.

But the contention loses entirely any weight which it might otherwise have, when it is observed that this section covers cases in which there are no progress certificates, in which there may be nothing ever payable by the owner to the contractor except the ultimate balance, if any, and so it goes far beyond any of the provisions of the Act in favour of other lien-holders.

The judgment of Rose, J., in the case of *Russell* v. *French*, 28 O.R. 215, shews plainly that the ruling in that case was based upon the same grounds as those upon which I have based my opinion in this case; and, if there be anything decided or said to the contrary in the cases of *Farrell* v. *Gallagher*, 23 O.L.R. 130, and *McManus* v. *Rothschild*, 25 O.L.R. 138, it ought, I think, for reasons which seem to me to be obvious, to be overruled.

I would allow the appeal; and refer the matter back to the Official Referee.

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GARROW, and MACLAREN, JJ.A., agreed with MEREDITH, J.A.

MAGEE, J.A.:—The growth of the provisions of the Mechanics' and Wage Earners' Liens Act as to the relative rights of owner, contractor, suppliers of material, wage earners, and sub-contractors, has been gradual. By R.S.O. 1877, ch. 120, secs. 3-10, and section 6 (as amended by 47 Vict. ch. 18, sec. 5, to accord with the original Act, 38 Vict. ch. 20, sec. 3), a lien was given unless there was an agreement to the contrary, but all payments made in good faith by the owner to the contractors before written notice of the lien, operated as a discharge to the owner, and the lien-holder could not recover more than the owner was liable to pay to the contractor, and was limited to the amount payable to the contractor.

In 1878, by the amending Act, 41 Vict. ch. 17, it was declared in sec. 1 that payments so made up to 90 per cent. of the price to be paid for the work operated as a discharge to the owner, and by sec. 2, that the lien should, in addition to all other rights or remedies given by the Act, also operate as a charge to the extent of ten per cent. to be paid by the owner.

The section did not expressly state upon what the lien should be a charge, and there was no provision enabling or requiring the owner to withhold any percentage from the contractor. It was at this stage of the enactment that the transactions involved in *Goddard* v. *Coulson*, 10 A.R. 1, took place.

In 1882, the Mechanics' Lien Act, 1882, 45 Vict. sec. 15, was passed to make further provision for the lien of mechanics and labourers. By section 2, they were given a lien for wages up to 30 days' wages and such lien was not to prejudice any lien under the Mechanics' Lien Act, R.S.O. 1877, and by sections 7-12, was to be enforced under the latter Act. By section 3, this lien for wages was to operate notwithstanding any agreement between owner and contractor excluding a lien, and by sec. 4 it was to the extent of 10 per cent. of the price to be paid, to have priority over all other liens under the Act of 1877, and over any claim by the owner against the contractor for failure to complete his contract. Sec. 5 provides that if any person other than the contractor has performed labour or supplied materials, the owner should, in the absence of a stipulation to the contrary, be entitled to retain for a period of 30 days after the completion of the contract the ten per cent. of the price to be paid the contractor. This was the first provision for retention. So far there was no clause postponing claims by the owner to any lien except liens for wages. By 47 Vict. ch. 18 (1884), sec. 1, no agreement to which he was not a party and not signed by him should deprive anyone of a lien, and by sec. 8 the priority of liens for wages was declared not to be affected.

It was in May, 1884, that *Goddard* v. *Coulson*, 10 A.R. 1,

came before the Court of Appeal. The contractor, one Crittenden, had failed in 1879 to complete his contract, and had been paid as much as the value of the work done, and it had cost the owner more than the balance of the contract price to complete the work. It was held that the plaintiff's sub-contractors had no lien as against the defendants, the owners. The contract was not put in evidence, and it was not shewn that anything had, in fact, become payable by the owner till completion. Hagarty, C.J.O., points out that under the Act the owner was not to be liable to pay any greater sum than what was payable by him to the contractor, and did not consider that the Act of 1878 affected that principle, or that the Court could extend ten per cent. of the price to be paid to mean ten per cent. on a price for work which had never been done. Patterson, J.A., said the lien was to operate as a charge to the extent of ten per cent. of the price to be paid by the owner, but he thought that could not fairly do more than charge ten per cent. of the money which becomes payable by the owner to the principal contractor, and that so far as the evidence shewed the contract price never became the price to be paid because the contractor failed to do what was necessary to earn it or to earn more than he was paid, which was under 90 per cent. He considered that view to be in accordance with what might be inferred from 45 Viet. ch. 15, sec. 4, to be the understanding of the law of the Legislature in giving a lien for wages priority over a claim by the owner, but he was not prepared to say that even under that Act the owner could be compelled to pay the workmen money for which he never became indebted to the contractor, and he suggested that possibly it only postponed a cross-demand of the owner. It will thus be seen that the case turned upon the fact that no money became payable to the contractor so far as appeared.

In *Sears* v. *Woods*, 23 O.R. 474 (1893), the Queen's Bench Division came to a like conclusion, and apparently so also in *Truax* v. *Dixon* (1889), 17 O.R. 366. In *Re Cornish* (June, 1884), 6 O.R. 259, the Chancery Division allowed the charge of the lien-holders upon the ten per cent. of the work done as against the owner, no reference being made to *Goddard* v. *Coulson*, 10 A.R. 1, decided shortly before.

In R.S.O. 1887, ch. 126, these various enactments were consolidated. In sec. 10, the words "save as herein provided" were prefixes to the declaration that the owner was not to be liable to a greater sum than the sum payable by him to the contractor. For the insertion of those words the reference is to 45 Viet. ch. 15, sec. 4, shewing that they referred to the lien for 30 days' wages. In that consolidating Act there was impliedly a distinction between the two classes of liens, and from the express postponement of the claims of the owner to the lien

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of the wage earner, it might be inferred that the Legislature did not consider the owner's claims postponed to other liens.

By 53 Viet. ch. 38, the amount of the percentage was changed —56 Viet. ch. 24, made provision for deducting from payments to contractors in cities the amount due wage earners, which was repealed by 59 Viet. ch. 35, but it may be referred to as shewing the policy aimed at. In sec. 2, the percentage which the owner was entitled to retain was referred to as the percentage "to be retained." Sec. 4 declared that the lien for 30 days' wages would not be defeated by attachments, garnishments or executions, or by reason of the work contracted for being unfinished or of the price for that or any other reason not being payable by the contractor, but by sec. 5, in case of the contract not having been completely fulfilled when the lien was claimed by wage earners the percentage was to be calculated on the work done or materials furnished by the contractor, and every wage earner was to be entitled to enforce a lien in respect of an unfinished building to the same extent as if finished, and the percentage was not as against wage earners to be applied to the completion of the work, nor to the payment of damages for the non-completion thereof by the contractor.

Here, again, in an Act intended, according to its title, to facilitate the enforcement of the just rights of wage earners and sub-contractors, we find the Legislature abstaining from expressly extending to other liens the advantages it was giving to liens for wages as against the owners.

In 1896, 59 Viet. ch. 35 was passed, repealing the existing Acts and consolidating and remodelling the provisions. The sections as to deducting from payments to contractors in cities were dropped. By sec. 5, the lien was limited to the sum "justly owing by the owner" with the addition of the words "excepting as herein provided," thus according with the previous enactment, R.S.O. 1887, ch. 126, sec. 10, already mentioned. Section 9 likewise limited the lien to the amount "owing to the contractor save as herein provided"; and sec. 9 declared that the "lien shall not attach so as to make the owner liable for a greater sum than the sum payable by owner to the contractor," but "save as herein provided."

But the chief change was made by sec. 10, which directed that "in all cases an owner shall as any contract progresses deduct from any payments to be made and retain for a period of 30 days after the completion or abandonment of the contract "twenty per cent. (or in some cases 15 per cent.) of the value of the work, service and materials actually done, placed or furnished, such values to be calculated on the basis of the price to be paid for the whole contract," and declared that "the liens created by this Act shall be a charge upon the amounts

directed to be retained by this section." Sub-section 2, of sec. 10 again declared that all payments up to 80 per cent. (or 85 per cent.) of such value made in good faith by an owner to a contractor before notice in writing of such lien should operate as a discharge *pro tanto* of the lien created by the Act.

Here, then, the lien created against the land by sec. 5 was made a charge not to the extent of a percentage of the price to be paid as before, but a charge for the whole amount of the lien upon a specified fund which the owner was now required, and not merely entitled, to retain. But, when we look to see what the fund is, we find it consists of sums deducted from "payments to be made." If there are no payments made or to be made, there would be no deductions and hence no fund to be charged, but the lien would still hold its position under section 5 against the property, and be limited as therein to the sum justly owing (excepting as the Act provided) by the owner.

Instead of the priority given by 56 Viet. ch. 24, sub-secs. 4 and 5, only to liens for wages over attachments, garnishments and executions and claims of the owner, we now find in sec. 12 all liens given priority over attachments, garnishments and executions, assignments, judgments, etc., and nothing said about priority over claims of the owner. But under sec. 13, mechanics' and labourers' liens for wages up to 30 days' wages have priority over other liens "to the extent of and on the 20 per cent. or 15 per cent., as the case may be, of the contract price (*sic*) directed to be retained by sec. 10 to which the contractor or sub-contractor through whom such lien is derived is entitled"; and (sub-sec. 2) every wage earner was to be entitled to enforce a lien in respect of the contract not completely fulfilled; when the lien was claimed by a wage earner the percentage was to be calculated on the work done or materials furnished by the contractor (or sub-contractor) employing him, and (sub-sec. 4) where the contractor made default in completing his contract, the percentage aforesaid was not as against a wage earner to be applied to the completion of the contract, or for any other purpose, by the owner, or damages for non-completion, nor to satisfaction of any claim against the contractor.

In thus giving special rights to wage earners side by side with provisions for lien-holders generally and in taking away from the owner in favour of the wage earner the ordinary legal right which the owner would otherwise have of resisting payment beyond what he had agreed to, it must, I think, be taken that the Legislature had no intention of conferring such special rights upon other lien-holders dealt with in the same statute, and that the latter are confined to whatever rights the language giving the lien upon the land and the charge upon the "payments to be made" by the owner confer upon them.

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If an owner contemplating building chooses to say, "I will not pay until completion," I do not see that the statute has advanced the rights of the general lien-holders not being wage earners, beyond the position of the plaintiff in *Goddard* v. *Coulson*, 10 A.R. 1, and they are still limited to the amount owing from the owner. No doubt under sec. 4 of the Act of 1896, now sec. 5 of the Act of 1910, the lien-holder is not to be deprived of his lien by an agreement between the owner and the contractor to which he is not a party, but if the lien does not arise he cannot be said to be deprived of it. On the other hand, if the owner chooses to agree to make payments to the contractor before completion, he cannot complain that a portion of that which he is willing to part with should be set aside, not for his security but for the security of others whose labour or materials have gone to benefit his property. If the owner agrees to pay 75 per cent. of the progress certificate as the work progresses, he is retaining 25 per cent. of his own accord for his security, and when the statute says, you shall keep back only 20 per cent. of those progress certificates and the lien-holders shall have a charge thereon, it does not do so to increase his security or to enable him to say it never was payable. As put by Rose, J., in *Russell* v. *French* (1897), 28 O.R. 215:—

> The owner being willing that the contractor should receive the stipulated percentage and that no part of the same should be retained as security, the statute takes from such percentage twenty per cent. of the value of the work and sets it apart as a fund for the lien-holder, and thereafter it is available for them only, and "not as a fund to which the owner can resort as security against or to make good any loss occasioned by the non-completion of the contract.

No change affecting the appeal has been made since 1896, by 60 Viet. ch. 24 (by sec. 2 of which payment over of the retained percentage was allowed after the expiration of the thirty days, and the liens were made a charge in favour of "sub-contractors"), nor on the revision of the statutes in 1897, and the present Act of 1910, 10 Edw. 7, ch. 69, in secs. 5, 6, 10, 11, 12, 14 and 15, in so far as regards the question here involved is substantially the same as that of 1896.

In *Farrell* v. *Gallagher* (1911), 23 O.L.R. 130, a Divisional Court and in *Rothschild* v. *McManus* (1911), 25 O.L.R. 130, Riddell, J., came to a conclusion different from that in *Russell* v. *French*, 28 O.R. 215. The statutes and decisions were in *Farrell* v. *Gallagher* very fully dealt with by Middleton, J., who said:—

> The action still recognizes that the charge is a charge upon money to become payable to the contractor.

In these words lies, I think, the reason of the failure to agree with *Russell* v. *French*.

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With much respect, I would point out that the charge is not upon money to become payable but upon money which has actually become payable, a payment which is to be made and is directed to be retained. One may well agree, at least with regard to non-wage earners, with the next sentence of Middleton, J., that:—

> When, by reason of the contractor's default the money never becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had, and their lien fails.

In my opinion, the true meaning of the statute is that, if the owner has agreed to pay moneys before completion of the contract, whether fixed amounts or sums arrived at by an architect's progress certificate, or otherwise, and they actually become payable, he must retain the same to the extent of twenty (or fifteen) per cent. of the value of the work and materials to the date for payment, calculated as prescribed in the Act, and upon this percentage the liens will be a charge. But except in so far as moneys become actually payable there is no percentage upon which liens other than wage earners' liens can become a charge.

In the present case the owners had agreed to pay 80 per cent. as the work progressed. It does not appear that any evidence was given as to what amounts actually became payable, or what value is to be placed on the work and materials up to the date of the last amount payable. The matter should, therefore, go back to the Referee, who followed *Farrell* v. *Gallagher*, to be dealt with in accordance with the statute, and the appellants should have their costs of the appeal.

Appeal allowed.

Re BELL and REGISTRAR OF TITLES.

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Alberta Supreme Court, Scott, J., in Chambers. January 14, 1913.

1. LAND TITLES (TORRENS SYSTEM) (§ III—30)—TRANSFER—TIME OF DEPOSIT FOR RECORD.

> When a registrable transfer in due form from the registered owner of lands is handed in to the registrar of titles together with the duplicate certificate of title of such owner pursuant to the provisions of sec. 20 of the Land Titles Act, 6 Edw. VII. (Alta.) ch. 24, such transfer takes priority from the time of such deposit as recorded in the official "day book," although the entry upon the official record or certificate of title is not made concurrently by the registrar because of pressure of work in his office; and the registrar is not entitled to endorse upon the new certificate of title issued to such transferee any memorandum of executions received against the transferor in the interim.

Statement

ON 11th May, 1912, one Bell was the owner and held a certificate of title for the lands referred to in the reference. On

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that day one Sinclair handed in for registration a registerable transfer of the lands from Bell to him accompanied by the duplicate certificate of title. On 21st May, 1912, an execution against Bell at the suit of one Griffin was received by the registrar who endorsed same on Bell's certificate of title. On 27th May, 1912, the registrar issued a new certificate of title to Sinclair subject to the Griffin execution. Sinclair thereupon applied to the registrar to have the execution removed from his certificate of title and the latter, being in doubt as to the duty imposed upon him, has made this reference under sec. 113 of the Land Titles Act, 6 Edw. VII. (Alta.) ch. 24.

Judgment was given for the removal of the execution from the certificate of title.

D. P. McLeod, for applicant.

F. S. McCormack, for respondent.

Scott, J.

SCOTT, J.:—When the question was argued before me I expressed the view that it was the duty of the registrar to issue the certificate of title subject to the execution, that it was not his duty to adjudicate upon the question whether the execution creditor was entitled to a lien upon the property as against the purchaser and that if the former was not so entitled the latter would have to take some other proceeding to have the execution removed from his title. Further consideration of the matter has led me to a different conclusion.

Section 20 of the Act provides that the registrar shall enter into his day book the particulars of each instrument handed in for registration and the date of its receipt, and that, for the purpose of priority between mortgagees, transferees, *and others*, the date so entered shall be taken as the time of registration.

The effect of this provision must be to give Sinclair, the purchaser, priority over the execution creditor. When the former handed in his transfer for registration he was entitled to the immediate issue to him of a certificate of title subject only to the incumbrances then appearing on the register, and had it been then issued to him it could not have been subject to the Griffin execution. The fact that, probably, owing to the registrar being behind in the work in his office, it was not issued until some sixteen days after, should not prejudice the purchaser. The effect of any other construction of the provision referred to would be that a purchaser would not be safe in paying over his purchase money until a certificate of title had actually issued to him.

I, therefore, hold that it is the duty of the registrar to remove the execution from the certificate of title issued to Sinclair.

Execution removed.

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Saskatchewan Supreme Court. Trial before Brown, J. January 22, 1913.

1. LANDLORD AND TENANT (§ III A—41)—AGREEMENT TO SUPPLY WATER FREE.

A condition in a lease for business purposes of premises connected for water supply from the city main and furnished with a sink and lavatory equipment, that the water is to be free to the tenant, is not a warranty by the lessor that under all circumstances water shall be supplied to the tenant, but it does obligate the landlord not to lessen the supply which the tenant ordinarily received and needed for the purpose of his business, either by the landlord's own act or by the act of other lessees claiming under him.

[*Blatchford* v. *Plymouth*, 3 Bing. N.C. 691, distinguished; *Anderson* v. *Oppenheimer*, 5 Q.B.D. 602, and *Markham* v. *Paget*, [1908] 1 Ch. 697, referred to.]

2. DAMAGES (§ III S—358)—MITIGATION OR REDUCTION OF DAMAGES—MINIMIZING LOSS OF PROFITS.

A tenant sustaining damage by the landlord's failure to give him the water supply needed for his business as a photographer in accordance with the lease, must do whatever he reasonably can to minimize the damages, as by installing a tank system at slight expense to keep his business going, and so claiming the expense of such installation instead of the much larger loss of profits through the practical suspension of the business.

Statement

ACTION for damages for breach of covenant contained in a lease.

Judgment was given for the plaintiff.

E. L. Elwood, for plaintiff.

P. M. Anderson, for defendants.

Brown, J.

BROWN, J.:—On the 25th November, 1909, the defendants executed in favour of the plaintiff a lease of certain premises in the city of Regina described as "the premises situate above butcher store at 1809 South Railway street, and being composed of five rooms, comprising the whole of the first floor of the said premises." The lease was to run for a period of seven years, "to be computed from the date of completion of alterations in the year 1909." The lease is the usual form of lease given in such cases, and at the end thereof there are the following provisions:—

The alterations to consist of:—

(1) One sky-light, ten feet by ten feet in roof.

(2) Door between rooms to be made eight feet wide.

(3) Door to be cut between cupboards.

(4) Partition across middle room to be made.

(5) Sink and water to be placed inside dark room, the sink not to be less than 18 inches by 10 inches, and the wash basin, now in lavatory, to be placed in middle room.

(6) Show cases to be allowed on entrance wall and staircase way.

(7) Rooms in front to be papered and painted. Lessee to have choice of paper.

(8) *Water to be free.*

(9) Light to be paid by lessee.

(10) Steam heat not guaranteed, but to be given when possible.

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HOWELL v. ARMOUR & CO.

Brown, J.

The plaintiff is a photographer by profession, and leased the premises, as the defendants knew, to be used partly for the purposes of his business and partly for residential purposes. The dark room which is referred to in the lease under item No. 5 of the alterations given above was the room specially used by the plaintiff in perfecting his plates and prints in connection with his business, and the sink and water which it is agreed should be put in this room were necessary for the proper carrying on of the business. Without water the plaintiff's business could not be carried on at all, and having it supplied through a pipe to the sink in the manner provided for by the lease was the most convenient and satisfactory way of securing it. At the time of the matters complained of, the ground floor of the building was occupied by Hugh Armour & Co., Ltd., in connection with their butcher business. Hugh Armour & Co., Ltd., were a different concern from the defendant company, although all the members of the defendant company, with at least one other person, constituted the Hugh Armour & Co., Ltd. This latter company had the ground floor under a lease from the defendants, but the evidence does not shew whether or not their lease and occupation were prior to the lease of the plaintiff. In any event, at the time of the execution of the plaintiff's lease the ground floor was used for a butcher business either by Hugh Armour & Co., Ltd., or the defendants, who at one time carried on a business in the same premises. In connection with such butcher business a considerable quantity of water was necessarily used, and the water was supplied to the building generally through a pipe leading from the city main. This pipe first entered the ground floor of the building, where it was tapped for such uses as the water might be put to on that floor in connection with the butcher business, and extended upwards to the flat occupied by the plaintiff. Up to the 1st July, 1912, the plaintiff, except on very rare occasions, got in this way sufficient water for the purpose of efficiently conducting his business; but at that time, and for the next two weeks more particularly, there was practically no water available on the plaintiff's flat. The plaintiff complained of the shortage to Hugh Armour, who was manager for the defendant company and also for the lessees of the ground floor, and urged upon him the great inconvenience and loss that the plaintiff was being put to by virtue of the shortage of water supply. It was suggested by Mr. Armour that the shortage was due to lack of city pressure, and he did nothing during the time complained of to try to remedy the trouble. As a matter of fact the evidence shews clearly that there was ample city pressure during those days, and that the shortage could not have been due to that cause. It was suggested by the plaintiff that the defendants or their lessees had deliberately

cut off the water supply from the plaintiff's flat, but the evidence does not support that contention, and I do not so find. It appears that towards the end of June, 1912, Hugh Armour & Co., Ltd., installed a motor on the ground floor in connection with their butcher business for refrigerator purposes. In operating this refrigerator plant the taps connected with the water pipe were opened and the water allowed to circulate freely, and I am satisfied from the evidence, more particularly that of Mr. Bull, the city electrician, that if this plant were operated to its full extent very little water could be expected to reach the plaintiff's flat at all. The time complained of was very warm weather, and I find as a fact that the cause of the shortage of the water on the plaintiff's flat was due to H. Armour & Co., Ltd., using so much water in connection with their refrigerator plant, more than they had hitherto been in the habit of using in their business. It is contended, however, that there is no guarantee of water supply in the plaintiff's lease, that the covenant is simply that the defendants shall pay the water rates. With that contention I agree only in part. There is no guarantee that under all circumstances water shall be supplied to the plaintiff, but there is, as I interpret the provision, under the circumstances an undertaking on the part of the defendants that neither they themselves nor anyone claiming under them shall in any way lessen the supply of water which the plaintiff ordinarily received and needed for the purpose of his business. Or, to put it in another way, there is so far as the supply of water is concerned a covenant for quiet enjoyment. That being so, the defendants under such covenant would be liable whether they or their lessees, Hugh Armour & Co. Ltd., were responsible for the shortage, and equally so whether Hugh Armour & Co., Ltd., were lessees before or after the execution of the lease under which the plaintiff claims. See *Anderson* v. *Oppenheimer* (1880), 5 Q.B.D. 602; *Markham* v. *Paget*, [1908] 1 Ch. 697; *Blatchford* v. *Plymouth Corporation* (1837), 3 Bing. N.C. 691, 18 Hals. 529. The case of *Blatchford* v. *Plymouth Corporation*, 3 Bing. N.C. 691, above referred to was cited by counsel for the defendants to shew that the defendants could not be held responsible for the action of Hugh Armour & Co., Ltd. A perusal of that case, however, shews that because of the nature of the pleadings therein the liability of the defendants for the acts of third parties claiming under them was not dealt with, and consequently I do not find that that case in any way assists the defendants herein.

In considering the amount of damages to which the plaintiff is entitled, I might point out that the plaintiff, in my judgment, was most extravagant in his estimate of the damages which he claims he incurred. He also seems to have been of the opinion

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that it was his privilege to sit with his arms folded, as it were, and incur all the damage possible. I am of opinion that the plaintiff was not justified in taking any such position. He was bound to act as a reasonable man, and to do whatever he reasonably could to minimise his damages. There can be no recovery for damages which might have been prevented by reasonable efforts on his part. Other photographers gave evidence shewing that in the event of shortage in water supply they used a tank, and that the work could be done very satisfactorily in that way. During the early days of July the plaintiff had a special opportunity of doing a large business owing to the great demand for cyclone pictures, and there was no reason why the plaintiff should not have used the tank system instead of practically doing nothing. Even with the tank system, however, the work, I find under the evidence, could not have been done quite as satisfactorily or with the same expedition as with a flowing stream from the tap. There would also be some loss of time in getting the tank system installed, all of which would necessarily mean a loss of profits to the plaintiff. There would further be some expense in connection with installing the tank system and some extra expense incurred in using it, as well as some inconvenience. For such loss of profits, and expense and inconvenience the plaintiff is entitled to recover, and I assess the damages at $325.00. The plaintiff is therefore entitled to judgment for $325.00 and his costs of action.

Judgment for plaintiff.

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Dec. 17.

RICKERT v. BRITTON.

Ontario Divisional Court, Boyd, C., Latchford and Middleton, JJ. December 17, 1912.

[*Rickert* v. *Britton*, 6 D.L.R. 887, affirmed.]

STAY OF PROCEEDINGS (§ I—13)—*Unpaid Costs—Vexatious Action—Discretion of Court.*]—Appeal by the plaintiffs from the order of Riddell, J., 6 D.L.R. 887, 4 O.W.N. 258. Judgment was given by BOYD, C., at the close of the argument, as follows: We cannot disturb the order appealed from. I would put this decision on the ground that there is jurisdiction in the Court to stay proceedings in default of payment of interlocutory costs, especially if the action is vexatious, or if the plaintiff in the course of it acts vexatiously towards the defendant. The learned Judge appealed from has exercised this discretion, holding that the plaintiffs in the course of the action acted vexatiously towards the defendant, and thus imposed the payment of the prior costs as a test of the bona fides of the litigation. The judgment will be affirmed with costs. J. G. O'Donoghue, for the plaintiffs. C. G. Jarvis, for the defendants.

SHARPE v. de PEDRO.

QUE.

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NOV. 22.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. November 22, 1912.

1. ARREST (§ II—21)—REPAIRING BUILDING BELONGING TO WIFE ON CREDIT OF HUSBAND—SALE OF PROPERTY BY WIFE—QUASHING CAPIAS.

Where a builder or contractor does work on or repairs to a building standing registered in the name of the wife, but giving credit to the husband and charging him therewith, such builder or contractor cannot afterwards charge the husband with secretion of property by the fact of the sale of the house by the wife at a low figure, and a *capias* issued under such circumstances will be quashed.

2. ARREST (§ II—20)—WHEN CAPIAS AVAILABLE—GIVING RECKLESS CREDIT.

Where merchants give credit recklessly on mere promises to pay to persons with no possible means of making good such promises, they are not entitled to relief by writ of *capias* if their debtors are unable to meet their payments as they fall due, although the debtors make payments to other creditors in preference or priority to them, particularly where the goods supplied are for personal use.

Statement

THIS was an appeal by the plaintiff from the decision of the Superior Court rendered by Charbonneau, J., on June 25th, 1912, maintaining with costs the defendant's petition to quash a writ of *capias* under which he was arrested at the plaintiff's instance and quashing such writ.

The appeal was dismissed.

F. S. Maclennan, K.C., and *W. A. Baker*, K.C., for plaintiff, appellant.

G. A. Morrison, for defendant, respondent.

The judgment of the Court was delivered by

Greenshields, J.

GREENSHIELDS, J.:—Previous to the 14th day of May, 1912, the plaintiff had obtained a judgment against the defendant for some $1,600 for work and labour done upon a house which stood in the name of Madame de Pedro.

Being unable to collect his judgment, he caused to be issued a writ of *capias ad respondendum* against the defendant, under which the defendant was arrested, and gave bail. The *capias* issued on an affidavit charging that the defendant has secreted and made away with, and is secreting and making away with his property with intent to defraud his creditors generally and the plaintiff in particular; that the defendant has been insolvent for several months, and has, since he contracted the indebtedness to the plaintiff, been selling and disposing of his property, which is the common pledge of all his creditors, and the plaintiff in particular, and has been applying the proceeds to the payment of claims of certain creditors who knew the defendant was insolvent, which payments were preferential, and were made in fraud of the rights of his creditors in general and of the plaintiff in particular.

The defendant petitions to quash the *capias*, and denies the

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allegations of fact contained in the affidavit. The learned trial Judge found that the plaintiff had failed to prove the allegations of the affidavit and quashed the *capias*.

A careful consideration of the evidence convinces me that the judgment *a quo* cannot be reversed.

The defendant seems to be a young man who was fortunate in, or afflicted with, the possession of a rich father and a more or less rich mother-in-law. He came from Cuba and established a house in Westmount. He has no business, or, so far as the record shews, any visible means of support, except what he gets from his father or his mother-in-law, or what his wife may get from either or both. Immediately on arriving in Westmount he proceeded to contract debts and was aided in this enterprise in a startling manner by all sorts of tradesmen.

A well-known modiste saw fit to trust him, or his wife, with some $7,000 worth of gowns; a well-known jewellery firm did not hesitate to give him, on credit, some $2,000 worth of jewellery. Other bills were contracted by him, ranging from $500 to $1,000, amounting in the aggregate to many thousands. He ran an establishment with five or six servants, and at one period had horses and carriages, and lived, he says, at the rate of about $800 a month. Judging from the traces left by way of liabilities, I should say it was more like $800 a week.

Complaint is made by the plaintiff, in the first place, that the house which was bought on the 20th of April, 1911, and which is the very house upon which the plaintiff's work was done, stood in his wife's name; that there is no declaration that his wife is separate as to property, and she is, therefore, says the plaintiff's counsel, presumed to be common as to property, and the house in question was an asset of the community and liable for its debts. The plaintiff says that after buying this house it was sold at an absurdly low figure and the proceeds were secreted. Now, whether or not the statement of law made by the plaintiff's counsel be correct, the fact is that at the time this work was done by the plaintiff that property stood in the name of the defendant's wife. There has been no action taken to have the property declared the property of the community, and, therefore, no judgment of any Court so declaring it. The title of the defendant's wife to the property was registered. The plaintiff was bound to know in whose name the property stood, and how can this Court say that when the property stood unattacked in the name of the defendant's wife that her dealing with it by way of sale was a secretion of the defendant's property in fraud of the defendant's creditors.

But the facts are hardly as stated by the plaintiff. On the 24th day of April, 1912, the defendant's wife wished to borrow money on the property, but there being a mortgage of some $7,000, it would appear that she failed to get the loan. It was

then decided to make a deed of sale to one Tremblay for $12,000, and this was done. The $12,000 was used, first, in payment of the mortgage due to the Grand Trunk Benefit Association, amounting to some $7,000, and the balance, so swears the defendant, was used by his wife in the payment of bills and the upkeep of his home—the defendant's source of supplies having been cut off, at least temporarily, if not permanently. At the same time there was given to the defendant's wife the right of redemption during a period of three years, of the said property, and a lease was given to her by Tremblay. I have no doubt whatever that it was really a loan that Tremblay made, but for one reason or another it was put in the shape of a sale and lease, with the right of redemption. This would explain the fact that the purchase price mentioned in the deed was less than the value of the property. In reality, the transaction between Tremblay and the defendant's wife was an advance by Tremblay of $12,000 to pay off the first mortgage, leaving the balance, viz., $5,000, at the disposition of the lady. Now, I can find in this transaction no trace of a fraudulent secretion by the defendant in the sense provided for in law.

The other ground of *capias* is, that while the defendant was insolvent, he made preferential payments. To what extent does the proof bear this out? As I have pointed out, the greatest facilities were offered the defendant and his wife to contract debts, and they rose to the occasion with laudable alacrity, but, disappointed in their source of revenue, they were unable to meet their liabilities promptly, but paid from time to time as they had money, different creditors, probably those who were most pressing. I have no doubt that if the supplies had not been shut off, the defendant following the *tour du rôle* would sometime have reached the plaintiff. At the time the *capias* was issued, unfortunately for the plaintiff, his turn had not been reached.

The proof shews that his mother-in-law was living with him, and the proof also shews that he had borrowed $23,000 from her previous to his marriage. If this fact calls for any remark, it would indicate a more kindly spirit on the part of a future mother-in-law than is usually exhibited.

Complaint is made that the defendant paid back some of this to the plaintiff's prejudice. However, living with him at Westmount, there is no doubt he did, at one time, pay her some money. I think the proof would fairly justify the statement that this money, paid to his mother-in-law, found its way back to his creditors, or to the upkeep of his extravagant establishment. Complaint is made by the plaintiff of the defendant's dealings with the horses and carriages. I refrain from entering into details, but I find nothing to justify a charge of fraudulent secretion. The defendant states, under oath, that these horses

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and carriages were bought for his wife. He is uncontradicted on that. But even if he could personally be held liable for these, I do not think the manner in which they were dealt with would support a charge of secretion.

So long as people will insist on giving credit to persons on a mere promise to pay, with no possible means to make good that promise, they cannot expect to find relief by His Majesty's writ of *capias*. If this young man could be called indiscreet in contracting these extravagant liabilities, there was not lacking ample encouragement and assistance in his indiscreet course.

On the whole I am in entire accord with the judgment of the learned trial Judge, and it is confirmed with costs.

Appeal dismissed.

VIAU v. SAUVE.

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Nov. 30.

Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. November 30, 1912.

1. ENCROACHMENT (§ I—5)—NECESSITY OF STRICT DESCRIPTION OF LAND—"SECUNDUM ALLEGATA ET PROBATA."

A plaintiff can only succeed *secundum allegata et probata*, and where a plaintiff takes a possessory action against his neighbour, charging him with encroachment on a specific part of his property (e.g., lot No. 6) and the neighbour denies this charge "as drawn" and the plaintiff persists, the action will be dismissed if the evidence shews the encroachment to have been on another part of the plaintiff's property (e.g., lot No. 7).

Statement

THE respondent brought a possessory action against the appellant, alleging that the appellant had dispossessed him of a certain part of his property. On June 5th, 1911, the Superior Court for the district of Terrebonne, Robidoux, J., dismissed the action on the ground that the dispossession had not been of the particular piece of ground described by the plaintiff in his declaration. On February 28th, 1912, the Court of Review, Tellier, DeLorimier, and Dunlop, JJ., unanimously reversed the judgment of the trial Judge and found that the defendant had interfered with the plaintiff's enjoyment as alleged.

The defendant now appealed to the Court of King's Bench and his appeal was unanimously sustained.

J. A. C. Ethier, for the appellant.

J. L. St. Jacques, for the respondent.

The opinion of the Court was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J. (translated):—This is a possessory action.

As is well known, possessory actions lie in favour of those persons who have been in possession, as owners, of an immovable or real right, and who have been forcibly dispossessed

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thereof by a third party or whose possession is disturbed: 1064 C.P. In the first alternative the law grants the possessory action called *réintégrande;* in the second that known as *en complainte.* To be entitled to a possessory action, the complainant must have had possession at least for one year and a day, and such possession must have been peaceful, public, continuous, and not under a precarious or equivocal title, but *animo domini;* in a word, such possession must have the characteristics required to allow of prescription operating.

In the present case it is established beyond doubt that the respondent possessed, by himself and his predecessors in title, a certain lot of land for over 30 years, and that in 1909 the appellant seized a portion thereof by cutting and removing the hay that had grown thereon.

The respondent is the owner of a piece of ground known as official lot No. 6 on the official cadastre of the parish of St. Hermas, and the appellant is the owner of a piece of ground which has been detached from this No. 6, and now bears the designation No. 7 on the same cadastre.

The respondent claims that the piece of ground of which he has been dispossessed by the appellant forms part of lot No. 6, whereas the appellant contends that it belongs to him as forming part of lot No. 7. But as I have already stated, it is not a question of ownership, but one of possession, which we have to decide; and if I have alluded to the pretensions of the parties as to the ownership of the piece of ground in dispute, it is merely to characterize the respondent's possession and to explain his dispossession.

The difficulty which confronts us is not relative to the question of possession and dispossession, as this is abundantly proven through more than thirty years' occupation. The respondent was therefore entitled to bring against the appellant an action *en réintégrande.* The question at issue is whether the respondent has so drafted his declaration as to be entitled to judgment against the appellant.

A plaintiff can only succeed *secundum allegata et probata.* When you claim that I have dispossessed you from an immovable which you possessed, you must prove that I really dispossessed you of the immovable in question; and you will not be able to obtain the conclusions of your demand by proving that I dispossessed you of another immovable. Now in this case the respondent claims that he has been dispossessed by the appellant of part of official lot No. 6 and the appellant answers that he has never seized any part of No. 6.

The respondent says: I am in possession as owner of lot No. 6, and the defendant, who is the owner of lot No. 7, has illegally dispossessed me of part of lot No. 6; and the respondent answers:

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this allegation of the declaration as drawn is untrue; I never dispossessed you of part of No. 6.

The whole case therefore resolves itself into this question of fact: Did the appellant encroach or not the official lot No. 6?

(The learned Judge then reviewed the evidence from which it appeared that the encroachment had been committed not on lot No. 6, but on a strip of lot No. 7 belonging to the respondent, and continued):—

It appears then from the evidence that the appellant did not encroach on lot No. 6. He seized a portion of lot No. 7 which had been in the respondent's possession for over a year and a day; but he did not seize any part of lot No. 6. The respondent can only succeed *secundum allegata et probata*. He alleged that the appellant dispossessed him of part of lot No. 5, and the evidence shews that he was dispossessed of part of lot No. 7. The Court cannot grant the conclusions of the declaration praying that the respondent be declared the owner of No. 6, and that it be declared that the appellant has disturbed him in his enjoyment of part of this lot.

The plaintiff's action was dismissed by the first Court for the reasons just given. This judgment was reversed by the Court of Review, which declared that the respondent was in possession as owner of a piece of ground three arpents wide, known as lot No. 6, and extending, for one-half, in depth to a line of trees and shrubs forming the dividing line between it and the next lot bearing No. 7 on the cadastre.

Were the plaintiff's declaration drawn in the same terms as those of the Court of Review, that is to say, if it alleged that the land in the respondent's possession extended to the line of trees and streets, I should have been disposed to confirm the judgment of the Court of Review. But, I say it once more, the respondent contented himself with alleging that he was in possession of lot No. 6, and that the appellant had dispossessed him of part of this lot No. 6, and he has not proven this allegation. There is a proverb that says: As one makes his bed, so must he lie in it.

This maxim is applicable to the respondent. He was not taken by surprise; the appellant answered squarely that this allegation was untrue "as drawn" and that he had never encroached on any part of lot No. 6. The respondent could, thereupon have amended his declaration. He did not do so.

I am of opinion that the judgment of the trial Judge was well founded and must be restored, and that of the Court of Review set aside.

Appeal allowed.

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Jan. 11.

Re CORKETT.

(Decision No. 2.)

Ontario Supreme Court, Britton, J., and Sutherland, J. January 11, 1913.

1. APPEAL (§ I B—21)—APPEAL FROM PROBATE DECREES—SURROGATE ALLOWANCE UNDER WILL.

An appeal lies to the Ontario Supreme Court from an order of a Surrogate Court judge adjusting an allowance for maintenance under a will, which adjustment was referred to the Surrogate judge by the court on disposing of an application made by the executors under Con. Rule 938 (Ont.) for the construction of the will.

[*Re Corkett* (No. 1), 4 D.L.R. 561, 3 O.W.N. 1134, referred to.]

2. APPEAL (§ I B—21)—PROBATE DECREES—SURROGATE DISCRETION UNDER WILL.

Where a Surrogate Court judge has exercised reasonable discretion in fixing a sum for support and maintenance of a legatee under the provisions of a will, where the question of amount was referred to him by an order of the High Court, his decision will not be interfered with on an appeal therefrom.

Statement

AN appeal by William George Corkett from an order of the Judge of the Surrogate Court of the County of Peel.

The appeal was (by consent) heard by a Divisional Court composed of BRITTON and SUTHERLAND, JJ.

B. F. Justin, K.C., for William George Corkett.

R. G. Agnew, for Margaret J. Kee.

E. C. Cattanach, for the infant.

Featherston Aylesworth, for the executors.

Sutherland, J.

SUTHERLAND, J.:—One George Corkett made his will dated the 24th February, 1902, and codicil thereto on the same date, and died on the 4th March, 1902. Letters probate were issued on the 4th April, 1902. There is a provision in the will with respect to the support and maintenance of certain devisees and legatees. One of these, William George Corkett, on the 1st May, 1911, launched a motion for an order declaring him entitled to such support and maintenance, and in his notice of motion asked that the executors and trustees be authorised and directed to pay to him out of the estate from time to time such sums as might be necessary for his support and maintenance from the 1st July, 1910, until he arrived at the age of twenty-five years.

The application came on for hearing before Falconbridge, C.J., on the 5th October, 1911, and an order was made that out of the income of the estate in the hands of the executors there should be paid to the applicant $600 forthwith and $100 per month until the 17th February, 1912, for his support and maintenance. On this latter day this maintenance was to cease, on his then attaining the age of twenty-five years.

In the year 1912, the executors, under Con. Rule 938, made an application for an order "declaring the construction and in-

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terpretation of certain clauses of the will." The motion was heard by Clute, J., and on the 28th February, 1912, he gave judgment (3 O.W.N. 761), from which I quote in part as follows: "I am also of opinion that the children Margaret and William George are entitled to what is a fair allowance for their maintenance, whether that maintenance, support, and education be upon the premises or not. In case the parties differ as to what a reasonable sum would be, the Surrogate Court may adjust that matter in settling the accounts of the executors."

An appeal was taken from that judgment to a Divisional Court, and on the 22nd April, 1912, a judgment, *Re Corkett*, 4 D.L.R. 561, 3 O.W.N. 1134, was delivered by it, varying in some respects the judgment of Clute, J., but substantially, in paragraph 4, repeating and affirming that part thereof just quoted as to maintenance.

The executors petitioned the Judge of the Surrogate Court of the County of Peel to audit, take, and pass their accounts, and fix their compensation. A hearing followed before the Surrogate Court Judge, in which evidence was taken at some considerable length with respect to the question of maintenance. On the 3rd July, 1912, the Surrogate Court Judge made an order which, besides dealing with the question of the audit and the fixing of the compensation of the executors, contained the following clauses:—

"And I find and declare that William George Corkett applied to the Court for an allowance for maintenance, and that on the 5th day of October, A.D. 1911, an order was made by the Chief Justice of the King's Bench, allowing him $600 to be paid forthwith and $100 a month for four months. And I find that the said amounts were duly paid to him or on his behalf as and for his maintenance.

"And I find that the said sums so paid were and are a reasonable amount to be allowed to the said William George Corkett for his maintenance, and that he is not entitled to be allowed any further amount for such maintenance.

"I further find that Margaret Jennie Kee consented before me to waive any further claim for maintenance in the event of no further amount being allowed to the said William George Corkett; and I, therefore, find that the said Margaret Jennie Kee is not entitled to any further allowance for such maintenance."

From this order William George Corkett appeals, and in his notice of motion, after setting out that he had previously received various sums on account of maintenance, prior to the order of the 15th October, 1911, already referred to, and that at the time of the making of such order it was understood "that an application would be made on behalf of the executors for construction

of the will of the said George Corkett, deceased, on the question of maintenance, upon the said William George Corkett, attaining the age of twenty-five years, in the event of his living to attain that age," he goes on further to allege that the "learned Judge of the Surrogate Court erred in refusing to admit evidence as to the facts in connection with the application on which the order of the 15th October, 1911, was made," and also "in holding that the amount of the maintenance to which the said William George Corkett was entitled was in any way fixed or intended by the parties or by the Court to be fixed by said order." And, further, that the order of the Divisional Court is binding "apart from whether the said order of the 15th October, 1911, assumes to fix such maintenance or otherwise;" and that, upon the evidence, the amounts as fixed by the order of the 15th October, 1911, were not reasonably sufficient to pay his necessary expenses of maintenance; and a reasonable sum should now be allowed.

Upon the application it was contended on the part of those opposing that no appeal could lie, as the Surrogate Court Judge was persona designata; and, further, that the order of Falconbridge, C.J., was a consent order and intended to cover all past unpaid maintenance and all future maintenance. Contradictory affidavits and statements were filed and made. When the motion came on for hearing before a Divisional Court, over which Falconbridge, C.J., was presiding, it appeared to him, after some discussion, that it was inadvisable for him to take part, under the circumstances, and he accordingly withdrew. By consent of all parties, it was agreed to go on with the appeal before the two remaining members of the Court.

When it is considered that allowances for maintenance had previously been made to the applicant before the launching of his motion in 1911, and that in the notice of that motion he asked for support and maintenance from the 1st July, 1910, until he arrived at the age of twenty-five years, colour is lent to the contention that the order made by Falconbridge, C.J., was intended to cover all claims for maintenance which had not thus far been paid, and in addition future maintenance. On the other hand, one must suppose that the parties now opposing this application must have had in mind the said order when the motion was made before Clute, J., for a construction of the will, and when his judgment was formally drawn, including that portion hereinbefore quoted, which suggests that in case the parties cannot agree on the question of maintenance it might be adjusted in the Surrogate Court, when the accounts of the executors were being dealt with. The same applies to the order of the Divisional Court.

These orders seem clearly to leave that question open to

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be dealt with by the Surrogate Court Judge on passing the accounts. All parties seem to have gone before him in that way and under these orders. I think, therefore, that the matter is properly before us by way of appeal from the order of the Surrogate Court Judge. In the light of the previous allowances for maintenance and of the sums allowed under the order of Falconbridge, C.J., and of the evidence taken before him at considerable length, the Surrogate Court Judge has come to the conclusion that the sums so paid were and are a reasonable amount to be allowed to the applicant for his maintenance, and that he should not be allowed any further amount for that purpose.

I am unable to see that he has not exercised a reasonable discretion in the matter and was not warranted in so disposing of the matter.

I think his order should be affirmed and the appeal dismissed; but, under the circumstances, without costs so far as the appellant is concerned. Those resisting the appeal will have their costs out of the estate; the executors as between solicitor and client.

Britton, J.

BRITTON, J.:—I agree that the appeal of William George Corkett should be dismissed. In my opinion, he accepted such sums as were paid on account of maintenance, so that, at the time of his application to the Chief Justice of the King's Bench, he intended—or must be considered as having intended—to accept the sum allowed for maintenance from the 1st July, 1910, until he arrived at the age of twenty-five years, as in full for all maintenance.

The appeal should be dismissed without costs as to the appellant. The respondents should get their costs out of the estate.

Appeal dismissed.

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REX v. BATTISTA.

Quebec Court of King's Bench, Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. November 30, 1912.

1. JURY (§ II B—55)—QUALIFICATION OF JUROR—RIGHT TO QUESTION AFTER VERDICT.

After verdict rendered and sentence passed it is too late to urge that one of the jurors who sat on the case was not qualified and that his name was not on the sheriff's list of jurors as sec. 1010 Cr. Code (1906) establishes the legal presumption that all those who rendered a verdict were competent to have served on the jury where no objection was taken at the trial of an indictment.

[*Rex* v. *McCrae*, 12 Can. Cr. Cas. 253, 16 Que. K.B. 193, distinguished; *Brisebois* v. *Regina*, 15 Can. S.C.R. 421, referred to.]

2 APPEAL (§ I C—25)—QUALIFICATION OF JUROR—CRIMINAL LAW—OBJECTION NOT TAKEN TILL AFTER VERDICT.

The question of qualification of a juror in a criminal case is a question of fact which cannot be raised after verdict rendered and the Court of Appeal has no jurisdiction to entertain a reserved case thereon.

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3. CRIMINAL LAW (§ II A—48)—PROCEDURE — WAIVER OR LOSS OF RIGHT —CR. CODE, 1906, SEC. 1010.

Section 1010 of the Criminal Code 1906, forbidding the reversal of a verdict for certain irregularites not objected to before verdict in criminal cases, is taken from the Imperial statute 7 Geo. IV. ch. 64, and not from 21 James I. ch. 13.

[*Regina* v. *Feore*, 3 Q.L.R. 219, corrected.]

4. STATUTES (§ II A—107)—CONSTRUCTION — EFFECT OF MARGINAL HEADINGS.

The marginal headings to the sections of a statute are not to be looked at to limit the plain meaning of the text.

[Compare *R.* v. *Shand*, 8 Can. Cr. Cas. 45, 51.]

Statement

THIS was a demand for a reserved case upon a question of law by the prisoner convicted of murder at the November assizes by the jury and upon whom sentence had been passed by Trenholme, J.

The demand was rejected.

Alban Germain, for the prisoner.

J. C. Walsh, K.C., for the Crown.

The judgment of the Court was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J. (translated).—This is a demand for a reserved case on a question of law.

On September 26th last the petitioner was convicted of murder and condemned to be hanged.

After sentence had been passed he moved to quash the verdict and obtain a new trial; or at least for a reserved case on a question of law to the Court of Appeal. The motion was not granted and the prisoner prays that he be allowed to appeal from this judgment.

The petition alleges that the verdict is null because one of the members of the jury, Vincent Ray, was not qualified to act as a petty juryman, and acted in lieu and stead of William Ray, his father, whose name had been inscribed on the jury list prepared by the sheriff.

The petition, which is supported by affidavits, alleges that Vincent Ray was not recused during the trial because the prisoner and his attorney only became aware of his incapacity after the verdict and sentence.

The prisoner's motion was rejected for the reason that article 1,010 of the Criminal Code states that no judgment may be reversed, after verdict rendered, by reason of the fact that a person served on the jury whose name did not appear on the jury list prepared by the sheriff.

The petitioner in appeal contends that this section of the Criminal Code applies only in the case of informalities and does not apply where a person who served on the jury and whose name did not appear on the jury list is not even qualified to act as juryman. In this case, says the appellant, the prisoner was

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judged by only eleven of his peers and the verdict is therefore tainted with a radical nullity which may be invoked at any time and even after verdict and sentence.

This question is not a new one and has already been raised before our Courts. The appellant relies especially on the judgment rendered by this Court in the *McCrae* case, *R.* v. *McCrae* or *McCraw*, 12 Can. Cr. Cas. 253, 16 Que. K.B. 193.

I do not think that this judgment can apply in the present case and this for two reasons. In the first place I find from the remarks of Lemieux, J., who sat in this case that McCrae complained before verdict was rendered that one of the jury, Montplaisir, was not qualified to sit on the jury (p. 204). The case contemplated by sec. 1010 did not arise therefore in the *McCrae* case, and there is no analogy between it and the present one.

The second reason for which the McCrae judgment is inapplicable in the present case is this: We cannot tell whether the verdict was quashed because Montplaisir, the juryman, was not qualified to serve, or because admissions were illegally obtained from the prisoner.

Two Judges (Lacoste, C.J., and Lemieux, J.), were against the verdict for the two reasons I have just mentioned. Two other members of the Court (Bossé and Blanchet, JJ.), were of opinion to sustain the verdict. The fifth Judge, my brother Lavergne, personally expressed no opinion. But evidently he was of the opinion that the verdict was null since it was quashed. But we do not know whether this was on account of the fact that Montplaisir served on the jury or whether it was due to the allowing to be put in evidence of admissions illegally obtained.

This question was discussed in the case of *Regina* v. *Brisebois* (1888), 15 Can. S.C.R. 421. The decision in this case does not hinge on the question now raised, but the Judges expressed their opinion on the subject. Taschereau, J., and Gwynne, J., stated their opinion as being that an objection similar to the one raised in this case could not be urged after verdict rendered because of the statutory provision then existing and in force, which is similar to our section 1010. Strong, J., and Fournier, J., were of contrary opinion. The fifth Judge, Ritchie, C.J., said it was not necessary to decide this point, but added:—

> Without expressing a positive opinion, I may say I am inclined very strongly to the view, that if this case does not come within the very words of the Act it is within the spirit and scope of the enactment, and within the intent, policy and object of the Legislature, or, as Lord Coke expressed it, to suppress the mischief and advance the remedy.

From what precedes, it may be concluded that no jurisprudence has yet been established on this point and that we are

free to interpret section 1010 of the Criminal Code according to our personal opinion.

In my opinion, and in that of all the members of this Court, this enactment applies to the present case and the verdict cannot be quashed on the ground raised by the appellant.

The appellant contends that section 1010 deals with informalities only, and that absence of qualification in a juryman is not a mere informality but a matter of jurisprudence. The jury as formed, says he, only contained eleven competent members and its verdict is radically null.

I cannot agree with this interpretation of sec. 1010. Its dispositions are absolute. It does not state that the verdict cannot be quashed where a person, qualified to act as a juror, has served upon the jury although not appearing on the sheriff's list. It declares that judgment after verdict shall not be reversed because a person has served upon the jury without being returned as a juror by the sheriff.

The section deals here with any person, whomsoever. Once the verdict has been rendered all those who served on the jury without objection are deemed to have been competent to serve.

It is true that the marginal note opposite section 1010 seems to imply that the section deals only with informalities; but this is evidently an error which has no significance. The enactment itself should be read and not the sense or meaning given to it by the clerk or employee who saw to the publication of the statute.

By tracing back the origin of this enactment (sec. 1010) we find that the marginal note is different. This enactment comes from the Imperial Statute, 7 Geo. IV. ch. 64, sec. 21, and not from the statute 21 James I. ch. 13, as was erroneously stated by Ramsay, J., in *Regina* v. *Fcore*, 3 Q.L.R. 219.

And sec. 21 of 7 Geo. IV. ch. 64 reads as follows:—

> And be it further enacted that no judgment after verdict upon any indictment or information for any felony or misdemeanour shall be stayed or reversed for want of a *similiter*, nor by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer.

It will be seen, therefore, that this enactment is precisely the same as that contained in section 1010, save only that 1010, does not speak of felony and misdemeanour inasmuch as the criminal law nowadays no longer divides offences into felonies and misdemeanours.

This enactment of sec. 21 of 7 Geo. IV. ch. 64 was first reproduced in the Canadian statute 4 and 5 Vict. ch. 24, sec. 47, then in the Revised Statutes of Canada of 1859, ch. 99, sec.

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85, and thence into the different statutes which have revised the Criminal Code.

The marginal note to sec. 21 of 7 Geo. IV. ch. 64 does not, like that of section 1010 C.C., refer to informalities, but reads as follows: "What shall not be sufficient to stay or reverse judgment after the verdict."

Besides, if we were to agree with the appellant that section 1010 should apply only where a juryman, really qualified to serve upon the jury, was not inscribed on the list prepared by the sheriff, we should be faced not with a mere informality but with a question of competence. A person whose name does not appear on the list prepared by the sheriff is absolutely incapable of serving on the jury, even though such person is qualified otherwise to act as a petty juryman.

The effect of the enactment contained in section 1010, is, I repeat, that after verdict rendered all those who sat in the jury are deemed competent to have served. Moreover, this disposition of sec. 1010 is in accord with that of sec. 1014, which allows of reserved cases only on questions of law. And whether or not a person is qualified or competent to serve on a jury is a question of fact and not a question of law.

And so the appellant was obliged to support his petition by affidavits to establish that Vincent Ray was not qualified to act on a petty jury.

This question of fact should have been raised before verdict was rendered. It is now too late as section 1010 of the Criminal Code allows us no jurisdiction in the matter.

Application refused.

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BERRY v. MACKENZIE.

Nova Scotia Supreme Court, Ritchie, J. November 4, 1912.

1. VENDOR AND PURCHASER (§ I—1)—RIGHTS OF PARTIES—ACTION FOR DAMAGES FOR BREACH OF CONTRACT.

The alleged purchaser cannot support an action for damages for breach of an oral contract for the sale of land to which the Statute of Frauds applies, by setting up part performance, since that doctrine is an equitable one and is applicable only where specific performance of the agreement is sought.

[Fry on Specific Performance, 5th ed., 290, specially referred to.]

2. VENDOR AND PURCHASER (§ I—1)—RIGHTS OF PARTIES—EQUITABLE DOCTRINE WHERE FRAUD VITIATES VERBAL CONTRACT.

The only ground upon which Courts of Equity compel the specific performance of a verbal contract to which the Statute of Frauds applies is where the refusal to perform the contract amounts to a fraud. (Dictum *per* Ritchie, J.)

Statement

ACTION to recover damages for breach of a verbal contract for the sale and purchase of real estate. The action was dismissed.

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The defendants pleaded that the action was not enforceable by reason of there being no memorandum in writing as required by the Statute of Frauds and also that there had been no part performance by taking possession and also that the defendant had gone out of possession before action brought and the plaintiff replied that there had been part performance of the agreement.

Statement

The property in question consisted of about ten acres of land, mill, and a dwelling-house, in which one of the defendants resided. After the contract for the sale and purchase of the premises had been completed the defendants permitted the plaintiff to take charge of the mill and operate it for several months. During this time the plaintiff was endeavouring to raise the purchase money, but was unsuccessful and eventually the defendants told him they would not bother with him any longer and he gave up possession of the mill and removed from the neighbourhood. Several months afterwards he brought this action.

I. S. Ralston, for the plaintiff.

F. L. Milner, for the defendants.

Ritchie, J.

RITCHIE, J.:—This action is brought to recover damages for the breach of a verbal agreement to sell real estate. Among other defences the Statute of Frauds is set up, and to this defence part performance is replied on behalf of the plaintiff. Part performance is an equitable doctrine and I think is not applicable to a case where the legal remedy of damages is sought and not specific performance. In Fry on Specific Performance, 5th ed., p. 290, it is said:—

> The part performance of a contract by one of the parties to it may in the contemplation of equity preclude the other party from setting up the Statute of Frauds and thus render it although resting in parol capable of being enforced by way of specific performance though not by way of damages even since the Judicature Act.

As intimated by Mr. Justice Chitty in *Lavery* v. *Pursell*, 39 Ch.D. 508, the equitable doctrine of part performance cannot be made use of for the purpose of obtaining damages at law. The only ground upon which Courts of equity compel the specific execution of a verbal contract to which the provisions of the Statute of Frauds apply is where the refusal to execute the contract amounts to a fraud. As I understand the facts there is nothing of that kind established against the defendants and if this was an action for specific performance I think it would probably fail. However it is not necessary for me to decide this and therefore I do not do so but place my decision upon the short ground that part performance does not help out the verbal contract where only damages and not specific performance is claimed. If the doctrine of part performance was applicable to this

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case I think the facts do not establish a case for the plaintiff. He never was in the exclusive possession of the property. The defendant Porteous allowed him to start work at the mill supposing that he would be able to produce the money. The plaintiff never had the money to pay for the property and although he says he had found a man willing to lend it to him I doubt it. It is a very difficult task for a man without a dollar to put in himself to borrow the whole of the purchase money. It is somewhat significant that the name of the man who was going to advance the whole of the purchase money is not given. If the idea was that the plaintiff was to get $1,200 on first mortgage and the defendant McKenzie take a second mortgage for $800, I do not believe that McKenzie would have done anything of the kind.

The action will be dismissed with costs.

Action dismissed.

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Dec. 14.

HALL v. LOCKWELL.

Quebec Court of Review, Davidson, C.J., Archibald, and Saint-Pierre, JJ. December 14, 1912.

1. NOVATION (§ I—5)—WHAT AMOUNTS TO—PAYMENT OF NOTE PART IN CASH AND RENEWAL NOTE FOR BALANCE.

The payment of a note partly by cash and partly by a renewal note for the balance does not operate novation of the original note, and, in the event of non-payment of the renewal note, suit is properly brought on the original note.

Statement

APPEAL by the defendant from the judgment of the Superior Court for the district of Montreal, Weir, J., rendered on November 17th, 1910, maintaining the plaintiff's action for $150, balance of a promissory note.

The appeal was dismissed.

C. Bruchési, for defendant, appellant.

Walter S. Johnson, for plaintiff, respondent.

The judgment of the Court was delivered by

Davidson, C.J.

DAVIDSON, C.J.:—The judgment under revision condemned defendant Lockwell, in the sum of $150, as being the balance due on a note of $200 signed by him, bearing date October 11th, 1909, and made payable, two months after date, to the order of Hubert Raymond, the other defendant, who could not be found, and so was not served with the writ.

Lockwell pleads that the note was discounted at the Sterling Bank; and that at maturity it was paid and novated by the acceptance on the part of the bank of $50 in cash, and of a note for $150 made by Lockwell to the order of and indorsed by Hubert.

The original transaction represented the obtaining by

Hubert of a discount of his own note for $1,500. To secure this discount several other notes were lodged with the bank, purely as collaterals. Among these was the note sued on. Although not under discount it had, of necessity, to be protected at maturity.

The payment of $50 on account, which went to the credit of Lockwell and the acceptance by the bank of a renewal for the balance, did not operate payment or novation of the original note for $200, which the bank retained. The jurisprudence in this respect is so firmly established that citation of cases is needless.

Another fact emphasizes the prudence of the retention of the original note and in a marked degree shatters the defence of Lockwell. When called on to meet the note of $150 he asserted that it was a forgery, and so it seems to be. Had he been sued for its recovery, such would have been his pretension.

We are to confirm the judgment.

Appeal dismissed.

CLAIROUX v. BLOUIN.

Quebec Court of Review, Archibald, Saint-Pierre, and Chauvin, JJ. December 14, 1912.

1. EVIDENCE (§ VI A—515)—PAROL EVIDENCE AS TO WRITINGS—STATUTE OF FRAUDS—QUEBEC C.C. 1235.

Where there is no writing signed by the purchaser, the vendor of goods, in the absence of delivery, either complete or partial, and in the absence of earnest money, cannot establish his claim by the evidence of the buyer; i.e., the writing required under the Statute of Frauds (C.C. 1235) cannot be supplied by the examination of the purchaser.

[See Annotation on the Statute of Frauds, 2 D.L.R. 636.]

Statement

THIS was an appeal by the defendant from the judgment rendered by the Superior Court at Montreal, Archer, J., on October 11th, 1910, maintaining the plaintiff's action for goods sold and dismissing the defendant's plea of compensation also for goods alleged to have been sold.

The appeal was dismissed.

L. E. Beaulieu, for plaintiff, respondent.

Paul St. Germain, for defendant, appellant.

The opinion of the Court was handed down by

Archibald, J.

ARCHIBALD, J.:—This is a review of a judgment of Mr. Justice Archer, maintaining the action of the plaintiffs against the defendants for goods sold and delivered, and rejecting the plea that the plaintiff's action was premature owing to a delay having been given for the payment of the debt, which had not expired when action was brought, and also a second plea of compensation for the price of other goods alleged to have been sold by defendants to plaintiffs for a price exceeding the amount of plaintiff's claim against the defendants.

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The judgment of the Court below held that the plaintiffs had proved their account against the defendants in the amount sued for; that the defendants had failed to prove that delay of payment had been given to them, and dismissed defendants' plea that the action was premature. The Judge also held that the defendants had failed to prove a debt for merchandise existing on the part of the plaintiffs in favour of the defendants, and so rejected the plea of compensation.

The order given by the defendants to the plaintiffs for the goods, the price of which is sued for by plaintiffs, contained the condition that the goods were payable only in three months, but that condition was changed by the plaintiffs before delivery of the goods, by inserting "ten days" in place of "three months." Defendants admit that there were *pour-parlers* between the parties and that they consented to that change, but only on condition that difficulties between the parties as to the other goods were to be settled.

The plea of compensation is based upon these circumstances, and it seems clear that the defendant consented to accept the goods with a delay of ten days instead of three months, for payment. The judgment was, therefore, right in dismissing the plea that the action was premature. The other plea was founded on the following facts:—

The defendant Blouin, being in the premises of plaintiffs, made a list of certain articles and wrote them down. These articles were such as the defendants sold, and the plaintiffs would have occasion to use in their business. Besides this list, upon the paper in question was written terms of payment, which indicated that they were to be paid in three equal portions at varying dates. Although there is some hesitation on the part of the plaintiffs to admit the fact, the defendants allege that a copy of that writing was left with the plaintiffs. This happened about the 14th of October, 1908. On the 16th of October, 1908, the plaintiffs wrote to the defendants in the following terms:—

"We have spoken of the arrangements that you wish to make with us concerning renforts and pulp, but we have decided not to take those goods all at once, but in accordance with our needs, so that you may count upon our order such as specified on the note that you gave us, but deliver upon demand. Do not forget to send the assortment for your order and your labels."

Notwithstanding this letter, the defendants did not wait to get an order requesting the delivery of any part of these goods, but, about the 22nd October, they forwarded a portion of the goods, somewhat about one-third of them, accompanied with the invoice, and as the defendants alleged, a letter was also sent at the same time, the original of which, plaintiffs declare, they either did not receive or cannot find, in which defendants insisted upon the order as given. Afterwards the defendants sent to Montreal

the balance of the goods as specified in the writing above referred to. But plaintiffs refused to accept them, and they were put in a warehouse by defendants. The plaintiffs accepted the goods, which were first sent, although pointing out that they had not ordered them specially, as referred to in their letter of 16th October, and plaintiffs paid for those goods. It is only the remainder of the goods the price of which is now offered in compensation. The Judge has held that these facts did not constitute an indebtedness on the part of the plaintiffs towards the defendants for those goods, which were sent by the defendants to plaintiff, refused acceptance and put in the warehouse.

The defendants appear to suppose that inferences as to the intentions of the parties can be drawn from the facts in regard to the sale of goods, although the articles of the Code which refer to the matter may not have been entirely complied with. Art. 1235 of the Code says that, in commercial matters, where the sum or value exceeds $50, no action or exception can be maintained against a person or his representatives without a writing signed by him in the following cases: "On any contract for the sale of goods, unless the buyer has accepted or received a part, or given earnest."

Now, the recent decisions of the Courts have established the jurisprudence that, where there is no writing signed by the purchaser as in this case, the vendor of the goods, in the absence of delivery, either complete or partial, and in the absence of earnest, cannot establish his claim by means of the evidence of the buyer; that is to say, that this is not one of those cases where the writing can be supplied by the examination of the purchaser. This is in accordance with the English decisions upon that matter.

There was, then, at the date of the 14th October, no complete contract between the plaintiffs and the defendants in reference to the goods which defendants alleged they had sold to the plaintiffs. The defendants, in their factum, make a great deal of the fact that they had left a copy of the writing, which they called an order or goods (but which was not signed), with the plaintiffs. But that adds nothing whatever to their defence. The document was wholly useless for the purpose of constituting a writing signed by the party obliging him to take these goods, and if there were two copies in place of one, it made no difference.

The only acceptation which was ever made by the plaintiffs of the contract to sell goods to them by the defendants, was the letter of the 16th October, in which they said they would take the goods mentioned in the writing in question, but only as they had need of them and upon their orders from time to time. These orders defendants never received, in respect of any of the goods. Plaintiff did, it is true, accept part of the goods, but under his letter of the 16th October, and not under conditions to make the fact of acceptance a ground of admission of verbal

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evidence. The letter of 16th October in question prevents, as the Judge below held, the acceptation of a portion of these goods from being dealt with as a reception of part of the goods in such a way as to admit verbal proof of the contract as a whole.

I think there is no doubt that the judgment of the Court below was right in holding that; and the judgment is sound and ought to be confirmed, and is confirmed with costs.

Appeal dismissed.

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Dec. 20.

BALL v. SYDNEY & LOUISBURG R. CO.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Drysdale, and Russell, JJ. December 20, 1912.

1. RAILWAYS (§ II C—25)—RIGHT TO FENCE RIGHT-OF-WAY—INTERFERENCE WITH ACCESS TO SPRING.

A railway company which in constructing its line and fencing in its right-of-way pursuant to its statutory right so to do, thereby interfered with plaintiff's access to a spring on the premises of another railway which he was permitted to use as a mere licensee, is not liable to him for damages for such interference.

2. NEW TRIAL (§ III B—17)—VERDICT—EXCESSIVE DAMAGES.

A new trial may be granted by an appellate Court where the jury in assessing damages for pollution of a stream on plaintiff's land by reason of material used in the construction of defendant's railway fixed such damages at a sum which in the opinion of such appellate Court had not been satisfactorily proved.

Statement

THIS was an appeal from the order of Mr. Justice Ritchie, whereby judgment was entered for the plaintiff against the defendant for the sum of $250 and costs to be taxed. The action was one claiming damages in respect of the pollution of a spring on land of the Intercolonial Railway to which plaintiff was permitted to have access, and interference with plaintiff's access to such spring by the building of defendant's line of railway between the spring and plaintiff's house, and also damages in respect of the pollution of the waters of a brook flowing through plaintiff's land. The pollution was alleged in each case to have been caused by the use of slag and other refuse in connection with the construction of defendants' line of railway. The findings of the jury were in favour of plaintiff and judgment was ordered accordingly.

Appeal allowed and a new trial ordered.

Argument

H. Mellish, K.C., for appellant:—By deed to the defendants plaintiff deprived himself of his right to the spring. The evidence shews that the brook was not used and that the pasture through which it flowed was full of other springs. There is no evidence that plaintiff suffered damage through the pollution of the spring. In any case the amount awarded is excessive. The defendants were entitled to ballast their road with slag, and if

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the stream was polluted thereby plaintiff has no cause of action. There is no evidence of negligence on the part of defendants: *Caledonia Railway* v. *Walker's Trustees*, 7 A.C. 259, 276, at 293; *Hammersmith R. Co.* v. *Brand*, L.R. 4 H.L. 171.

J. L. Ralston and *Colin McKenzie*, for respondent:—The award made in favour of plaintiff only covered the land taken and not damages caused by improper construction and ballasting. Plaintiff has a title to the spring by virtue of R.S.N.S. ch. 167, sec. 31. We claim title to the spring by virtue of an easement: *Race* v. *Ward*, 4 E. & B. 702, 14 Beav. 530. As to what is covered by the award: N.S. Acts 1910, ch. 171, sec. 19. Defendants must shew that they have a statutory right to establish a nuisance: *Rapier* v. *London Tramways Co.*, [1893] 2 Ch. 588; *Shelfer* v. *City of London Electric Co.*, [1895] 1 Ch. 287, 292; *Canadian Pacific R. Co.* v. *Parke*, [1899] A.C. 535; *Jones* v. *Festiniog R. Co.*, L.R. 3 Q.B. 733; *Hilliard* v. *Thurston*, 9 A.R. (Ont.) 514; *Reg.* v. *Bradford Navigation Co.*, 6 B. & S. 631, 34 L.J.Q.B. 191, 13 W.R. 892; *Metropolitan Asylum* v. *Hill*, 6 A.C. 193; R.S. N.S. 1900, ch. 99, sec. 279; N.S. Statutes of 1910, ch. 171, sec. 2; *Faulkner* v. *City of Ottawa*, 41 Can. S.C.R. 190, 214.

Mellish, K.C., replied.

The judgment of the Court was delivered by

Russell, J.

RUSSELL, J.:—The plaintiff's action is for damages for injury caused to him by the building of their railway; and he has recovered against the defendant company on three distinct grounds. First, as to a spring on the line of the Intercolonial Railway, or within the limits of the land expropriated for the purposes of the Intercolonial Railway, to which he had access; secondly, because of the pollution of the spring, and thirdly, because of the pollution of a brook running through the plaintiff's land by water discharged into the brook from the defendant's railway, the ballast on which consisted, as the plaintiff claims, of unsuitable material.

As to the first and second elements of damage, the case is that there was a spring on the land of the plaintiff expropriated for the Intercolonial Railway which was destroyed by the track of the railway running over it and filling it up. There was another spring discovered or developed later within the lands of the Intercolonial, to which the plaintiff was allowed to have access. But he was a mere licensee as to this, and I do not understand how he can have any grievance in respect to it. The defendant company did nothing that they had not a perfect right to do in building their road and fencing in their right-of-way. I cannot make out from the evidence that they did anything whatever on unexpropriated land as claimed.

As to the other element of damage, I think that the damages awarded, if any were suffered, were excessive. The brook had

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been diverted and is now running on the southern side of the defendant's railway. For this diversion plaintiff has received compensation. The pollution of the water can only occur, if at all, during rain storms, I suppose, when the water comes over the ballast on the road and enters the brook. The inconvenience from this cause must therefore have been occasional and temporary, and, in fact, I cannot find in the evidence of the witnesses any material on which, if I were a juryman, I could satisfactorily appraise the damage suffered, if any. I am not even certain that there was any evidence of any injury at all.

It is enough for the purpose of the present enquiry to say that damage to the amount awarded by the jury has not been satisfactorily proved, and there must therefore be a new trial, the appeal being allowed for that purpose with costs.

New trial ordered.

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DOREY v. DOREY.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, and Drysdale, JJ. December 20, 1912.

1. COURTS (§ I A—2)—JURISDICTION—STATUTORY POWER TO GRANT ALIMONY —EXTENSION—N.S. LAW, 1903, CH. 64, 1904, CH. 35.

Chapter 64 of the Nova Scotia Laws, 1903, as amended by ch. 35 of the N.S. Laws, 1904, conferring upon the Supreme Court of Nova Scotia the right to grant alimony in certain cases and upon the happening of certain circumstances, cannot be extended to the granting of alimony *pendente lite*, the jurisdiction conferred being a statutory one and the latter power not being specifically mentioned.

2. DIVORCE AND SEPARATION (§ V A—46)—APPLICABILITY OF DIVORCE COURT PROCEDURE, N.S., TO ACTION FOR ALIMONY.

The provision and procedure of the Divorce Court in Nova Scotia are not applicable to actions for alimony in the Supreme Court of Nova Scotia.

Statement

APPEAL from the judgment of Ritchie, J., refusing an application on the part of plaintiff for alimony *pendente lite*. The judgment appealed from proceeded on the ground that the action was one of a purely statutory character, and the statute (ch. 64 of the provincial Acts of 1903 as amended by ch. 35 of the Acts of 1904) made no provision for such an order as that applied for.

The appeal was dismissed.

Argument

W. E. Roscoe, K.C., and *B. Russell*, in support of appeal:—The statute as amended provides for alimony *pendente lite*: Acts 1903, ch. 64; Acts 1904, ch. 35; Eversley on Domestic Relations, 3rd ed., 168; Schouler on Husband and Wife, 5th ed., sec. 551. Temporary support is an incident to proceedings at law in an action for alimony, and it will be granted: *Head* v. *Head*, 3 Atk. 295; *Yeo* v. *Yeo*, 2 Dick. 498; *Ball* v. *Montgomery*, 2 Ves. Jr. 191; *Duncan* v. *Duncan*, 19 Ves. Jr. 394; Storey's Eq. Jur., sec.

1476; *Soules* v. *Soules*, 3 Gr. Ch. 113; *Johnson* v. *Johnson*, 20 Ill. 496; *Van Arsdalen* v. *Van Arsdalen*, 30 N.J. Eq. 359; *Paterson* v. *Paterson*, 5 N.J. Eq. 389; Am. & Eng. Encyc. vol. 2, p. 99; Holmested & Langton's Jud. Act, p. 28; *Campbell* v. *Campbell*, 6 P.R. (Ont.) 128; *Wilson* v. *Wilson*, 6 P.R. (Ont.) 129; *Keith* v. *Keith*, 7 P.R. (Ont.) 41. The merits cannot be gone into until the preliminary question is settled: *D'Oyley* v. *D'Oyley*, 4 Sw. & Tr. 226; *McCulloch* v. *McCulloch*, 10 Gr. Ch. 320.

H. Mellish, K.C., *contra*:—In the cases cited by counsel for appellant the suit was for something else than alimony and alimony *pendente lite* was in the nature of a declaration of distribution of property in favour of the plaintiff. As to the statutes in relation to divorce: Pritchard on Divorce 21. For the definition of alimony: *L*—— v. *L*——, 27 Times L.R. 316. Alimony was formerly and is now only an ancillary remedy in another action and where alimony *pendente lite* is granted in a suit for permanent alimony it is only by statute. The Ontario practice is shewn in Holmested & Langton, pp. 575, 577, 1370, 1371. Plaintiff is in a position to support herself and is not entitled in any case: *George* v. *George*, L.R. 1 P. & D. 554, 37 L.J. Mat. 17; *Burrows* v. *Burrows*, L.R. 1 P. & D. 554.

Ralston, replied.

The judgment of the Court was delivered by

Drysdale, J.

DRYSDALE, J.:—An appeal from the order or judgment of Mr. Justice Ritchie, dismissing an application for alimony *pendente lite*.

By ch. 64 of the Acts of 1903 passed by the Legislature of Nova Scotia a new right of action is given to a married woman and the right to grant alimony is conferred on the Supreme Court upon the happening of a certain set of circumstances.

This is a new jurisdiction conferred on this Court for the first time by said enactment, and confers power to grant alimony to any wife who would be entitled to alimony by the law of England or to a wife who would be entitled by the law of England to a divorce and to alimony as an incident thereto, or to a wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights, and alimony when so granted by the Court by the Act shall continue until the further order of the Court.

The plaintiff has brought an action in which she alleges circumstances entitling her to recover under one or the other provisions of this Act. Her statements are denied and the cause is at issue. If she fails on the trial of the issues there can, of course, be no recovery.

This alimony means support for a wife authorized under certain circumstances, and there the Act stops. There is no provision for a recovery by the wife of any money pending the action,

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and yet because of this Act and an action pending thereunder the plaintiff asserts on this motion (interlocutory) her right to have allowed her alimony or support pending the action. I could understand, of course, such an application in the Divorce Court, but in this Court the procedure and provisions of the Divorce Court are not applicable and if there is any right to money or support to a wife who brings this statutory action in this Court it must be in the enactment itself or under some statute conferring such right. It is not argued that there is any such enactment, but the plaintiff's right to an award of money called alimony *pendente lite*, is insisted upon because this Court is given the power to ultimately award money or alimony to plaintiff for her support.

It is obvious that the right of the Court to grant relief in the action under the statute depends upon proof of her allegations in the claim. Only upon satisfactory proof of such allegations can any relief be granted, and I do not think because the statute calls the money to be ultimately awarded her on proof of her statement alimony that it was ever intended by the Legislature she should be awarded any money prior to proving her claim, whether you choose to call such money alimony *pendente lite* or by any other name.

If plaintiff's contention were to prevail, a wife could bring an action under the statute alleging circumstances entitling her to relief and on an interlocutory motion be awarded an allowance without the merits being considered and without any means of ascertaining her true position, and then on trial utterly fail in her action. This was not, I think, the intention of the Legislature as expressed in the Act.

I agree with Mr. Justice Ritchie below and would dismiss the appeal with costs.

Appeal dismissed.

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Dec. 24.

BOILARD v. CITY OF MONTREAL.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. December 24, 1912.

1. EVIDENCE (§ XII B—927)—SUFFICIENCY OF—PERSONAL INJURIES—INFECTED VACCINE.

In a trial by jury the verdict must be based on actual proven facts and not on mere opinion; therefore, in an action in damages for injuries resulting from vaccination alleged to have been performed negligently with infected vaccine, positive proof as to the quality of the vaccine must be adduced to justify a condemnation; the maxim *res ipsa loquitur* cannot apply especially where it is proven that the illness following upon the vaccination might be due to one of several causes.

2. TRIAL (§ II C 4—85)—QUESTIONS OF FACT—WHETHER MEDICAL PRACTITIONER A MUNICIPAL EMPLOYEE.

The question as to whether a medical practitioner is an employee of a municipality is a question of fact and may properly be submitted to a jury for answer.

3. EVIDENCE (§ XI K—830)—SIMILAR ACTS OR FACTS—ADMISSIBILITY.

Proof of vaccination of other persons than the plaintiff and evil results following is admissible, although far from conclusive, to contradict an averment of a plea stating that a large number of persons had been vaccinated by the same doctor with the same vaccine without evil results.

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THIS was an action in damages for $10,000 against the city of Montreal, as the result of an alleged negligent vaccination, as a result of which plaintiff's child lost the use of his arm. The jury brought in a verdict for $6,000 on February 8th, 1912, but Demers, J., reserved the case for decision by the Court of Review.

Statement

The action was dismissed with costs.

T. Rinfret, K.C., for the plaintiff.

J. A. Jarry, for the defendant.

The opinion of the Court was delivered by

GREENSHIELDS, J.:—The plaintiff, the mother of, and tutrix to her son, Ernest Poirier, aged seven and one-half years, claims personally from the defendant the sum of $2,000, and in her quality of tutrix, $8,000, and alleges in effect: That, on the 28th of August, 1909, at the city of Montreal, compelled by a by-law of the city defendant to do so, she caused her minor son, Ernest Poirier, to be vaccinated, and he was vaccinated by Dr. Lesage, one of the employees of the city defendant, and with vaccine belonging to and supplied by the city; that as a result of the vaccination, and as a result of the bad quality of the vaccine furnished by the defendant, the minor child of the plaintiff was seriously afflicted with a nervous affection, and he completely lost the use of his left arm, and his health and physical force are considerably diminished; that the said minor child of the plaintiff is now in a state of debility, and by the fault of the defendant and its employees, and the defective vaccine furnished by the defendant, the said minor son of the plaintiff is permanently incapacitated from earning his livelihood as he otherwise could have. The plaintiff alleges the united damages suffered by herself and her minor son, and places the amount at $10,000. She alleges that on the 24th of January, 1910, she gave a notice to the defendant setting forth the facts above mentioned, and notifying the defendant of her intention to bring the present action, declaring, however, that such notice was given only with a view of avoiding, if possible, costs of an action, and without recognizing any obligation to give such notice, and that, moreover, the said notice was not sooner given because the plaintiff became finally and definitely aware of the gravity of the injuries and their permanency only a short time previous to the giving of the notice.

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The defendant pleads ignorance of the relationship between the plaintiff and Ernest Poirier, and also pleads ignorance of her appointment as his tutrix. As to par. 2 of plaintiff's declara-

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tion, the defendant relies on the terms of the by-law, and admits that Ernest Poirier was vaccinated by Dr. Lesage at the corner of Mount Royal avenue and Delorimier street, in the city of Montreal, with vaccine furnished by the defendant. The defendant denies pars. 3 and 4 of the plaintiff's declaration, which paragraphs allege injuries resulting to the said Ernest Poirier by reason of improper vaccination and defective or improper vaccine; and the defendant denies the damages as alleged. Then follows the affirmative allegation, that the defendant is guilty of no fault, negligence or imprudence in connection with the matters and things alleged by the plaintiff; that the vaccination of the plaintiff's minor son was done carefully and according to all the rules governing such matters; that the vaccine used was the best in existence; that at the same time as young Poirier was vaccinated, a large number of children were vaccinated by Dr. Lesage, and none of them suffered any injuries therefrom; that the sickness or nervous affection from which the said Ernest Poirier is alleged to have suffered, resulted in no way from the vaccination itself, nor from the vaccine used; that the sickness or nervous affection was due to an infection brought about by lack of care on the part of those who had the care of the child, or by its clothes, or by the hands of the child himself; that the by-law referred to by the plaintiff is a by-law passed in the public interest and for the safety of the public generally.

The defendant pleads a defect in the notice given, and then reiterates the allegation that it, the defendant, is in no way responsible, and is guilty of no fault, but that the fault lies wholly upon the plaintiff herself, or those for whom she is responsible.

The issues were joined by plaintiff's answer, praying *acte* of the admissions contained in par. 2 of the defendant's plea.

The plaintiff made an option for trial by jury, and the following, among other questions, were submitted to the jury for answer:—

> 2. Was the plaintiff compelled to cause her minor son, Ernest Poirier, to be vaccinated on or about the 28th day of August, 1909, in virtue of the by-laws of the city of Montreal?
>
> 2a. Did the plaintiff cause her minor son, Ernest Poirier, to be vaccinated by one of the employees of the defendant, with vaccine furnished by the defendant, or by its employees?
>
> 3. Was Ernest Poirier, the minor son of the plaintiff, attacked with a serious illness; has he lost completely the use of the vaccinated arm, and is he permanently incapacitated from earning his livelihood?
>
> 4. Was the state of permanent incapacity, debility and sickness of Ernest Poirier caused by the sole fault and negligence or imprudence of the defendant or persons for whom it is responsible? If you answer in the affirmative, state in what consisted such fault.

All the foregoing questions were answered in the affirmative with unanimity, and to the last was added: "cause, infected vaccine."

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Then follows question 5:—

5. Was the condition of Ernest Poirier caused by the fault of the plaintiff or of Ernest Poirier, and if so, in what did the fault consist?

To which the jury answered "No."

A like answer was given to the question as to whether the condition of Ernest Poirier was brought about by the joint fault of the plaintiff and Ernest Poirier and the defendant.

The jury then proceeded to assess the damages, and awarded to the plaintiff personally $2,000, and to Ernest Poirier $4,000.

During the course of the trial objection was made by the plaintiff to certain questions put by the defendant's counsel, and which objections were maintained.

Thereupon the defendant moved to be allowed to amend par. 2 of its defence, by adding the following: "And the defendant denies all of the said par. 2 except that which is not mentioned in the admission already stated"; that, moreover, it be permitted to substitute for the words "nervous infection" mentioned in pars. 11, 12, 15 and 16, the words "inertia" or "paralysis"; that, moreover, it be permitted to amend further its plea, by adding after pars. 12, 12a, as follows: "That this inertia or paralysis of the arm of Ernest Poirier can be attributed to a large number of other causes, notably 'infantile paralysis.'"

Notwithstanding objections made by the plaintiff's counsel, th mendment was permitted and the defendant's plea stands as ded.

After the verdict of the jury was rendered the plaintiff moved for a judgment according to the verdict. The defendant moved for judgment *non obstanter veredicto*, dismissing the action.

The learned trial Judge, exercising the powers conferred upon him by the Code of Civil Procedure, reserved the case for the Court of Review.

The defendant by its motion before this Court again asks for a judgment dismissing the action, or alternatively for a new trial, and urges in support:—

1st. That the facts submitted to the jury are insufficient and defective, inasmuch as questions 2 and 2a are questions of law and not of fact.

First, dealing with this, I cannot agree with the defendant's view. I should probably have suggested a different form of question, and possibly the question may be unnecessary. If the object of the question is to obtain a statement from the jury of the existence of a by-law, of course that would be a question of fact, but of no importance since the by-laws of the city by its charter are public law. If the question sought to obtain an interpretation of the by-law, it would probably be a question of law, but I do not think the question meant either the one or the other—probably all the question meant was, whether in the

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opinion of the jury the plaintiff knew of the existence of this by-law, and whether she caused her son to be vaccinated by Dr. Lesage because she knew of that by-law. If this be correct, there is no possible objection to the question. In any event, the answer given by the jury cannot possibly prejudice the defendant in the slightest way.

Now, question 2a calls for an answer, as to whether the plaintiff did cause her son to be vaccinated by the employee of the defendant, with vaccine furnished by the defendant. That is not a pure question of law, there is a question of fact involved; so much did the parties realize it to be a question of fact, that considerable evidence was offered as to what the duties of Dr. Lesage were, and as to what his remuneration was and how it was paid. As to whether the vaccine was furnished by the defendant is a question of fact. Employment is a question of fact, which can be determined by a jury, and as to whether or not the vaccine used by Dr. Lesage was furnished by the defendant or its employees, is clearly a question of fact, and is properly submitted to the jury.

The second ground urged by the defendant is, that the learned trial Judge illegally admitted proof of facts, irrelevant to the case, particularly the questions put to Dr. J. Edmond Lesage, with respect to the vaccination of a boy Richard, and of a young girl, Lanoie. The apparent object of these questions to Dr. Lesage was to prove that about that time, with vaccine obtained from the city, he had vaccinated these two persons, and that serious results had followed. I should have probably instructed the jury that proof of such facts, if they existed, was far from conclusive, but I do not believe the learned trial Judge erred in admitting the evidence, particularly when the defendant by one of the paragraphs of its plea affirmatively alleges that about that time Dr. Lesage vaccinated a large number of children with vaccine obtained from the city, and no serious or disastrous results followed. It was the defendant who first opened the door for such proof, by its plea, and I think the objection is unfounded.

I pass for a moment over grounds 3 and 4, as they are the most serious, and will take up the fifth ground urged by the defendant, and that is, that acts of misconduct were committed by the jury, preventing them from giving a just and impartial decision, and cites as an example, the question asked by one of the jurors to Dr. J. A. Leduc. The most that this question would shew would be perhaps a hasty but withal laudable desire on the part of the juror to get some information as to the real cause of the accident. The juror had been listening for a long while to a most general statement by Dr. Leduc about the manufacture or preparation of vaccine. Apparently this

was not very interesting, and then he made the statement: "I would like to know how it came about that the young boy lost his arm—may I be permitted to ask this question?" He probably should not have asked it then, and he probably never got a satisfactory answer to it till the end of the trial. A careful, lengthy and exhaustive study of the records has not furnished me with a satisfactory answer to his question.

But it is not possible to order a new trial upon that ground.

The sixth ground states that the names of the jurors were not inserted, as required by law. Apparently the learned counsel for the defendant interprets the law to mean, that if nine jurors answered a question in the affirmative, and three had a different opinion, the names of the nine so answering affirmatively should be inscribed, and the names of the three answering negatively should in like manner be inscribed. I know of no law to that effect, and such has never been the practice.

Now, to return to the fourth ground: The defendant alleges that the verdict rendered by the jury is contrary to law and manifestly against the weight of proof. This is the most important ground raised, and owing to the amount involved in the present case, and possibly its future effect in this city, it is worthy of the greatest attention.

By-law 324, passed in 1904, reads in part as follows:—

> No parent, guardian or tutor shall permit a child of whom it has the care or the direction, to attend any school, college, convent or other educational institution in the city, unless such child shall be provided with a certificate of effective vaccination.

The power of the city to pass such a by-law is not questioned. It must be observed that the by-law does not make vaccination compulsory albeit the result obtained might. All the by-law enacts is that children will be excluded from the public schools unless effectively vaccinated.

It has been put in question in other countries, and it has been declared constitutional, and within the powers of the state or of the municipality to enact such a by-law. Not only has it been held to be within its power, but it has been held to be the duty of the state to enact such a provision.

It is pre-eminently a by-law enacted for the protection of the public health, and in the best interest of the citizens.

In order to see to the enforcement and carrying out of that by-law, the city appointed, among others, Dr. J. Edmond Lesage, a physician of eighteen years' experience, and apparently of reputable standing, as an inspector of schools, among others, a school known as "St. Francois Xavier." He was employed at a yearly salary, and a part of his duty was to see that each child attending that school should hold the certificate referred to in the by-law. For that purpose the city supplied him with blank certificates printed by the city, and furnished him with vaccine,

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and the city invited the parents and guardians whose children proposed to attend (I confine myself to one school only) St. Francois Xavier school, to bring their children to be vaccinated by Dr. Lesage free of charge.

On the Sunday previous to the 28th or 29th of August, 1909, it was announced at the church in the neighbourhood of St. Francois Xavier school that Dr. Lesage would vaccinate the children who proposed to attend, or were attending that school.

On the afternoon of the 28th or 29th of August (the date is not clear, nor is it of particular importance) Madame Poirier, the plaintiff, accompanied by her sister, Madame Régnier, went, each with two children, to the office of Dr. Lesage, for the purpose of having them vaccinated. The four were vaccinated, the first being a boy, Ernest Poirier, who was then about seven or seven and a half years of age. His vaccination was followed by that of the other three. The time occupied is not clearly defined. The plaintiff and her sister put the time at from ten to fifteen minutes. Too much reliance should not be placed upon their testimony, or the testimony of others, as to the time occupied. No record was kept of it, and it would be impossible for these ladies to accurately state the exact time the operation occupied, but I am satisfied that the case will not turn, or the Court be greatly influenced in its decision, upon that point.

Now the plaintiff says in effect, and this is the whole basis of her action: "The vaccination which was performed upon my minor son on that date was negligently, carelessly and imprudently performed." That is the operation itself, and it is suggested that in the operation strict cleanliness and sterilization was not observed, and that infection resulted; and then is added "that the vaccine used by Dr. Lesage was itself infected and improper and unfit for use, and," says the plaintiff, "all the disastrous results which happened to my son were due to the one or other, or both." The jury found only one, viz., that infected vaccine had been used.

Let us first consider the proof as to the operation itself. Probably the best qualified witness to testify upon that subject is the operator himself, Dr. Lesage, and he has minutely described the operation as invariably followed by him. The patient's arm is bared, it is washed with soap and water, or even with boracic acid, where necessary, that depending upon the condition of cleanliness in which he may find the patient's arm; alcohol is rubbed on it, and then an instrument to cut the skin is used; this instrument, says the witness, is kept in a bowl of alcohol, and before being used on each patient is heated in a spirit lamp; the incision is made; the vaccine is taken from its receptacle by a little instrument provided for that purpose, only one being used on a patient, and then destroyed. The vaccine point is placed upon the incision, and absorbent cotton is placed upon

it, which is sometimes, but perhaps not always, fastened or kept in place by means of a little sticking plaster.

Now this is the manner in which this operation, Dr. Lesage says, was invariably performed by him. It is true that he says he could not recall in detail the operation on this particular patient, and, seeing the large number he vaccinated, it certainly would be most surprising if he did; but he reiterates again and again that, realizing the gravity of any neglect in a matter of this kind, he invariably takes these, and all of these, precautions.

Now against that there is the testimony, if it be against it, of Madame Poirier the plaintiff, and her sister. In the first place, both said they paid no particular attention to what the doctor was doing, and again it would be surprising if they did. While this boy was being vaccinated, the others were being prepared, with the assistance of Madame Lesage, and both the plaintiff and her sister frankly admit that little, if any, attention was paid by them. The young child says he did not see any alcohol lamp burning; but I cannot accept this statement to contradict the clear statement of Dr. Lesage and his wife. And here it may be mentioned that the fact that within the year, or that summer, Dr. Lesage had probably vaccinated several hundred children, that this was the only case that led to anything approaching a complication such as the present one.

Now it is quite clear from the evidence that if it be the fact that Dr. Lesage followed this course in operating upon young Poirier, he followed as safe a course as is known to modern science of vaccination. All the doctors examined agree on this point.

Now, can it be said that upon that ground of complaint the plaintiff has succeeded in making any proof of any lack of care or fault on the part of Dr. Lesage? I fail to find any. The jury, apparently, had no fault to find with the manner in which the operation was performed, because they found no fault with it, but found fault only with the vaccine. It is urged that the result speaks for itself. It might be true, and it might speak strongly, if the proof did not shew that the lamentable condition which developed in this young boy could be due to any number of other causes.

Among the physicians examined, one of the most eminent says that he is satisfied that the vaccination had nothing to do with the condition, but that it was a mere coincidence.

The jury, however, found that the vaccine was infected. It certainly did not obtain this finding of fact from any direct proof. From the very nature of the case it was impossible to make this proof directly.

In 1904 or 1905 Dr. J. A. Leduc founded what is called the "Institute of Vaccination," where vaccine is prepared. He

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recounts in detail the manner of its preparation; states that each time a quantity is ready it is submitted to the Provincial Board of Health; is microscopically examined, and a certificate is obtained of its good and proper condition before it is placed upon the market. It is then placed in tubes or bottles of different kinds hermetically sealed, and is sold to the public.

I fail to see a possibility of greater care being exercised, and there is absolutely no proof in the record to justify a statement that the vaccine used on the boy, Ernest Poirier, was tainted or infected. It is difficult to find anything to justify a statement that the city was negligent in any way in connection with the vaccine used.

In my opinion the verdict cannot stand; it is unsupported by proof, and the verdict is the substitution of the opinion of a jury in the place of proof.

Upon the whole, I think the defendant is entitled to judgment, notwithstanding the verdict, and the action should be dismissed.

Appeal allowed.

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CODERRE v. CITY OF SHERBROOKE.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ. December 27, 1912.

1. ELECTRICITY (§ III B—32) — CONTRIBUTORY NEGLIGENCE — EMPLOYEE TOUCHING LIVE WIRE—COURSE OF EMPLOYMENT.

The Workmen's Compensation Act (Que.) covers only claims for injuries received in the course of or by reason of the work done by the injured employee, and where a workman before working hours goes into the power house of his employer where he had absolutely no business and impelled by sheer curiosity touches a live wire and is killed, his employer is not liable in damages for such accident.

Statement

APPEAL from the judgment of the Superior Court for the district of St. Francis, Hutchinson, J., rendered March 25, 1912, dismissing the plaintiff's action for damages resulting from the death of her husband.

The appeal was dismissed.

P. A. Juneau, for the plaintiff.

L. E. Panneton, for the defendant.

The opinion of the Court was delivered by

DeLorimier, J.

DELORIMIER, J. (translated):—The plaintiff inscribes in review from the judgment of the Superior Court for the district of St. Francis (Hutchinson, J.), rendered on March 25th, 1912, dismissing the action with costs.

This was an action instituted in virtue of the Workmen's Compensation Act of 1909, whereby the plaintiff claimed the sum of $3,025 as indemnity and funeral expenses resulting from the death of her husband, Pierre Gosselin, in the electric power house of the defendant in whose employ he was. The corporation de-

fendant pleaded denying all liability, averring that the accident had not happened by reason of or in the course of the work of the deceased, but solely on account of the gross and inexcusable fault of the said Pierre Gosselin.

The Superior Court dismissed the action.

From the evidence it appeared that the deceased, a blacksmith by trade, arrived at the smithy of the corporation defendant, where he used to work, some minutes ahead of time on the morning of the accident. The foreman of the nearby power-house told some of the men at this moment that owing to a storm the evening before something had gone wrong in the power-house and that he would have to telephone to Sherbrooke to get some one to come and repair. Whilst this foreman was absent Gosselin, out of pure curiosity, before starting on his day's work, left the smithy where he usually worked, went to the power-house some 75 feet away, crossed it in its entirety over to where the switchboard was, noticed a wire the covering of which was partly burned, laid his finger on it and received a shock and died.

The trial Judge held that the accident had not occurred by reason of nor in the course of Gosselin's work. We concur. The accident happened before Gosselin had begun working, at a place where he had no need to go. He had no business in this power-house. He had never been there during the two months he had been in the defendant's employ. He was impelled to enter this power-house by sheer curiosity, and it was reckless imprudence on his part to touch this live wire. No doubt an employer is bound to see to the protection of his employees in the buildings wherein they work. And statutory enactments regulate the extent of these obligations as regards the safeguarding of the workmen, the hygiene and salubrity of the establishments, etc.: R.S.Q. 2924 *et seq.*, 3929 *et seq.* But this duty of protection cannot be extended so as to compel the employer to protect the workman against his own free and voluntary and deliberate actions, which actions would be the immediate cause of an accident to such workingman. The employer cannot be obliged to protect a workingman against his own curiosity, which needlessly and of his own deliberate movement brings him into danger and which happens neither by reason of nor in course of the work: R.S.Q. 7325, 9 Edw. VII. ch. 66, sec. 5; Beauchamp Civil Code on art. 1053, No. 25.

The jurisprudence on cases of this kind is reported in Foran "Workmen's Compensation Act," sec. 1, No. 100:—

> Thus a carter sent by his employer for a load, leaves his horse and inadvertently puts his hand on an electric coil which he had approached out of curiosity and is killed; it was held that the accident did not arise out of the employment.

Below this decision a great number of French cases are referred to. No. 125:—

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A man working in a quarry, while resting and drinking, during a suspension of the work, made a bet that he could touch the electric wires connected with the motor power of the quarry, and was killed in so doing: Held, that the accident did not arise in the course of his employment.

No. 110:—

The authority and control of the employer are the primary elements of his liability, and he is not responsible if the accident happens after the work is done and the workman is no longer within the premises where he was employed. So, if the employee leaves the work of his own free will and goes out of the shop into an outbuilding where no duty called him and where the accident happens, it cannot be said to have arisen in the course of his employment.

Other similar cases are reported at Nos. 115, 123 and 144.

Dean Walton in his treatise on this Act says at page 75: "It is otherwise when the workman goes to a part of the works where he has no business and there meets with an accident": Dijon, 11th May, 1903, D. 1904-2-292. I would refer finally to the remarks of Archambeault, C.J., in the case of *Dominion Quarry Co.* v. *Morin*, 21 Que. K.B. 147.

For these reasons we are of opinion that the judgment *a quo* is well founded and must be confirmed.

Appeal dismissed.

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ALLARD v. TOWN OF BEAUHARNOIS.

Quebec Court of Review, Tellier, DeLorimier, and Greenshields, JJ.
Montreal, November 29, 1912.

1. LIMITATION OF ACTIONS (§ III F—130)—STATUTORY CONDITIONS PRECEDENT TO ACTION FOR PERSONAL INJURIES—NOTICE OF ACTION.

Where a provincial statute enacts that in cases of claims for bodily injuries the claimant must give notice to the corporation of the accident within sixty days therefrom, failing which such corporation is to be relieved of all liability, and further provides that suit cannot be instituted before the expiry of fifteen days from the service of such notice, but that no action shall lie unless instituted within six months "after the day the accident happened, or right of action accrued," then the prescriptive period of six months begins to run from the day of the accident and not from the expiry of the fifteen days following the service of the notice, where the plaintiff's pleading shews only a single right of action and a single claim for damages resulting therefrom.

2. DISMISSAL AND DISCONTINUANCE (§ I—5)—STATUTORY DENIAL OF RIGHT OF ACTION—SUPPLYING DEFENCE.

Where the law denies a right of action, the Court must of its own motion supply this defence and dismiss the action, although the defendants have not raised it.

[*City of Montreal* v. *McGee*, 30 Can. S.C.R. 582, applied.]

Statement

THIS was an appeal from the judgment of the Superior Court for the district of Beauharnois, Mercier, J., rendered on November 16th, 1911, dismissing the plaintiff's action without costs.

The plaintiff had sued the town of Beauharnois for $1,999, damages alleged to have been suffered by his wife on September 21st, 1910, as a result of a fall on a sidewalk within the town.

Notice of this accident was given to the defendant on October 26th, 1910. The action was instituted on April 15th, 1911.

The trial Judge dismissed the action on the ground that the right of action was prescribed at the time of the institution of the action, but dismissed it without costs for the reason that the defendant had not raised this question of prescription in its plea.

J. A. Descarries, K.C., for plaintiff, appellant.
J. G. Laurendeau, K.C., for defendant, respondent.

The following opinions were handed down:—

DeLorimier, J. (translated):—The only question to be decided on this appeal is as to whether the plaintiff's right of action was prescribed at the time the present suit was instituted. DeLorimier, J.

The plaintiff admits, in his factum, that where the right of action is denied the Judge must, of his own motion, pronounce the denial of the right even when such a ground of defence has not been invoked (C.C. 2188), but he contends that, in this case, the delay for prescription had not expired when he instituted his action. . . . Says the plaintiff, as I gave the notice in writing, required by art. 5864 R.S.Q., to advise the defendant of this accident and to warn it of my intention to claim damages therefor, my action only became prescribed six months after the expiry of fifteen days from the date at which the notice in question was served. The notice was given to the defendant on October 25th, 1910, that is to say, within the sixty days from the date of the accident according to the requirements of art. 5864. And thereafter I had, under this article 5864, to wait ten days before bringing suit. This delayed me until November 11th, 1910. Only on that date, November 11th, 1910, did my right of action accrue. Therefore, concludes the plaintiff, I had six months from November 11th, 1910, within which to bring suit, to wit, until May 11th, 1911; and I took action on April 1st, 1911, and served it on April 15th; in useful time therefore before the delay for prescription was expired. . . .

To decide the merits of this claim as regards the proper interpretation to be given to art. 5864 R.S.Q. 1909, it is necessary to reproduce the text of this article:—

> 5864. If any person claims or pretends to have suffered bodily injury by any accident, for which he intends to claim damages from the corporation, he shall, within sixty days from the date of such accident, give or cause to be given in writing to the clerk of the corporation, notice of such intention, containing the particulars of his claim, and stating the place of his residence, failing which the corporation shall be relieved from any liability for any damages caused by accident, notwithstanding any provision of law to the contrary; and in case of any claim for damages to property, moveable or immoveable, a similar notice shall also be given to the clerk of the corporation, within thirty days, failing which the corporation shall not be liable for any damages, not-

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withstanding any provision of law; but no action for such damages shall lie unless such action has been instituted within six months after the day the accident happened or right of action accrued.

No such action shall be instituted before the expiration of fifteen days from the date of the serving of such notice.

The default of such notice shall not, however, deprive the victims of such accident of their rights of action, if they prove that they were prevented from giving such notice by irresistible force, or for any other reason deemed valid by the Court or Judge.

The corporation shall have its recourse in warranty against any person whose fault or negligence occasioned the accident and damages arising therefrom: 3 Edw. VII. ch. 38, sec. 606.

As will be seen, therefore, the law enacts that where a person wishes to claim damages for bodily injuries, such person: (1) must give to the clerk of the municipality within sixty days from the date of the accident the special notice in writing mentioned therein, failing which such municipality will not be liable for any damages resulting from the accident, any disposition of the law to the contrary, notwithstanding; (2) cannot institute such action before the expiry of fifteen days from the giving of such notice; (3) must bring such action within six months from the day of the accident or from the day on which the right of action accrued. For the law says:—

> But no action for such damages shall lie unless such action has been instituted within six months after the day the accident happened or right of action accrued.

The plaintiff admits these provisions of the law, but contends that the forfeiture or prescription of his right of action only began to run from the expiry of the fifteen days following the date of the service upon the defendant of the notice required by law, within which delay he could not sue the town. . . . His calculations are, therefore, as follows: Date of accident, September 21st, 1910; date of the notice, October 26th, 1910 (within the sixty days required by law); date of the expiry of the fifteen days after service of the notice, November 11th, 1910, and it is from this date that, according to him, the six months' prescription of his right of action began to run, and not from September 21st, 1910, the date of the accident. These six months expired, always according to the plaintiff, on May 11th, 1911. And as his action was instituted on April 1st and served on April 15th, 1911, he contends that his right of action was not prescribed at the time suit was taken.

Now, if the plaintiff's claim is admitted on the basis of his calculations, it will be seen that the prescription of his right of action, instead of operating by the expiry of six months from the date of the accident, only operated after seven months and twenty days, to wit, on May 11th, 1911.

The plaintiff's claim in the present case is, in our opinion, ill-founded. It is evident that we have in hand a claim for

bodily injuries resulting from an accident which occurred at a precise date, September 21st, 1910. Neither is his declaration nor in his factum does the plaintiff allege the accruing in his favour of any other right of action than that resulting from the accident of September 21st. He does not even allege continuing damages resulting from a persistent cause productive of damages. Plaintiff's contention is purely and simply this: that art. 5864 must, in every case, be interpreted so as to have the prescriptive period of six months run, not from the date of the accident, but from the expiry of fifteen days after service of the notice of the accident; that he could give notice of the accident on the fifty-ninth day after the accident, wait fifteen days—therefore seventy-five days after the accident—and then bring his action at any time within the six months following. This would give him 254 days and the prescription of the right of action would not operate before some eight months and fourteen days from the date of the accident.

We cannot accept this proposition in the present case. The plaintiff has one single claim for damages resulting from a sole cause: the accident of September 21st, 1910. Under these circumstances only one right of action accrued, and this right of action accrued on the very day of the accident: 5 Larombière on C.N. 1382-3, Nos. 37 *et seq.* and 47.

In *City of Montreal* v. *McGee*, 30 Can. S.C.R. 582, the Supreme Court held:—

> The prescription of actions for personal injuries established by art. 2262 C.C. of Lower Canada, is not waived by failure of the defendant to plead the limitation, but the Court must take judicial notice of such prescription as absolutely extinguishing the right of action. When in an action of this nature there is but one cause of action, damages must be assessed once for all.

In the same case (p. 585) Taschereau, J., said:—

> La prescription annale contre l'intimée a commencé à courir *ipso jure* concurremment avec la cause de son action. Or, la cause de son action, c'est la faute de l'appelante, la cause des souffrances et des blessures dont elle réclame compensation. C'est cette faute qui, sous l'article 1053 du code, lui a donné son droit à une réparation le lendemain même de l'accident.

At page 589 the learned Judge referred to the case of *Serrao* v. *Noel*, 15 Q.B.D. 549, wherein Bowen, L.J., said:—

> The principle is that where there is but one cause of action, damages must be assessed once for all.

We have arrived at the conclusion that the plaintiff's right of action herein became absolutely prescribed by the fact that he did not bring suit within six months from the date of the accident.

As to the interpretation to be given to art. 5864, "or from the day on which the right of action accrued," this Court is not

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called upon in the present case to give such interpretation. We have not to examine whether these words should be read: "from the date of the accident, or (that is to say) from the day on which the right of action accrued"; or whether, on the other hand, the law wished to recognize that particular cases may arise where, for some reason or other, the right of action might arise on another day than that of the accident. This is unnecessary for the purposes of this case.

DeLorimier, J. For these reasons the judgment appealed from is affirmed with costs.

Greenshields, J. GREENSHIELDS, J.:—By his action the plaintiff claims from the defendant the sum of $1,999 damages, and alleges: that he is the husband, common as to property, of Dame Sarah Lefebvre; that while walking on the sidewalk on Ellis street, in the town of Beauharnois, at that part between the residences of one Elder and one Madame Ceceyre, on the 21st of September, 1911, about eight o'clock in the evening, she fell in an opening in the sidewalk, caused by the fact that a plank was removed; that in falling she seriously injured the ankle of her right foot; that upon continuing her way a short distance she fell again in another opening in the sidewalk, also due to the fact that a plank had been removed; that the second fall of the plaintiff's wife was so violent that her garments were torn, and she suffered a lesion of the right knee, torn ligaments and a twisted ankle; that since said date the wounds or injuries became more serious, although she was placed at once under the care of doctors, and has since been under their care; that she walks with difficulty and suffers great pain; that she is not able to attend to her household duties; that the plaintiff was obliged to engage a servant after the accident; that the plaintiff has reason to believe that his wife will continue to be helpless; that the plaintiff has suffered the damages as alleged; that the plaintiff gave written notice to the defendant of the accident in question on the 26th day of October, 1911. The defendant pleads, denying the essential allegations of plaintiff's declaration, and also complains of the lack of formality in the notice given by the plaintiff.

The plaintiff answers that the defendant is without right in complaining of the insufficiency of the notice, inasmuch as after the notice was received the defendant sent a doctor to the plaintiff in order to establish the extent of her injuries, and to arrive at an understanding as to the damages, if possible, which damages could not then be established.

By a replication this is denied.

The learned trial Judge, although it had not been pleaded, dismissed the plaintiff's action by the following considerant:—

> Considering that the present action was in virtue of sec. 5864 of the Revised Statutes of Quebec, prescribed at the time of the service thereof.

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The learned trial Judge held that although the defendant had not pleaded prescription, the Court of its own motion was bound to apply the law. The plaintiff seeks a revision of this judgment, chiefly, if not solely, upon this ground.

The corporation defendant is governed by the City and Towns Act, and sec. 5864 of the Revised Statutes of Quebec, 1909, is applicable in the present case.

By this article it is in part provided, that any one intending to claim damages for bodily injuries sustained as a result of an accident, such person must within sixty days from the date of the accident give, or cause to be given, a notice in writing to the clerk of the municipality, of his intention to sue, indicating the details of his claim, the locality in which the accident happened; and in default of such notice the municipality will not be held liable for damages, notwithstanding any law to the contrary; but in any case, no action for damages will lie unless such action shall have been taken within six months from the date of the accident, or from the day on which the right of action accrued.

Then follows the provision, that no action shall be taken or instituted before the expiration of fifteen days from the date of the signification of such notice. Then follows the provision, that the want of notice will not deprive a person of his right of action if it is established that he was prevented from giving notice by *force majeure*, or other reasons considered sufficient by the Judge.

Three dates are important in the consideration of the present case: The accident happened on the 21st day of September, 1910; the notice was given on the 26th day of October, 1910, and the action was served on the 15th day of April, 1911.

It will be seen that the plaintiff, if the notice was sufficient, and I consider it was, served it within sixty days from the date of the accident, as by the statute is compulsory; he was prevented from taking his action for fifteen days from the date of the service of his notice, which would bring it to the 11th of November, 1910; he served his action on the 15th of April, 1911, more than six months after the happening of the accident, but less than six months after the lapse of the fifteen days immediately following his giving notice.

The argument submitted to this Court by the learned counsel for the plaintiff in effect is this: The plaintiff had sixty days within which to give notice after the accident; he was not bound to give that notice until the last of the sixty days had arrived; he was prevented from taking his action, by law, for fifteen days after he gave that notice, therefore the prescription—if prescription it can be called—of six months, commenced to run as against the plaintiff only from and after the lapse of fifteen days from the date of the service of the notice.

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It will be at once seen, that if this pretension be upheld, the plaintiff would have approximately eight months and a half from the date of the accident within which to bring his action.

The learned counsel for the plaintiff seeks support for his pretension from the wording of the article itself. The words used in the statute are:—

> But no action for such damages shall lie unless such action has been instituted within six months after the day the accident happened, or right of action accrued.

And, urges the plaintiff's learned counsel, the right of action accrued only when, and not until, the fifteen days had elapsed after service of notice.

It would seem that the decision of the present case involves the answer to the question, When did the right of action accrue? I must say, that the choice of the words "right of action" is not fortunate, and the choice seems more unfortunate if we question the meaning of the words "right of action."

> A right of action is not the power of bringing an action. Anybody can bring an action, though he has no right at all. The meaning of the phrase is, that a person has a right or claim before the action, which is determined by the action to be a valid right or claim. The action or suit does not confer a right which did not exist before it; it only declares that a right did exist before it. An action or suit is, therefore, mere procedure.

Per Esher, M.R., *Attorney-General* v. *Sudeley*, [1896] 1 Q.B. 354.

It is clear that the cause of action, and the whole cause of action, arose when the accident happened, resulting in damages, and in the absence of a statutory prohibition, an action could be taken one hour after the accident. If, on the other hand, the statute means, that the procedure to have an action or claim declared valid by the Court, must be commenced within six months from the date, not when the cause of claim had its origin, but when the right to institute the proceedings necessary to have that claim or action declared valid accrued, then force would be given to the statement that that delay ran only from the first day that claim or cause of action could be asserted by the institution of an action.

The question raised by the learned counsel for the plaintiff does not seem to have received judicial consideration in our Province.

I find in an English case the Court of Appeals has given an interpretation upon a statute somewhat similar in its terms. I refer to the case of *Coburn et al.* v. *Colledge*, [1897] 1 Q.B. 702, 66 L.J.Q.B. 462.

By statute 21 James I. ch. 16, sec. 3, a solicitor's bill was prescribed by the lapse of six years.

In 1843 the statute 6 & 7 Vict. ch. 73, sec. 37, was enacted,

by which no action would lie for the recovery of a solicitor's bill until after the lapse of one month from the delivery to the debtor of a signed copy of the bill. In that case the unanimous judgment of the Court of Appeal was, that the six years commenced to run from the completion of the solicitor's work, and not from the date of the delivery of the signed bill. The firm holding of the Court was as follows:—

> The cause of action in respect of work done by a solicitor arises upon the completion of the work, and not at the expiration of one month from the delivery of a bill of costs, and therefore the Statute of Limitations runs from the completion of the work.

In that case the action was taken within six years from the lapse of one month after the delivery of the signed bill, but was more than six years from the date of the completion of the work, and it was held, as above stated, that the action was prescribed.

The learned counsel for the plaintiffs in that case, in his submission, used the word found in our statute, viz., "accrued." He said that the cause of action on a solicitor's bill of costs does not "accrue" until one month after the delivery of the signed bill, and he relies on sec. 37 of the Act of 1843, which reads as follows:—

> No attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges or disbursements until the expiration of one month after the delivery of a signed bill.

After that statute, says the learned counsel, the delivery of the signed bill became part of the cause of action.

The Court refused to adopt the plaintiffs' view. Lord Esher, Master of the Rolls, in delivering his judgment, said in part:—

> Now the Statute of Limitations clearly does not in any way affect a cause of action; it merely relates to procedure; it provides that actions of debt shall be commenced within six years next after the cause of action. Has the Solicitors Act of 1843 dealt with the cause of action, or does it only affect the procedure as to commencing actions? Sec. 37 provides that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges or disbursements for any business done by any such attorney or solicitor until the expiration of one month after delivery of a duly signed bill of such fees, charges and disbursements. The section assumes the solicitor's right to his fees, charges and disbursements, but says that he is not to enforce that right by an action until certain preliminary steps have been taken. . . .
>
> Therefore, it seems to me that the section (37) only touches the remedy for enforcing the cause of action, and does not touch the cause of action.

In the same case, Lopes, L.J., said:—

> That enactment (referring to sec. 37) seems to me to assume that the cause of action is in existence, and merely postpones the remedy by action for a certain time. It assumes the right to postpone the remedy by action for a certain time. It seems to me that there is

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nothing in the section which in any way militates against the view that the cause of action arises the moment the work is completed. It is said that if this view be adopted, a solicitor will have a shorter time within which to bring his action than the rest of Her Majesty's subjects. That, no doubt, is so, but, on the other hand, if the other contention were adopted, a solicitor might wait for twenty years before delivering his bill of costs, and might commence his action within six years from the time of the delivery of the bill.

Chitty, L.J., said:—

Upon the other hand, if the view of the plaintiffs were correct, the solicitor might postpone the delivery of his bill and then sue within six years after its delivery. The plaintiffs' counsel felt the force of that objection, and said that the bill must be delivered within a reasonable time. It seems to me that the plaintiffs' contention is contrary to the whole principle of the Statute of Limitations, which is to allow a fixed time within which an action may be brought.

I am disposed to adopt this view, and I believe our statute once and for all fixed the time within which an action of this kind should be brought, viz., within six months from the date when the plaintiff suffered the damages which was the date when the cause of action accrued.

I am of opinion that although the defendant did not plead this short prescription, the Court of its own motion was bound to apply it.

I am in favour of confirming the judgment.

Appeal dismissed.

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Sept. 30.

MATHIEU v. MORIN.

Quebec Court of Review, Malouin, Tourigny, and Dorion, JJ.
September 30, 1912.

1. COSTS (§ I—19)—OF USELESS CONTESTATION.

Where a boundary line has been drawn between neighbours and one of them refuses to accept the same and brings action to have such line declared incorrect and another drawn, and the other contests the action on the ground that the line was correctly found, that he is ready to fix the boundary and prays for the dismissal of the action, the court will, on finding the plaintiff's claim unfounded, dismiss the action, but the costs of contestation should fall on the defendant, seeing his contestation was useless.

Statement

THIS was an appeal from the judgment of the Superior Court, Pelletier, J., rendered on May 30th, 1912, on a question of costs in an action in boundary.

The appeal was dismissed.

M. Rousseau, K.C., for defendant, appellant.
Bérubé & Gendron, for plaintiff, respondent.

The opinion of the Court was delivered by

Dorion, J.

DORION, J. (translated):—This is an action in boundary. The plaintiff alleges that the defendant, his neighbour, asked

him to draw the boundary line between their properties; that he, the plaintiff, consented thereto; that a surveyor, appointed by both parties, drew a line which he, the plaintiff, refused to accept; that such line is not correct; and that it is the defendant's refusal to draw the line according to his claims that forces him to take action; and he prays for costs against the defendant.

The defendant pleads that the line drawn by the surveyor is the correct line, that he has always been ready and willing to bound in accordance therewith, and is still ready to do so and prays *acte* thereof and also prays for the dismissal of the action with costs.

The trial Judge held that the line claimed by the defendant is the correct one and ordered the boundary to be fixed according to such line; and, inasmuch as the defendant had asked for the dismissal of the action, ordered that all the costs of the action and of the boundary should be divided and borne equally by the parties.

The defendant has appealed from this judgment in order to have the plaintiff condemned to bear all the costs for his having instituted action uselessly inasmuch as he, the defendant, was willing to have the boundary fixed along this line which was found, eventually, to be correct.

The question of costs in boundary actions has often been debated. It was once contended that the costs should always be divided; but to-day this jurisprudence no longer obtains. It is admitted that the costs of a contestation should be borne by him who has incurred them by his ill-founded pretensions. (504*a*, C.C.)

It has also been contested that the costs of an uncontested demand should be divided; but the contrary has been held in several cases: *Belanger* v. *Giroux*, 9 Q.L.R. 249; *Dauphin* v. *Beaugrand*, 10 Que. S.C. 338. It is admitted that the costs of a demand, rendered useless by the defendant's consent, should be borne by the plaintiff but the costs of the bounding itself should always be borne in common.

In the present instance the plaintiff should not have sued; he would have obtained the same result by signing the "*process verbal*" of the surveyor and by allowing him to place the boundary pickets in the line accepted by the defendant. On the other hand the defendant could have said: I consent to the fixing of the boundary but without costs; I consent to judgment but without costs. Perhaps, should he, in such a case, have offered this as a confession to judgment before making the costs of a contestation; but here the defendant asked for the dismissal of the action, that is to say he said, "I am ready to fix the boundary, but I contend that the Court has no right to order it, seeing that I do not refuse to do so."

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But the Court has always the right to order the doing of a thing that should be done, if it is requested to this effect. The Court must adjudicate on the merits of every demand. Now, to incur costs of a contestation merely to prevent this is to ask that the Court should refrain from adjudicating; therefore it is an unfounded contestation.

As the plaintiff asked for the fixing of the boundary according to the titles and the possession of the parties the defendant should have consented even though the parties had not agreed on the line, because such line should be established before a land surveyor when the conclusions of the action do not pay for any line in particular.

Where the suit is for a sum of money if there have been a tender and the tender is renewed and deposit made, dismissal of suit may be prayed for; but this is because the Civil Code states that such offers constitute payment; they therefore extinguish the obligation. But the offer to fix a boundary is not the fixing thereof; hence even where the defendant has, before suit, consented to bound such boundary still remains to be fixed and the Court must order the same with costs against the plaintiff if the action is useless. The case of *Dauphin* v. *Beaugrand*, 10 Que. S.C. 338, does not affect the present case; it does not appear there that the defendant concluded for a nonsuit. The plaintiff is responsible for the costs of action, the defendant for the costs of contestation. The trial Judge divided the whole; the defendant is far from unlucky. The judgment is confirmed with costs.

Appeal dismissed.

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Dec. 14.

BROSSEAU v. BENARD.

Quebec Court of Review, Archibald, Saint-Pierre, and Mercier, JJ. December 14, 1912.

1. CONTRACTS (§ II—125)—CONSTRUCTION OF—COMMERCIAL CONTRACT—QUE. C.C. 1069.

A contract between a lumber company and a trader, owner of land, for the cutting down of a certain quantity of wood each year for a number of years (*coupe de bois*) on the trader's land for the purpose of gradually clearing the land, is a commercial contract, and where a delay is fixed for the accomplishment of an obligation, the party under such obligation is in default by the lapse of time alone.

2. CONTRACTS (§ II A—128)—CONSTRUCTION OF—INTENTION OF PARTIES—QUE. C.C. 1068.

Where large trees are to be cut down and conveyed to the mill, it must be done in the autumn and winter, so as to allow of the logs being hauled out of the woods before the snow disappears, and failure so to do also puts the party who agreed to do the work in default without any formal notice being necessary.

Statement

THIS was an appeal by the plaintiff from the judgment of the Superior Court for the district of Terrebonne, Robidoux, J.,

rendered on March 20th, 1908, dismissing his action in damages for the non-fulfilment by the defendant of his obligations under a contract for the cutting of wood.

The appeal was allowed.

G. Rochon, for the plaintiff, appellant.

E. Patenaude, for the defendant, respondent.

The opinion of the Court was handed down by

ARCHIBALD, J.:— This is a review of a judgment dismissing an action of damages for non-performance of contract by the defendant. Archibald, J.

The plaintiff contracted by notarial Act passed before Barrette, notary, on the 22nd August, 1898, with the Northern Lumber Company, which was a commercial company having mills and a place of business in St. Faustin in the district of Terrebonne, to sell to the said company the *coupe de bois* upon lot No. 12 of the ninth range of the township of Wolfe; by said deed of sale it was stipulated that the wood was to be cut and carried away in ten years, to count from the date of the deed, and that the purchaser would not be obliged to cut more than ten acres of wood each year, and he was to follow the clearings of the seller, if the latter exacted it.

The Northern Lumber Company took possession and for two years, in 1899 and 1900, cut the wood as contracted for. Plaintiff alleges that the sale of the wood was made by him in order to facilitate the clearing up of the land; that the Northern Lumber Company sold all their rights in 1901 to the present defendant, in the wood in question, and that the defendant, during the three years of 1901, 1902 and 1903, had not cut the wood as required by the contract, and plaintiff sues for damages in the sum of $200.

The plea sets out that there was no putting in default, and that the plaintiff could not sue for damages if the defendant was not in default; and in the second place, denies that the plaintiff suffered the damages in question.

The judgment maintained that point of view and dismissed the action. I am of opinion that the proof sufficiently shews the damage which the plaintiff alleges, provided that the defendant is responsible therefor.

There is no sufficient proof of a *mis-en-demeure* in useful time. It is proved that both the Northern Lumber Company and the present defendant were traders, and that the trees in question were bought for the purpose of their trade. I think that a contract between a trader and a non-trader, with respect to the subject-matter of the trader's affairs, is a commercial contract, and particularly so as respects the obligations of the trader. Art. 1069 says:—

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In every contract of a commercial nature, where a delay is fixed for the accomplishment of the obligation, the debtor is in default by the lapse of time alone.

It is true, in this instance, that no particular date is fixed for the accomplishment of the obligation other than that a certain portion is to be accomplished each year. One must then take into account the custom in such matters. Where large trees are to be cut down and conveyed to the mill, it is usual—it is, in fact, a universal custom—that the cutting must be done in the autumn and winter, so as to enable the logs to be hauled out of the goods before the snow disappears. There is no possibility of hauling logs through a wood road on wheels. Adding these considerations to the terms of the contract, it might be said that clearing of the logs from the lot under the contract would have to be made each year, while the roads of snow existed, which also would enable the farmer to clear up that land during the spring and get it burned and have a first crop upon it during that year.

If, then, the contract was commercial, and if, as I am of opinion, there was no necessity for a special *mis-en-demeure*, the defendant would be in default in case he had not cut and removed the logs from the ten acres in question at the latest before it became impossible to remove them by the melting of the snow.

There is another consideration which may, perhaps, be applicable to this case: art. 1068 provides that the debtor is also in default when a thing which he has obliged himself to give or to do can only be given or done within a time which he has allowed to elapse. Commentators of the corresponding article of the Code Napoleon give as an instance of this the case of a man who undertakes to furnish certain articles for exhibition at a fair, the date of which has been fixed, and has not furnished them until the fair is over. In this case it has been held that the defendant was in default without any special act on the plaintiff's part.

The question arises whether, as in this case, where it appears that the intention of the parties was that this cutting of ten acres should be done each year in order to facilitate the clearing of the land for agricultural purposes, the mere failure to do the cutting and removing of the logs, within a delay which would enable the farmer to clear his land that year, did not furnish a case where the thing could only be done within the delay which the debtor had allowed to elapse. It is true that the thing could be done the next year, but so also the goods in the case above mentioned could be exhibited at the fair which might take place the next year. It seems to me that, if the contract had clearly stipulated that its object was that the ten acres which were to be cut each year were so to be cut and the logs hauled away in time to allow the cultivation of the land that year, this case

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would certainly fall under art. 1068. The contract is not specific as to the object of the plaintiff in making it, but it does refer to the clearing up of the land; it does oblige the defendant to follow the clearings of the plaintiff if a demand is made for that purpose. I think it does indicate that there was an intention in the mind of both parties that the logs were being cut so as to enable the plaintiff to clear up the land; that that was an interest which the plaintiff had in the contract and one of the considerations of the sale which he made of the logs.

Now, the theory of default is this: that the delay given for the performance of the contract is a delay on behalf of the debtor of the contract, and it is not presumed that the creditor has an unless he expressly says so. Thus, in a case where a penalty is attached to the non-performance of the contract within the delay interest in the performance of the contract within the delay stipulated, there is no necessity of putting in default because the creditor has already sufficiently declared his interest in the performance within the delay. So, where a creditor expressly stipulates that the contract shall be performed within that delay and the debtor shall be in default—that is, liable to pay damages—if not so performed, then there is no necessity of putting in default.

It would seem, then, that, where a creditor had taken the trouble to express that the contract was to be performed within a certain delay in order to enable him to take advantage of the contract for a specific purpose, that would be a sufficient declaration of the interest of the creditor in the performance of the contract at the time to compel the debtor to pay damages in the event of his not performing the contract within the time specified.

I am of opinion that no special putting in default was necessary and that the judgment is erroneous and should be reversed, and that plaintiff should have judgment in accordance with the demand for $200, with costs of both Courts.

Appeal allowed.

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Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Meagher, Russell, Drysdale, and Ritchie, JJ. December 21, 1912.

1. NEW TRIAL (§ II—8)—CRIMINAL CASE—SUBSTANTIAL WRONG—INSTRUCTIONS.

A new trial in a criminal case will not be granted on the ground of misdirection if the general outlines and principles of law which should guide the jury in the particular case have been stated in the charge, although all possible qualifications or differences as regards the nature of the crime generally may not have been explained, it being essential for the granting of a new trial by an appellate Court under

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Cr. Code sec. 1019 that some substantial wrong or miscarriage should appear to have been occasioned on the trial. (*Per* Townshend, C.J., Meagher, and Drysdale, JJ., on an equal division of the Court.)

[The majority opinion in *Rex* v. *Graves* (No. 2), 9 D.L.R. 30, not followed.]

2. COURTS (§ V B—295)—STARE DECISIS—PREVIOUS OPINION ON THE MERITS BY SAME COURT.

The rule of *stare decisis* does not apply to bind a Court of criminal appeal, hearing a stated case sent up by its direction under Cr. Code (1906), secs. 1015 and 1016 from the trial Court after a conviction for murder, by the opinions on the merits expressed by the majority of the Court as constituted when the stated case was ordered on a motion for leave to appeal, although full argument had been then heard on the merits and a majority opinion expressed in expectation that the case might be dealt with *pro forma* in accordance with such opinion and without re-argument on the filing of the formal stated case; particularly where the Court on such motion for leave entertained doubt of its jurisdiction to determine the case on the merits without a formal case stated, and its formal order then made was accordingly limited to the granting of leave to appeal and a direction to the trial Judge to send up a stated case and did not purport to order a new trial or to quash the conviction, or otherwise to dispose of the case on the merits. (*Per* Townshend, C.J., Meagher, and Drysdale, JJ., on an equal division of the Court.)

[*Rex* v. *Graves* (No. 2), 9 D.L.R. 30, not followed; *Rex* v. *Blyth*, 15 Can. Cr. Cas. 224, referred to.]

Statement

BY direction of the majority of the Court of Appeal the learned Chief Justice stated for the opinion of the Court the questions of law asked to be reserved, viz., 4 to 36 inclusive, omitting 35, with his reasons for refusing to reserve the same. He also appended as part of the case the evidence, and his charge to the jury, all contained in the appeal book. The grounds asked to be reserved, and from the refusal to reserve which the appeal was taken, the grounds for refusal and the charge to the jury to which exception was taken are set out in full in *The King* v. *Graves* (No. 2), 9 D.L.R. 30.

An application was made on behalf of the accused for a change of venue and the judgment on return of the motion is found, *The King* v. *Graves*, 5 D.L.R. 474.

Argument

W. E. Roscoe, K.C.:—The principles of law applicable to the case having been argued and decided I do not propose to argue what is *res judicata* so far as the matters that should enter into the consideration of the Court are concerned. I therefore content myself by making a formal motion to quash the conviction. On the judgments as delivered there is nothing further left for me to say, as the Court has disposed of the questions.

SIR CHARLES TOWNSHEND, C.J.:—In the report of my charge there is an omission that I did not notice until my brother Ritchie called my attention to it in his reference to one section of the Code that he said I did not mention to the jury. That is sec. 259 of the Code. I have here the original notes which I used on the trial shewing that I did mention that section.

Mr. Roscoe:—All I can say is that if it was mentioned I did not hear it.

SIR CHARLES TOWNSHEND, C.J.:—It was not mentioned in your points.

RITCHIE, J.:—I understand it to have been taken.

SIR CHARLES TOWNSHEND, C.J.:—I have here the notes that I was using on the trial.

Mr. Roscoe:—I did not hear anything about it and on that alone I based the ground that I have stated.

SIR CHARLES TOWNSHEND, C.J.:—I direct it to be noted that I point out the omission in the report which is as follows:—

> Then by sec. 259 it is provided, "Culpable homicide is murder (*b*) if the offender means to cause to the person killed any bodily injury, which is known to the offender to be likely to cause death, and is reckless whether death ensues or not."

In another place the charge should read, "If there is reasonable provocation and no malice" instead of "or no malice."

Mr. Jenks, K.C.:—I think the case reserved might be amended by reducing the number of questions. The case would be simplified and it would attain the same result. There are really only two questions: (1) Did the learned Chief Justice on the trial charge the jury properly; and (2) is there any evidence upon which a verdict of guilty of murder might be brought in. I think that sec. 28 covers the whole case.

MEAGHER, J.:—In my opinion we cannot amend the case either as to the questions or as to the matter of the charge.

Mr. Jenks:—I am only suggesting that it might be sent back to have the number of questions reduced.

MEAGHER, J.:—We have no power over it.

SIR CHARLES TOWNSHEND, C.J.:—I do not like the way in which they are stated because they are so general.

Mr. Jenks:—So far as the case is concerned we argued the matter before and it is for the Court to say whether they wish to hear me further. I think that I said everything that I could before and unless the Court desires it I have nothing further to add now.

GRAHAM, E.J.:—I will have to consider whether the majority judgment is not a precedent that should be followed.

SIR CHARLES TOWNSHEND, C.J.:—In my opinion it is in no sense *res judicata*. I think the Court went very far in discussing the whole thing. The case came up on appeal from my refusal to reserve a case and it was sent back to me to return questions, which I did. These are now before the Court to be discussed entirely apart from anything that may have been said in the opinions read. Of course I may change my opinion.

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Argument

GRAHAM, E.J.:—I am speaking of the question of a precedent of this Court—the opinion of a majority of this Court that I am bound by. I do not see that there has to be any re-argument of a matter that has been decided by a majority of the Court.

MEAGHER, J.:—I do not admit by my silence that I am assenting to any such view. My opinion is that this Court had no jurisdiction to give an opinion on the merits, beyond giving leave to appeal, until the case comes here in the form of a stated case.

RUSSELL, J.:—I think we had jurisdiction through the consent of counsel. By such consent we heard the case as if it had actually been reserved. It was a mere courtesy to refer it back to the trial Judge for a statement of the case and it was done merely to put in regular shape the judgment of the Court.

DRYSDALE, J.:—I have already given my opinion that there can be no expression of opinion on the merits without a stated case.

Graham, E.J.

GRAHAM, E.J.:—When the application to appeal came before the Court composed of Meagher, Russell, Drysdale, and Ritchie, JJ., and myself, the learned counsel for the prisoners and the Deputy Attorney-General were heard at great length, the hearing extending over two days. My notes shew that at least 85 cases or authorities were cited, and while I do not profess to have examined them all, I did, in the preparation of my opinion, examine as many. Many things were argued which were not in the opinions ultimately delivered.

At the close of the hearing the learned Deputy Attorney-General proposed and the counsel for the prisoners agreed in open Court that the judgment on that application could be given as if a case had been stated, and without further argument, as was done in the case of *Rex* v. *Blyth*, 15 Can. Cr. Cas. 224, to which reference was made. My opinion and the opinion of the other Judges apparently were prepared on that footing. But the minority objected to that course being taken, claiming in effect that a statement of a case could not be waived.

While holding the view that it was a proper course to take, I thought it expedient to proceed formally as the Court was sitting again within a week and the matter could be disposed of *pro forma*. So I changed the closing words of my opinion in favour of a new trial, so that it reads as it now appears in favour of having a case stated.

The opinions were accordingly delivered adversely to the Crown by Russell and Ritchie, JJ., and myself, Meagher and Drysdale, JJ., dissenting.

A case was stated by the learned Chief Justice.

Whatever opinion the Judges had as to whether or not the

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Court could dispose of the matter without a stated case, the Deputy Attorney-General at least was bound to his agreement that in effect there would not be further argument, and he appears to have been loyal to it, and neither he nor the counsel for the prisoners made further argument. And the prisoners are entitled to the benefit of that agreement made in open Court.

It cannot be said that they have not had the opportunity to present their case to the Court with the personnel changed. They could not be prejudiced anyway: *Attorney-General New South Wales* v. *Bertrand*, L.R. 1 P.C. 520. It is a sound principle in the administration of criminal law that prisoners should be fully heard. *Audi alteram partem* is a maxim peculiarly applicable.

There is another consideration. I do not say that in the ordinary case the judgment on an application for leave to appeal shuts out argument when the case stated comes on for a hearing. But when a case has been debated and opinions given as in this case, really with a view of disposing of it, there is much to be said in favour of that judgment constituting a precedent on the law of the case.

In 26 American and English Encyc. 160 it is said:—

> An expression of opinion upon a point involved in a case argued by counsel and deliberately passed upon by the Court, although not essential to the disposition of the case, if a dictum, should be considered a "judicial dictum" as distinguished from a mere *obiter dictum*, which is an expression originating alone with the Judge writing the opinion as an argument or illustration.

I incorporate herewith the opinion I delivered upon the application to grant leave to appeal.

For the reasons therein contained I think that there was error in the summing up, misdirection occasioning on the trial substantial wrong or miscarriage.

I rely upon the grounds in the case stated numbered as follows: 8, 9, 10, 11, 12, 18, 15, 17, 22, 31, 24, 28, 34 and 6, and answer them in a sense favourable to the prisoners.

I express no opinion on the other grounds, as it is unnecessary to do so.

The conviction in my opinion should be quashed and a new trial granted and the prisoners remanded.

Russell, J.

RUSSELL, J.:—I do not consider that the questions now before the Court are *res adjudicata*, but I did assume that after the Attorney-General and the counsel for the defendants had both agreed that the whole matter should be dealt with on the appeal from the refusal of the learned trial Judge to reserve a case, as if a case had been reserved and that a final judgment should be pronounced and the opinions prepared and read were so prepared and read by a majority of the Judges who heard the argument in pursuance of that agreement, and with that under-

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standing the proceeding now before the Court was to be a mere formality. I can understand that if the hearing on the appeal had resulted in affirming the conviction, it might have been desirable that a larger Court should be assembled to give the prisoners another chance for their lives, but inasmuch as the result of the former argument was to grant them another trial, it might well have been accepted as the final decision of this Court in the cause. As, however, this result has not been accepted as a finality and we are to deal with the matter again, I can only say that, having had an opportunity to read the comments of the learned trial Judge on the decision of the Court that heard the argument, I cannot see any reason to change my views.

I do not think the learned trial Judge correctly describes my opinion as having been constructed on the lines of an application for a new trial in a civil case. The argument was made by counsel that the case had not been fairly presented to the jury on the evidence, and I do not understand how the merits of that contention could well be adjudged without some reference to the facts of the case, to which I certainly had no intention to refer, except in so far as the reference was relevant to the complaint of misdirection. I may have been mistaken in assuming that it would be an error in law to instruct the jury to find as a fact that for which there was no evidence, or to put to the jury a proposition of law as bearing upon the issue if it necessarily assumed a condition of fact that did not exist. Beyond that I certainly had no intention to refer to the evidence, and certainly I should not have thought of reviewing the verdict of the jury. I thought I had made this very clear.

Ritchie, J.

RITCHIE, J.:—On the application for leave to appeal it was agreed in open Court by the Deputy Attorney-General for the Crown and Mr. Roscoe, K.C., for the prisoners, that the judgment of the Court on the application for leave to appeal should dispose of the case and thus save the necessity of a re-argument of the points involved, and attention was drawn to *Rex* v. *Blythe*, 15 Can. Cr. Cas. 224, as an authority for this course. It was not then suggested either from the bench or at the bar that there was any objection to the course agreed on.

I accordingly wrote my judgment on the application for leave upon this understanding, and directed that the conviction be quashed and a new trial had. But before handing down the judgment two members of the Court expressed the opinion that the course agreed on was without jurisdiction. To avoid what then seemed to me an unnecessary difference of opinion, I changed that part of my judgment which quashed the conviction and ordered a new trial. I thought that when the stated case came on to be disposed of it would be a purely formal matter. As the learned Chief Justice had delivered a considered

opinion that there was no point worthy of being reserved, it did not occur to me that he would sit in the case on appeal. I am, of course, not expressing any doubt as to his right to sit.

For the reasons stated in my judgment on the application for leave to appeal (which I make part of this judgment), I am of opinion that the conviction against the three prisoners should be quashed and a new trial ordered.

I also desire to add that I entirely agree with the judgment of my brother Graham, delivered on the application for leave to appeal.

Drysdale, J.

DRYSDALE, J.:—On the questions of law reserved in this case and stated by the Chief Justice, in obedience to the order of the Court, coming on for hearing, it was urged by counsel for the prisoners that inasmuch as the merits of certain questions had been considered by the Court that heard the appeal from the refusal of the Chief Justice to reserve the said questions, it was not open to this Court to again hear and determine such questions and accordingly that the motion to quash the conviction herein or to order a new trial should be considered as merely a *pro forma* motion.

I cannot understand this position. The only motion before this Court heretofore was whether or not a case should be stated in respect to certain questions of law raised on or incidental to the trial. A majority of this Court was of opinion that certain questions should be reserved and stated, and directed the learned trial Judge to state a case in respect to such questions.

This order has been obeyed and a case stated, and the questions of law so reserved and stated come now before us on the stated case for consideration.

I cannot understand the doctrine of *res adjudicata* suggested. Surely the only question before the Court on the former occasion was whether or not the trial Judge should reserve and state a case on points of law raised before him. The Court (by a majority in opinion) decided that he should and that is all that was decided. The opinions as a whole and the rule granted thereon will shew this.

Many points were urged on the appeal from the trial Judge's refusal to state a case that were not given effect to, and the result is that we have a case stated on certain points of law by the trial Judge now before us for consideration.

It is, I think, a somewhat startling doctrine that because certain members of this Court in their opinions directing a case to be reserved and stated, expressed themselves on certain questions in the case as it then appeared to them on the appeal from the trial Judge's refusal to reserve a case on questions of law should preclude the Court of Appeal from considering the questions so reserved and stated. The absurdity of such a position only

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requires to be stated. To my mind no further comment is necessary. If the Court of Appeal for Crown Cases Reserved is to be bound by the decision of a majority of the Court of Appeal that sat only to hear whether a case should be reserved and stated in respect to a point of law raised on the trial, then it is obvious that the Court of Appeal sitting to hear such points is useless, and a mere formality, and that the members of the Court that had only one question before them, viz., whether a case should be stated or not (even if a Court of three) could for all purposes bind the Court of Appeal specially sitting to hear the questions directed to be stated and reserved, even if the latter Court were differently constituted. and much larger in its component parts. If this were so, why state a case or direct a question or questions to be reserved?

I will not pursue the subject further, and would not have dealt with a matter so obvious, except for the fact that the prisoners' counsel's suggestions on this point and to this effect seemed to find some favour.

On the questions reserved and stated in obedience to the order of this Court by the trial Judge, I desire to say that although this Court by a majority directed that questions printed in the case as numbers 4 to 36 inclusive, excepting 35, be reserved, the only real question involved is whether or not there was misdirection on the part of the trial Judge, that is to say, misdirection in law. When the case was formerly before us on the question whether the trial Judge should reserve and state a case or not, I discussed this point as fully as I deem necessary.

With all respect to my learned brothers, whose opinions I have heard and also read, I am bound to say I have not changed my opinion, and incorporate it herewith. I think there was not error in law on the part of the learned trial Judge, and I am of opinion that the conviction herein was warranted and ought to be affirmed, and I have only to repeat here my former opinion on the merits of this case.

Meagher, J.

MEAGHER, J.:—When the application for leave to appeal was heard I was strongly of opinion that we should not express any opinion upon the merits unless one reached the conclusion to refuse the application. I was quite persuaded we had not the material called for by the statute before us, nor in the form prescribed by it, nor stated by the trial Judge, and for that reason we had no jurisdiction to go beyond granting or refusing the leave sought; and that consent could not dispense with the requirements of the statute. I have been unable to find any case where the Privy Council, except perhaps where refusing leave to appeal, has disposed of the case upon the merits on the application for leave to appeal, and I feel fully convinced it never adopted such a course. With all becoming deference I submit

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that there is neither force nor merit in the ground urged, that the matter was *res adjudicata* because of the opinions expressed when the motion for leave to appeal was disposed of. My learned brothers Graham and Ritchie were of opinion that leave to appeal should be granted, while my learned brother Russell was of opinion, because of the alleged consent, that the convictions should be quashed at that stage. My learned brother Drysdale and myself were of opinion that the motion should be refused.

Upon this record the most that can be said is that the leave was granted, and in the result the situation is the same as if a Judge in granting an order for a certiorari, or a writ of habeas corpus, expressed an opinion upon the merits. In such a case it would be altogether impossible to say, as a matter of law, that there had been an effective adjudication which would control the parties or any Judge or Court hearing it at a later stage. If the consent and the decision upon the motion were so effective as to be binding upon the Court and the parties, why direct a case to be stated for the purpose of a hearing on the merits? A more idle proceeding, in view of the point now urged, could hardly be ordered.

In *Re Abraham Mallory Dillet* (1887), 12 A.C. 459, it was held:—

> that Her Majesty will not review criminal proceedings unless it be shewn that by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done,

approving in that connection of *Falkland Islands Co.* v. *The Queen*, 1 Moo. P.C.N.S. 312.

Re Abraham Mallory Dillet, 12 A.C. 459, was followed in *Ex parte Deeming*, [1892] A.C. 422, and again in *Ex parte Kops, Kops* v. *R.*, [1894] A.C. 650.

The principle thus enunciated is, I venture to think, binding upon this Court as well as upon the Supreme Court of Canada under its constitution and its relation to the Privy Council; but if not actually binding, it furnishes a guide we should follow without hesitation. My opinion upon the merits is that the convictions should be affirmed.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—Before the argument was commenced on the stated case I informed the Court there had been an omission in the report of my charge only noticed by me on reading the opinion of one of the Judges given on the appeal from my refusal to reserve the question asked for. I directed the case to be amended accordingly. The omission was as follows:—

> Then by sec. 259 it is provided, culpable homicide is murder (*b*) if the offender means to cause to the person killed any bodily injury

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which is known to the offender to be likely to cause death and is reckless whether death ensues or not.

Also a further error in reporting the word "or" when it should have been "and" in a citation given.

Counsel were then called on to proceed with their argument. Mr. Roscoe claimed that the opinion of the three Judges on the appeal from my refusal was binding, or, as he expressed it, was *res adjudicata*, and said nothing further. After pointing to the statute which made that hearing merely a preliminary hearing, as to whether a case should be stated or not, which could have no binding effect on the Court now hearing the points reserved, the argument proceeded. One of the Judges intimated that counsel had consented that the arguments then made should deal with the whole matter, and that there would be no further argument. The Deputy Attorney-General, Mr. Jenks, agreed to that so far as it would not be necessary to repeat the argument, but said he had not waived any right to be heard in case a reserved case was stated—that at the time such consent was given the majority of the Judges had intimated that they could dispose of the whole matter at that hearing, but that afterwards all the Judges but one had decided that a case must be regularly stated for the opinion of the Court—and that for both reasons he claimed the right to make any further argument he wished, to which the majority of the Court agreed. At the conclusion of Mr. Jenks' argument for the Crown the Court adjourned until the next day for further consideration and on that day delivered judgment, dismissing the prisoners' contentions and affirming the conviction.

I have had the advantage in this case not only of hearing the arguments of the counsel for the defence as well as for the Crown, but am necessarily familiar with all the facts and circumstances of the case. I have also had the advantage of reading and carefully studying the opinions of my brethren who have taken different views of the questions before the Court.

After giving the best consideration to the whole matter I have come to the conclusion that the opinion of Mr. Justice Drysdale, concurred in by Mr. Justice Meagher, is a correct and a full exposition of the law which must govern us on the questions reserved for the Court in this case.

Before dealing with any of these questions in detail, I would call attention to the fact that this is not an appeal to the Court under sec. 1021 of the Code, in which it is provided that leave to appeal may be given to the person convicted, for a new trial on the ground that the verdict was against the weight of evidence. We have no such question before us. The proceedings now are exclusively under secs. 1014, 1015, 1016, 1018 and 1019 of the Code. Under these sections nothing can be considered, except such questions of law as the Judge may be asked to reserve, either on the trial or subsequent thereto, arising out

of the direction of the Judge. The questions asked to be reserved in this case number 36, all of which I refused to reserve because, as I have stated in my reasons, none of them raised any question of law respecting which there could be any reasonable doubt and most of them raised no questions of law, unless it was some objection to the general character of my charge in commenting on facts in evidence to the jury. The majority of the Court on appeal, however, have thought proper to direct the reservation of the questions asked for, from questions 4 to 36 inclusive, excepting No. 35.

I need hardly repeat here that those questions were not in my opinion of a sufficiently definite character as to what the questions of law were. As, however, they are now before us I will express my opinion as briefly as possible on them.

I would submit generally that the fundamental error, going through the opinions of my brothers, Graham, Russell and Ritchie, is that they undertake to deal more or less with questions of fact which were for the jury and not for them, under this procedure. My brother Russell deals with the whole matter as if it were a motion for a new trial in a civil case, apparently overlooking the fact that on such an appeal he could only consider questions of law which have been asked to be reserved and refused. He discusses and decides questions of evidence and weight of evidence which clearly cannot be done on such an application as this. Take for instance this passage:—

> There is positively no evidence whatever of any assault at this stage of the proceedings, nor any evidence whatever to warrant finding that the defendants had any intention beyond that of disarming the deceased. Of course there was no evidence of that intention either.

Now the learned Judge as I have said had no right to deal with such a question whatever, even if he were correct, but he is obviously incorrect, and such evidence as there was was duly submitted to the jury for their decision as a matter of fact. Here is the way in which it was placed in the charge before the jury:—

> Was Mr. Lea's act in taking hold of the barrel of the gun due to the attempt of the accused to assault him? That is for you under the evidence. The best way of conveying to you the meaning of this rule is to apply it to what occurred here. If it was the unlawful act and conduct of the accused which caused Mr. Lea to handle the gun in the way he did, taking the barrel in his hand and using the stock to defend himself against their assault, they are responsible for the consequences.

Now, I respectfully submit that this was a correct statement of the law. I do not discuss the evidence, as I have already indicated, that does not properly come up here.

Take again this passage:—

> It is altogether possible, and I should judge highly probable, that the deceased inflicted a mortal wound upon himself by his manner of using

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the gun, which resulted in its accidental discharge. It is possible also, though it will perhaps be considered improbable, that the fatality resulting from the wound was not accelerated by the conduct of the defendants any more than it was by the removal of the patient to Halifax.

Here let me call attention to the fact that the learned Judge is considering a question not before him and is usurping the functions of the jury who had all the evidence before them and decided the other way.

Then the learned Judge puts a number of hypotheses on the facts which, he thinks, if they had been put before the jury fairly and dispassionately, they might, after consideration, have come to a different conclusion and he does not see how they could have been rejected by the jury without more than a reasonable doubt and that they might have reduced the crime from murder to manslaughter. He seems to think that these were never presented to the jury for their consideration. I think the best answer to such an observation is to refer to the charge itself and to that portion which he himself has quoted to shew that all such considerations as were proper were fully presented for the consideration of the jury. He further finds fault with the charge for not explaining that the word "felony" had been abolished from the Code and that it does not explain the change which has been brought about by our amendment to the common law, but it is sufficient to point out that such an explanation was unnecessary and would have had no connection with the responsibility of the defendants in this case. They were instructed over and over again that if these defendants were engaged in an unlawful act, and that act was acting in a disorderly manner and trespassing on Mr. Lea's property with the result of what occurred, then they were responsible for it. *Vide* Code, sec. 252, sub-sec. (2).

It is unnecessary further to comment on the reasons given by my brother Russell in his opinion, as I think they are based throughout on an erroneous view of the statute under which the Court were hearing the matter.

With respect to the grounds on which Mr. Justice Ritchie decides, he seems to be under the impression that the statute defining murder or culpable homicide (sec. 259 of the Code) must necessarily have been read to the jury and they should have been asked to find these questions:—

> Did the defendants mean to cause the death of Mr. Lea? Did the defendants mean to cause Mr. Lea bodily injury, known to be likely to cause death, and were they reckless as to whether death ensued or not?

And for this reason he thinks the law was not properly stated.

I might point out that it would be hardly useful to submit such questions to the jury when I had instructed them that

there was not the slightest evidence of premeditated murder and that I thought they had no intention of doing anything of the kind, not even a bodily injury, but that what occurred arose after they came there.

I may further add that provided the Judge properly explains the difference between murder and manslaughter and what would constitute murder there is no necessity for reading the statute, in fact it would, in my opinion, convey nothing that the jury could properly understand. But whatever force there might be in such an objection it is now clear under the amended report that sec. 259 was read to the jury.

Then again my brother Ritchie says:—

> I think it could not be said that it is a reasonable or natural thing for a man to point the barrel of a gun which he knows to be cocked and loaded at his own body and strike at another with the stock.

Now with all respect I submit that whether such a thing was reasonable is a question for the jury and not for the Judge and more than that it is not one of the grounds asked to be reserved in this case. I would call attention further to question 9 numbered in his opinion, viz.:—

> Whether the direction that the defendants were responsible if he did not do as he did, and provided that what he did was reasonable under the circumstances.

I can find no such question reserved under question 9 or any other question.

Now the opinion of my brother Graham is of great length and shews marks of great industry and study and deals in a more detailed manner with the questions reserved and it would be undesirable in such a brief opinion as this to go over it in detail and point out what I consider the mistaken views therein expressed. As in the case of the other opinions, he undertakes to deal with questions of fact to some extent which, as I have said before, were clearly not before him. Both he and Mr. Justice Ritchie comment on the three cases from the English reports which were mentioned to the jury as illustrations, that a man might be guilty of murder or manslaughter even though he does not strike the blow which caused the death of the deceased, but if he was the direct cause of the deceased inflicting the blow or doing the act which resulted in his death, that he would be responsible for it. A simple reading of the charge will shew anyone that these cases were not put before the jury for the purpose of shewing the difference between murder and manslaughter but merely for the purpose of clearing up a common idea that because Mr. Lea held in his own hands the gun the discharge of which inflicted the wound which approximately contributed to his death the accused were not responsible for that part of the affray. Therefore it was unnecessary to give the

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explanations referred to in Mr. Justice Ritchie's opinion as to their effect further than that.

Again it is said that the jury should have been instructed that Mr. Lea must have been in fear of violence or assault. Now I think that that view of the situation was over and over again submitted to the jury. The word "fear," it is true, was not used, but if language can convey anything, it is sufficiently before them. The part of the charge referring to that is as follows:—

> Was Mr. Lea's act in taking hold of the barrel of the gun due to the attempt of the accused to assault him? That is for you under the evidence. The best way to convey to you the meaning of this rule is to apply it to what occurred here. If it was the unlawful act and conduct of the accused which caused Mr. Lea to handle the gun in the way he did, taking the barrel in his hands and using the stock to defend himself against their assault, they are responsible for the consequences.

As very well stated in the learned Judge's opinion referring to the case put for illustration:—

> These cases have found a place in the Code first mentioned and are all founded upon the conditions of deceased being put in a state of fear by the violence of the defendants, namely, that the deceased in doing the act which caused his death, was moved by a well-grounded apprehension of immediate violence; under these circumstances the theory is that the act of the deceased cannot be regarded as voluntary, but is merely the exercise of a choice between two evils and so is directly dependent upon the act creating the condition which required the election.

We know what occurred here. The circumstances of what occurred were given in evidence before the jury. The evidence shewed the defendants in a drunken and disorderly condition on Mr. Lea's private grounds in front of his house, refusing to depart when requested, swearing at him and abusing him and frightening his family. It shewed a bottle either thrown at him or that he was struck at with it. It shewed a rush towards Mr. Lea on the plank sidewalk. It shewed Mr. Lea had reversed the gun. It shewed that he had struck one of the defendants. It showed that he fell to the verandah wounded and these men were around him, kicking him. Would not the jury be justified in inferring from that that there was fear on the part of Mr. Lea when he reversed the gun and when he struck at them? Must they not have come towards him, or rather could not the jury have believed that they rushed towards him with intent of assaulting him or had assaulted him and that Lea in fear of that used his gun as he did? Was not that sufficient to justify the jury in finding that there was well-grounded fear of assault or violence on the part of Lea when he struck at them? Again it is said that the question of provocation was not properly stated. I think it unnecessary to say more on that subject than

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to point to the language twice over in the charge. It was not for the Judge to suggest what might be a possible cause of provocation but to do as he has done, tell the jury that from all that has transpired, they can judge whether there was provocation or not, and if there was, that would reduce the crime from murder to manslaughter. The learned Judge seems to think that the word "malice" was not sufficiently explained to the jury and that it was apt to confuse them. I can only point out that malice, and what constituted it, was over and over again, in as clear terms as possible, explained to the jury and I think that, notwithstanding my learned brother's opinion, such explanations were more easily understood by the jury than if I had read them a clause from the Code, as he thinks I ought to have done, and which I did read. But when we are told by the learned Judge as follows:—

> Now in the legal sense of malice there was in my opinion in this branch of the case nothing worth submitting to a jury.

Such a statement as that, in the face of the evidence of three or four witnesses as to the malicious feelings which these defendants bore to Lea, I think requires no comment from me. Again the learned Judge says:—

> I think this case is too serious a one to leave it to a jury to find for murder or manslaughter according as they find whether there was or was not malice in the sense of ill-feeling, etc.

I confess that I had always thought and will continue to think until I am corrected by a higher Court that whether there was malice was peculiarly a question for the jury and no one else.

Another statement in his opinion requires some observation as follows:—

> Moreover, I think that this case should not have been submitted to the jury, as if there was no alternative, but one of either murder or manslaughter. I have dealt with gunshot wound. If there was no acceleration there was an alternative of acquittal.

I really am unable to appreciate such an observation when I am told that I ought to have charged the jury that they could acquit these defendants under the facts of the evidence, that is to say, the jury were to be told that in face of the riotous, disorderly conduct of these men, in the face of their assault upon Mr. Lea, in the face of their maltreating, abusing him, kicking and finally doing the acts which led to his death, that the jury should have been instructed that they might be acquitted. It is unnecessary to say more.

Now on the question of acceleration of death, so far as I can form any opinion, my learned brethren have not shewn any sound legal reason why the verdict should be set aside on that finding. The evidence as to the acceleration of death is complete. It was for the jury and not for the Court to say whether

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Mr. Lea's death was accelerated by these defendants or not. They have said that it did accelerate it and that is the end of the matter.

If it were necessary for the Judge in summing up to go into all the minutæ and shades of difference in the crime for which the prisoners have been indicted, with all the detail of a text-book, in my view it would be almost impossible to give directions which might not afterwards, when examined under a legal microscope, be found faulty in some minor and immaterial particular. It was for this reason that sec. 1019 was placed in the Code, which provides that:—

> No conviction shall be set aside nor any new trial directed, although it appeared . . . or some misdirection given, unless it appears that some substantial wrong or miscarriage was thereby occasioned on the trial.

Now it seems to me if I succeed in placing before the jury the broad, general outlines and principles of law which should guide them without material error their verdict should not be disturbed.

Assuming for the moment there was error in the direction on some point, I venture to assert that in regard to the acceleration of Lea's death by defendants, there can be no doubt either as to the direction or the evidence on which the jury founded their verdict. The charge on that subject is as follows:—

> Even if the man was wounded and would have died anyway, yet if his assailants committed acts which made him die sooner, it amounts to murder, assuming that malice was present. If the medical testimony satisfies you that Lea's death was hastened by the subsequent treatment which he received at the hands of the accused, you are justified on that ground in finding them guilty of murder or manslaughter. The Code (sec. 256) is very clear about that. It says: "Everyone who, by any act or omission, causes the death of another, kills that person, although the effect of the bodily injury caused to such other person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause." That is this case. Although the prisoners may not have been responsible for inflicting the gunshot wound, if they hastened his death by their rough treatment and ill-usage of him, subsequently, they are responsible for murder or manslaughter according as you find that malice was or was not present.

Now I have made these observations as I deem it necessary and right to put my views properly before the Court of Appeal in the event of this case going further. I feel that what I have said is very imperfect, but in view of the opinion of my brother Drysdale, which so completely and fairly disposes of all the questions reserved, I think it unnecessary to say more.

The Court being evenly divided, appeal dismissed and conviction stands.

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Judicial Committee of the Privy Council. Present: *Viscount Haldane, L.C., Lord Macnaghten, Lord Atkinson, and Sir Charles Fitzpatrick.* *July* 22, 1912.

1. ELECTRICITY (§ IV—41)—COMPENSATION FOR WATER POWER USED TO OPERATE ELECTRIC POWER PLANT.

Under an agreement between the Queen Victoria Niagara Falls Park Commissioners and a power company, licensing the latter to exercise certain rights in the park and in the water of the Niagara river for the purpose of generating electricity and pneumatic power to be transmitted to places beyond the park and requiring payment therefor at a specified annual rental and "in addition thereto, payment at the rate of the sum of one dollar per annum (with sliding scale) for each electrical horse-power generated and used and sold or disposed of over 10,000 electrical horse-power," the extra payments are to be made as the electricity is generated at a rate greater than 10,000 horse-power as shewn by the meters, and so continue even when the generation falls below such rate, the proper basis of calculation, according to the true construction of the clause relating to additional rentals, being the highest amount or quantity of electrical horse-power generated and used and sold or disposed of at any one time, and so remaining (regardless of a drop in actual use or sale) until a higher point of generation and use or sale is reached.

[*Attorney-General for Ontario* v. *Canadian Niagara Power Company*, 2 D.L.R. 425, varied.]

2. ELECTRICITY (§ IV—41)—GENERATION OF LIGHT AND POWER—CONTRACT.

The extra price provided for in an agreement between the Queen Victoria Falls Park Commissioners and a power company, licensing the company to operate an electric power plant in the park and in the water of the Niagara river, for which the Park Commissioners, a public body, was to be paid "for each electrical horse-power generated and used and sold or disposed of over 10,000 electrical horse-power," includes power used by the power company for its own purposes as well as that sold to others.

[*Attorney-General for Ontario* v. *Canadian Niagara Power Company*, 2 D.L.R. 425, affirmed on this point.]

3. ELECTRICITY (§ IV—41)—SALE OF ELECTRIC POWER—LEASE OF LAND AND WATER FOR GENERATING ELECTRICITY—RENTAL VARYING WITH AMOUNT OF ELECTRICAL HORSE-POWER GENERATED AND USED AND SOLD —METHOD OF CALCULATING—CONSTRUCTION.

Where by an agreement in 1899, supplemental to an agreement in 1892, a power company stipulated to pay a specified fixed rental for a strip of land lying by the water's edge in a public park, together with the use of a portion of the flow of the river as it passes, which had been placed at its disposal for the purpose of constructing works and generating electricity; and also stipulated to pay additional rentals varying in amount by reference to the electrical horse-power generated and used and sold or disposed of by the company, "such additional rentals as shall be payable for and from such generation and sale or other disposition" to be payable half-yearly; the proper basis of calculation, according to the true construction of the clause relating to additional rentals, is the highest amount or quantity of electrical horse-power at any one time generated and used or sold, and such amount remains the true basis, regardless of a drop in actual use or sale until a higher point of generation and use or sale is reached.

[*Attorney-General for Ontario* v. *Canadian Niagara Power Company*, 2 D.L.R. 425, varied on this point.]

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Statement

APPEAL from a judgment of the Court of Appeal (January 17, 1912), *Attorney-General for Ontario* v. *Canadian Niagara Power Co.*, 2 D.L.R. 425, 3 O.W.N. 545, 20 O.W.R. 941, affirming with a variation in favour of the appellants, a judgment of Riddell, J. (May 16, 1910), 1 O.W.N. 127.

The question decided was as to the true construction and effect of paragraph 2 of an agreement dated July 15, 1899, between the appellant Commissioners for the Queen Victoria Niagara Falls Park and the respondents, and set out in their Lordships' judgment.

The action was brought by the appellants to recover certain moneys alleged to be due from the respondents over and above those which had already been paid. The payments claimed were in addition to a fixed stipulated rental and were based upon and fluctuated with certain contingencies. The material words in the above paragraph which defined the measure of those payments are as follows:—

> In addition thereto payment at the rate of the sum of one dollar per annum for each electrical horse-power generated and used and sold or disposed of over ten thousand electrical horse-power up to twenty thousand electrical horse-power, and the further payment of the sum of seventy-five cents for each electrical horse-power generated and used and sold or disposed of over twenty thousand electrical horse-power up to thirty thousand electrical horse-power, and the further payment of the sum of fifty cents for each electrical horse-power generated and used and sold or disposed of over thirty thousand electrical horse-power.

In the words above cited "horse-power" as a term of measurement indicates the rate of generation of electrical energy at a given instant. In dealing with power commercially its duration as well as its force is considered, and sale of horse-power means a sale of so many horse-power hours or days or years. Contracts for its supply, where payment is based upon actual user, are known as peak contracts and meter contracts. Under the former payment is based upon the greatest number of horse-power recorded as taken at any one time, representing the horse-power actually used, as measured and shewn by indicating meters, and is computed on each horse-power of such record from the date thereof until a subsequent higher record, and so on. Under the latter payment is based either upon the number of "horse-power hours" ascertained from meters which compound horse-power and time and give the result in horse-power hours, or upon the "average horse-power" arrived at by averaging the records of horse-power from indicating meters.

The figures of the horse-power involved in this controversy were not in dispute. Both parties took them from the indicating meters in the respondents' power-house, the half-hourly readings of which furnished records in horse-power of the horse-power gen-

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erated and used. The issue was as to the method of dealing with those figures. The appellants contended that, on the true construction of the paragraph, payment was to be based thereon according to the practice under what were termed peak contracts, that is, on the greatest number of horse-power recorded at any one time until a subsequent higher record. The respondents contended that payment should be calculated according to the practice under meter contracts, that is, on average horse-power, arrived at by taking the figures of horse-power and then averaging or compounding them with time.

Statement

Mr. Justice Riddell's judgment was in accordance with the contentions of the respondents, and ruled that the additional rental should be calculated on the following basis: "For each day of twenty-four hours the number of horse-power hours generated as measured at the terminals of the generators in the defendants' power-house, is to be ascertained, and from this number is to be deducted the number of horse-power hours used by the defendants for the purposes of their own plant as measured in the said power-house and elsewhere where used"; the remainder to form the basis on which the rent should be calculated.

The Court of Appeal was equally divided in opinion, and so the ruling of Riddell, J., was affirmed with a variation, from which the respondents did not appeal, to the effect that the power used by the respondents for their own purposes should be included in the power to be paid for by them.

Argument

Sir R. Finlay, K.C., *MacInnes*, K.C., and *Geoffrey Lawrence*, for the appellants, contended that clause 2 of the agreement of July 15, 1899, provides for an additional rental for and from the generation by the respondents of each horse-power over 10,000 horse-power, and does not provide for the taking of an average of the readings of the meters or for the ascertaining of the number of horse-power hours. The agreement deals with the unit of horse-power and not with the unit of horse-power hour; and if the parties had intended to deal with average horse-power, they would have done so in express terms. In this case the figures of the horse-power involved are not in dispute. Both parties have taken them from indicating meters in the respondents' power-house, the half-hourly readings of which furnish records in horse-power of the horse-power generated and used. The issue is as to the mode of dealing with those figures. It was contended that the clause directed payment to be based thereon according to the practice in contracts known as peak contracts. Payment should be based upon the greatest number of horse-power recorded as taken at any one time as actually used. Payment at a stipulated rate is to be computed on each horse-power of such record from the date thereof until a subsequent higher record, and so on. The last highest record will govern the payment from its date

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for the remainder of the term. In this way any point of increase in development is to be taken as the starting-point for computation thenceforth, and the words "on generation . . . of 30,000 electrical horse-power the gross rental shall be $32,500 per annum, payable half-yearly, and so on in case of further development," indicate the intention that the rental should not revert at the beginning of each half-year to the minimum of $15,000, but should continue at the figure fixed by the highest previous development until a higher development should be attained. Moreover, the appellants' construction is supported by the provisions that payment is to run "from the day" and that half-yearly payments are to be made at certain annual rates "for each horse-power generated," not "generated for any period." The express controlling idea of this clause is that of development, and it was contended that that pointed to payment being made on the records of "horse-power" and not upon the average of half-yearly or other readings of the indicating meters. There is no difficulty about the figures of horse-power generated and used. The maximum horse-power generated is an actual quantity; average horse-power is a hypothetical quantity, being the minimum horse-power which will produce a given number of horse-power hours in a specified time. The basis of payment contended for by the appellants is the actual horse-power demonstrated by the respondents themselves to be required for their obligations to their customers, which obligations could not have been fulfilled by average horse-power, or by anything else than the full amount of such actual horse-power as the appellants have always delivered the means of producing, which after their contract they could not dispose of elsewhere.

Wallace Nesbitt, K.C., and *A. Monro Grier*, K.C., for the respondents, contended that the covenant for additional payment had been rightly construed by Riddell, J., in accordance with the contention of the respondents. Those contentions were that the covenant was clear in its terms, namely, that the additional payment was to be calculated on the basis of power "generated and used and sold or disposed of." The word "generated" referred to the actual output of power. The word "used" limited this by eliminating the element of waste. The words "sold or disposed of" further limited this by eliminating power made use of by the company for its own purposes. The result is that the payment is to be ascertained on the basis of what is generated, less what is wasted and less what is used by the company itself, or in other words, on the commercial output. The rate of payment covenanted for is equally clear. The horse-power being generated at any particular time must be measured, less waste and the respondents' user. Then calculate the rental for the time or period in question, ascertained by the average of meter readings, taken by day, hour, or other interval according to reasonable conveni-

ence "at the rate of" one dollar per annum, that is to say, by applying the appropriate fraction thereof. The words of the covenant being clear, its effect was not varied by the illustration or example contained therein, which is governed by the words "as above provided." It was contended that the remaining portion of clause 2 of the agreement supported the respondents' construction of the covenant and were inconsistent with the contention of the appellants. The words of the covenant could not be reasonably construed as requiring that the rental is to depend on the highest point previously reached, even for an instant, and not upon the actual quantities generated during the half-year in question. Such a construction is inequitable and contrary to the intention of the parties as gathered from the agreement and the surrounding circumstances. The appellants in effect contend that the rental in question depends upon the capacity or state of development of the respondents' power plant. On the other hand, the covenant bases the rental, not on development nor on capacity, but on output, not on each electrical horse-power which the plant had the capacity to generate, but on the total electrical energy actually and in fact generated, or, which comes to the same thing, on the average electrical horse-power developed. In order that the appellants' contention should prevail they must shew that the covenant contains express words apt to give effect to such intention, and in this they have failed.

Sir R. Finley, K.C., in reply.

July 22, 1912.—The judgment of their Lordships was delivered by

Lord Macnaghten.

LORD MACNAGHTEN:—The question in this case lies in a narrow compass. But it is one of considerable difficulty. The trial Judge, Riddell, J., decided the question in favour of the respondents. The four learned Judges who constituted the Court of Appeal for Ontario were equally divided in opinion. Moss, C.J., and Garrow, J., were in favour of affirming the decision of the trial Judge. Meredith, and Magee, JJ., were in favour of reversing that decision. And so the judgment of the trial Judge with a slight variation was upheld.

The result is that this Board is now called upon to determine the meaning and effect of one paragraph in an agreement dated July 15, 1899, made between the Commissioners for the Queen Victoria Niagara Falls Park, acting therein on their own behalf and with the approval of the Government of the Province of Ontario, who are therein and hereinafter called "the Commissioners," of the first part, and the Canadian Niagara Power Company, of the second part. This agreement was made in pursuance of statutory authority. It modified and varied an agreement dated April 7, 1892, made between the Commissioners and the promoters of the then intended company, afterwards incorpor-

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ated as the Canadian Niagara Power Company. The statute which incorporated the company ratified and confirmed the agreement of April, 1892, and made it binding upon the company.

There is no clause or provision in the agreement of 1892 similar to the paragraph in the agreement of July, 1899, which is now under consideration. But it is convenient, if not necessary, to consider the provisions of the earlier agreement in order to understand the position of the parties when the agreement of 1899 was made.

By the agreement of April 7, 1892, it was among other things declared:—

> (1) That for the purpose of generating electricity and pneumatic power to be transmitted to places beyond the park, the Commissioners grant to the company a license irrevocably to take water from the Niagara River between the head of Cedar Island and the mainland, and to lead the water by means of that natural channel and an extension of it to supply works to be constructed by the company in buildings and power-houses on the mainland within the park upon a location therein described, which was to occupy a tract of land of not more than 1,200 feet in length by not more than 100 feet in width; and
>
> (2) That the company was to have the further right to excavate tunnels to discharge the water led from the Niagara river to the said buildings and power-houses, so that such water should emerge below the Horse Shoe Fall at or near the water's edge.

The license was subject to three specified agreements which were already in existence and operative.

By paragraph 4 of the agreement it was declared that the license was granted for the term of twenty years at the rental of $25,000, and that during the second ten years of that term the rental was to be increased by the sum of $1,000 each year, so that in the twentieth year the rental would be $35,000.

At the end of the period of twenty years the company was to be entitled at their option to a further period of twenty years and similarly at their option to three further renewals at the like rental. So the effect was in substance that the company became entitled to a license, or lease, as it is sometimes called, for the period of 100 years, terminable at their option at the end of each successive period of twenty years. There was a further provision entitling the company during the first period of twenty years to terminate the license or lease at any time on giving three months' notice in writing.

There were further powers granted to the company which it is not necessary to specify.

The company undertook to begin the work on or before May 1, 1897, and to proceed so far with their works on or before November 1, 1898, as to have completed water connections for the development of 25,000 horse-power, and have actually ready for use, supply and transmission 10,000 developed horse-power by the said last-mentioned day.

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By the agreement of July, 1899, the time for the construction of the proposed works was extended, and the terms of payment by the company for the accommodation and facilities placed at their disposal were varied. Paragraph 2 is expressed in the following words:—

> The said agreement of the 7th April, 1892, in respect of the amount of rentals and period for which the same is payable, is hereby amended by providing that from and after the first day of May, 1899, the rent payable under the said agreement in lieu of that specified paragraph 4 thereof shall be up to the first day of May, 1949, the sum of fifteen thousand dollars per annum, payable half-yearly on the same days and times as specified in said paragraph 4 of said agreement, and in addition thereto payment at the rate of the sum of one dollar per annum for each electrical horse-power generated and used and sold or disposed of over ten thousand electrical horse-power up to twenty thousand electrical horse-power, and the further payment of the sum of seventy-five cents for each electrical horse-power generated and used and sold or disposed of over twenty thousand electrical horse-power up to thirty thousand electrical horse-power, and the further payment of the sum of fifty cents for each electrical horse-power generated and used and sold or disposed of over thirty thousand electrical horse-power; that is to say, by way of example, that on generation and use and sale or disposal of thirty thousand electrical horse-power the gross rental shall be $32,500 per annum, payable half-yearly, and so on in case of further development as above provided, and that such rates shall apply to power supplied or used either in Canada or the United States. Such additional rentals as shall be payable for and from such generation and sale or other disposition as aforesaid to the Commissioners shall be payable half-yearly at the rate above specified on the first days of November and May in each year for all power sold in the said several half-yearly periods from the day of sale; and within ten days after said first days of November and May in each year on which such additional rentals shall be payable respectively, the treasurer, or if no treasurer, the head officer of the company shall deliver to the Commissioners a verified statement of the electrical horse-power generated and used and sold or disposed of during the preceding half-year, and the books of the company shall be open to inspection and examination by the Commissioners or their agent for the purpose of verifying or testing the correctness of such statement; and if any question or dispute arises in respect of such return or of any statement delivered at any time by the company to the Commissioners of the quantity or amount of the electrical horse-power generated and used and sold or disposed of, or of the amount payable for such additional rentals, the High Court of Justice of Ontario shall have jurisdiction to hear and determine the same and to enforce the giving of the information required.

The whole question turns on the meaning and effect of that paragraph. In lieu of a fixed rental mounting up by annual increments to $35,000 a year, the Commissioners agreed to accept, and the company agreed to pay, a fixed rental of $15,000 a year and an additional rental varying in amount by reference

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to the electricity generated and used and sold or disposed of by the company. So far the parties are agreed. The dispute is as to the method of computing this additional rental. To assist the Court in coming to a right conclusion, the parties agreed on admissions as to the methods according to which electricity is disposed of in ordinary commercial practice.

These methods are conveniently summarized in the respondents' case as follows:—

(1) A contract whereby the customer has the right to receive continuously a certain amount of power and pays for it on the basis of the amount he is entitled to receive. He has the right to call for it, and he pays for it, whether in fact he calls for it or not, and whether in fact the power is ever generated or not.

This method is known as the flat rate contract.

(2) A contract whereby the customer takes what power he wants, as and when he wants it, and pays on the basis of the exact number of kilowatt hours, or the horse-power hours taken.

This method is known as the meter contract.

(3) A contract whereby the customer takes what power he wants as and when he wants it, but pays on the basis of what is called "the peak," that is to say, on the basis of the number of watts or of horse-power made use of by him at the instant of maximum use.

This method is known as the peak contract.

The flat rate contract may be left out of consideration. Much argument was expended on the comparative advantages of the meter contract and the peak contract. It may, however, be doubted (if it is permissible to express a doubt on the subject after the able and elaborate arguments addressed to this Board by the learned counsel on both sides), whether the solution of the question at issue is more advanced or more embarrassed by a discussion as to the merits or the applicability of these two methods of contract.

One thing is plain. This contract is neither a meter contract nor a peak contract, for the simple reason that the Commissioners do not create or produce any vendible commodity. The part of the Commissioners is to place at the disposal of the company (whether you call the instrument of disposition a license or a lease) a strip of the park lying by the water's edge, just above the Horse Shoe Fall, together with the use of a portion of the flow of the river, as it passes, for the purpose of constructing electrical works and generating there electricity for transmission beyond the limits of the park. They neither generate nor dispose of electricity themselves. The result is that, when the contract speaks of an additional rental for electrical power generated and used and sold or disposed of over and above a certain quantity or amount, it cannot mean that the additional payment is "in consideration of" or "remuneration for" the power generated and disposed of. It must mean that the rental is to be calculated by reference to the amount or quantity of power

generated and disposed of by the company, that is, that when the amount or quantity generated and disposed of by the company is so much, the rental to be paid to the Commissioners is to be calculated by reference to it.

The view of the respondents is stated very clearly in their printed case, to which Mr. Nesbitt referred. Their Lordships are glad to have had the opportunity of reading in print and considering the argument so presented in addition to listening to the oral address of counsel. They say:—

> The payment is stated to be "at the rate of the sum of one dollar per annum for each electrical horse-power." The words "at the rate of" mean that the payment is to be calculated for all periods on the basis of one dollar for a full period of a year. The method of working out the clause is simple. Take each day of the year, or each hour of the year, or each instant, according to reasonable possibility or convenience. Ascertain, that is to say, measure, the horse-power being generated at that time, less waste and the respondents' own user. In the case of an instant this is absolute. In the case of an hour or a day a reasonably correct result is obtained by averaging a number of readings, for instance, taken at regular intervals. Find the rental for the period in question, whether it is a day or an hour or an instant, "at the rate of" one dollar per annum, that is to say, by applying the appropriate fraction of one dollar. These various results, whether of days, hours, or instants, may then be added together, and the total arrived at for the year. Where the power runs above 20,000 horse-power a different rate will become applicable to the portion above 20,000, and so with 30,000, but this does not affect the principle, and introduces no inconvenience into the calculation.

Sir Robert Finlay, on the other hand, said that that was an impossible task, or a task so difficult as to be practically impossible. No doubt the method proposed by the respondents is not so simple as that proposed by the appellants; and it seems far more troublesome. But their Lordships are not satisfied that the difficulty is insurmountable or so formidable as to turn the scale in favour of the appellants. It was contended by the appellants that the true standard was the highest amount or quantity of electricity generated and used and sold or disposed of which the accommodation and facilities furnished by the Commissioners enabled the company to attain and that that point once attained remained the standard until a higher point was reached. It seems to their Lordships that the two methods are equally fair and equally reasonable. The fairness, of course, depends on the rate adopted. But there is no complaint by either party on that score.

The fact that the rate is lowered as the amount or quantity of electricity developed becomes larger, so that ultimately for additional development the rate is reduced to 50 cents, seems rather to tell against the view presented by the respondents. But that is only a slight indication of the meaning of the par-

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ties. The example given by way of illustration points more strongly in the same direction. But after all the example is not conclusive. The question must depend upon the fair meaning of the language used. The case is not susceptible of much argument. It rather lends itself to minute criticism which would be out of place in this judgment.

On the whole, not without some doubt and hesitation, their Lordships have come to the conclusion that the view of the appellants is to be preferred mainly on the ground that there are some expressions which it seems impossible to reconcile with the contention of the respondents, as, for instance, the direction that increased rental is to be payable not simply "for"—a word which has already been criticized—but "from" the development of higher power.

It was urged on behalf of the respondents that if in consequence of some sudden emergency the demand on their resources should raise the standard abnormally, it would be a very serious thing and a very harsh thing, and tie them down to that standard for the whole remainder of the period of a hundred years. There is, no doubt, force in that objection. But the appellants replied: "You can relieve yourselves from the burden of the contract if it is really oppressive at the end of each period of twenty years until you come to the last period, and the omission of a precaution to guard against a contingency which was either overlooked at the time by your inadvertence, or disregarded then as unimportant, is no reason for putting a strained construction on the words of the second edition of a solemn contract. If you want the contract reformed you must come to terms with us. And we are quite willing to remove your objection by consenting to treat each yearly or half-yearly period as distinct and self-contained." That seems a reasonable offer, embodying a provision which apparently would obviate the danger apprehended by the respondents, but which their Lordships are unable to find in the contract as it stands.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed and a decree made in favour of the appellants. The costs paid under the order of the High Court must be refunded. There will be no order as to costs.

Appeal allowed.

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Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Lavergne, Cross, Carroll, and Gervais, JJ. December 23, 1912.

1. SCHOOLS (§ III A—55)—COMMISSIONER OF — REGULARITY OF APPOINTMENT—ABILITY TO READ AND WRITE.

In order to exercise the office of school commissioner two conditions are required; regular appointment to office and proper qualifications to exercise it, amongst which is the ability to read and write.

2. SCHOOLS (§ III A—55)—COMMISSIONER OF — INABILITY TO READ AND WRITE AS DISQUALIFICATION FOR OFFICE—INCAPACITY NOT CURED BY FAILURE TO CONTEST ELECTION.

Failure to know how to read and write in a school commissioner constitutes an incapacity rendering his exercise of office unlawful and is not a mere defect of eligibility covered by the failure of the voters to contest his election within fifteen days before the Circuit Court.

[*Bonin* v. *Pagé*, 9 Que. P.R. 177, discussed and overruled.]

3. QUO WARRANTO (§ I C—30)—OUSTING SCHOOL COMMISSIONER FROM OFFICE—INABILITY TO READ OR WRITE.

Not only voters or ratepayers, but any interested party, may have a school commissioner, who is disqualified by reason of not being able to read or write, ousted from office by writ of *quo warranto* whether within or after the delays for contestation of election.

4. QUO WARRANTO (§ I C—30)—OUSTING FROM OFFICE—INCAPABILITY TO HOLD OFFICE AS INELIGIBILITY—INCAPACITY NOT WAIVED BY FAILURE TO CONTEST.

Where a statute enacts that certain persons only are eligible for office it also means that persons who are not capable are not eligible of holding such office, and the fact that their election has not been contested does not deprive interested parties from taking *quo warranto* proceedings and this whether such incapacity be a statutory or common law incapacity.

5. ELECTIONS (§ IV—90)—CONTESTS OF—REMEDIES OF CONTESTATION AND QUO WARRANTO—JURISDICTION OF COURTS.

The remedies of contestation of election and of *quo warranto* are not exclusive the one of the other; but contestation proceedings must be brought within a fixed delay before the circuit or district magistrate's court, whereas *quo warranto* is of the jurisdiction of the Superior Court.

Statement

THIS was a petition by the appellant to have the respondent, a school commissioner, dispossessed of his office on the ground that he could neither read nor write. The writ was maintained by the Superior Court, Tourigny, J., on March 16th, 1911. But the Court of Review, at Quebec, Lemieux, Pelletier, and Letellier, JJ., on May 31, 1911, quashed the writ. The appellant inscribed in appeal and the appeal was maintained, CARROLL, J., dissenting.

J. A. Désy, and *L. St. Laurent*, K.C., for appellant.
J. A. Tessier, for respondent.

The opinion of the majority of the Court was delivered by

Archambeault, C.J.

ARCHAMBEAULT, C.J. (translated):—The appellant, plaintiff, in the Superior Court, obtained the issue of a writ of *quo warranto* against the respondent to have him excluded

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from the charge of school commissioner for the parish of St. Jean des Piles.

The petition alleges that the respondent can neither read nor write, and is therefore incapable of filling the charge of school commissioner.

The trial Judge maintained the conclusions of the petition. This judgment was carried to review where it was set aside and the writ of *quo warranto* was quashed.

The appellant now appeals to us to restore the judgment of the trial Judge.

The question arising in this case is as to whether the appellant could proceed as he has done, by *quo warranto* before the Superior Court, or whether he should have proceeded by way of contestation of election before the Circuit Court or the District Magistrate's Court.

And the question is not without interest as it has often arisen before our Courts who have solved it in different ways.

1. The oldest case to be found in our judicial reports is that of *Fiset* v. *Fournier*, 3 Q.L.R. 334, decided in 1877, at Montmagny. That was a *quo warranto* against a municipal councillor not on the ground of incapacity, but for informalities in the election. Mr. Justice Maguire held that the procedure should have been by ordinary contestation of election and not by *quo warranto*.

2. The next case is that of *Paris* v. *Couture*, 10 Q.L.R. 1, decided by the Court of Review at Quebec in 1883, Meredith, Casault, and Caron, JJ. Here, two municipal councillors had been elected by the council and one of them was subsequently chosen as mayor.

The plaintiff took a writ of *quo warranto* against them, but his petition was dismissed and the defendants maintained in their charge, and Mr. Justice Meredith, and Mr. Justice Casault expressed it as their opinion that the jurisdiction conferred on the Circuit Court and the District Magistrate's Court by art. 348 of the Municipal Code regarding the contestation of the election of mayor and councillors was an exclusive one and that in the cases provided for, the *quo warranto* procedure could not avail in lieu of that of contestation of election.

3. The next case we find is that of *Métras* v. *Trudeau* (1885), M.L.R. 1 Q.B. 347, decided by the Court of King's Bench in 1885, Dorion, C.J., Monk, Tessier, Cross, and Baby, JJ.

In that case school commissioners had been elected by acclamation; but it was not established that they had ever acted or claimed to act as school commissioners since their election.

The Court held, under the circumstances, that a *quo warranto* did not lie. The report of the case does not disclose the reasons invoked for a *quo warranto*. But Mr. Justice

Baby examined, in the course of his remarks, the question as to whether a *quo warranto* lay as a means of contesting the election of school commissioners and he stated that the Court was of the opinion that only the Circuit Court and the District Magistrate's Court had jurisdiction in the matter and that it endorsed the opinion of Meredith, J., in *Paris* v. *Couture*, 10 Q.L.R. 1.

4. We then come to *Delâge* v. *Germain*, 12 Q.L.R. 149, decided by the Court of Review at Quebec in 1886 (Stuart, Casault, and Caron, JJ.). In this case it was alleged that the mayor had no domicile in the parish and kept therein a common bawdy house.

Mr. Justice Andrews, the trial Judge, quashed the writ of *quo warranto* on the ground that it had not been proven that the alleged incapacity had arisen only subsequently to the delay fixed by law for contesting the election and that it had not been possible to proceed by contestation of election before the Circuit Court or District Magistrate's Court. In his opinion the Superior Court had no jurisdiction.

In review, Mr. Justice Casault was of the opinion that the grounds of incapacity alleged had arisen subsequently to the election and hence that it would have been impossible to proceed by contestation. He was, therefore, for reversing.

Mr. Justice Stuart, and Mr. Justice Caron were to confirm the judgment but on the ground that the plaintiff had failed to prove the allegations of his declaration.

Nevertheless Mr. Justice Stuart stated that the reasons given by Mr. Justice Andrews were well-founded in law.

5. The fifth case mentioned by our reports is that of *Lajeunesse* v. *Nadeau* (1896), 10 Que. S.C. 61, Andrews, J. Here, where the election of a mayor, named by the council, was being attacked by reason of informality, Mr. Justice Andrews held that the Superior Court had no jurisdiction and that the proper proceeding was by contestation of election before the Circuit Court or District Magistrate's Court.

6. Sixthly, there is the case of *Riendeau* v. *Dudevoir*, 12 Que. S.C. 273, decided in 1897 at Montreal by the Court of Review, Jetté, Gill, and Archibald, JJ. This was a *quo warranto* against a municipal councillor of the town of Maisonneuve who had made an abandonment of his property after having been elected, whose seat had been declared vacant by the council and who had been re-elected.

Mr. Justice Pagneulo in the first Court had dismissed the petition on the ground that contestation of election was the proper method to follow.

The Court of Review reversed this judgment holding that the writ of *quo warranto* is subject to no restrictions and lies absolutely against any person illegally holding a charge in a public corporation.

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This case differed from the previous ones in that a town councillor was concerned, and therefore the Superior Court, and not the Circuit or District Magistrate's Court, is called upon to decide the contestation of elections. There could be no question of competency or jurisdiction in that case.

7. The next case is that of *Chalifoux* v. *Goyer*, 14 Que. S.C. 170, decided by Pagnuelo, J., in 1898. This case was not decided on the point at issue in the present action; but here also it was a *quo warranto* proceeding and the trial Judge expressed the opinion that where a permanent qualification is required and the incapacity arises after the expiry of the delays for contesting the election, there is no other method of proceeding than by *quo warranto*.

8. The eighth case is that of *Allard* v. *Charlebois*, 15 Que. S.C. 517, decided at Montreal in 1898, by the Court of Review, Tait, Taschereau, and DeLorimier, JJ.

This was the case of a municipal councillor who, at the time of his election was not a municipal elector inasmuch as his name did not appear on the valuation roll.

The Court of Review held, Taschereau, J., dissenting, confirming the judgment of Loranger, J., that the question was one of eligibility and not one of permanent incapacity. Provided a candidate is an elector at the time of his election this suffices; it is not necessary that he should remain a qualified voter during the whole period of his incumbency. Hence, said the Court, the proceeding should have been that of contestation of election instituted within 30 days of the election and not that of *quo warranto* eight months thereafter. At the time of the issue of the writ the incapacity had ceased and the councillor was no longer occupying his position illegally.

9. We next find the case of *Lemire* v. *Neault*, 15 Que. S.C. 33, decided at Three-Rivers in 1898. In this case Bourgeois, J., squarely held that a *quo warranto* lay to oust a municipal councillor not qualified by law to act even where the cause of incapacity existed at the time of the election and where proceedings, by way of contestation of election, would have been in order. For, said the Judge, proceedings in contestation are not exclusive of proceedings by *quo warranto*.

10. Then comes the case of *Sigouin* v. *Viau*, 16 Que. S.C. 143, decided at Montreal by the Court of Review, Mathieu, DeLorimier, and Lynch, JJ.

The Court, reversing Choquette, J., held, as did Mr. Justice Bourgeois in the previous case, that *quo warranto* lies at any time to oust a municipal councillor who is not qualified and even if such incapacity existed at the time of the election.

> "Considérant," says the judgment, "qu'un membre du conseil qui n'a pas la qualification voulue, ne peut agir comme tel conseiller, peu

importe qu'il ait en cette qualification au moment de son élection ou non; que s'il agit ainsi comme conseiller, sans avoir la qualification requise on peut procéder sous les dispositions des arts. 987 et suivants C.P.C."

11. I now come to a case quite different in aspect from the above, that of *Martel* v. *Prévost*, 6 Que. P.R. 244, decided by this Court in 1903, Lacoste, C.J., Bossé, Blanchet, Wurtele, and Ouimet, JJ. This was the case of a trustee for the building of a church who was accused of conniving with the contractors, sharing in their profits from the contract, selling them materials and receiving bribes from them. A writ of *quo warranto* issued against him.

The Court held, confirming Lynch, J., that where, according to common law, a person is incapable of holding a public office the right to *quo warranto* lies even in the absence of any statutory enactment declaring such incapacity and the *quo warranto* lies whether as regards an incapacity accruing after the election of the incumbent or as regards an incapacity existing at the time of the election.

Lacoste, C.J., and Blanchet, J., dissented on the ground that the defendant having been regularly elected, it could not be held that he was holding his office illegally so long as his destitution had not been pronounced by a judgment.

12. Another case in 1904 is that of *Bédard* v. *Verret*, 25 Que. S.C. 537, decided by Cimon, J. (25 Que. S.C. 537), where a *quo warranto* was taken against a mayor who could neither read nor write after the expiry of the delays for contesting his election. Motion was made to reject the petition on the ground that the petitioner should have proceeded before the Circuit Court by contestation of election. The motion was dismissed and the Judge declared it his opinion that the right to proceed by *quo warranto* could not be doubted.

13. I now arrive at the case of *Marois* v. *Lafontaine*, 27 Que. S.C. 174, decided in 1905 by Langelier, J. In these last years Sir Francis Langelier has made himself the champion of the doctrine that proceedings by *quo warranto* will not lie where it would have been possible to proceed by way of contestation of election before the Circuit or district magistrate's Court. With him it is a question of jurisdiction and the Superior Court is incompetent on account of art. 348 of the Municipal Code, which declares that the trial and decision of this question belongs to the Circuit Court or to the district magistrate's Court to the exclusion of all other Courts.

In this case of *Marois* v. *Lafontaine*, 27 Que. S.C. 174, a writ of *quo warranto* was issued in May against a mayor of a rural municipality elected on January 30th, 1905, on the ground that he could neither read nor write. The petition for a writ was

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dismissed on motion for the reason above mentioned. But the Judge recognizes, in his notes, that a *quo warranto* would lie where the incapacity occurred subsequent to the election.

14. The next case is that of *Duval* v. *Marchand*, 28 Que. S.C. 184, decided in Quebec in 1905, by the Court of Review, Routhier, Langelier, and Sir A. P. Pelletier, JJ. This case was absolutely analogous to the present action: a *quo warranto* taken against a school commissioner who could neither read nor write. The petition was dismissed because the Court was of opinion that the petitioner had failed to prove that the defendant could not read nor write. But Sir A. P. Pelletier, in rendering judgment for the Court added that even had the petitioner proven his allegations a *quo warranto* did not lie inasmuch as he should have taken action in the Circuit Court or in the district magistrate's Court. And he cites the cases of *Paris* v. *Couture*, 10 Q.L.R. 1, and of *Delâge* v. *Germain*, 12 Q.L.R. 149.

15. The next case is that of *Bonin* v. *Pagé*, 9 Que. P.R. 177, decided at Joliette, in 1907 by DeLorimier, J. This was also a *quo warranto* against a school commissioner who could neither read nor write. Mr. Justice DeLorimier expressed the opinion that a *quo warranto* lay in cases of permanent incapacity even where such incapacity existed at the time of the election. The petition was dismissed nevertheless because, said the Judge, it was not a case of permanent incapacity, but only a case of ineligibility.

I shall revert to this case when expressing the opinion of the Court on the present action.

16. The case of *Thibault* v. *Lévesque*, 34 Que. S.C. 476, decided by my learned brother Carroll in 1908, dealt with a school commissioner who could neither read nor write and who had been elected, not by the voters, but by the school commissioners. His nomination could not be attacked by a contestation of election; there was no remedy other than *quo warranto*. And so the declinatory exception produced by the defendant was dismissed.

17. Then comes the case of *Pagé* v. *Génois*, 34 Que. S.C. 541, 38 Que. S.C. 1, decided in 1908 by the Court of Review at Quebec presided over by Langelier, Gagné and Tessier, JJ., involving the namination by the council of a mayor who could neither read nor write. This nomination might have been attacked by contestation of election in virtue of art. 347 M.C.

Nevertheless the Court of Review, Sir Francis Langelier dissenting, confirmed the judgment of McCorkill, J., dismissing a motion to quash the writ of *quo warranto*. The judgment is based on art. 335 M.C. which decrees that a person who can neither read nor write, not only cannot be elected mayor, but cannot act as mayor.

18 and 19. The last two cases on the question mentioned in our reports are those of *Larochelle* v. *Pouliot*, 37 Que. S.C. 359, decided by McCorkill, J., in 1910, that of *Leggs* v. *Jewell*, 17 Rev. de Jur. 244, decided by Weir, J., in 1910. In both these cases it was held that a *quo warranto* lies in the case of incapacity even where such incapacity existed at the time of the election.

We come, at last, to the present case in which the trial Judge maintained the *quo warranto*, but which judgment was reversed by the Court of Review. The judgment of the latter Court is based as follows:—

> Considérant qu'Elie Désaulniers a été élu commissaire d'écoles pour la municipalité de St. Jean des Piles, le cinq juillet 1909, et que, lors de son élection, il ne savait ni lire ni écrire;
>
> Considérant que la dite élection n'a pas été contestée dans le délai voulu par la loi;
>
> Considérant que l'incapacité résultant du fait de ne pas savoir lire et écrire, chez un commissaire d'écoles, ne repose pas sur un motif de droit public ou de droit commun;
>
> Considérant que le fait de ne pas se plaindre de la dite incapacité par voie de contestation, et devant les tribunaux compétents, constitue une déchéance de ce faire;
>
> Considérant qu'après le délai accordé pour la contestation de telle élection, on ne peut se prévaloir, par bref de "quo warranto," du défaut de capacité légale résultant du fait de ne pas savoir lire et écrire;
>
> Considérant que le bref de "quo warranto," au lieu d'être maintenu, aurait dû être cassé, etc."

As will be seen by the foregoing examination of our jurisprudence on this question which we are called upon to decide this jurisprudence is verily kaleidoscopic, and it is surely to the interest of the public and of members of the legal profession that such jurisprudence be moulded into a fixed form of single colouring.

Everybody is agreed as to one point, and it is this: when the incapacity occurs after the election, the proper proceeding is the *quo warranto* because, in such case, no other remedy exists to prevent a person from occupying an office to which he is no longer qualified to hold according to law.

But there remain two other questions to be decided: 1. Does a *quo warranto* lie when the cause of incapacity alleged existed at the time of the election of the person whom it is sought to oust from office? 2. Does the necessity of knowing how to read and write for a school commissioner exist only as a condition of eligibility or also as a condition requisite to the exercise of such office.

As to the first question, we are of opinion that where a person occupies the office of school commissioner without being

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qualified so to do, he may be dispossessed thereof by *quo warranto*, even though the cause of incapacity should have existed at the time of his election as school commissioner.

The contrary opinion held to by the Court of Review is based on arts. 2672, 2673, and 2675 of the Revised Statutes of Quebec.

Articles 2672 and 2673 read as follows:—

2672. The election of any school commissioner or trustee may be contested by any candidate or by five electors, when it has been carried by violence, corruption or fraud, or by the votes of persons who have voted without being qualified as electors, on the ground of disability, or on the ground of the non-observance of the formalities required.

2673. Contestations of elections of school commissioners or trustees shall be tried and decided by the Circuit Court of the district or county, or by the magistrate's Court of the county in which the municipality is situated, to the exclusion of every other Court.

Article 2675 adds that a copy of the petition in contestation must be served on the commissioner whose election is contested within fifteen days from the date of his election "otherwise the right of contesting shall lapse."

It is contended that the words "to the exclusion of every other Court," at the end of article 2673 deprive the Superior Court of any jurisdiction in the matter and that the words "otherwise the right of contesting shall lapse" at the end of art. 2675 do away with all right of action and remove all the incapacities decreed by law.

There is no doubt that these two dispositions of the law confer an exclusive jurisdiction on the Circuit Court and on the district magistrate's Court as regards the contestation of a school commissioner's or syndic's election and demand that notice of such contestation should be served within the required delay.

But these provisions of the law do not do away with another provision of law on public instruction nor with a provision contained in the Code of Civil Procedure.

The section of the law on public instruction to which I refer is art. 2639 R.S.Q. which reads as follows:—

Every Roman Catholic curé and every minister of any other religious faith ministering in the school municipality, although not qualified with respect to property, every male resident rate-payer, to every resident husband of a rate-payer, able to read and write qualified to vote under article 2642, is eligible as school commissioner or trustee.

Art. 2642 which enumerates the necessary qualifications to be entitled to vote at an election of school commissioners or trustees says that it is necessary to be of the age of majority, to be entered on the valuation-roll as proprietor or husband

of the proprietor of real property and to have paid all school contributions.

Therefore, in order to hold the office of school commissioner one must be eligible, that is to say have the qualifications mentioned in art. 2639 and have been elected.

If an unqualified person is elected, then his election may be contested. But, if, in such a case, the election is not contested within the delay fixed by law, and if the incapacity continues to exist, then of course a contestation of the election is no longer possible but another remedy exists and this we find in art. 987 C.P. This remedy is the *quo warranto*. For art. 987 enacts that any person interested may bring a complaint whenever another person usurps, intrudes into or unlawfully holds or exercises any public office in the province.

There is no doubt that where a person holds a public office when the law declares him incapable of so holding it, he is holding it unlawfully. It cannot be said that such person has usurped the charge if he has been elected to it but he certainly is holding it unlawfully.

Consequently the remedy granted by law lies.

The holding of a public office by an incapable person cannot depend on the will of the voters. Even though all the electors but one should agree to elect as school commissioner a person who could neither read nor write and should agree in refusing to contest his election, they could not deprive this sole remaining elector of the right given him by art. 987 of obtaining a writ of *quo warranto* against this school commissioner if he persisted in remaining in office.

Nay, more, art. 987 does not require the petitioner to be a voter. It suffices according to the article that he be an interested person.

There is no contradiction between art. 2673 R.S.Q. and art. 987 C.P. The first gives exclusive jurisdiction to the Circuit Court and to the district magistrate's Court as regards contestation of elections of school commissioners; the second gives the Superior Court exclusive jurisdiction as regards *quo warranto*.

There are cases where it is impossible to have recourse to *quo warranto* and where the only possible procedure is that of contestation of election. Such for instance would be the case of an election carried by violence, by fraud, by corruption, or by the votes of persons not qualified as voters, or for failure to observe the necessary formalities, that is to say, all the cases foreseen by law as justifying the contestation of an election with the exception of the incapacity of the person elected. In such cases *quo warranto* to the Superior Court would not be possible. Of necessity recourse must be had to contestation of election before the circuit or district magistrate's Court.

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And even in cases of incapacity if the incapacity disappears after the election there will be no recourse to oust the elected party other than the contestation of election and if the delay for contestation has expired, then there will be no other remedy; as stated by art. 2675 the right will lapse.

Let us take, for example, the case of the election of a minor who becomes of age after his election. His election can certainly be contested, even after he has attained the age of majority, provided such contestation is instituted within fifteen days of the election, because he was not eligible. But after the fifteen days are expired he can no longer be attacked by *quo warranto* and ousted from office inasmuch as he, having attained the age of majority, can no longer be accused of occupying and holding office unlawfully.

A contestation of election requires to be made by five voters, whereas any interested person may take a *quo warranto*.

There are other differences between a contestation of election and a writ of *quo warranto*. For instance, the voters exercise the power of contesting an election as a matter of right whereas a writ of *quo warranto* can only issue under the authorization of a Judge of the Superior Court (980 and 988 C.P.). Where an election is annulled after contestation a new election must be held, *i.e.*, electors must elect a new commissioner (2687 R. S.Q.), where, on the other hand, the office of school commissioner is declared vacant on a writ of *quo warranto* the vacancy is filled by the other commissioners within the thirty days following, or by the Lieutenant-Governor-in-council, should they fail so to do within such delay.

As will be seen therefore, there are marked differences between the contestation of election and proceedings by *quo warranto* and I cannot see how the provisions of the law regarding one of these methods of procedure can have any effect or influence as regards the other mode of action.

I now come to the second question.

Is the knowledge of reading and writing required of a school commissioner only as a condition of eligibility or as a condition precedent to the exercising of the office?

In other words does the incapacity resulting from a failure to be able to read and write constitute a ground of ineligibility or a permanent incapacity?

This question has been examined with great care by Mr. Justice DeLorimier in the case of *Bonin* v. *Page*, 9 Que. P.R. 177, to which I have referred. His notes are quite elaborate.

It was held in this case that the incapacity of a school commissioner resulting from his failure to be able to read and write is not based on a ground of public or common law, and that failure to complain of the same by contestation of election within

the stipulated delays and before the competent Courts deprives the interested parties of any right of action in the matter. They cannot later avail themselves of this lack of legal capacity by *quo warranto*.

I have read with great care the notes of the learned Judge but it is impossible for me to arrive at the conclusion he has reached.

When a person is not eligible for an office, he is incapable of holding and exercising it.

Art. 2639 R.S.Q. enumerates the persons eligible as school commissioners or school trustees. They are, as we have seen, priests and ministers, ratepayers of the male sex, and husbands of ratepayers, who can read and write, and are entitled to vote.

This article is the first of a paragraph of the law on public instruction intituled: "Qualifications required to be a school commissioner or trustee." This title clearly shews that he who is not eligible to the office of school commissioner is incapable of holding or exercising such office.

Mr. Justice DeLorimier draws a distinction between incapacities at common law and incapacities under statutory law. The first, says he, appertain to public order and may be permanent or temporary. The others are but relative incapacities which constitute grounds of ineligibility only which disappear if the interested parties do not avail themselves thereof by contestation in useful time before the proper Courts. And the learned Judge mentions insane persons, minors, aliens, and women as being incapable, at common law and at public law, from exercising any public office. Statutory law may, he adds, confirm the common law. Such is, for instance, art. 2639 R.S.Q. which enacts that to be eligible to charge of school commissioner a person must be of the male sex. And as this is a common law incapacity it is permanent and may be taken advantage of by *quo warranto* as long as the incapable person holds and exercises this office.

But, adds Mr. Justice DeLorimier, when the law on public instruction requires that, in order to be eligible as a school commissioner, a person should be able to read and write, it does not confirm a common law incapacity; it creates itself an incapacity; and like all restrictive laws it should be restrictively interpreted. Now the provisions of the law deal solely with the capability of being elected and not with the capability of exercising the office once the person is elected. Hence, if the interested parties do not avail themselves of contestation of election they will be denied the right to complain later of this want of legal capacity because no text of the law on public instruction allows of it.

The answer to this reasoning, which I consider more subtle

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than logical, is that the provisions of the law declaring that persons who cannot read or write are ineligible have not been decreed in the interest of the voters so as to deprive them of their right to complain thereof, if they do not proceed by contestation of election; these are dispositions of public order and mean that illiterate persons are not only incapable of being elected, but are also incapable of holding the office of school commissioner. Every interested party may complain of this incapacity by *quo warranto* if the ratepayers or voters do not wish to avail themselves of their right to contest the election in the manner or within the delay fixed by law.

It is contended that the legislature has used different expressions when it desired to create a permanent incapacity and not a mere ineligibility or relative and temporary incapacity; and articles of the municipal code are cited wherein it is not only enacted that certain persons may not be appointed to municipal offices but wherein it is further stated that such persons cannot hold or exercise such offices if they have been elected thereto. (203, 283, 335 M.C.).

This comparison of texts is not, in my opinion, conclusive because these are two totally distinct laws.

Moreover, I believe that if the municipal code was content to state that the persons in question could not be appointed or elected to municipal offices, that such provisions would suffice to render them incapable of holding or exercising such office. As already stated I hold that where a person is not eligible for a certain office he is not capable of holding it. Two conditions are necessary for holding a public office: qualification to exercise it and proper appointment thereto. If one of the two conditions be lacking the incumbent holds office illegally.

For these reasons, I am of opinion that the judgment of the Court of Review is erroneous and must be set aside.

We cannot, however, restore the judgment of the trial Judge ordering the defendant to be ousted from the office to which he was elected as his term of office has long since expired. Only the question of costs remains. This must go in favour of the appellant and the respondent will pay the costs in the three Courts.

Carroll, J.

CARROLL, J., dissented.

Appeal allowed,
CARROLL, J., *dissenting.*

CORDINER v. ANCIENT ORDER OF UNITED WORKMEN OF THE PROVINCE OF ONTARIO.

(Decision No. 2.)

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Dec. 31.

Ontario Divisional Court, Mulock, C.J.Ex.D., Clute, and Sutherland, JJ. December 31, 1912.

1. BENEVOLENT SOCIETIES (§ III—11)—AMENDMENT RAISING ASSESSMENTS —NOTICE OF.

An injunction will be granted to restrain the defendant (a fraternal benevolent society) from taking any proceedings under a certain amendment to the constitution of the defendant society, where it appeared that the amendment in question greatly increased the assessments (or premiums) on the insurance of the plaintiffs, as aged members of the society; and where its constitution required that a copy of all proposed amendments should be forwarded to the Grand Recorder on or before a certain fixed date each year, in order that the Grand Recorder, in turn, might send a copy to each subordinate lodge in time for a full discussion of the proposed amendment before selection of a Grand Lodge representative; and where the constitution also provides that in all important matters the representative in Grand Lodge of a subordinate lodge has as many votes as his lodge has members; and where the Grand Lodge had assumed to pass such constitutional amendment without such notice being given to the Grand Recorder, as provided by the constitution of the society.

[*Cordiner* v. *A. O. U. W.*, 6 D.L.R. 491, 4 O.W.N. 102, affirmed on appeal.]

APPEAL from the judgment of Riddell, J., restraining the defendants by interim injunction from taking any proceedings under an alleged amendment of sec. 63, sub-sec. 1, of the "Constitution" of the Order, which was by consent changed into a motion for final judgment. The judgment of Riddell, J., is reported, *Cordiner* v. *Ancient Order of United Workmen* (No. 1), 6 D.L.R. 491, 4 O.W.N. 102, where the facts are stated.

The appeal was dismissed.

E. F. B. Johnston, K.C., and *A. G. F. Lawrence*, for the defendants.

I. F. Hellmuth, K.C., and *P. Kerwin*, for the plaintiff.

MULOCK, C.J.:—The defendants are a fraternal association, one of its objects being to provide for the payment of stipulated sums of money to the beneficiaries of deceased members, the moneys for such purpose being derived from monthly assessments upon the members, each member being required to contribute according to a certain table of rates which is set forth in section 63 of the "Constitution." Mulock, C.J.

Recently the Grand Lodge purported to make material changes and increases in this table of rates, whereupon the plaintiffs brought this action, complaining that the procedure necessary in order to entitle the Grand Lodge to make such changes and increases had not been complied with, and that therefore they were invalid. The learned trial Judge sustained the plaintiffs' contention, and granted the interim injunction appealed from.

Part of the material used on the motion is a book marked Exhibit "A," which purports to declare the objects of the

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Order, and to shew the "Constitution" of the Grand Lodge and its rules of order.

As set forth in this "Constitution," the Order consists of Grand Lodge and subordinate lodges. The Grand Lodge consists of certain grand officers and one representative from each subordinate lodge (sections 2 and 5), and is to meet regularly on the third Wednesday of March in each year (section 11), and may hold special meetings (section 12), and when on any question before Grand Lodge the yeas and nays are called for, each representative shall be entitled to as many votes as there are members of the lodge represented by him at the date of the last annual report made by his lodge to Grand Lodge.

Section 63 enacts as follows:

"63. (1) Each and every present member of this Order, from and after the first day of May, A.D. 1905, and each and every new member of this Order, without notice, commencing with the month following the receiving of the Workman Degree, shall pay to the financier of the lodge a monthly assessment of the amount designated opposite the age of the member at the date of admission to the order, according to the following graded plan." (Then follows the graded plan, shewing the table of rates payable by a member in respect of his beneficiary certificate, and then the section concludes as follows):

"To be due and payable on the first day of each month, or within thirty days thereafter, as prescribed by statute in that behalf, and in addition to said regular monthly assessments, such extra assessments as may be required to pay and discharge all death claims upon the Order.

"(2). The date of such payment shall be kept by the financier, who shall credit the member with and give him a receipt for the amount so paid.

"(3). A member may pay his assessments in advance quarterly or otherwise."

Section 169 of the "Constitution" is as follows:

"169. Alterations and amendments to this Constitution may be made at any annual meeting of Grand Lodge by vote of two-thirds of the entire number to which members present at such meeting are entitled, provided that all such alterations and amendments are forwarded to the Grand Recorder on or before the 31st day of October, in order that a copy thereof may be sent to each subordinate lodge and to all members of the executive lodge and to all members of the executive committee and officers of Grand Lodge, before the 15th day of November following."

Section 76 declares that the representative of each subordinate lodge to Grand Lodge "shall be elected annually at a regular meeting in December," etc.

Thus the scheme of the Order provided by the "Constitu-

tion," whereby any alterations or amendments may be made to the "Constitution" is as follows: The proposed alteration or amendment must be forwarded to the Grand Recorder on or before the 31st October, in order to enable that officer to transmit a copy to each subordinate lodge before the 15th November thereafter. Thus each subordinate lodge before electing at its December meeting its representative to Grand Lodge will have before it the proposed alteration or amendment, and be in a position to consider the same, and to elect a suitable representative for the purpose of voicing the views of its members at the meeting of Grand Lodge to be held on the third Wednesday of March, thereafter.

On the 21st of June, 1912, at its adjourned annual meeting, Grand Lodge purported to pass an amendment to the "Constitution" making material changes in the graded plan of table of rates established and set forth in section 63 of the "Constitution" as above referred to, and one contention of the plaintiffs is that no notice of this change was given to the subordinate lodges as required by section 169 of the "Constitution," and that therefore Grand Lodge had no power to pass such amendment.

It is admitted that no notice of the amendment complained of (called the Mills Amendment) was given to the subordinate lodges, but it is contended that notice having been given to them of another proposed amendment (called the Executive Committee's Amendment), it was competent for Grand Lodge to pass the Mills Amendment as an amendment of the executive committee's proposal, and in support of this view the defendants refer to section 171, subsection 16, of the "Constitution" which is as follows: "When not otherwise provided for, Bourinot's Manual shall govern all parliamentary questions in Grand Lodge and subordinate lodges."

This section does not, in my opinion, qualify the plain meaning of section 169, that before Grand Lodge shall have jurisdiction to adopt any amendment to the "Constitution," notice of that particular amendment must have been given to the subordinate lodges. Parliamentary practice permits an amendment to a main motion substantially differing therefrom, while even a proposed amendment may, as a matter of parliamentary practice, be in order and be the subject of debate, and may be advanced through various stages, still Grand Lodge has no jurisdiction to finally pass it and thereby amend the "Constitution," until the requirement of section 169 as to previous notice to the subordinate lodges, shall have been complied with. Were it otherwise the plain object of section 169 as to notice could be defeated. That section in substance creates a contract with the subordinate lodges, and with those who were members on the 1st of May, 1905, when the graded plan of rates came

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into force, and with all new members, that the graded plan fixed by section 63 should not be changed until notice of the proposed change was given to the subordinate lodges, and until they had an opportunity of passing upon it, and electing representatives to Grand Lodge to vote thereon. By that graded plan rates of assessment increased each year until the member attained the age of 49 years, but no longer; whilst the Mills Amendment proposed to increase the rate each year until the member attained the age of 65 years.

No notice of such proposed amendment was given to the subordinate lodges, and, in my opinion, it is no answer to say that although no such notice was given, yet notice of some other proposed change was given which, as a matter of parliamentary practice, might be amended to the effect set forth in the Mills Amendment.

As to the contention that under the provisions of section 14, above quoted, Grand Lodge could of its own motion enact, alter, and amend the "Constitution" laws, rules, and regulations of the Order, without notice of the proposed amendments to the subordinate lodges; if Grand Lodge has such unrestricted right to alter its "Constitution," then the provision of section 169 as to notice would be meaningless. The two sections must be read together, and then full effect can be given to both of them; that is, Grand Lodge may alter and amend the "Constitution," provided notice as required by section 169 has been given to the subordinate lodges.

Mr. Johnston further contended that the question of rates was a mere matter of detail, and that a change therein was not, in a parliamentary sense, a constitutional change. A perusal of book "A" shews that the word "Constitution" there used is not used in its strict technical sense. The title of the document is "Constitution of the Grand Lodge of the Ancient Order of United Workmen of the Province of Ontario," and it deals with a variety of matters, such as the powers of Grand Lodge and of the subordinate lodges, the methods of carrying on business by the different branches of the Order, the powers and duties of their various officers, the rights and liabilities of the members, the creation and maintenance of a reserve fund and a beneficiary system, and other matters. No distinction, in this document, is drawn between what might be considered constitutional principles, and what, mere details; but all are dealt with in the one instrument in consecutive sections from 1 to section 172, and together represent the nature of the compact between the Order and its members, and the rights of its members between themselves.

The change proposed by the Mills Amendment is a most material change. In fact, it is difficult to imagine any alteration of this compact which might have more serious results than

would one affecting the assessment rates, and I cannot assent to Mr. Johnston's contention that they may be changed at the mere will of Grand Lodge, without previous notice to the subordinate lodges as required by section 169.

For these reasons I think the judgment appealed from should be affirmed with costs here and below, and that the injunction should remain perpetually. Having reached the foregoing conclusion, it is not necessary to deal with other objections advanced by the plaintiffs.

Mulock, C.J.

CLUTE, J.:—Section 169 of the constitution upon which, in my opinion, the whole question turns, is as follows:—

Clute, J.

> Alterations and amendments to this constitution may be made at any annual meeting of Grand Lodge by a vote of two-thirds of the number to which the members present at such meeting are entitled, provided that all such alterations and amendments are forwarded to the Grand Recorder on or before the 31st day of October in order that a copy thereof may be sent to each subordinate lodge, and to all members of the executive committee and officers of Grand Lodge before the 15th day of November following.

The executive committee had made a report recommending a change in the rate. Notice of this report had been sent down to the subordinate lodges. At the meeting of Grand Lodge this report, recommending that sec. 63 of the Constitution, which contained the tariff indicating the amount to be paid monthly, be amended in the way there suggested. This report was not adopted. A motion was brought in proposing to amend sec. 63, and this motion was declared carried. As to whether it was in fact ever properly voted upon or not, I will deal with later. The motion had not in fact been forwarded to the Grand Recorder on or before the 31st of October preceding the meeting of the Grand Lodge, nor was a copy thereof sent to each subordinate lodge as required by sec. 169. This, in my opinion, was a prerequisite to the proposed amendment being passed by the Grand Lodge.

It was urged by Mr. Johnston that the amendment in question was not in fact an amendment of the Constitution. I cannot accede to this view.

The section in question which it is proposed to amend provides for the rate which each member has to pay. This formed the basis of the contract entered into with the defendant society. The proposed amendment in regard to those whom it affected, about doubled the rate, and was a most material change from that which existed at the date of membership. The section in question falls within the class of subjects dealt with under the head of "Constitution of the Grand Lodge of the Ancient Order of United Workmen," and sec. 169 expressly provides how this constitution may be amended.

From the numerous amendments heretofore made, it is clear that the society always treated matters of equal or less import-

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ance as amendments to the Constitution. It is not, I think, governed by cases applicable to corporations, but forms a part of the basis upon which individuals entered into a contract and became members of the association, and when the Constitution itself declares the only manner in which the basis of the contract can be changed, it is a condition precedent to such change that such requirements should be complied with.

The case of *Bartram* v. *Supreme Council of the Royal Arcanum*, 6 O.W.R. 404, referred to by Mr. Johnston, supports, I think, the plaintiff's contention. It was there held that the Grand Lodge had power to make changes in the by-law governing the plaintiff's contract, but it also expressly states that those changes had been made according to the rules governing the plaintiff and defendants. In the present case, the proposed change has not been made in accordance with the rules of the society in such case. Even in the case of a company it is very doubtful whether the amendment would have been in order. As pointed out the amendment was a proposal to increase the rate by nearly doubling the amount of that mentioned in the report which had been sent out to the local lodges. Had there been a general notice that a change would have been made in the rate, leaving it entirely open, the delegates then might have been instructed what to do, but where the proposed increase was definitely stated and the amendment greatly enlarges the liability of the class affected, this was to spring a question upon the delegates for which they might be wholly unprepared and uninstructed, and as is said by the learned author, Palmer's Company Law, 9th ed., 174:—

> For it is not fair to call the members together for an apparently limited and small object, and then to spring on them a much larger proposal. Those who are absent may have stayed away because they are content with what is proposed in the notice, and those who are present by proxy, are presumed to have given proxy on the basis of the notice,

citing *Teede and Bishop, Limited*, [1901] W.N. 52, and *Clind* v. *Financial Corporation*, 5 Eq. 461; *Wall* v. *London and Northern Assets Corporation* (No. 1), [1898] 2 Ch. 469, 484; *Stroud* v. *Royal Aquarium Society*, 89 L.T. 243.

I, therefore, think that the amendment was not legally passed by the Grand Lodge. But there is another ground which I think equally fatal to the defendants' contention. The representative from each lodge represented a number of voters, and upon any question for decision by the Grand Lodge it was the number of voters as represented by the delegates from the local lodges that decided all questions there submitted. It is quite clear that no attempt was made to ascertain how the actual vote stood. When the amendment was put, 94 of the members present stood up as against the amendment and 212 voted in favour of the amendment. There was no attempt to ascertain how many votes each of these individuals represented.

It appears that in some cases the delegates of a single lodge represented 400 or more; in other cases it might be a score or less. So that the number of individual delegates who voted for or against the motion formed no criterion whatever as to the number of votes that should be cast for or against it. There was a dispute as to whether it was carried or not. It was contended by Mr. Johnston that upon this point the action of the chairman in declaring it carried is conclusive and that in any case there was no call for a ballot, or if there was there should have been an appeal upon this question to the lodge. I think upon the admitted facts that no vote was taken shewing or intending to shew or providing means of shewing what the real vote was for or against the amendment, and that while the chairman was empowered to give a decision as to vote, that applies only where a vote has in fact been cast. But in the present case as no such vote was cast there could be no such decision as to what it was, and that the amendment never was in fact passed by the Grand Lodge.

The case of *Arnot* v. *United African Lands Co., Limited*, [1901] 1 Ch. 518, relied on by Mr. Johnston, does not, I think, govern the present case. In that case it was expressly provided by the company's articles that the vote might be taken, as it there was taken, by a show of hands, and that a declaration by the chairman that a resolution has been carried, and an entry to that effect in the books of the company should be sufficient evidence of its having been carried. The Companies Act under which incorporation was made, sec. 51, also expressly provides that a declaration of the chairman that a resolution has been carried is made conclusive evidence of the fact unless a poll is demanded. That case and *Re Hadleigh Castle Coal Mines Limited*, [1900] 2 Ch. 419, are commented upon and distinguished in *Re Caratel (New) Mines Limited*, [1902] 2 Ch. 498, where it was held that notwithstanding sec. 52 of the Companies Act, a declaration of the chairman of a meeting is not conclusive where the declaration shews on the face of it that the statutory majority has not voted in favour of the resolution. There is no clause governing the present case as in the Companies Act and in the charters referred to, and there was no attempt to ascertain the actual vote taken, having regard to the number of votes which each representative had the right to give. There was, in truth, no vote in fact taken as required by the rules of the association, and there was no announcement, therefore, that could be made by the chairman. What took place was wholly nugatory, in my judgment, as to deciding the question one way or the other. The injunction should, therefore, be made absolute with costs of action, including the costs here and below.

SUTHERLAND, J., agreed with the judgment of MULOCK, C.J. Sutherland, J.

Appeal dismissed.

N.S.

JOHNSTON v. COUNTY OF HALIFAX.

S. C. 1913

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Drysdale, and Ritchie, JJ. February 5, 1913.

Feb. 5.

1. HEALTH (§ II—5)—EPIDEMICS—CONTAGIOUS OR INFECTIOUS DISEASE—PRIMARY AND SECONDARY LIABILITY.

The municipality is primarily liable for obligations incurred by a local board of health under N.S. Acts 1910, ch. 6, secs. 25 and 29, in connection with the suppression of contagious or infectious disease with a remedy over against the patient or other person or persons liable for his support if able to repay. (*Per* Graham, E.J., and Ritchie, J., on an equal division of the Court.)

[*Cameron* v. *Dauphin*, 14 Man. L.R. 573, followed.]

2. PLEADINGS (§ I M—95)—FAILURE TO PLEAD—ADMISSION BY.

Failure to deny an allegation in the statement of claim that plaintiff is a physician "duly registered" is equivalent to an admission.

Statement

AN appeal by the defendant from the judgment at trial in an action brought by plaintiff, "a physician duly registered under the provisions of ch. 103 of the Revised Statutes of Nova Scotia," to recover the sum of $168, for services as a physician and for medicines and disinfectants supplied at the instance and request of the board of health for the district of Tangier, in the municipality of the county of Halifax, in connection with the suppression of infectious or contagious diseases within said municipality. The defence denied the various allegations contained in the statement of claim, including the authority of the board of health of the district, to engage the plaintiff to perform the services and supply the drugs, etc., sued for. The cause was tried before Russell, J., who gave judgment in favour of plaintiff for the amount claimed. The learned trial Judge held that the services rendered by plaintiff were rendered in good faith and their value was not disputed. They were necessary in order to the preventing the spread of infectious diseases (diphtheria and small-pox) in the district in which they were rendered. The procedure was irregular in some respects, but he thought the substantials had been complied with. It was objected that the plaintiff did not prove the fact of his registration, but this was alleged in the statement of claim and was not denied and must be taken as admitted. The judgment concluded:—

> The contention is made by the defendant that there is nothing in the Health Act to authorize the board to employ a physician to attend such cases. I agree that there is no specific provision to that effect. But there is a provision making all the necessary expenses incurred by a local board in suppressing any infectious or contagious disease a municipal charge, and I think the suppression of such diseases involves the curing of the person affected.

The appeal was dismissed, DRYSDALE, and MEAGHER, JJ., dissenting.

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DRYSDALE, J. (dissenting):—The plaintiff's claim is for services and for medicines supplied to patients at the instance and request of the board of health for the district of Tangier, in the defendant municipality.

The charges are reasonable and the learned trial Judge, being of opinion that all necessary expenses incurred by a local board in suppressing infectious diseases, were by the Public Health Act made a municipal charge, directed recovery in the action. The question turns wholly upon a proper construction of the Consolidated Public Health Act, ch. 6, of the local Acts of 1910. On a consideration of the provisions of this Act I am of opinion that the scheme of the Act is to make first such attendances and services as provided in this case primarily a charge on the patient or the patients or others liable for the support of such patient, and in the event of such patient or others liable for his support being unable to pay for such services, then that the same should be a charge on the municipality. Sec. 25 of the Act deals with the subject in express terms in the order named. It was argued that sec. 29 has a broader effect and that such section in itself makes all charges for necessary expenses incurred by a local board in suppressing any infectious disease a charge on the municipality, but I think this section must be read subject to sec. 25, and as contemplating the expenses dealt with in such sec. 25. When examined, I think sec. 29, including its sub-sections, is intended as an apportionment section and is not intended as a direct charging section. In other words, it apportions the moneys made a charge by the prior sec. 25 amongst certain sections of the municipality. So read, you have a consistent scheme of legislation and all sections given full scope without inconsisteney.

It would thus appear to me that in order to fix liability here one must look for some evidence of inability to pay on the part of the patients or those liable for their support before the municipality can be charged. An examination of the case discloses that no evidence of this kind was given, and I am constrained to hold that in the absence of any such proof the defendant municipality cannot be charged.

I think the appeal must be allowed and a new trial ordered.

Since writing this opinion, my attention has been called to a case decided by the Manitoba Court which I cannot follow. It is on a statute very similar to ours. The reasoning in that case is based on the argument of convenience—an argument not to be resorted to when the statute is not ambiguous. To follow that case would, in my opinion, necessitate entirely re-casting our statute, making a primary liability where it seems to me the Legislature intended only an alternate liability after proof of inability on the part of the patient.

Meagher, J.

MEAGHER, J., read an opinion coming to the same conclusion, holding that inability on the part of the patient to pay was

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part of the cause of action, and must be proved in due form. To make the municipality liable in the first instance was to thrust aside the primary liability created by the statute and to read out of it the word "otherwise" in sec. 25. There was no ambiguity in the statute and the argument of convenience did not arise and should not be applied. If the Legislature intended to impose a direct liability upon the municipality, one would look for a different reading, imposing such liability upon the municipality in the first instance, with a remedy over; but for some good reason—such as that the patient should discharge the liability if able—that course had not been pursued. If the question were to be decided according to considerations of convenience or inconvenience, every one who furnished a day's work, etc., might be given an action directly against the municipality. He could not appreciate the point that difficulty would arise in procuring assistance for patients if the statute were read as he thought it ought to be, because the party furnishing the assistance would know that he had the municipality to fall back upon eventually, and for that reason there need not be any thought as to who ought to be charged. The statute now was different from the statute when the cases of *McKay* v. *Cape Breton*, 21 N.S.R. 492, affirmed on appeal, *Cape Breton* v. *McKay*, 18 Can. S.C.R 639, and *McKay* v. *Moore*, 4 Russ. & Geld. (16 N.S.R.) 326, were decided.

There should be a new trial, and, he thought, with costs.

Graham, E.J.

GRAHAM, E.J.:—This in an action by a medical doctor to recover for his services and for medicines and disinfectants under the Public Health Act, 1910, ch. 6, in connection with the suppression of infectious diseases, two cases of small-pox and one of diphtheria, rendered at the instance of the board of health for the district of Tangier, in the municipality of Halifax. The amount, which is not in question, is the sum of $168.

By sec. 11 (3) it is provided that in every municipality one board of health for each polling district shall be appointed by the municipal council at the annual meeting. The councillor for the district shall be the chairman. There is a provision for a union of districts and a provision for the councillors being members and a selection of one for chairman. And in case of residence out of, or absence of a chairman from, the district, the warden and two councillors may appoint a chairman. By sec. 19 the board may, if there is a contagious or infectious disease, make regulations and appoint persons to enforce them. By sec. 21 a local board may order a person suffering from a contagious or infectious disease to be removed from any house or other place to a suitable house or place, and if he cannot be removed, to be shewn by a certificate of a medical practitioner, the board may cause the house to be vacated by the other occupants. By sec. 25 (1):—

(1) If any person coming from abroad, or residing within the Province, is infected or lately before has been infected with or exposed to smallpox, diphtheria, etc., the local board of the district, in which such person is, may make effective provision, in the manner which to it seems best, for the public safety by removing such person to a separate house, or by otherwise isolating him if it can be done without danger to his health, and by providing nurses and other assistants and necessaries for him at his own cost or charge, or the cost of his parents or other person or persons liable for his support, if able to pay the same; otherwise at the cost and charge of the municipality.

(2) The cost and charges of providing nurses, assistants or necessaries aforesaid may be recovered from such person or from his parents or other person liable for his support as aforesaid by an action by the local board, or by any person who provides such nurses, assistants or necessaries in like manner as if the same were a private debt.

29. (1) In every municipality, and in every incorporated town within the territorial limits of the county or district of which such municipality is formed, all necessary expenses incurred by a local board in suppressing any infections or contagious disease shall be a charge upon the municipality.

(2) Expenses so incurred and for which the municipality is liable shall be a municipal expenditure for the joint benefit of the municipality and the incorporated towns which before incorporation formed part of the county or (municipal) district.

Then there is a health officer appointed as an executive officer of the local board of health. By sec. 33 the health officer for the municipality or town, if he finds that an infectious or contagious disease exists, may, as seems to him best, send the person so diseased to a pest house, or hospital, or make provision for isolation. Then in the Municipal Act, R.S. ch. 70, sec. 124, the municipal council has power to vote, rate, collect, receive, appropriate and pay all sums of money required by the municipality for the following purposes:—

(*f*) The payment of any judgments recovered, or costs awarded against the municipality, with interest.

(*g*) The payment of all expenses properly incurred by the health officer, boards of health, and their officers.

I think the scheme of this legislation is comparatively simple. If small-pox breaks out in a community, the people infected do not, as a general rule, make a request to be isolated; they do not request nurses to nurse them, servants to take care of them, druggists to send disinfectants and medicines and so on, and therefore there will not be a promise in law from them to pay for these things. Of course I am aware of extreme cases where a request may be made, but that is not always a sure thing. And all the while the other members of the community are, for obvious reasons, deeply concerned in the suppression of the disease. So the Legislature has created a statutory liability to pay. In the first place, there is to be a local board of health appointed in each

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district by the municipal council, with the councillor himself at the head of it, and this board of health is given sufficiently drastic powers to do compulsorily what the small-pox patients should do, whether they are willing or not. It is this board that makes the requests. They engage the temporary hospital, the cabman, the whitewash man, the nurses and servants, and they order the disinfectants, medicines, food and so on. But the board is unincorporated and the members are the officials and agents of the municipality, and they have no funds of their own and they cannot levy rates. But the municipality has funds and can levy rates. The expenditure so incurred is to be met by the municipality. It is expressly made payable by the municipality. And as I shall presently shew, there is to be a recovery over against the patients, or the parents, or other persons liable for their support, if they are able to pay, because the expenditure is at their cost and charge, and ultimately to be paid by them.

The sole question in this case is whether the owner of the building for the temporary hospital, the cabman, the whitewash man, the nurses and servants, the druggist, grocer, and so on, must each in the first instance proceed against the patients or their parents or other persons liable for their support for the amount of their accounts, or must look to the authority which has made the request. I should think that the argument from convenience is all one way. Fancy each one of these worthy people, on getting a request or order from the chairman of the board, the councillor of the district, being told in response to an inquiry to charge it to the patients or their parents or other persons liable for their support. It must come up in that practical form.

Suppose it is a crew of infected sailors just arrived, or a mixed lot in a community. The worthy people are told to charge it to them and then sue them, and if the execution is returned *nulla bona* (for you cannot tell by looking at patients or their parents or others liable for their support whether they are able to pay or not), then by-and-by you may proceed against the municipality. With a community feeling unsafe and in a hurry, and more concerned in suppressing the spread of the malady than the patients, etc., are, I think that would be rather ineffective. There is economy, too, in the procedure I suggest, for there may be several patients with no relation between them.

I think there cannot be any question of the primary liability of the municipality and in a simple action of assumpsit. Its officials have made the request and it is given statutory authority to pay the amount and include it in the general rates. I know that if the whitewash man proceeds in this simple way there will always be a lawyer left to contend (it was not so contended here, however) that he should have proceeded by the prerogative writ of mandamus to compel the municipality to raise by assessment

the amount of his account. And that if he proceeded by prerogative writ the same lawyer would contend there is no remedy by prerogative writ because there is another remedy, a simple action of assumpsit. I think that the proper remedy is the simple action of assumpsit and a judgment of recovery thereon. And my reason is that the statutes already quoted contemplate that remedy.

There is a precedent in this Court, decided at a time when the legislation was in a more crude condition than it is now, and not as favourable to a recovery, in my opinion, as it is now. The difficulty there was that the doctor was suing in a case of small-pox patients for damages for an alleged wrongful dismissal, and the Supreme Court of Canada was equally divided as to whether the expression "reasonable expenses" covered such a case. And two of the six Judges, under the legislation as it then existed, thought that mandamus was the doctor's proper remedy, but four held that an action would lie under the old Act, R.S. (4th series), ch. 29, sec. 12, by which the reasonable expenses incurred by any board of health in carrying out the provisions of the chapter should be a county, district or city charge. This is still to be found embodied in 1910, ch. 6, sec. 29. It was held in this Court in *McKay* v. *Moore*, 4 Russ. & Geld. (16 N.S.R.) 326, that the board of health was not liable to a doctor who sued the members of it under a contract for a rescission of that contract. It was held that primarily the remedy of the plaintiff was against the municipality. Then when the doctor brought his action against the municipality he recovered: *McKay* v. *The Municipality of Cape Breton*, 21 N.S.R. 492. The headnote is in part: "The municipality is liable for the expense of a medical practitioner engaged by a duly constituted board of health to attend cases of small-pox."

On appeal to the Supreme Court of Canada, that Court, as I said, was equally divided: *Municipality of Cape Breton* v. *McKay*, 18 Can. S.C.R. 639. But Patterson, J., who thought with Ritchie, C.J., and Strong, J., that damages for wrongful dismissal was not a county charge, was not reasonable expenses, held as opposed to Ritchie, C.J., and Strong, J., that expenses might be recovered in an action rather than by a mandamus to compel the municipality to make an assessment.

And the provision at that time, R.S. (4th series) ch. 29, sec. 12, had express words after "charge" as already quoted, "and shall be assessed, etc., as the ordinary county rates."

But Ritchie, C.J., said:—

> The only funds those who supply medical attendance and necessaries can look to is that provided by the statute, namely, the county charge to be assessed as provided.

There has been an important change in the legislation. At

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that time the board of health was appointed by the provincial governor; not as now by the municipal council. And Strong, J., said with much force:—

> The latter body (i.e., the board of health) are not appointed by the county and are not in any sense its officers or agents.

So that there is really nothing in the opinions of the learned Judges in the Supreme Court of Canada, who were for reversing the judgment in this Court, in conflict with any view, it is necessary to take in the support of this case. And I rely on what Gwynne, J., said at p. 661.

This brings me to the contention which is made in this case, namely, that the provision in sec. 25 (1) "if able to pay the same," requires proof by the evidence in the case that the infected persons were not able to pay the same. Now that section, or rather sub-sec. (1), has been taken from a similar section in force in Ontario and Manitoba. It is R.S. Man. ch. 138, sec. 67. And I really cannot profitably add anything to the reasoning of the learned Judges in the case of *Cameron* v. *The Town of Dauphin*, 14 Man. L.R. 573, a case Mr. Justice Ritchie has courteously called my attention to. I follow it. There a doctor was suing as here, and there was no proof of inability of the patients to pay. Perdue, J., at 580, says:—

> The matters dealt with in the portions of the Act referred to are of pressing necessity and require prompt action in the interest of the persons affected and of the health of the whole community. It was argued that the municipality was not compellable to pay the expenses incurred under the Act until proceedings had been taken against the persons liable to pay and until it was shewn that the expenses could not be recovered from such persons. To give effect to this would be to compel all persons furnishing food, medicine and other necessaries for patients, and all nurses and other assistants giving their services, to wait for payment until the remedies against the persons ultimately liable should be exhausted. This might involve a delay of many months, during which the persons furnishing necessaries or services would receive no remuneration. I cannot believe that this was the intention of the Act. The provisions of the Act to which reference is above made appear to me to contemplate the incurring of the expense by the officials on behalf of the municipality in the general public interest, and that the municipality should be primarily liable for and should pay those expenses, recovering them, when possible, from the persons who may be proved liable to pay them. It is not intended that the officials should purchase supplies for a smallpox hospital and then tell the persons furnishing them to collect payment from the patients; nor is it intended that a nurse acting on the request of the health officer and Reeve, is a matter of great emergency, and taking charge of smallpox patients, should be ordered to wait for her pay until legal remedies were exhausted against the patients or the persons liable for their support.

I wish to add that in the argument of that case the dictum of Burton, J.A., in the case of *Township of Logan* v. *Hurlburt*,

23 A.R. (Ont.) 628, 657, was cited and was not followed. This dictum was followed by the trial Judge in *Ross* v. *Township of London*, 20 O.L.R. 578, but in the Court of Appeal but one Judge mentioned the matter, *Ross* v. *Township of London*, 23 O.L.R. 74, 80, and it was not necessary in either case to the decision. The board had not given the order on the treasury of the municipality, as that statute required; therefore the municipality was not yet in default.

But here in Nova Scotia we have a provision, sub-sec. 2 of sec. 25 already quoted and first passed by way of an amendment in 1906, ch. 21, sec. 3, which really confirms the reasoning in the case from Manitoba.

The cost and charges of providing nurses, assistants or necessaries aforesaid, may be recovered from the patients or their parents or persons liable for their support in an action by the local board or by any person who provides such nurses, assistants or necessaries in like manner as if the same were a private debt.

Now, why is this action legislatively given to the local board against the patients, etc., if the nurses and so on must first sue the patients, etc., in order to recover the costs and charges? If the recovery against the patients is not really a recovery over, surely that sub-section points to an action to recover over against the patients, etc., the cost of providing nurses, etc. Why the cost and charges of "providing nurses"? That does not point to the nurse bringing an action against the patients, etc. I suppose the additional words "or by any person who provides such nurses, etc.," refer to the health officers or persons empowered to put in nurses, etc.

Upon a proper construction of sec. 25 there is nothing which provides that the persons concerned in providing assistance to suppress an infectious or contagious disease, as well as benefiting at the same time the infected patients, must first seek a remedy against the patients, their parents or other persons liable to their support, before proceeding against the municipality. The Legislature is simply saying that although the local board makes the requests and incurs all these expenses, they are to be ultimately borne by the patients, and if they are not able to bear them they have to be borne by the municipality. That seems to me to be a reasonable construction of the provision. There can hardly be any doubt that the local board employing a doctor would be providing necessaries within the meaning of the statute. No one, in a case of small-pox at least, is fit to take a step in its suppression except a doctor or someone on the advice of a doctor.

In the Manitoba case just cited the doctor recovered and the words of the provision were the same.

There is another defence, or, rather, a contention, because there was no issue on the pleadings to admit it. By the Medical

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Act, ch. 103, sec. 22, it is provided that no person shall practise medicine, surgery, etc., unless his name is registered in the medical registry. Sec. 25: No person shall be entitled to recover in any Court of law any charge for medical or surgical advice or attendance or—for medicines—unless he proves upon the trial that he is registered under this chapter.

The plaintiff in his statement of claim alleged, "The plaintiff is a physician duly registered under the provisions of ch. 103, R.S.N.S. and amendments thereto," and it was not denied in the statements of defence. Now the plaintiff in his evidence said: "Am a physician duly qualified under the law of Nova Scotia." And this was not objected to. Perjury could be assigned upon such a statement. Perhaps the best evidence, at least competent evidence, would have been a copy of the Royal Gazette, which annually publishes the register, hanging up in the office of the officer of the Court down stairs. But I think this sworn oral statement without objection quite sufficient to satisfy the interest of the public. It is not a matter for the party; he has not pleaded it. It was not one of the issues joined and therefore would not be submitted to a jury on a jury trial. It is for the Judge, and as a Judge in questions of fact of that kind which are for him, even on a jury trial, he has a latitude in respect to the nature of the proof, whether primary or secondary evidence. Suppose there was no trial, as there is not in all cases where a patient makes default in an action brought against him by his doctor, and the patient does not attend at all. In such a case, surely, there is not required formal proof by the best evidence. I cannot seriously consider this contention, when, before us, the officer of the Court could have been directed to hand up the Royal Gazette, and as, under O. 57, rule 5, further evidence may be given on an appeal, and I have known it to be given on appeals in the Supreme Court of Canada, and in England even in the House of Lords. I would be very much ashamed, and I think it would merit strong language, if for want of putting in such further evidence, merely formal, a party should lose his case and lose a reasonable remuneration for valuable services, the justice and reasonableness of which are not even questioned. It is many, many years since I have heard of a party losing a case on any such ground, with a remedy so near by. I think, however, the qualification was quite sufficiently proved, no objection to admissibility having been taken.

The appeal should be dismissed and with costs.

Ritchie, J.

RITCHIE, J.:—I agree with my brother Drysdale that the scheme of the Act is that the expenses shall be borne by the patient, or his parents or other persons liable if they are able to pay, and failing that, by the municipality. But this does not lead me to the conclusion that the plaintiff cannot recover in this case.

Section 25 is as follows:—

> If any person coming from abroad, or residing within the Province, is infected, or lately before has been infected with, or exposed to, smallpox, diphtheria, scarlet fever, cholera or any infectious malady, the local board of the district in which such person is, may make effective provision in the manner which to it seems best for the public safety, by removing such person to a separate house or by otherwise isolating him, if it can be done without danger to his health, and by providing nurses and other assistants and necessaries for him at his own cost and charge, or the cost of his parents or other person or persons liable for his support if able to pay the same, otherwise at the cost and charge of the municipality.

Sub-sec. (2) goes on to provide that the local board or any person who provides such nurses, assistants or necessaries may recover for the same in an action against the patient or his parents or other persons liable.

But who is to provide the necessaries, etc., in the first instance? I think the local board. It is charged with this duty. Under the statute it is created for the purpose of dealing promptly with emergency when it arises and safeguarding the public health by making, in the words of the statute, "effective provision" among other things "by providing nurses and other assistants and necessaries."

This "effective provision" is to be made by the local board. It would not, in my opinion, be "effective provision," for the local board to say to a doctor: "Here is a patient stricken with small-pox; go and attend him; he is bound under the statute to pay you, or his parents or someone else is; if he or they do not pay you, you can recover in an action against the municipality. You must assume the burden of proving by legal evidence at the trial their inability to pay. If you succeed in doing this then the municipality is liable." The doctor might well decline to accept this burden, and say: "If the board directs me to attend, the municipality must be liable to me; otherwise I will not undertake the case."

Sec. 25, which I have quoted, is the same as sec. 67 of the Manitoba Public Health Act, and *Cameron* v. *Dauphin*, 14 Man. L.R. 573, is in point. At 575, Richards, J., said:—

> In any case it should not be held, I think, that the municipality is not liable in the first instance, unless the statute clearly so states, otherwise there would be great difficulty in procuring skilled nurses, if they knew that, after doing their work, they would have to enquire into the ability of the patient, or his parents, or others liable for him, to pay them, and to take the risk of having to prove that inability before becoming entitled to be paid by the municipality. From the nature of such cases the health officer must act promptly, or endanger the life of the patient and the public safety. A construction of the Act which would make it extremely difficult to get nurses and assistants, as that argued for the defence, should, I think, be only arrived at if the Act were clearly open to no other.

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It is, I think, clear that the municipality must bear the expense in the first instance, in order to make reasonably "effective provision" in the interests of the public health, the safeguarding of which is the object and purpose of the statute. My view of the statute is that the local board is authorized to do what was done here, namely, make a contract with a doctor to attend the patient and furnish the necessary medicine, and that, having made that contract, the municipality is bound to pay. But by virtue of the words "at his own cost and charge or the cost of his parents or other person or persons liable for his support," the municipality has a remedy over and a right of action against the patient or his parents, etc., to recover for "the nurses and other assistants and necessaries" provided by the municipality.

By sub-sec. (2) of sec. 25, this right of action is recognized, and the intention of the Legislature in this regard is, I think, made clear. And this is in accord with the scheme and purpose of the statute. It is, of course, of the greatest importance that an emergency dangerous to the public health be dealt with promptly, and, bearing this in mind, it is, I think, a reasonable construction to hold that the local board had authority to pledge the credit of the municipality in the first instance, in order to secure prompt assistance, leaving the municipality to its remedy over under the statute against the patient or others liable.

Objection is taken that the plaintiff cannot recover because proof was not given at the trial, as required by sec. 25 of the Medical Act, that the plaintiff was registered. I think the answer to this is that there was such proof. The plaintiff in his direct examination said: "Am a physician duly qualified under the law of Nova Scotia." He could not be duly qualified under the law of Nova Scotia unless he was registered under the Medical Act. Of course it may be said that this was not the way to prove it, the Royal Gazette containing the list of registered names should have been produced. But this objection, if intended to be relied on, should have been taken at the trial. The evidence which would have been insufficient if objected to on the trial has, I think, for want of such objection, become cogent proof. If the objection had been raised, no doubt the counsel for the plaintiff would have put in the Royal Gazette. This evidence at the trial distinguishes this case from *Sherwood* v. *Hay* and the other cases cited on this point by Mr. O'Connor.

Registration is alleged in the statement of claim and not denied in the defence. Under our system of pleading, material facts alleged and not denied are admitted. It is exactly the same in legal effect as though the defendants in their defence said: "We admit that the plaintiff was duly registered under the Medical Act." In this state of the pleadings the action is tried. Counsel for the municipality made no suggestion at the trial that

he was relying upon non-registry. If he had done so, nothing could have been easier than to put in the copy of the Royal Gazette. Counsel trying the cause refrained from raising the objection. It would have been a useless one then, because it would have been so easily remedied. But, on the argument, counsel for the municipality raises the objection. I am glad that I do not feel obliged under the law to defeat an honest claim by permitting this course to be successful.

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

Appeal dismissed, on an equal division.

KLINE v. DOMINION FIRE INSURANCE CO.

(Decision No. 2.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, and Brodeur, JJ. December 20, 1912.

1. INSURANCE (§ II E 1—91)—FIRE INSURANCE ON GOODS—CHANGE OF LOCATION.

Antedating a consent to a transfer, of a fire insurance policy covering a stock of goods on their removal from one warehouse to another, will not operate to bind the insurance company, when obtained after the fire, but without disclosing the fact, in the knowledge of the insured but not known to the insurance company, that the fire had already occurred.

[*Kline* v. *Dominion Fire Ins. Co.*, 1 D.L.R. 733, 25 O.L.R. 534, affirmed.]

Statement

APPEAL from a decision of the Court of Appeal for Ontario, 1 D.L.R. 733, 25 O.L.R. 534, affirming the judgment at the trial in favour of the defendants.

The appeal was dismissed.

The defendants pleaded several defences to the action on the policy insuring plaintiffs' tobacco in Quincy, Fla., but the only one dealt with on the appeal was that at the time of the loss the policy only covered goods in another building.

Argument

D. L. McCarthy, K.C., for the appellants:—The defendants are estopped from denying that the New York firm were their agents: *Montreal Assurance Co.* v. *McGillivray*, 13 Moo. P.C. 87. at 121. Being agents, they had authority to issue the binder: *Eastern Counties Railway Co.* v. *Broom*, 6 Ex. 314. The issue of the binder was ratified: *Lewis* v. *Read*, 13 M. & W. 234; *Williams* v. *North China Ins. Co.*, 1 C.P.D. 757. Even if the New York firm were agents of respondents, they could not license a removal of the stock insured without express authority in writing. The policy so provides, and see *Western Assurance Co.* v. *Doull*, 12 Can. S.C.R. 446. The indorsement on the policy after the loss

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would not have ratified if the respondents had knowledge of the fire: *Grover* v. *Mathews*, [1910] 2 K.B. 401.

Hamilton Cassels, K.C., for respondents.

SIR CHARLES FITZPATRICK, C.J.:—I would dismiss this appeal with costs. The action is brought on a policy of fire insurance issued by the respondents through their agents in New York, to cover a stock of tobacco in a warehouse described as situated on the southeast corner of Love and Washington streets, in the town of Quincy. The policy is dated 3rd September, 1908, and the fire occurred on the night of the 18th March, 1909; the amount claimed is $2,000.

There are several defences, the substantial one being, that, by reason of changes in the contract of insurance previously made at the request of the insured, the goods were not, at the time of the fire, within the protection of the policy. In December, 1908, it was found necessary by the insured to transfer the tobacco from the warehouse, at the corner of Love and Washington streets, to the Owl warehouse in the suburbs of Quincy, and this was done with the consent of the company, evidenced by the memorandum attached to the policy and dated 14th October, 1909. So that at the moment of the fire the subject of insurance was tobacco stored in the Owl warehouse, whereas the goods actually destroyed and for the value of which this claim was made, had been removed from that location several weeks before. There can be no doubt as to the fate of this claim if there was nothing else on this record. And I must confess my inability to understand how the liability of the respondents has been affected by the subsequent happenings upon which the appellants rely. It is useless to insist upon the many reasons which may be urged to support the company's contention, that the location of the goods insured materially affect the risk; they are so obvious as not to require mention. For the better understanding of the appellants' case I will briefly state all the facts. As I said before, the policy was issued by the company's agents in New York, and the indorsement consenting to the change in the location was given through the same agency. When, however, the appellants were prepared to transfer the tobacco to the corner of Love and Washington streets, the New York agency was closed, a fact which came to the knowledge of the appellants' insurance broker either at the time, or immediately after the application for the consent of the company to the change was made at the office in New York occupied by their former agents. In my view, however, the broker's knowledge of the closing of the agency is not of major importance because of the other facts of this case. Whatever may be the truth as to this, the brokers, when they applied for the consent of the company to the re-transfer, were content to accept from a clerk in the office of the company's former agents,

instead of the document which they had prepared, a document known amongst insurance brokers as a "binder," and which it is alleged operates according to the custom of insurance brokers in New York, to bind the company until such time as a more formal agreement is issued. Whatever may be in some circumstances the effect of a "binder" issued by a qualified agent, when the policy is first applied for, I entertain no doubt that it was of no value in the circumstances of this case.

Excluding from consideration those cases where the agent is clothed with all the powers of the company itself, and has authority to issue and cancel policies of insurance generally without reference to the head office, I agree fully with the respondents' counsel who, in his very able factum, makes the distinction between the powers to be implied in the case of insurance agents when taking new risks, and their powers when assuming to deal with risks already in existence. In the former case a person dealing with the agent is entitled to assume that he has the general powers of an insurance agent, and within the scope of his ostensible authority, has power to bind the company to the extent of the risk accepted by the agent, even though, as a matter of fact, in accepting such risk, the agent is exceeding his authority. But where, after a risk has been accepted, and the terms of the contract are embodied in a policy, the agent is applied to for permission to change the location of the goods insured, or any of the conditions of that policy, the applicant deals with that agent at his peril, and if in fact the agent has no authority, the assent given by him is of no avail, even although the person obtaining the assent has no knowledge of the lack of authority. Here, of course, it cannot be successfully pretended that the agent had any authority to issue the "binder" in view of this condition of the policy which the insured or their agents had at the time in their possession:—

> In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of the company,

and admittedly there was no such writing. It is also provided that the entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured, or if any change takes place in the subject of insurance, unless otherwise provided by agreement indorsed on the policy or added thereto, and there is no such agreement here. As I have already said, a change of location in the subject of insurance would, as materially affecting the risk, come within that provision. It may almost be accepted as an axiom in insurance law "that the locality and surroundings of insured property are always considered material by insurers in accepting and rejecting applications for insurance, is a matter of common information to which the Courts cannot be indifferent in the decision of questions of this character": Beach on Insurance, vol. 2, sec. 623. But it is

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said that on application to the company at its head office in Toronto the action of the clerk who issued the "binder" was ratified, and the consent of the company then given operated retroactively to validate the action of the clerk (14th January, 1909). It is impossible to accept this contention. At the time the assent of the company was given—March 26th, 1909—the fire had actually occurred and the subject-matter of the insurance had been destroyed. The company could not insure with the knowledge of the loss, and, of course, there can be no ratification if the principal could not make the contract at the time he is asked to ratify it.

Here we have this additional fact, which certainly does not help the appellant. At the time the assent of the company was given the insured's agents knew that the goods were destroyed, and, notwithstanding, they carefully kept that fact concealed from the company. It is unnecessary to comment on such lack of candour. The assent could not in any case be referred back to the date of the binder, because it was given without any reference to it; the company appears to have been kept in ignorance of the fact that such a document ever existed. I also agree with Mr. Justice Garrow when he says that in any event the application to the company for its consent to a re-transfer of the goods should not have been delayed from the 14th January to the 26th March. For the neglect which caused the loss the appellant must now bear the consequences; the respondent company is not in any way responsible.

DAVIES, J., concurred with the Chief Justice.

IDINGTON, J.:—I think this appeal must be dismissed with costs.

DUFF, J.:—I concur in dismissing this appeal with costs.

BRODEUR, J.:—I concur with the Chief Justice.

Appeal dismissed.

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Re HOLMAN and REA.

(Decision No. 2.)

Ontario Divisional Court, Middleton, Lennox, and Leitch, JJ.
December 6, 1912.

1. PROHIBITION (§ IV—17)—JUSTICE OF THE PEACE—PROCEEDINGS AFTER DISMISSAL OF CASE.

Prohibition to an inferior court will not be refused on the ground that the proceedings in that court are at an end by the dismissal of the case therein, so long as anything remains to be done to complete the proceedings sought to be prohibited, *ex. gr.*, the granting of a statutory certificate of dismissal so as to enable the dismissal to be pleaded in bar to any future proceeding.

[*Brazill* v. *Johns*, 24 O.R. 209, and *Mayor of London* v. *Cox*, L.R. 2 H.L. 239, followed.]

2. PROHIBITION (§ III—10)—PARTIES OR STRANGER MAY APPLY.

It is not essential that the party applying for a prohibition to an inferior court which is exceeding its jurisdiction shall be a party to the cause; the motion will lie at the instance of a stranger.

3. PROHIBITION (§ V—33)—INTERIM PROCEEDINGS IN—PROCEDURE.

The court has no power, pending an application for prohibition, to make an interim order staying the proceedings in the inferior court as to which the prohibition is sought. (*Per* Middleton, J.)

[*Myron* v. *McCabe*, 4 P.R. (Ont.) 171, referred to.]

4. JUSTICE OF THE PEACE (§ III—10)—PRELIMINARY ENQUIRY — WHEN EXCLUSIVE JURISDICTION ACQUIRED BY JUSTICE TAKING INFORMATION.

The provision of sub-sec. 3 of sec. 708 of the Criminal Code 1906, which declares that it shall not be necessary for the justice who acts before the hearing, *ex. gr.*, in issuing the summons or warrant, to be the justice by whom the case is to be heard, applies only to summary conviction proceedings under part XV. of the Criminal Code 1906, and not to preliminary enquiries for indictable offences.

[*Re Holman and Rea*, 7 D.L.R. 481, 4 O.W.N. 207, reversed.]

5. JUSTICE OF THE PEACE (§ III—12)—PRELIMINARY ENQUIRY—TRANSFER OF CASE TO ANOTHER JUSTICE.

When a magistrate has become seized of a case by taking the information for an indictable offence no other magistrate having general concurrent jurisdiction with him can acquire jurisdiction to intervene and preside at a preliminary enquiry, even with the consent of the first magistrate, except in so far as such course is authorized by statute in special circumstances such as illness or absence of the first magistrate.

[*Re Holman and Rea*, 7 D.L.R. 481, 4 O.W.N. 207, reversed; *R.* v. *McRae*, 28 O.R. 569, referred to.]

6. JUSTICE OF THE PEACE (§ III—10)—PRELIMINARY ENQUIRY—JURISDICTION—DEFENDANTS RIGHTLY BEFORE THE JUSTICE.

Criminal Code sec. 668 directing the justice to proceed to inquire into the matters charged when a person is before a justice and is accused of an indictable offence is to be limited to cases in which the accused is rightly before such justice. (*Per* Middleton, J.)

Statement

APPEAL by N. J. Holman from the judgment of Sutherland, J., *Re Holman and Rea*, 7 D.L.R. 481, 4 O.W.N. 207, dismissing a motion for prohibition.

The appeal was allowed.

C. A. Moss, for N. J. Holman.

R. C. H. Cassels, for the respondent.

Middleton, J.

MIDDLETON, J.:—An information was laid by Holman before the Police Magistrate at Stratford, charging Rea with the theft of a horse. A warrant was issued, and Rea was brought before the Police Magistrate at Stratford, when he was admitted to bail and directed to appear for trial before the Police Magistrate at St. Mary's.

The accused thereupon went before the Police Magistrate at St. Mary's, surrendered himself into custody on the charge, pleaded not guilty, and elected to be summarily tried by that magistrate. The complainant objected to the trial proceeding before the Police Magistrate at St. Mary's, and his counsel at-

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tended and protested against the assumption of jurisdiction; whereupon the magistrate proceeded with the trial, and the informant not appearing, the magistrate—although served with the notice of motion for prohibition—acquitted the accused. The informant had been served with a subpœna to attend, but failed to do so.

Upon the motion for prohibition the learned Judge took the view that the course adopted was justified by section 708 of the Code; his attention not having been drawn to the fact that this section is one of the group of sections, 705 to 770, relating entirely to summary convictions, and that the case in hand was a summary trial of the accused by his consent for an indictable offence.

The learned Judge also relied upon section 668 of the Code, which provides that "when any person accused of an indictable offence, is before a justice, whether voluntarily or upon a summons . . . the justice shall proceed to enquire into the matters charged against such person in the manner hereinafter directed." This section, then, does not purport to confer jurisdiction, and must, I think, be confined to cases in which the accused is rightly before the justices; in which case the procedure to be followed is pointed out.

Upon the argument counsel failed to point out any section authorising the adoption of the course pursued in this case. The case, therefore, falls to be determined upon general principles.

Regina v. *McRae* (1897), 28 O.R. 569, determines that where an information is laid before a magistrate he becomes seized of the case and that no other magistrate has any right to take part in the trial unless at the request of the magistrate before whom proceedings are taken. All the magistrates in the county have jurisdiction; but so soon as proceedings are taken before any one of these officers having concurrent jurisdiction he becomes solely seized of the case. The magistrate has under the statute, and possibly apart from the statute, the right to ask other magistrates to sit with him; and, if he does so, the whole Bench becomes seized of the complaint: *Regina* v. *Milne*, 15 U.C.C.P. 94.

The statute relating to Police Magistrates, 10 Edw. VII. ch. 36, sec. 18, recognizes this principle. So also do sections 10 and 34, which provide that the Deputy Police Magistrate, or, if there is no Deputy, any other Police Magistrate appointed for the county, may proceed for the Police Magistrate in the case of his illness or absence. Neither of these sections gives to the magistrate any power, once he has undertaken the case, to discharge himself, save in the case of illness or absence. He has no power to request another magistrate to sit for him. Contrast the provisions of the two sections with section 18, which provides that in the case falling within it, the magistrate may so request.

By section 31, where the case arises out of the limits of the city, the Police Magistrate is not bound to act; but if once he does act it appears that he must continue to the end.

This view of the statute is quite consistent with the view taken in *Regina* v. *Gordon*, 16 O.R. 64.

It is argued on behalf of the respondent that prohibition ought not now to be awarded, because nothing remains to be done before the magistrate. The magistrate has acquitted. He has no jurisdiction. All that he has done is a nullity, and it may be that a more proper motion would have been for a certiorari, so that the proceedings taken before the magistrate might be quashed. But I think there is yet one thing that the magistrate may assume to do, and that is to grant a certificate of acquittal; therefore, prohibition may yet be awarded.

As was said in *Brazill* v. *Johns*, 24 O.R. 209, a prohibition may be granted at the very latest stage, so long as there is anything to prohibit. From the very earliest times this has been recognized as the guiding principle. In the historic answers of the Judges to the articuli cleri, resulting in the statute 9 Edw. II. ch. 1—found in 2 Inst. 602—it is said: "Prohibitions by law are to be granted at any time to restrain a Court to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintained the contrary . . . for their proceedings in such case are coram non judice; and the King's Courts that may award prohibitions, being informed either by the parties themselves or by any stranger that any, temporal or ecclesiastical, doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same as well after judgment and execution as before." A statement which is referred to with approval by Willes, J., in *Mayor of London* v. *Cox*, L.R. 2 H.L. 239.

I have the less hesitation in awarding prohibition, where the magistrate proceeds with the hearing of the case having knowledge that his jurisdiction is disputed. It would be more seemly for all tribunals charged with the administration of justice to act in such a way as to avoid any suspicion that the course adopted is in any way the result of temper.

Here, the magistrate, knowing that his jurisdiction was disputed, and after having been served with a notice of motion for prohibition, dismissed the charge without having heard the informant's evidence, and apparently sought to put the informant in the position of either attorning to his jurisdiction by appearing in obedience to his summons, or risking everything upon the result of the motion. It would have been more consistent with judicial dignity to have enlarged the hearing until the question of jurisdiction had been determined.

There is no power in the Court to stay proceedings in an in-

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ferior Court pending the hearing of the motion: *Myron* v. *McCabe*, 4 P.R. 171; and this should make all inferior tribunals reluctant to act in a way that will afford any foundation for the argument here presented, that the motion is rendered nugatory by what has been done after the motion was on foot.

The citation from Coke also answers another objection made to this motion, that the informant had no locus standi to apply.

I think it my duty to draw attention to another matter appearing upon the material. In *Livingston* v. *Livingston*, 13 O.L.R. 604, the Court has spoken with no uncertain sound concerning the position occupied by local masters who are by law allowed to practise. What is there said does not apply to the full extent to the conduct of Crown Attorneys; who are, unfortunately, I think, allowed to practise generally. But what has taken place in this case serves to indicate the difficulties that all too frequently arise from this mischievious state of affairs.

Holman purchased a horse from Edgerton Rea, and paid him. William J. Rea, the father of Edgerton, brought an action of replevin to recover the horse. In that action he swore that his son had no authority to sell the horse. If his evidence is true, the son is guilty of larceny. The Crown Attorney appears in the replevin action as counsel for the father. When the information is laid, the son is taken before the magistrate, the Crown Attorney is notified, appears, and consents to the case being transferred to the other magistrate, without in any way communicating with the informant. When the informant goes before the other magistrate to protest against his jurisdiction, the Crown Attorney appears to conduct the prosecution, and apparently assents to the course adopted by the magistrate in acquitting the prisoner pending the motion. When this motion is made, the Crown Attorney appears for the magistrate and argues that the Court has no jurisdiction because the prosecution is ended, and is then awarded costs against the informant. One who thinks that this indicates something wrong in the administration of justice is not necessarily an unreasonable man.

The appeal should be allowed, and the prohibition granted, with costs against the respondent and the magistrate.

Lennox, J.
Leitch, J.

LENNOX and LEITCH, JJ., agreed in the result.

Appeal allowed.

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Oct. 21.

Ontario Divisional Court, Falconbridge, C.J.K.B., Riddell, and Sutherland, JJ. October 21, 1912.

1. MECHANICS' LIENS (§ VIII—66)—TIME OF REGISTERING LIEN—JUDGMENT IN ACTION OF OTHER LIENHOLDER, EFFECT OF—MECHANICS AND WAGE-EARNERS' LIEN ACT (ONT.).

Where a lienholder had registered a claim of lien under the Mechanics and Wage-earners' Lien Act, 10 Edw. VII. (Ont.) ch. 69, and judgment in the action had been delivered, but not signed, a lienholder who registered his lien after the judgment was delivered may be let in to prove his claim on payment of his own costs of the application.

2. MECHANICS' LIENS (§ VIII—66)—PROCESS BY OTHER LIENHOLDER.

Any proceeding taken during the existence of a lien, is within the meaning of the words "unless in the meantime an action is commenced" in sec. 24 (1) of the Mechanics and Wage-earners' Lien Act, 10 Edw. VII. (Ont.) ch. 69, the words "in the meantime" being held to mean any time before the lien ceases to exist.

Statement

APPEAL by the plaintiffs from an order of the Local Master at Ottawa, in a proceeding for the enforcement of a mechanics' lien.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

In August, 1909, the Rideau Club of Ottawa employed H. C. Hitch & Co. to erect a building and make some additions to a building already erected on the land of the club, for $98,000. Hitch & Co., in 1910, employed the plaintiffs to furnish part of the materials for $15,250, and have paid all but $4,125 of that amount.

On the 30th June, 1911, the plaintiffs registered a claim for a lien under the Mechanics and Wage-Earners' Lien Act, 10 Edw. VII. ch. 69, sec. 17; and on the 31st July, 1911, framed, and on or about the 2nd August, 1911, filed and served a statement of claim under sec. 31 (2), (3), of that Act.

The matter came on for trial before the Master at Ottawa, under sec. 33, in October, 1911; and he gave judgment in August, 1912; but the judgment has not yet been signed.

King, a master painter carrying on business at Ottawa, had, in July, 1910, entered into a contract with Hitch & Co. for the painting and glazing of the work for $3,800. Computing extras, payments on account, etc., there was due at the completion of the work, in November, 1911, according to King's affidavit, the sum of $1,830. King did not come in in the proceedings before the Master; but on the 15th December, 1911, he registered his claim for a lien.

After some fruitless negotiations for a settlement, King applied, under sec. 37 (6) of the Act, to be let in to prove his claim. The Master made an order on the 14th September, 1912, allowing him in; he to pay the costs of the application.

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Argument

The plaintiffs now appeal, under sec. 40 (3); but, for the greater caution, have obtained leave in case Con. Rule 777 should be considered to apply.

The appeal was dismissed with costs.

J. E. Caldwell, for the plaintiffs. The question for decision arises under sec. 24 of the Mechanics and Wage-Earners' Lien Act of 1910, under which it is contended by the appellants that the respondent's lien has "ceased to exist." It is submitted that the words "in the meantime" in sub-sec. 1 of sec. 24, as interpreted by the Standard Dictionaries bear out this contention. *McPherson* v. *Gedge* (1883), 4 O.R. 246, supports this view, and is the nearest in application to the case at bar.

F. A. Magee, for the respondent, King, argued that the respondent's claim was valid, not merely under sec. 24 of the Act, but also under sec. 23. The statute does not fix any *terminus à quo* from which "in the meantime" is to begin, and was correctly interpreted by the Local Master.

Caldwell, in reply, argued that the respondent had only one lien, which he had alternative modes of realising. Having chosen his remedy under sec. 24, the provisions of which are absolute, and have no relation to the provisions of sec. 23, his lien became extinguished, as he had not complied with the conditions necessary to its continuance in force.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—The main contention is based upon the provisions of sec. 24 of the Act, and it may be thus stated:—

Liens are, for the purposes of the Act, divided into two classes: (1) liens for which a claim is not registered; and (2) liens for which a claim is registered.

The lien is given by sec. 6, and exists independently of the registration of a claim; and, when the lien is in that condition, *i.e.*, before registration of a claim, there are two courses open to the lienor: (*a*) omit to register a claim, in which case his lien will either (1) lapse or (2) be enforced by action at his own instance or that of others; or (*b*) make up his mind to take the other course, and register his claim, in which case his lien will (1) lapse on the expiration of ninety days thereafter, or (2) he must take an action within a certain time or some one else must. In this view, the lienor who registers his claim must be taken to have abandoned all relief but what he can obtain under sec. 24.

I find no crevice in this logic—the words of sec. 24 are plain and unambiguous, that "every lien for which a claim has been registered shall absolutely cease to exist on the expiration of ninety days . . . unless . . ." something is done. It is

not that the claim for a lien shall become ineffective, etc.; but that the lien itself, which exists independently of the claim, absolutely ceases to exist.

What is it then that will keep alive the lien after "the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or after the expiry of the period of credit . . ."?

It is "in the meantime an action is commenced to realise the claim or in which the claim may be realised under the provisions of this Act. . . ."

The words "in the meantime," it is contended, must mean "between the time of registering the claim and the expiry of the time limited." No doubt, the words would bear that interpretation—but with that interpretation what would be the result?

A lienor has, without registering, already commenced an action: for the sake of ordinary business caution he registers his claim—he must discontinue his action and begin *de novo*, otherwise the action is not "commenced . . . in the meantime."

Or, without registering, he is proceeding with the proof of his claim under proceedings instituted by another—he registers: he must stop; his proceedings in the pending action will be of no avail—he must bring another action or get some one else to do so.

This is manifest absurdity—still the Legislature may pass absurd legislation if so inclined. But, before we decide that that is the meaning of the language employed, we should see if there is no other interpretation possible which will not result in an absurdity.

"In the meantime," no doubt, has the primary signification "during or within the time which intervenes between one specified period or event and another:" Murray's New English Dictionary, *sub voce* "meantime," vol. 6, p. 276. col. 2, A.1. The original of "mean" is the same as that of "mesne," *i.e.*, *"medianus"* late Latin for "in the middle," from *"medius."* In strictness there is in contemplation a *terminus â quo* as well as a *terminus ad quem*, a date or event with which the period begins as well as a date or event with which it ends. But in no few instances the *terminus â quo* is not in mind at all, it is the *terminus ad quem* which is the only date, etc., in contemplation (most frequently, perhaps, it is the present time, actual or supposed, which is the *terminus a quo*). In such a case, the words are equivalent to "before such and such an event, a date, a period."

In the inquiry whether this be not the real meaning of the expression, I think the history of the legislation is all important. It is true that counsel for the respondent repudiated the idea that he could receive any assistance from the consideration of

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former statutes; but we are bound to use every means of doing justice between the parties, irrespective of what their representatives may say.

The first Ontario Act was (1873) 36 Vict. ch. 27. That, by sec. 1, gave a lien in words not dissimilar to those in sec. 6 of the present Act (1910), 10 Edw. VII. ch. 69; but in sec. 2 it was provided: "No lien under this Act shall exist unless and until a statement of claim, in the form, or to the effect in Schedule A. . . . is filed in the registry office . . ." Section 4 provides: "Such lien shall absolutely cease to exist within (*sic*) ninety days after such work shall have been completed, or materials or machinery furnished or the expiry of the period of credit, unless in the meantime proceedings shall have been instituted to realise such a claim. . . ."

Under this state of the law the lien did not exist until the filing of the claim—no proceedings by way of action, bill in Chancery or otherwise could be taken without that indispensable prerequisite; but the time of filing was wholly immaterial. When, then, it is said in sec. 4 that the lien shall cease unless "in the meantime proceedings" are instituted, there is no reference to, no contemplation of, the date of the filing. There is no intention to provide that proceedings shall not be had before the filing—no lien then existed. What is meant is simply that a lien which has come into existence "shall . . . cease to exist" unless proceedings are instituted before the expiration of certain days which have no relation to the filing at all.

That this is the real meaning is made, perhaps, more clear by the first amendment, the following year (1874), 38 Vict. ch. 20. In this Act a lien is given by sec. 2; and it is, as now, not the filing but the doing of work, supply of materials, etc., which gives the lien: *McCormick* v. *Bullivant* (1877), 25 Gr. 273.

There is often misunderstanding—as there was upon the argument before us—from not sufficiently distinguishing between the lien given by the statute and the claim for lien which may be filed. Under the previous legislation, every lienor had to take proceedings himself (or his assignee, *Grant* v. *Dunn* (1883), 3 O.R. 376): by this Act, sec. 13, any number of lienors may join in one suit.

There is in this Act no provision for filing a claim, but the Act of 1873 is not repealed—the only provision being sec. 20, "All Acts inconsistent with the provisions of this Act are hereby repealed."

It is obvious that the two Acts are not wholly inconsistent; they went on side by side, so far as they did not clash: *e.g.*, in *Walker* v. *Walton* (1876), 24 Gr. 209, it was held by the Court of Chancery that a claim for a lien registered before the com-

ing into force of the Act of 1874, followed by a bill in Chancery within ninety days from the expiry of the period of credit, was insufficient to get over the express words of the Act of 1874, sec. 14: "Every lien shall absolutely cease to exist after the expiration of thirty days after the work shall have been completed . . . unless in the meantime proceedings have been instituted to realise the claim under . . . this Act . . ." But the Court of Appeal, *Walker* v. *Walton* (1877), 1 A.R. 579, reversed this, holding that the Interpretation Act, sec. 7 (34), preserved the right of the plaintiff. But neither Court suggested that both Acts were not in force, that of 1874 as a whole, and that of 1873 so far as it was not inconsistent with the later Act.

It is sec. 14 of the Act of 1874 which most requires consideration. As we have seen, it reads: "Every lien shall absolutely cease to exist after the expiration of thirty days after the work shall have been completed . . . unless in the meantime proceedings have been instituted to realise the claim under the provisions of this Act . . . ." The same terminology "in the meantime" is used here as in the Act of 1873—and it is apparent that no *terminus â quo* was in contemplation of the legislators. I think this helps us to infer that in the Act of 1873 the meaning was, as in this Act—"A lien having attached, it becomes absolutely void unless, before the expiry of a certain period, proceedings are taken to realise it."

That the former Act continued may also be seen. In *Bunting* v. *Bell* (1876), 23 Gr. 584, after the Act of 1874, a claim was filed in the registry office on the 2nd July, and bill filed in Chancery on the 15th July: the lien was sustained.

Accordingly, when the revision was made in 1877, the two Acts were consolidated (R.S.O. 1877, ch 120). The lien was, as in the Act of 1874, given by the doing of the work, etc., and not, as in the Act of 1873, by the filing of a claim. Provision was made by sec. 4 that "a statement of claim . . . may be filed in the registry office . . . ;" by sec. 15, any number of lienors may join in one suit.

Then comes sec. 20, which purports to be a consolidation of 38 Viet. ch. 20, sec. 14, and 36 Viet. ch. 27, sec. 4: "Every lien which has not been duly registered . . . shall absolutely cease to exist after the expiration of thirty days after the work has been completed . . . unless in the meantime proceedings are instituted . . ." This, it is plain, is a continuation of the practice under the Act of 1874.

Section 21 provides: "Every lien which has been duly registered . . . shall absolutely cease to exist after the expiration of ninety days after the work has been completed . . . unless in the meantime proceedings are instituted to

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realise the claim . . .'' This is plainly, as indeed it purports to be, a transcript of the provisions of the 4th section of the Act of 1873. It is made to apply only to liens claims for which have been registered, because such liens only are provided for by the Act of 1873. The same words ''in the meantime'' are used as in that Act, and I do not think that they have any application to the date of filing at all. What is meant in this section by these words is what was meant in the Act of 1873, in the Act of 1874, and in sec. 20 of R.S.O. 1877, ch. 120—before the expiration of the period named. And no more than in the Act of 1873 was the time of filing taken into consideration, or was it intended to be provided that proceedings to be effective must be taken after the filing.

The same terminology is carried on through R.S.O. 1887, ch. 126, secs. 22, 23; (1896) 59 Viet. ch. 35, secs. 22, 23; R.S.O. 1897, ch. 153, secs. 23, 24; 10 Edw. VII ch. 69, secs. 23, 24—and the same meaning must be attached to the words in the present Act as in its predecessors.

The result is, that any proceeding taken during the existence of the lien (at all events) is taken ''in the meantime,'' within the meaning of sec. 24, if taken before the expiration of the periods mentioned in sec. 24. The proceedings taken by the plaintiffs were such proceedings in point of time. Section 32 provides that ''an action brought by a lien-holder shall be taken to be brought on behalf of the other lien-holders.'' Therefore, these are proceedings ''in which the claim may be realised under the provisions of this Act.''

The order appealed from is right; and this appeal should be dismissed, and with costs.

Appeal dismissed.

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Dec. 13.

GOWER v. GLEN WOOLLEN MILLS, Ltd.

Ontario High Court. Trial before Latchford, J. December 13, 1912.

1. MASTER AND SERVANT (§ II B 3—144)—USE OF DANGEROUS MACHINERY —RECOVERY UNDER FACTORY ACT, R.S.O. 1897, CH. 256, SEC. 19.

When the employer neglected to guard a shaft, and such want of a guard was a direct and proximate cause of the accident, the employee who is not himself negligent, is entitled to recover under the Factories Act, R.S.O. 1897, ch. 256, sec. 19.

[*Webster* v. *Foley*, 21 Can. S.C.R. 580, referred to.]

2. MASTER AND SERVANT (§ II B 3—144)—DEFECTIVE SYSTEM—RECOVERY UNDER COMMON LAW.

Where personal injury is occasioned to a factory employee by reason of defects generally in the system and equipment of the factory, the employee is entitled to recover at common law, although an action under the employers' liability statutes has become barred by the lapse of the statutory limitation of time.

Statement

ACTION by Arthur Edward Gower, an infant, aged 19, against

the defendants for injuries sustained by him while in the defendants' employment, on the 15th December, 1911.

Judgment was given for the plaintiff.

T. J. Blain, for the plaintiff.

E. E. A. DuVernet, K.C., and *F. H. Ardagh*, for the defendants.

LATCHFORD, J.:—This is an action brought by the next friend of the plaintiff, an infant, against the defendants, an incorporated company, carrying on business as woollen manufacturers in their factory at Glen William, in the county of Halton. Damages are claimed at common law, and under the Workmen's Compensation for Injuries Act and the Ontario Factories Act, for injuries sustained by the plaintiff on the 15th of December, 1911, when he was in the defendants' employ.

In opening the case to the jury, counsel for the plaintiff mentioned that the defendants' liability was covered by insurance; and I thereupon—following *Loughead* v. *Collingwood Shipbuilding Company*, 16 O.L.R. 64—required him to elect between a postponement of the trial or the dismissal of the jury. He chose the latter. I then dismissed the jury and proceeded with the trial.

The plaintiff, who was nineteen years of age at the time of the accident, had had five years' experience in England in the same kind of work that he was doing for the defendants in their spinning room on the third story of their factory.

An elevator ran between the weaving room on the ground floor of the factory and the room in which the plaintiff was employed. Until a few weeks before the accident the elevator was operated by a belt which ran from the main shaft, suspended from the ceiling of the centre of the weaving room, to a pulley connected with the elevator. Some inconvenience resulted from this, and a jack shaft was installed between the main shaft and the pulley which actuated the elevator. The main shaft was connected to this sub-shaft by a belt. From the sub-shaft to the elevator pulley was a five-inch belt, with a twist in it, so as to give the elevator pulley a reverse motion. The pulley actuating the belt to the elevator pulley was a fixed pulley; and the belt, either because of the twist or—mainly as I find—because the shaft was not properly hung, frequently came off.

The employees with few exceptions were women and children. The evidence of one of the women in the weaving room is that this belt often came off, and that then "anybody put it on again." When the belt was off, the elevator would not run, and the skips containing the yarn from the spinning room could not be brought down to the weaving floor, nor could the skips containing the emptied spools or carded wool be taken up from the ground floor or the second story to the third.

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Latchford, J.

Small boys were employed, one of them under fourteen, to take the spools, rolls and yarn from one story to another by means of the elevator.

The plaintiff had no experience in putting on belts; but on one occasion had been told by the foreman, Schofield, to take a pole and move the belt off the elevator pulley. Gower reported to Schofield what he had done, and Schofield then sent him back to put the belt on. Schofield denies this; but, having regard to the manner in which he gave his evidence, I think his denial and his testimony generally, entitled to no consideration, save when he admits that the belt came off the pulley frequently.

The only method of placing the belt on the elevator pulley was to rest a twelve-foot ladder on the greasy floor of the weaving room, and ascending the ladder until a suitable position was obtained, pull the belt over the pulley.

On the fifteenth of December the plaintiff was engaged as usual in the spinning room. He required empty spools for his mules. The spools were in the weaving room, and could be got up only by means of the elevator. At the moment a boy named Bearman came up the stairs for yarn. The elevator—the only means of taking the yarn down and the spools up—was not running. Bearman asked the plaintiff to put the belt on the elevator pulley. Bearman says that he had previously asked Preston, the only man on the weaving floor, to put on the belt, and that Preston told him he had no time and to ask another man, Eddie Hill. Bearman then asked Hill—who was cleaning cards on the second floor—and Hill also said he had no time. Neither Preston nor Hill was called to deny these statements. It was after Preston and Hill had refused to put on the belt that the request of Bearman to the plaintiff was made.

Gower and Bearman both needed, in the defendants' interest, to use the elevator; Gower to get his spools up and Bearman to bring the yarn down. Without the yarn the weaving could not proceed; nor could the spinning proceed without the spools. While the primary duty of the plaintiff was to attend to his spinning, he could at times leave his machine to do other work in his employers' interest. The foreman having once ordered him to put on the elevator belt, the urgency of this particular occasion led him to think it was also his duty to connect up the elevator in the only way practised in the factory. With that intention he went with Bearman down the stairs to the weaving room floor.

There is a conflict of evidence as to whether the ladder should have been rested against the wall or against the projecting end of the shaft in replacing the belt. The shaft, which was ten feet from the floor, was nineteen inches from the wall; and the face of the thirteen-inch pulley would be about a foot from the wall.

I find that it would have been so difficult as to be almost impossible for a person using the ladder—the only ladder available—with one end upon the floor and the other end against the wall—to place the belt upon the pulley. With the ladder against the wall in a position of stability to sustain the plaintiff—that is, with its base three or four feet from the wall—there would remain, as a simple calculation will shew, a distance of not more than six inches between the face of the pulley and the upper part of the ladder; a space into which neither man nor boy could squeeze himself for the purpose of putting on the belt.

The proper and safe position would be breast-high to the pulley. If the distance between the ladder in a stable position and the shaft itself is considered, the available space is not more than a foot—a space also inconsistent with safety.

The system adopted in putting on the belt was to rest the ladder against the end of the shaft, which projected eighteen inches beyond the pulley. This position was also dangerous, but was the least dangerous of the only positions available. The ladder was without spikes at its foot to prevent it from slipping on the greasy floor; and Bearman attempted to hold it while Gower ascended.

While standing upon the ladder Gower succeeded in placing the belt upon the pulley. The belt, however, ran off between the pulley and the hanger on the other side. Gower then reached over for the belt, and while he was doing so the ladder slipped upon the floor. Gower fell against the projecting end of the shaft, which, engaging in his clothing, whirled him around between the shaft and the wall, tore off his left arm at the shoulder, and inflicted other serious injuries.

The foreman, the manager, and one of the directors of the defendant company gave Gower immediate attention, and had him conveyed to a hospital. There the torn shoulder was dressed, and all possible care given to the boy, who made a fairly rapid recovery.

The defendants had full knowledge of the accident as soon as it occurred; but no formal notice as required by the Workmen's Compensation for Injuries Act was given to them. Negotiations regarding a settlement were entered into, and protracted—deliberately, I think—until six months had expired, and an action under the Workmen's Compensation for Injuries Act was barred.

In ordinary circumstances it would not be necessary to guard the projecting end of the shaft, far above the heads of the operators in the spinning room; but where, as in this case, it was necessary constantly to replace the belt, the projecting end of the shaft was a source of great danger. Mr. Mackell, a toolmaker and machinist of great experience and high intelligence,

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testified that it was practicable to guard the pulley and shaft; and I accept his evidence. If the shaft had been so guarded, the accident would not have happened. Want of a guard was the direct and proximate cause of the accident; and the plaintiff is accordingly, in my judgment, entitled to recover under the Factories Act.

I think the plaintiff is also entitled to recover at common law. The system was defective. The shaft undoubtedly was not properly hung. The pulley was set eighteen inches out from a hanger, and no hanger was placed at the other end of the shaft, which was but two and three-eighths inches in diameter. There was consequently nothing to resist the pull which the belt exerted upon the shaft, except the hanger already mentioned. The shaft was, therefore, constantly sprung towards the driving pulley, and the belt necessarily ran off and had to be frequently replaced.

Then, the ladder used for replacing the belt was wholly unfit for the purpose. The ladder, as well as the floor, was greasy. There were no spikes in the bottom of the ladder to prevent it from slipping. Some employee had from time to time to mount the ladder for the purpose of replacing the belt. Mr. Schofield, the overseer, says that he was there to do that work. But I do not credit his evidence. He himself had lost an arm, and could put on a five-inch belt, only with considerable difficulty.

The practice in the factory was for "anyone" to put the belt on; not the little boys or the women, who formed the majority of the employees, but any of the few men who were capable, like the plaintiff, of doing so. The plaintiff had been once ordered to put on the belt, and had not been forbidden at any time to do so.

The plaintiff was not a mere volunteer. His very work in the weaving room itself made spools necessary, and the elevator was the only means of bringing them up. In putting on the belt he was doing work identical with that which the foreman had, at least upon one occasion, ordered him to do, and was doing it in the only way the system of the defendants rendered possible, and without knowledge of the risk he was running.

The system of the defendants was defective in the respect I have mentioned. The plaintiff was not himself negligent, and, apart from his rights under any statute, is entitled to damages: *Smith* v. *Baker & Sons*, [1891] A.C. 325; *Webster* v. *Foley* (1892), 21 Can. S.C.R. 580.

I assess the damages at two thousand dollars, and direct that judgment be entered against the defendants for that amount with costs.

Judgment for plaintiff.

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Ontario Divisional Court, Falconbridge, C.J.K.B., and Riddell, and Lennox, JJ. November 20, 1912.

1. TAXES (§ III F—145)—TAX SALE OF INDIAN LANDS—LIMITATION OF TIME FOR ATTACKING—INDIAN ACT (CAN.).

The limitation as to time, contained in the Indian Act, R.S.C. 1906. ch. 81, sec. 59, during which the original purchaser of Indian lands may claim the assistance of the courts in having a tax sale of his lands declared invalid, is applicable only to a case where the Superintendent-General has actively intervened between the tax purchaser and the original purchaser, by taking under consideration the tax deed, and approving it as a valid transfer by endorsement thereon; but there is no such limit of time in attacking an illegal tax sale and deed, if no action in respect of the tax deed by way of approval has been taken by the Superintendent-General.

2. TAXES (§ III F—145)—TAX SALE—LEGAL IMPOST OF TAXES ESSENTIAL —ASSESSMENT ACT (ONT.).

The statutory protection afforded by sec. 209, Assessment Act (Ont.), to the effect that where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, that deed shall be to all intents and purposes valid and binding, if the same has not been questioned before some court of competent jurisdiction by some person interested, within two years from the time of sale, does not apply if there has been no legal impost of taxes.

[Sec. 209, Assessment Act, R.S.O. 1897, ch. 224, consolidated by 4 Edw. VII. (Ont.) ch. 23, referred to.]

3. TAXES (§ III F—145)—TAX SALE—THREE YEARS' ARREARS PRECEDING FURNISHING OF LIST UNDER SEC. 152, ASSESSMENT ACT (ONT.).

The provision of sec. 209, Assessment Act (Ont.), to the effect that where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, the deed shall be to all intents and purposes valid and binding, if the same has not been questioned before some court of competent jurisdiction by some person interested, within two years from the time of sale, does not apply where the tax has not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Act or where no such list was furnished.

[Secs. 152 and 209, Assessment Act, R.S.O. 1897, ch. 224, consolidated by 4 Edw. VII. (Ont.) ch. 23, referred to.]

4. STATUTES (§ II D—125)—RETROACTIVE, WHEN—SUBSTANTIVE RIGHTS DISTINGUISHED FROM PROCEDURE, AS TO RETROACTIVE EFFECT.

In a matter of substantive rights, as distinguished from mere matters of procedure or practice, a statute is not presumed to be retroactive. (*Per* Riddell, J.)

[Assessment Act, 4 Edw. VII. (Ont.) ch. 23, sec. 176 (1), considered.]

5. EQUITY (§ III A—59)—EQUITY PRINCIPLES—"HE WHO SEEKS EQUITY MUST DO EQUITY."

Where the court is called upon under equitable pleas to set aside a tax sale which is equally void at law and in equity, the court does so, only on such terms as are equitable, upon the principle of equity, "He who seeks equity must do equity," so that where the plaintiffs might have brought a simple action in ejectment, but, instead, asked and received equitable relief, they come under the obligation to do equity. (*Per* Riddell, J.)

[*Paul* v. *Ferguson*, 14 Gr. 230, 232, referred to.]

APPEAL by the defendant and cross-appeal by the plaintiffs from the following judgment of Boyd, C. (3 O.W.N. 1479).

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The appeal was dismissed.

BOYD, C.:—An objection not on the pleadings was raised ore tenus, that, by reason of some provisions of the Dominion Indian Act, this action was not well-founded.

The Indian Act, as found in R.S.C. 1886 ch. 43, sec. 43, was amended in 1888 by 51 Viet. ch. 22, sec. 2, now found in the revision of 1906, as ch. 81, secs. 58, 59, and 60, and brings in an entirely new provision as to dealing with Indian lands which have been sold for taxes. The substance of this new legislation appears to be, that, when a conveyance has been made by the proper municipal officer of the Province, purporting to be based upon a sale for taxes, the Superintendent-General may "approve of such conveyance and act upon it and treat it as a valid transfer" of the interest of the original purchaser: sec. 58 (1).

When the Superintendent-General has "signified his approval of such conveyance by endorsement thereon," the grantee shall be substituted (in all respects in relation to the land) for the original purchaser: sec. 58 (2).

The Superintendent-General may cause a patent to be issued to the grantee named in such conveyance, on the completion of the original conditions of sale, unless such conveyance is declared invalid by a Court of competent jurisdiction, in a suit by some person interested in such land, within two years after the date of the sale for taxes, and unless, within such delay, notice of such contestation has been given to the Superintendent-General: sec. 59.

These provisions are, I think, to be read as applicable to a case where the Superintendent-General has actively intervened as between the tax purchaser and the original purchaser: where the Superintendent-General has taken under consideration the tax deed, and has approved of it as a valid transfer, by endorsement thereon. This primâ facie ruling of his may be brought into question and disputed in the Court by suit brought within two years after the date of the tax deed. But, in my view of these sections, there is no such limit of time in attacking an illegal tax sale and deed, if (as in this case) no action in respect of the tax deed by way of approval has been taken by the Superintendent-General. If the Superintendent-General remains silent and inactive, there is no restriction as to time placed upon the right of the original purchaser to claim the assistance of the Courts so far as the Indian Act is concerned. He may otherwise lose his legal status by delay and adverse possession, but in this case no such barrier exists.

This case rests under the general law as to tax sales then in force, namely, that where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, that deed shall be,

to all intents and purposes, valid and binding, if the same has not been questioned before some Court of competent jurisdiction by some person interested, within two years from the time of sale: sec. 209, R.S.O. 1897 ch. 224.

This statutory protection does not avail if there has been no legal impost of taxes, and if these, though legally imposed, have not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Assessment Act, and if there has been no such list furnished at all. Each one of these necessary preliminaries appears to be absent in the case in hand, as may now be briefly noted.

The action relates to certain conflicting claims made to the possession of an interest in land situate in the district of Manitoulin, part of an Indian reserve, and as such subject to the control of the Department of Indian Affairs for the Dominion of Canada. Lot 21 in the 12th concession of the township of Howland, in that district, containing 147 acres, was sold in June, 1869, to Thomas F. Richards, and a certificate of sale was duly issued. This land was so dealt with that a patent from the Crown was issued for the westerly 100 acres in 1879 to Jane Mackie, and that part is not in controversy. The easterly 47 acres was assigned in 1876 to David Richards by his son Thomas, and that was duly registered in the Indian Department, and that part still stands in the name of David Richards, and has not been patented.

David Richards died in February, 1890, leaving a will by which he left all of his belongings to his wife to hold for her life. He gave her power to sell a part or all of the real estate and personal, and declared that, at her death, what remained was to be equally divided between his sons Thomas and Luther. These two are the plaintiffs; and I see no reason to question that they take directly through their father. I do not give effect, therefore, to the contention that the widow made a valid disposition of the 47 acres by will so as to give a life estate to her second husband, Moore, and a remainder to the plaintiffs.

The disability of the original purchaser to hold or to transfer, on the ground of infancy, is raised by the pleadings. It appears that he was born in 1854, and he was of age in 1875, when he assigned to his father, and that assignment has been recognised and acted on by the Indian Department; and I think any controversy as to his status will have to be decided by that Department, if and when he applies for a patent. He has sufficient locus standi, with his brother, to seek the intervention of this Court.

The intervention is sought in respect of a tax sale held in 1901, and a certificate of purchase obtained by the defendant.

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That certificate sets out that a sale was had on the 4th September, 1901, of the right, title, and interest of the owner in the patented lot, being lot 21 in the 12th concession of Howland, containing 48 acres, more or less, and that Collins became the purchaser, for the sum of $8.65.

That sum was directed to be levied by warrant of the reeve, dated the 27th May, 1901, of which $7.85 was for arrears of taxes alleged to be due up to the 31st December, 1900.

On this state of facts, the tax deed was executed by the proper officer of the township on the 17th September, 1902, which has been duly registered upon the land and in the Indian Department. By this deed the defendant claims that he has cut out any right of the plaintiffs to the land, and is alone entitled to claim a patent from the Indian Department. The validity of the tax sale is, therefore, the main issue in this litigation.

Evidence is given as to the taxes for the years 1897, 1898, and 1899, and which appear to form the aggregate of the arrears alleged to be sufficient to support the sale. But I have seldom seen a case where the evidence was so limping and unsatisfactory, and where so many flagrant mistakes and omissions are manifest in all the proceedings.

The radical error appears to be this, that the 100 acres patented, being the westerly part of the whole lot, was treated as being lot 21 in the 12th concession of Howland, and all the taxes on that part have been duly paid. The officers appear to have assessed the easterly 47 acres as lot 21 in the 13th concession of Howland—as an entirely different lot in another concession, which concession has no existence. Among other mishaps, the assessment rolls of 1898 have been lost; but, on production of the assessment rolls of 1897 and 1899, it clearly appears that lot 21 in the 13th concession is assessed as belonging to Richards and as containing 48 acres. I cannot suppose that this mistake was remedied in the missing roll of 1898, though some reliance is placed upon the collector's roll of 1898, as shewing taxes of $2.47 on 48 acres, concession 12, lot 21, owned by Thomas Richards; yet it does not seem to be clear that this is not the roll of 1899. But, even in the roll of 1898, Richards was not notified of the tax till the 10th October, 1898, which would be less than three years before the sale in September, 1901. Besides, by the tax deed the sale purports to be for arrears alleged to be due up to the 31st December, 1900. Upon the evidence, I can find no valid assessment of the land intended to be sold for the years 1897 or 1899; and I much doubt the validity of that in 1898.

The lands were assessed as "resident," and no list of lands containing these as liable to be sold for taxes was prepared by

the treasurer; this statutory warning, which is an indispensable prerequisite to a valid sale, was not in this case given: sec. 152.

What was substituted is frankly told by the treasurer: "The clerk and I found that this lot had been missed in being assessed, and we went back three years and computed the taxes; I do not remember notifying anybody; they would see it when it was advertised. I had no authority to fix the amount in this way."

This summary ascertainment of what ought to have been assessed from year to year appears to be the only foundation upon which this land was confiscated by enforced sale for taxes. Apart from all other objections (which need not be further discussed), those I have mentioned are fatal to the validity of the tax sale, which has to be vacated upon proper terms.

The defendant has counterclaimed for his outlay in taxes, statute labour, and improvements by way of clearing and fencing in the lands. These should be ascertained and declared to be a lien on the land, and against this should be set off any profit derived from the land, or which could reasonably have been derived from it, by the purchaser.

The plaintiffs should get the costs of action, and the defendant the costs of counterclaim, to be set off. The amount of the lien to be ascertained by the Master, if the parties cannot agree; and he will say how the costs should go in his office of the reference.

A. G. Murray, for the defendant.
F. E. Titus, for the plaintiffs.

RIDDELL, J.:—This is an appeal from the judgment of Boyd, C., 3 O.W.N. 1479; the plaintiffs also cross-appealing. Riddell, J.

Upon the argument, we dismissed the defendant's appeal, entirely agreeing with the Chancellor's view of the law. The plaintiffs' cross-appeal is as follows:—

The defendant counterclaimed for $400 for improvements and for money expended for taxes and statute labour, for an account to take the same, and for an order declaring a lien on the lands for such amount. The formal judgment declared that the defendant "is entitled to . . . a lien upon the lands . . . for the amount of the purchase money paid by him . . . and interest . . . and for taxes and statute labour paid or performed by him, and for the value of any improvements made by the defendant upon the said lands . . . before this action was commenced and for the costs of his counterclaim . . . after deducting . . . the rents and profits received . . . or which might have been received . . . ." and it is referred to the Master at North Bay to determine the amount, leaving the costs of the reference in the discretion of the Master. The plaintiffs contend that this is not justified by the law.

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The judgment is said to be based on the Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), considered in *Sutherland* v. *Sutherland*, 22 O.W.N. 299: but this Act did not come into force till 1st January, 1905—see sec. 229. And this is not a mere matter of procedure or practice, but of substantive rights. I therefore think the statute is not retroactive.

We must see how the law stood when the rights of the plaintiffs accrued, which may for the purposes of this action be considered as 1901 or 1902, at any rate before January, 1905. The statute then in force was R.S.O. (1897), ch. 224, sec. 212, but that applies only when the sale "is invalid by reason of uncertain and insufficient designation or description"—which is not the case here. We may, however, apply the statute R.S.O. 1897 ch. 119, sec. 30, if necessary. This comes from (1873), 36 Vict. ch. 22, sec. 1.

"In every case in which any person has made or may make lasting improvements on any land under the belief that the land was his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of such land is enhanced by such improvements. . . ."

This statute very much extends the application of the principle of remuneration by the true owner of the land to one who under a mistake of title has made permanent improvements upon it—the former Act going as far back as 1819, 59 Geo. III. ch. 14, by sec. 3 providing for the case of mistake in boundaries occasioned by unskilful surveys, which were by no means uncommon in those days of dense forest, deep morasses, and cheap whiskey. This statute is in substance repeated as R.S.O. 1897 ch. 119, sec. 31.

The relief granted by sec. 30 however is much more restricted than that given by the Act of 1904. But I think in the present instance we are entitled to go beyond sec. 30 in aid of the defendant.

It is a well recognised principle of equity: "He who seeks equity must do equity." In many instances this contains a pun on the word "equity," and means nothing more than: "He who seeks the assistance of a Court of Equity must, in the matter in which he so asks assistance, do what is just as a term of receiving such assistance." "Equity" means "Chancery" in one instance, and "Right" or "Fair Dealing" in the other.

Accordingly while a plaintiff asserting a legal right in a common law Court would receive justice according to the common law, however harsh or unjust the law might be—yet if he required the assistance of the Court of Chancery to obtain his rights according to the common law, he would—or might—not be assisted unless he did what was just in the matter toward the defendant.

This case was represented, on the argument, as a simple case of ejectment—and it might well be a simple action in ejectment. Had it been such, I think we would have had great, if not insuperable, difficulty in giving the defendant any relief beyond what the statute, sec. 30, gives him—and that is why one of us said on the argument that had he been solicitor for the plaintiff, he would have brought the action in that way. There could on the facts have been no defence at law, the deed under which the defendant claims being void at law as well as in equity. The action however is not a simple ejectment, as it might have been. The statement of claim sets out the facts as in ejectment, indeed, but in the prayer, in addition to possession, etc., a claim is made for "5. Such further relief as the nature of the case may require." This is ambiguous, and might mean only relief as at the common law, or it might mean equitable relief. We accordingly look at the judgment the plaintiffs have taken out and are insisting upon holding. Clause 2 of the judgment declares "that the sale for taxes . . . and the deed . . . made to the said defendant . . . are and each of them is invalid, and that the same should be set aside and vacated and doth order and adjudge the same accordingly." No appeal is taken by the plaintiffs against this clause, but on the contrary they attend to support it in this Court. This relief the plaintiffs asked for and received could not have been granted by a Common Law Court, but the plaintiffs must have come into equity for it.

They cannot now be allowed to change their position: and they have come into a Court of Equity for equitable relief not grantable in a Common Law Court.

They must therefore do equity. *Paul* v. *Ferguson* (1868), 14 Gr. 230, is directly in point. The head note reads: "Where the Court is called upon to set aside a tax sale which is equally void at law and in equity the Court does so, if at all, only on such terms as are equitable." At p. 232 the Chancellor (Van Koughnet) speaking of putting the machinery of the Court in motion to aid a harsh legal right, says that in certain cases this will not be done, and continues thus: "and when the Court in its discretion does interfere, it does so only on such terms as it deems equitable . . . . The Court says 'You need not have come here at all. The deed is void at law and here, and cannot be enforced against you in any tribunal; but if you wish for your own purposes to have your title cleared of the cloud which this deed casts upon it, we will aid you only on terms.'" It is not at all necessary to cite other cases to establish the principle, but if desired the many cases may be looked at referred to in Story's Equity Jurisprudence, 2nd Eng. ed. sec. 64(e); Snell, 16th ed. p. 14 (6); Josiah W. Smith's Manual of Equity Jurisprudence, 14th ed., p. 30 IX; and notes in the several works.

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What is equitable in this case; fair play? justice? I can find nothing inequitable, but on the contrary what is wholly equitable, in the statutory rule laid down in 1904. The Legislature in definite and unmistakable terms have said what they thought was fair—with that commendable tenderness for vested rights which characterizes a responsible and representative Parliament, they have refrained from making the statute retrospective, but there is no reason why the Court, untrammelled by authority, should not adopt the statutory rule as its own. I think, therefore, this ground of appeal without merit.

It is also complained of by the plaintiffs that the judgment contains no order for possession—that is the fault of the plaintiffs themselves so far as appears—they take out an order and judgment which should be such as satisfies them. If there be any omission, e.g. if the trial Judge has not passed upon any matter which it is thought should be passed upon, the matter should be brought to his attention before being made a ground of appeal. There can be no objection to the judgment containing an order for possession, not however to be made effective "until the expiration of one month thereafter, nor until the plaintiff has paid into the Court for the defendant the amount" for which the defendant is declared to have a lien: 4 Edw. VII. ch. 23, sec. 176(2) first clause. It is also objected that the judgment should not have left the costs of the reference in the discretion of the Master, and R.S.O. 1897 ch. 224, sec. 217 (1), (2), is cited in support of that proposition.

This section was repealed as of 1st January, 1905, by 4 Edw. VII. ch. 23, sec. 228, Schedule M. first item. What is provided for in this sec. 217 (1), (2), is practice and procedure, and not substantive right—and accordingly the section must go; but it is found repeated in the new Act, sec. 181. Sub-sec. 2 provides that "if on the trial it is found that such notice (i.e. a notice which the defendant is by sub-sec. 1 authorised to give at the time of appearing") or (adding other cases) the Judge shall not certify, and the defendant shall not be entitled to the costs of the defence, but shall pay costs to the plaintiff . . . ."

The prerequisite for the application of this section is that, on the trial, it must be found that such notice was not given. The Chancellor did not so find; he was not asked to so find: there was no scrap of evidence offered upon which he could so find—the plaintiffs claiming some right following such a finding, the onus was upon them to establish the fact and they failed to do so. De non apparentibus et de non existentibus eadem est ratio. It is of no avail for counsel to tell us on the argument that no such notice was served—that is not evidence, and we do not even have an affidavit of the fact, if it is one.

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In any event, the plaintiffs have been awarded the costs of the action—the statute does not compel the Court to award all costs of reference, etc. to the plaintiff—the word used is "costs." The defendant is literally ordered to (I use the words of the statute) "pay costs to the plaintiffs"—and in my view, awarding the costs of the action to the plaintiffs as has been done, sufficiently complies with the statute, without awarding also the costs of a reference which, it is possible, may be caused or rendered necessary by the unreasonable demands or conduct of the plaintiffs themselves.

Both appeal and (with the trifling modification spoken of) the cross-appeal fail; both must be dismissed. And as success has been divided, there should be no costs of the appeal or cross-appeal.

Of course we express no opinion as to the effect (if any) of any action by the Superintendent General under the provisions of the Indian Act, R.S.C. (1906), ch. 81.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B.:—I agree in the result.

Lennox, J.

LENNOX, J.:—I agree in the result.

Appeal dismissed.

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Nov. 11.

PLOURDE (petitioner, appellant) v. **GAUVREAU** (respondent, respondent.)

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 11, 1912.

1. APPEAL (§ II A—35)—SUPREME COURT (CAN.)—DOMINION ELECTIONS APPEALS.

An order made by an election court constituted under the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7, refusing an enlargement of the time for commencement of the trial, which would expire on the next day, or to fix a day for hearing of preliminary objections remaining undisposed of, is not an order of a final and conclusive nature within sec. 64 of that statute, so as to permit of an appeal being taken therefrom to the Supreme Court of Canada.

[*L'Assomption Election Case*, 14 Can. S.C.R. 429, and *Halifax Election Case*, 39 Can. S.C.R. 401, followed.]

Statement

APPEAL from the judgment of Mr. Justice Cimon, in the Controverted Elections Court (Que.), in the matter of the controverted election of a member for the electoral district of Temiscouata in the House of Commons of Canada, dismissing motions by the petitioner (*a*) for enlargement of the time for the commencement of the trial, and (*b*) to fix a day for the hearing of certain preliminary objections remaining undisposed of.

The motions were made on the day before the expiration of

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the six months, limited for the commencement of the trial by sec. 39 of the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7.

E. J. Flynn, K.C., for the appellant.
E. Lapointe, K.C., for the respondent.

SIR CHARLES FITZPATRICK, C.J.:—This is an appeal from a judgment of the Superior Court, at Fraserville, district of Kamouraska, dismissing two motions made on behalf of the petitioner; (*a*) to obtain an enlargement of the delay for the commencement of the trial, (*b*) to fix a day for proof and hearing on certain preliminary objections then undisposed of.

We were asked by the appellant's counsel to decide *in limine* the question of jurisdiction raised in the respondent's factum so as to avoid, if that point was decided against him, the necessity of a lengthy argument on the merits of the motions. I was of opinion at the hearing that we were without jurisdiction and in this opinion I am confirmed by subsequent examination of the authorities. Among a host of others I refer to the *L'Assomption Election Case*, 14 Can. S.C.R. 429, in which Strong, J., said, at 432:—

> Nothing can be clearer than that appeals in controverted elections are limited to two matters only, viz.: First, an appeal from any decision, rule or order on preliminary objections to an election petition the allowing of which is final and conclusive and puts an end to the petition, or which objection, if it had been allowed, would have been final and conclusive and have put an end to the petition; and, secondly, an appeal from the judgment or decision on any question of law or of fact of the Judge who has tried the petition. As the appeal is now presented, it is quite clear that it does not fall under either of these heads, and, consequently, this Court has no jurisdiction.

See to the same effect the *King's County (N.S.) Election Case*, 8 Can. S.C.R. 192, and the *Gloucester Election Case*, 8 Can. S.C.R. 204. In the *Halifax Election Case*, 39 Can. S.C.R. 401, Sir Louis Davies, speaking for the Court, said at 404:—

> I do not think it is open to serious argument that every decision given by the trial Judges, either before or during the progress of the trial, is at once and before the end of the trial appealable. Such a conclusion would defeat the object of the statute absolutely and make election trials a farce.

We may, therefore, safely say that it is now well settled by authority that this Court is not competent to hear this appeal. If we were to hold that we are competent to hear an appeal in an intermediate proceeding like this, appeals would be repeated in all election trials to the great oppression of the parties and to the injury of the public which demands that election trials should be speedily disposed of. Of course we express no opinion on the merits.

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The appeal is quashed for want of jurisdiction, costs to be taxed by the registrar as if motion made in accordance with rule.

DAVIES, J., concurred with the Chief Justice.

IDINGTON, J.:—Unless we reverse the view taken of this statute in a long line of decisions in this Court, this appeal must be dismissed with costs for the reason that we have no jurisdiction to interfere with the order appealed from.

Idington, J.

DUFF, J.:—It has been pointed out time and again that the jurisdiction of the Courts in respect of controverted elections is a very special jurisdiction and is strictly limited by the terms of the Controverted Elections Act. Section 64 of that Act defines the jurisdiction of this Court. There is obviously no jurisdiction under sub-section (*b*). Under sub-section (*a*) an appeal lies only from a

> judgment, rule, order or decision on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive and has put an end to such petition, or which objection, if it has been allowed,

would have that effect. The order sought to be impugned in the present proceedings is expressed in these terms:—

> Met de coté pour le moment la présenté motion sauf à la reprendre si le delai pour le commencement du procès venait d'être prolongé.

This is clearly not a "judgment, rule, order or decision" on a preliminary objection within the meaning of the provision quoted above. Consequently no appeal lies from it.

Duff, J.

ANGLIN, and BRODEUR, JJ., concurred with the Chief Justice.

Anglin, J.
Brodeur, J.

Appeal quashed with costs.

SALTER v. McCAFFREY.

ONT.

H. C. J.
1912

Dec. 16.

Ontario High Court, Cartwright, M.C. December 16, 1912.

1. LIS PENDENS (§ II—10)—SETTING ASIDE.

A certificate of *lis pendens* will not be vacated before trial, unless the applicant can shew that under no possible circumstances can the facts as set out in the endorsement on the writ or the plaintiff's pleading give him any right in respect of the land in question.

Statement

MOTION by the defendant for an order vacating certificate of lis pendens on the ground that the filing of same is an abuse of the process of the Court, and embarrasses the winding up of the estate, as its chief asset is the house in question, which must be sold in order to pay off liabilities as well as for distribution.

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H. C. J.
1912

SALTER
v.
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Statement

The action is an outcome of the death on 28th September last of William McCaffrey with his wife and children, unseen by any human eye. The plaintiff is the administratrix of Mrs. McCaffrey, and as such has brought an action against the administrator of Mr. McCaffrey. Her claim as endorsed on the writ is "for a declaration that the plaintiff is entitled to share as an heir at law of the late Wm. McCaffrey, deceased, and for a declaration that the said plaintiff is joint owner of the land hereinafter described" (setting it out by metes and bounds), "and for a lis pendens."

The motion was refused.

N. F. Davidson, K.C., for the defendant.

G. B. Balfour, for the plaintiff.

Cartwright, M.C.

THE MASTER (after setting out the facts as above):—The whole doctrine of lis pendens was examined and explained in *Brock* v. *Crawford*, 11 O.W.R. 143. There, at p. 147, it is said: "To remove (the certificate) the defendant must, I think, shew clearly that there is and can be no valid claim in respect of the land, and that the proceedings—not alone the registration of the certificate—are an abuse of the process of the Court. That can only be done by proving that under no possible circumstances can the facts as set out in the pleading give any right to the plaintiff in respect of the land in question." No statement of claim has as yet been delivered, though an appearance to the writ was entered on the same day it was served—25th November. There can, therefore, be nothing to consider here except the endorsement on the writ. In a similar case it was said in *Sheppard* v. *Kennedy*, 10 P.R. 242, 245, "that where a plaintiff seeks to register a lis pendens he should be more precise than in ordinary cases, and by his endorsement he should define generally the grounds of his claiming an interest in the lands." Here it is not made clear whether the first clause of the endorsement is a personal claim by Mrs. Salter or whether it is made by her as administratrix. Probably the latter is intended, and the plaintiff is only to be taken as speaking in behalf of the deceased whom she represents. There were affidavits filed in support of the motion, and these were answered by two affidavits of the plaintiff herself and a lady friend of Mrs. McCaffrey. On cross-examination they receded very materially from the statements in their affidavits—so much so that, if no stronger evidence could be had, the plaintiff could not hope to succeed.—But, of course, the action cannot be tried in that way or at this stage. Counsel on the argument stated that he was prepared to rely on the endorsement of the writ as being sufficient within the decision above cited in *Sheppard* v. *Kennedy*, 10 P.R. 242. He relies especially on what was said in that case, at p. 244: "It may well be that nothing more happened than is detailed in their affidavits, but

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no suitor is obliged to submit to a preliminary trial of his case on affidavit."

While I feel very strongly the unfortunate and perhaps disastrous consequences to the estate that may ensue if this certificate is allowed to stand, yet I cannot say that I am warranted by the two authorities above cited in ordering it to be discharged, unless on such terms, if any, as plaintiff is willing to accept.

Failing this, however, the trial should be expedited in every way. For that purpose the statement of claim should be delivered this week, and reply, if any, should be delivered in two days after statement of defence is delivered.—The case should be set done forthwith as soon as it is at issue—so as to be heard, if possible, in the first or second week of the January sittings.—This is to be done, notwithstanding Con. Rule 552.

The costs of this motion will be in the cause.

I regret that my decision is not subject to appeal. See *Hodge* v. *Hallamore*, 18 P.R. 447. While this consideration has made me consider the application very carefully, yet I am not thereby absolved from doing what seems to be a duty, by refusing to decide the question raised, to adopt the language of the judgment in *Brock* v. *Crawford*, 11 O.W.R. 143, 148.

Motion refused.

Re STANTON.

ONT.

H. C. J. 1912

Dec. 21.

Ontario High Court, Latchford, J. December 21, 1912.

1. WILLS (§ III G 2—127)—REDUCING ABSOLUTE GIFT—REMAINDER OVER.

Where a testator after devising and bequeathing all his real and personal estate to his widow made a codicil which stated that it was now his desire that such provision be also subject to the condition and proviso that upon her death sixty per centum of his property or estate remaining at the time of her death should be divided between certain named persons, the balance or forty per centum to be disposed of as his wife should please, and further stated that the codicil was not intended to restrict his wife's reasonable enjoyment of the provision made for her in the will, the widow is entitled to the whole of the property till her death, but if any of it remained at her death, three-fifths would pass as directed in the codicil.

2. WILLS (§ III A—75)—CONSTRUCTION—READING CODICIL WITH WILL.

The intention of the testator with reference to the cutting down of an absolute gift in the original will by the terms of a codicil must be gathered from a consideration of the whole will and the codicil read together as one document.

Statement

MOTION by executors for an order under Con. Rule 938 construing the will and three codicils of the late Edmund Patrick Stanton.

E. P. Gleeson, for the executors.

M. J. Gorman, K.C., for the widow.

D. O'Brien, for other legatees.

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RE STANTON.

Latchford, J.

LATCHFORD, J.:—The opinion of the Court is sought on the following points: "1. As to whether the interest granted the widow under the original will of the deceased is restricted to a life interest by the codicils to said will.

"2. As to whether the widow is entitled, after payment of the debts and legacy of $140 referred to in the codicil dated June 4th, 1903, to have an absolute transfer to her from the executors, of the corpus of the estate.

"3. In the event of it being decided that said entire corpus is not to be transferred to the said widow, what part of the said corpus, if any, are the executors and trustees authorised to transfer?"

Mr. Stanton died May 24th, 1912, and probate of his will and three codicils was granted October 17th, 1912.

By his will, dated May 12th, 1897, the deceased devised and bequeathed all the real and personal estate to which he should be entitled at the time of his decease to his wife Sabina, whom he appointed his sole executrix.

The first codicil—June 8th, 1901—modified the will only to the extent of substituting as executor, in the place of his wife, the Trusts & Guarantee Company; and the second—June 4th, 1902—merely bequeathed a legacy of $140 to a sister of the testator.

By the third codicil, dated November 16th, 1911, the testator ratified his will, save in so far as any part of the will is inconsistent with the last codicil or with either of the two preceding codicils.

The codicil proceeds:

"Whereas by my said will I have made my wife sole devisee and legatee thereunder, I now desire that this provision be also subject to the condition and proviso that upon her death sixty per centum of my property or estate remaining at the time of her death be divided, share and share alike, as follows:"

Then come the names of a brother and two sisters, and a provision that in the event of the death of any such legatees the legacies are to inure to their heirs.

The codicil proceeds:

"The balance or forty per centum of my remaining property or estate to be disposed of as my dear wife may please (this devise or bequest to be in lieu of her dower, should the latter not have been satisfied previously in the provisions of my will itself). Be it remembered, however, that it is not my intention by the present codicil to restrict in any way my dear wife's reasonable enjoyment of the provision made for her in my last will and testament which, of course, is subject to the three codicils now existing thereto, but only to secure that upon

her death any real or personal estate remaining and traceable to said provision to her may be disposed of as directed in the present codicil. In the carrying out of this wish I rely wholly on the sense of justice, as well as on the kindliness of heart, of my beloved wife."

The estate is sworn at a little over $25,000; all realty, except about $300. The debts are about $1,000. To pay them it will be necessary to sell the real property.

It was stated upon the argument that Mrs. Stanton would elect to take the benefits under the will in lieu of her dower.

From the language of the codicil and the intention of the testator thereby manifested, I think that he clearly limits the absolute gift to his wife conferred by the will itself.

That devise is to be "subject to the condition and proviso" that upon her death sixty per cent. of the property of the deceased then remaining and traceable to the devise in her favour shall pass to the testator's brother and sisters. In impressive words he reiterates his intention that his wife's reasonable enjoyment of the provision made for her in the will—that is, the devise to her of all absolutely, less the $140 to a sister—is not to be restricted by the last codicil except to the extent that a fixed proportion of what, if any, of his estate may be in her hands at her death shall pass to his relatives, and not be in her power to dispose of. During her life all is hers. Upon her death, forty per cent. of the testator's property remaining "at the time of her death" may be disposed of as Mrs. Stanton may direct; or, failing any testamentary disposition, will pass to her personal representatives.

That the estate shall be reasonably used and enjoyed, so that a substantial part may pass to his relatives, is manifested by the testator's words expressing that for the carrying out of his wishes he relies wholly on his wife's sense of justice and her kindliness of heart. The words, however, fall far short of imposing an obligation, and create no precatory trust.

After the executors shall have paid the debts of the deceased and the legacy of $140, and, if it should be necessary for such purpose, shall have sold the realty, Mrs. Stanton is entitled to the whole estate, provided she shall previously have elected to take under the will as against her right to dower. The property of her husband is hers to use as she may deem proper; but of any that may remain at her death, not consumed by use, three-fifths is not to be at her disposal, but will pass as directed by the codicil.

As has been often said, cases are of little use where the intention of the testator may be gathered from the will itself. The following, however, cited upon the argument, are to some

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extent in point: *Re Tuck*, 10 O.L.R. 309; *Re Davey*, 2 O.W.N. 467.

I would also refer to *Re Rowland, Jones* v. *Rowland*, 86 L.T.R. 78; *Re Willatts*, [1905] 1 Ch. 378, as reversed, [1905] 2 Ch. 135; and especially *FitzGibbon* v. *McNeill*, [1908] 1 I.R. 1.

Costs of all parties out of the estate.

Order accordingly.

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Dec. 5.

Re CHISHOLM and CITY OF BERLIN.

Ontario High Court, Middleton, J., in Chambers. December 5, 1912.

1. JUDGES (§ III—23)—DISQUALIFICATION BY INTEREST—PROCEDURE IN NAMING SUBSTITUTE.

Where a county judge is disqualified by interest from hearing and determining an assessment appeal to which he is a party, the disqualification is absolute, preventing the county judge from even nominating the judge of another county to act for him, where there is a statutory provision under which the selection of a disinterested person to try the appeal may be made by a High Court judge in Chambers.

[*Eckersley* v. *Mersey*, [1894] 2 Q.B. 667, 671, referred to.]

Statement

MOTION by the city of Berlin for an order prohibiting the Judge of the County of Waterloo, or any Deputy or Acting Judge thereof, from hearing or disposing of an appeal of His Honour Judge Chisholm from the Court of Revision of the city of Berlin with respect to an assessment of his judicial salary.

W. Davidson, K.C., for the city of Berlin.
R. McKay, K.C., for Chisholm.

Middleton, J.

MIDDLETON, J.:—His Honour Judge Chisholm, being of opinion that his salary is not subject to municipal assessment, appealed from his assessment to the Court of Revision. This Court confirmed the assessment. Under the Assessment Act an appeal lies from the Court of Revision to the County Judge; and on the 16th November His Honour appealed from the Court of Revision, "to the County Judge of the County of Waterloo, or any Deputy or Acting Judge thereof, or any Judge who may be sitting for and in the stead of the said County Judge"; and pursuant to this notice His Honour has served an appointment for the hearing of the appeal. "Take notice that I hereby appoint Tuesday, the third day of December proximo, at the Judge's Chambers in the Court House Square, Berlin, at the hour of 11.30 a.m., to hear the above appeal. Dated at the City of Berlin this 23rd day of November, A.D. 1912. D. Chisholm, County Judge."

The motion for prohibition is then launched, and an alternative application is made under the provision of 10 Edw. VII. ch. 26, sec. 16, which provides that where any person or the occupant of any office is empowered to do or perform an act, and such person is disqualified by interest from acting, and no other person is empowered to do or perform such act, then he or any interested person may apply upon summary motion to a Judge of the High Court in Chambers, who shall have power to appoint some disinterested person to do or perform the act in question.

On the return of the motion it is not contended on behalf of the County Judge that he had the right to hear the appeal himself; and it was not his intention, when he issued the appointment, to attempt himself to deal with his own case; but the position is taken that the Judge, although disqualified, should have the privilege of requesting some other County Judge to sit for him and hear the case. The learned Judge desires to act under 9 Edw. VII. (Ont.) ch. 29, sec. 15; and he proposes to request the Judge of some other county to sit for him upon the hearing of this appeal.

This course is objected to by the city, upon the ground that the Judge proposed to be asked to sit is himself interested in the very question; one of the Judges named having already successfully appealed from the assessment of his salary, and another name suggested being that of a Judge who now has an appeal pending. It is also objected that in selecting any other Judge to act for him, the Judge is really performing a judicial act in connection with his own case.

The appeal authorised by the Assessment Act is to the County Judge at Waterloo; and it is manifest that the County Judge is disqualified by reason of interest. I think that the jurisdiction of a Judge in Chambers immediately arises, and that I have the power to appoint some person under 10 Edw. VII. (Ont.) ch. 26, sec. 16. Moreover, I think the contention of the city is well founded, that the disqualification by reason of interest is absolute, and that the learned Judge has no power to do anything in connection with his own appeal.

I do not go so far as to say that if there was no other provision, he might not upon the ground of necessity request another Judge to act; but when the statute has pointed out a way in which some disinterested person may be named, then I think that course should be followed.

The power given by the statute to a Judge of the High Court is much wider than the power conferred upon the County Court Judge by the Act of 1909. A County Court Judge can only request the Judge of another County Court to act: the High Court Judge can name a disinterested person. While it is quite

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true that the Judge of an adjoining county would not be interested in the assessment of the Judge of Waterloo upon his income, yet he is interested in a wider sense; as it is entirely likely that the assessment of judicial incomes in one county will be found to govern the action of the municipal authorities in the adjoining county.

Bearing this in mind, and seeking to apply the principle laid down in many cases, that it is important not only that the fountain of justice should be preserved from all impurity, but also that it should be protected against any semblance of impurity—or, as put in *Eckersley* v. *Mersey*, [1894] 2 Q.B. 667, 671: "Not only must Judges be not biassed, but even though it be demonstrated that they would not be biassed, they ought not to act in a matter where the circumstances are such that people, not necessarily reasonable people, would expect them to be biassed"—it appears to be my duty to appoint some entirely disinterested person. I do not in any way reflect upon the learned Judge or upon those whom he contemplated asking to act for him; but it seems to me clear that the interests of justice will best be served by taking this course.

I, therefore, appoint the Chairman of the Ontario Railway and Municipal Board, under the statute, to hear the appeal. I select him, as that Board has jurisdiction over many matters of assessment.

There will be no costs of the application.

Order accordingly.

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Jan. 29.

REX v. CHEW DEB.

British Columbia Supreme Court, Gregory, J., in Chambers.
January 29, 1913.

1. SUMMARY CONVICTIONS (§ III—30)—LEAVE TO WITHDRAW CASE—PROCEDURE.

On a summary trial, where all the evidence offered by the prosecution has been heard and the case closed, the prosecutor cannot, upon objection taken that material proof is lacking, withdraw the charge and lay a new information charging the identical offence.

[*Ex parte Wyman*, 5 Can. Cr. Cas. 58, disapproved; *Bradshaw* v. *Vaughton*, 30 L.J.C.P. 93, followed.]

2. SUMMARY CONVICTIONS (§ II—20)—TRIAL—CERTIFICATE OF DISMISSAL—DUTY OF MAGISTRATE.

Where on the trial of summary conviction proceedings the evidence produced is insufficient to prove the charge, the duty of the magistrate is to dismiss it and grant a certificate of the dismissal as provided by the Criminal Code, 1906.

[Criminal Code, 1906, secs. 720, 726, referred to.]

3. CRIMINAL LAW (§ II G2—82)—FORMER JEOPARDY—IDENTITY OF OFFENCES.

Prohibition will be granted against a magistrate enforcing a summary conviction where the accused had been tried summarily under a previous information and, after all the evidence for the prosecution had been taken and the case closed, the magistrate improperly allowed the prosecutor to withdraw the charge and lay a new information for the same offence, on the hearing of which he convicted the accused of the offence charged upon new evidence.

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Statement

APPLICATION for writ of prohibition directed to a magistrate, prohibiting him from signing a warrant of commitment against the defendant, convicted on the charge of selling liquor to an Indian.

The writ of prohibition was granted.

Aikman, for accused.

Lowe, for the magistrate.

Gregory, J.

GREGORY, J.:—This is an application for a writ of prohibition to be issued against the above-named magistrate, prohibiting him from signing a warrant of commitment against the said Chew Deb. The ground of the application is that the said Chew Deb has already been tried on the said charge. It appears that an information was laid against the accused for supplying liquor to an Indian, and on the return thereof the prosecution offered all the evidence it had to offer, and closed its case. It was then objected by counsel on behalf of the accused that he could not be convicted, as no evidence had been offered to shew that the person receiving the liquor was an Indian. The magistrate thereupon reserved his decision, and remanded the case to the 20th December, 1912. On the 20th December the complainant asked permission to withdraw the charge. It was accordingly done, the accused man consenting. A new information was then laid for the identical offence, evidence taken and a conviction secured, and it is to prevent the signing of the warrant for such conviction that the present proceedings are taken. I have no hesitation in saying that I think the magistrate's action was wrong. If the evidence for the prosecution was not sufficient at the close of the case, it was his clear duty then to dismiss the charge and grant a certificate of such dismissal, as provided for by the Criminal Code; or if in his opinion it was sufficient, he should have convicted. Counsel for Chew Deb contended that there is no provision whatever for withdrawing summary proceedings once started, and that secs. 720 and 726 of the Code shew that the magistrate must hear and determine the matter, subject, of course, to the right of adjournment. This contention is, in my opinion, sound. The magistrate, I consider, has no more jurisdiction to permit the proceedings to be withdrawn at the close of the case for the prosecution than has a Judge at the assizes to permit the Crown to discontinue at the end of its case with the intention of starting afresh.

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The man has been put upon his trial; he has been in jeopardy, and it is one of the best, most sacred and well-established rules of English jurisprudence that he shall not be put in this position twice for the same offence. In the present case, the prosecution had closed its case, counsel for the defence insisted upon a decision, as he had a right to do, and the magistrate should not afterwards, in the absence of counsel, have asked the accused to consent to what his counsel would certainly have refused.

Although it appears that the accused has some understanding of English, I do not think it at all likely that he understood that fresh proceedings would be immediately started for the same offence, and in the circumstances I do not think that such fresh proceedings can be carried any further.

With great respect I cannot follow the decision in *Ex parte Wyman*, 5 Can. Cr. Cas. 58. It is to be noted that Mr. Justice Landry gave a dissenting judgment in that case, and it does not appear whether sec. 42 of ch. 178, R.S. 1886, which is identical with sec. 720 of the Criminal Code, Can. 1906, was drawn to the attention of the Court. That section enacts that the parties being present, the "justice shall proceed to hear and determine," etc.

As Earl, C.J., says in *Bradshaw* v. *Vaughton*, 30 L.J.C.P. 93:—

> The informant cannot withdraw, and the defendant has a right to a decision; and if the informant says he withdraws, the case is heard and the information is dismissed.

In the circumstances of this case I do not think the defendant should be in any way prejudiced by his consent to the withdrawal; it was given in the absence of his counsel. He is a Chinaman, and might easily have misunderstood it—in fact, it does not appear that he was told that fresh proceedings were to be started.

There will be an order absolute as asked for, but there will be no order as to costs. The magistrate beyond doubt acted honestly and he has facilitated the present application.

Prohibition granted.

POIRIER v. LEGRAND es-qual.

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Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Carroll, and Gervais, JJ. January 23, 1913.

Jan. 23

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMMON LAW TORT CUMULATIVE TO STATUTORY RIGHT, WHEN—"INEXCUSABLE FAULT," EFFECT OF.

The indemnity allowed to injured workmen under the Workmen's Compensation Act may be greater than the sum of $2,000 where such injury results from the "inexcusable fault" of the employer; that is to say, in cases of "inexcusable fault" the injured party is not deprived of his common law action in tort although suing in virtue of the statute itself.

2. MASTER AND SERVANT (§ II A—35)—EMPLOYER'S LIABILITY—"INEXCUSABLE FAULT," DEFINITION OF—ELEMENTS CONSTITUTING.

Three elements go to make "inexcusable fault": (*a*) the will to do or not to do, (*b*) knowledge of the danger which may result from the act or omission, (*c*) the absence of any justifying or explanatory cause.

3. MASTER AND SERVANT (§ II A—35)—EMPLOYER'S LIABILITY—"INEXCUSABLE FAULT," EXAMPLES OF.

An employer is guilty of "inexcusable fault" in causing an inexperienced workman to work at a round-saw unprotected by any guard, contrary to the factory law regulations, with the help of a mere lad also inexperienced, especially when the inexperience of these employees has been reported to him by his foreman.

4. MASTER AND SERVANT (§ II A—36)—LIABILITY OF EMPLOYER WHEN GUILTY OF "INEXCUSABLE FAULT"—PARTICIPATION BY EMPLOYER.

As a rule the "inexcusable fault" of the co-employee is as regards the employee an excusable fault, except where the employer has participated therein (e.g., by engaging an employee of immature years to do dangerous work), but the inexcusable fault of a foreman is the inexcusable fault of the employer.

Statement

APPEAL from the judgment of the Superior Court for the district of Bedford, Lynch, J., rendered on June 20, 1912, condemning the appellant to pay to the respondent $2,650 as damages for the death of her husband in appellant's factory.

The appeal was dismissed.

Oct. Mousseau, K.C., for appellant.

F. X. A. Giroux (*E. Fabre Surveyer*, K.C., counsel), for respondent.

The opinion of the Court was delivered by

Gervais, J.

GERVAIS, J. (translated):—The appellant seeks by the present appeal the reversal of the judgment rendered by the Superior Court for the district of Bedford on June 20th, 1912, condemning him to pay to the respondent personally a sum of $1,511.55; and in her quality of tutrix to her five minor children another sum of $1,138.50, as a result of the death of her husband, Alfred Bisaillon, on April 4th, 1911, at Roxton Falls, due to the fault

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and inexcusable negligence of the appellant in compelling the said Bisaillon to work in his saw-mill at Roxton Falls on an unprotected round-saw with the help of an inexperienced lad of 14 named Brin.

The action was instituted on November 21, 1911. The appellant, although denying all liability, confessed judgment for $1,280, alleging that the said Bisaillon, aged 41, was at the time of his death earning only $1 per day. The respondent refused to accept this confession of judgment and the parties went to trial.

The evidence as regards the amount of damages suffered by the respondent appears clearly conclusive in the respondent's favour . . . and we therefore need not dwell any longer on the fact that this accident caused damages which the respondent could assess at the sum of $5,000.

Is the respondent entitled to recover from the appellant the full amount claimed? We must answer in the negative under art. 7325, R.S.Q., if the respondent has failed to prove that this accident was the result of the appellant's inexcusable fault; in the affirmative under the same article, if the respondent has proved such inexcusable fault.

What are the constituents of a fault of such nature which would allow the respondent to avoid the denial of action laid down in this article as regards any sum exceeding $2,000; and therefore would entitle her to recover the full amount of the compensation in case of such inexcusable fault. . . . The whole controversy, therefore, resolves itself into whether the respondent has proven the following facts against the appellant:—

1. Absence of any guard over the round-saw in question;
2. Failure to properly balance the said saw;
3. Abnormal vibration of the said saw;
4. Inexperience of Bisaillon's helper as regards the manipulation thereof.

(The learned Judge then quoted at length the evidence on these points, shewing the allegations of the plaintiff to be well grounded.)

What conclusions are we to draw from the facts as proven? These conclusions are three:—

(*a*) What is meant by inexcusable fault under the Workmen's Compensation Act, 9 Edw. VII. ch. 66?

(*b*) Was the appellant guilty of inexcusable fault in this case?

(*c*) Is the inexcusable fault of the co-employee the inexcusable fault of the employer?

First question: What is meant by inexcusable fault? Our 1909 law has been taken almost entirely from the French law

on accidents to workingmen (*accidents du travail*) of April 9th, 1898. It resembles, in its essential theories, the English law, the German law, and the Austrian law. Art. 5 of our 1909 law is taken almost word for word from art. 20 of the 1898 French law. In order to ascertain what is meant by "inexcusable fault" we must refer to the teachings of the authors and to the jurisprudence under the French Civil Code, as well as to our own.

Three elements are necessary to the existence of "inexcusable fault," both under art. 5 of our law and under art. 20 of the French law.

The restriction in the amount of indemnity under the French law, even in the case of inexcusable fault, did not find its way into art. 5 of our law. Our article reads as follows:—

> No compensation shall be granted if the accident was brought intentionally by the person injured. The Court may reduce the compensation if the accident was due to the inexcusable fault of the workman, or increase it if it is due to the inexcusable fault of the employer.

As will be seen, therefore, the whole interest of the case turns on the definition to be given to the expression "inexcusable fault." The law on compensation to workmen, which legislators introduced after they had realized that "*le moule du contrat de louage d'ouvrage avait été à jamais brisé par l'établissement du machinisme dans l'industrie du pays,*" went to establish a compensation not complete, but partial; that is to say, fixed, in favour of the workman who has been the victim of an accident causing him damage due to the excusable fault of his employer; but the new law did not and could not deprive the workman of the full and complete compensation to which he is entitled in virtue of the natural law from his employer guilty of inexcusable fault. In order that there be inexcusable fault of the employer we must find the three elements following:—

1. The will to do or not to do.

2. Knowledge of the danger which may result from the act or omission.

3. Absence of any justifying or explanatory cause.

I shall explain each one of these by an example:—

A scaffolding breaks down owing to a worn-out cable; the employer is ignorant of the fact that this cable is worn out; there is no will to do or not to do.

In the second place, the heir of a manufacturer, who, before his father's death was not employed in the factory and was ignorant of all the risks attendant upon the operation therefrom, cannot be deemed to know the dangers which may result therefrom.

In the third place, the guard designed for the protection of round-saws or other machinery may require a form of construc-

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tion not free from danger, provided always that the necessity of cutting or sawing the wood with this piece of machinery requires it to be thus specially built in such fashion and form.

So then the usefulness of the act or mission attenuates the fault of the employer, as well as that of the workman, so as to render it excusable. Thus where an employer omits knowingly to have a dangerous machine protected with some covering, which covering or protection would in no way interfere with the proper running of the machine, he is inexcusably guilty: Grenoble, 25th May, 1901; Revue Miniere, Comm. No. 3, p. 838; Douai, December 24th, 1900; S. 1901-2-221. The Cour de Cassation has held (8th July, 1903, Gazette du Palais, 30 September, 1903) that it is inexcusable fault for a mining company to knowingly make use of a worn-out cable; for an employer to have a workman under age, 18, clean a machine whilst in motion; for a quarry proprietor or lessee to omit, with a view to increased profits, the most elementary precautions to prevent cavings-in or slidings. And many more judgments to this effect could be cited, both from French jurisprudence and our own.

Second question: Was the appellant guilty of inexcusable fault in this case? The respondent charges the appellant with having ordered Alfred Bisaillon to work on a round-saw absolutely unprotected, with the help of Brin, a lad of only 14.

The appellant knew that Alfred Bisaillon did not have the required experience to work this saw, since his foreman had informed him of this fact a year before, when the deceased had met with a first accident. And then he paid Bisaillon $1 a day only, whereas he paid the others who worked on this saw $1.50 a day. Besides, the appellant had been told by his foreman that Bisaillon had not the required experience to work at this saw. Similarly the appellant knew of young Brin's inexperience, for Brin had arrived from Labelle, where he floated logs, only two days previous.

Third question: Is the inexcusable fault of the co-employee the inexcusable fault of the employer?

The law of 1909 gives no answer to this question, nor as regards that of persons under his control, a judicial condition which is clearly defined by the French law. The fault of persons under his control, that is to say, the fault of a foreman, is, under the French law, the fault of the employer; the fault of the ordinary co-employee in the discharge of his duties remaining subject to the rules regarding excusable or inexcusable fault.

What are we to conclude on this subject in the present case? The appellant is certainly responsible for the inexcusable fault

of young Brin in negligently passing over the saw in motion large and heavy pieces of hard wood; for the appellant knew of Brin's tender age, of his inexperience and of the consequences that might follow. It may be, therefore, that Brin, under the circumstances, was a person under the appellant's control (*préposé*). And according to French law the inexcusable fault of a *préposé* is the inexcusable fault of the employer.

But what of the inexcusable fault of the co-employee? In our law, I repeat, there is no text which speaks of this as explicitly as the French law as regards *préposés*. Here we must, as a general rule, hold that the inexcusable fault of the co-employee is only excusable fault as regards the employer if the latter have not participated therein as did the employer in the present case, by engaging a young lad of 14 without any experience to help Bisaillon, and this after the foreman's warning. The engagement of this boy under the circumstances bears all the earmarks of inexcusable fault.

Lastly, we come to the dangers attendant upon this round-saw. Did the appellant know that it was without any protective guard, that is to say, without a guard placed over the saw and crosswise, to prevent the pieces of wood which had to be passed over the same, from being caught by the teeth of the saw and hurled against the workmen manipulating these?

The appellant knew the necessity of having such a guard for three reasons:—

1st. On account of the rules passed by provincial order-in-council under the Factory Inspection Law of this Province, which obliged him to place such a guard. 2nd. Then, in the second place, his own experience must have warned him that it was necessary to protect this saw. And 3rd, his foremen had called his attention to the danger which threatened the workmen working on an unprotected round-saw. Finally, the requirements of the sawing in question did not demand the absence of a guard.

The appellant was, therefore, guilty of inexcusable fault, knowingly, without any useful reason, unless it be that of gain, in making Bisaillon work on this dangerous and defective round-saw, and this is our unanimous opinion.

The judgment is confirmed.

Appeal dismissed.

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Feb. 14.

Re KETCHUM and CITY OF OTTAWA.

Ontario Supreme Court, Kelly, J. February 14, 1913.

1. APPEAL (§ III F—97)—TIME — FROM TAKING UP OF AWARD—NOTICE.

Even if notice of the taking up of an award is to be taken as impliedly required under the Municipal Arbitrations Act, R.S.O. 1897, ch. 227, an appeal by the municipality is too late of which notice is given more than one month after the receipt of a letter by the municipality from the claimant's solicitor demanding payment of the amount of the award and costs; such demand is in effect a notice of the taking up of the award.

Statement

MOTION by Ketchum *et al.*, claimants, for an order quashing the appeal of the Municipal Corporation of the City of Ottawa from an award made by the Official Arbitrator for that city, under the Municipal Arbitrations Act, R.S.O. 1897 ch. 227, upon the ground that the appeal was not, as required by sec. 7 of the Act, launched within one month after the taking up of the award.

T. A. Beament, for the applicants.

Taylor McVeity, for the city corporation.

Kelly, J.

KELLY, J.:—On the 21st December, 1912, the solicitor for the city corporation received from the claimants' solicitors a written communication asking for payment of the amount found due by the arbitrator and their costs of the arbitration. It has been suggested by the city corporation that notice of the taking up of the award should have been served on them, and that the time allowed for the appeal should run only from the giving of such notice. Section 7 says that "the award of the Official Arbitrator . . . shall be binding and conclusive upon all parties thereto unless appealed from within one month after the taking up of the same."

Notice of the filing of the award was given to the appellants' solicitor on the 29th November. On the argument it was admitted by counsel that the award was taken up not later than the 4th December; and the appellants' solicitor states in his affidavit that the letter which he received on the 21st December was the first notice or intimation which he received that the award had been taken up; so that, even if notice of the taking up were necessary —and that is not expressly required by the Act—he had such notice on the 21st December; and the appeal, therefore, was not taken within the time required.

The application is granted with costs.

Appeal quashed.

CORNING et al. v. TOWN OF YARMOUTH.

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(Decision No. 1.)

Nova Scotia Supreme Court, Russell, J., in Chambers. December 21, 1912.

1. OFFICERS (§ II A—70)—POWER OF MAYOR—RIGHT TO INSTRUCT SOLICITOR TO DEFEND ACTION—ABSENCE OF INTEREST.

The mayor of an incorporated town cannot of his own motion and in opposition to a resolution of the town council, instruct a solicitor to enter an appearance in an action brought against the town, where the solicitor is not defending on behalf of the mayor, and the mayor has no interest in the subject matter otherwise than in common with the other ratepayers of the town.

2. COURTS (§ II A—150)—JURISDICTION TO SET ASIDE APPEARANCE—ACTION COMMENCED IN ANOTHER COUNTY—CAUSE OF ACTION ARISING IN STILL ANOTHER COUNTY.

A Judge of the Supreme Court of Nova Scotia has jurisdiction as a Judge in Chambers to determine an application made to him in one county to set aside an appearance to an action commenced in another county for a cause of action which arose in still another county.

Statement

THIS was an action brought by plaintiffs, a firm of solicitors, to recover an amount claimed to be due them for professional services rendered to the defendant town in connection with prosecutions for violations of the Canada Temperance Act. The town council, by a majority vote, directed payment of the account, but the mayor, on the ground that the majority of the council, who were the temperance committee, had acted illegally and collusively with the inspector under the Act, that the account included moneys paid out for illegal purposes and that neither the inspector nor the committee had authority to contract such an account, refused to sign a cheque for payment. The action was thereupon brought and one of the members of the plaintiff firm being the solicitor for the town, the mayor in writing authorized Mr. R. W. E. Landry to defend on behalf of the town. A motion was made to set aside the appearance entered under such authorization.

The application was granted.

W. E. Roscoe, K.C., in support of motion.

Russell, J.

RUSSELL, J.:—A motion was made before me at Bridgewater on November 5th to set aside an appearance in this cause entered by Mr. Landry, a barrister and solicitor of the Supreme Court. The action is one of account for services rendered to the town by the plaintiff firm, one of the members of which is the town solicitor. A preliminary objection was taken that I could not as a Judge at Chambers discharge the functions of such a Judge in this case at Bridgewater, the writ having been issued in Kentville and the cause of action having arisen in Yarmouth, where

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the solicitor who entered the appearance resides and practices. Inasmuch as motions of this kind have frequently been made before a Judge at Chambers, no matter where he has happened to be, or where the cause of action has arisen, I think I shall be justified in pursuing what I understand to have been the constant practice of the Judges of the Court, until it has been discovered that the practice is erroneous.

The difficulty has arisen apparently from a conflict between the mayor and a majority of the town council over a question of policy, and it is apparent that a fair question may also be raised as to the power of the council to pay the plaintiff's claim, in part at least, if not in its entirety. But I think that these questions cannot conveniently or properly be tried out in the manner proposed. I do not think that the mayor could of his own motion instruct a solicitor to defend the action on behalf of the town in opposition to a resolution of the town council that the claim should be paid and that the suit should not be defended.

If the council had considered the claim unfair or unfounded it could have defended the suit and in that case it would have power under the statute to appoint a solicitor to defend the action, the town solicitor being disqualified because of his interest in the cause. But the mayor could not instruct a solicitor to defend on behalf of the town.

It is contended that the mayor could be authorized to defend as a person interested in resisting the claim. To this there are two answers, I think: first, that he is not, or rather his solicitor is not, defending the suit on behalf of the mayor, and, secondly, that the mayor has no interest in the matter otherwise than in common with the other ratepayers of the town. There is a procedure well known to the counsel on both sides, by which to institute such a defence, and I know of no other in which their rights can be vindicated, if such they have.

I therefore think that the appearance must be set aside, but I shall defer making the order until the parties interested shall have had an opportunity to prevent judgment for default of appearance from being entered, if they are willing to take the risk of the proper proceedings to contest the plaintiffs' claim. In any case the appearance will be set aside with costs.

Appearance set aside.

CORNING et al. v. TOWN OF YARMOUTH
(Decision No. 2.)

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Nova Scotia Supreme Court, Russell, J., in Chambers. January 23, 1913.

1. PARTIES (§ III—12*a*)—ACTION BY TOWN SOLICITOR—RIGHT OF MAYOR TO INTERVENE—CONDITION AS TO COSTS.

In an action brought against an incorporated town by a firm of solicitors, of which the town solicitor is a member, in respect of a claim which a majority of the town council are in favour of paying, but which is resisted by the mayor as illegal and unauthorized, the fact that the town is *inops consilii*, by reason of the interest of the town solicitor, is a reason for admitting the mayor to intervene and defend the action on behalf of himself and other dissenting ratepayers, if any, subject to the penalty of payment of costs.

2. PARTIES (§ III—12*a*)—INTERVENTION OF MAYOR—LOCUS STANDI OF A RATEPAYER.

The liability as a ratepayer to pay a proportion of the amount involved in a claim against a municipal corporation, is such a special interest as to give the mayor a *locus standi* on the hearing of the application for leave to intervene and defend.

[*Hart* v. *Macilreith*, 39 Can. S.C.R. 657, followed.]

Statement

THIS was an application made by S. C. Hood as mayor of the town of Yarmouth, for leave to intervene and defend the action either in the name of the defendant or in his own name on behalf of himself as a ratepayer of the town, or in his own name on behalf of himself and all other ratepayers of the town.

The nature of the action and the reasons for defending the same were as stated in the previous case, *Corning et al.* v. *Town of Yarmouth* (No. 1), 9 D.L.R. 111.

W. E. Roscoe, K.C., for plaintiffs, and *J. L. Ralston*, for the town council, *contra*.

Russell, J.

RUSSELL, J.:—When I dismissed the application of the mayor to be permitted to defend this action, I felt that the situation was a hard one for the ratepayers, if any, who were objecting to the proceedings of the majority of the council. The legal adviser of the town is interested adversely to the defendant in the action, and is driven to the position, for which, of course, no blame attaches to him, that he is obliged to advise on both sides of the case. The town, as a party to the suit, is in fact without counsel. If a judgment by default had been entered up, it seems pretty clear to me that I could entertain a motion properly launched to set aside the default at the instance of any ratepayer shewing himself to be aggrieved. Hawkins, J., in *Jacques* v. *Harrison*, 12 Q.B.D. 141, said that "the rule giving power to set aside a judgment by default, had no limitation as to the person who might apply to set it aside." The obligation to pay a proportion of the amount involved is, under the case of *Hart* v. *MacIlreith*,

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39 Can. S.C.R. 657, such a special interest as would give him a *locus standi* without the intervention of the Attorney-General.

It seems to me to follow from this, that if after a judgment by default I could open it up and allow the present appellant to intervene, it must be a regular procedure to allow him to intervene now and not wait till the horse is stolen before locking the stable door. It must certainly be better for the interests of all concerned to contest the questions at issue in the present suit than to drive the parties to an inquisition and involve them all in unnecessary expenses.

There are some items in the account sued for that are fairly open to the challenge that they are *ultra vires*.

I understand it to be conceded that if those items are *ultra vires* they do not come within the principle that the direction of the town council must be a finality. This, in fact, had to be conceded, but it was suggested that if necessary the plaintiff would abandon those items rather than have the whole account delayed. But the difficulty here is that they have not been abandoned and the onus is thrown upon me of deciding whether they are *ultra vires* or not. Mr. Ralston, for the town counsel, contends that they may fairly, under the circumstances, be considered *intra vires* as expenditures properly incurred in the enforcement of the Act. And I am not prepared to say that they may not be. Nor do I wish to pronounce any opinion adverse to any part of the plaintiff's claim.

In view of the fact that the town as a town is in this particular case *inops consilii* from the circumstances already referred to, I think that the mayor should have leave to intervene as proposed on behalf of himself and the dissenting ratepayers, if any, of course at the peril of costs. The costs of the application will be for the present reserved, and I assume that they can be best dealt with after the trial.

Application granted.

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LAURENTIDE PAPER CO. v. CANADA IRON FURNACE CO., Ltd.

Quebec Court of King's Bench, Archambeault, C.J., Trenholme, Lavergne, Carroll, and Gervais, JJ. January 23, 1913.

1. PUBLIC LANDS (§ I C—17)—CANCELLATION OF PATENT—SCIRE FACIAS.

In an action in annulment of letters patent (*scire facias*) which requires, for its institution, the consent of the Attorney-General on cause being shewn, no ground can be alleged in the action unless it has been disclosed to the Attorney-General.

Statement

THIS is an appeal by the plaintiff from the judgment of the Superior Court, Charbonneau, J., rendered on December 5, 1910, dismissing its action to have the letters patent of the company defendant annulled.

The appeal was dismissed.

A. C. Casgrain, for appellant.

J. L. Perron, K.C., and *A. W. P. Buchanan*, K.C., for respondent.

The opinion of the Court was delivered by

ARCHAMBEAULT, C.J. (translated):—This is an action in annulment of letters patent to cancel the sale of four lots of land situated in the des Piles concession, in the parish of Ste. Flore.

The reasons invoked by the plaintiff appellant in support of its demand are: first, that the sale is illegal; second, that the letters patent were obtained on the strength of fraudulent representations.

The company appellant has possessed since 1852 by itself and its predecessors in title diverse timber limits in the district of Three Rivers. In 1890 four lots of land were detached from these limits and conceded for colonization purposes. They are lots 42, 43, 44 and 45, and are the lots in issue in this case. Lots 42 and 43 were conceded to Sevère Hamel; lots 44 and 45 to Arthur Genest. Later, in 1893, Hamel and Genest sold these four lots to one Sylvestre, who, in turn, transferred them in 1903 to the company respondent.

In 1906 the appellant company asked the district forest warden, named Trépanier, to inspect the work done thereon and also on other lots detached from their timber concessions; and on August 18th the forest warden reported that he had made such inspection and had found no improvements of a homestead nature on such lots, and he added that these lots must have been acquired for timber purposes rather than agricultural lands, as they were not adapted to cultivation.

On the same day, August 18, 1906, the company appellant applied to the department for the revocation of the sale of these lots in order to have them returned to their own limits. On September 15th notice was given according to law that thirty days after the giving of such notice the sale of the lots would be revoked. On the other hand, the respondent company did not remain inactive during this period. On September 8th the local land and forest agent, one Lord, wrote to the minister that, at the request of the manager of the company respondent, he had visited the place in question on September 3rd and had found this land unsuitable for cultivation; that there was but little commercial timber thereon, the predominant wood being hard wood. Lord's letter added that the respondent company desired to obtain these lots as timber limits for the purposes of its industry, that the company employed three hundred men, and that seventy-five per cent. of its disbursements went into the pockets of the neighbouring population. At the end of this letter is to be found a note of the Quebec superintendent for the sale of Crown lands, Mr. Lavoie, stating that the petition of the company respondent could be granted if it obtained the consent in writing of

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the company appellant. On September 17th the deputy minister of Crown lands wrote Mr. Lord a letter to the same effect as the note of Mr. Lavoie.

On September 28th the general manager of the company respondent, Mr. Geo. E. Drummond, wrote to the Prime Minister, asking him to interest himself personally in this matter. In this letter he represented that his company had acquired these lots in good faith in 1903 for the purposes of its industry, that the company appellant was seeking to take these lots away, that these lots were unsuited to cultivation and should be conceded as timber land. The letter adds that the company has been advised to obtain the consent of the proprietors of the limits, but that this is impossible, inasmuch as these proprietors are precisely the other company which wanted to get the lots. Another note of Mr. Lavoie is to be found at the end of this letter, stating that, owing to the dispositions of the new law, it was impossible to recommend the sale of these lots as timber land because they were unsuited to cultivation. Nevertheless, adds the note, in order not to prejudice acquired rights, the proceedings in cancellation of sale might be suspended and the question referred to the law officials to see whether in the circumstances it might not be possible to accede to Mr. Drummond's demand by order-in-council.

On October 7th the company respondent sent a petition in proper form to the Minister of Crown Lands, requesting for the issue, in its favour, of letters patent for the four lots in question. At the bottom of this petition the minister wrote the following note authorizing the sale:—

> Vente autorisée pour fins industrielles.
> Prix fixé par M. Lavoie.
>
> (Sgd.) A. T.

Under this note the sale price was fixed by Lavoie in the following terms:—

> Recommandé que le prix des lots soit fixé à $2.00 l'acre, l'argent déjà payé devant être déduit du montant à payer.

This price of $2 was subsequently changed to $1.50 by the minister himself on certain representations made by the company. Finally on July 6th, 1907, these lots were sold to the company respondent for the aforementioned price of $1.50 per acre. The deed of sale has the following mention:—

"This deed of sale is made in accordance with the official order, Letter 3039-06, dated May 2nd, 1907." This official order is a letter from the deputy minister to the lands agent at Three Rivers, informing him that the minister had fixed the price to be paid by the company respondent for these farm lots at $1.50 per acre; and telling him to inform Messrs. Caron and Bourgeois, advocates, of Three Rivers, of the amount to be paid for the obtention of letters patent. This is the deed of sale which the

company appellant seeks to have annulled by reason of illegality and fraudulent representations.

The causes of illegality invoked by the appellant are: (1) that the sale was made by the deputy minister on the *ipse dixit* of the minister, and on the conditions and for the price fixed by the latter, whereas it should have been made by the Lieutenant-Governor-in-Council under the conditions and for the prices fixed by such order-in-council; (2) that the minister had no right to sell for industrial purposes lots which virtually formed part of the appellant's timber limits. The first ground seems to have been raised for the first time before this Court. The trial Judge does not mention it in his judgment and there is nothing to shew that it was spoken of in the Court below. In any event this ground is certainly not invoked in the appellant's declaration.

Until 1908 a demand in annulment of letters patent could only be brought by the Attorney-General or some other officer duly authorized to this purpose: art. 1008 C.P. In 1908 the statute 8 Edw. VII. ch. 78, amended the law so as to allow any interested person to bring suit in his own name; but, in such case, the writ can only issue under the written authorization of the Attorney-General. Naturally the required authorization is only granted with full knowledge of facts. The petition must indicate to the Attorney-General the reasons on which he bases his demand in annulment of letters patent. It necessarily follows that the demand cannot be made for other reasons than those mentioned to the Attorney-General. And so the statute requires that the authorization should be annexed to the *fiat* or *praecipe*. Besides, this is the way in which the appellant understood the law and its proceedings were made in accord therewith. In its petition to the Attorney-General to be authorized to bring the present action the appellant said:—

> Your petitioner has a good right of action against the Canada Iron Furnace Company, Limited, for the reasons stated in the annexed declaration and in the affidavit fyled in support thereof.

The Attorney-General granted the authorization prayed for to have the letters patent issued on July 6th, 1907, annulled "conformément aux conclusions de la dite déclaration, et pour les causes et raisons y énoncées." Now, as I have already stated, the declaration in no way alleges that the sale should be made by the Lieutenant-Governor-in-Council and not by the deputy minister. This ground must, therefore, be set aside.

The second ground of illegality raised by the appellant is that the Government or the Minister of Lands and Forests had no right to sell for industrial purposes lots which virtually formed part of its timber limits. This ground is also ill founded.

It presupposes that these lots formed part of the appellant's timber limits. As a matter of fact, these lots had been detached from these limits in 1890, and never returned therein. The

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Minister can revoke sales or leases of land in the case of fraud or abuse or in the event of non-performance of the conditions of sale or of lease. Art. 1574 gives him this power, but does not compel him to exercise it. He "may" cancel, says the article, and in such case the land reverts to the department, which may dispose thereof as if such sale or lease had never been made.

The appellant invokes art. 1633, which declares that where a sale of lots is cancelled, these lots are to be restored to the licensee holding the license to cut timber. This article cannot have any application in the present case, because, as a matter of fact, the revocation of the location tickets granted in 1890 never happened. The appellant is, therefore, without interest in demanding the annulment of the letters patent of 1907, for were such annulment to be granted, the lots would not be comprised in its timber limits, but would revert to the Crown by virtue of the location tickets of 1890. The appellant has, therefore, no interest, within the meaning of 8 Edw. VII. ch. 78, in demanding the annulment of the 1907 letters patent.

I have now only to examine the question of the fraudulent representations. There is certainly no proof of record that false representations were made. The contrary is established. . . . All the facts were laid before the department, which acted with full knowledge when it decided to sell these lots to the respondent as timber lands. The appellant contends that the land agent deceived the department by reporting that this ground bore but little commercial timber. Surely this cannot be claimed to be a fraudulent representation on the part of the respondent. The Government agent's error cannot constitute a fraudulent representation on the part of the company.

Besides, as stated by Mr. Justice Charbonneau in his judgment, the letters patent in question were not issued solely because there was little commercial timber on the lots in question, but also because these lots were not suited to cultivation, because they were useful for the purposes of the respondent's industry, and because the respondent had bought and used them for years for the purposes of this industry.

For all these reasons the judgment of the Court below is confirmed.

Appeal dismissed.

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Feb. 5.

ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

Nova Scotia Supreme Court, Meagher, Russell, and Ritchie, JJ. February 5, 1913.

1. MILITIA (§ I—3)—STRIKE—CALLING MILITIA TO QUELL—STATUTORY LIABILITY OF MUNICIPALITY, REQUIREMENT AS TO COMPLIANCE.

Where a liability imposed upon a municipality is purely statutory a substantial compliance with the requirement of the statute which alone creates the liability is essential to the existence of the liability.

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ATTORNEY-GENERAL OF CANADA v. CITY OF SYDNEY.

2. MILITIA (§ I—1)—OFFICERS OF—"SENIOR OFFICER PRESENT AT ANY LOCALITY," MEANING OF.

The officer in command of a military district, who pursuant to a requisition addressed to him for that purpose, calls out the militia in aid of the civil authorities in connection with matters arising from a labour strike, is not the "senior officer of the active militia present at any locality" as designated by R.S.C. 1886, ch. 41, sec. 34, so as to make the municipality where the force has served liable for the pay of the members; the term "senior officer of the active militia present at any locality" is to be construed as meaning the senior officer at or nearest the place where the riot has occurred or is anticipated, and not the senior officer of the district.

[The Militia Act, R.S.C. 1886, ch. 41, sec. 34, referred to; see also R.S.C. 1906, ch. 41, sec. 80.]

3. STATUTES (§ II A—96)—CONSTRUCTION OF—REFERENCE TO SUBSEQUENT ACT—LEGISLATIVE INTENT.

A subsequent statute dealing with the same subject matter may be looked at and referred to in aid of the construction of the former Act.

[*Grill* v. *General Iron Screw Colliery Co.*, L.R. 1 C.P. 600; *Rex* v. *Loxdale*, 1 Burr. 445, specially referred to.]

Statement

APPEAL by the defendant from judgment of Graham, E.J., in favour of the plaintiff in an action brought against the defendant for the sum of $5,309.09, money advanced out of the consolidated fund of Canada by the plaintiff under the statutes relating to the militia and defence of Canada, being pay for subsistence, etc., incurred by reason of the calling out of the active militia in connection with a strike in the city of Sydney during the months of August, September, October and November, 1904, and the months of January and February, 1905. The defence admitted the calling out of the militia by Lieutenant-Colonel Irving on the requisitions referred to, and that Lieutenant-Colonel Irving was at the time district officer in command of military district No. 9, of which the county of Cape Breton and the city of Sydney were a part, but relied among other things upon irregularities in connection with the requisitions.

The appeal was allowed.

F. McDonald, K.C., for appellant.

R. F. Macilreith, K.C., for respondent.

Ritchie, J.

RITCHIE, J.:—This is an action brought by the Attorney-General of Canada to recover from the city of Sydney $5,309.09 in connection with the calling out of the militia in consequence of a strike in the defendant city in 1904 and 1905. The action was tried before Mr. Justice Graham without a jury, and judgment was given in favour of the Crown for $5,289.60 with costs. An appeal was taken which came on for hearing at the March term, 1911. On the hearing, counsel for the defendant city attacked the requisitions calling out the militia, chiefly on the ground that they were not addressed to the proper authority designated by the statute. This point was not pleaded and was not taken at the trial, and therefore was not at all considered by Mr. Justice Graham, whose judgment was based upon other grounds. Coun-

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sel for the Crown objected to the point being raised on the appeal and an order passed granting the necessary amendment of the defence, and giving either party leave to adduce further evidence. The appeal now comes back for rehearing without any further evidence having been taken. The statute in force when the militia were called out in connection with this strike is ch. 41 of the Revised Statutes of Canada, 1886.

Sec. 34 provides (among other things) as follows: —

> The active militia or any corps thereof shall be liable to be called out for active service with their arms and ammunition, in aid of the civil power in any case in which a riot, disturbance of the peace, or other emergency requiring such service occurs, or is, in the opinion of the civil authorities hereinafter mentioned, anticipated as likely to occur, and in either case to be beyond the powers of the civil authorities to suppress or to prevent, or deal with, whether such riot, disturbance or other emergency occurs or is so anticipated within or without the municipality in which such corps is raised or organized. The senior officer of the active militia present at any locality shall call out the same or such portion thereof as he considers necessary for the purpose of preventing or suppressing any such actual or anticipated riot or disturbance, or for the purpose of meeting and dealing with any such emergency as aforesaid, when thereunto required in writing by the chairman or custos of the quarter sessions of the peace, or by any three justices of the peace, of whom the warden, mayor or other head of the municipality or county in which such riot or disturbance or other emergency occurs or is anticipated as aforesaid may be one; and he shall obey such instructions as are lawfully given to him by any justice of the peace in regard to the suppression of any such actual riot or disturbance, or in regard to the anticipation of such riot, disturbance or other emergency, or to the suppression of the same, or to the aid to be given to the civil power in case of any such riot, disturbance or other emergency.

The statute further provides that:—

> When the active militia or any corps thereof is so called out in aid of the civil power, the municipality in which their services are required shall pay them when so employed, etc.

And it is further provided:—

> Such pay and allowances of the force called out, together with the reasonable cost of transport, may, pending payment by the municipality, be advanced in the first instance out of the consolidated revenue fund of Canada by authority of the Governor-in-council, but such advance shall not interfere with the liability of the municipality.

The money has been so advanced and this action is brought to recover it. The whole proceeding is statutory and the basis of the proceedings is the requisition. The militia are to be called out:—

> When thereunto requested in writing by the chairman, custos of the quarter sessions of the peace or by any three justices of the peace, etc.

In this case there were three requisitions: the first addressed to Major Crowe, commanding the 17th Field Battery at Sydney;

the second addressed to Col. Irving at Halifax; and the third addressed to Col. McRae at Baddeck. The expenses incident to the calling out of the militia by Major Crowe have been settled, and it is in regard to the expenses incident to the calling out of the militia by Col. Irving and Col. McRae that this action is brought.

The point is taken for the defendants that neither Col. Irving or Col. McRae come within the words of the statute, "The senior officer of the active militia present at any locality." The Province of Nova Scotia is by the statute created one of the military districts of Canada. In the same statute we have the words "present at any locality." Counsel for the Crown contends that "locality" means "military district." I cannot come to this conclusion. I think the words in the statute, "the senior officer of the active militia present at any locality," mean the senior officer at or nearest the place where the riot has occurred or is anticipated. This construction, I think, gives to the words (in the connection in which they are used) their ordinary and natural meaning. For some reason, probably because the man on the spot is better able than one in a different locality to exercise the discretion which the statute gives him to call out such portion of the militia as he considers necessary for the preventing or suppression of a riot, I think Parliament had in view the local man when using the words, "the senior officer present at any locality." The word "district" is used in secs. 16 and 41. I think that if the word "locality" had been used in those sections it would have been very unsuitable. I do not think the words mean the same thing at all. "District" means the Province. "Locality" means the place where the thing is happening. If I accept the contention of the counsel for the Crown, I must come to the conclusion that two distinct words are used in the same statute meaning the same thing. But this would be to impute very bad drafting. A properly drawn statute or document always calls the same thing by the same name, and this is necessary where precision is required. To give the same thing two names is to create entirely unnecessary confusion, and I see no reason for assuming that this has been done in the statute under consideration.

"It is a sound rule of construction," said Cleasby, B., in *Courtauld* v. *Legh*, L.R. 4 Ex. 126, 130, "to give the same meaning to the same words occurring in different parts of an Act of Parliament."

This, I think, is a safe general rule, not an inflexible one, because sufficient reason might be assigned for construing a word in one part of an Act in a different sense from that which it bears in another part. But I see no such reason here. Sec. 78 is, I think, opposed to the contention made on behalf of the Crown. It is as follows:—

> The officer commanding any military district or division, or the

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officer commanding any corps of active militia, may upon any sudden emergency of invasion or insurrection or imminent danger, either call out the whole or any part of the militia within his command, etc.

To my mind it is obvious that the officer commanding any military district referred to in sec. 78 is not the same man as the "senior officer of the active militia present at any locality." The present Militia Act, which is ch. 41 of the Revised Statutes of Canada, 1906, is of assistance in construing the earlier Act upon which this action is brought. I refer to sec. 81 of the present Act, where it is provided:—

> The district officer commanding in any locality, if he is present in the locality and able to act, or, if he is not so present, or from sickness or other cause is unable to act, the senior militia officer of the active militia in any locality, not from sickness or other cause unable to act, shall collect the active militia or such portion thereof as he considers necessary, etc.

The district officer is commanding throughout the whole district. He is therefore commanding in every locality, if he is present in the locality, as, for instance, if the riot occurred in Halifax, where he resides, he is the man to call out the militia. If not so present, then it is the senior officer of the active militia in any locality who calls out the militia, shewing conclusively that when the words "senior officer of the active militia in any locality" are used, the district officer is not referred to. They are different men. One is to act under one set of circumstances; the other under different circumstances. It is a well-known rule of construction that a subsequent Act dealing with the same subject matter as the former Act may properly be referred to as an aid in determining the meaning of the former Act. In this connection I refer to *Grill* v. *General Iron Screw Colliery Co.*, L.R. 1 C.P. 600. Lord Mansfield in *Rex* v. *Loxdale*, 1 Burr. 445, 447, said:—

> Where there are different statutes *in pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other. So in the laws concerning church leases and those concerning bankrupts. And so also I consider all the statutes providing for the poor as one system relative to that subject.

In my opinion neither Col. Irving or Col. McRae were the officers designated by the statute to call out the militia, because neither of them was the senior officer of the active militia present in the locality within the meaning of the statute. The municipality has received the benefit of the calling out of the militia; the required aid has been given. I think the requisitions should receive a fair, reasonable construction, and I would not permit the claim of the Crown to be defeated by any narrow construction or mere technical informality. But the liability of the municipality is purely statutory, and a substantial compliance with the requirements of the statute, which alone creates the liability,

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is essential to the existence of the liability. The statute designates the officer who is to call out the militia (no other person has any jurisdiction or authority to do so), and provides that the municipality shall pay when the militia or any corps thereof "is so called out in aid of the civil power."

Giving the statute as favourable a construction for the Crown as I reasonably can, and with a disposition to make the municipality pay for the aid received, I cannot come to the conclusion that the militia was "so called out in aid of the civil power," because, as I have said, neither Col. Irving or Col. McRae had, in my opinion, any authority or jurisdiction in the premises. This objection, I think, goes to the root of the matter. The corner-stone of this statutory liability is that the requisition shall be addressed to and the militia called out by the man who by virtue of the statute is clothed with the authority and jurisdiction to act. Holding this view, it is not necessary to consider the questions raised before Mr. Justice Graham or the other questions raised at the argument. I would allow the appeal and hear counsel in respect to costs when the order is moved for.

Ritchie, J.

MEAGHER, J.:—I agree with some fairly strong doubts. The question is a difficult one.

Meagher, J.

RUSSELL, J., concurred.

Russell, J.

Appeal allowed.

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Manitoba King's Bench. Trial before Macdonald, J. February 5, 1913.

1. EVIDENCE (§ XII A—921*a*)—WEIGHT AND EFFECT—STALE DEMANDS.

The fact that the claim made is old and stale forms an additional reason why incomplete and unsatisfactory parol evidence in its support should not be credited.

Statement

TRIAL of action for a money demand.

W. M. Crichton, and *E. A. Cohen*, for plaintiff.
I. Pitblado, and *P. J. Montague*, for Anderson.
C. S. Tupper, for Trusts & Guarantee Co.
M. J. Finkelstein, for Trusts Investment Co.

Macdonald, J.

MACDONALD, J.:—In the year 1901 the plaintiff and defendant Anderson formed a partnership in certain special business transactions, the plaintiff to advance the moneys necessary for the expenses, and such advances to be deducted from the profits made and then the profits equally divided. Afterwards they entered into a general partnership until 1903, when W. A. Anderson, a brother of the defendant Anderson, came into the firm, and a new partnership formed, and this partnership con-

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tinued until December 31, 1906, under the firm name of Hunter, Cooper & Co., in Winnipeg, and Anderson, Cooper & Anderson, in the United States of America.

For some time prior to December, 1902, the defendant Anderson was a tenant of one Joseph Fisher, of the property on Edmonton street, in the statement of claim described, with an option of purchase at $8,250, and being unable, by reason of financial troubles, to comply with the terms of the lease by which such option could be exercised, he approached his then warm personal friend, the plaintiff, to lend him a helping hand, resulting in the latter securing title to the land, paying off the purchase price by mortgaging the property, which fell short, however, by $635, for which latter amount the plaintiff gave his personal notes to the vendor, Fisher. The plaintiff was not called upon to advance any moneys other than the moneys secured on mortgages on the property.

This $635 the plaintiff claims as part of the defendant Anderson's indebtedness to him, but I find that these notes were paid by the firm of Hunter, Cooper & Co., and not by the plaintiff.

There is no denial of the fact that the plaintiff took over the property to assist his friend, and not as beneficial owner, but he now claims that the property was to be held by him, not only in trust for the defendant Anderson, but also as security for any indebtedness of Anderson to him and for any future advances which might be made.

At the time of the taking over of the property from Fisher, I am satisfied that there was nothing in the minds of the parties in connection with the matter other than securing the property for the defendant Anderson and preserving it as a home for his parents. There certainly was not any thought of any indebtedness from Anderson to the plaintiff for which the property was to stand as security, unless it might be for any liability incurred in connection with the property. In 1902 the plaintiff says, "Lac du Bonnet deal fell through but we took up other deals and things looked rosy." In 1903, they opened up offices in New York and London. They had three large matters on hand, and the plaintiff says, "Things looked well for our partnership." Their banking facilities were evidently very easy and all partners drew heavily from that source.

On 1904 the plaintiff made arrangements to go to London to give his attention to the business of the firm there, and before going, the defendant Anderson suggested his executing a trust agreement pursuant to the arrangement under which he secured the title to the property in question, and an agreement and declaration of trust (ex. 74) was made and executed by the plaintiff. It was suggested by the defendant Anderson that the

plaintiff should go to Mr. Creighton, whom he had previously seen and presumably to whom he gave instructions to have the papers drawn. The plaintiff went to Mr. Creighton and certain changes were made, to which this defendant asserts he never assented and did not know of them; the portion objected to by the defendant being the words, "and subject also to the adjustment of certain accounts between the party of the first part and John Herbert Anderson, the son of the party of the second part." These words being now attempted by the plaintiff to be interpreted to mean that the lands were held by him as security for any indebtedness that might be at any time owing by the defendant Anderson to him.

This agreement and declaration of trust was deposited by the plaintiff with Mr. Creighton, as the latter says, in escrow, pending final adjustments of accounts between the plaintiff and this defendant, this also without the knowledge of this defendant, and it seems to me a curious circumstance that the declaration of trust, the very object of which was to make clear the position of the parties, should be so vague on the subject-matter of which the plaintiff now seeks advantage.

I could understand the property being held by the plaintiff as security for any then present indebtedness and to reimburse him for any moneys paid out by him in connection with the property. He had given his notes, and if he had to pay them it would be reasonable that he should be entitled to look to the property as well as to the defendant for reimbursement, but I cannot understand it as intended to be held as a security for any other indebtedness that might be in the future incurred, as such a condition was not in the contemplation of the parties under the anticipated success of their business ventures.

At the time the plaintiff was about to leave for England he executed a power of attorney in favour of this defendant which, on April 28, 1905, was followed by executing a further and more enabling general power of attorney in favour of the defendant and under this latter power of attorney the defendant disposed of the lands in question to the defendant Wickson. The latter in turn disposed of the property by transfer to the defendants, the Trusts and Guarantee Company, Limited. This company took the property over from Wickson, advancing the moneys necessary, and this was done at the request of the defendant Anderson. The property was to be the company's security and subject to such security they were to hold the property in trust for the parents of the defendant Anderson.

This company did not, and does not, claim to be the owners of the land other than as above stated. They took the property over without any knowledge of the conditions set forth by the plaintiff, and they acted innocently and with the object of assisting Anderson in protecting the property for him.

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At the time of this transaction the defendant Anderson had expectations leading the company to feel secure that the moneys so advanced by them would be repaid within a very short time, but the expectations did not materialize and not for over a year did this company realize their money, and that was done by way of a sale of the property made by the defendant Anderson to the defendants the Trusts Investment Company for the sum of $55,000. This transaction was a *bonâ fide* one and this company cannot be charged with any knowledge of conditions set forth by the plaintiff.

In June, 1911, the Trusts and Guarantee Company executed a transfer of the lands in question to the defendant Orpen, as security for an advance of twenty-five thousand dollars. After the commencement of this action this defendant transferred the property back to the defendants the Trusts and Guarantee Company, and notified the plaintiff that he had done so. There was, therefore, no possible object in further pursuing this defendant.

The object of making the defendants, the Trusts and Guarantee Company, Limited, Annie Anderson, Agnes Anderson, the Trust Investment Company, Limited, and A. Orpen, defendants, can only be for the purpose of following the property and reinstating it, and the parties in their original position. This, however, by reason of the various changes and disposition of the property, is impossible.

The defendant Anderson, having secured a release by the *cestui que trust* of their interests under the declaration of trust with the Trusts and Guarantee Company, caused an agreement (ex. 150) to be entered into, under the terms of which the defendants the Trusts and Guarantee Company were to hold certain of the moneys received by them from the sale of the property referred to, and to invest the same as the defendant Anderson might direct, and it was further agreed that a portion of the said moneys not exceeding $7,000 should be invested in acquiring a lot and building a house thereon in the city of Winnipeg for the use and benefit of the mother and sister of the defendant Anderson, and that such property should be held by the said company in trust as in said agreement recited.

In pursuance of such agreement, a lot was purchased and a dwelling erected thereon, and in the event of the plaintiff being entitled to a judgment, this property and the funds in the hands of the defendants the Trusts and Guarantee Company should be bound by it, providing it could be held that the property originally transferred to the plaintiff was transferred as a security as claimed by him.

During the absence of the plaintiff in England, conducting a losing business, greater disaster followed the business ventures at all points conducted by the defendant Anderson and his

brother, resulting in the firm of Hunter, Cooper & Co. being hopelessly insolvent, and on the return of the plaintiff to Winnipeg in 1908, he found that the defendant Anderson had decamped, having first disposed of the property in question, as already stated. The partnership between the plaintiff and the Andersons had ceased in 1906, and the defendant Anderson communicated with the plaintiff in London, stating that the situation was an impossible one, and that after the end of that year no new business would be undertaken.

Some time after the return of the plaintiff he got in communication with the defendant Anderson, and by arrangement, met in St. Paul, where a settlement of their partnership dealings was discussed, and finally carried to a conclusion in Winnipeg on August 22, 1908, by agreement (ex. 98). At that time the plaintiff had knowledge of the transfer of the property in question to the defendant Wickson under the power of attorney. He seeks to avoid this settlement by reason of the fraud and conspiracy set out in his statement of claim; but, to my mind, suspicious as the transactions between the defendants Anderson and Wickson may appear, he has failed in bringing such fraud and conspiracy satisfactorily home to the defendant Wickson.

The plaintiff charges that the defendant Anderson, during the years 1901 and 1902, became largely indebted to him. Now this indebtedness must be the basis of the claim he asserts to the lands in question. After his return from England, with such books, vouchers and cheques as he could resurrect after years of burial, he makes out a statement (ex. 62), shewing the defendant Anderson's indebtedness to him to be $2,694.08. The evidence of this indebtedness is far from complete and satisfactory; the claim is old and stale, and if it ever was a reality, at this late date it would be difficult to prove; but, because it is so old and stale, is the greater reason why it should be proved beyond a question, and that has not, to my mind, been done.

The defendant also pleads the Statute of Limitations, and unless it can be held that the simple contract indebtedness became merged in the security of the property, this would be a complete answer.

Now, the contention of the plaintiff is that the property was to be his security, and that the declarations of trust, together with the inexplicable delivery in escrow, is evidence of that fact. The land is not made chargeable with any indebtedness; putting the best and most favourable construction upon these documents, they could only mean that the parties would adjust their accounts, and then make the land liable as security for the indebtedness arrived at, but that adjusting must, to my mind,

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be gone into and a settlement made before the Statute of Limitations has run its course.

In my opinion, on all grounds, the plaintiff has failed, and the action must be dismissed as against all parties with costs.

Action dismissed.

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MEMO. DECISIONS.

RAE v. PARR.

Manitoba King's Bench, George Patterson, K.C., Referee. January 6, 1913.

COSTS (§ I—14) — *Security — Temporary residence within jurisdiction.*]

APPLICATION by the defendant for an order requiring the plaintiff to give security for costs on the ground that he was a non-resident of the province. The statement of claim gave his residence as Winnipeg, but on his examination for discovery he stated that he came to the province before the action was commenced and that he was a temporary resident at the time of the accrual of the cause of action sued for, and intended to remain in the province until the conclusion of the action, but that otherwise he was not a resident of the province.

The application was dismissed.

P. J. Montague, for defendant.
R. B. Graham, for plaintiff.

MR. PATTERSON, Referee:—I find no rule in the King's Bench Act providing for an order for security for costs in such a case as the present. Rule 978 applies only "where it appears by the statement of claim, notice, petition or other proceeding, etc., that the plaintiff resides out of Manitoba." Rules 979, 980 and 981 provide for other special cases in which security for costs may be ordered upon application based upon affidavits, but we do not appear to have any rule similar to rule 1198 of the Ontario rules, which provides, among other things, that security for costs may be ordered where the plaintiff is ordinarily resident out of Ontario, though he may be then resident temporarily within Ontario, and before that rule was enacted in Ontario it would seem from the cases that security for costs would not have been ordered in a case like the present: *Wilder* v. *Hopkins*, 4 P.R. (Ont.) 350; *Ridondo* v. *Chaytor*, 4 Q.B.D. 453; *Robertson* v. *Cowan*, 10 P.R. (Ont.) 568, and *Dupont* v. *Crook*, 80 L.T. Jour. 31.

I therefore feel constrained to dismiss the application with costs.

Application dismissed.

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Ontario High Court. Trial before Clute, J. December 17, 1912.

1. SPECIFIC PERFORMANCE (§ II—42)—DAMAGES IN LIEU OF—ENFORCEMENT PREVENTED BY DEFENDANT'S WRONG.

A court possessing the former jurisdiction both of the common law courts and of the courts of equity may, in an action brought by the purchaser for specific performance, award in lieu thereof damages for non-performance in addition to the return of purchase money paid, where there had been a part performance by admitting the purchaser into possession and the vendor was the owner able to give title but re-sold to another in fraud of the plaintiff, notwithstanding that there was no contract in writing under the Statute of Frauds.

[*Lavery* v. *Pursell*, 39 Ch.D. 508, and *Re Northumberland Avenue Hotel Co.*, 23 Ch. D. 16, distinguished; *Elmore* v. *Pirrie*, 57 L.T. 333, applied.]

Statement

ACTION for specific performance of an agreement for the sale of a house and lot in North Bay by the defendant to the plaintiff.

Judgment was given for the plaintiff for damages.

J. C. W. Bell, for the plaintiff.

R. McKay, K.C., and *G. A. McGaughey*, for the defendant.

Clute, J.

CLUTE, J.:—This action was brought for specific performance for the sale of a house and lot in North Bay by the defendant to the plaintiff. There was no memorandum in writing, but I found as a fact that plaintiff went in possession under the agreement, and is still in occupation of the house and premises.

The purchase price was $2,800, $500 was paid down and monthly payments were made for sixteen months at the rate of $20 a month.

The deed and mortgage were prepared, but the plaintiff having attended several times and the solicitors not being in, he neglected afterwards to attend and sign the papers. They never were in fact executed. There was some question raised as to whether the title was in the defendant or not, but the evidence clearly disposed of this point, and I found as a fact at the close of the evidence, that the defendant before he re-sold the property was in a position to convey to the plaintiff, and that he was the real owner at the time of the agreement for sale, although he had agreed to give a portion of the purchase money to his son as a gift, and the property stood in the son's name for a time.

The defence relied upon the case of *Lavery* v. *Pursell*, 39 Ch. D. 508, where it was held that the jurisdiction to give damages in substitution for, or in addition to specific performance, has not been extended to cases where specific performance could not possibly have been directed, and accordingly the contract having from lapse of time become at the hearing incapable of specific performance, the equitable doctrine of part performance did not enable the plaintiff to obtain relief and damages. The

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only point reserved at the trial was whether this case applied, and would preclude the plaintiff from recovering damages from the defendant for re-sale of the property at an advanced price, subsequent to the sale to the plaintiff.

A reference to the facts in the *Lavery* case shews that at the time the action was tried the time for specific performance had passed, and it was there held that as it would have been impossible to grant specific performance the plaintiff could not recover damages in lieu thereof.

In *Re Northumberland Avenue Hotel Co.*, 33 Ch.D. 16, the case was affirmed by the Court of Appeal, but not upon the ground that damages could not be given in lieu of specific performance. That question does not seem to have been referred to, either in the argument, or in any of the judgments in the Court of Appeal. It is true that Chitty, J., as a second ground in his judgment states, that if there had been an agreement on which specific performance could have been originally decreed on the ground of part performance, there would not be any jurisdiction to give damages after specific performance had become impossible, but this was not necessary for the decision of the case and is in no way confirmed by the Court of Appeal.

The argument upon which this view proceeds is, to my mind, wholly unsatisfactory, and at all events does not, I think, apply to the facts in the present case.

Here was a binding contract, made so by admitting the purchaser into possession of the property, where he resided for some sixteen months and made payments upon the principal of the purchase money and was so credited by the defendant in a book kept by himself. The transaction was repeatedly confirmed by these payments, and the defendant did not deny in the box that it was an absolute sale by him, and it was merely an accident that the plaintiff did not sign the documents which were prepared. He subsequently found an opportunity to re-sell the property at an advance and actually offered to the plaintiff $100 for his loss. I cannot understand upon what principle the man should be relieved from the effect of his contract, which is binding upon him, simply because by his own wrong he places himself in a position where he cannot carry it out. Since the Judicature Act there was a binding contract in law as well as in equity. There is a breach of that contract by refusal to complete, and I am of opinion that the plaintiff is entitled to recover damages for the breach, as well as a return of the purchase money paid by him, with interest from the dates of payment.

The *Lavery* case was decided apparently having exclusive reference to Lord Cairns' Act, which corresponds to our Judicature Act, sec. 58, sub-sec. 10, but the Judicature Act vested in the High Court all the jurisdiction which prior to the 22nd of

August, 1881, was vested in the Common Law Courts and the Court of Chancery. While Chitty, J., in the Lavery case incidentally refers to the Judicature Act, he does not point out the effect of the added jurisdiction to the High Court to that possessed formerly by the Court of Chancery. The effect of this enlarged jurisdiction is clearly set forth in the case of *Elmore* v. *Pirrie*, 57 L.T. 333. It was there held that under the Judicature Act of 1873, the Court had complete jurisdiction both in law and in equity, so that whether the Court could in a particular case, grant specific performance or not, it could give damages for breach of the agreement. This case does not appear to have been referred to in the *Lavery* case, [*Lavery* v. *Pursell*, 39 Ch.D. 508] although decided the year before.

Kay, J., in the *Elmore* case points out that Lord Cairns' Act somewhat enlarged the jurisdiction of the Chancery Court to grant specific performance or to give damages in lieu thereof to the extent pointed out by Lord Cairns himself in *Ferguson* v. *Wilson*, 15 L.T. (N.S.) 230, 2 Ch. 77.

Lord Cairns there said, L.R. 2 Ch., at 88:—

> There were many cases where a court of equity would decline to grant specific performance, and yet the plaintiff might be entitled to damages at law; and great complaints were constantly made by the public that when plaintiffs came into a court of equity for specific performance, the court of equity sent them to a court of law in order to recover damages, so that parties were bandied about, as it was said, from one court to the other. The object, therefore, of that Act of Parliament was to prevent parties being so sent from one court to the other, and accordingly the Act provides that the court may, either in addition to or in substitution for the relief which is prayed, grant that relief which would otherwise be proper to be granted by another court. But that Act never was intended, as I conceive, to transfer the jurisdiction of a court of law to a court of equity.

And again at p. 91:—

> "In all cases in which the Court of Chancery has jurisdiction to entertain an application for the specific performance of any covenant, contract, or agreement." That, of course, means where there are, at least, at the time of bill filed, all those ingredients which would enable the court, if it thought fit, to exercise its power and decree specific performance, among other things, where there is the subject-matter whereon the decree of the Court can act: *Soames* v. *Edge*, John. 669.

Chitty, J., in giving judgment in the *Lavery* case, put the argument in this way:—

> Part performance was an equitable doctrine, and, putting it shortly, where there was performance under the contract it took the case out of the statute, but it was an equitable doctrine applied by the courts of equity, and it was applied in those cases where the court would grant specific performance; for instance, the case of a sale of land. But if, before the Judicature Act, the court dismissed the bill because

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it was not a case for specific performance, the court of law when asked to give damages, the contract not being within the fourth section, had no alternative but to refuse, and to give judgment for the defendant in the action.

He then proceeds:—

But since the various amendments which have taken place in the law with regard to equitable doctrines, it has never been decided, so far as I am aware, that the equitable doctrine of part performance can be made use of for the purpose of obtaining damages on a contract at law. I considered the question carefully in *Re Northumberland Avenue Hotel Company*, and that went to the Court of Appeal, 33 Ch. D. 16, 18, 2 Times L.R. 210. There it was impossible to give specific performance because the subject-matter of the contract had come to an end. The Metropolitan Board of Works had entered, and the claimant (it was in a winding-up) could not claim specific performance. It was in that case argued strenuously on behalf of the claimant, that he was still entitled to obtain damages, and I held that he was not, although there had been part performance by entry, and my decision was, as I understand, affirmed by the Court of Appeal. The result is that I adhere to that, and I point out that in this case, when the writ was issued, it was impossible to give specific performance. It was suggested that after Lord Cairns' Act, the Court of equity could give damages in lieu of specific performance. Yes, but it must be in a case where specific performance could have been given. It was a substitute for specific performance.

Kay, J., after referring to the cases, points out that the Judicature Act of 1873 gave the Court a power which it did not possess before, "that is to say, it gave the Court complete jurisdiction both in law and equity; so that, whether the Court could in a particular case grant specific performance or not, it could give damages for breach of the agreement; a fortiori, if the contract was one as to which the Court had the right to exercise its jurisdiction to grant specific performance of it, the Court could grant damages for breach of it; so that the Court had now a much larger power than it had under Lord Cairns' Act, for under that Act the plaintiff had first to make out that he was entitled to an equitable remedy before he could get damages at all. Now, however, the plaintiff might come to the Court and say: 'If you think I am not entitled to specific performance of the whole or any part of the agreement, then give me damages.' That was the jurisdiction of the Court when the Judicature Act was passed."

This is, in my opinion, the true effect of the changes in the law. It is not by virtue of sec. 58, sub-sec. 10, of the Judicature Act, that the jurisdiction covering the present case was determined, but sec. 41, which gives to the High Court the jurisdiction possessed by the former Courts both of law and of equity. This is the view I expressed at the close of the plaintiff's case, and it is confirmed by a further consideration of the effect of

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the changes of the law bearing upon the question. See also Fry on Specific Performance, 5th ed., 637, 644*a*.

I think there is a distinction where the plaintiff by his own act disentitles himself to specific performance, as in *Hargreaves* v. *Case*, 26 Ch.D. 356, and where, as here, the defendant commits the wrongful act which deprives the plaintiff of the rights arising under his contract.

The plaintiff is, therefore, entitled to a return of his purchase money and interest thereon from the date of payment, and also damages for the breach of contract.

As to the amount of damages, the evidence was not very clear or satisfactory; the plaintiff claiming too much, and the defendant, I think, conceding too little. I assess the damages at $200, with a right to either party to take a reference, at his peril as to costs, to either increase or reduce this amount before the Master at North Bay. The plaintiff is entitled to full costs of action.

Judgment for plaintiff.

INTERNATIONAL HOME PURCHASING CONTRACT CO., Limited v. REGISTRAR OF JOINT STOCK COMPANIES.

ALTA.

S.C. 1912

Nov. 22.

Alberta Supreme Court, Harvey, C.J. November 22, 1912.

1. CORPORATIONS AND COMPANIES (§ VII B—370)—FOREIGN AND EXTRA-PROVINCIAL COMPANIES—LICENSE.

A mandamus will not be granted to compel the registrar of joint-stock companies to register under the Foreign Companies Ordinance, Alta. Ord., 1911, ch. 63, a company having only a provincial incorporation in another province, though it had as one of its expressed objects of incorporation that of carrying on business throughout the entire Dominion, as the duty to register is not so clear that the court should exercise its discretion to grant a mandamus to compel him to do so, the object of incorporation so indicated being one for which a Dominion and not a provincial charter should have been obtained.

2. CONSTITUTIONAL LAW (§ I G—141)—CREATION OF CORPORATIONS—EXTRA-TERRITORIAL CORPORATE OBJECTS OR FUNCTIONS.

The British North America Act gives the provinces the right to incorporate companies with provincial objects only, and the exercise of such objects is necessarily limited to the geographical boundaries of the province granting the privilege. (Dictum *per* HARVEY C.J.).

[*Rex* v. *Massey Harris Co.*, 6 Terr. L.R. 126, approved; a reference by the Governor-in-Council is pending before the Supreme Court of Canada upon this point.]

Statement

THIS is an application for a mandamus to compel the registrar to register the company under the Foreign Companies Ordinance.

The application was refused.

S. W. Field, for plaintiff.

L. F. Clarry, Deputy Attorney-General, for defendant.

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INTERNATIONAL HOME PURCHASING CONTRACT CO. v. REGISTRAR OF JOINT STOCK COMPANIES.

Harvey, C.J.

HARVEY, C.J.:—The company is incorporated under the laws of the Province of British Columbia. The memorandum is subscribed by five members, each of whom subscribe for one share of the par value of ten dollars, the nominal capital being $100,000.

The alphabet is employed one and one-half times in the enumeration of the objects for which the company is incorporated. Objection is taken to many of the objects. The first object is:—

> (a) To carry on in the Province of British Columbia, throughout the Dominion of Canada, and in any other country that may seem desirable, the business of a general loan and investment company, etc.

A foreign company within the meaning of the said Ordinance is one incorporated otherwise than by the laws of the Territories (and now, of the Province), for the purpose of carrying on a business to which the legislative authority of the Legislature extends. Such a company having gain for its object is prohibited from carrying on its business within the province unless registered. Section 3 provides that "any foreign company may become registered on compliance with the provisions of the Ordinance." By section 12 a foreign company when registered is given the rights and powers of companies incorporated under the Companies Ordinance.

In *Rex* v. *Massey Harris Co.* (1905), 6 Terr. L.R. 126, 1 W. L.R. 45, the Territorial Court *en banc* held that a company incorporated under the Dominion Companies Act, for manufacturing and selling agricultural implements throughout Canada, was a foreign company and required to be registered. But it was pointed out in that case that the Dominion alone could incorporate a company to do business throughout Canada. That view appears to me to be incontrovertible. The British North America Act gives the provinces the right to incorporate companies with provincial objects. Whatever other limitations that may involve, it appears clear that it involves the limitations of the provincial boundaries. If the province could incorporate a company with power to carry on its business, outside the province, it could incorporate it for that purpose only and I cannot see how the business of mining in Mexico, for instance, could be said to be a provincial object, though the business of mining in Alberta would undoubtedly be so.

The first object of the company in question is, therefore, clearly objectionable. What effect that would have on its incorporation, it is not necessary to consider. The registration would, under sec. 12, amount, in some respects, at best, to the same thing as incorporation.

It is not necessary to determine whether the registrar might properly register the company and whether such registration

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would give it the right to carry on its business in Alberta. The question is whether the duty of the registrar to register it is so clear that the Court should exercise its discretion to grant a mandamus to compel him to do so. If the parties applied for incorporation with these objects the registrar might, in my opinion, quite properly refuse the certificate of incorporation. I am unable, therefore, to say that he was wrong in refusing to register the company with these objects it having only a provincial incorporation. The application is, therefore, refused with costs.

Application refused.

LEBLANC v. CITY OF FRASERVILLE.

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Oct. 31

Quebec Court of Review, Malouin, Tourigny and Dorion, JJ.
October 31, 1912.

1. HIGHWAYS (§ IV A 5—154)—LIABILITY OF MUNICIPAL CORPORATION FOR INJURIES BY SNOW AND ICE ON SIDEWALKS.

Municipal corporations are bound to maintain their roads, streets and sidewalks in a safe condition so as to allow pedestrians to walk thereon without danger, and a city municipality which allows in winter time a dangerous piece of glare ice to remain without ashes or sand on it, or other protection or warning to pedestrians on a sloping street in a central locality, is liable in damages to a person who falls thereon and suffers injury.

Statement

THIS was an appeal from the judgment of the Superior Court, Cimon, J., rendered on April 29, 1912, condemning the defendant to pay $300 damages as the result of a fall on an icy sidewalk.

The appeal was dismissed.

Potvin & Langlais, for plaintiff.
Lapointe & Stein, for defendant.

The opinion of the Court was delivered by

Malouin, J.

MALOUIN, J. (translated):—This is an action for $400 damages resulting from a tort. The trial Judge awarded $300. Hence the inscription in Review.

At the end of November, 1911, the plaintiff fell on the sidewalk of Lafontaine street at Fraserville and injured seriously her leg and left hip. She alleges that the accident was due to the defective condition of the sidewalk at this spot; that at the time of the accident and for many days previous thereto it offered a sloping surface of glare ice; and that the defendant's employees neglected to keep the sidewalk in good order and to place sand or ashes thereon to prevent accidents.

The defendant repudiates any fault or negligence and alleges that the accident is due to the plaintiff's fault or, at all events, to a fortuitous event, owing to the inclemency of the weather.

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The question submitted to us is not free from difficulty, far from it. And what renders these cases even more difficult is that we have no definite rules of law to apply, we have to rely on the common law.

In Ontario there is 57 Vict. ch. 30, sec. 13, which enacts:—

> No municipal corporation shall be liable for accidents arising from persons falling, owing to snow or ice upon the sidewalks, unless in case of gross negligence by the corporation.

We have no such law in Quebec that I know of. Our judicial reports contain a large number of decisions on this matter, but no very definite rule appears in any of them. Each case must be decided according to the circumstances and facts proven.

Article 1053 says that every person capable of discerning right from wrong is responsible for the damages caused to another by his fault, either by his own act or as a result of his imprudence, neglect or want of skill.

The question is, therefore, one of fact and appreciation. Has the plaintiff proven that the defendant was at fault?

The accident occurred quite close to the town hall. On the day of the accident a light snow was falling, but so light that the plaintiff, who was carrying an umbrella used it as a cane. The snow that fell during the day was not even sufficient to completely hide the ice covering the sidewalk. The plaintiff was going towards the station and walking carefully along when she slipped, fell, and suffered serious injuries.

At this spot the sidewalk slopes, and on the day of the accident was covered with glare ice. It was evidently a dangerous spot, all the more so as the ice was slightly coated with snow.

The defendant does not deny there was ice, but states that it had caused sand to be placed thereon. The defendant, be it noted, does not plead that this spot was not dangerous, nor that it was not bound to put ashes or sand there, but it claims that it did so.

The evidence in support of this is not satisfactory. The evidence of the plaintiff is far more convincing and precise.

The trial Judge found that the plaintiff had proven negligence on the part of the defendant. I am not ready to state that he has not correctly appreciated the evidence.

The judgment is confirmed.

Appeal dismissed.

Re GREEN.

SASK.

S. C. 1912

Nov. 6.

Saskatchewan Supreme Court, Brown, J., in Chambers. November 6, 1912.

1. LAND TITLES (TORRENS SYSTEM) (§ IV—40)—CAVEATS — LAND PURCHASE CONTRACT—STIPULATION AGAINST TRANSFER WITHOUT CONSENT—PRIORITY BETWEEN ASSIGNEES.

An order continuing a caveat registered under the Land Titles Act against one lot of a tract of land will not be made, where the applicant merely holds a sub-contract for the sale of that one lot and where it appears that the applicant's vendor purchased the entire tract under an agreement for the sale thereof from the registered owner, which agreement contained a provision prohibiting an assignment of the agreement of sale unless such assignment should be for the entire interest of the original purchaser and should be approved and countersigned by the original vendor, and the applicant claimed as to a part interest only and never received such approval from the original vendor, and the entire tract of land subsequently by intermediate assignments, but before the filing of the applicant's caveat, came without notice into the hands of one who did secure the approval of the registered owner to the sale to him and also his approval to the various mesne assignments; and this notwithstanding that such final purchaser of the entire block did not himself record a caveat until after the caveat had been filed by the applicant.

[*McKillop* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, 20 W.L.R. 850, referred to.]

Statement

AN application for an order continuing a caveat.

The application was dismissed.

A. R. Tingley, for Green.

F. L. Bastedo, for Slater and Blake.

Brown, J.

BROWN, J.:—This is an application on the part of one Thomas F. Green for an order continuing a caveat. The facts are briefly as follows:—

James A. Blake became the registered owner of lots 1 to 10 inclusive, block 9, C.P.R. addition, Regina, on June 11, 1908, and the certificate of title therefor duly issued and still continues in his name. On July 21, 1911, Blake sold these lots to one Store under agreement for sale, and this agreement contained the following provisions: "No assignment of this agreement shall be valid unless the same shall be for the entire interest of the purchaser and shall be approved and countersigned by the vendor." On July 26, 1911, Store sold lot 10 to the applicant Green under an agreement of sale for $450, of which he (Green) has paid $115. This agreement is still subsisting and valid as against Store. On July 29, 1911, Store sold all the lots, including lot 10, to one Richardson, and executed in his favour an assignment of all his (Store's) interest in the lots in question. On August 14, 1911, Richardson sold the lots to Frank W. H. Davis and Harry Croft, and executed in their favour an assignment of all his interest in the lots in question. On August 21, 1911, Davis and Croft registered a caveat against the lots under their assignment. On February 15, 1912, Davis and Croft sold

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Brown, J.

the lots to G. L. Slater, assigning all their interest in the lots to him. On the date of this sale to Slater, and before any money was paid under it, Slater, with Davis and Croft, attended upon one E. Jackson, who acted for Blake under power of attorney, and he (Jackson) on behalf of Blake approved of the various assignments from Store to Richardson, from Richardson to Davis and Croft, and from Davis and Croft to Slater. Slater then on the same day made a search of the title in the land titles office and found that Blake appeared as the registered owner and that the only instrument registered against the title was the caveat of Davis and Croft. Neither Slater nor Blake was at that time aware of Green having any interest or claim to any of the lots in question. Slater then paid his purchase money and received the original agreement from Blake to Store, and also the various assignments to which Jackson had given his approval. On April 13, 1912, Green registered a caveat under his agreement against lot 10, and on June 4, 1912, Slater registered a caveat under his assignment against all the lots. The caveat which had previously been registered by Davis and Croft was allowed to lapse some time after the registration of Slater's caveat. Both Slater and Blake appear by counsel and oppose this application. Blake does so on the ground that he has recognized and approved of the assignments under which Slater claims and is desirous of giving effect to such approval, and that in any event Green's claim is only as to one lot. Slater contends that under all the circumstances Green has no claim whatever to the property, and his (Slater's) claim must prevail.

In view of what has been laid down in the recent case of *McKillop and Benjafield* v. *Alexander*, 1 D.L.R. 586, 45 Can. S.C.R. 551, 20 W.L.R., 850, a mere statement of the facts as above related shews clearly that the applicant cannot succeed and that Slater's claim must prevail. The application will therefore be dismissed with costs.

Application dismissed.

Samuel E. DUNN and THE EASTERN TRUST COMPANY (defendants, appellants) v. Frederick R. EATON et al. (plaintiff, respondent).

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Oct. 29.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. October 29, 1912.

1. APPEAL (§ II A—35) — JURISDICTION OF CANADA SUPREME COURT — EQUITY AND COMMON LAW PLEADING—COMMON LAW TRIAL—REFERENCE—ABSENCE OF FINAL JUDGMENT OR ORDER.

Although the plaintiff sued for equitable relief, by way of rescission of agreements, repayment of moneys paid on account, a receiver, and an injunction, and in the alternative common law relief by way of damages for deceit, if it appears that the cause of action which was really tried and for which relief was given was that of deceit as a common law action, in which the trial judge, although determining generally on the question of fraudulent misrepresentation as between the parties, did not attempt to assess the damages, but referred these and other matters to a referee, and reserved to the court the final judgment which should be given after the referee had made his report, an appeal to the Supreme Court of Canada will be dismissed for want of jurisdiction.

[*Wenger* v. *Lamont*, 41 Can. S.C.R. 603; *Crown Life Ins. Co.* v. *Skinner*, 44 Can. S.C.R. 616; *Clark* v. *Goodall*, 44 Can. S.C.R. 284, followed; *Eaton* v. *Dunn*, 5 D.L.R. 604, 11 East. L.R. 52, considered on appeal.]

Statement

APPEAL by defendants from a decision of the Supreme Court of Nova Scotia: *Eaton* v. *Dunn*, 5 D.L.R. 604, 11 East. L.R. 52, maintaining the judgment at the trial in favour of the plaintiffs in the principal action, and dismissing the defendants' counterclaim.

The appeal in the principal action was quashed and the appeal upon the counterclaim was dismissed.

The action claimed relief in equity and in law. The trial Judge held that the plaintiffs were not entitled to equitable relief and dealing with the case as an action in damages for deceit gave judgment for the plaintiffs with a reference for inquiry as to the action and counterclaim and reserved further consideration of the cause. His judgment was affirmed by the full Court and the defendants took an appeal to the Supreme Court of Canada.

L. A. Currey, K.C., for the appellants.

T. S. Rogers, K.C., for the respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—The statement of claim in this action sets out certain agreements for the sale of timber lands and asks as relief rescission of the agreements, re-payment of moneys paid on account, a receiver and an injunction, and, in the alternative, damages for deceit. It is, therefore, framed both as an action in equity and an action at common law. The defence, besides denying the allegations as to misrepresentation, is united with a counterclaim in which the defendant asks for

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damages for breaches of the agreement with respect to the time within which the lumber was to be cut, and for an injunction restraining the plaintiffs from continuing their wrongful acts. The counterclaim contained the usual common law counts to recover the price of goods sold and delivered, for work and labour done and for the values of a steam saw-mill, engine and boiler.

At the trial Mr. Justice Meagher gave reasons for judgment in which he generally found in favour of the plaintiffs, but decided that it was not a case for rescission, but for damages, and the formal judgment of the Court ordered, declared and decreed that the agreements in question had been obtained through fraudulent misrepresentations. He refused the remedy of rescission, but declared that the plaintiffs were entitled to damages, the amount thereof being reserved pending the report of the referee, and referred to the referee a number of matters referred to in the counterclaim above-mentioned, and directed the referee to take an account of all moneys paid by the plaintiffs, an inquiry as to liens and incumbrances, an inquiry as to the quantity of timber standing upon the purchased premises within the meaning of the first agreement, such other accounts as the referee might deem proper, and also finally reserved further consideration of the cause.

It would appear, therefore, that the action which was tried, and for which relief was given, was the action for deceit, and it was, therefore, a common law action in which the Judge, although determining generally on the question of fraudulent misrepresentation as between the parties did not attempt to assess the damages, but referred these and other matters to a referee and reserved to the Court the final judgment which should be given after the referee had made his report.

The case, therefore, would seem to be entirely on all fours with *Wenger* v. *Lamont*, 41 Can. S.C.R. 603; *Crown Life Ins. Co.* v. *Skinner*, 44 Can. S.C.R. 616, and *Clark* v. *Goodall*, 44 Can. S.C.R. 284, and we are without jurisdiction on this branch of the case.

We are also of opinion that the appellant failed completely to maintain his counterclaim and the appeal is dismissed as to that claim with costs, for the reasons given by the trial Judge.

Davies, J.
Anglin, J.
Brodeur, J.

DAVIES, ANGLIN, and BRODEUR, JJ., concurred.

Idington, J.

IDINGTON, J.:—The individual respondents and the appellant Dunn entered into an agreement, dated May 10, 1909. Then the corporation, named the S. E. Dunn Company, was created, apparently for the purpose of executing the purposes which the individual respondents had in effecting the first agreement.

On January 18, 1910, an agreement was entered into between Dunn and the said corporation based upon what the first agreement had in view. This action was launched by the individual respondents and said corporation seeking to rescind said first agreement on the ground that it had been induced by fraud of Dunn, but, alternatively, asking for damages if rescission could not be had.

The appellant Dunn, by way of counterclaim, amongst other things asked for a declaration that the agreement of January 18, 1910, was not his deed, was never delivered, and to have it set aside.

The learned trial Judge could not see his way to rescind the first agreement, but found there had been fraud practised, and, with a view to giving relief in respect thereof, directed a reference embracing numerous inquiries.

By the same judgment he dismissed that part of the counterclaim which sought to have the agreement of January, 18, 1910, set aside.

An appeal was had by appellants herein to the full Court, and a cross-appeal was taken by the present individual respondents, and that Court dismissed these appeals.

Therefrom the appellant brought this appeal seeking to have said judgment of reference set aside and to have the judgment reversed so far as it dismissed the counterclaim as to the part of it seeking to set aside the agreement of January 18, 1910.

No objection was taken by respondents to the jurisdiction of this Court, but, upon its being observed in course of the argument, that it was an appeal involving chiefly the judgment of reference, attention of counsel was called thereto. Nothing urged in support of the jurisdiction save as to one part of the counterclaim can maintain it.

The cases of the *Union Bank of Halifax* v. *Dickie*, 41 Can. S.C.R. 13; *Crown Life Ins. Co.* v. *Skinner*, 44 Can. S.C.R. 616, and other cases rendered it hopeless to maintain that the judgment of reference was a final judgment within the meaning of the Supreme Court Act.

That part of the appeal should, therefore, be dismissed for want of jurisdiction with such costs as might have been given on a motion by the respondent at the proper time to quash the appeal.

That part of the judgment dismissing the part of the counterclaim impeaching the agreement of January 18, 1910, is, of course, final and properly appealable, but the evidence given on the trial of the issues raised thereby renders the appeal therefrom apparently hopeless and it should be dismissed with such costs of and incidental to the appeal as would be properly tax-

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Duff, J.

able had the appeal been confined to that part of the counterclaim alone.

DUFF, J.:—The trial Judge held that the first of the two agreements was procured by means of representations which were false and which were fraudulent in the sense that they were made recklessly and without care whether they were true or untrue. This finding was affirmed by the full Court and it cannot be said that there is not evidence to support it. On this ground I should dismiss the appeal with costs. I express no opinion on the question of jurisdiction because it was not argued and I am by no means satisfied that the facts of the case bring it within the principles upon which this Court acted in *Wenger* v. *Lamont*, 41 Can. S.C.R. 603; *Crown Life Ins. Co.* v. *Skinner*, 44 Can. S.C.R. 616, and *Clark* v. *Goodall*, 44 Can. S.C.R. 284.

Principal appeal quashed with costs; appeal upon the counterclaim dismissed with costs.

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1912

Nov. 18.

"MY VALET," LIMITED v. WINTERS.

Ontario High Court. Trial before Middleton, J. November 18, 1912.

1. TRADE NAME (§ I—2)—WHAT MAY BE—"VALET"—DESCRIPTIVE TERM.

One who carries on the business of cleaning, pressing and repairing clothing cannot acquire any proprietary right to the use of the word "valet" in connection therewith, since that word is merely descriptive of the kind of business that is carried on.

2. TRADE NAME (§ I—9)—PROTECTION OF—UNFAIR COMPETITION—RIVAL HOLDING OUT—PURELY DESCRIPTIVE NAME.

Where a trader uses a word to describe his business, another may not use that word in such a way as to hold out his business to the public as being that of his rival, even though the word is one which, being purely descriptive, cannot be the subject of proprietary rights.

3. INJUNCTION (§ I M—121)—PROTECTION OF TRADE NAME BY INJUNCTION —ATTEMPTING TO "PASS OFF."

The use of the words "My New Valet" constitute an attempt to pass off the business of the user as the business of one who has for many years used the words "My Valet," and will be restrained by injunction at the instance of the latter.

[*British Vacuum Cleaner* v. *The New Vacuum Cleaner*, [1907] 2 Ch. 312, distinguished.]

Statement

ACTION to obtain an injunction restraining the defendant from carrying on business under the name, "My New Valet," or any other similar name, or any name so closely resembling that of the plaintiffs, as to be likely to deceive, and for damages.

The plaintiffs were awarded an injunction.

E. F. B. Johnston, K.C., and *D. I. Grant*, for the plaintiffs.

J. H. Cooke, for the defendant.

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"My Valet," Limited v. Winters.

Middleton, J.

Middleton, J.:—In the year 1896 William Fountain, a tailor, carrying on business in Toronto, conceived the idea that a business could be profitably conducted by an establishment which would undertake to look after the customers' clothing, establishing a system of collecting, cleaning, pressing, and returning garments, and of making minor repairs; in short, of performing for each customer the services which would be rendered by a gentleman's valet, save the personal attendance. This business was established, and was extensively advertised under the name of "My Valet," coupled in many instances with the words "Fountain, the Cleaner."

This business was very successful, and for a considerable time Fountain enjoyed what was practically a monopoly. His success induced rivals to establish opposition businesses; and this they undoubtedly had a right to do. In the case of some of these businesses the rivals have used the word "valet," and this I also think they have a right to do, as the word is descriptive of the kind of business which is being carried on. I do not think that Fountain could acquire a proprietary interest in this word which would entitle him to monopolize it. As said by Cozens-Hardy, M.R., in *Re Crosfield*, [1910] 1 Ch. 118, at page 141: "Wealthy traders are habitually eager to enclose a part of the great common of the English language and to exclude the general public of the present day and of the future from access to the inclosure,"—a statement even more true of the successful trader than the wealthy trader.

While this is so, it is equally well-established that a trader may not so use a word which another has attempted to appropriate, as to hold out to the public his business as being that of his rival.

Reference may be made to the judgment of James, L.J., in *Levy* v. *Walker*, 10 Ch. D. 436, 447; and to *Standard Paint Co.* v. *Trinidad Asphalt Manufacturing Co.* (1910), 220 U.S. 446.

In the present case the facts developed at the trial, I think, would shew a deliberate attempt on the part of the defendant to trade unfairly in the sense indicated. I think he intended to represent his business as being the plaintiff's business, and to unfairly divert to his own pocket that which was lawfully the plaintiff's; and that what he did was not merely calculated to deceive, but did actually deceive, and bring about, at least in some cases, the result intended. Had he used some such name as "Winters, the Valet," his course would have been objectionable. I do not think that the use of the word "New" in the title which he did adopt—"My New Valet"—is sufficiently distinctive.

It is not without significance, in considering this aspect of the case, that the word "My" is common to both names. It is not a case where the defendant is merely using the descriptive

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word; it is a case in which he is also using another word which forms an integral part of the plaintiff's title.

The *British Vacuum Cleaner* v. *The New Vacuum Cleaner*, [1907] 2 Ch. 312, comes very close to this case, but it is, I think, distinguishable. There could be no monopoly of the words, "Vacuum Cleaner" or "Vacuum Cleaner Company"; and the holding was that the word "New" sufficiently distinguished the defendant company from the plaintiff company, which had chosen as its descriptive word "British." I think the result would have been otherwise if the defendant company had called itself "The New British Vacuum Cleaner Company."

For these reasons I think it proper to award the plaintiff an injunction to restrain the defendant from the use of the name "My New Valet" or any other similar name only colourably different from the plaintiff's name.

The plaintiff company has sustained some damage; I have not satisfactory evidence as to how much, and therefore award fifty dollars, with the liberty to either party to have a reference at its risk as to costs; and I think the defendant should pay the costs of the action, including the costs of the motion for an interim injunction. If there is a reference, costs of the reference will be reserved.

Judgment for plaintiff.

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Feb. 5.

McGIBBON v. McGIBBON.

Nova Scotia Supreme Court, Graham, E.J., and Meagher, Russell, and Drysdale, JJ. February 5, 1913.

1. ADVERSE POSSESSION (§ II—64)—TIME REQUIRED AGAINST CROWN.

Adverse possession extending over a period of sixty years is sufficient to give the holder title as against the Crown or any one claiming under the Crown.

2. ADVERSE POSSESSION (§ II—62)—TACKING.

In making up the period of sixty years' adverse possession, the possessions of two or more parties who have been in possession continuously and without any break may be tacked.

[See *Robinson* v. *Osborne*, 8 D.L.R. 1014, and Annotation to same, 8 D.L.R. 1021, on the subject of Successive Trespassers.]

Statement

APPEAL by the plaintiff from the judgment of Ritchie, J., at trial dismissing an action claiming damages for breaking and entering upon the plaintiff's premises and cutting and carrying away hay. Plaintiff's title to the land in question depended upon a grant from the Crown issued on May 16, 1906.

The defence was that defendant and his predecesors in title had been in exclusive, continuous and uninterrupted possession of the lot of land referred to for sixty years and upwards prior to action brought and that plaintiff's claim or right of

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action was barred by the Statute of Limitations, being ch. 167 of the Revised Statutes of Nova Scotia 1900.

The judgment appealed from was as follows:—

RITCHIE, J.:—This is an action of trespass to real estate brought to try title. The lot in dispute is described in paragraph (3) of the defence and is the lot marked "A" on the plan which is exhibit M/2.

(*a*) The lot in question was part of lands which Dugald McGibbon took possession of without title 93 years ago. He built a house on the lands and was in occupation until his death. Dugald was the father of the plaintiff and defendant and he verbally gave the lot in question to the defendant, so far as he could so give it. This was about fifty years ago and the defendant then built a house on the lot and since that time he has been in exclusive, continuous and notorious possession of the lot, claiming it as his own.

(*b*) During the last fifty years or thereabouts a line fence has been kept up by the plaintiff and defendant between the lot in dispute and adjoining lands belonging to the plaintiff. Dugald McGibbon was in possession of this lot for a term of forty years prior to the building of the defendant's house.

(*c*) The order-in-council for the granting to the plaintiff of lands which included this lot, was made on the 16th day of July, 1905, and the grant was issued on the 16th day of May, 1906. The defendant knew that the plaintiff was applying for a grant of lands but did not know that the lands so applied for included this lot. This case is clearly within *Smyth* v. *McDonald*, 5 N.S.R. 274, cited by Mr. Ross, but *Smyth* v. *McDonald* is no longer law, having been overruled by *Emmerson* v. *Maddison*, [1906] A.C. 569.

It certainly seems extraordinary that the Crown should grant land of which the defendant had been for such a long period of time in open, notorious and undisturbed possession, but since the decision of the Privy Council in *Emmerson* v. *Maddison*, [1906] A.C. 569, the legal right of the Crown to make the grant is not open to question.

The second point made by Mr. Ross was, that tacking the possession of the defendant to that of Dugald McGibbon there is a possession of more than sixty years, which gives defendant absolute title. The question is, can the two possessions be tacked? The general rule is that the possession of successive disseisors can be tacked together so as to make a continuous possession, unless there is a privity of estate or title which will refer the second possession to the original entry so as to make a continuous possession. In this case there was no conveyance from Dugald McGibbon, but he handed all the possession of this lot to the defendant, with the intention of giving him the

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lot. By virtue of being thus put in possession the defendant has been holding and claiming the land as his own for fifty years. The question is not, did defendant get a good title from Dugald McGibbon but, was this possession continuous with that of Dugald McGibbon without any break?

I am of opinion that the two possessions can be tacked, and I find on the evidence that there has been a continuous possession adverse to the Crown for more than sixty years. I refer to *Weber* v. *Anderson*, 73 Ill. 439; *Cunningham* v. *Patton*, 6 Pa. State 355, and to Warvelle on Ejectment 472.

The right of action to recover the lot accrued to the Crown more than sixty years before the grant was made to the plaintiff. At that time the right of the Crown was barred by sec. 20 of the Statutes of Limitations. The plaintiff cannot be in any better position than the Crown was when the grant was made.

Mr. Langille contended that the defendant could not set up adverse possession or the lapse of time against the grant, but that his only remedy was to apply to the Commissioner of Crown Lands to have the grant vacated under secs. 21, 22 and 23 of the Crown Lands Act. To hold this would be to decide that a man who has an absolute title by sixty years or as in this case, ninety years adverse possession when sued in ejectment, cannot avail himself of his undoubted defence to the action, but must go to the Commissioner. I do not think this is what the statute means.

This action will be dismissed with costs.

Subsequently: On the defendant's motion for order for judgment, Mr. Meagher puts in agreement between Sarah McGibbon and Hector McGibbon. This was inadvertently not handed to me at the trial and I did not have it before me when writing the judgment in this case. Mr. Meagher contends that, in the light of this agreement, judgment should be for the plaintiff, but I cannot agree with this contention, and adhere to the judgment handed down. I expressed surprise, in my judgment, that the Crown should have made the grant; in the light of Mr. Meagher's argument this expression of surprise is probably not called for by the circumstances.

The plaintiff appealed.

H. Mellish, K.C., for defendant (respondent).

Graham, E.J.

GRAHAM, E.J.:—In this case in which a defendant is relying upon possession by himself and his father before him for upwards of 60 years before the grant from the Crown passed to the plaintiff, it is contended that the occupation for 60 years which bars the right of the Crown must be an occupation by one person, that an earlier occupation cannot be added to a later occupation the occupants being in privity and there being no inter-

vening period. Inasmuch as the normal period of a life is but three score and ten, and one cannot very well occupy land before he is 10 or 15 years old, a Nullum Tempus Act passed, as the title indicates, "for the general quiet of the subject," would hardly merit that implication. Perhaps it would be only fair to require some authority for such a contention, but I think that it can be disproved and I assume that burden.

I have no doubt that the first Nullum Tempus Act, 21 James, ch. 2, was brought to this country by the first settlers under the doctrine of *Uniacke* v. *Dickson*, 1 James' Nova Scotia Reports 287; see *Attorney-General for New South Wales* v. *Love*, [1898] A.C. 679. But as there has been legislation on the subject passed in Nova Scotia since, although not inconsistent with it and thus of a repealing nature, still, I shall not rely upon that Act. We had a Nullum Tempus Act passed in Nova Scotia in 1837. Statutes of 1837, ch. 93, which was continued until 1841, when it was repealed by the first series of the revised statutes. At that time a simple provision was included in the Statute of Limitations, ch. 154, sec. 14:—

> No claims for lands or rent shall be made by Her Majesty but within sixty years after the right of action to recover such lands shall have accrued.

That provision has been continued in that Statute of Limitations in those terms ever since, and is now sec. 20, R.S.N.S. ch. 167.

It is not saying too much that when the eminent lawyers who revised the statutes in 1841, recommended the repeal of the very long provincial Nullum Tempus Act, they thought, at least, they had sufficient for our purposes in the section just quoted. In these revisions a statute is not *primâ facie* to be construed as changing the previous statute.

Then in the Crown Land Act, R.S.N.S. 190, ch. 24, sec. 58, there is a recognition of the rights of a person in possession or Crown lands for 60 years, the inference there is that the Crown then has no rights. It is quite clear that under the provisions of this Statute of Limitations, relating to others than the Crown that the whole period, say of twenty years, that is, a complete statutory title may be made up by adding together periods of wrongful possession of a series of persons being successive holders transmitted from one to the other by descent, devise, conveyance or even agreement. The whole is taken as the continuous possession of one person and bars the true owner. *Handley* v. *Archibald*, 30 Can. S.C.R. 130, Strong, J., says at 137:—

> Whatever doubts there may have been with regard to the language of the Act when the statute 3 & 4 Wm. IV. was first passed, it is now elementary law that the statute does not run against a party out of possession unless there is a person in possession: *Smith* v. *Lloyd*,

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9 Ex. 562; *McDonnell* v. *McKinty*, 10 Ir. L.R. 514, and further, if there has been a series of persons in possession for the statutory term, between some of whom and their predecessors there has been no privity, in such case the bar of the statute is complete.

Asher v. *Whitlock*, L.R. 1 Q.B. 1; *Calder* v. *Alexander*, 16 Times L.R. 294.

In *Simmons* v. *Shipman*, 15 O.R. 301 at 304, Boyd, C., says:—

To bar the true owner and give a possessory title under the statute the fact of actual possession is the material thing, and this possession must be of a continuous character by successive occupants claiming in some sufficient way under each other. As pointed out by the Lord Chancellor in *Burroughs* v. *McCreight*, 1 Jo. & Lat. 290, at 303, it is not necessary that this possession should be strengthened or corroborated by intermediate conveyances. The Act speaks of possession without reference to conveyances.

And it will be noticed that Strong, J., has stated the same view.

It is also clear that under the different Nullum Tempus Acts a party could rely upon the occupation of his ancestor as well as his own to make up the sixty years period. There is no direct authority. It has always been taken for granted.

In *Goodtitle* v. *Baldwin*, 11 East. 488, the 60 years had not run and a grant could not be presumed because an old statute, 20 Car. 2, prevented the land in that locality from being the subject of a grant. There had been a possession of the Crown land 55 years before, by encroachment by the plaintiff's father, continued until his death 19 years before, after which his widow continued in possession for two years, and the plaintiff, the eldest son, being out of the way, she gave up the premises to the defendant for two or three guineas 17 years before, who had held possession for 17 years. Lord Ellenborough said:—

The statute of 9 Geo. III. does not give a title; it does not affect to repeal the statute 20 Car. II. It only takes away the right of suit of the Crown or those claiming from the Crown against such as have held an adverse possession against it for 60 years. But here the defendant who had been in possession for the last 17 years was a stranger both to the lessor (of the plaintiff) and his father.

In *Attorney-General for British Honduras* v. *Bristowe*, 6 A.C. 143, the note is in part as follows:—

Held, in an information of intrusion relating to land in British Honduras that the defendants having shewn sixty years' adverse possession there from before 1817, by themselves and their predecessors in title, without disturbance or effective claim by the Crown, such information must be dismissed.

The note is borne out by the judgment, page 155:—

Assuming then the conclusion of fact to be established . . . full possession of the land had been taken by the devisees and that such possession had been continued by them and their assignees down to the filing of the information, etc.

In *Attorney-General for New South Wales* v. *Love*, [1898] A.C. 679, the defendant's plea on the Crown's demurrer was upheld by the Judicial Committee and it was alleged that one Keith, more than 60 years before the filing of the information, entered on and thenceforth held possession of the land as his own property, that he conveyed his interest therein to William Love, who settled same in trust for himself, and his wife Susannah Love and the survivors of them for life and after the decease of the survivor on the respondent (the defendant) absolutely; that the foregoing persons had from the entry of Keith to the present time held continuous possession of the lands adversely to Her Majesty and without payment of rent to her, etc., etc.

Moreover in that case it was held that the Act applied to waste lands which had never been granted out or dealt with by the Crown.

In New Brunswick the Consolidated Statutes, ch. 14, sec. 1, enacted that adverse possession for 60 years barred an action by the Crown.

In *Emmerson* v. *Maddison*, [1906] A.C. 569, the Judicial Committee, 575, says:—

> The moment that it appeared that the land belonged to the Crown and had not been occupied adversely to the Crown for 60 years the presumption of ownership was gone. And as occupation for a period of less than 60 years can avail nothing against the Crown it would have been shewn that the possession as well as the right had always been in the Crown notwithstanding the occupation of the plaintiff and his predecessors in title.

Now one naturally asks if the period of twenty years under this Act can be made up by the addition of an earlier to a later occupation or possession, why cannot the period of 60 years be so made up? Also, if the period of sixty years can be so made up under the Nullum Tempus Act, why not under sec. 20 of the Statute of Limitations?

It is contended, while the words may be much the same, that the Crown is different from a subject; for instance, the Crown is never disseised. But that common law axiom is irrelevant. That contention would displace the dicta I have cited under the English Nullum Tempus Act. There are no special words in it to enable two successive periods of occupation to be added together.

A case is cited from the Court of Wards, mentioned in Dyer, and probably 2 Bacon's Abridgment, and mentioned by Halliburton, C.J., in *Scott* v. *Henderson*, 2 Thomson (3 N.S.R.) at 115, 119, and 121, and by Bliss, J., at page 143.

The first reference is a mere reiteration of the axiom that the King cannot be disseised. On the later reference it is thus explained by Halliburton, C.J.:—

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The King was seized of the manor of Beverly. A stranger erected a shop in a vacant plot and took the profits without paying any rent to the Crown. Then the Crown granted the manor to the Earl of Leicester and he made no entry on the shop or received any rent for it. And afterwards the occupant of the shop died and his son entered. The question was whether the son was in by descent or not. Four of the tribunal thought there was no descent and two sergeants thought otherwise.

Halliburton, C.J., says:—

It is very probable that this question may have arisen in an action of ejectment brought by the Earl of Leicester against the son although the reporter does not tell us so. Be that as it may, it does not appear that the right of the Crown to make the grant was mooted as the son seems to have rested his defence upon the descent cast which would have barred the entry.

In respect to the doctrine of "descent cast," while the death of the ancestor in possession and its descent to his heir tolled the entry of the true owner, the latter could bring his action of ejectment. It is not shewn that even a twenty year period had run against the Crown. As Bliss, J., points out, it was before the statute of 21 James I. While the King may not be disseised of land according to the common law, the 60 years' period of the Nullum Tempus Act may be running against him in consequence of a subject being in possession.

In the note to the Nullum Tempus Act, 3 Chitty on Statutes, title "Crown," p. 9, it is said:—

Although the King can never be put out of possession in point of law by the wrongful entry of a subject yet there may be an adverse possession in fact against the Crown.

I do not think that this Statute of Limitations requires any Acts to work a disseisin in the case of the Crown more marked than in the case of a subject.

In *DesBarres* v. *Shey*, 29 L.T.N.S. 592, 595, the Judicial Committee said in the case of a subject:—

Mr. Field, indeed contended that the possession could not be adverse unless there had been a disseisin. This contention is certainly not correct if disseisin in its technical and confined sense is meant. This question is elaborately discussed and numerous authorities collected in the notes to *Doe d. Nepean* v. *Knight*, 2 M. & W. 894, and *Taylor dem Atkins* v. *Horde*, in Smith's Leading Cases, 6th ed., vol. 2, notes, pp. 595, 613, 614. The result appears to be that possession is adverse for the purpose of limitation when an actual possession is found to exist under circumstances which evince its incompatibility with a freehold in the claimant.

I also refer to *Nepean* v. *Knight*, 2 M. & W. 894. In the case of the Crown, I notice that the question of the acts of possession put to the jury was put in much the same way as in the case of a subject. That is isolated trespasses for instance would not suffice: *Doe dem King William IV.* v. *Roberts*, 13 M. & W. 520.

Then the defendant's counsel contends that if the Crown may not by this provision bring an information to recover the possession after the 60 years' period has elapsed it may still make a grant of the land after that period, and of course, that the grantee may then bring an action. Now, I think that the expression "no claim for land shall be made by Her Majesty" is as strong to bar the right to grant as it is to bar a remedy. In New Brunswick, the provision in the Statute of Limitations in respect to real property is much the same in the case of the Crown as it is in Nova Scotia. It is mentioned in the report of the case of *Emmerson* v. *Maddison*, [1906] A.C. 569 and could hardly have been overlooked in the Supreme Court of Canada, 34 Can. S.C.R. 567. And at that page Nesbitt, J., delivering the judgment of the majority, more than once uses language implying that the effect of the statute is to extinguish the Crown's title after the lapse of 60 years.

In our Statute of Limitations the very next section to the one in question, namely, section 21, provides:—

> That at the determination of the period limited by this chapter to any person for making an entry or bringing an action the right and title of such person to the land . . . for the recovery whereof such entry . . . or action respectively might have been made or brought shall be extinguished.

I see no objection whatever to holding that "person" in that section includes Her Majesty who is mentioned in the next preceding section. It is odd that the very object of the first Nullum Tempus Act was to prevent grants being made when the land was in the quiet possession of a subject. Bliss, J., points this out in *Scott* v. *Henderson*, 2 Thomson (3 N.S.R.) 115, at 145:—

> Now, from this statute and the commentary (Coke, 4 Institute 188) upon it, we learn most clearly that it had been prevalent to pry into and seek out the ancient titles of the Crown to manor lands, etc., which had been of long time in the quiet possession of the subject, and the title of the Crown being thus unlimited they obtained grants and letters patent of such lands under a pretence that they had been concealed or wrongfully withheld from the Crown, and this was the mischief which the statute professed to remedy. The Crown then was in the constant habit of granting lands which were, so to speak, in the adverse possession of its subjects and these grants were never considered illegal or they would have been checked by a very different kind of statute.

Take the early grants in this province of vast areas of wilderness land with very many grantees in one grant and granted by shares or numbers instead of individual descriptions and very vague descriptions if any. Suppose the officials of the Crown would grant those lands to others now, what hope would the old occupants have if they could not rely upon the 60 years' pos-

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session? I refer to *Attorney-General for New South Wales* v. *Love*, [1898] A.C. 679. I think this provision would be a very poor statute if it should receive a construction which could be evaded by such officials. Such a construction is always to be avoided. The learned counsel for the defendant contends that the 60 years' period was interrupted by an application to the Crown for a grant made in the lifetime of the ancestor. It is in the cases and it is dated May 20th, 1873, an offer to purchase from the Crown 290 acres, which includes this seven acres. Now an offer to purchase of which nothing comes does not ordinarily prevent the running of the statute. There is no time during which the true owner could not have brought the action to recover the land: *Doe* v. *Curzon*, 6 M. & W. 295, 302; *Doe d. Mayor, Aldermen and Commonalty of Saint John* v. *Hasson*, 8 N.B.R. 451; *Jackson* v. *Newton*, 18 Johns. 355; *Warren* v. *Bowdran*, 156 Mass. 280; *McAllister* v. *Hartzell*, 60 Ohio St. 69, 94.

I think that under this Statute of Limitations, sec. 16, an acknowledgment to prevent the running of the statute must be in writing and must be signed by the party. The application was never signed by the father, Dugald McGibbon. It was signed by Hector, this plaintiff, and in his own name although it purported to be the father's petition. Signing is essential: *Ley* v. *Peter*, 3 H. & N. 101; *Doe d. Mayor, Aldermen and Commonalty of Saint John* v. *Hasson*, 8 N.B.R. 451.

The father then had been for two years insane and continued so up to the time of his death in 1883. Hector himself says:—

> Q. How long was your father's memory deranged? Up until the time he died? A. Yes.
>
> Q. How long before? A. About 12 years.
>
> (Re-examined): Q. About 12 years his memory was incapacitated? A. Yes.
>
> (Re-examined): Q. How long was he with you? A. He was two years in the hospital and ten years with me.
>
> (Re-examined): Q. This original petition of Dugald McGibbon of that grant, that is your signature, "Hector McGibbon"? A. Yes, that is my writing.

In the Crown Land Surveyor's report of September, 1874, this appears: "He is an old man and has been deranged for two years." Therefore, in my opinion, there was no acknowledgment in writing or otherwise. This is so whether the 16th section applies to the Crown or not. I think it does.

There was a payment of $5 made, but this by reason of the insanity was not at all binding on the father Dugald. It was in fact paid by the plaintiff as his witnessed writing of December 4th, 1903, addressed to the department shews, and it was not at all in the interest or on behalf of Dugald or the defendant. In the defendant's letter to the department of lands, Sept. 6th, 1905, which appears to have been obtained from him at the instance of the plaintiff, he says, p. 24:—

I hereby relinquish any claim that I have to the $5 paid by my deceased father Dugald McGibbon on an application for a grant of 290 acres lot of land, etc., as the money was not mine and I have no claim to any part of it. It should be credited to Hector McGibbon.

It appears that the officials of the department in 1873-1874 in consequence of the insanity of Dugald, conceived the idea of granting to the two sons, the parties in this action, the area which had been occupied by Dugald on an obligation from one of them providing for the support of Dugald and his wife and of dividing the land between them. A surveyor ran a line, but put this 7 acres now in dispute on which the defendant had commenced in 1868 to build a house and which land his father then gave to him for that purpose and on which he had been living since 1870, when the house was finished. That was a binding gift: *Dagley* v. *Dagley*, 38 N.S.R. 313. I think that the evidence does not connect this defendant with that, no doubt, well meant idea of the officials of the department. It was practically never carried out until long afterwards, because the plaintiff's fresh start in December 4th, 1903, thirty odd years afterwards, to obtain a grant of 150 acres which ultimately passed 16th May, 1906, was after the 60 years' period had run.

All the while the defendant had possession of the 7 acres since 1865, and any proceedings taken by the plaintiff as between him and the department are not shewn to have been known by the defendant. The defendant would take by descent on the father's death in 1883, as well as by the previous gift. The plaintiff cannot claim under the father, for the plaintiff's interest when this action was brought was extinguished as against Alexander by the limitation of twenty years: *Asher* v. *Whitlock*, L.R. 1 Q.B. 1. Nor under the grant from the Crown because its title was barred by the limitation of 60 years before the grant passed.

It is also contended that the Crown made an entry which prevented the running of the statute. This alleged entry was the running of a line in 1873, midway through the 290 acres which Dugald had occupied (not through the 7 acres) by W. R. Mackenzie, who, it appears, was a deputy Crown land surveyor. The Crown has such well recognized remedies against a person in occupation of its lands (see the Crown Land Act statute—Wrongful occupation of Crown lands, trespasses to Crown lands), besides the information of intrusion that one would hardly expect it to proceed by an entry or guess that it intended to make an entry when Mr. Mackenzie went there to make that survey. Intent counts for something in making an entry and also the manifestation of that intention to the intruder.

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At that time Dugald had been in occupation since 1833 (40 years) of the whole area and cultivating it. This plaintiff alleges that over his signature. In respect to the seven acres, that was in the occupation of this defendant For the purpose of limitation the gift to him would be recognized and as I said there is descent on the father's death. I think that neither to the one nor to the other was there any indication that this surveyor was there intending to regain possession or challenging the right of the occupant. Then this was a very temporary occupancy. There was no remaining in possession. Deputy Crown land surveyors make surveys for private parties as well as for the Crown and the official capacity in which this one was present was not made known to the occupants.

One test of an entry is, could the occupants bring an action of trespass against the person for making the entry. And in this case they could not do so: R.S.N.S. ch. 24, sec. 9. I think that if the officials of the Crown proceed by an entry to regain possession it would not be different from a subject making an entry. And I think that such a survey on the part of a private individual would be entirely inadequate to be considered such an entry: *DesBarres* v. *Shey*, 8 N.S.R. 327, on appeal 29 L.T.N.S. 592; *Doe d. Mayor, Aldermen and Commonalty of Saint John* v. *Hasson*, 8 N.B.R. 451; *Doe d. Baker* v. *Coombes*, 9 C.B. 715; Creswell, J., at 718; *Marshall* v. *Taylor*, [1895] 1 Ch. 641; *Lynes* v. *Snaith*, [1899] 1 Q.B. 486.

The appeal ought to be dismissed with costs and the judgment appealed from affirmed.

Drysdale, J.

DRYSDALE, J.:—I think under the Statutes of Limitations the question of possession in respect to the Crown must be treated in the same manner as possession in respect to individuals; in other words, that tacking of possession can take place as against the Crown just as against individuals. These statutes are in my opinion given effect to quite apart from the doctrine of seisin. I agree that the appeal should be dismissed.

Meagher, J.

MEAGHER, J., expressed doubt, but did not dissent.

Russell, J.

RUSSELL, J., concurred in the judgment appealed from.

Appeal dismissed with costs.

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Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Riddell, Sutherland, and Leitch, JJ. February 14, 1913.

1. DAMAGES (§ III K 1—206*a*)—TRESPASS TO LAND—ENTRY "UNDER CLAIM OF RIGHT"—QUANTUM.

If a trespasser enters on another's land "under a claim of right" the damages should be moderate, especially where coupled with an injunction and where the actual damages are trifling, and this, although the entry was made with a high hand.

Statement

APPEAL by the plaintiff from the judgment of Winchester, Senior Judge of the County Court of the County of York, in favour of the defendants, in an action brought in that Court to establish a boundary line between the properties of the plaintiff and defendant, and for damages for trespass.

The appeal was allowed with damages and an injunction.

Shirley Denison, K.C., for the plaintiff.

F. W. Carey, for the defendant.

Riddell, J.

The judgment of the Court was delivered by RIDDELL, J.:—In 1876, Adam Wilson laid out part of lots 1 and 2 in the 1st and broken front concessions of the township of York, and filed a plan, No. 406. On the plan, the course of Pine avenue is given definitely as N. 74° E., while that of Beech avenue is given as N. 16° W., in quotation marks thus, "N. 16° W.," indicating, it is said, that the line of Beech avenue has not been in fact run, but taken for granted. But there is no dispute or question that the line of Beech avenue is the well known N. 16° W. It follows that, on the plan, Pine and Beech avenues run at right angles. There is no dispute as to the correct position of the north-west corner of Beech and Pine avenues or of the south-east corner of lot 99—these points are all fixed and agreed upon.

The plaintiff bought a part of the south-west portion of lot 99 from her brother Frankland Terry in 1909, having had an agreement for purchase from the spring or summer of 1905, her husband having built a pair of houses on the western portion of the lot, one for a neighbour who owned the land north of hers, and one for Terry on his land.

The land had been theretofore vacant, but a fence of posts and wires ran along what was taken for the south line of lot 99—an old fence which, the plaintiff says, ran from a stake on Balsam avenue through to Beech avenue. Edward Heffernan says that in 1902, a surveyor, Mr. Browne, planted a stake on Balsam avenue, and that he (Heffernan) built the post and wire fence in 1904 to this stake and one (undisputed) on Beech avenue, which indicated the north line of lot 98.

In 1910, Heffernan, who owned that part of lot 98 now the property of the defendant, and the plaintiff, agreed to put up a

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board fence as the boundary of their lots; and they did so on practically the line of the former post and wire fence.

The defendant bought the north part of lot 98 from Heffernan in 1911. The owner to the south of him "moved him up" about four feet; and he then claimed four feet from the plaintiff. She refused to give this up; he tore down the fence; and she brought this action.

The whole case of the defendant is based upon two assumptions: (1) the north line of Pine avenue is not at right angles to Beech avenue; and (2) the boundary line between 98 and 99 is necessarily parallel to this north line.

I am not at all satisfied that Pine avenue, as originally laid out, was not run on the course laid down definitely, and not with quotation marks—that is, N. 74° E. Much assumption must be made before that can be accepted.

But, supposing that Pine avenue was not made at right angles to Beech. it by no means follows that the other lines are not at right angles to Beech. The course that would be followed if a blunder had been made at the junction of the two avenues, is to measure along the course N. 16° W. the proper number of feet, and then, turning the instrument through 90° from this course, run the course to the westerly—then, giving another distance, pursue the same course.

No original stakes have been found on Balsam avenue, and there is absolutely nothing to indicate that this course was not followed in the original laying out. We have no radii for the curves on Balsam avenue, and the scale 100 feet to an inch makes it impossible to determine accurately a small distance like four feet (which would take up only 1-25 of an inch on the plan).

If Pine avenue were at right angles to Beech, the assumption of the surveyors that all the lot-lines were parallel to Pine avenue would be sound; but only so because they, as well as Pine avenue, were at right angles to Beech avenue.

Quite irrespective of the evidence of Heffernan that the board fence ran from surveyor's stake to surveyor's stake, I think the defendant has wholly failed to prove that his land goes beyond the fence.

He went on land of which the plaintiff was in quiet possession, and which he has not proved to be his: he was a trespasser, and he should pay damages. The "cash amount" of such damages is about $16. I think, as he acted under claim of right, though with a high hand, the damages should be moderate. The plaintiff should have a verdict for $25 damages, an injunction, and costs on the County Court scale, here and below.

Appeal allowed.

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Manitoba Court of King's Bench. Trial before Metcalfe, J. March 10, 1913.

1. INJUNCTION (§ I B—24)—CONTRACT RIGHTS—COMPETING BUSINESS.

An injunction may be granted against a publisher and a company controlled by him, jointly sued for infringing his contract which conferred exclusive rights of sale of a copyrighted book upon another company in consideration of the latter's purchase of a specified number of copies of the work, to restrain the future selling or offering for sale of such work by either of defendants in contravention of the contract, and damages may be awarded for the past infringement.

[See *Pitt, Pitts* v. *George & Co.*, [1896] 2 Ch. 866; *Walsh* v. *Whitcomb*, 2 Esp. 565; *Boha* v. *Bogue*, 10 Jur. 421; *Re Hirth*, [1899] 1 Q.B. 612, 625.]

2. EVIDENCE (§ XI—1—820)—CONTRACTS—SUGGESTIVE FACTS.

In an action for infringement of exclusive territorial rights of sale conferred by contract, the court may give weight to the circumstance that the defendant had, prior to the expiry date for which he himself contended, and which was in dispute, made extensive preparations to invade the business territory in question in competition with the party holding such contractual rights, and had not communicated the fact to the latter.

[See *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182; *Waterpark* v. *Fennell*, 7 H.L.C. 650, 678; *The "Curfew,"* [1891] P. 131.]

3. CONTRACTS (§ I E 6—111)—PART PERFORMANCE—STATUTE OF FRAUDS.

Where an exclusive agency for a copyright publication has been granted within a defined territory in consideration of a guaranteed purchase by the agent of a large quantity for re-sale and where the parties for a long period thereafter have acted as though there were an enforceable contract and goods have been supplied and accepted in pursuance thereof, a plea of the Statute of Frauds (sec. 4) is not a bar in equity to the enforcement of the contract so acted upon, even if there were no sufficient memorandum to answer the statute.

[*Prested* v. *Garner*, [1910] 2 K.B. 776, and in appeal, [1911] 1 K.B. 425, distinguished.]

4. CONTRACTS (§ II A—128)—CONSTRUCTION—INTENTION OF PARTIES.

A letter setting forth in detail what the writer claimed had been agreed upon and purporting to confirm an unsigned cablegram sent by him a short time previously must be regarded in ascertaining the terms of a contract informally made and not theretofore completely shewn by a writing signed by the party to be charged; and where the party receiving the letter did not repudiate (although through inadvertence) and the contract in other respects was acted upon and partially performed, he must be taken to have accepted any variation of terms expressed in the letter.

5. CONTRACTS (§ I E 5—97)—STATUTE OF FRAUDS—SEVERAL PAPERS.

Where documents can be connected by a reasonable inference, although there is no express reference from one document to the other, they may be read together so as to constitute a complete memorandum under the Statute of Frauds (sec. 4).

[*Bristol, etc., Aerated Bread Co.* v. *Maggs*, 44 Ch. D. 620, applied; and see *Treadgold* v. *Rost*, 7 D.L.R. 741, 749.]

6. ESTOPPEL (§ III—41)—EQUITABLE ESTOPPEL BY CONDUCT.

A company may be estopped from setting up that the alleged stipulation relied upon by the other contracting party and set forth in a

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letter purporting to confirm the contract was in fact a variation from the terms already agreed upon, if the company without notifying the other party of its repudiation of the variance proceeds with the fulfilment of the contract in other respects; and this although such letter when received by the company was not brought to the attention of any of its officers or employees having authority to deal with the matter, of which circumstance the sender had no knowledge.

7. CONTRACTS (§ V B—389)—CONTINUATION—EXERCISING OPTION.

Where the contract provides that an extension of the original term for which exclusive selling rights of a copyright book are granted "shall be obtained" for another period by taking a specified quantity from year to year thereafter, the court may give effect to the renewal rights, although no notice was given during the original term of an intention to exercise the renewal option, where the election to renew was made within the first renewal year, and the other party has not been prejudiced by the delay.

[See *Dainty* v. *Vidal*, 13 A.R. 47; *Barlow* v. *Williams*, 16 Man. L.R. 164; *Farley* v. *Sanson*, 5 O.L.R. 105.]

Statement

ACTION by the plaintiffs to restrain defendants from selling Halsbury's Laws of England in Canada, as being in contravention of an agreement set up by plaintiffs.

A. B. Hudson and *H. E. Swift*, for plaintiffs.

C. P. Fullerton, K.C., and *C. S. Tupper*, for defendants.

Metcalfe, J.

METCALFE, J.:—The plaintiff does business as a dealer in law books, throughout the Dominion of Canada, the United States and elsewhere. One S. S. Bond is the sole proprietor of the defendant Butterworth & Co., law book publisher, of London, England. The other defendant, Butterworth & Co. (Canada), Limited, is a joint stock company, incorporated in England, having its head office for Canada at Winnipeg. Of the 1,000 shares issued by the company, Mr. Bond owns 999. The remaining share is owned by Mr. Bond's solicitor.

Prior to the year 1907, the defendants Butterworth & Co. were about to publish a work known as "Halsbury's Laws of England." This work is copyrighted and the copyright is owned by Butterworth & Co. That firm sent out circulars of advertisement by which the work is described as "The Laws of England, being a complete statement of the whole law of England, by the Right Honourable The Earl of Halsbury . . . in 18 to 20 volumes."

Some of these circulars were sent to Canada, with order forms attached, and inviting orders at the reduced rate of 21 shillings net, delivered. The Canada Law Book Co., having already had similar dealings with Butterworth & Co., opened a

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correspondence with a view to obtaining the exclusive right to sell this work in Canada and the United States.

On the 7th of March, 1907, the Canada Law Book Co. wrote Mr. Bond. The material parts of the letter are as follows:—

S. S. Bond, Esq.,
Messrs. Butterworth & Co.,
12 Bell Yard, Temple Bar,
London, England.

Dear Sirs,—When I was in England in July last you stated that you would communicate with me early after the first of the year in regard to Halsbury's Laws, as to the sole agency for this country and the United States.

On receipt of this letter please advise me by cable if you will accept our offer, which we now make, and which is on exactly the same terms and arrangements which I made with Green in regard to the Encyclopedia, second edition. We will undertake to purchase 300 sets within two years, paying you the sum of 7s. per volume, we to have the sole agency in Canada and the United States, and you to agree not to sell any copies in this country, and to notify the trade in London that they are not to sell in this territory.

Trusting to hear from you by cable on receipt of this letter, I am,

Yours very truly,
Canada Law Book Company, Limited,
R. R. Cromarty.

Afterwards one Robinson, acting on behalf of the plaintiffs, called on Mr. Bond in London, who thereupon made a proposal to Mr. Robinson, embodied in a memorandum reduced to writing, but not signed, which he handed to Mr. Robinson, and which memorandum is as follows:—

Given to Mr. Robinson.

1. Order to be accepted by the Company.
2. Sets not to be returned to England.
3. We to do our best to prevent sale to Canada.
4. Sole agency to Canada and U.S.A. for five years from publication of volume I. or for one year after publication of the last volume of the set, whichever shall be the longest period.
5. Sole agency after the above-mentioned period shall be obtained by their taking fifty sets for the first year and forty sets for the next year, and so by a sliding scale to ten sets for the fifth year.
6. Five hundred sets at 7s. 6d. in quires to be taken within two years, ordinary account.
7. We to hand over the orders from above territory received before this date, and to receive a bonus of 3s. 0d. per volume for the same; also to refer future orders and enquiries while this agreement lasts to the Canada Law Book Co.
8. B. & Co. to take back up to 100 sets at same price as charged, at completion of the expiry of the sole agency.

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After Robinson's return to Canada, the Canada Law Book Co., having that memorandum before it, wrote to Mr. Bond its letter of May 21st, 1907, the material parts of which are as follows:—

> Referring further to Halsbury's Laws of England, Mr. Robinson has just handed me the proposition you made to him. . . . As to the guarantee of fourteen volumes, the additional volumes, of course, will be free. We were to take 300 sets inside of five years from September last. It seems to me your proposition is a pretty stiff one. . . .
>
> We should like very much to handle the sale of Halsbury's Laws, and would be able to give you much better satisfaction than you could get through any other channel, but the terms are too stiff. If you want the assurance of an annual sale of this work, you may rest assured that if the sale can be made, we can do it, and if the agency is handed over to us, it will receive proper attention from us. If you wish, we will meet you half way, and pay 7s. 6d. per volume. We to agree to take 400 sets within two years, for the sole agency for Canada and the United States for five years, from the date of publication. We will waive the right to return any copies, all of which will be purchased outright. You will hand over to us any orders you have in Canada and the United States, without any cost to us. We will agree to supply them at the special price. . . .
>
> On receipt of this letter, you might wire me acceptance or refusal. We, of course, have the right to purchase additional sets at the price.
>
> Yours very truly,
>
> Canada Law Book Company, Limited.

Upon receipt of that letter, Mr. Bond, on the 13th of June, 1907, cabled as follows:—

> Cromarty, Toronto.
>
> Halsbury's Laws. Agree your modified terms. Writing.

This cablegram was unsigned. It is explained that in business dealings, it is quite usual to omit the signature to such cables. The cable was followed by a letter, dictated by Mr. Bond, and signed by Butterworth & Co., dated June 14th, the material parts of which are as follows:—

> THE LAWS OF ENGLAND.
>
> By the Earl of Halsbury and a Distinguished Body of Lawyers.
>
> We are in receipt of your letter of May 21st with reference to the above. Although we think that you should not have had any difficulty in falling in with our proposal, yet we will agree to accept your modification of our terms. The terms between us are now as set out overleaf.
>
> We cabled as requested as follows:—
>
> Cromarty, Toronto. Halsbury's Laws. Agree your modified terms. Writing.

The terms "overleaf" were set forth on a separate sheet accompanying the letter. The following is a copy:—

Arrangements with The Canada Law Book Company, Ltd., for "Halsbury's Laws of England."

1. This arrangement to be between the Company, if we decide to make one for this undertaking.

2. Sets not to be returned to England.

3. Butterworth & Co. to do their best to prevent sale to Canada.

4. Canada Law Book Company to take four hundred (400) sets within two years in return for the sole agency to Canada and the U.S.A. for five years from date of publication of Volume I. During the said sole agency they to have the right of purchasing additional sets at the same price.

5. Butterworth & Co. to hand over any orders from above territory that they have received.

June 14th, 1907.

Mr. Cromarty, who appears to be the governing power of the Canada Law Book Co., says that he did not see that letter, nor the "overleaf" memorandum until the spring of the year 1912. While at first glance this might appear unlikely, I have given weight to the explanation of Mr. Cromarty, who says that, after the receipt of the cablegram, he was absent from home because of bad health, and that the letter, arriving in his absence, instead of being filed with the cablegram and the other letters in a file under the heading of "contracts" was filed by his filing clerk in the general correspondence. I believe Mr. Cromarty's testimony on this point, and I find as a fact that this letter was not brought to his personal attention, nor to the attention of anyone in authority in the employ of the plaintiff company until some time in the spring of 1912.

Mr. Bond, who is really Butterworth & Co., evidently decided, prior to the 13th November, 1912, that, thereafter he would, by his one-man company to be formed for that and other purposes, sell the said publication practically direct in what had been the previously admitted territory of the Canada Law Book Co.

On the 13th of November, 1912, and as soon thereafter as physical conditions and the capacity of the Winnipeg post office would allow, for the purpose of procuring orders within the territory previously granted to the Canada Law Book Co., Butterworth & Co. (Canada), Ltd., acting under instructions of Bond and the English house, mailed from Winnipeg many

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circulars offering an India paper edition, "For a short time only," of the said work, at a price less than that at which the thick paper edition was being sold, and afterwards mailed many other "follow up" and other circulars, all for the purpose of soliciting orders. Such circulars did result in many orders for Halsbury coming to Butterworth & Co. (Canada), Ltd. If the contract is alive, I think Butterworth & Co., which is really Butterworth & Co. (Canada), Ltd., has committed a breach thereof, and I do not think that Butterworth & Co. (Canada), Ltd., if the contract is alive, can escape liability.

The plaintiff laid its claim contending that its contract with the defendant Butterworth & Co. is a contract extending for a period of five years from the date of publication; that the work is a complete work, subscribed for and sold only in sets, and that it is not "published" until the last volume is issued. In the alternative, it is said that if it has not such contract, it has a contract for at least one year from the date of the publication of the final volume. The plaintiff claims an injunction to restrain the defendants from soliciting orders within its territory, and damages for breach of the contract.

With great reason, he says it never was intended that his sole right to sell would cease before the completion of the work. Were it not for the "overleaf" accompanying the letter of June 14th, I could easily follow the plaintiff's contention. Certainly prior to the date of that letter Mr. Bond recognized that the contract should continue until a period after the publication of the last volume. While his memorandum "overleaf" may seem at variance with that conclusion, still, I fail to understand how he could expect any offer to be accepted or considered reasonable where the term would expire before the final completion of the work.

The defendant denies the contract.

At the trial I allowed an amendment setting up the fourth section of the Statute of Frauds. During the progress of the trial various applications for amendment were made, some of which I refused. As the trial proceeded, however, it became apparent that all the material evidence was at hand, and I intimated to counsel that if, upon consideration, I considered any amendments to either the statement of claim or defence were necessary to grant proper relief, I would allow the necessary amendments.

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I allow the plaintiff such amendments as are necessary to set up in the alternative, the contract as one for five years, with a right of renewal, the plaintiff by his counsel having offered to take the required number of sets. I also allow the plaintiff to set up waiver and claim for equitable relief.

I allow both the plaintiff and defendants to set up pleas of estoppel.

I allow all the amendments both of the plaintiff and defendants attached to the record.

The defendants say that the contract is a contract for the sale of goods and is not to be performed within a year; that there is no sufficient memorandum; that part performance does not take the case out of the statute, citing for this proposition, *Prested* v. *Garner*, [1910] 2 K.B. 776. It was there held that the 4th section of the Statute of Frauds was not repealed by the Sales of Goods Act, and therefore, that in such case part performance as set forth in section 6 of our Sales of Goods Act does not avail. This principle was recognized without discussion on appeal: *Prested* v. *Garner*, [1911] 1 K.B. 425. The defendants also say that there was no *consensus ad idem;* that if there is a sufficient memorandum it does not embody the mutual understanding; and that there is consequently no contract.

Of course, were the facts and circumstances similar, I would have no hesitation in applying the principle laid down in *Prested* v. *Garner*, but, while expressing no opinion on the application of that case here, I think there are many circumstances in this case which would tend a Court of Equity towards a different conclusion. It is true that in *Prested* v. *Garner* there was part performance; but how? By a shipment of a certain portion of a lot of carburetors. Each of these carburetors is a complete article in itself. The balance of the lot of carburetors, I think I may safely assume, were for sale upon the open market and the deficiency would be easily replaced, while here the work is copyrighted and cannot be procured elsewhere. Then Butterworth & Co. knew the plaintiffs would, in the ordinary course of business, incur obligations with its customers to provide them with the complete sets, and that the remaining volumes could be procured only from Butterworth & Co. Not only with the knowledge, but with the consent and assistance of Butterworth & Co., the plaintiffs did proceed as

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though there was a contract, sold more than the 400 sets before the expiration of two years and many hundred sets since, all of which sets were supplied by Butterworth & Co. at the price per volume mentioned in the correspondence. The contract was treated by both parties as a contract for the agency of a copyrighted publication.

Would a Court of Equity now hear the defendants say, "There is no memorandum"? Having regard to the portions of the correspondence already set forth, the mass of correspondence following during the next five years, the circumstances of the case and the conduct of the parties, who at all times acted during the whole five years as though there were an enforceable contract, I think I must find there was a contract.

It is true Mr. Cromarty did not see the letter of June 14th, 1907, nor its accompanying "overleaf" until the spring of 1912. But, had he seen those writings when they arrived, and if they contained a variation, could he have sat quietly by and now be heard to say that any variation therein expressed did not become a part of the contract. Surely after five years, if any variation were set forth in a way a reasonable man should understand, he could not now say, such is not a part of the contract. Is he in any better position because he did not see those writings? I do not think so. It was through no fault of Butterworth & Co. that Mr. Cromarty did not see either this letter or the "overleaf." I think that now the plaintiff may not be heard to deny that the variations, if any, mentioned in the "overleaf" became a part of the contract, and that the plaintiff must, by its conduct, be precluded from denying that it accepted any variation therein expressed.

It is not shewn on what date the first volume was published. Mr. Bond said some time in November, 1907. In the defence it is stated as November 14, 1907. As against the defendants, I think this may be taken as correct.

It appears that the sets supplied at 7s. 6d. per volume were unbound and printed on thick paper. Butterworth & Co. had issued an apparently limited number of sets printed on India paper. These sets were more attractive. The plaintiff kept continually asking for such sets, and some were from time to time supplied, bound and at a higher price. Mr. Cromarty from time to time unsuccessfully urged Butterworth & Co. to print

a further edition on India paper. Some Canadians wrote direct to London to the defendant Butterworth & Co. for India paper sets, and Butterworth & Co. replied stating that they could not supply them, and referring such applicants to the plaintiffs, whom Butterworth & Co. said were their sole agents. Butterworth & Co. sent copies of such correspondence to the plaintiffs. Evidently there became an increasing demand for the India paper sets. On January 6th, 1911, Butterworth & Co. wrote, "but it would be too expensive to reprint from moulds specially for the purpose of making up the stock of India paper editions. Under the circumstances there is no other course than to wait until a later date when we may be able to reprint a thick paper edition." On January 18th, the plaintiffs wrote wanting a price on 100 sets India paper edition, and later got 2 sets. Butterworth & Co., on February 10th wrote saying they could not spare more, and saying further: "If we are so fortunate as to be able to reprint the India paper edition in a few years, then it will serve as an extra attraction to those few benighted people who have not taken up the work, supposing there are any such."

Before November 12th, 1912, Mr. Bond appears to have made up his mind to go into business in Canada himself, not only to sell Halsbury, but to sell other goods in competition with the plaintiff. It is true he formed a one-man company; but can I come to any conclusion other than that Bond and Butterworth & Co. and Butterworth & Co. (Canada), Ltd. are one and the same thing, and that the limited company was thought by Bond either better for business reasons or perhaps safer in case of litigation with the Canada Law Book Co.?

Notwithstanding his repeated assertions to Cromarty that there would be no India paper edition for years, in the face of those assertions, and under the circumstances, I think, while he was making those assertions, he was preparing such an edition and preparing to advertise and sell these at reduced rates "For a short time only" on what he says he thought was the very eve of the contract with the plaintiff.

Who came to Winnipeg and arranged for the lease in his name, bearing date November 1st, 1912? That is not shewn, but I think I may assume someone was here on his behalf. When did he install his one-man company in those premises? It is

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not shewn, but surely it was before November 13th, 1912. When did he prepare those circulars? Surely long before November 13th, because, having been previously printed in England, they were then here; cart-loads of them, so many cart-loads that the Post Office could not, apparently, receive them all on one day. When did he commence to get ready his India paper edition? If I exercise any common sense, I would say long before November, 1912.

But it is not until he sends a letter bearing date November 6th, by way of mail, to the plaintiff at Toronto, that he says a word about his intention to himself come into the territory. Then he writes: "We are writing to say that on the 14th of this month, we open an office in Canada," giving the Winnipeg address. Still no word of the India paper edition. Let us see what happened. I cannot do better than copy a portion of the letter of November 16th from the Winnipeg office to the London office of Butterworth & Co.

Letter of Notification.

We have by this mail posted to London several copies of the above. On Wednesday, the 13th, we posted to the profession as many as the Post Office would allow. The balance were despatched on the 14th. If we have time we will explain our reference to the Post Office. The Government organization here is certainly the hardest case that we have ever had to deal with.

Book of the Laws of England.

Having regard to the possibility of activity in certain directions, we had decided, prior to the receipt of the personal letter to Mr. Bellew, to expedite the posting of the above. You will recollect that the original arrangement was for them to be posted on Saturday, the 16th. We, however, arranged to post the packets for Winnipeg on the night of the 14th, and the balance were taken away in four cart-loads on the 15th.

In passing, we think it well that you should become acquainted with what we have had to go through in connection with this matter. In the first place, the staff here had to paste on the title page and the order form (two operations). Secondly, they had to insert the red special offer slip, and an envelope; thirdly, the pamphlet had to be inserted in the envelope; fourthly, each packet had to be stamped "Butterworth & Co."; fifthly, a special number of "cancelled" stamps had to be procured in order to expedite the delivery of the packets. In the next place, as the Post Office decided it was too large a quantity for them to handle immediately, our staff here had to sort the packets into various postal districts, tie them up in special bundles, and make four journeys with the cart, to which we have already referred, to the C.P.R. mailing depot, where arrangements were made for them to be put on the respective trains. We may say that one of the clerks

was so amazed by such a quantity of stuff being delivered to them at once that he has asked for a copy of the pamphlet in order to keep it as a memento.

We have not set out this information merely to shew you that we have had some trouble in connection with the matter here. We include it in this letter because it is an important fact to take into consideration in the future. The Post Office here is not equipped to handle expeditiously in any event large quantities of either circulars or advertising matter sent to them from one firm. This does not, of course, raise an insuperable barrier in the way of future advertising, but it does put upon the office here a good deal of the burden that is borne by the Post Office in every reasonable country. From our experience of the country it is better for matter to be posted in Winnipeg rather than in London; but when arranging advertising campaigns you must be good enough to take all the facts set out in this section of the letter into consideration. Unless we had actually been through the experience of the last week we should not have believed it possible that such an organization, going under the name of the Post Office, could have existed in any modern country.

Now that the *Book of the Laws of England* is on its way over the country, we feel that we have got rid of one of the most important of our early tasks. We expect, within a few days, to have quite a fair correspondence as a result of the prospectuses being sent out. As a matter of fact, we have had two or three enquiring callers at the office to-day. We have also received our first letter in connection with the matter. When we write our next letter we hope we shall be able to say we have secured our first batch of orders. Some time must elapse, however, before it is possible for letters to reach us from the profession, either in the east or the west. There is, apparently, no standardized time for the transit of letters from one place to another. In any event, however, at the end of next week our letter box should be busy.

Laws Prospectuses No. 2.

Having regard to the possible activity already referred to in the previous section, we have also decided to expedite the despatching of the "follow" pamphlet, a stock of which has safely arrived. Another reason that we have decided upon this course is that it strikes us there may be a good chance of it being even more impressive than that beautiful production, *The Book of the Laws of England*. In our opinion it is one of the best advertising prospectuses that has so far been issued by the London house. It gives fresh glory to the premier legal work; it emphasises its utility, and shews that the *turn over edition* gives the work a value which up to the present has not existed. If our letter box does not commence to be put to good use, say a week after the despatch of this "*follow*," we are not at all sure that there will not be some grounds for our coming to the conclusion that something has gone awry with the Dominion.

Our Representatives.

We met Messrs. Wood, Dalziel and Lightfoot at the depot at 1.15 Thursday morning. They did not seem surprised, even at that early

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hour, to be met by someone from London. They all struck us as being depressed, and they certainly had not many pleasant recollections with regard to the journey. They apparently wished to stay here a few days in order to get some washing done, and to settle down to the country, or some such nonsense. We, however, despatched them as follows by the 10.40 train to the west, leaving the night they arrived.

Mr. Dalziel has gone to Regina, and we hope he was able to commence work there yesterday.

Mr. Lightfoot starts—if he carries out our instructions—in Calgary on Saturday morning; and Mr. Wood should be fit and ready on Monday morning.

We have arranged for them to telegraph us a "night letter," as we mean to keep in close touch with them.

The Laws of England, "Turn Over" Edition.

We were glad to learn that you have shipped 100 sets of the first ten volumes of the above. We expect these will arrive in Montreal about the end of the month. As we informed you in our previous communication, we will see that Mills has very explicit instructions with regard to the disposal of these. We hope you gave special instructions to the packers with regard to the wrapping and packing of the cases containing the ten volumes. Our reason for specially mentioning this is that a number of the volumes in the representatives' specimen cases appear to have got rather damp, and, as a result, the leather is somewhat marked. We cannot say very badly marked, but the examination of the travellers' sets already referred to revealed the necessity for special care to be taken in the matter of packing. If Messrs. Wingate & Johnston have attended to this matter with the corresponding care with which they packed the ordinary stock, we have no doubt the volumes will arrive at Montreal in quite good condition. The sets you are now sending out from England will, moreover, have greater protection than the travellers' sets referred to, as they are to be enclosed in a strong outer case. . . .

The defendants knew that the plaintiff was active in securing subscriptions and had the right to be active in doing so until the last moment. It is true that Bond did not know of Cromarty's oversight of his "overleaf" letter, for Cromarty had said nothing of it. Must I therefore assume that Bond thought his contract expired on the 13th of November, or was it a case in which he himself was uncertain? What was the "possible activity in certain directions" referred to in the letter of the 16th November from the Winnipeg office to the head office, not once, but twice, and in such a way that I can have no doubt but that both Bond and his Winnipeg representatives expected there would be activity? Was it that they did expect that the Canada Law Book Co. would not tamely submit to the termination of its contract on the 13th of November? Did

they expect that, unless they could get their circulars out by the cart-load and at once, they might be stopped? Why is it that the Winnipeg office finds so much fault with the Winnipeg post office accommodation? Surely it is because the circulars which they attempted to send out were so numerous and bulky as to be extremely unusual. I say again, why was there necessity for such haste?

The Canada Law Book Co. had been active in securing subscriptions. Butterworth & Co. had a register upon which was entered the subscriptions, and the date of entry, at London. During this very month of November the Canada Law Book Co. had ordered, in the usual way, apparently, 100 sets. Did Mr. Bond think that his circulars would have any effect upon these 100 subscribers, and upon the many other various recent subscribers? Did he think that those who were getting the thick paper edition would cast longing eyes upon the India paper edition? Did he think that he was dealing fairly with his Canadian customer, the Canada Law Book Co., when, knowing the price at which, during the whole five years, "Halsbury" had been sold in the thick paper edition, he, at the crack of dawn, floods the market with cart-loads of circulars, advertising for sale, at a less price, "For a short time only," the far more attractive India paper edition, by a rival Law Book Company formed to sell this and other law books.

Mr. Bond may consider that good business. He may consider it honourable business; but to my mind it is not commendable.

The contract was made before the publication of the first volume. Let us see what was in the minds of the parties, or in the mind of Cromarty on the one hand, and Bond on the other. Bond intended to give, and Cromarty to take, the sole agency for a term of years. Both Bond and Cromarty thought the work would be finally completed before five years. Having regard to the nature of the work and the consequent contracts that the plaintiff would make with its customers I must find that Bond intended (when he made the contract) that the plaintiff would have the sole agency, at any rate until the final completion of the work. I do not think any other thought was then in the mind of either party. During the subsequent correspondence the plaintiff urged haste, suggesting two years.

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On the strength of the circular before mentioned (complete in 18 to 20 volumes) the plaintiff opened correspondence for the exclusive agency. For what? Surely for the complete sets. Then followed Robinson's interview and the memorandum given to him by Bond to deliver to his principal, the plaintiff. Does the subsequent correspondence change the conditions set forth in that memorandum? In some respects its conditions are expressly varied. But in some respects not. In view of the common intention as to the plaintiff's right to an exclusive agency until completion of the publication, does the term in the "overleaf" so vary the contract that Bond may now say, "Although I have taken longer to complete the sets than either of us contemplated, and although that is my fault, now, because five years have expired, you have no contract."

When we look at the original memorandum we see, "For five years from the publication of Volume 1, or for one year after publication of the last volume of the set, whichever shall be the longest period."

After working for five years under the contract, the defendants now say the term as to time means one thing and the plaintiff says it means another. I think, in so far as the defendants are concerned, it looks as though they are trying to take advantage of the wording of the "overleaf" to work out an afterthought and something not in the mind of Mr. Bond when he sent the cable and wrote the letter following. Parties may well be fairly agreed upon the terms of a contract when it is made and get wide apart as the years go on as to the interpretation of its terms.

While I am not prepared to follow the plaintiff's contention as at first laid, I think there is strong ground to support it.

As the parties cannot now agree, let us look at the correspondence and see if we cannot find a contract.

It is strongly urged by the defendants that I must not look at the Robinson memorandum. I cannot support this contention.

> Where one document refers to another, the two may be read together so as to constitute a complete memorandum. . . . The same rule applies if the documents can be connected together by a reasonable inference, although there be no express reference from one document to the other: Halsbury, Vol. 7, 269.

The law is fully reviewed on this point in *Bristol, etc., Aerated Bread Co.* v. *Maggs*, 44 Ch. D. 620.

When I look at the whole correspondence to gather the terms of the contract, I am deeply impressed with the fact that the memorandum given to Mr. Robinson, which was the first writing of any moment, is an essential part of the contract. It is true that Cromarty makes certain propositions in his letter of the 21st of May, 1907; but he has the written proposition before him when he writes that letter and refers to it in that letter. When I look at the cable of the 13th of June and the letter of the 14th of June, and also the "overleaf," and compare this with the letter and with the original memorandum, I think I may safely say that, except wherein that original memorandum handed to Mr. Robinson is varied, its contents become and are a part of the contract.

Let us assume for the moment that the defendants are right in their contention that the term was varied by the "overleaf." Even so, the renewal clause remains a part of the contract.

But if the defendants are right in their contention that the contract expired in five years, whether they completed their publication or not, then it may be urged that the plaintiffs not having elected to renew within the term, may have lost that right. I have been referred to no authority on this point. I think I may refer to the law regarding leases:—

> A lease which creates a tenancy for a term of years may confer on the lessee an option to take a lease for a further time . . . and its exercise is not necessarily restricted to the duration of the original term: Halsbury, Vol. 18, 845.
>
> Where a lessee for a term of years has the option to renew his lease, it seems to be the better doctrine that he must notify his lessor before the term expires whether he elects to renew, as the lessor should know at the moment when the lease expires whether he has or has not a tenant. . . . A court of equity will not relieve the lessee against a failure to give the required notice if such failure was caused by wilful ignorance or accident not unavoidable. If, however, the failure to give the notice was caused by unavoidable accident, fraud of the lessor, surprise or ignorance not wilful, a court of equity should grant relief and compel renewal. . . . The lessor may also be bound by a waiver. . . . : 18 Am. & Eng. Encyc., 2nd ed., 692.
>
> Courts of equity will relieve a lessee if he has lost his right to renew by fraud on the part of the lessor or by unavoidable accident on his own part. They will not assist him where his failure to renew is on account of his own gross laches or negligence. On the other hand, it is held that on the question of the right to relief against a forfeiture for failure to renew time is not essential where there is mere neglect, but that in the case of gross or wilful negligence relief will not be granted: 24 Cyc. 1006.

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A provision in a lease giving to the lessee the privilege of extending the term is to be distinguished from a provision giving to the lessee the option to renew. In the former case no notice of the lessee's election to extend the term is required, in the absence of a stipulation therefor in the lease, his mere remaining in possession being sufficient notice: 18 Am. & Eng. Encyc., 2nd ed., 693.

The provisions of a lease requiring notice from the lessee of an election or intention to renew or extend the term are for the benefit of the lessor and, therefore, the notice itself or any other matter going to the sufficiency thereof may be waived: 24 Cyc. 1003.

It may be said that the case is not analogous; but I think the Court here should adopt a similar principle. It is true that a tenant remaining in possession gives an evidence of some intention. Here, considering the conduct of Bond and his Winnipeg office, and especially in view of the contemplated "activity in certain directions," I have no doubt that the defendants were fully aware of the stand the plaintiff would take as to the contract.

I think the defendants made all their preparations well knowing they would surprise the plaintiff. I think they succeeded in springing a surprise. Under the circumstances I fail to see in what better position the defendants are to complain of lack of election than would a lessor in any of the cases cited above. I think here the defendants had no right at all to invade the territory as they did.

I think the plaintiff is entitled to a renewal of his contract upon the terms mentioned in that memorandum. I do not think the defendants may offer for sale the India paper edition in the territory granted.

It was agreed at the trial that if I found the defendants had no right to invade the territory, I might assume damage, and that in such case there would be a reference by consent to an arbitrator to be agreed upon or to be appointed by me under the law in that behalf.

I reserve the matter of the appointment. If the parties cannot agree I will appoint the arbitrator.

There will be an injunction as prayed.

Having regard to the amendments, I allow no costs.

Judgment for plaintiff; injunction ordered.

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Judicial Committee of the Privy Council. Present: Viscount Haldane (Lord Chancellor), Lord Macnaghten, Lord Atkinson and Lord Moulton. January 31, 1913.

1. CONTRACTS (§ VI A—411)—MONEY HAD AND RECEIVED—FAILURE OF CONSIDERATION.

When money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use; and this principle extends to cases where the money has been paid for a consideration that has failed.

2. CONTRACTS (§ VI A—411)—RECOVERING BACK MONEY—LOAN UNDER ABORTIVE SCHEME—LENDER'S RIGHTS.

Where money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect and the scheme becomes abortive, the lender has a right to claim the return of the money in the hands of the borrowers as being held to his use.

[*Wilson* v. *Church*, 13 Ch.D. 1, in appeal *sub nom. National Bolivian Navigation Co.* v. *Wilson*, 5 A.C. 176, referred to.]

3. CONSTITUTIONAL LAW (§ I G—140)—FUNCTIONS AND POWERS OF PROVINCE—ACT ALTERING CONDITIONS OF LOAN—NON-RESIDENT BONDHOLDERS—SITUS OF REMEDY ON FAILURE OF CONSIDERATION.

Where the purchase price of bonds was remitted by the lenders in London to a branch of a Canadian bank in New York, to be applied in carrying out the proposed construction of a railway upon a guarantee of the bonds by the Provincial Government of Alberta, and in pursuance thereof the bank through its head office in Montreal authorized the opening of a credit for the amount in a branch of the same bank in Alberta subject to be drawn upon only upon the terms of the scheme which the province had approved by statute and order-in-council, the province cannot, by declaring a forfeiture of the concession and enacting a statute purporting to alter the conditions of the scheme previously approved, acquire jurisdiction to legislate over the civil right which arose in favour of the bondholders in London to claim from the bank in Montreal, outside of the jurisdiction of the Alberta legislature, a return of the money which they had advanced for a purpose which had ceased to exist.

[*The King* v. *Lovitt*, [1912] A.C. 212, distinguished.]

4. CONSTITUTIONAL LAW (§ I G—140)—FUNCTIONS AND POWERS OF PROVINCE—ACT AFFECTING EXTRA-TERRITORIAL RIGHTS.

As the effect of the Alberta statute, 1910, ch. 9, the Alberta and Great Waterways Railway Bonds Act, if validly enacted, would have been to preclude the bank, through which the money of the bondholders was being advanced under the terms of a government concession, from fulfilling its legal obligation accruing and remaining enforceable at a place outside of the Province of Alberta, the statute is *ultra vires*.

Statement

APPEAL by the Royal Bank of Canada *et al.*, the defendants in an action brought in the name of the Crown and of the Provincial Treasurer of Alberta from the judgment of the Supreme Court of Alberta in favour of the plaintiffs for $6,042,083.26 and interest as the proceeds of certain bonds which the provincial statute known as the Alberta and Great Waterways Railway Bond Act (Alta. Statutes, 1910, ch. 9) had declared to form part

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of the general revenue fund of the province. *The King and the Provincial Treasurer* v. *The Royal Bank of Canada*, 2 D.L.R. 762, 20 W.L.R. 929.

The appeal was allowed and the action dismissed.

Sir R. Finlay, K.C., and *William Finlay*, for all the appellants, and *J. H. Moss*, K.C. (of the Canadian Bar), for the appellants the Alberta and Great Waterways Railway Company and the Canada West Construction Company, Limited.

S. O. Buckmaster, K.C., *C. A. Masten*, K.C. (of the Canadian Bar), and *Geoffrey Lawrence*, for the respondents.

Counsel referred to the following cases: *The King* v. *Lovitt*, [1912] A.C. 212; *Dobie* v. *Temporalities Board*, 7 A.C. 136; *Attorney-General of Ontario* v. *Mercer*, 8 A.C. 767; *Citizens Ins. Co.* v. *Parsons*, 7 A.C. 96; *Blackwood* v. *Reg.* (1882), 8 A.C. 82; *Commissioner of Stamps* v. *Hope*, [1891] A.C. 476; *Prince* v. *Oriental Bank Corp.*, 3 A.C., Pt. 1, 325; *Woodland* v. *Fear*, 7 E. & B. 519; *Clode* v. *Bayley*, 12 M. & W. 51; *The Attorney-General* v. *Alexander*, L.R. 10 Ex. 20; *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A.C. 455; *McGregor* v. *The Esquimalt and Nanaimo Ry. Co.*, [1907] A.C. 462; *Woodruff* v. *Attorney-General for Ontario*, [1908] A.C. 462; *Bank of Toronto* v. *Lambe*, 12 A.C. 575; *Attorney-General (Que.)* v. *Reed*, 10 A. C. 31; *Tennant* v. *The Union Bank*, [1894] A.C. 31; *Grand Trunk R. Co.* v. *Attorney-General, Can.*, [1907] A.C. 67; *Madden* v. *Nelson and Fort Sheppard R. Co.*, [1899] A.C. 626; *Toronto City* v. *Bell Telephone Co.*, [1905] A.C. 52; *Crown Grain Co.* v. *Day*, [1908] A.C. 504; *Jones* v. *Can. Central R. Co.*, 46 U.C.R. 250; *City of Montreal* v. *Montreal St. R.*, [1912] A.C. 333; *Wilson* v. *Church*, 13 Ch.D. 1; *National Bolivian Navigation Co.* v. *Wilson et al.*, 5 A.C. 176; *Colquhoun* v. *Brooks*, 14 A.C. 493; *Wentworth* v. *Smith*, 15 Ont. P.R. 372.

The judgment of the Board was delivered by

The Lord Chancellor.

THE LORD CHANCELLOR:—This is an appeal from a judgment of the Supreme Court of Alberta. It raises questions of much importance, which their Lordships have taken time to consider. The main controversy is as to the validity of a statute of the legislature of Alberta, passed in 1910, and dealing with the proceeds of sale of certain bonds. These proceeds had been deposited with certain banks, one of them being the appellant bank. The judgment under appeal was given in an action brought by the Government of Alberta against the Royal Bank of Canada, the Alberta and Great Waterways Railway Co. and the Canada West Construction Co., to recover $6,042,083.26, with interest, being the amount of the deposit held by the appellant bank. The

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Court of first instance and the Court of Appeal for the province have given judgment for the Government. (2 D.L.R. 762.)

It is contended by the appellants that the statute in question was not validly enacted. It is said to have been *ultra vires* of the legislature of the province, as attempting to interfere with property and civil rights outside the province, and also as trenching on the field of legislation as to banking, which, by section 91 of the British North America Act, is reserved to the Parliament of Canada. It is further said that, inasmuch as the statute purported to make the deposits part of the general revenue fund of the province, it was inoperative, as being an attempt to raise revenue for provincial purposes in a manner not authorized by section 92 of that Act.

In order to determine the points thus raised, it is necessary to examine the transactions to which the legislative action of the Alberta Government was directed. The appellant railway company was incorporated by an Act of the legislature of the province, being chapter 46 of 1909, for the purpose of constructing and operating a railway, to extend from Edmonton in a northeasterly direction, and to be wholly within the province. The capital was to be $7,000,000, and the company was empowered to issue bonds. By another Act of the same session, being chapter 16, which received the Royal assent on the same day, the 25th February, the Government of Alberta was authorized to guarantee the principal and interest of the bonds to be issued by the railway company to the extent of $20,000 a mile up to 350 miles, with a further amount in respect of the cost of terminals. The bonds were to be repayable in fifty years, and were to bear interest at the rate of five per cent. By section 2 it was provided that the bonds so guaranteed were to be secured by a mortgage to be made to trustees, which was to cover the railway, its rolling stock and equipment, and its revenues, rights and powers. By section 3, the form and terms of the bonds, mortgage, and guarantees were to be approved by the Lieutenant-Governor-in-council. By section 4, when the guarantees were signed on behalf of the Government, the province was to be liable for payment of principal and interest, and no person entitled to the bonds was to be under the necessity of inquiry in respect of compliance with the terms of the Act. By section 5, all moneys realized by sale, pledge, or otherwise of the bonds, were to be paid by the purchaser, subscriber, pledgee, or lender, into a bank or banks approved by the Lieutenant-Governor-in-council, to the credit of a special account in the name of the treasurer of the province, or such other credit as the Lieutenant-Governor-in-council should direct. The balance at the credit of the special account or accounts was to be credited with interest at such times and at such rate as might be agreed on between the company and

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the bank holding the same, and such balance was from time to time to be paid out to the company or its nominee, in monthly payments so far as practicable, as the construction of the lines of railway and the terminals was proceeded with to the satisfaction of the Lieutenant-Governor-in-council, according to specifications to be fixed by contract between the Government and the company, and in such sums as an engineer appointed by the Lieutenant-Governor-in-council should certify as justified; provided that, at the option of the company, the moneys so paid into the bank should, instead of being so paid out, be paid to the company on the completion, as certified by the engineer, to the satisfaction of the Lieutenant-Governor-in-council, of sections and terminals specified. The balance of the proceeds of the bonds which might remain after completion of the railway was to be paid over to the company or its nominees. Section 5 concluded with a provision, which appears to have been inaccurately printed, but which their Lordships interpret as bearing the meaning put on it in an order-in-council subsequently made by the Lieutenant-Governor, on the 7th October, 1909, that the balance at the credit of the special account remaining until paid out, as above arranged for, was to be deemed part of the mortgaged premises under the mortgage, and not public moneys received by the province.

On the 7th October, two orders-in-council were made by the Lieutenant-Governor. The first of these, after reciting the incorporating Act and the Guarantee Act, above referred to, approved forms of mortgage and a guarantee, authorized the proper officials to execute them, and designated the Standard Trusts Co. as the trustee under the mortgage-deed. This order, also, pending the preparation of engraved bonds, authorized the guarantee of a single printed bond without coupons for the entire sum to be covered by the bonds, $7,400,000, to be exchanged for the engraved bonds in due course. By the second of these orders, after reciting that the company had elected to receive the money on completion of sections and of terminals on a progress basis, certain banks, including the appellant bank, were designated as the banks into which the proceeds of the bonds were to be paid in accordance with the Guarantee Act.

By an order made on the 9th November, the lists of banks was varied, but the appellant bank remained included, and the deposit out of the proceeds of the bonds of $6,000,000, being the principal included in the amount sued for, was assigned to it. This order recited that it was the understanding of the Government that, on the proper interpretation of the last-mentioned Act, the moneys in question, when paid into the banks, not being public moneys received by the province, could only be withdrawn on the terms stated in the Act.

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The second order of the 7th October had approved the terms of the preliminary bond, in a form which made the principal and interest payable in London at the counting-house of Messrs. Morgan, Grenfell & Co. The terms of the bond provided that it should be secured by a mortgage from the railway company to the Standard Trusts Co. and for the guarantee of principal and interest by the province. The bond was to be registered in the books of the company in London, and transfers were to be made in these books. Shortly after the making of the two orders-in-council of the 7th October, arrangements were made in London with Messrs. Morgan, Grenfell & Co., for the raising of the money authorized to be borrowed.

To enable the transaction to be carried out, the railway company, on the 28th October, entered into a formal contract with the provincial Government for the construction of at least 350 miles of the line. The contract recited the right of the company to issue bonds in proportion to mileage and terminals and the authority of the Government to guarantee principal and interest to the extent of $20,000 a mile and further sums in respect of terminals, and provided, in accordance with the Guarantee Act, that the proceeds arising from the bonds so issued should be paid into the banks approved by the Lieutenant-Governor-in-council, to the credit of the treasurer of the province in a special account, and that such proceeds should from time to time be paid out to the railway company on engineers' certificates. The balance of the proceeds, after completion of the railway and terminals, was to be paid over to the railway company. By a deed of the same date made between the railway company, the provincial Government, and the Standard Trusts Co., a company incorporated under the law of Manitoba, and having its head office outside the province, the railway company mortgaged its property to the trusts company to secure the bonds for the sum of $7,400,000 and interest at 5 per cent., repayable on the 1st January, 1959; and the Government guaranteed payment of principal and interest. The security expressly included, not only the railway and its rolling stock and equipment, but all real and personal property then or thereafter held or acquired for the purposes of the railway. Later on, on the 22nd November, the railway company entered into a contract with the appellant construction company, which had been incorporated under Dominion statutes, and had its head office outside the province, for the construction of the railway, and the railway company agreed to pay to the construction company the net proceeds of the bond issue, an agreement which was afterwards supplemented by a formal assignment of the 8th March, 1910.

Under the arrangements with Messrs. Morgan, Grenfell & Co., the preliminary bond for $7,400,000, already referred to,

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was taken up by them. A letter of the 11th October, 1909, from the deputy provincial treasurer of the province to Messrs. J. P. Morgan & Co., of New York, shews the method adopted by the Government in carrying out the transaction. The preliminary bond was to be handed to Messrs. J. P. Morgan & Co. as agents for the Government. That firm was to transfer to or hold this bond for Messrs. Morgan, Grenfell & Co., the immediate takers-up of the bond issue in London. The purchase-money was to be deposited to the credit of the provincial treasurer in the Edmonton branches of the designated banks. These arrangements were carried out in this fashion. As the proceeds of the bond issue in London came over to New York, the money which was to be applied and secured in accordance with the statutes, orders-in-council, and contracts, already referred to, was paid in instalments in New York, the part with which the appellant bank is concerned being received by its house in New York, and credited to the provincial treasurer in the railway special account. The bank had its head-offices in Montreal, and was incorporated under Dominion law. The account at Edmonton, in Alberta, was opened there in accordance with the arrangements already referred to.

No money in specie was sent to the branch office which the bank possessed there, but the general manager in Montreal arranged for the proper credit of the special account. It is plain that all these transactions were carried out for the purposes and on the faith of the statutes, orders-in-council, contracts, and mortgage-deed referred to, and were effected for the purpose of providing for the construction of the railway with the security and guarantees which had been given. It is not in dispute that the Government at this period meant the appellants to understand that it would adhere strictly to the terms of its guarantee.

The construction company commenced the works preliminary to the construction of the line. No part of the sum at the credit of the special account was paid out for this purpose, but the bank made advances, and the construction company assigned to the bank as security its interest in the proceeds of the bond issue.

The second chapter of the history of the events which resulted in the appeal before their Lordships opened in March, 1910. There appears to have been public uneasiness about the action of the Government in entering into the arrangements above described; and, in the event, a Royal Commission of inquiry was appointed. While it was sitting, there was a change of Government.

The new administration introduced and passed two statutes, and on the validity of the first of these the question to be decided in the appeal turns. This statute, which became law on the 16th December, 1910, after setting out in its preamble that

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the railway company had made default in payment of interest on the bonds and in the construction of the line, and then ratifying and confirming the guarantee by the province of the bonds, enacted that the whole of the proceeds of sale of the bonds, and all interest thereon, including such part of the proceeds of sale as was then standing in the banks in the name of the treasurer of the province or otherwise, and comprising, *inter alia*, the $6,000,000 and accrued interest in the appellant bank, should form part of the general revenue fund of the province, free from all claim of the railway company or their assigns, and should be paid over to the treasurer without deduction. It was also provided that, notwithstanding the form of the bonds and guarantee, the province should, as between itself and the railway company, be primarily liable on the bonds, and should indemnify the company against claims under them.

By another statute passed at the same time, any person or corporation claiming to have suffered loss or damage in consequence of the passing of the Act just referred to, might submit a claim to the Government, to be reported on to the legislature.

On the day of the passing of these Acts, a notice was served on behalf of the treasurer of the province on the appellant bank, claiming payment of $6,042,083.26 and interest, and a cheque was presented to and refused by the bank. A claim against the bank as from this date for interest at the rate of 5 per cent. was then made. The action out of which the appeal arises was immediately launched, claiming, on behalf of the Crown and the provincial treasurer, the sum above mentioned from the appellant bank, and the railway company and the construction company were subsequently joined as defendants. The main defence pleaded was the invalidity of the first of the two statutes of 1910, and the bank also claimed a lien for advances to the construction company.

The case was tried before Stuart, J., who held that the proceeds of the bonds were within the province, and that the matter was one of a local nature in the province. He, therefore, decided that it fell within class 16 of section 92 of the British North America Act, and not within section 91; and that, accordingly, the statute having been validly passed, there should be judgment for the plaintiffs.

The appellants appealed to the Court of Appeal, which unanimously dismissed the appeal. The Chief Justice held that the statute was probably authorized by classes 10 and 16 of section 92, and certainly by class 13, relating to property and civil rights. He also decided against the appellants on the further points they made, that the Act trenched on the subject of banking legislation in section 91, and that it was invalid as being confiscatory, and not an authorized way of raising a provincial

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revenue. Beck, J., Scott, J., and Simmons, J., decided against the appeal on substantially the same grounds, though the two latter learned Judges differed from the rest of the Court on a minor question as to interest.

Their Lordships are not concerned with the merits of the political controversy which gave rise to the statute the validity of which is impeached. What they have to decide is the question whether it was within the power of the legislature of the province to pass the Act of 1910. They agree with the contention of the respondents that, in a case such as this, it was in the power of that legislature subsequently to repeal any Act which it had passed. If this were the only question which arose, the appeal could be disposed of without difficulty. But the Act under consideration does more than modify existing legislation. It purports to appropriate to the province the balance standing at the special accounts in the banks, and so to change its position under the scheme to carry out which the bondholders had subscribed their money. Elaborately as the case was argued in the judgments of the learned Judges in the Courts below, their Lordships are not satisfied that what appears to them to be the fundamental question at issue has been adequately considered.

It is a well-established principle of the English common law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use. The principle extends to cases where the money has been paid for a consideration that has failed. It applies, as was pointed out by Brett, L.J., in *Wilson* v. *Church*, 13 Ch. D. 1, at 49, when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment and which has become abortive. The lender has in this case a right to claim the return of the money in the hands of the borrowers, as being held to his use. *Wilson* v. *Church*, which was affirmed in the House of Lords, under the name of *National Bolivian Navigation Co.* v. *Wilson*, 5 App. Cas. 176, is an excellent illustration of the principle. A loan had been raised to make a foreign railway, on a prospectus which set out a concession by the foreign Government in virtue of which the bondholders were to have the benefit of certain custom duties. The foreign Government, finding that the railway had not been made, revoked the concessions. The trustees, to whom the money had been paid to be expended on the gradual construction of the railway, contended that it was not apparent that they could not, with certain variations, substantially carry out the scheme. It was held that, while the Government had a right to revoke the concession which could

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not be questioned, the effect of its so doing was to materially vary the prospects and terms of security of the bondholders, and that the question whether the scheme had become so abortive that the consideration for the advances had failed, must be determined, not merely by a survey of physical or financial considerations, but by reference to the conditions originally stipulated for. The bondholders were declared to be entitled to recover their money.

The present case appears to their Lordships to fall within the broad principle on which the judgments in that case proceeded. The lenders in London remitted their money to New York to be applied in carrying out the particular scheme which was established by the statutes of 1909 and the orders-in-council, and by the contracts and mortgage of that year. The money claimed in the action was paid to the appellant bank as one of those designated to act in carrying out the scheme. The bank received the money at its branch in New York, and its general manager then gave instructions from the head office in Montreal to the manager of one of its local branches, that at Edmonton, in the Province of Alberta, for the opening of the credit for the special account. The local manager was told that he was to act on instructions from the head office, which retained control.

It appears to their Lordships that the special account was opened solely for the purposes of the scheme, and that, when the action of the Government in 1910 altered its conditions, the lenders in London were entitled to claim from the bank, at its head office in Montreal, the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province; and the legislature of the province could not legislate validly in derogation of that right. These circumstances distinguish the case from that of *The King* v. *Lovitt*, [1912] A.C. 212, where the point decided was in reality quite a different one.

In the opinion of their Lordships, the effect of the statute of 1910, if validly enacted, would have been to preclude the bank from fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right which had arisen and remained enforceable outside the province.

The statute was, on this ground, beyond the powers of the legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it.

Other questions have, as already stated, been raised in this appeal as to whether the statute of 1910 infringed the provisions of section 91 of the British North America Act, by attempting to deal with a question relating to banking, and by trenching

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on the field already occupied by the Dominion Bank Act. It was also contended that the appropriation of the deposits to the general revenue fund of the province was outside the powers assigned to the provincial legislature for raising a revenue for provincial purposes. The conclusion already arrived at makes it unnecessary for their Lordships to enter on the consideration of these questions and of other points which were made during the arguments of counsel.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the action dismissed. The respondents must pay the costs here and in the Courts below.

Appeal allowed and action dismissed.

Annotation
Constitutional law—Property and civil rights

Annotation—Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.

It is not out of place to record here that this was the last great constitutional case in which Lord Macnaghten took part—a master of constitutional law, a great and revered Judge.

There were three constitutional questions of importance for decision in this appeal, in regard to a statute of the Alberta Legislature:—

(1) Did the statute infringe banking law?

(2) Was the statute a measure of taxation, and if so, was that taxation within the competence of a Provincial Legislature?

(3) Did the statute affect property and civil rights within the Province?

The last question only was decided.

The main facts appear in the judgment; of these it is important to bear in mind (1) that the plaintiffs had arranged that the account relating to the money, the proceeds of the bonds, should be opened in Alberta. (2) That the money did not go to Alberta. (I do not assert that the decision would have been different had the money gone there in specie.) (3) That the statute (held to be *ultra vires*) recited that the railway company had made default. This default was the fact on which a right existing outside the Province arose, viz., the right of the bondholders to require payment to them of the money in the hands of the bank to the amount it held, by reason of the failure of the purpose for which it had been subscribed.

The decision is not creative in the sense of introducing a new canon or principle of construction, but it is interesting as illustrative of the limitations of legislative power, especially as our habit of thought is to regard a legislature as omnipotent.

It is impossible to deal adequately in a note with the varied and important questions at issue and it is intended to deal in the first place and mainly with the question that was decided, and to refer to a few of the cases.

The provisions of the British North America Act that need be referred to are:—

Section 92 enacting that in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects enumerated in sub-sections:—

Annotation (*continued*)—**Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.**

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(2) Direct taxation within the province in order to the raising of a revenue for provincial purposes.

(3) The borrowing of money on the sole credit of the province.

(5) The management and sale of the public lands belonging to the province, and of the timber and wood thereon.

(10) Local works and undertakings (with certain exceptions such as lines of ships, railways, etc., extending beyond the province).

(13) Property and civil rights in the province.

(16) Generally all matters of a merely local or private nature in the province.

Section 91 vesting in the Dominion Parliament the power to legislate in regard to:—

(3) The raising of money by any mode or system of taxation.

(15) Banking, incorporation of banks, and the issue of paper money.

(18) Bills of exchange and promissory notes.

The legislature of the province is sovereign while acting within the powers given by section 92, except that where a subject of legislation is already dealt with by the Dominion Parliament, enacted within its powers, provincial legislation must give way to that of the Dominion Parliament. So while a provincial legislature may not pass legislation affecting civil rights outside the province, the Dominion Parliament may pass legislation affecting civil rights in any province. For example, among the enumerated classes of subjects in section 91 are patents and copyright. It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the province (Lord Watson in *Tennant* v. *Union Bank of Canada*, [1894] A.C. p. 31, at p. 45; see also *Cushing* v. *Dupuy*, 5 A.C. 409).

Owing in part to the tendency to regard all legislative bodies as omnipotent, there is a decided inclination to regard decisions like that in the *Royal Bank* v. *Alberta*, as an undue restriction on legislative bodies, peculiar to bodies created as the Canadian Provincial Legislatures have been. I submit that this is a wrong view to take.

So far as regards property or rights to property such as were in question in this action, the limitation of the powers of the Provincial Legislature to property and rights within the province is no more than that imposed on any sovereign state by the comity of nations. A Canadian Provincial Legislature, as regards such property and civil rights, has legislative powers co-extensive with those of an independent sovereign state—except only where it meets Dominion legislation, properly enacted, when it must give way. Being co-extensive, a Provincial Legislature cannot exercise (and there can be no ground to claim) power exceeding the power that a sovereign state can exercise. The power of legislation of a sovereign state in general is limited to its territory and its subjects: *Ex parte Blain*, 12 Ch. D. 522; approved in *Re Pearson*, [1892] 2 Q.B., p. 268 ,where the then Master of the Rolls said, at p. 528:—

"The governing principle is that all legislation is *primâ facie* territorial, that is to say, that the legislation of any country binds its

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Annotation

Annotation (*continued*)—Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.

Constitutional law—Property and civil rights

own subjects, and the subjects of other countries who for the time bring themselves within the allegiance of the legislating power."

And—

"The right of municipal legislation of a sovereign state extends to everything affecting the state and capacity of its own subjects, with respect to their personal rights within its own territory. . . . Continental jurists generally agree that, properly speaking, there are three places of jurisdiction: first, the *forum domicilii*, or place of domicile of the party defendant; second, the *forum rei sitæ*, or the place where the thing in controversy is situate; and third, the *forum contractus* or *forum rei gestæ*, or the place where the contract is made or the act is done. These distinctions in jurisdiction result from the distinctions of the Roman civil law. Considered in an international point of view, either the thing, or the person made the subject of the jurisdiction must be within the territory, for no sovereignty can extend its process beyond its own territorial limits so as to subject either persons or property to its judicial decisions."

(The last two are quotations from International Law—Sherstone Baker.)

By the law of nations and by the British North America Act, therefore, the Provincial Legislature could not properly pass this legislation.

The right that came to be considered in this case, may be defined as an interest duly acquired under the law of a civilized country which may be enforced in the Courts of law of that or any other country having jurisdiction. The right, which was the deciding factor, was that of the bondholders to recover the money held by the bank to the use of the bondholders. This right existed outside the province (and, therefore, outside the powers of the Provincial Legislature) since the bondholders, who were not resident in the province, could sue the bank at Montreal where its head office is situated.

The revenue laws of certain provinces apparently formed a difficulty facing the appellant bank; for example, such legislation as was under consideration in *The King* v. *Lovitt*, [1912] A.C. 212. In this case a depositor domiciled outside New Brunswick deposited moneys in a bank in New Brunswick, and died. *Primâ facie* the rule *mobilia sequuntur personam* applied, but it was held that the Legislature of New Brunswick could levy succession duty thereon. The subject-matter of the taxation was held to be, not the right of succession which was outside the province and so outside the power of the Provincial Legislature, but the simple contract debt which the bank owed to the deceased's estate. The *situs* of a simple contract debt is the residence of the debtor; the debtor in the *Lovitt Case* was the branch of the bank where the deposit was made; the property taxed was, therefore, in the province and within the legislative power of the Provincial Legislature.

In the Alberta case the statute purported to create a debt due to the Government—a debt within the province—assuming (and this is not clear) that the bank had a domicile in Alberta for the purpose of being sued, through its branch office there. This legislation was ineffective because persons outside the province had rights in the fund, which itself was outside the province and the bondholders were not bound to go to the Courts of

Annotation (*continued*)—Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.

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Alberta to recover it. A sharp distinction must be drawn between the legislation passed by Alberta and the decision of the Alberta Courts. For the Courts of a country, in some circumstances, have (or at any rate, claim) jurisdiction over persons and moveable property, greater than the legislature of that country has, even though it be an independent sovereign legislature. For example, the Courts of a country, generally speaking, assume jurisdiction over the defendant in an action *in personam* where the defendant is, at the service of the writ, in that country, in respect of any cause of action, in whatever country such cause of action arises, but not over immoveables not situate in that country. (Dicey, Conflict of Laws.)

Supposing the bank had accepted the decision of the Alberta Courts, would that decision have been an answer to an action by the bondholder against the bank, say in the Quebec Courts? And supposing the bank had obeyed the direction given by the Alberta Act and paid the money to the Government, could it successfully plead the Act as a defence to an action by the bondholders in the Quebec Court.

The judgment of the competent Courts of a civilized country is accepted in the Courts of another civilized country, provided it is not plainly against the principles of natural justice. There is one exception suggested in *Simpson* v. *Fogo*, 29 L.J. Ch. 657, where a decision of the Courts of Louisiana was disregarded by an English Court on the ground that it was against the comity of nations. (Mr. Lafleur terms the expression "comity of nations" as an unfortunate one (Lafleur, Conflict of Laws) and I apologize for its use. In a case like the Alberta case, however, it seems a peculiarly apt one—even on the basis of *lucus a non lucendo*.)

> "If a foreign Court exercises a jurisdiction which, according to the law of nations, its sovereign could not confer upon it, its sentence or judgment is not available in the Courts of any other State, and the Courts in which such judgment is brought in controversy will determine the question of jurisdiction for themselves, and the same may be said where sufficient notice has not been given to the defendant." International Law—Sherstone Baker.)

I think this is too broad a statement and some doubt has been thrown on the decision of the English Court in *Simpson* v. *Fogo*. It is submitted that (apart from the special rules of a local Court, *e.g.*, Quebec Civil Code quoted below) the decision of the Courts of Alberta, assuming they were competent would have been recognized in the Courts of any other civilized country. The Quebec Civil Code distinguishes between judgments rendered out of Canada, and those rendered in Canada. In regard to the former, any defence may be pleaded in answer to an action for enforcing it that might have been pleaded in the original action. In regard to the latter, the same rule applies, if the defendant was not personally served in the province where the action was brought—or did not appear to the action, otherwise the judgment is binding.

If there had been no judgment of the Alberta Court, the statute of the Legislature of the Province of Alberta, attempting to deal as it does, with rights outside the province belonging to persons not subject to its legislature, would not be binding in the Courts of another country. On these

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Annotation (*continued*)—Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.

grounds, I submit, with respect, that had the legislation passed by Alberta been passed by the German or French legislative bodies, it would have been equally ineffective to achieve the object for which it was passed. The principle contended for may be supported on another ground. Again, taking the supposed action in Montreal by a bondholder against the bank, the bank (as mentioned) would not have been protected by the statute purporting to take away the bondholder's rights. The Alberta Legislature could not have protected the bank in the action brought in Quebec. This "test or criterion of effectiveness" is more often spoken of in connection with the judgment of a Court of law, but the principle of which is equally sound as a test of legislation. For no legislature ought to pass legislation which it cannot carry out. The Alberta statute purported to free the money in the bank from claims. It could not enforce this, say, against persons resident in Quebec—or domiciled in Germany or England—therefore, the legislation was bad by the ordinary rule of international law, quite apart from the operation of the British North America Act.

The legitimate use of decisions is to ascertain principles. I submit that the two basic principles involved in this theory are "territorial jurisdiction," and "*mobilia sequuntur personam*." The points where the first does not hold absolute sway are where Dominion and Provincial legislation meet—necessitated by the existence of a federal authority in whose jurisdiction certain wide-spread powers are vested—and the second principle fails in regard to revenue laws, which are always difficult to square to any rule; they are referable in some measure to the claim that statutes make for payment for recovery or protection of anything within their power, either physically or passing to their resident subjects.

II. Banking.

It is thought that the legislation affected a banking transaction on the following authority. In *Tennant* v. *Union Bank of Canada*, [1894] A.C. 31, an Ontario statute (the Mercantile Amendment Act, ch. 122, of the Rev. Statutes) contained certain provisions as to warehouse receipts, which were at variance with provisions in the Bank Act of the Dominion (46 Vict. ch. 120) then in force. The Ontario statute dealt with property and civil rights in the province. The Dominion Act deals with such rights generally, being matters of banking. It was said in the judgment (after referring to *Cushing* v. *Dupuy*, 5 A.C. 409), p. 46:—

> "The law being so far settled by precedent, it only remains for consideration whether warehouse receipts, taken in security by a bank in the course of the business of banking, are matters coming within the class of subjects described in section 91, sub-section 15, as "Banking, incorporation of banks, and the issue of paper money." If they are, the provisions made by the Bank Act with respect to such receipts are *intra vires*. Upon that point their Lordships do not entertain any doubt. The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the

Annotation (*continued*)—**Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.**

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law of the province does not and cannot attach to it. It also comprehends 'banking,' an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker. . . . These (*i.e.*, the legislative powers of the Dominion Parliament) depend upon section 91 and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights within the province. And it appears to their Lordships that the plenary authority given to the Parliament of Canada by section 91, sub-section 15, to legislate in regard to banking transactions is sufficient to sustain the provisions of the Bank Act which the appellant impugns."

In the Alberta case the proceeds of the bond were received by the Royal Bank in the course of a banking transaction, an incident of the business it was authorized to carry on, by the Bank Act of Canada. The money was to be paid out in certain amounts as the construction of the railway proceeded and proportionately thereto. Construction would necessarily proceed for a length of time, so in effect the deposit was a time deposit, and the bank agreed to pay interest on that basis. Some discussion occurred in the Alberta Courts as to whether the deposit was a true time deposit. It is submitted that it was a deposit for a period of time ascertainable by progress of construction. The Act of the Alberta Legislature directed immediate payment of the money held by the bank, and so altered a time deposit into a deposit payable on demand. It was argued that this was an interference by a Provincial Legislature with a banking transaction entered into by a corporation created for that purpose (among others) by a Dominion Act. It may be contended with some force that the interference was incidental to a transfer by the Provincial Legislature of property within the province—that the object of the legislation was a right that the province had, and the mere incidents following could not be a trespass on the Dominion field. But the Act and its consequences come within the words quoted above from *Tennant* v. *Union Bank*: "It also comprehends 'banking,' an expression which is wide enough to embrace every transaction within the legitimate business of a banker."

This particular aspect of the Alberta case was perhaps the most interesting of the various questions arising in that case, and it is disappointing that the finding that there was a right outside the province made it unnecessary to decide the question.

III. Was the measure one of taxation, and if so was such taxation within the competence of the Provincial Legislature?

The Alberta statute directing payment of the money directed it to be paid into the public revenue fund. It thus became available for public revenue. A fund raised for building a railway was made available for the public revenue, presumably in relief of taxation. Was this "direct taxation within the province in order to the raising of a revenue for provincial purposes" (sec. 92, sub-sec. (2))? It was not direct taxation—it was not taxation at all—it seemed to come within the dictum of Lord Watson in *Dobie* v. *Temporalities Board*, a case much relied on by the appellants:—

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Constitutional law—Property and civil rights

Annotation (*continued*)—Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.

"When funds belonging to a corporation in Ontario are so situated or invested in the Province of Quebec, the Legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorized by section 92 (2) (B.N.A. Act) or may impose conditions upon the transfer or realization of such funds; but that the Quebec Legislature shall have power also to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867."

The powers of the province to levy anything in the nature of indirect taxation received a narrow interpretation in *Attorney-General of Quebec* v. *Read*, 10 A.C. 141, where the province attempted to levy a tax of ten cents on every affidavit filed in Court. The point was not decided in the case.

At the end of this note will be found a list of the principal cases which may be consulted, principally constitutional cases. The case may be summed up as suggesting (as the point was not decided) the strict limitation for Provincial Legislatures to prevent their trespassing on Dominion powers such as banking. It is, indeed, but reasonable and prudent—considering that banks have played so vital a part in the growth of Canadian commerce, and must be such an integral part of the financial solidity of the Dominion—to limit interference with banks and banking in the strictest manner. If the case suggests this, it affirms that a Provincial Legislature has not powers over rights outside its jurisdiction which a sovereign state would not claim to have.

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Attorney General of Quebec v. *Queen Insurance Co.*, 3 A.C. 1090.

Legislation of the Province of Quebec requiring a stamp to be affixed to each policy of insurance held *ultra vires*. It was not direct taxation within the provisions of section 92 of the B.N.A. Act.

Cushing v. *Dupuy*, 5 A.C. 409.

Sections of the Insolvent Act (passed by Dominion Parliament) limited the right of appeal, held *intra vires* (p. 415).

"It is therefore to be presumed, indeed it is a necessary implication, that the Imperial Statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them."

Citizens Insurance Company v. *Parsons*, 7 A.C. 96.

A statute passed by the Legislature of the Province of Ontario imposing statutory conditions on each policy of fire insurance issued by any company doing business in the Province by whatever power incorporated, held *intra vires* and did not constitute such an interference with trade and commerce as to make it *ultra vires*.

Russell v. *The Queen*, 7 A.C. 829.

The "Scott Act" passed by the Parliament of Canada and which was temperance legislation dependent for its application upon its acceptance by

Annotation (*continued*)—**Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.**

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a majority vote of parliamentary counties, held *intra vires* as being legislation dealing with the peace, order and good government of Canada, although it did interfere with property and civil rights.

Dobie v. *The Temporalities Board*, 7 A.C. 136.

The old Parliament of Canada created a corporation having its corporate existence and rights in the Provinces of Ontario and Quebec. The Legislature of the Province of Quebec assumed to repeal and amend the Act of incorporation and to destroy the same and substitute a new corporation, and also to materially alter the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the Province of Quebec.

The statute was held *ultra vires* (p. 148).

"But upon an examination of these two statutes it becomes at once apparent that there is a marked difference in the character of their respective enactments. The Ontario Act merely prescribed that certain conditions should attach to every policy entered into or in force for insuring property situate within the province against the risk of fire. It dealt with all corporations, companies, and individuals alike who might choose to insure property in Ontario—it did not interfere with their constitution or status, but required that certain reasonable conditions should be held as inserted in every contract made by them. The Quebec Act, 38 Vict. ch. 64, on the contrary deals with a single statutory trust and interferes directly with the constitution and privileges of a corporation created by an Act of the Dominion of Canada and having its corporate existence and corporate rights in the Province of Ontario as well as in the Province of Quebec. The professed object of the Act and the effect of its provisions is not to impose conditions on the dealings of the corporation with its funds within the Province of Quebec, but to destroy, in the first place, the old corporation and create a new one, and, in the second place, to alter materially the class of persons interested in the funds of the corporation."

. . .

"The domicile of the corporation is merely forensic, and cannot alter its statutory constitution as a board in and for the Provinces of Upper Canada and Lower Canada. Neither can the accident of the funds being invested in Quebec give the legislature of that Province authority to change the constitution of a corporation with which it would otherwise have no right to interfere. When funds belonging to a corporation in Ontario are so situated or invested in the Province of Quebec, the legislature of Quebec may impose direct taxes upon them for provincial purposes, as authorised by sec. 92 (2), or may impose conditions upon the transfer or realization of such funds; but that the Quebec legislature shall have power also to confiscate these funds, or any part of them, for provincial purposes, is a proposition for which no warrant is to be found in the Act of 1867."

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Annotation (*continued*)—Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.

Attorney General of Ontario v. *Mercer*, 8 A.C. 767.

Lands in Canada escheated to the Crown for defect of heirs belong to the Province in which they are situated, and not to the Dominion.

Colonial Building & Investment Assn. v. *Attorney-General of Quebec*, 9 A.C. 157.

Held it was competent for the Federal Authority to incorporate a company carrying on its principal business in one province only (p. 166).

> "What the Act of Incorporation has done is to create a legal and artificial person with capacity to carry on certain kinds of business, which are defined, within a defined area, viz., throughout the Dominion. Among other things, it has given to the association power to deal in land and buildings, but the capacity so given only enables it to acquire and hold land in any Province consistently with the laws of that Province relating to the acquisition and tenure of land. If the company can so acquire and hold it, the Act of Incorporation gives it capacity to do so."

Hodge v. *The Queen*, 9 A.C. 117.

The Liquor License Act of Ontario which made regulations in the nature of by-laws or municipal regulations for the good government of taverns, etc., held to be *intra vires*.

Attorney-General of Quebec v. *Read*, 10 A.C. 141.

A Quebec statute imposed a duty of ten cents on every exhibit filed in Court. It was contended that it was direct taxation under the provisions of sub-sec. 2 of sec. 92 of the B.N.A. Act. The Earl of Selborne in delivering the judgment of the committee (p. 142-3) referred to the various definitions of direct and indirect taxation (p. 145).

> "The fund to be raised by that taxation is carried to the purposes mentioned in the 2nd sub-sec.; it is made part of the general consolidated revenue of the province. It, therefore, is precisely within the words 'taxation in order to the raising of a revenue for provincial purposes.' If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more specially applicable for the administration of justice than any other part of the general provincial revenue.
>
> "Their Lordships therefore think that it cannot be justified under the 14th sub-section."

Bank of Toronto v. *Lambe*, 12 A.C. 575.

A statute passed by the legislature of the Province of Quebec imposed direct taxes upon all banks doing business within the province, the amount of such taxes being dependent upon the amount of paid up capital and the number of branches which the bank might maintain in the province. The tax was also applicable to insurance and other commercial corporations held to be *intra vires*.

***Tennant* v. *Union Bank of Canada*, [1894] A.C. 31.**

Is specific power given under the Dominion Bank Act to all chartered

Annotation (*continued*)—**Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.**

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banks in Canada to take security for advances and assert their effectiveness within a province without registration, as provided by the laws of the province, valid? (p. 46).

"The law being so far settled by precedent, it only remains for consideration whether warehouse receipts, taken in security by a bank in the course of the business of banking, are matters coming within the class of subjects described in sec. 91, sub-sec. 15, as 'Banking, Incorporation of Banks, and the Issue of Paper Money.' If they are, the provisions made by the Bank Act with respect to such receipts are *intra vires*. Upon that point their Lordships do not entertain any doubt. The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province does not, and cannot, attach to it. It also comprehends 'Banking,' an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.

"The appellant's counsel hardly ventured to dispute that the lending of money on the security of goods, or of documents representing the property of goods, was a proper banking transaction. Their chief contention was that, whilst the legislature of Canada had power to deprive its own creature, the bank, of privileges enjoyed by other lenders under the provincial law, it had no power to confer upon the bank any privilege as a lender which the provincial law does not recognise. It might enact that the security, valid in the case of another lender, should be invalid in the hands of the bank, but could not enact that a security should be available to the bank which would not have been effectual in the hands of another lender. It was said in support of the argument, that the first of these things did, and the second did not, constitute an interference with property and civil rights in the province. It is not easy to follow the distinction thus suggested. There must be two parties to a transaction of loan; and, if a security, valid according to provincial law, was made invalid in the hands of the lender by a Dominion statute, the civil rights of the borrower would be affected, because he could not avail himself of his property in his dealings with a bank.

"But the argument, even if well founded, can afford no test of the legislative powers of the Parliament of Canada. These depend upon sec. 91, and the power to legislate conferred by that clause may be fully exercised, although with the effect of modifying civil rights in the province. And it appears to their Lordships that the plenary authority given to the Parliament of Canada by sec. 91, sub-sec. 15, to legislate in relation to banking transactions is sufficient to sustain the provisions of the Bank Act which the appellant impugns."

Attorney General of Ontario v. *Attorney General of Canada*, [1894] A.C. 189.

The Act passed by the Legislature of Ontario dealing with assignments and preferences by insolvent persons was *intra vires*, as it related to purely

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Constitutional law—Property and civil rights

Annotation (*continued*)—**Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.**

voluntary assignments merely ancillary to bankruptcy law, and not in conflict with any existing bankruptcy legislation of the Dominion.

Brewers and Maltsters Assn. v. *Attorney General of Ontario*, [1897] A.C. 231.

The Liquor License Act of Ontario, which requires every brewer and distiller to obtain a license thereunder to sell wholesale within the province, held valid, (a) as being direct taxation, and (b) as comprised within the term "other licenses." It was argued that the provincial legislature might impose its tax in such a way as to make it practically indirect taxation. This argument was answered by Lord Herschell in delivering judgment of the committee, as follows (p. 237):—

> "Such a case is conceivable. But if the Legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise."

C.P.R. v. *Bonsecours Market*, [1899] A.C. 367.

Is the Railway Company as a creature of the Dominion Parliament subject to provincial regulations, so as to be compelled to clean a ditch beside its right of way? Held, that the provincial legislation was *intra vires*, and that while the Provincial Legislature could not order any change in the structure of the ditch it might compel the Railway Company to keep it clean and free from obstructions.

Union Colliery Co. of B.C. v. *Bryden*, [1899] A.C. 580.

The British Columbian Coal Mines Regulation Act prohibited Chinamen from being employed in underground workings. Held *ultra vires*.

Madden v. *Nelson & Fort Sheppard Rly. Co.*, [1899] A.C. 626.

The British Columbian Cattle Protection Act, 1891, as amended in 1895, enacting that a Dominion railway company, unless it erected proper fences on its railway, shall be responsible for cattle injured or killed thereon, held *ultra vires*.

Attorney-General of Manitoba v. *License Holders*, [1902] A.C. 73.

The Manitoba Liquor Act, 1900, held *intra vires*, as being of a purely local nature within the meaning of the B.N.A. Act, sec. 92, sub-sec. 16, notwithstanding that in its practical working it interfered with Dominion revenue and indirectly with extra-provincial trade and commerce.

By sec. 119 of the Act it was specifically provided that it should not affect bonâ fide transactions between a person in the province of Manitoba and a person in another province or in a foreign country, and that the provisions of the Act should be construed accordingly.

City of Toronto v. *Bell Telephone Co.*, [1905] A.C. 52.

A Dominion statute which authorised and empowered the Telephone Company to carry on its business throughout Canada and erect poles in the streets and towns of the various provinces held *intra vires*, and was not such an interference with property and civil rights within the provinces to render it invalid (p. 57).

Annotation (*continued*)—**Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.**

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"It would seem to follow that the Bell Telephone Company acquired from the Legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and that no provincial legislature was or is competent to interfere with its operations, as authorised by the Parliament of Canada."

Grand Trunk Railway Co. v. *Attorney General of Canada*, [1907] A.C. 65.

A statute of the Dominion Parliament prohibiting "contracting out" by employees held to be *intra vires* of the Dominion, as being a law ancillary to through railway legislation, notwithstanding that it affected civil rights within the several provinces.

Woodruff v. *Attorney General for Ontario*, [1908] A.C. 508.

The Legislature of Ontario had no power to tax property not within the province under its Successions Duty Act (p. 513).

"The pith of the matter seems to be that, the powers of the Provincial Legislature being strictly limited to 'direct taxation within the province' (British North America Act 30 & 31 Vict. ch. 3 sec. 92, sub-sec. 2), any attempt to levy a tax on property locally situate outside the province is beyond their competence."

(Note:—Compare with *R.* v. *Lovitt*, [1912] A.C. 212.

Crown Grain Co. v. *Day*, [1908] A.C. 504.

The Manitoban Mechanics' and Wage Earners' Lien Act, which limited the right of appeal in actions arising thereunder and declared that the judgment of the Court of King's Bench should be final, was *ultra vires*, inasmuch as sec. 101 of the B.N.A. Act authorised Parliament to establish the Supreme Court of Canada, and secs. 35 and 36 of ch. 139, R.S.C., 1906 had actually defined the appellate jurisdiction of that Court.

Hydraulic Co. of St. Francois v. *Continental Heat and Light Company*, [1909] A.C. 194.

The Continental Heat and Light Company had a Dominion charter which empowered it to supply, sell and dispose of gas and electricity. The St. François Co. had an exclusive franchise to produce and sell electricity as power, heat and light in the village of Disraeli under a provincial statute passed subsequent to the date of the Dominion Act. The local company contended that the only effect of the Canadian Act was to authorise the respondent company to carry out its operations in the sense that its so doing would not be *ultra vires* of the company, but that the legality of the company's actions in any province must be dependent upon the law of that province. The judicial committee refused to give effect to that contention (p. 198).

"This contention seems to their Lordships to be in conflict with several decisions of this board. Those decisions have established that where, as here, a given field of legislation is within the competence both of the Parliament of Canada and the Provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict, as they clearly are in the present case."

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Constitutional law—Property and civil rights

Annotation (*continued*)—Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.

The King v. *Lovitt*, [1912] A.C. 212.

A deposit receipt was given to Lovitt at St. John in the Province of New Brunswick, with respect to moneys deposited by him in the Bank of British North America there. Was this property situate in the province liable to succession duty on Lovitt's death? Lovitt was domiciled in Nova Scotia. His personal representatives took out probate in New Brunswick and obtained payment of the money there:—*Held*, that the obligation to pay was primarily confined to the New Brunswick branch of the bank and governed by the law of New Brunswick where the property was locally situated:—*Held*, subject to duty imposed by New Brunswick Act.

City of Montreal v. *Montreal Street Railway*, [1912] A.C. 333.

As to the validity of sub-sec. (b) of sec. 8 of the Railway Act of Canada (1906, R.S.C., ch. 37), which purports to subject any provincial railway (although not declared by Parliament to be a work for the general advantage of Canada) to the provisions of the Act relating to through traffic. The Act was held to be *ultra vires* (p. 343).

> "It has, no doubt, been many times decided by this board that the two sections 91 and 92 are not mutually exclusive, that the provisions may overlap, and that where the legislation of the Dominion Parliament comes into conflict with that of a Provincial Legislature over a field of jurisdiction common to both, the former must prevail; but, on the other hand, it was laid down in *Attorney-General of Ontario* v. *Attorney-General of the Dominion*, [1896] A.C. 348, (1) that the exception contained in sec. 91, near its end, was not meant to derogate from the legislative authority given to Provincial Legislatures by the 16th sub-sec. of sec. 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in sec. 91; (2) that to those matters which are not specified amongst the enumerated subjects of legislation in sec. 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the Provincial Legislature by section 92; (3) that these enactments, sections 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in sec. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in sec. 92; (4) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by sec. 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each pro-

Annotation (*continued*)—**Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.**

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vince are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in sec. 91, viz., the regulation of trade and commerce. Taken in their widest sense these words would authorise legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in sec. 92 and would seriously encroach upon the local autonomy of the province. In their Lordships' opinion these pronouncements have an important bearing on the question of decision in the present case, though the case itself in which they were made was wholly different from the present case, and the decision given in it has little if any application to the present case. They apparently established this, that the invasion of the rights of the province which the Railway Act and the Order of the Commissioners necessarily involve in respect of one of the matters enumerated in sec. 92, namely, legislation touching local railways, cannot be justified on the ground that this Act and Order concerned the peace, order, and good government of Canada nor upon the ground that they deal with the regulation of trade and commerce.

"It follows, therefore, that the Act and Order, if justified at all, must be justified on the ground that they are necessarily incidental to the exercise by the Dominion Parliament of the powers conferred upon it by the enumerated heads of sec. 91. Well, the only one of the heads enumerated in sec. 91 dealing expressly or impliedly with railways is that which is interpolated by the transfer into it of sub-heads (a), (b), and (c) of sub-sec. 10 of sec. 92. Lines such as the Street Railway are not amongst these."

Wilson v. *Church*, 13 Ch. Div. 1 (1879).

The facts of this case (which are very fully reported) are, shortly, as follows:—

A concession was granted by the Bolivian Government for opening a communication between Bolivia and the Atlantic by the Amazon, a part of which scheme involved making a railway on Brazilian territory, for which a concession was obtained from the Government of Brazil, the N. Company was formed in America for effectuating the general scheme, and a limited company was formed in London for making the railway. In January, 1872, a prospectus was issued in England by the Bolivian Government and the two companies, inviting subscriptions to a loan for which bonds were to be given, the payment of which was to be secured by the general liability of the Bolivian Government and by the hypothecation of the customs duties on imports by the new route, and of the entire net profits of the company. It was further stated in the prospectus that the C. Company, who had had the line examined, had entered into a contract for making the railway, which was to be made within two years. It was also stated that out of the proceeds of the loan certain persons who were to act

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Annotation (*continued*)—Constitutional law (§ II A 2—175)—Property and civil rights—Non-residents in province.

as trustees for the bondholders would retain a sum equal to the contract price of the railway, and apply it from time to time in payment for the works as they proceeded. The public took up the loan to a large amount. The C. Company had contracted to make the line for £600,000, and that amount was set apart out of the proceeds of the loan in pursuance of the prospectus. The rest of the money was paid partly to the Bolivian Government and partly to the N. Company, by whom it was expended. The C. Company commenced the works, but shortly afterwards repudiated the contract on the ground that they had been deceived. In September, 1873, a fresh contract was entered into with other persons for making the railway at a higher price. Nothing was done under this contract, and in August, 1875, it was transferred to another contractor. A dispute having occurred the N. Company in October, 1877, entered into another contract with other persons to make the railway, on terms which would make the cost greatly exceed £600,000, and which in some important particulars (as the Court of Appeal considered) were prejudicial to the rights of the bondholders. The Bolivian Government in the meantime revoked the concession. In March, 1878, a bondholder commenced an action on behalf of himself and all the bondholders except one, who was a defendant, the Bolivian Government being a co-plaintiff, to have the fund in the hands of the trustees divided amongst the bondholders, on the ground that the scheme had become abortive. It was admitted that the cost of making the railway would exceed the sum in the hands of the trustees. The shares in the N. Company had for the most part been allotted as fully paid-up shares, and nothing could be obtained from calls. The shares in the railway company had, by arrangements between the two companies, become the property of the N. Company, and there were no shareholders in the railway company liable to calls. It did not appear that there were any engineering difficulties making it impossible to construct the railway.

Held, by Fry, J.:—

"That as there were no insuperable engineering difficulties, the scheme could not be pronounced impracticable; that the revocation of the concession by the Bolivian Government was unjustifiable, and one to which the Court ought not to give effect, and that the action must be dismissed."

The plaintiff having appealed to the Court of Appeal (p. 35):—

"*Held*, by that Court, reversing the judgment of Fry, J., that as the funds in the hands of the trustees were admittedly insufficient to complete the railway, and the company had no means of raising further funds it had become, in a business sense, impracticable to carry into effect the scheme, and to give the bondholders the security on the faith of which they advanced their money, and that they were entitled to have the fund, which was still in medio, in the hands of the trustees, returned to them:—

"*Held*, further, that assuming the revocation by the Bolivian Government of their concession to be unjustifiable (which in the opinion of

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the Court of Appeal it was not) still it was the act of a sovereign power with which the Court could not interfere, and made it impossible for the bondholders to have the security on the faith of which their money was advanced."

Brett, L.J., in his judgment, said (p. 49):—

"Now, where the money is to be loaned upon such an understanding as that, it seems to me that if the scheme wholly fails, the most ordinary principles of law determine that the money must be given back to the bondholders. The money has never been paid to the Bolivian Government, or to the navigation company, or to the railway company. The money is in the hands of trustees, and of trustees for the bondholders. The bondholders have found the money, but it has never gone effectively from them to the borrowers. It has stopped in medio in the hands of trustees; but the principle of law seems to me to be identical with what it would be if the money were paid to the borrowers for a consideration which is to be accomplished after the payment of the money, and by the most ordinary principle of law, where money is paid for a consideration which is to be performed after the payment, if that consideration wholly fails, the money becomes money in the hands of the borrowers held to the use and for the benefit of the lenders, and must be returned. That would be the case at common law under such circumstances. But here you do not want to carry it so far, because, the money being in medio, if the consideration for which the money was to be handed over fails, the money must be given back by these trustees to the bondholders. That seems to me a plain principle of law, and no decision in any of the suits which have hitherto taken place between these parties has determined anything to the contrary."

Appeal was taken to the House of Lords under the title of *National Bolivian Navigation Co.* v. *Wilson* (1880), 5 App. Cas. 176. Their Lordships maintained the judgment of the Court of Appeal, holding that the bondholders were entitled to recover from the trustees.

The head-note is as follows:—

"Where money has been subscribed by bondholders for a particular purpose (such as the construction of a railroad) and part of that money has been placed in the hands of the trustees for the bondholders, the duty of such trustees being to pay portions of the money as portions of the intended railroad are constructed, if no such railroad nor any portion of it is constructed, and its construction becomes impracticable, the bondholders are entitled to demand from the trustees repayment of what remains in their hands.

"Where there is a right dependent upon the practicability of doing a certain work, the question of its practicability is not to be determinded solely by physical or financial reasons, but conditions previously stipulated (especially where the interests and the rights of third parties are concerned) must be considered.

"Thus, where a loan was raised to make a railroad in a foreign country, such loan being raised on the faith of a prospectus which set forth, as a security to the bondholders, the grant of a concession by the

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foreign Government, in virtue of which the bondholders would have the benefit of the customs duties imposed by that Government on goods passing along that railroad, and the foreign Government, finding the railroad not made, revoked its concession, the loss of the security which the concession had afforded to the bondholders, entitled them to treat the scheme as a failure, and to demand the return of their subscriptions.

"A foreign Government granted a concession, on the terms of which a company was formed and a loan raised, and bondholders constituted. The Government afterwards revoked the concession:—

"*Held*, that its right to do so could not be questioned in any legal proceedings in this country."

In his judgment Earl Cairns (Lord Chancellor) said (p. 184):—

". . . I think it is established by the evidence that the State of Bolivia, acting, as it appears to me, not arbitrarily or capriciously, but in the exercise of rights which the persons constituting that Government considered that under the circumstances they possessed, and which I do not think it can be said they did not possess, have revoked that concession to the navigation company, which, as it appears to me, was the principal security for the loan and the principal inducement held out to the bondholders to make it.

"If under these circumstances the bondholders were helpless; if they were obliged to leave their money unreclaimed in the hands of the trustees, if they were unable to come to the Court and to assert that the terms on which they advanced their money were departed from, that the consideration for the loan had failed, that the security for the loan had disappeared, and that in this state of things the money which had been placed in the hands of trustees should be returned to them—if, I say, they were unable to do this, I should have to arrive at the conclusion that the whole trust arrangement, so carefully constructed for the protection of the bondholders, was a simple mockery. In my opinion, however, the bondholders are entitled to this relief, and I think the decision of the Court of Appeal, which gave them this relief, was correct and in accordance with the first principles of equity."

Prince v. *Oriental Bank Corporation* (1878), 3 App. Cas. 325:—

"The defendant bank, an English corporation had branches at Sydney, Murrumburrah, and Young, in New South Wales—Sydney being the head branch. Appellants held a promissory note made by Messrs. H. & G. at Young for £426. The note was dated 1st December, 1874, and fell due on 3rd April, 1875. H. & G. had an account with respondent's branch bank at Young, but had no account at Murrumburrah or Sydney branches; the note was made payable at Murrumburrah at the request of the respondent's manager at the Young branch, in order that respondent might get certain commission on the collection of the note. Just before the note became due the appellants lodged it with their own bankers, the Bank of New South Wales, for collection, which bank became the appellants' agent in order to collect the amount. The

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Bank of New South Wales then handed over the note to respondent's bank at Sydney to collect for them for the purpose of sending it on to Murrumburrah, where it was made payable. The respondent bank transmitted the note to their Murrumburrah branch and the manager there sent a draft transfer to the Sydney branch in favour of the Bank of New South Wales. In respondent's books at Murrumburrah there was an account current between the Young agency and the Murrumburrah agency, and in that account under date 3rd April the Young agency, where H. & G. banked, was debited with their note, and under the same date credit was given for the draft. On Sunday, the 4th April, H. & G.'s store at Young was entirely destroyed by fire. On Monday, 5th April, the Murrumburrah manager requested the respondents' Sydney branch to cancel the transfer draft in favour of the Bank of New South Wales and return the promissory note dishonoured, on receipt of which respondent's Sydney manager returned the note to the Bank of New South Wales. Thereupon that bank gave notice of dishonour to the plaintiffs, who brought action to recover money alleged to have been received by defendant bank for the use of the plaintiffs.

"*Held*, that where a promissory note is returned dishonoured to the plaintiffs, the amount thereof having been transmitted by transfer drafts and entries in the bank's books, from the branch where the same was made payable to the branch where the plaintiffs paid the same in, such transfer and entries not being communicated to the plaintiffs, the bank could not be charged with the receipt of the money."

In dismissing the appeal, Sir Montague Smith, for the Judicial Committee, stated that the case really turned upon the position or status of these branch banks, and laid down the proposition that

"the position of branch banks is, that in principle and in fact they are agencies of one principal banking corporation or firm, notwithstanding that they may be regarded as distinct for special purposes, *e.g.*, that of estimating the time at which notice of dishonour should be given; or of entitling a banker to refuse payment of a customer's cheques except at that branch where he keeps his account."

CAN.

S. C.

1913

Feb. 25.

Re DEAN.

Supreme Court of Canada, Duff, J., in Chambers. February 25, 1913.

1. THEFT (§ I—11)—WITH BREAKING AND ENTERING—CR. CODE 1906, SECS. 11, 460.

The offence of breaking into a counting-house and stealing money therefrom as declared by the English statute 7-8 Geo. IV. ch. 29, sec. 15, was a part of the criminal law of British Columbia prior to its admission into Confederation, and remains in force under Cr. Code sec. 11, subject to the change made by the Criminal Code as to the nature of the punishment.

[See Cr. Code, sec. 460.]

2. COURTS (§ III H—241)—SUPREME COURT (CAN.)—HABEAS CORPUS JURISDICTION.

A judge of the Supreme Court of Canada has concurrent jurisdiction with provincial courts to grant a writ of *habeas corpus* under the Supreme Court Act, R.S.C. (1906) ch. 139, sec. 62, in respect of a commitment in a criminal case where the commitment is in respect of some act which is made a criminal offence solely by virtue of a statute of the Dominion Parliament, and not where it was already a crime at common law or under the statute law in force in the province on its admission into the Canadian Confederation and which had not been repealed by the Federal Parliament.

[*Re Sproule*, 12 Can. S.C.R. 140, applied.]

Statement

APPLICATION for writ of *habeas corpus*.

The application was refused.

J. Travers Lewis, K.C., for the applicant.

E. F. B. Johnston, K.C., for the Attorney-General for British Columbia.

Duff, J.

DUFF, J.:—I think I have no jurisdiction to entertain this application. It will not be necessary, in view of my opinion as to the construction of sec. 62 of the Supreme Court Act, to decide the point raised by the contention of Mr. Johnston, on behalf of the Attorney-General of British Columbia, that that enactment is beyond the competence of the Parliament of Canada.

Sec. 62 is as follows:—

62. Every Judge of the Court shall, except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the Courts or Judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

2. If the Judge refuses the writ or remands the prisoner, an appeal shall lie to the Court.

The language indicates an intention on the part of Parliament to confer only a strictly limited jurisdiction. Anything like frequent interposition in the administration of the criminal law in the provinces by the Judges of the Supreme Court of Canada, through the instrumentality of the writ of *habeas cor-*

pus, would obviously lead to the most undesirable results; and before exercising the authority in a given case, I think it is my duty to scrutinize most carefully the terms in which that authority is given, to ascertain whether or not the case is one of those in which it was intended to be exercised.

The jurisdiction extends only, I think, to those cases in which the "commitment" has followed upon a charge of a criminal offence, which is a criminal offence by virtue of some statutory enactment of the Parliament of Canada; it does not, in my opinion, extend to cases in which the "commitment" is for an offence which was an offence at common law, or under a statute which was passed prior to Confederation and is still in force. That, I think, is the effect of previous decisions by Judges of this Court. See *Re Sproule*, 12 Can. S.C.R. 140. The offence for which the applicant was committed to stand his trial is described in the warrant of commitment in these words:—

> He, the said Charles Dean, at the city of New Westminster, in the county of Westminster, on the 15th day of September, A.D. 1911, did unlawfully break and enter the counting-house of the Bank of Montreal, situated on the corner of Columbia and Church streets, in the city of New Westminster aforesaid, and the sum of $271,000, the property of the said Bank of Montreal then there being found therein did then and there steal contrary to the form of the statute in such case made and provided.

This language aptly describes an offence under sec. 15 of 7-8 Geo. IV. ch. 29, which became part of the law of British Columbia under the Ordinance of the 19th November, 1858, introducing the civil and criminal law of England into that colony. This enactment continued to be a part of the criminal law of British Columbia down to the time of the Union with Canada, and by sec. 11 of the Criminal Code it is now the law of the province in so far as it has not been repealed, "altered, varied, modified or affected" by competent legislative authority. The only change which has been made in the law as declared by sec. 15, relates to the nature of the punishment to which an offender is liable. Sec. 62 has consequently no application.

Application refused.

B. C.

C. A. 1913

Jan. 7.

GARVEY v. MASSEY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. January 7, 1913.

1. ESTOPPEL (§ II C—36)—BY JUDGMENT ON INCONSISTENT PLEADING.

Where in an action for breach of contract the defendants set up a counterclaim asking for (1) rescission and (2) recovery of a certain sum of money as damages for alleged false representations upon which the claim for rescission is based, without asking for alternative relief, and then defendants' counsel elects to rely upon the claim for damages and the trial judge gives judgment both in the action and on the counterclaim, and formal judgment is duly entered thereon, the defendants, if they accept the judgment so far as it is in their favour, are precluded from taking a limited appeal from that portion of the judgment which is against them upon their other claim inconsistent therewith, particularly where no cross-appeal has been launched. (Dictum *per* Martin, J.A.)

Statement

APPEAL by plaintiff from judgment of Murphy, J.

The appeal was dismissed.

Bird, for appellant.

Craig, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In my opinion the learned trial Judge came to the right conclusion as regards both the judgment in the action and on the counterclaim. I have come to my conclusion entirely upon the merits of the case, and without deciding one way or the other the contention of Mr. Craig that defendant, having accepted the judgment on the counterclaim, was precluded by that from attacking the judgment in the action, the two being in this case interdependent, as he contended.

Irving, J.A.

IRVING, J.A.:—I concur with judgment of Macdonald, C.J.A.

Martin, J.A.

MARTIN, J.A.:—So far as the findings, and judgment thereon, of the learned trial Judge relate to the original action, they are not, I think, open to serious objection.

With respect to the judgment on the counterclaim, the position is somewhat unusual, because the plaintiffs therein ask for two distinct things, viz.: (1) rescission, and (2) recovery of the $1,000 which is ground and amount of the false representation upon which the claim for rescission is based. On the facts of this case these claims are inconsistent and both cannot be given effect to because they are mutually destructive. They are not pleaded in the alternative, and the second one (which was set up by way of amendment), counsel had expressly "decided" (*i.e.*, elected) at the request of the learned Judge, to rely upon. (See A.B., pp. 64, 68 and 70). It was therefore open to the Judge to give judgment upon either of these claims in favour of the plaintiff's counterclaim, and he did so upon the second and the formal judgment was duly entered thereon: p. 162.

Now the said plaintiffs have launched a limited appeal from that portion of the judgment which is in favour of the original plaintiff, but not from that part which still stands in their own favour, and there is no cross-appeal. I am unable to see how they can both approbate and reprobate the judgment which they have accepted in their favour. No case has been cited to us in support of such a contention. The matter, when clearly understood, comes before us, not in the position of the appellants being entitled to rely on two alternative claims, but as having formally accepted a judgment in their favour on one branch, which prevents the Court giving them relief on the other. They have raised their own barrier to success in this Court.

GALLIHER, J.A.:—I would dismiss the appeal.

There can be no rescission, as the parties cannot be put back substantially in their original position, and it becomes then a question of what damage the appellants are entitled to by reason of misrepresentations on the part of Garvey.

Mr. Bird contends that they have been damaged to the extent of a one-third interest in the property, but I cannot agree with that.

Assuming that appellants were justified in believing and did believe and understand that there was $1,000 of the purchase money that they would not be called upon to pay on account of Garvey's representations to them at the time the dissolution agreement was signed, that $1,000 would be an asset of the partnership and they purchased that asset as well as Garvey's one-third interest in the land for $5,500.

As it turned out this $1,000 asset proved valueless or rather, as the learned trial Judge had found as a fact, it never existed, but the remaining assets they had received, and it seems to me it cannot be said that they have been damaged to any greater extent than the $1,000 which has been allowed by the learned trial Judge.

The respondents have not appealed from these findings, and it becomes unnecessary for me to consider them further.

Appeal dismissed.

ONT.

S. C. 1913

Jan. 15.

COOPER v. LONDON STREET R. CO.

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.A. January 15, 1913.

1. STREET RAILWAYS (§ III B—26)—DUTY OF RAILWAY COMPANY—USUAL STOPPING PLACE—NEGLIGENTLY RUNNING PAST STATIONARY CAR.

A passenger who had just alighted from a street car which was being met on a parallel track by another, at a point where cars usually stopped to discharge and receive passengers, and where, to the knowledge of the railway company, it was the custom or habit of persons alighting from cars to cross a parallel track in order to reach another street, is not necessarily guilty of contributory negligence, where the fact that another passenger warned the plaintiff, a woman, to look out for the car, might well have flurried and perturbed her, as witnesses said, and led her to lower her head in the face of a strong wind, as she went around the rear of the car from which she had just alighted, and attempted to cross the parallel track, where she was struck by a car which was negligently run past the stationary car at an unusually high rate of speed.

[*Cooper* v. *London Street R. Co.*, 5 D.L.R. 198, affirmed.]

2. TRIAL (§ II C 8—137)—SUBMISSION OF QUESTIONS TO A JURY—LACK OF CARE IN RUNNING CAR—CAR STATIONARY DISCHARGING PASSENGERS.

The negligence of the defendant street railway company was sufficiently shewn so as to prevent the withdrawal of such question from the jury, where the evidence disclosed that sufficient caution was not observed in running a street car towards a car standing on a parallel track discharging passengers at a street crossing where they were regularly discharged and received, and where, to the knowledge of the company, it was the habit or custom of passengers to cross a parallel track in order to reach another street, and that the car struck and injured the plaintiff, who had just alighted from the stationary car, and without noticing the car approaching from the opposite direction, passed around the rear of the standing car and stepped upon the parallel track.

[*Cooper* v. *London Street R. Co.*, 5 D.L.R. 198, affirmed.]

3. TRIAL (§ II D 3—186)—TAKING CASE FROM JURY—NEGLIGENCE—PERSONAL INJURIES.

Where there is no reasonable evidence upon the whole case whether adduced by the plaintiff or the defendant upon which the jury could find in the plaintiff's favour in an action of negligence, the case should be withdrawn from them and the action dismissed; it is not necessary to go through the form of directing the jury to find a verdict for the defendant and of having such verdict recorded. (Dictum *per* Meredith, J.A.)

Statement

APPEAL by the defendants from the judgment of a Divisional Court dismissing the defendants' appeal from the judgment of the trial Judge, upon the findings of a jury, in favour of the plaintiff, for the recovery of $1,000 and costs, in an action for damages for personal injuries alleged to have been sustained by the plaintiff owing to the negligence of the defendants' servants.

The plaintiff, an elderly woman, alighted from a street-car of the defendants, and, in attempting to cross the road behind that car, was struck by another car travelling in the opposite direction, and, as she alleged, at an excessive speed.

The appeal was dismissed.

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I. F. Hellmuth, K.C., for the defendants.

Sir George C. Gibbons, K.C., and *G. S. Gibbons*, for the plaintiff.

MEREDITH, J.A.:—The appellants' one contention here is, that the plaintiff should have been nonsuited at the trial; a new trial is not sought.

There are just two questions raised: whether there was any evidence adduced at the trial upon which reasonable men could find, as the jury did find, (1) that the defendants were guilty of negligence, and (2) that the plaintiff was not also so guilty.

Meredith, J.A.

In my opinion, there was evidence, upon each point, which precluded a nonsuit; that is, that each finding is supported by reasonable evidence, or, as before put, evidence upon which reasonable men might find, as the jury did, in the plaintiff's favour on each of these questions.

It was contended for the plaintiff that, although there might be a nonsuit for want of reasonable evidence of negligence on the defendants' part in a case where there is such a want of evidence, there never can be a nonsuit, or dismissal of the action without a verdict, on a question of contributory negligence, because the onus of proof in such a case is upon the defendants; but that contention must, in my opinion, be held, in these days, to be erroneous; and that in all cases in which there is no reasonable evidence upon which the jury could find in the plaintiff's favour the case should be withdrawn from them and the action dismissed. Why not? Why make any difference? It is just as much no legal evidence whether the onus is the one or the other way; a verdict must be supported by some legal evidence, no matter upon whom the onus of proof may be or which way the finding may be; and, if there be no legal evidence on one side, no matter which, there is nothing upon which a jury can pass, and so the case should be withdrawn from them. It is not necessary, in my opinion, in these days, to go through the form of directing them to find a verdict; and it has always seemed to me to be illogical, from all points of view, that they should be so directed; if there be any evidence, the verdict should be theirs; if there be no evidence, the judgment should be the Court's as a matter of law. But, if the technical ground upon which the respondent relies were applicable in any case now, why should such a nonsuit not be applicable to this case; the proof of more than negligence only is essential to the plaintiff's success; proof that such negligence was the cause of the injury; then the plaintiff gives no reasonable evidence of that, but proves that negligence contributed by her together with negligence contributed by the defendants was the cause, and that without both the accident would not have happened?

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On the question of negligence the extremity of each contention is erroneous; a railway company is not free from all restraint in regard to the rate of speed of its cars; nor is it at all within the power of any jury to lay down the law in that respect.

A railway company operating on a public highway, must—apart from legislative rights or restrictions—run its cars with reasonable care for the rights of others using the highway. What is such care is not to be measured by what the company may say it should be; nor is it to be measured by the length of the jury's foot. It is a thing quite capable of proof, and is to be determined—just as any other question of fact is to be determined—upon competent evidence adduced at the trial.

Then was there any competent evidence adduced at the trial upon which the jury could find that the plaintiff's injury was caused by the defendants imprudently running the car by which the plaintiff was struck at too great a speed at the place of the accident and under the circumstances existing there at the time of it?

I think there was. It is not disputed that a moving car approaching a car stopped to let down passengers ought to approach and pass it with more care than would be needed if both were moving, in order to avoid especially just such accidents as that which is the subject-matter of this action. And that is proved by the conduct of the driver of the car with which the plaintiff came in collision; he said that on approaching the car which had stopped he cut off the power from his own car. Then the evidence of the shopkeeper, extracted in cross-examination, was, that this car was running at an unusually high rate of speed, under the circumstances existing at the time, so much so as to attract his attention, and that in all the long time he had seen cars so passing his shop only in a very few instances had they gone as fast. There was in this, I think, enough evidence to go to the jury; that is, there was evidence upon which reasonable men might find that the rate of speed was excessive, and beyond what even the defendants deemed proper; and there was also evidence upon which they might find that, if the speed had been less, the collision would not have occurred, or, if it had occurred, it would have been harmless—merely brushing the plaintiff aside; this was sworn to by one of the witnesses. I do not take into consideration the evidence as to the rules or practice of another railway company; that was not, in my opinion, evidence; the question is not what any one individual or company may do; but what prudent individuals or companies generally do.

So, too, on the question of contributory negligence; the circumstances were peculiar. The plaintiff, a very old woman, was

deaf; the weather was unpropitious—a storm in her face; another car was following up that from which she alighted; and the jury might well, upon the evidence, have found that her attention was absorbed in it, and in her desire to cross before it could come down upon her; all of which a jury might find to be quite natural, and such as would apply to an ordinarily prudent person under the same circumstances. Cars were not constantly passing in the opposite direction on the other track; indeed, one might cross hundreds of times in the same manner without meeting one. I would not have been able to find as the jury have found on this question; but, equally, I am unable to say that there was no evidence upon which reasonable men could find as they found. On this ground, also, the contentions on each side went quite too far; it is not, on the one side, the actual state of mind of the plaintiff at the time that is essential; nor, on the other, that circumstances not thought about by the defendants are not to be taken into account; all the circumstances, however brought about, may be taken into consideration; and the question is, what would persons of ordinary prudence do in such circumstances.

Accidents such as this are likely to happen unless perhaps considerably more care than the ordinary person takes is taken. Not only should the passenger be more than ordinarily careful in crossing the other track after alighting from a car and passing close behind it; but also conductors, as well as motormen, should be more than usually alert to prevent accidents so happening. The companies should remember that, when they use the public highway as discharging and receiving stations for their passengers, they, as well as the passenger, should have some care that the alighting and discharge and boarding are made with some reasonable regard to saving the passenger from the danger incident to one on foot in a horse road traversed by a railway as well as ordinary traffic.

I would dismiss the appeal.

GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A., agreed in the result.

Appeal dismissed with costs.

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Feb. 12.

CREAMER v. GOODERHAM.

Saskatchewan Supreme Court, Newlands, J. February 12, 1913.

1. LIMITATION OF ACTIONS (§ II B—42)—MORTGAGE — VACANT LANDS — CONSTRUCTIVE POSSESSION—WHEN STATUTE BEGINS AGAINST MORTGAGEE.

Where a right of entry or to sue for possession has accrued to a mortgagee by the mortgagor's default in payment, and the mortgaged lands are left unfenced and without actual occupation by anyone, the Statute of Limitations does not run against the mortgagee so as to extinguish his title to the lands.

[*Bucknam* v. *Stewart*, 11 Man. L.R. 625, followed; *Delaney* v. *C.P.R.*, 21 O.R. 11, applied; see also *McMicking* v. *Gibbons*, 24 A.R. (Ont.) 586, reviewing and partially disapproving of *Delaney* v. *C.P.R.*, 21 O.R. 11.]

Statement

HEARING of a stated case.

E. B. Jonah, for plaintiff.

W. M. Martin, for defendant.

Newlands, J.

NEWLANDS, J.:—The plaintiff is the administratrix of James Charles Findlay, who on the 21st October, 1885, was the owner of the north-east quarter of section thirty-six, township eighteen, range twenty-one, west of the second meridian, and who on that date mortgaged said land to George Gooderham, now deceased, for the sum of $250 with interest at 12%. This mortgage was made under the ordinance respecting short forms of indentures and contained a provision that in default the mortgagee shall have quiet possession of the said land and provided that until default of payment the mortgagor shall have quiet possession of the said land, and it further provided that the mortgagee on default of payment for one month may, on giving ten days' notice, enter on and lease or sell the said land.

This matter comes before me by way of a stated case in which it is set out that no part of the principal or interest secured by the mortgage was ever paid, that default was made on the 21st October, 1886, that said Findlay left the jurisdiction of the Court before that date and that from the time of the happening of the default no person has been in occupation of the land and it has never been fenced.

Upon these facts the following questions are submitted for the opinion of the Court:—

(1) Have the defendants (who are the executors of the last will and testament of George Gooderham, deceased) any legal right against the estate of the said James Charles Findlay under the said mortgage for payment of the whole or any portion of the moneys secured by the said mortgage?

(2) If the defendants have not any right to payment of any portion of the principal or interest secured by said mortgage

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have the rights of defendants been extinguished and is the registration of the said mortgage against the said land a cloud upon the plaintiffs title to the said land which she is entitled to have cancelled and removed therefrom?

The mortgagee had two remedies, one against the mortgagor and the other against the land. By the Statute of Limitations the first remedy is barred but not extinguished: *Kibble* v. *Fairthorne*, [1895] 1 Ch. 219.

The second remedy is quite distinct from the first and the defendant's right of entry would only be barred under the statute by the actual possession of someone else for twelve years; *Agency Company* v. *Short*, 13 A.C. 793. There never having been anyone in actual possession of the property, the statute did not commence to run against the defendants and their right of entry or to bring an action to recover possession still continues: *Bucknam* v. *Stewart*, 11 Man. L.R. 625; *Delaney* v. *C.P.R.*, 21 O.R. 11. This latter case is also an authority for the proposition that the defendants would be entitled to retain out of moneys derived from the sale of said land interest at 12% from the date of the mortgage until October 21, 1890, and at 5% since that date.

Judgment accordingly.

Re UPTON.

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Feb. 11.

Ontario Supreme Court, Middleton, J. February 11, 1913.

1. CHARITIES AND CHURCHES (§ II B—45)—CY-PRES—BEQUEST TO CHARITY NOT AT ONCE APPLICABLE, HOW CONSTRUED.

Where there is a general declaration of intention by a testator in favour of charity, the fact that the fund cannot be applied at once to a specific charity does not render the gift void.

Statement

MOTION by the executors of the will of Johanna Upton, deceased, for an order, under Con. Rule 938, determining a question arising upon the construction of the will.

J. Cowan, K.C., for the executors.

T. L. Monahan, for the Roman Catholic Church.

Frank McCarthy, for the next of kin and heirs at law.

Middleton, J.

MIDDLETON, J.:—Johanna Upton, in her lifetime a member of the Roman Catholic Church, by her last will, after some specific legacies, gave all the residue of her estate, real and personal, "unto and for the use and benefit of foreign missions in connection with the Roman Catholic Church in Canada," and further directed her executors "to use and apply all such rest and residue of my estate in and towards the support of such foreign missioners as aforesaid."

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The Roman Catholic Church is a world-wide body, and has no separate organisation for Canada. The Church in Canada is part of the parent body, having its headquarters at Rome. There are not at the present time any foreign missions carried on by that portion of the Roman Catholic Church which is in Canada. Contributions for the purpose of foreign missions are remitted to the principal officers of the Church; and the missions in all countries are carried on, as the Church in Canada itself is carried on, under the directions of the authorities at Rome.

From this it is clear that the devise in question is not aptly expressed. I think, however, that there is a sufficiently clear expression of the general charitable intention to prevent the failure of the gift.

Upon the argument, both counsel seemed to assume that it was necessary that there should be foreign missions at present in existence. I do not at all agree with this. It may well be sufficient if such missions are hereafter established in connection with the Roman Catholic Church in Canada. Counsel for the Roman Catholic Church intimated a readiness to do everything necessary to carry the intention of the testatrix into effect, but desired that the money should be paid to the Catholic Church Extension Society of Canada, incorporated by 8 & 9 Edw. VII. ch. 70(D.)

I do not see my way clear to assent to this. As I read the will, the desire of the testatrix was, that the money should be spent on foreign missions, that is to say, missions presumably to heathen lands; certainly outside of Canada; and the Church Extension Society is incorporated for the purpose of supporting Christian missions and missionary schools throughout Canada.

I see no reason why the executors should not pay the moneys over to the proper authorities of the Roman Catholic Church—the Church undertaking on its part to apply the moneys in and towards the support of foreign missions in connection with that branch of the Roman Catholic Church which is in Canada.

It may have been the desire of the testatrix to induce the Church to connect some particular mission with the membership in Canada, and so encourage and quicken missionary zeal. No doubt, that end can be brought about by the action of the Church authorities, which their counsel has said they are ready to take.

Costs of all parties may come out of the fund.

Declaration accordingly.

WATTS v. ROBERTSON.

MAN.

K. B. 1913

Feb. 5.

Manitoba King's Bench. Trial before Macdonald, J. February 5, 1913.

1. BROKERS (§ II A—7)—REAL ESTATE BROKERS—FIDUCIARY RELATIONSHIP —DUTY TO DISCLOSE IDENTITY.

Where real estate agents, employed by the owner of lands to negotiate a sale, plan to purchase the property for themselves in the name of a third party, a fiduciary duty devolves upon the agents to disclose their personal interest to the owner.

2. BROKERS (§ II A—7)—REAL ESTATE BROKERS—FIDUCIARY RELATIONSHIP —BROKER BUYING CLANDESTINELY FROM HIS PRINCIPAL, EFFECT.

Where real estate agents enter into an agreement as agents with the owner of lands to negotiate a sale of the property, and where in such capacity they induce the owner to sell at a reduced price to a third party, who is merely a pretended purchaser and who has no interest in the transaction except to lend his name to the agents, who themselves are the real purchasers, the pretended contract of sale may be repudiated by the vendor on discovering the true facts, by reason of the fraud of the agents for whose benefit the pretended contract was made.

Statement

THE defendant was the owner of a half-section and a quarter-section of farm lands and plaintiff the owner of No. 225 Atlantic avenue, Winnipeg. In September, 1912, they agreed to exchange these properties. Plaintiff was to construct a store front addition to the property on Atlantic avenue and he was to pay the sum of $1,500 into a chartered bank upon which cheques could be issued for the erection of the addition.

Plaintiff did construct the addition and brought this suit for specific performance of the contract as the defendant had refused to perform his part.

The defence raised was that defendant, in July, 1912, listed his farm with M. A. Davis and R. B. McGreevy, real estate agents, for sale at $30 an acre; that in the month of September, 1912, Davis and McGreevy as such agents of defendant represented to him that they had found a purchaser for the lands and that Watts would purchase the property upon certain terms, which terms were never agreed to. Defendant alleged that the representations were false to the knowledge of Davis and McGreevy and that the plaintiff never agreed to purchase the lands; that the sale referred to was only a pretended sale and that the real purchasers of the lands were Davis and McGreevy, or one of them, which fact was concealed from the defendant; that plaintiff is not really the owner of the lands he asserted he was, but simply held the same in trust for Davis and McGreevy, and that he was not in a position to make a transfer of the same.

Defendant, therefore, asked that the plaintiff's action be dismissed, and that the caveats filed by him be vacated and discharged.

The action was dismissed.

J. B. Coyne, and *J. Galloway*, for the plaintiff.

J. P. Foley, and *N. A. McMillan*, for the defendant.

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Macdonald, J.

MACDONALD, J.:—The defendant being the owner of a farm near Baldur in Manitoba, placed it for sale in the hands of Davis and McGreevy, a real estate firm doing business in Winnipeg. This firm deny that they had the farm for sale, and say that they were the owners of the city property which they were exchanging with the defendant for his farm, and were acting as principals and not as agents for the sale of the farm. They further state that they never represented the plaintiff as the owner and cannot account for the defendant's knowledge of the plaintiff's connection with the city property.

I find, without hesitation, that Davis & McGreevy were the selling agents of the defendant and, as such, were under a duty to disclose their identity as actual principals. This they did not do. On the contrary, they resorted to every possible artifice to conceal that fact.

They were not at arm's length. The defendant was induced to reduce the price of his farm from $28 per acre to $27 per acre because of the misrepresentation of his agents that the plaintiff on looking over the farm discovered that it was dirty and the buildings in bad repair and that he would not enter into the contract unless the price was reduced, whereas the plaintiff was never on the farm and, as he himself admits, had no interest in the transaction. The city property was in his name for the convenience of Davis and McGreevy.

The defendant is a poor business man, a very slow thinker, and I would judge, very confiding. It is reasonable to suppose that had he known that the plaintiff was not the principal and that his own agents were the principals he would have entertained a different feeling toward the business being negotiated. Thinking that Davis and McGreevy were his agents, he would naturally feel some protection by way of straightforward, honest treatment, as there would be no incentive to them to act otherwise.

The conduct of these men, under all the circumstances, seems to me inexcusable and cannot be too severely condemned.

They were the agents of the defendant and were charging him a commission and were in duty bound to protect him in every way possible, instead of which they resort to deceit and falsehood of the most reprehensible character.

Specific performance will be refused, and the action dismissed wih costs. Such costs to be taxed without the statutory limitation, and failing payment of such costs by the plaintiff the same to be paid by Davis and McGreevy.

All transfers, deeds and agreements executed by the defendant to be delivered up and cancelled.

Action dismissed.

ST. CLAIR v. STAIR.

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Feb. 10.

Ontario Supreme Court, Latchford, J. February 10, 1913.

1. CONTEMPT (§ I—1)—BREACH OF COUNSEL'S UNDERTAKING ON CLIENT'S BEHALF—CLIENT'S LIABILITY.

An undertaking given by counsel on behalf of his client, and with the knowledge of the client may be enforced against the client by process of contempt, and in the case of a company by sequestration.

[*D.* v. *A. & Co.*, [1900] 1 Ch. 484, and *Milburn* v. *Newton Colliery* (1898), 52 Sol. J. 317, referred to.]

Statement

MOTIONS by the plaintiff to commit the defendant Rogers and for the issue of a writ of sequestration against the defendants the "Jack Canuck" Publishing Company for contempt of Court in publishing in a newspaper called "Jack Canuck," pending this action, articles containing injurious references to the matters in question in this action, in breach of undertakings contained in former orders.

W. E. Raney, K.C., for the plaintiff.

A. R. Hassard, for the defendant company.

The defendant Rogers in person.

Latchford, J.

LATCHFORD, J.:—The defendants Rogers and the publishing company formally undertook by their counsel, as is stated in the orders of the 19th December, that until the trial of this action nothing would be published in their newspaper "in any way defamatory of the plaintiff or tending to prejudice the minds of the public against him."

The undertaking was given with the knowledge of Rogers, and may, therefore, be enforced against him by process of contempt, and against the publishing company by sequestration; the remedies invoked upon this motion: Cozens-Hardy, J., in *D.* v. *A. & Co.*, [1900] 1 Ch. 484; *Milburn* v. *Newton Colliery* (1898), 52 Sol. J. 317.

The statements made by counsel for the accused at the trial of the case of Rex v. Stair, as published in the newspaper of the defendants, now before me, are grossly defamatory of the plaintiff. I express no opinion as to whether the counsel who made such statements are or are not protected by the rule expressed in *Munster* v. *Lamb* (1883), 11 Q.B.D. 588. What is material is, that the defendants published the language used by counsel, with other defamatory statements regarding the plaintiff, and at least one reference to the present action, which could not but tend to his prejudice at the trial.

In *The King* v. *Parke*, [1903] 2 K.B. 432, Mr. Justice Wills, in delivering the judgment of the Court, says: "The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency, and

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sometimes their object, is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which is to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned."

There can be no doubt upon the facts, unquestioned before me, that the defendants have acted in breach of their undertaking and in contempt of Court. Mr. Rogers is liable to committal, and the publishing company to a writ or order of sequestration.

On behalf of the defendants, affidavits are filed disclaiming any intentions of acting in contempt of Court or in breach of the orders of the 19th December. I should be the more readily disposed to credit these asseverations but for the conduct of Mr. Rogers in giving out for publication, after the hearing of these motions on the 8th instant, a summary of that part of his argument before me devoted to the denunciation of the plaintiff and his counsel.

As Mr. Rogers was a layman, I allowed him the widest latitude in opposing the motion, and did not interfere with him when his language exceeded the bounds of propriety, as it frequently did. Had I imagined that he would, upon leaving my Chambers, have published any part of his intemperate argument, I should have restricted him closely to the issue, and not have afforded him any opportunity, under cover of a report of the proceedings, to repeat with addenda the defamatory statements he had published in his newspaper.

He has, however, expressed once more his regret, and apologised for what he considers his inadvertence.

I am a little sceptical as to his good faith; but, giving him and the defendant company credit for their professions, I do not at present make any order further than that the defendants Rogers and the publishing company pay forthwith to the plaintiff the costs of and incidental to these motions.

It is perhaps needless to express the hope that no occasion will be given for a renewal of the present applications.

Order for payment of costs.

NILES v. GRAND TRUNK R. CO.

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Feb. 12.

Ontario Supreme Court, Kelly, J. February 12, 1913.

1. LIMITATION OF ACTIONS (§ II G—66)—WHEN STATUTE BEGINS TO RUN—INJURY TO LANDS BY DIVERTING SURFACE WATER.

The flooding of an adjoining owner's land by a railway company by interference with the natural flow of surface water may result in such continuing damage as to extend the time for bringing an action for damages sustained by reason of the construction or operation of the railway.

2. WATERS (§ II G—128)—SURFACE WATER—DEFLECTING AND DIVERTING—INJURY TO ADJOINING LANDS.

A defendant railway company is liable for damage caused to the plaintiff, an adjoining owner, by deflecting and diverting the course of the surface water so as to make it flow over the plaintiff's land, and for bringing water on the defendant's own lands and then discharging it on to the plaintiff's land, to his injury; and the statutory powers, in furtherance of the objects for which the defendant company was incorporated, do not, by implication or otherwise, empower it so to carry on its operations as to cause damage to adjoining owners by deflecting or diverting such surface waters to the injury of adjoining lands.

[*Rylands* v. *Fletcher*, L.R. 3 H.L. 330, applied.]

Statement

ACTION for damages for flooding the plaintiff's lands in the township of Thurlow.

E. G. Porter, K.C., and *W. Carnew*, for the plaintiff.

D. L. McCarthy, K.C., and *W. E. Foster*, for the defendants.

Kelly, J.

KELLY, J., after reviewing the evidence, said that the flooding had seriously interfered with the use of the plaintiff's lands as a market garden and orchard; that many fruit trees had been killed or injured; and water had found its way into the cellar of the plaintiff's dwelling-house. The condition of which the plaintiff complained and the damage were continuing; and he was not debarred by lapse of time, as contended by the defendants, from bringing action. The law as to liability for interfering with the natural flow of surface water and causing it to overflow on other lands is to be found in Angell on Watercourses, 7th ed., p. 133; Gould on Waters, 3rd ed., pp. 539, 540, 545, 551; Addison on Torts, 5th Eng. ed., p. 247.

The defendants contended that, not only as to the surface water which was directed towards the ditch in the plaintiff's land, but also as to the water which they brought on their own premises and then discharged in the same direction, they were not liable; that, by the terms of their Act of incorporation and by the provisions of the Railway Act, they were within their rights in disposing of the water as they did in carrying on the operations of their business.

The learned Judge said that he was unable to accept the broad proposition that, because the defendants had been given certain powers in furtherance of the objects for which they were

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incorporated, they had the right so to carry on these operations as, in such circumstances as appeared in this case, to cause damage to others.

The learned Judge was of opinion that the law as laid down in *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, applied to this case; and he referred also to *Baird* v. *Williamson*, 13 C.B.N.S. 317, and *Whalley* v. *Lancashire and Yorkshire R. Co.*, 13 Q.B.D. 131; saying that the circumstances in the present case were much the same as those in *Rylands* v. *Fletcher*, with the added fact that the defendants not only brought upon their premises this large quantity of water, and discharged it therefrom, to the injury of the plaintiff, but, by widening and deepening the ditch on Herkimer avenue, they turned it more directly and in larger quantities on the plaintiff's lands.

The learned Judge did not agree with the defendant's further contention that the plaintiff's remedy was against the municipality, and that his proceedings should be under the Municipal Drainage Act.

Then, as to the damages. The plaintiff said that the value of his property had decreased in value from $12,000 to $2,000; but that was an extravagant estimate. The main elements of damage were the injury to and destruction of his fruit trees, the almost total loss of his vegetable crop in 1912, as well as a loss in 1911, and the loss of some of his hay crop. Taking all the facts into consideration, the learned Judge estimated the damages sustained by the plaintiff at $1,525.

Judgment for the plaintiff for $1,525 and for an injunction restraining the defendants from permitting the water, other than surface water by natural flow, from their premises and works, to come upon and overflow the plaintiff's lands, with costs of the action. The injunction part of the judgment not to be operative for four months, so as to give the defendants ample time to make provision for properly taking care of the water and removing the cause of the trouble; this to be without prejudice to any proceedings by the plaintiff for the recovery of any damage that he may in the meantime suffer.

Judgment for plaintiff.

HERRON v. COMO.

ALTA.

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Jan. 31.

Alberta Supreme Court. Trial before Simmons, J. January 31, 1913.

1. BROKERS (§ II B 1—12)—REAL ESTATE AGENTS—SALE OF PART RATIFIED BY PRINCIPAL.

A real estate agent authorized to sell acreage land in one lot at a price not less than a fixed minimum per acre will be entitled, unless the contract of agency provides to the contrary, to recover commission at the stipulated rate upon a sale of a part of the land at a higher acreage rate made through him and accepted by his principal.

[As to commission of real estate agents generally, see *Haffner* v. *Grundy*, 4 D.L.R. 529, and Annotation to same.]

ACTION for the recovery of broker's commissions.

Judgment was given for the plaintiff.

G. H. Ross, and *J. T. Shaw*, for the plaintiff.

J. B. Roberts, for the defendant.

Simmons, J.

SIMMONS, J. (oral):—I think this action is quite distinguishable from the one that is now pending in the full Court, namely, *George* v. *Howard* (No. 2), on appeal from *George* v. *Howard*, 4 D.L.R. 257, as the memorandum here is quite definite in its terms. The memorandum clearly recites, "That in the event of your selling the property described on the opposite side of this card, I agree to pay a commission of five per cent. and so on . . . ." and "In consideration of your advertising and pushing sale I agree to list exclusively with you for a period of one month." There is no doubt in my mind that that is a general agency to sell the property at a commission of five per cent. There is no limitation as to price in the wording of that agreement. It does not even say "upon the terms set out upon the opposite side" so I am bound to hold that the terms as set out on the opposite side were merely limiting the agent's authority so that he could not sell for less than thirty-five dollars per acre without the consent of the owner and the same remark would apply to the terms of payment.

The only other question that it seems necessary to decide in this case is whether or not the plaintiff is not entitled to succeed in view of the fact that the property as described is a section and a half, whereas only one section was sold. I cannot find anything in the wording of the agreement that will so limit the meaning as to give effect to that view that he must sell the section and a half in order to make this contract apply to the sale. The description, it is true, is on the first page here, but it is not connected with these words in particular and it seems to me that it is in the same class with the reservation as to price and as to the terms of payment which was a general agency for the selling of these lands, and that the owner might consent to a sale being made of a part only of the lands by the agents and still the agency contract would apply. That is what happened in

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this case. There is no doubt that Mr. Herron, the plaintiff, brought about the sale, that is, he brought the purchaser to the owner and even assisted in the negotiations, assisted in shewing the purchaser the land as he had lived in that vicinity for some years being at the time a farmer and was able to conduct business of that kind apparently successfully. He was the direct cause of the sale. The plaintiff brought the parties together and took part in the negotiations until the completed sale was effected. There is no dispute as to that. The defendant on his part consented to the sale going through for the section, leaving out the half section, and the purchaser in consideration of that agreed that the terms should be raised from thirty-five dollars per acre to forty dollars per acre. It is true that the money was not paid in cash but was paid in money's value by taking in payment the house and lot in the city of Calgary which, according to the plaintiff, was valued at fifteen thousand dollars.

There was a mortgage on that of five thousand dollars leaving ten thousand dollars that would apply upon the purchase price of the farm lands. I am further convinced of the view that the second page here which describes the land and the terms was for the purposes I have held, I say I am further confirmed in that view from the fact that it leaves certain matters to be determined such as the balance, which says, "balance arranged." That means that the balance was to be arranged and the evidence is that the balance was arranged satisfactorily to both parties inasmuch as the sale was made. It seems to me to hold that the statute would defeat a claim of this kind, would be to make the statute an instrument the reverse of safety, whereas the statute is intended to prevent fraud. The intention of the statute is to prevent a man from coming in and saying he had an agreement with another whereby he was authorized to sell his land for a consideration and the plaintiff has brought forward the memorandum in writing whereby the defendant did agree to pay him five per cent. commission for selling his land, and to go as far as to say that the statute implies that every term of the contract of sale must be included in the memorandum or in the alternative that every item or condition as to terms, description and price which are set out in the memorandum must be complied with would go very far in defeating the very object of the statute and would enable the man who had obtained the services of another in selling his lands, to defeat the very legitimate claim for services. The result is that there will be judgment for the amount claimed, twelve hundred and eighty dollars, and interest at five per cent. from the 28th day of May, and the costs of the action.

Judgment for plaintiff.

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Ontario Supreme Court, Britton, J. February 13, 1913.

1. JUDICIAL SALE (§ I A—4)—BIDS AND BIDDING—RESERVED BID ON SECOND SALE.

Upon a judicial sale pursuant to a judgment that certain mining properties should be forthwith sold with the approbation of the Master-in-Ordinary, subject to confirmation by the court, to answer the plaintiff's lien for unpaid purchase money, where a public auction has been held and the bidding did not reach the reserved bid but approximates the original price, the court may, on the application of the plaintiff, direct that a second sale at auction shall be held without reserve, particularly where all the parties to the litigation have leave to bid.

Statement

MOTION by the plaintiffs by way of appeal from the interim certificate of the Master in Ordinary, dated the 14th January, 1913, of his ruling that the mining properties in question in this action should be a second time offered for sale by public auction, on the 16th June, 1913, and that such sale should be subject to a reserved bid, to be fixed by him, and for an order directing the Master to proceed to sell the properties forthwith, pursuant to the judgment of the Court of Appeal dated the 28th June, 1912 (3 O.W.N. 1527), and without reserve.

James Bicknell, K.C., for the plaintiff.

George Bell, K.C., for the defendants William Marshall and Gray's Siding Development Limited.

Britton, J.

BRITTON, J.:—The formal judgment of the Court of Appeal, in so far as material to the matters now under consideration, is as follows: "2 (a). And this Court doth further order and adjudge that, in default of payment into Court on or before the 12th October, 1912, by the said defendants William Marshall and Gray's Siding Development Limited, or either of them, of the moneys aforesaid, the mining properties in question in this action be forthwith sold, with the approbation of the Master in Ordinary of this Court, to answer the lien of the plaintiffs as unpaid vendors for purchase-money."

These mining properties were offered for sale on the 23rd December last. That attempted sale, although held only a little over two months from the date on which the money was to be paid into Court, was not abortive by reason of an entire absence of bidders, but because the bidding did not reach the reserved bid. The properties must again be offered, but when, and whether subject to another or any reserved bid, are the questions.

The sale is to be with the approbation of the Master, and must, therefore, be conducted as a judicial sale; and, so far as reasonably possible, the sale must be conducted in such a way as to protect the interests of all parties—but all this is subject to the fact that the sale is necessary to enable the plaintiffs to get the money to which they are entitled, and which the defendants did not pay into Court—money for the plaintiffs' pro-

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perties—which properties are in a way being held up by the defendants. To enable the plaintiffs to get their money, they are entitled to a sale of the properties forthwith, which at least means without unnecessary or unreasonable delay.

The reserved bid on the 23rd December has already prevented the plaintiffs for a considerable time from getting their money. That reserved bid is not now complained of.

The learned Master, in my opinion, wisely exercised the wide discretion vested in him by then fixing a reserved bid—but, considering what took place at the attempted sale, and upon all the facts, there is no reason why there should be any further reserve.

Another may block the way again; and, if a second reserved bid is named, why not a third? Further reserved bids are not consistent with a sale to be made forthwith to realise a vendor's lien—a sale that the plaintiffs are, ex debito justitiæ, entitled to have carried out.

I have not been able to find any cases upon the question of repeated reserved bids. It must be dealt with upon the facts of each case. In this case, the terms and limitations of the judgment are important. It is also important that the bidding on the 23rd December last was only $25,000 less than the original purchase-price of $250,000. That seems to me not a large deficiency on mining properties, not being worked at the time of the attempted sale. The defendants were and are unwilling to take the properties at the purchase-price. A fair inference from the facts is, that there are persons possessed of or who command large means, who have an eye on the properties, and who may bid if they know there will be a sale to the highest bidder. All the parties are allowed to bid. Again, as this is a judicial sale, the Master will report, and the report must be confirmed. If there is any fraud or collusion or improper practice on the part of the purchaser, the sale will not be confirmed.

For these reasons, I am, with great respect, of opinion that the sale should be without reserve.

It is suggested by the plaintiffs that thirty days will be sufficient to give intending purchasers time to make necessary inquiries. I do not agree; but, on the other hand, the delay should not be so long as the 16th June. In fixing the time, the judgment must be looked at, and the fact of the former offering should be considered. Men likely to buy—or bid—are those who will get information from persons already more or less acquainted with the properties. If, however, personal inspection is required, it can be made in two months. The time of sale should be Monday the 5th May, 1913. If there is any objection to that day, the Master should name a day not later than the 12th May nor earlier than the 30th April next.

Appeal allowed as above and order accordingly. Costs of the plaintiffs of this appeal to be added to the plaintiffs' claim.

Appeal allowed.

MADER v. HARRISON.
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Nova Scotia Supreme Court, Graham, E.J., and Meagher and Drysdale, JJ. February 5, 1913.

1. PARTNERSHIP (§ I—3)—CREATION—WHAT CONSTITUTES — AGREEMENT BETWEEN PHYSICIANS—EMPLOYMENT FOLLOWED BY PARTNERSHIP.

Where an agreement between two physicians provided for the employment of one by the other for two years and that thereupon a partnership would be entered into upon a fixed basis for division of profits, and where, after the expiration of the two years, they continued to work together for six months, but without having agreed upon the partnership articles contemplated by the original agreement, in default of which there was to be a division of the practice and an arbitration to settle differences, it will be presumed that a partnership, at least at the will of the parties, existed for the period which had elapsed following the employment up to the time when the parties ceased to practise together.

[*Syers* v. *Syers*, 1 App. Cas. 174, referred to.]

2. CONTRACTS (§ II D—145)—PARTICULAR WORDS OR PHRASES—AGREEMENT BETWEEN PHYSICIANS — "PERCENTAGE OF TOTAL NET RECEIPTS," CONSTRUED.

Where, in an agreement between two physicians, one is employed by the other for a fixed sum for each of two years, for the first year at a percentage of the net proceeds of business for that year and for the next at an increased percentage on the same basis, the percentage on the business for the year is not necessarily based upon the amount of money actually received during any of the years in question, but payments made subsequently for services rendered during such year, whether paid for during each of such years or at a subsequent period, are to be taken into consideration.

Statement

APPEAL from the judgment of Russell, J., at the trial.

The plaintiff and defendant carried on a medical practice in the city of Halifax, under an agreement in writing whereby the defendant Harrison became assistant to the plaintiff Mader and was to receive for his services during the first year a fixed sum in money and a percentage of the total net receipts, and during the second year a like sum in money with a larger percentage of the receipts and after the expiration of the second year was to become a partner of the plaintiff Mader and was to receive for his services as such, one-third of the total net receipts.

In the event of a mutually satisfactory arrangement for a partnership not being arrived at there was a provision for a distribution of business and a reference to arbitration. The proposed partnership did not go into effect and there was an arbitration and an award.

An action was brought by the plaintiff Mader alleging violation of the terms of the award and claiming discovery and an accounting and an injunction. The defence was that the formation of a partnership was prevented by the action of the plaintiff, who refused to become a party to any partnership agreement as

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contemplated by the agreement in writing entered into between the parties, and by such refusal defendant was discharged from any obligation to enter upon the arbitration; that the submission and the award were indefinite and uncertain and that the terms of the award were not authorized by the submission.

In the suit, *Harrison* v. *Mader*, the plaintiff claimed a declaration as to the true meaning of the agreements entered into between the parties, an accounting and payment of such sums as might be found to be due. He further claimed that on the 30th December, 1910, on the expiration of the then agreement, he became a partner of Mader's and he claimed payment on that basis. This was the real difference or dispute between the parties, the previous agreement in writing being admitted by both. In his defence to the action by Harrison, Mader denied the partnership alleged and claimed repayment of the amount to which he might be found to be entitled on an accounting.

W. E. Roscoe, K.C., for Mader.

T. S. Rogers, K.C., for Harrison.

Graham, E.J.

GRAHAM, E.J.:—Dr. Mader under a verbal contract had agreed that Dr. Harrison should be his assistant from 30th December, 1905, for a period of five years. On the 23rd September, 1909, a written agreement was made covering the balance of the period. The remuneration was provided for, a salary and percentage of the profits.

They agreed in part as follows:—

> And the said Mader on his part hereby covenants and agrees with the said Harrison that for the year ending 30th December, 1909, he will pay to the said Harrison, he performing the said duties as such assistant as aforesaid, the sum of six hundred dollars, and also nine per cent. of the net proceeds earned and received by the said Mader for the professional services of himself and the said Harrison, during the said year. Net proceeds is hereby defined to mean the money derived from the said year's practice after first deducting all expenses connected therewith of every kind and description. The said Mader hereby further agrees that for the year ending the 30th December, 1910, he will pay and remunerate the said Harrison as is hereinbefore provided for the year ending the 30th December, 1909, except that the said Harrison for the year ending the 30th December, 1910, is to receive twelve and one-half per cent. of the said net proceeds instead of nine per cent. And the said parties hereto hereby covenant and agree to and with each other that at the end of the term hereby created, to wit, on the 30th December, 1910, they will enter into a copartnership, the one with the other, for the practice of medicine and surgery at Halifax aforesaid, to continue for a period of five years from the 30th December, 1910, upon the terms that the said Mader is to receive and have two-thirds of the net proceeds of the earnings of the said partnership, and the said Harrison is to receive and have one-third of such net proceeds.

A formal partnership agreement mutually satisfactory to both parties to be hereafter entered into. In the event of the terms of the partnership agreement not being mutually satisfactory and the partnership not going into effect, the respective rights of the parties hereto in regard to patients and as to who shall retain them, the same shall be referred to the arbitration of three medical doctors, one to be appointed by each party, and the said two arbitrators so appointed to appoint a third medical doctor, as arbitrator, before entering upon the arbitration, and the award and determination of such arbitrators, or any two of them, to be final, binding and conclusive upon the parties hereto.

This agreement was no doubt entered into upon the eve of the going abroad of Dr. Mader.

The formal partnership articles were never agreed on.

Dr. Mader on his return from abroad, about May, 1910, submitted a draft of an agreement which was not for a partnership at all, but was rather an amplification of the agreement then in force and had mostly to do with the question of patients and it was quite unreasonable.

The parties drifted on after the termination of the period 30th of December, 1910, until July, 1911, when there was a breach between the parties which terminated all relations.

Dr. Harrison took up other offices in the city.

This is the award:—

We, the undersigned being chosen to arbitrate as regards the distribution of patients between Drs. A. I. Mader and L. L. Harrison, at the close of their business relations, do hereby award and determine as follows:—

1. That all patients who have never consulted Dr. Mader and had been attended by Dr. Harrison, are and shall be regarded as Dr. Harrison's patients.

2. The remainder of the patients, whether attended by Dr. Mader or Dr. Harrison, are and shall be regarded as the patients of Dr. Mader, including patients assigned by Dr. Mader to Dr. Harrison, irrespective of previous attendance.

3. New patients who employed Dr. Harrison during Dr. Mader's absence, are and shall be considered as the patients of Dr. Mader.

I must confess this hardly identifies or earmarks patients. How is Dr. Harrison to find out whether a person had been consulted formerly by Dr. Mader, and refuse him, and how is Dr. Mader to find out and refuse a person whom Dr. Harrison had attended? The books might shew and they might not. I am of opinion that the arbitrators went outside of the scope of the submission. I think it provided only for an apportionment of the patients in charge at the close of the five years' term then under treatment of one or the other of the doctors. Either that or it is uncertain. What patients? The patients attended during the five years' term or during the years 1909 and 1910, the period of the written agreement, or as I said, the patients in charge?

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The relation of client and solicitor may be of a more continuous character.

I think it is only in respect to patients in charge that a doctor may be said to have "rights" or to which the expression "retain" is correctly applicable. Former patients could hardly have been intended. It was no doubt a stipulation which would help the doctors to finish out the existing relation of physician and patient on the eve of their separation to different establishments. Even doctors cannot transfer as if they were chattels healthy persons who had been out of their hands for years.

But the arbitrators have proceeded on that basis and attempted to distribute those who were patients of either at any time during the five years. That is evident from the terms of the award.

The persons who had been attended by Dr. Harrison were to be his patients provided they had never consulted Dr. Mader (and he says he has been in practice for 20 years) or provided they called in Dr. Harrison, while Dr. Mader was absent between 23rd September, 1909, and May, 1910. All of the other former patients whether attended by one or the other of the doctors or even if assigned to Dr. Harrison by Dr. Mader, were to be regarded as Dr. Mader's patients forever.

In my opinion that is an unreasonable construction to put on the terms of the submission.

The arbitrators having gone beyond the scope of the submission their award is void and cannot be enforced. Here the excess is not separated from what might have been legitimately determined. In my opinion, there is another view why the relief by way of injunction cannot be granted to Dr. Mader.

Take the terms of the agreement as to retaining patients and the terms of the award—that certain patients shall be regarded as patients of the one or the other, I am of opinion that there are no effective provisions in the one or the other to bind either of the parties in respect to the future which the Court could enforce by specific performance or by injunction.

I shall be obliged to refer to some cases more particularly of solicitors whose business is similar in some respects to medical men to shew what clauses are usual and may be enforced by a Court in dealing with such a business: In *Austen* v. *Boys*, 2 De G. & J. 626, the Lord Chancellor at page 636 said: "But the term 'goodwill' seems wholly inapplicable to the business of a solicitor which has no local existence, but is entirely personal depending upon the trust and confidence persons may repose in his integrity and ability to conduct their legal affairs. I can perfectly understand a solicitor agreeing to relinquish his business in favour of another, and to use his best endeavours to recommend his clients, and engaging not to interfere with his

successor by a stipulation not to carry on business within a certain distance, but to sell the goodwill without anything more and without arranging any price would be an agreement incapable of being enforced by specific performance."

Bozon v. *Farlow*, 1 Mer. 459, 472, was not the case of a co-partnership but the sale of the business of one attorney to another. And there was a suit for specific performance. The stipulations just mentioned were not in the agreement, but the final agreement was to have the "usual clauses." The Master of the Rolls, Sir William Grant, p. 472, says, dealing with the nature of an attorney's business: "Now the business of an attorney consists in his being employed by others from the confidence which they repose in his skill and integrity. In what way then is the Court to decree the transfer of such a business? What is it that I am to direct Mr. Bozon to do towards the fulfilment of his part of the contract? The Court must be able to prescribe to both parties what it is that they are reciprocally to perform. The very ground on which the jurisdiction of a Court of equity in decreeing a specific performance is founded is that it is able to give possession of the very thing which is the subject of the agreement, and which a Court of law cannot do. But when I order Mr. Farlow to pay his £3,075, in what way am I to proceed to put him in possession of Mr. Bozon's business?" Then he refers to a case of *Bunn* v. *Guy*, 4 East 190, where the agreement also between attorneys contained stipulations such as were mentioned by the Lord Chancellor in *Austen* v. *Roy*, 2 DeG. & J. 626, just cited. The Master of the Rolls thought he could not decree a performance of any such acts as were stipulated for in the earlier case of *Bunn* v. *Guy*, 4 East 190, as if they were included in the agreement and that the reference to the "usual clauses" did not enable him to read such clauses into the agreement. And he asks, "Is Mr. Bozon to be bound for instance not to carry on his business of an attorney within 150 miles of Plymouth, when no such point ever came into discussion between the parties; and when it has been decided in the case of *Cruttwell* v. *Lye*, 17 Ves. 335, that unless restrained by positive contract a man may, after selling the goodwill of a trade, set up a business of the same kind at the same place whenever he pleases?" In *Whittaker* v. *Howe*, 3 Beav. 383, a solicitor had sold out to an incoming partner in a firm his interest which was to cease in two years, but meanwhile it was to continue so that the firm would have the benefit of his name and assistance. In that agreement there was a covenant that the outgoing partner was to use his utmost endeavours to retain the then present clients and secure the possession of the business as the same had been carried on to the incoming partner during the term of two years and after the expiration thereof and also covenanted that he should not afterwards practise in Great Britain for 20 years.

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In that case, the two years had elapsed, there was an injunction to restrain the outgoing solicitor from practising for 20 years in Great Britain and from endeavouring to induce any persons who were clients of the old or the new firm to cease or abstain from employing.

This it will be seen was all provided for by the covenant. In *May* v. *Thomson*, 20 Ch.D. 705, there had been the sale of a medical practice, but the formal agreement though drawn up, had not been executed. Sir George Jessel, M.R., on the argument of the appeal, 715, said: "I cannot see my way to make a decree for specific performance of an agreement to purchase a medical practice. What can the Court order the seller to do?"

And in giving judgment, he says:—

> I pause there to consider what there was to sell. The main subject of the sale was as I have said a medical practice. What is the mean of selling a medical practice? It is the selling of the introduction of the patients of the doctor who sells to the doctor who buys, he has nothing else to sell, except the introduction. He can persuade his patients probably who have confidence in him to employ the gentleman he introduces as being a qualified man, and fit to undertake the cure of their maladies, but that is all he can do. Therefore, when you talk of the sale of a non-dispensing medical practice—of course, when a man keeps what is called a doctor's shop, there is a different thing entirely to sell—you are really talking of the sale of the introduction to the patients, and the length, the character and duration of the introduction. The terms of the introductions are everything. And there is something more according to my experience in cases of the sale of medical practices—I do not know how the evidence is with regard to it in this case—there is always a stipulation that the selling doctor shall retire from practice, either altogether or within a given distance. It is so always, and there is also sometimes a stipulation that he shall not solicit the patients or shall not solicit them for a given time. They are both very important stipulations as regards keeping together the practice for the purchasing doctor.
>
> Well, when you do not find any of those things stipulated for, can you suppose that Dr. Thomson intended to buy without something being stipulated for as to what he was to buy—the length of the introduction, the retirement from business of Dr. May or something? It is impossible.

In my opinion, there is not in the agreement a stipulation, nor in the award a provision sufficient for a foundation for any relief which this Court can afford.

It is not suggested that Dr. Harrison since the breach of relationship solicited any patients. He has not stipulated that he will try to induce any person calling him up, but who is to be "considered" Dr. Mader's patient to call Dr. Mader in instead of him. There might be an action for damages for breach of

such a stipulation if it was there. And he has not stipulated, and it is not provided in the award that although certain persons are to be "considered" Dr. Mader's patients that he shall not attend them, if they call him in.

It would have been quite simple to have included in the instrument, a stipulation which might have been enforced by the Court.

In *Lumley* v. *Wagner*, 1 DeG. M. & G. 605, 610, Lord St. Leonards during the hearing said:—

> This Court interferes by injunction in the case of articled clerks, surgeons, apprentices, etc., who have covenanted after they leave their masters not to practise within certain limits, although no question of specific performance is involved.

And at page 617:—

> At an early stage of the argument, I adverted to the familiar case of attorneys' clerks, and surgeons and apothecaries' apprentices and the like, in which this Court has constantly interfered, simply to prevent the violation of negative covenants.

Morley v. *Newman*, 5 Dow. & R. 317, was cited for Dr. Mader. In that case the arbitrator had by the submission a very large power given to him, namely, "the terms and conditions on which the partnership should be dissolved and it provided also that Morley should carry on the business for his own sole benefit." The arbitrator awarded that it should not be lawful for Newman during the lifetime of Morley to carry on the profession or practice of surgeon and apothecary in Horncastle, or within thirteen miles thereof. The award was upheld. But in this case even the arbitrators could have inserted such a provision. They have not done so.

I have come to the conclusion that there is no case for an injunction, and therefore there will be no inquiry directed with that end in view. There is nothing of that kind to enforce.

In respect to the period of the six months after the term mentioned in the agreement, I am disposed to agree with the learned Judge who heard the case that during that period there was a partnership rather than an employment on the previous terms—a partnership at the will of the parties. I refer to *Syers* v. *Syers*, 1 App. Cas. 174. I think, though, that the order does not perhaps include all the expenses properly chargeable against Dr. Harrison as, for instance, teams.

I also agree with the learned Judge in respect to the remuneration by way of a commission on the proceeds, viz., that the money must be received as well as earned before a commission is payable thereon and that it need not be received in the same calendar year in which it is earned. It means services rendered during the year. I suppose the draftsman was providing against the alternative of paying a commission on earnings from

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the joint services rendered during the year which might never be received and also on previous earnings of Dr. Mader, received, but not until after this relation had commenced.

The appeals should be dismissed with costs.

Drysdale, J. DRYSDALE, J., concurred.

Meagher, J. MEAGHER, J., concurred in the result.

Appeals dismissed.

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McCORMICK v. KELLIHER.

(Decision No. 3.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Galliher, JJ.A. January 7, 1913.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION LAW — UNSUCCESSFUL NEGLIGENCE ACTION.

Where a plaintiff sues her son's employers for negligence charged as having caused the son's death in the course of the employment and a judgment in her favour in the negligence action is reversed on appeal, the plaintiff may still apply to a Judge of the Supreme Court (B.C.) to fix and allow compensation apart from negligence to which she may be entitled by reason of the fatal injury having been received in the course of the son's employment with the defendant, although, if the trial court had originally decided against the plaintiff, the assessment under the Act ought to have been applied for then and there.

[*McCormick* v. *Kelliher*, 7 D.L.R. 732, applying *McCormick* v. *Kelliher*, 4 D.L.R. 657, affirmed. See sub-secs. 3 and 4 of sec. 6 of Workmen's Compensation Act, R.S.B.C. 1911, ch. 244.]

2. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION LAW— UNSUCCESSFUL NEGLIGENCE ACTION.

The rule that where an action for personal injuries which has been brought under the common law has been disposed of, the plaintiff has no right to ask for an assessment under the Workmen's Compensation Act (B.C.), unless he does so immediately after trial of the action at common law, is applicable only where the judgment was rendered against the plaintiff, but where the plaintiff had obtained a verdict under the common law and the verdict was set aside on appeal and he subsequently applied to the trial judge for an assessment of damages under the Workmen's Compensation Act, such application is allowable.

[*McCormick* v. *Kelliher*, 7 D.L.R. 732, applying *McCormick* v. *Kelliher*, 4 D.L.R. 657, affirmed; *Cribb* v. *Kynoch* (1908), 2 K.B. 551; *Edwards* v. *Godfrey* (1899), 2 Q.B. 333, distinguished. See Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, sub-secs. 3 and 4 of sec. 6.]

3. MASTER AND SERVANT (§ V—340)—"IN COURSE OF EMPLOYMENT," CONSTRUED—WORKMEN'S COMPENSATION ACT (B.C.) — ADJUSTING BELT, AS MOTOR IN SERVANT'S WORK, IN ADJUSTER'S ABSENCE.

The act of a workman employed as a fireman tending a furnace, in adjusting a belt attached to a carrier which fed the furnace with fuel, in the absence of the chief engineer, whose duty it was to adjust the belt, is an act done in the course of the workman's employment, so as to entitle the workman to compensation under the Work-

men's Compensation Act (B.C.) for injuries incurred during the progress of the work.

[*McCormick* v. *Kelliher*, 7 D.L.R. 732, applying *McCormick* v. *Kelliher*, 4 D.L.R. 657, affirmed; *Barnes* v. *Nunnery Colliery Co.* (1912), 81 L.J.Q.B. 213, distinguished. See sec. 6, Workmen's Compensation Act, R.S.B.C. ch. 244.]

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4. APPEAL (§ VIII B—670)—ASSESSMENT OF COMPENSATION BY APPELLATE COURT—B.C. WORKMEN'S COMPENSATION ACT, SEC. 6, SUB-SEC. 4.

The Court of Appeal, upon reversing, because no negligence on the part of the defendant was shewn, a judgment in favour of the plaintiff for negligently causing the death of her son, based on Lord Campbell's Act and the Employers' Liability Act as well, cannot assess compensation under sec. 6, of sub-sec. 4, of the Workmen's Compensation Act (B.C.); the trial court is the only tribunal with jurisdiction to do so.

[*McCormick* v. *Kelliher*, 7 D.L.R. 732, applying *McCormick* v. *Kelliher*, 4 D.L.R. 657, affirmed.

5. DAMAGES (§ III J 3—188)—DEATH OF PLAINTIFF'S SON—POWER OF APPELLATE COURT TO ASSESS DAMAGES.

There is no reason why an application should not be made to the trial court to assess damages for negligently causing death, under sec. 6 of sub-sec. 4 of the Workmen's Compensation Act (B.C.), after the Court of Appeal has reversed a judgment in favour of the plaintiff based upon Lord Campbell's Act and the Employers' Liability Act as well, on the ground that the negligence of the employer had not been shewn.

[*McCormick* v. *Kelliher*, 7 D.L.R. 732, applying *McCormick* v. *Kelliher*, 4 D.L.R. 657, affirmed.

Statement

APPEAL by defendant from judgment of Clement, J., *McCormick* v. *Kelliher*, 7 D.L.R. 732.

The appeal was dismissed.

E. A. Lucas, for appellant.

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

MACDONALD, C.J.A. and IRVING, J.A. concurred with judgment of GALLIHER, J.A.

Galliher, J.A.

GALLIHER, J.A.:—This case comes before us by way of appeal from the judgment of Clement, J., awarding the respondent $1,500 under the Workmen's Compensation Act. The action was tried at common law, and a verdict for $1,500 rendered in favour of the respondents by the learned trial Judge.

On appeal, this verdict was set aside by a majority of this Court. An application was then made to us to assess damages under the Workmen's Compensation Act, but the Court held that they had no jurisdiction to do so and dismissed the application, at the same time stating that they saw no reason why an application might not be made to the trial Judge. Thus application was subsequently made, with the result above first stated.

Two objections were urged before us by Mr. Lucas for the appellants. First, that after the action at common law had been disposed of, the plaintiff, not having then and there asked for assessment under the Workmen's Compensation Act, could

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not come in at a later date and do so, and cites *Cribb* v. *Kynoch*, [1908] 2 K.B. 551; *Edwards* v. *Godfrey*, [1899] 2 Q.B. 333. Both of these were cases where the judgment at common law was against the plaintiffs, and they had the opportunity then and there to make the application to the trial Judge, which they neglected to do, and subsequently tried to recover under the Workmen's Compensation Act; and it was held that plaintiffs could not succeed, as to entitle them to do so the procedure laid down in the Act must be strictly followed.

In my opinion this case does not stand on the same footing.

Here, the judgment at common law at the trial was in favour of the plaintiff, and although that judgment was reversed by this Court, the effect of that, as I view it, would be to place the parties back in the position they would have been in at the trial if the trial Judge had given the judgment which this Court held should have been given when the plaintiffs would be entitled to ask for assessment under the Act.

What was subsequently done by this Court on the application to us to assess the damages does not alter the above position, as we made no order dealing with the matter other than to hold that we had no jurisdiction.

I think this objection must fail.

Secondly, it was urged that the respondents could not recover in any event as the accident which caused the death of the deceased was not an accident in the course of and arising out of his employment, and the judgment of Irving, J.A. (appeal book p. 136) in which I concurred, is referred to.

As I understood that judgment, and as I still understand it, it is to the effect that the plaintiffs in the action could not recover at common law on the ground of contributory negligence of the deceased. But what would disentitle plaintiffs to recover at common law might in no way affect their rights to recover under the Workmen's Compensation Act.

In the case of *Harding* v. *Brynddu Colliery Co.* (1911), 80 L.J.K.B. 1052, it was held by a majority of the Court, Cozens-Hardy, Master of the Rolls, and Kennedy, L.J., Buckley, L.J., dissenting, that the accident arose out of and in the course of the employment, and that the defendants were entitled to compensation under the Act.

The facts there were, shortly, that a collier was employed to drill a hole from above into a stall below to allow gas to escape from the stall; that in the process of drilling he asked leave to go into the stall which was blocked with boards in order to ascertain the direction the drill was taking, and was forbidden to do so, but went in notwithstanding, and was overcome with gas and died.

Buckley, L.J., in his dissenting judgment, says at p. 1055:—

> Now, I want to add something lest this judgment be misunderstood, To my mind the test is not whether the man in the course of his employment went to a forbidden place. If that were all, then no doubt that would be simply serious and wilful misconduct and the applicant might be entitled to recover, but the subject-matter in which you want to find the distinction is this: Has the man by an act outside the scope of his employment or has he in doing an act within the scope of his employment, been guilty of serious and wilful misconduct?
>
> If it be the former, he is not entitled to recover, if it be the latter, he is.

The learned Lord Justice held in the case before him that it fell within the former, disagreeing in that respect with the majority of the Court.

It seems to me on the evidence the case before us is clearly within the latter proposition. The deceased was employed as a fireman; the fuel was conveyed to the furnace by means of carriers operated by a belt, revolving on a pulley attached to the main driving shaft of the engine. Occasionally these carriers would clog, causing the belt to be thrown off, thus stopping the passage of the fuel for the purpose of keeping up steam.

The chief engineer, whose duty it was to adjust this belt, and put it on under such circumstances, was temporarily absent on the day in question, and returned in time to see the deceased attempting to put on the belt in the doing of which he met with the accident.

Under these circumstances the deceased, whose duty it was to keep up steam, finding his supply shut off, and the belt thrown off by the clogging of the carriers in the absence of the chief engineer, went to put on the belt.

Surely the putting on of the belt for the purpose of starting the carriers to convey the fuel to the point where it would be utilized for the purpose of keeping up steam, the very purpose for which he was employed, was an act within the scope of his employment in the sense that it was incidental to it, and although his defined duty may not have included the adjusting of this belt, it was an act done in the interest of the master and in the furtherance of the work he was employed to do. In this respect it is distinguishable from the very recent case of *Barnes* v. *Nunnery Colliery Co.* (1912), 81 L.J.Q.B. 213.

This objection, I think, also fails.

The appeal should be dismissed with costs.

Appeal dismissed.

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Jan. 9.

MOACHON v. BLAIR.

Saskatchewan Supreme Court. Trial before Brown, J. January 9, 1913.

1. CONTRACTS (§ V C 2—396)—RESCISSION—PROMPTNESS — STALLION — MUTUAL MISTAKE—RETAINING POSSESSION AFTER DISCOVERY.

Rescission of a contract for the sale of a stallion on the ground that the wrong animal was delivered will not be allowed where it appears that the delivery of the wrong stallion on the part of the seller was an honest mistake, and where after the mistake was discovered and the selling price had been paid, instead of rejecting the horse the buyer retained possession of him and hired him out frequently for breeding purposes.

Statement

ACTION to rescind contract for the sale of a stallion and for damages, the wrong horse having been delivered.

The action was dismissed.

E. J. Brooksmith, for plaintiff.

G. F. Blair, for defendant.

Brown, J.

BROWN, J.:—In the month of April, 1911, the plaintiff purchased from the defendant a Clydesdale stallion called Chaplet, represented at the time to be in the possession of the defendant at Balgonie. The plaintiff did not see the horse at the time of purchase, but bought him on the strength of his pedigree, which was produced at that time, and on the representations of the defendant. The plaintiff paid the full amount of the purchase price. On May 6, 1911, the defendant delivered to the plaintiff at Balgonie a horse which at the time both parties thought was the horse Chaplet, but which, I have no hesitation in finding under the evidence, was not the horse Chaplet, but a horse very similar in appearance, so similar, in fact, that had it not been for the information imparted by Dr. Fyffe to the plaintiff, all parties might have continued in ignorance of any mistake being made. It was only a few days after the delivery that the plaintiff became aware of the mistake through Dr. Fyffe, and very shortly after that, again, the plaintiff called the defendant's attention to the mistake, and the defendant admitted that a mistake had been made, but it was to him a mystery, and seems still to be a mystery, how the horse so delivered could have been substituted for the horse Chaplet. It is not necessary that I should express any opinion on that point. It is sufficient that I should find, as I do find, that the horse delivered to the plaintiff was not the horse to which he was entitled under the contract. The plaintiff, as I have already indicated, became fully aware shortly after the delivery of the mistake having been made, and yet he did not return the horse so delivered to the defendant or notify the defendant that he rejected the same. He seems to have been content with simply calling the defendant's attention to the fact that the horse delivered was not the

horse Chaplet that was sold. Instead of rejecting him, as one would have expected him to do under the circumstances, the plaintiff retained the horse in his possession and still retains him. Moreover, during the season of 1912 he travelled him as a stallion, serving some forty-five mares at a fee of $12.50 per mare for such service. Under such circumstances the plaintiff cannot now reject this horse and cannot get rescission of the contract. His only remedy, if any, is by way of damages. But here, again, he must fail, because he has not proved any damages. So far as I know, or the evidence discloses, the horse which has been delivered and which he has seen fit to retain may be a better and more valuable horse than the horse Chaplet which he was supposed to get. Under the circumstances there must be judgment for the defendant on the claim and judgment for the plaintiff on the counterclaim.

The defendant by his pleadings and during the trial contended that the horse which he delivered to the plaintiff was the horse Chaplet, although admitting that the horse which he afterwards saw in the plaintiff's possession was not the horse Chaplet, and asserted his belief that the substitution had been made some time after delivery. Practically all the time of the trial was occupied with reference to this point, and on this issue the defendant has failed. I am of opinion, therefore, that under all the circumstances of this case it is one in which no costs should be ordered.

Action and counterclaim dismissed.

BALFOUR & BROADFOOT v. CALDERWOOD.

Saskatchewan Supreme Court, Johnstone, J. January 7, 1913.

1. BROKERS (§ II B 1—12)—REAL ESTATE—COMPENSATION — SUFFICIENCY OF BROKER'S SERVICES—SPECIAL AGENCY CONTRACT — QUANTUM MERUIT, WHEN.

Where the defendant purchases certain lands through the plaintiffs for the disclosed purpose of re-selling at a profit, listing the property for re-sale with the plaintiffs as his exclusive real estate agents for a fixed period at a fixed minimum price on a special contract for commission and expenses; and where the plaintiffs, pursuant to and during the period of the agency contract, expend time and money in efforts to make a sale, including the transportation charges in taking a proposed purchaser on a trip of inspection to the lands; and where later, while the agency contract is still in force, the owner, through another agent, effects a sale at the minimum price, the plaintiffs are entitled to recover upon a *quantum meruit* for their services, and are not limited to the actual value of the time given or the moneys expended, but are entitled to a substantial sum to be fixed by regard being had to the defendant's profit from the transaction.

[*Aldous* v. *Swanson*, 14 W.L.R. 186, and *Aldous* v. *Grundy*, 17 W.L.R. 230, 20 W.L.R. 550, applied.]

Statement

ACTION to recover compensation for the sale of land, alleged to be due under a certain contract or upon a *quantum meruit*.

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BALFOUR AND BROADFOOT v. CALDERWOOD.

Johnstone, J.

G. F. Blair, for plaintiff.
E. B. Jonah, for defendant.

JOHNSTONE, J.:—The defendant purchased the lands in question through the plaintiffs for the purpose of re-selling the same at a profit. With this purpose in view, the lands were listed by him with the plaintiffs for sale.

After the lapse of about a year, correspondence took place between the plaintiffs and the defendant, the result of which was the raising of the price of the lands to $11 per acre.

The relationship of principal and agent was established at the trial by the following document:—

LAND LIST.

No.....

I, Robert Calderwood, of Florence, Province of Ont., hereby appoint John Balfour and David D. Broadfoot, trading under the firm name of Balfour & Broadfoot, of Regina, Sask., my exclusive agents subject to the conditions noted below, for the sale of the following described lands situated in the Province of Sask., Dominion of Canada, to wit:—

All of section 19, township 31, range 19, west of the 3rd meridian, at $11.00 per acre. Total $.....

(1) Terms of sale: The said land to net me no less than the price above named; John Balfour and David D. Broadfoot, aforesaid, to retain all over that amount received in full for expenses and commission in the sale of the said land. $50.00 to be paid down as soon as the sale is made, $1.50 per acre when deed or contract properly executed, shewing good title, is delivered at the ..... Bank of Canada in Regina, Sask.; balance as follows:..... Seven equal annual payments. Int. at 6 per cent. per annum.

(2) I am the owner of the above described land. My title is .....

.....

(3) Encumbrances: Will give a clear deed when sold.

(4) This list will expire 1st Dec., 1910.

Give full description of land and improvements on back of this sheet.

ROBT. CALDERWOOD,
Florence,
Ont.

In June following, in addition to other attempts made by the plaintiffs to sell, the plaintiff Broadfoot and one Webster, a proposed purchaser, made a trip to the lands (sec. 19, tp. 31, rg. 19 W. 3rd mer.). The land was inspected by Webster at a cost to the plaintiffs by actual disbursement of $30.

The defendant, through another agent in Ontario, effected a sale of the land at $11. The plaintiffs, learning of the sale made in Ontario, claimed compensation from the defendant, who refused to pay the plaintiffs either under the said special contract creating the plaintiffs agents or by way of *quantum meruit*. The plaintiffs thereupon sued, claiming $640, resorting to both forms of action.

I think the plaintiffs should not recover from the defendant

the amount claimed, namely $640, because were they to do so the defendant would derive no profit from the transaction as to this section; the plaintiffs would be reaping the whole benefit. I think the plaintiffs should be paid for their services and reimbursed the expenses of the plaintiff Broadfoot, adopting the course taken in *Aldous* v. *Swanson*, 14 W.L.R. 186, and in *Aldous* v. *Grundy*, 17 W.L.R. 230, affirmed on appeal, 20 W.L.R. 550; and I therefore allow the plaintiffs 50 cents per acre, or $320, and the $30 expended by Broadfoot—in all, $350, for which the plaintiffs will have judgment together with costs.

Judgment accordingly.

WINNIPEG v. WINNIPEG ELECTRIC R. CO.

Manitoba King's Bench, Mathers, C.J.K.B. January 18, 1913.

1. COSTS (§ II—21)—COSTS OF DEPOSITIONS—UNNECESSARY EXAMINATION FOR DISCOVERY.

An application by defendants for a fiat to tax the costs of examining for discovery a person out of the jurisdiction will be refused where it appears that by the examination of that person the defendants obtained no material discovery that they had not already obtained from other witnesses, that no part of the examination was used at the trial nor did defendants apply for leave to use it, but instead they brought in that person as a witness on the trial, although the examination may have been sought to disclose and did disclose that the witness in question could give material evidence for the defendants.

Statement

APPLICATION by the defendants for a fiat to tax the costs of examining for discovery S. H. Reynolds, a past officer of the plaintiff, out of the jurisdiction.

The application was refused.

J. Prendhomme, for plaintiff.

D. H. Laird, for defendants.

Mathers, C.J.K.B.

MATHERS, C.J.K.B.:—By the examination of the officer named the defendants obtained no material discovery that they had not already obtained by the examination for the same purpose of the city engineer and by the plaintiffs' affidavit on production. No part of the examination was used at the trial, nor did the defendants apply for leave to use it. On the other hand they brought Mr. Reynolds here and called him as a witness at the trial. It is said that by the examination the defendants discovered that he could give material evidence in their favour, but there is nothing to shew that they could not have ascertained this fact without the expense of an examination on oath. In taking this proceeding the defendants appear to have acted *ex abundanti cautela. Primâ facie* they are not entitled to tax these costs against the plaintiff and in my opinion they have not satisfied the onus upon them of making a case for a fiat. The application is refused.

Application refused.

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Jan. 7.

BROWNLEE v. MACINTOSH.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Martin, JJ.A. January 7, 1913.

1. BROKERS (§ II B 1—12)—REAL ESTATE—COMPENSATION—SUFFICIENCY OF BROKER'S SERVICES—QUANTUM MERUIT—COMMISSION PAID ANOTHER AGENT.

Neither a commission nor, in the alternative, a *quantum meruit* for services rendered can be awarded a real estate broker where he fails to shew that he procured the purchaser, or even introduced or sent him to the defendant or that there was any agreement, express or implied, on which *quantum meruit* could be based, although he was authorized to obtain a purchaser; and where another agent introduced the purchaser to the vendor and got a commission on the resulting sale although the plaintiff real estate agent had (without the knowledge of the defendant owner for whom he had negotiated the latter's original purchase) promoted the negotiations of the broker who made the sale by giving to him and to his prospective buyer the information he had relating to the property.

Statement

APPEAL by the defendant from judgment of Grant, Co.J., in an action for the commission of the sale of certain land, or for a *quantum meruit*.

The appeal was allowed, IRVING, J.A., dissenting.

St. John, for the appellant.

Baird, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiff sues to recover a commission on the sale of a tract of land, or in the alternative for a *quantum meruit* for services rendered at the request of the defendant.

It is important to keep separate the different transactions between these parties. The land above referred to was acquired from the Crown by the defendant and one Garnham with the assistance of the plaintiff. For this assistance the plaintiff was paid 25 cents per acre. That transaction was closed before the beginning of 1911. Thereafter plaintiff alleges that the defendant asked him to help to sell the said land and he would be paid a commission, the amount of which was not stated. Defendant denies this, but I am going to assume that the plaintiff was authorized by defendant to obtain a purchaser, and thus earn a commission. One Elmer Jones, another agent for defendant, found a customer named Coote, whom he brought to defendant's office, and who was given such information as the defendant and Garnham had, which included a report on the property made by the plaintiff for defendant in the earlier transaction. It appears that while negotiations were pending, Jones and Coote went to see the plaintiff and were shewn certain maps or blue prints and given information respecting the property. It also appears that Coote almost immediately resold or entered into negotiations to resell the property to one Armstrong, represented by one McMillan, and that Coote and McMillan obtained

considerable assistance from the plaintiff. This is what the plaintiff relies upon as entitling him to either a commission or to a *quantum meruit*. It is quite clear that the plaintiff did not find the customer Coote. It is also sworn to positively by the defendant and Garnham that they had not sent Coote to the plaintiff or suggested in any way that he should go to the plaintiff for information or assistance. This evidence is uncontradicted. The plaintiff does not pretend that he was requested by the defendant or Garnham to give information to Coote or to Jones. What took place between Jones, Coote, McMillan and the plaintiff was entirely behind the defendant's back and without his knowledge. In these circumstances, assuming that the plaintiff was authorized to obtain a purchaser, or was promised a commission for assisting in a sale, I think he has failed to make out a case for commission or for a *quantum meruit*. When Coote and Jones came to him for information he ought to have ascertained in what capacity they came, and whether any assistance or information which was asked of him was at the request of the defendant or Garnham.

The plaintiff's case therefore fails. The appeal should be allowed and the action dismissed.

Irving, J.A. (dissenting).

IRVING, J.A. (dissenting):—Defendant and one Garnham bought in the autumn of 1910 some 7,152 acres of land situate near Babine lake, through or on the recommendation of the plaintiff, who had made a survey of the land. Brownlee, for his services in getting the land grant, was to receive 25 cents per acre. On 22nd April, 1911, the defendants sold to Coote at $6 per acre, who at once entered into negotiations with one Armstrong, at Winnipeg, for the resale to him—these negotiations culminated on 10th of June. Coote was not able to pay down more than $500, and as the balance depended upon his making a sale of the property, the defendant and Garnham were interested in the sale to Armstrong going through.

Brownlee undoubtedly gave to Coote and Armstrong's agent a great deal of information. The defence set up that Brownlee was engaged to do all this, in consideration of his being paid 25 cents per acre, or in the alternative that he did it voluntarily. Brownlee explained to the Judge that this 25 cents per acre contract was exhausted when the Crown grants were obtained in 1910. That afterwards he was employed by them in 1911 to make maps and furnish notes of the property to enable them to resell it; that they paid him for these maps and notes. Then he says they asked him to assist them in selling the lands and that he saw Coote and Coote bought. Immediately after the sale to Coote, Brownlee applied for his commission, and

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was not told at once that he had nothing to do with the sale, or that he was to assist in consideration of the 25 cents per acre agreement.

If the defendant expected Brownlee to assist in the sale he would naturally refer Coote to Brownlee. Coote we know went to see Brownlee, and got the information, and that the sale was afterwards made. I think the fair inference is that Brownlee brought about the sale.

The Judge has found against the contentions put forward by the defence and I do not see how we can interfere.

Martin, J.A.

MARTIN, J.A.:—This appeal should, in my opinion, be allowed, because even on those facts which are not in dispute the plaintiff has not shewn either that he earned a commission by having procured a purchaser, or even introduced or sent the purchaser, Coote, to the defendant; or that there was any agreement, express or implied, on which a claim *quantum meruit* could be based. The plaintiff admits that Jones was Coote's agent (p. 29), and it was Jones who introduced Coote to the defendant (p. 32) and got a commission.

Appeal allowed, IRVING, J.A., *dissenting*.

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Jan. 31.

DAVIS v. WENATCHEE VALLEY FRUIT GROWERS ASSOCIATION.

Alberta Supreme Court, Stuart, J. January 31, 1913.

1. WRIT AND PROCESS (§ II A—16)—SERVICE ON NON-RESIDENT.

On an application for leave to serve a writ of summons out of the jurisdiction, it is essential to prove a *primâ facie* cause of action against the defendant upon whom it is proposed to serve the writ *ex juris*.

Statement

APPLICATION to set aside an order made for service of writ of summons out of the jurisdiction.

The order was granted.

Robert Ure, for the plaintiff.

C. F. Adams, for the defendants.

Stuart, J.

STUART, J.:—I regret that I paid so much attention on the argument of this application to questions of law and so little attention to the facts and the affidavits. If I had looked at the affidavits a little more carefully I would not have reserved my decision. The application will have to be allowed and the order for service out of the jurisdiction and all proceedings following thereon will have to be set aside.

The original affidavit, on which the order of service out of the jurisdiction was granted, was extremely defective. It was

made by a student-at-law who did not know anything about the matter at all. All he said was that he verily believed that the plaintiff's claim was for wages for a certain amount, and that he verily believed that the defendants on a certain date dismissed the plaintiff without reasonable cause. He did not give the grounds of his belief or the source of his information. I warned him at the time that his material was very defective and that even if I gave the order it would be liable to be set aside.

Now, upon the application to set it aside a further affidavit is presented to me which is also made by a student-at-law. I have read this affidavit carefully and the three letters which are exhibited and I am unable to discover therefrom even a *primâ facie* case of liability. The letter of May 13th, 1912, does, indeed, shew an engagement of the plaintiff for a certain time at a certain salary. But there is absolutely no evidence in the affidavit or in any other letter that any salary is due the plaintiff or that he was wrongfully dismissed. The letter of November 19th does indicate that there was some disagreement between the parties about the amount of money that the plaintiff should receive, and it also indicates that the defendants considered that the plaintiff's services terminated on October 15th, which was considerably earlier than the date stated in the first letter of employment; but so far as the letter goes it is quite possible that the engagement may have been ended by mutual arrangement and that all that was in dispute was the exact date on which it should be considered as having terminated.

Whatever may be the law upon the points so strenuously argued before me, there is certainly no doubt upon the law on this point; that on an application for leave to serve a writ out of the jurisdiction a *primâ facie* cause of action must be shewn against the proposed defendant. Nothing of the kind has been shewn here, and the application will have to be allowed with costs.

Order vacated.

BEAVIS v. TOWNSHIP OF LANGLEY, and STEWART.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. January 10, 1913.

1. PLEADING (§ II—65)—ESTABLISHING ALLEGATIONS OR CLAIMS—BURDEN OF PROOF—ORDER FOR PARTICULARS, WHEN REFUSED.

In an action by plaintiff claiming that his property had been sold for taxes wrongfully claimed as due and unpaid, and that such sale was made without any power or authority in the township making the sale, an order for particulars giving the defects in the authority of the township to sell will not be made on defendant's application.

[*Turner* v. *Municipality of Surrey*, 16 B.C.R. 79, followed.]

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2. PLEADING (§ I Q—135)—ESTABLISHING ALLEGATIONS OR CLAIMS—BURDEN OF PROOF—SURPLUSAGE IN PLEADING.

It is not necessary in an action to recover property alleged to have been sold under an invalid tax sale, for the plaintiff in his pleadings to set up the tax sale and allege it was made without authority; the proper course is to set out his title and allege the wrongful possession of the person who purchased under the tax sale.

3. TAXES (§ I F—145)—SALE — DEED — RIGHTS OF PURCHASER—BURDEN AS TO REGULARITY.

In an action to recover property alleged to have been sold under an invalid tax sale, though the person in possession of the land has a certificate of title, if it appears that the defendant's certificate of title under the Land Registry Act (B.C.) was obtained by him as purchaser at a tax sale, the burden is on him to establish the re-purchaser at a tax sale, the burden is on him to establish the regularity of the tax sale.

[*Kirk* v. *Kirkland*, 7 B.C.R. 12, in appeal *sub nom. Johnson* v. *Kirk*, 30 Can. S.C.R. 344, followed.]

Statement

PLAINTIFF'S statement of claim alleges that Thomas Nelson is the registered owner of the property in question, subject to mortgage to defendant Jenny Stewart and Eliza Coffey, and that Nelson has executed conveyance of the property to plaintiff, and that prior to such conveyance the defendant, the corporation of the township of Langley, without any power or authority it thereunto enabling, purported to convey the property to the defendant Jenny Stewart for taxes wrongfully alleged to be due and unpaid, and that the reeve and clerk of the corporation of the township of Langley had executed a conveyance to defendant Jenny Stewart of the said property, same purporting to be made under and by virtue of said alleged sale, such conveyance being executed by said reeve and clerk without any power or authority. Plaintiff claimed an injunction restraining the defendants from dealing with the property, and a declaration that the alleged tax sale was null and void, and that plaintiff is entitled to have his conveyance from Thomas Nelson registered, and to redeem the mortgage. The statement of defence of the defendant Jenny Stewart alleges that the sale to her of the property in question, was duly made for taxes lawfully due and payable, and duly charged against the property, and that such sale was made by virtue of authority vested in the corporation of the township of Langley, and that conveyance to the defendant Jenny Stewart from the corporation of the township of Langley was duly registered in the land registry office, and that she holds a certificate of title to the property. The defendant Jenny Stewart subsequent to putting in defence obtained an order from the Honourable Mr. Justice Morrison, that plaintiff furnish her with particulars of the defects in the authority of the township of Langley to sell and convey the property in question.

Argument

Ritchie, K.C., for appellant, referred to *Turner* v. *Municipality of Surrey* (1911), 16 B.C.R. 79, 349, and *Kirk* v. *Kirkland*

(1899), 7 B.C.R. 12, and *sub nom. Johnson* v. *Kirk*, 30 Can. S.C.R. 344.

Mayers, for respondent:—*Turner* v. *Municipality of Surrey*, 16 B.C.R. 79, 349, is distinguishable because there the only party defendant was the municipality, and the facts in relation to the tax sale were peculiarly within their knowledge. The fact that defendant Stewart has a certificate of title which is *primâ facie* evidence of title, puts the burden of shewing defects in such title upon plaintiff. Convenience is greatly in favour of requiring particulars of the defect upon which plaintiff really relies. The furnishing of such may obviate the necessity for an adjournment of the trial.

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Argument

MACDONALD, C.J.A.:—It was bad pleading for plaintiff to set up the tax sale and allege that it was made without authority; he should have simply set out his title and alleged that the defendant Stewart had taken possession of his property, but the authority of *Kirk* v. *Kirkland*, 7 B.C.R. 12, and *Johnson* v. *Kirk*, 30 Can. S.C.R. 344, is clear, that although defendant Stewart has a certificate of title, when it is made to appear that such certificate was obtained upon a tax sale this put the burden upon her of establishing the regularity of the tax sale. The case is not distinguishable from *Turner* v. *Municipality of Surrey*, 16 B.C.R. 79, 349. The appeal will be allowed and the order for particulars set aside.

Macdonald, C.J.A.

IRVING, MARTIN, and GALLIHER, JJ.A., concurred.

Appeal allowed.

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Manitoba Court of Appeal, Perdue, Cameron and Haggart, JJ.A. February 24, 1913.

1. MUNICIPAL CORPORATIONS (§ II C 3—105)—REVOCATION OF POOL-ROOM LICENSE—RIGHT OF TOWN COUNCIL TO REVOKE.

A town council has the right to revoke a pool-room license, for an infraction of a by-law of the town by the licensee, where such by-law existed at the time of the application for the license, and where the infraction was expressly made ground for such revocation at the time of such application.

[See Annotation at end of this case.]

2. MUNICIPAL CORPORATIONS (§ II C 3—105)—REVOCATION OF POOL-ROOM LICENSE—RIGHT OF LICENSEE TO BE HEARD BEFORE TOWN COUNCIL.

Where a town council, having the right to revoke a pool-room license for certain infractions of a by-law of the town, revokes the license, without giving the licensee a chance to be heard at a judicial hearing, such action is not illegal, where it appears that the town in question is a small place, and the pool-room one of the principal loitering places and one that may very quickly become notoriously objectionable, and the court is satisfied that, even if the members of the council did not have a knowledge from personal observation, there were sufficient grounds to justify their action, especially where there is no suggestion that the council acted arbitrarily or in bad faith.

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APPEAL from decision of Macdonald, J.

The appeal was dismissed.

THE decision appealed from refused a motion made under sec. 427 of the Municipal Act to quash the resolution of the council of the town of Swan River, cancelling the poolroom license of George A. Crabbe.

The opinion of Macdonald, J., which stands affirmed, was as follows:—

Macdonald, J.

MACDONALD, J.:—The applicant George A. Crabbe was on the 12th day of July, 1912, granted a license to run a pool-room until the 31st day of May, 1913, subject to being suspended or forfeited, and the license was also subject from time to time during its continuance to any and all by-laws, rules and regulations in force or that may be in force in the said corporation.

By-law No. 6 of the corporation provides that in cases where a license shall have been granted and where in the opinion of the council the licensee has allowed profanity or gambling or boisterous conduct in the licensed premises, or has kept them in a neglected or unsanitary condition, then, and in any such case, such licensee shall be liable to have his license revoked upon a motion of the council carried with a three-fourths majority and such licensee shall have no claim for any unexpired portion of the said license so revoked.

On the twenty-first October, 1912, at a regular meeting of the council, a resolution was carried cancelling the license and this motion is made by the licensee for an order that the resolution so passed be quashed on the following grounds:—

1. The resolution is illegal.

2. The resolution is *ultra vires* of the town council.

3. The resolution does not refer to any by-law of the town council conferring on them the power of cancellation, nor any statutory authority, authorizing them to cancel the license.

Under sec. 10 of an Act to amend the Municipal Act, 1907, it is provided that the council may pass a by-law for limiting the duration of and revoking any such license on grounds to be fixed by by-law.

Pursuant to this the council passed a by-law (No. 6) which provides that in cases where a license shall have been granted to any person or persons in respect of any billiard-room, pool-room, etc., and where in the opinion of the council the licensee has allowed profanity or gambling or boisterous conduct in the licensed premises or has kept them in a neglected or unsanitary condition, or has been convicted more than three times of an infraction of this or any other by-law which may in future be in force in the town of Swan River, then in all such cases and in any such case such licensee of such billiard-room, pool-room,

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etc., shall be liable to have his license revoked upon a motion of the council carried with a three-fourths majority in that behalf.

The license granted the applicant was issued subject to any and all by-laws then or thereafter to be in force in the said corporation respecting the same.

By-law No. 6 was then in force, and in his application for license such application is made subject to such by-law.

From the material before me it is evident that the council at its meeting of the 21st October, 1912, fully discussed the license in question and were unanimously of the opinion that the licensee violated the by-law under which his license had been granted by allowing profanity and boisterous conduct in the premises licensed by such pool-room license.

There is nothing to suggest that the council acted arbitrarily or otherwise than with a *bonâ fide* desire for the peace and good government of the corporation, and, in my opinion, they acted strictly within their legal rights.

It is urged that the applicant was condemned unheard and that the opinion of the Council can be formed only after a judicial hearing where the applicant has a right to be heard. I do not consider this objection seriously. Swan River is a small town and a pool-room one of the principal loitering places and one that may very quickly become notoriously objectionable, and the members of the council, I am satisfied, if they did not have a knowledge from personal observation, acted on sufficient grounds to justify their action.

The further objection is that there was not a three-fourths majority in favour of the resolution, but, from the affidavits filed they were unanimously in favour of it, but through a mistaken idea that the majority voting must not exceed three-fourths, one member of the council, who favoured the resolution, voted against it.

The motion must be dismissed with costs.

H. W. Whitla, K.C., and *H. S. Scarth*, for plaintiff.

S. J. Rothwell, for town of Swan River.

Perdue, J.A.

Perdue, J.A., concurred with judgment of Haggart, J.A.

Cameron, J.A.

Cameron, J.A.:—The license in question was issued subject to by-laws of the council then or thereafter in force. The by-law of the council (No. 6) set out in the judgment appealed from, had already been passed.

The resolution of the council, cancelling the license, was passed October 21, 1912. The original motion was to quash this resolution on the grounds that it was illegal and *ultra vires*. This Mr. Justice Macdonald refused to do, and dismissed the motion. This appeal is taken against his judgment, both on the original and additional grounds of objection to the resolu-

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tion, and on the ground that the by-law does not comply with the provisions of sub-sec. (a) of sec. 10, ch. 27, statutes of Manitoba, 1907. On the argument the appellant took further grounds of objection not strictly indicated in his notice of appeal.

The principles on which such by-laws should be construed by the Courts are set forth in numerous cases. Lord Russell of Killowen said, in *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, that such a by-law

> should not be set aside as unreasonable merely because particular Judges may think that it goes further than is necessary or convenient, or because it is not accompanied by qualifications or exceptions which some Judges think ought to have been there. In matters which directly or mainly concern the people . . . who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than Judges.

See the cases collected in Biggar, Municipal Manual, at p. 337. I refer also to the judgment of Mr. Justice Teetzel in *Re Dinnick* v. *McCallum*, 5 D.L.R. 843, 26 O.L.R. 560, 22 O. W.R. 546, 3 O.W.N. 1463. It is clear that such a by-law as that before us should be supported if possible. And on consideration of its terms, and on giving its words a fair construction, it appears to me that it cannot be disregarded or set aside, either as unreasonable or as discriminating in its application. And even if the by-law were objectionable on these or similar grounds, it is by no means clear that it can be attacked in this proceeding; indeed the authorities point the other way. Nor does it seem to me that it can be effectively impeached as going beyond the authority conferred by statute. The words "in the opinion of the council" really add no new or unauthorized term. The whole text of the by-law simply means that the members of the council are to have an opinion in the matter, which opinion has legal effect only when expressed in the terms of a resolution or order by three-fourths of its members.

We were referred to the cases of *Scott* v. *Pilliner*, [1904] 2 K.B. 855, and *Strickland* v. *Hayes*, [1896] 1 Q.B. 290, and the argument is based thereon that the profanity or boisterous conduct mentioned in the by-law cannot be an offence unless such is, and is expressed to be, to the annoyance of others, and that therefore the by-law is too wide. But the offences in the cases referred to were such as might be committed in the streets and public places. Here they are confined to the premises. The Courts must not be too astute in finding grounds for holding by-laws invalid on such refined grounds. I would say that the by-law in question, on its face, necessarily involves the idea of profanity and boisterous conduct in presence of, and, therefore, objectionable to, others.

It is argued that the licensee was entitled to be heard before the council could act, on the resolution to cancel the license. But the licensee, as I have stated, took his license subject to the provisions of the statute and of the by-law, and one of the conditions of the latter was that it might be revoked on the occurrence of certain events, "upon a motion of the council carried with a three-fourths majority." The licensee therefore accepted the license on the distinct agreement that it was revocable by the council acting upon the grounds set out in the by-law. The presumption would be, in the absence of any evidence shewing the contrary, that the council acted in good faith, on due consideration and on grounds appearing to it to be sufficiently established. The evidence is that the council had facts before it and acted upon them after discussion. I cannot see, therefore, that it is open to the licensee to object to the action of the council by which he, in effect, agreed to be bound, merely because he was not given a formal notice of the time when the matter of revocation would be up for discussion. The council is given, by the statute, wide powers, both in fixing the grounds of revocation and in acting upon them, and it cannot be said that those powers have been exceeded or abused, either in the by-law or the resolution here in question.

I cannot take seriously the objection that the resolution was not carried by the prescribed majority. Giving the words their plain and ordinary meaning, it was carried by a three-fourths majority, that is to say, by a majority consisting of three-fourths of the members of the Council.

I think the appeal must be dismissed.

HAGGART, J.A.:—I agree with the reasons of Mr. Justice Macdonald, who refused the applicant's motion to quash a resolution of the respondent's council, cancelling a pool-room license. Haggart, J.A.

Sec. 640, sub-sec. (*a*) of the Municipal Act, as amended by ch. 27, sec. 10, statutes of Manitoba, 1907, is the legislative authority for the passing of by-law No. 6, which provides for the regulation of certain businesses and the granting of licenses.

> The municipality is expressly empowered to pass by-laws
>
> for licensing, regulating and governing pool-rooms and revoking any such license on grounds to be fixed by by-law,

and pursuant to this authority the council enacts (sec. 25 of by-law No. 6) that where

> in the opinion of the council the licensee has allowed profanity, gambling or boisterous conduct in the licensed premises, or has kept them in a neglected or unsanitary condition . . . the licensee . . . shall be liable to have his license revoked upon a motion of the council carried with a three-fourths majority in that behalf.

This by-law is wide enough to cover the resolution impeached, which is as follows:—

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> Moved by Councillor Hay, seconded by Councillor Owens, that the pool-room license granted to George A. Crabbe, expiring on May 31st, A.D. 1913, be cancelled forthwith, and the clerk notify George A. Crabbe of the cancellation of the license.

As to the objection that there was no formal trial or investigation, I assume that the personnel of the council is fairly representative of the intelligent citizenship of the town or village, and that on taking any executive or legislative action they would, as a council or as individuals, inform themselves of the existing conditions. In a small town or village the councillors would necessarily know the facts.

I do not agree with the applicant's construction as to the "majority." There is some ambiguity, but it is plain the intention was that the motion for revoking should be supported by three-fourths of the members of the council.

I think the words of Lord Russell of Killowen, C.J., in *Walker* v. *Stretton* (1906), 12 Times L.R. 363, are applicable to the present case, where he lays it down as a general rule that

> the Court ought as far as possible to support by-laws made by local authorities unless it can be clearly seen that the by-law was made without jurisdiction and was unreasonable,

and that Judges

> should not willingly pick holes in rules which deal with local matters and local requirements which the local authorities are often better able to judge of than the Courts.

And in the later case, *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, the same learned Judge, after pointing out that the majority of the English cases in which the validity of by-laws had been discussed, related to the by-laws of railway companies, dock companies and other commercial corporations, expresses the opinion that a much more liberal rule should be applied to the by-laws of representative public bodies entrusted by Parliament with legislative powers for the general good, and that such a by-law

> should not be set aside as unreasonable merely because certain Judges may think that it goes farther than is necessary or convenient, or because it is not accompanied by qualifications or exceptions which some Judges think ought to have been there. In matters which directly or mainly concern the people . . . who have the right to choose those whom they think best fitted to represent them in their local governing bodies, such representatives may be trusted to understand their own requirements better than (some) Judges.

If these observations were pertinent in the old land, they apply with much stronger force in this new country where our municipal institutions are in the moulding and where legal and professional assistance is not always available.

The appeal should be dismissed with costs.

Appeal dismissed.

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Annotation

Municipal corporations —Licensing powers

Annotation—Municipal corporations (§ II C 3—105) — License — Power to revoke license to carry on business.

GENERAL STATEMENT.

(Licenses for sale of intoxicating liquors are excluded from consideration in this note.)

The power to revoke a license once issued is less comprehensive even than is the power to require it, as the power to license may be based upon the power to tax. But this delegation by the Legislature to a municipality of the power to license occupations lawful in themselves, vests in a municipality no corresponding power of revocation, unless necessarily implied from the power to regulate or control. Even where the power of revocation is expressly conferred as applied to licenses to engage in occupations lawful in themselves, it should be construed to confer the right only where necessary to the comfort, welfare or safety of society and then not in an arbitrary or unreasonable manner. Such authority carries with it no power arbitrarily to prohibit citizens from engaging in occupations lawful in themselves or unduly to interfere therewith. The power of a municipality to revoke a license issued by it to engage in a lawful occupation, therefore, depends upon either express legislative authority or general power to regulate and control, and will not be implied from a mere delegation of the power to license: *People ex rel. Lodes* v. *Department of Health*, 189 N.Y. 187, 35 L.R.A. (N.S.) 716.

A by-law of a municipal council cannot be altered by a mere resolution passed by the council: *City of Victoria* v. *Meston*, 11 B.C.R. 341.

NECESSITY OF EXPRESS POWER WHERE VESTED RIGHTS ARE INVOLVED.

Some cases apparently limit the authority of a municipality to revoke such a license. Thus in *City of Toronto* v. *Wheeler*, 4 D.L.R. 352, where an applicant for a permit for a garage to be located upon a certain street was granted permission to build and maintain the same, it was held that the city could not after the building was erected in pursuance of such permit, pass an ordinance prohibiting the erection and maintenance of such buildings on the said street, because by the expenditure of money in the purchase of land and erection of garage building, the applicant had obtained a vested right, which could not be destroyed by such an ordinance.

In the last case cited Middleton, J., said: "With reference to legislation of this kind it is, I think, a sound principle that the Legislature could not have contemplated an interference with vested rights, unless the language used clearly required some other construction to be given to the enactment. The language here used is by no means free from difficulty and ambiguity. What is prohibited is not as in sub-sec. (b) the "location, erection and use of buildings," for the objectionable purpose, but the location only; and, I think, it may fairly be said that what had been done previous to the enactment of the by-law in question constituted a complete location of the garage. The context indicates that 'location' is used in some sense differing from 'erection and use.' It would be manifestly most unfair so to construe the statute as to leave the defendant in the position in which he would find himself if, on the faith of the municipal assent indicated by the building-permit, he had purchased the lands and entered into contracts for the erection of this building, and was then enjoined from the completion of the work already entered into upon the ground."

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Municipal corporations —Licensing powers

Annotation (*continued*)—**Municipal corporations** (§ II C 3—105)—**License—Power to revoke license to carry on business.**

Vested rights cannot be interfered with by municipal by-laws, except where the language of legislation conferring power to enact them clearly discloses such intent: *City of Toronto* v. *Wheeler*, 4 D.L.R. 352.

The completion of a building on a certain street which was begun under a permit from the city for use as a garage for hire and gain cannot be prevented by a municipal by-law prohibiting the "location" of structures of that character on such street which was adopted subsequent to the granting of such permit: *City of Toronto* v. *Wheeler*, 4 D.L.R. 352.

And in *United States ex rel. Daley* v. *McFarlane*, 28 App. D.C. 552, it is held that in the absence of authorization from Congress, the District of Columbia or the representatives themselves of the District, have no authority to revoke a plumbers' or gas-fitters' license for failure to comply with the provisions of an ordinance relating to the license of such occupation. The Court said: "The constitutional guaranties of the liberty and property of the individual undoubtedly include and protect him in the exercise of his right to earn his living by following a lawful calling, and this right is subject only to reasonable control. That such a license as was revoked in this case is a species of property goes without saying. The right to forfeit this property by the revocation of the license must clearly appear or it must be held not to exist."

And in *Greater New York Athletic Club* v. *Wurster*, 19 Misc. (N.Y.) 443, 42 N.Y. Supp. 703, the Court said: "The general law of the state is freedom of the individual to carry on any kind of lawful business. His amenability to the criminal law has been found to suffice for the maintenance of social order. If he conducts a circus or a theatre or a store, and so on, he must take heed not to violate the criminal law against immorality, nuisances and the like." The Court also said: "A legislative grant of power to regulate such a trade or business and, to that end, to require it to be licensed, does not carry with it power to prohibit everyone or any person from engaging in it." In this case it was held that an ordinance requiring a mayor of a city to issue licenses to operate places of amusement did not thereby vest him with authority to revoke a license after it was issued.

A license granted by a city board of health to permit one to erect a building and use it for a stable, which license contained no limit of time for its exercise, and was not subject to any existing regulations prescribed by the board, cannot be revoked by the board, merely because citizens in the vicinity objected to the building, though the license may have been improvidently issued in the first instance: *Lowell* v. *Arch Inn*, 189 Mass. 70, 75 N.E. 65.

POWER TO REGULATE AND CONTROL AS CONFERRING POWER TO REVOKE.

While it is the general rule that the power of a municipality to revoke licenses to carry on business arises either from express grant or from the power to regulate and control, it is also a rule that this power must be exercised in a reasonable manner and for a legitimate purpose.

In *Wiggins* v. *Chicago*, 68 Ill. 372, the Court said: "That power conferred by the charter to tax, license and regulate auctioneers, authorized the city to adopt any reasonable ordinance for the purpose. The charter points out no particular mode. The city may tax, may license and may regulate the business of auctioneers. The city may not directly prohibit the business, nor can it adopt such an unreasonable regulation as would produce such

Annotation (*continued*)—**Municipal corporations** (§ II C 3—105)—**License—Power to revoke license to carry on business.**

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Municipal corporations —Licensing powers

results, or even be oppressive and highly injurious to the business. All means employed for the taxation, licensing and regulation of the business must be reasonable. And this is true of all ordinances of a city. The question then recurs, is this a reasonable ordinance? The sum charged, the length of time the license is to continue, and the required bond and security for the faithful observance of the ordinance regulating the business are not unreasonable requirements, nor do we see that in regulating the business a forfeiture of the license should follow a violation of the ordinance, and that the mayor should have the power of revoking the license when he should become satisfied of the fact, is unreasonable or oppressive. Such provisions may be the only effectual mode of regulating the business; and whether it be so or not we regard the ordinance as reasonable. The power must reside somewhere to revoke the license, and if it could only be done by the Courts the delays that would be produced in litigation would render such a provision entirely unavailing, as the license would expire before a final determination could be had."

A municipality may require a license as a condition precedent to engaging in a business the manner of operating which is important to the public health, and may make rules for its efficacious regulation and may revoke the license even though the power to revoke is not conferred by express terms. The power to regulate in such a case is sufficient. As for instance, in *People ex rel. Lodes* v. *Health Department* 189 N.Y. 187, 82 N.E. 187, a case arising under the sanitary code the pow[illegible] of the members of the board of health being administrative merely, al[illegible]gh without express authority therefor, they were held to have powe[illegible]ue or revoke permits to sell milk in the exercise of their best judgm[illegible], with or without notice, and based upon such information as they might have obtained through their own agents; and the licensee had no redress, it not appearing that the board acted in an arbitrary, tyrannical or unreasonable manner, or upon false information.

And power conferred by the Legislature upon a board of health, to protect the health of the inhabitants and to prevent the sale of deleterious articles of food, is sufficient to authorize the board to require permits in order to engage in a sale of milk in a municipality, and to incorporate in the permits a condition that they should be revocable at the pleasure of the board. Under such a permit the licensee has no redress for the revocation of his permit after he has been found guilty of supplying impure, unwholesome and adulterated milk: *Metropolitan Milk and Cream Co.* v. *New York*, 113 N.Y. App. Div. 377, 98 N.Y. Supp. 894, affirmed without opinion in 186 N.Y. 533, 78 N.E. 1107.

A city authorised to license and regulate pawnbrokers, junk dealers and dealers in second-hand goods, though not expressly authorised to revoke licenses, may provide as a condition precedent to the issuing of a license that the applicant shall agree that his license may be revoked at the will of the council: *Grand Rapids* v. *Brandy*, 105 Mich. 670, 32 L.R.A. 116, 35 Am. St. Rep. 470.

A city council has no authority to provide for revocation of licenses, where the charter gives no such power, but authorises the enforcement of license ordinances by penalties provided therein: *Greater New York Athletic Club* v. *Wurster*, 19 Misc. (N.Y.) 443, 43 N.Y. Supp. 703.

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Municipal corporations —Licensing powers

Annotation (*continued*)—**Municipal corporations** (§ II C 3—105)—**License**—**Power to revoke license to carry on business.**

The power to enforce the observance of all rules, ordinances, by-laws and police and other regulations of cities by penalties not exceeding $100 for any offence against the same does not necessarily confine the city to that mode nor to suit upon the bond of a grocery keeper for violations by him, but the city in the exercise of the police powers conferred, may provide for the revocation of his license: *Schwuchow* v. *Chicago*, 68 Ill. 444.

WHERE DUTY TO PROTECT PUBLIC MORALS IS INVOLVED.

The right to revoke a license may be exercised where necessary to the protection of public morals or safety. Thus in *Grand Rapids* v. *Brandy*, 105 Mich. 670, 32 L.R.A. 116, 55 Am. St. Rep. 472, in sustaining the power of the common council of city to insist, as a condition precedent to the issuance of a license to run a pawn-shop, that the applicant agree that his license might be revoked at the will of the council, the Court said: "The necessity of a rigid control over this business in our large cities is clear. Convictions are difficult, though the public authorities may be well convinced that stolen goods are bought and sold at these places. The business is not necessary to the welfare of society or the public. The common council with the knowledge of all the facts before them to a greater extent than Courts can possibly have, have determined that it is well, in their judgment, to require these conditions. While the exercise of any arbitrary power may seem harsh, still we are of the opinion that this requirement is not so unreasonable as to require the Courts to declare it void."

The Legislature has power in the interest of public morals either to absolutely prohibit or regulate the keeping of pool tables for hire, and the common form of regulation is by requiring a license. If a license is required, the licensee takes it subject to such conditions as are imposed by the Legislature, and where one of the conditions imposed is that it may be revoked by the selectmen of the town at their pleasure, the license is not a contract and a revocation of it does not deprive the defendant of any property, immunity or privilege within the meaning of these words in the Massachusetts Declaration of Rights, art. 12, even though no notice of the intention to revoke is served upon the licensee before revocation: *Commonwealth* v. *Kinsley*, 133 Mass. 178.

In *William Fox Amusement Co.* v. *McClellan*, 62 Misc. (N.Y.) 100, 114 N.Y. Supp. 594, it is held that a municipality has the power to revoke a license to carry on a business affecting the public health, morals, etc., although such authority is not conferred in express terms, there being authority to regulate or control. This power must, however, be reasonably exercised, and the revocation of the licenses of all moving picture shows in the city of New York, including those operating according to law, as well as those violating the law, is an arbitrary and unreasonable exercise of the power, and, therefore, cannot be sustained.

WHERE MUNICIPALITY HAS EXPRESS POWER TO REVOKE.

Where authority is conferred upon a municipality to revoke a license for cause after a hearing, a licensee, licensed to conduct an employment bureau or agency, has no such vested right in conducting the business as to prevent the revocation of his license by the municipality issuing it: *People ex rel. Pechtold* v. *Bogart*, 122 N.Y. App. Div. 872, 107 N.Y. Supp. 831.

Annotation *(continued)*—**Municipal corporations (§ II C 3—105)—License—Power to revoke license to carry on business.**

In *Re Hammerstein*, 52 Misc. (N.Y.) 606, 102 N.Y. Supp. 950, it is held a license to operate a music hall might be revoked for improper performances on Sunday where the right to revoke for cause was reserved.

Under a statute requiring a city board of health to enforce the city's sanitary code, a license to sell milk may be revoked by the board on it finding after a hearing that the licensee sold adulterated milk, especially where the license stipulated that it was revocable at the pleasure of the board: *Metropolitan Milk and Cream Co.* v. *New York*, 113 N.Y. App. Div. 377, affirmed 186 N.Y. 533.

Where an auctioneer accepts a license under an ordinance empowering the mayor to revoke the same for cause, and the license recites that the mayor may in his discretion revoke the same at any time, the licensee cannot claim that the license can only be revoked by judicial sentence: *Wiggins* v. *Chicago*, 68 Ill. 372.

In *Commonwealth* v. *Kinsley*, 133 Mass. 578, where it appeared that under the statute conferring the power to grant a license to keep a pool table for hire, it could be revoked at the pleasure of the selectmen granting the same, it was held that the licensee took it subject to this condition, and the selectmen could revoke the same without giving the licensee any notice of their intention to revoke it or any opportunity to be heard.

While in *Spiegler* v. *Chicago*, 216 Ill. 114, 74 N.E. 718, it was held that an ordinance providing that a license granted by a city to dealers in oil handling the same from tank waggons, shall be revocable by the mayor at any time on proof of violation of any of the provisions of the ordinances of the city by the licensee, will be construed as conferring the right of revocation to a violation of the ordinance in which the provision is found.

WHERE LICENSE IS TO USE PUBLIC STREET.

The proprietor of a hack has no legal right to conduct his business in a public street, unless under a lawful license to do so, as the Legislature has the supreme control of the streets and public highways and has the right to regulate and restrict their use.

This power to regulate may be delegated to a municipality, and where a hackman accepts from a municipality a license to carry on his business, subject to certain conditions, he has no redress if, upon the violation by him of such conditions, his license is revoked: *People ex rel. VanNorder* v. *Sewer, Water and Street Commission*, 90 N.Y. App. Div. 555, 86 N.Y. Supp. 445.

REASONABLENESS OF EXERCISE OF POWER.

A license to maintain a moving picture show is revocable, but the exercise of the power to revoke must be reasonable. And so the fact that many places of that sort had inadequate fire protection, and many of the pictures were vulgar and licentious, and representations of lawlessness and crime, did not warrant a general order revoking all licenses granted to moving picture shows: *Williams Fox Amusement Co.* v. *McClellan*, 62 Misc. (N.Y.) 100, 114 N.Y. Supp. 594.

After a license has been granted, paid for and acted upon, a revocation without cause is unreasonable and arbitrary: *Williams Fox Amusement Co.* v. *McClellan*, 62 Misc. (N.Y.) 100, 114 N.Y. Supp. 594.

In the case last cited, the Court says: "Where a vocation duly licensed is lawful, it cannot be made unlawful by executive decree, unless a sufficient

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Annotation

Municipal corporations —Licensing powers

Annotation (*continued*)—**Municipal corporations (§ II C 3—105)—License—Power to revoke license to carry on business.**

cause exists to revoke the license, for a revocation without such cause is arbitrary and not within the scope of executive powers. Within certain limits the discretion of the mayor to determine when a license shall be revoked will not be controlled; within those limits, the Court will not substitute its judgment for that vested in the chief executive of the city, but a general order of revocation which is concededly based upon abuse of the privilege by a part only of the licenses is not a valid exercise of the power."

The holder of a permit to sell milk has a remedy by mandamus where the action of the board of health in revoking the same is arbitrary, tyrannical and unreasonable, or is based upon false information: *People ex rel. Lodes* v. *Health Department*, 189 N.Y. 187, 82 N.E. 187.

The revocation by the board of health of the city of New York of a permit to sell milk without according the holder of the permit a notice, or opportunity to be heard, is not a violation of due process of law: *People ex rel. Lodes* v. *Health Department*, 189 N.Y. 187, 82 N.E. 187.

B.C.

C. A.

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Jan. 30.

ROSIO v. BEECH.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. January 30, 1913.

1. MECHANICS' LIENS (§ VI—51)—SUB-CONTRACTOR — EFFECT OF PAYING PRINCIPAL CONTRACTOR.

A sub-contractor filing a mechanics' lien in that capacity in respect of his contract with the principal contractor for painting a house and furnishing both labour and materials, who admits payment for all material and that the balance owing to him was for work done only, has no lien as against the owner who has paid the principal contractor in full, even where the owner has made payment without receiving the receipted pay-roll under sec. 15 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154.

[For Annotation on Mechanics' Liens, see 9 D.L.R. 105.]

2. MECHANICS' LIENS (§ VI—46)—MATERIALMEN—WORK INCLUDING MATERIALS AT LUMP SUM.

A sub-contractor at a lump sum for painting work, including the supply of the necessary materials for that purpose, is not a "labourer" nor "person placing or furnishing materials" within sec. 15 of the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, so as to preserve to him a lien under that section, where the owner has made payment in full to the principal contractor before the lien was filed by the sub-contractor. (*Per* Galliher, J.A.)

Statement

APPEAL by plaintiffs from judgment of McInnes, County Court Judge.

The appeal was dismissed.

Findlay, for the appellants.

Bray, for the respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A., agreed with GALLIHER, J.A.

Irving, J.A.

IRVING, J.A., concurred in dismissing the appeal.

Martin, J.A.

MARTIN, J.A.:—Though the lien as filed for a balance of $390 was based on an entire contract, made by the plaintiffs

as sub-contractors, to paint the house, furnishing both labour and materials, yet the lien states, sec. 6, and it is formally admitted (No. 9 of admissions) that the whole of the said balance claimed as a lien was for work done only. In such case, the proviso in sec. 6 (to which we were referred), as to notice relating to materials, has, in any event, no application to the question in hand, and consequently I do not express any other opinion on it.

Martin, J.A.

Nothing was due by the owner to the contractor when the lien was filed, and on the face of the matter he is protected by sec. 8, but it is contended that the owner cannot set up his payments, amounting to $6,100, to said contractor, because the provisions of sec. 15 as to pay-rolls have not been complied with, and the plaintiffs claim the benefit of the prohibition at the end of that section. To obtain this they must bring themselves within the words "any such labourer or person placing or furnishing materials," as specified in the proviso, because the somewhat drastic consequences of failure to deliver the pay-roll are clearly limited thereby in favour of two classes of persons only, and the appropriate use of the word "such" is not in my opinion at all sufficient to expand the language to include another class of persons mentioned in the prior portion of the section. Plaintiffs clearly, as sub-contractors, are not within the definition of "labourer," and therefore their names could not even have been placed upon the pay-roll in form B (which should be noticed). Nor on the facts has the payment made by the defendant owner without the delivery of the pay-roll had the effect

> of defeating or diminishing any lien . . . in favour of any . . . person placing or furnishing material,

because the plaintiffs in this action admit they have been paid in full for all their material, and consequently can have no such lien. I think, therefore, that the learned Judge below rightly held that sec. 8 is a bar to the lien.

Galliher, J.A.

GALLIHER, J.A.:—Certain admissions were made for the purposes of appeal, and among these it is admitted that at the time Beech was taken off the contract by the owner, Turner, the $6,100 which had been paid to him up to that time, December 18, 1911, was in full of all work done by Beech under the contract with Turner. Such being the case, under the provisions of sec. 8 of the Mechanics' Lien Act, no lien could attach to make the owner, Turner, responsible to the plaintiffs unless they could bring themselves within the provision in the last clause of sec. 15 of the Act, which is as follows:—

> No payment made by the owner without the delivery of such pay-roll shall be valid for the purposes of defeating or diminishing any lien upon such property, asset or interest in favour of any such labourer or person placing or furnishing material.

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The plaintiffs were sub-contractors for the purpose of supplying certain materials and doing certain work (namely, painting) for a lump sum. In my view they are not within the meaning of the words "labourer," or "person placing or furnishing material." I think the materialman is in a different position to a sub-contractor.

It follows therefore that the appeal must be dismissed.

Appeal dismissed.

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Mar. 10.

ALLISON v. ALLISON.

Alberta Supreme Court, Scott, J. March 10, 1913.

1. DIVORCE AND SEPARATION (§ V B—53)—INTERIM ALIMONY—WHEN REFUSED—INDEPENDENT MEANS OF SUPPORT.

The court will refuse to grant an order for interim alimony *pendente lite*, when a wife is in receipt of rents from the real estate owned by her sufficient, after providing for the costs of carrying the property, to produce an adequate income for her maintenance until the trial of the action.

[*Coombs* v. *Coombs*, L.R. 1 P. & D. 218, followed.]

Statement

THIS is an application for alimony *pendente lite*.

The application was refused.

A. H. Gibson, for plaintiff.

F. S. Cormack, for defendant.

Scott, J.

SCOTT, J.:—Plaintiff, in her affidavit filed, states that she was married to the defendant in September, 1908, that the defendant refuses to allow her to live with him or to contribute to her support, that she has no private income available for her support and is unable to support herself, that she is at present in need of money to pay for her board and lodging, that she has endeavoured to obtain work and was unable to do so, and that the defendant is a railway engineer, and, as such, earns about $200 per month.

The defendant, in his affidavit filed, states that the plaintiff is the owner of a house in Edmonton, worth at least $15,000, subject to the payment of the balance of the purchase money thereon amounting to about $1,200 and that the rental value of the house is at least $75 per month.

The plaintiff does not dispute this statement of the defendant, beyond stating that she applies the rents in payment of the balance of the purchase money of the property and that it will be approximately two years before they will discharge the balance due thereon.

In *Coombs* v. *Coombs*, L.R. 1 P. & D. 218, it was held that alimony *pendente lite* should be allowed only on the ground of necessity and it was refused in that case as it was shewn that

there was a fund in the wife's hands from which she could be alimented pending the suit.

In this case the wife is shewn to be possessed of considerable property and is in receipt of an income of at least $900 per year therefrom. It is not shewn that she is obliged to apply the rents in payment of the balance of the purchase price, but even if such were the case, she could, without difficulty and without impairing her interest in the property, arrange for the payment of the balance of the purchase money in such manner as would yield her a sufficient sum for her maintenance until the trial of the action.

The application is dismissed, costs reserved until the trial.

Application refused.

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REX v. EAVES.

(Decision No. 2.)

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K. B.
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Feb. 22.

Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross and Gervais, JJ. February 22, 1913.

1. USURY (§ I B—10)—BY DISCOUNTS—"LENDING."

The offence of "lending" money at a greater interest than is authorized by the Money Lenders Act, R.S.C. 1906, ch. 122, for which a money-lender may be indicted under sec. 11 of that statute, includes discounts made contrary to sec. 6 thereof which in terms prohibits a money-lender from stipulating for, allowing or exacting on any negotiable instrument, contract or agreement, concerning a loan of money the principal of which is under $500, "a rate of interest or discount greater than 12 per cent. per annum."

2. USURY (§ I B—10)—MONEY LENDERS ACT, R.S.C. 1906, CH. 122—WHO IS A "MONEY-LENDER."

A person is shewn to be a "money-lender" within the Money Lenders Act, R.S.C. 1906, ch. 122, if it be proved that he discounted promissory notes at a prohibited rate at various times each of less than $500 and so within the statute, although all for the same customer.

3. USURY (§ I B—10)—CRIMINAL OFFENCE—LIMIT OF RATE FOR SMALL LOANS—AGGREGATE DISCOUNTS FOR LARGER AMOUNT.

A person who is a money-lender within the terms of the Money Lenders Act, R.S.C. 1906, ch. 122, is guilty of a criminal offence under sec. 11 of that Act if he discounts for the customer at one time several notes made by various other persons maturing at various dates for less than $500 each, although the notes aggregate more than $500 and the net amount of the advance after deducting the discount was also more than $500, where the discount charge was separately computed and retained on each note at a rate of more than 12 per cent. per annum, if there was no contract of open credit and the discount was made directly upon such notes without the customer himself giving his own note for the gross amount exceeding $500 as the subject of discount with the smaller notes as collateral only to the advance, so as thereby to make the transaction a single one for more than $500, to which the statute would not apply.

Statement

APPEAL by the Crown upon questions of law, brought up

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upon a stated case pursuant to leave to appeal, *R.* v. *Eaves* (No. 1), 8 D.L.R. 1026, granted under Cr. Code of Canada 1906, sec. 1014, after an acquittal of defendant at his trial for an offence under the Money Lenders Act, R.S.C. 1906, ch. 122, relating to criminal usury.

The trial Judge had held that, as the total discounts made at any time of the various promissory notes exceeded $500, the statute did not apply, and had, therefore, dismissed the charge at the close of the prosecutor's case.

The appeal was allowed and the case remitted for trial. Mr. Justice Cross, dissented.

N. K. Laflamme, K.C., for the Crown.

J. P. Whelan, for the respondent.

The opinion of the majority of the Court was rendered by

Gervais, J.

GERVAIS, J. (translated):—This is an appeal by His Majesty the King, under leave granted by this Court on November 30, 1912, from the judgment of the Court of Special Sessions (August 13, 1912) dismissing the appellant's demand for a reserved case on certain questions of law to this Court after the said Court of Sessions had decided these questions in favour of the respondent and rendered a judgment of nonsuit on August 1, 1912, thereby dismissing the complaint against the respondent laid by Moses Greenberg on April 12, 1912, wherein he charged that the respondent had, at divers times between September, 1911, and February, 1912, made loans of less than $500 at an interest of 60 per cent. per year, contrary to the terms of chapter 122 of the Revised Statutes of Canada.

The appellant has moved this appeal under section 1014 of the Criminal Code as amended in 1910.

Preliminary observations.

To properly appreciate the questions raised in this appeal it may not be amiss to review briefly the history and the comparative legislation regarding loans upon interest.

Loan upon interest, as well as loan for use and loan for consumption is governed by the ninth title of the second book of the Civil Code (Que.): to wit, 1762 to 1786 C.C.

Loan upon interest is a kind of loan for consumption, wherein the lender gives the borrower a certain quantity of things which are consumed by the use made of them, under the obligation by the latter to return a like quantity of things of the same kind and quality, and, furthermore, under the obligation to pay a certain sum as rent.

Loans for consumption have never been the object of restrictive legislation; on the other hand, loans upon interest have been the object of numerous laws at all periods, including the

present age, for the purpose of determining and fixing the amount of the rent or interest to be paid. From the enactment of the Mosaic law:—

> Thou shalt not lend upon usury to thy brother, usury of money, usury of victuals, usury of anything that is lent upon usury; unto a stranger thou mayst lend upon usury, but unto thy brother thou shalt not lend upon usury; that the Lord thy God may bless thee in all that thou settest thine hand to in the land whither thou goest to possess it. Deut. 23, vv. 19 and 20;

down to the statute passed by the Dominion of Canada in 1906, 6 Edw. VII. ch. 32, intituled: "An Act respecting money lenders" (ch. 122 R.S.C.) nearly all of the great lawmakers and moralists and theologians have bewailed the evils resulting from loan upon interest.

Tacitus in his Annals testifies to the fact that usury is without doubt one of the most ancient evils of the republic. The Church forbade loan upon interest, invoking Deuteronomy against it; it forbade the Christians from committing usury even against pagans. St. Jerome, St. Augustine, St. Gregory, St. Cyprian, Lactantius, Eusebius of Cæsarea, St. Anastasius, St. Hilaire, St. Basil, St. Chrysostom, one after the other, condemned loan upon interest, even at legal rates. St. Bernard declares usury to be theft. The kings of France, by numerous edicts, attempted to repress it. Yet the Constituent Assembly recognized it on October 2, 1789; and the French Civil Code fixed the legal rate thereon at six per cent. (1907 C.N.). Where this article of the French code is violated the law allows the Courts to set aside the stipulation of an excessive rate of interest; furthermore, in cases of usury the lender may be sent before the police court (*correctionnelle*) which may condemn him to a fine equivalent to one-half of the capital loaned usuriously or even send him to jail for a term not exceeding two years in cases of fraud. Nearly all the legislations to which I shall refer oscillate between the annulment of the loan made at usurious rate—or rather the modification thereof by reducing the rate of interest, and the committing of the offending lender to the criminal Courts. Since the Code Napoleon nearly all the states have made a criminal offence of loan at usurious interest. The Belgian Criminal Code of 1867, art. 494, subjects the habitual usurious money-lender to a fine of from 1,000 to 10,000 francs and also to imprisonment of not less than a month nor more than one year. But the law of May 14, 1886, has abolished these penal dispositions as regards loans upon interest in commercial matters. Holland, by an old statute of Charles V. in 1540, forbade loans at more than 12 per cent. per annum, under pain of annulment of any stipulations of interest exceeding such rate; but these old prohibitions disappeared through the introduction of the Code Napoleon, in 1811. The German Empire, by a law of May

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24, 1880, amending the 1871 Criminal Code, punishes usurers by fine or imprisonment. But we must go to Austria to find the law known as Baden law against lenders at usurious rates. This is a sort of standard law on which the English Money Lenders Act of 1900 (revised in 1911) was probably modelled. Under the Austrian law, the civil Courts have the right to enquire, without following the rules of evidence, into the way in which a contract of usurious loan has been made, to annul such contract and then to condemn the offending lender to imprisonment of not less than one nor more than three months and to a fine of 100 to 500 florins. The Russian, Norwegian, Swiss and other laws are drawn more or less completely from this Baden law. In England it was found possible, owing to the survival before the civil Courts of the canon law rule allowing of the annulment of contracts vitiated by lesion, to do without any law on this subject until 1900: Money Lenders Act, 1900, 63-64 Viet. ch. 51; *ibid*, 1911, 1-2 Geo. V. ch. 38.

It is clear that our 1906 statute was taken from the English Act of 1900. It is a rather curious thing that ever since the introduction of responsible government in Canada in 1850, our Parliaments have been eager, no doubt in order to avoid violently conflicting legislation, to adopt many of the more important English statutes shortly after their adoption at Westminster. A few differences between the English statute and ours should be noted. The English Act does not apply to pawn-brokers, bankers, insurers, benevolent societies, building societies, nor to several societies which enjoy a privilege of exemption. On the other hand, the Canadian Act does not apply to the pawnbrokers and is inoperative in the Yukon. The English Act compels the money-lender to obtain a license under pain of fine or imprisonment. The Canadian Act recognizes as a money-lender whoever loans money or holds himself out as money-lender and habitually charges an interest exceeding 10 per cent. a year. It is evident that our definition of money-lender is drawn from the English law which requires a complainant to prove that the person he is charging with the offence loaned money "with some degree of system and continuity." It may be said in a general way that the English law has made lending upon interest a criminal offence; it may also be said that it has done nothing of the kind since it allows the civil Courts to annul any stipulation of interest which from the risk and attendant circumstances of each case is considered exorbitant, and since it has allowed the Court to grant a 60 per cent. interest in the case of *Michaelson* v. *Nichol*, [1910] 26 T.L.R. 327; 30 per cent. in *Carrington's, Ltd.* v. *Smith*, [1906] 1 K.B. 79; 60 per cent. in *King* v. *Barnett*, [1908] 25 T.L.R. 52; and 50 per cent. in *Fortescue, Ltd.* v. *Bradshaw*, [1911] 27 T.L.R. 251. The English

Money Lenders Act has therefore taken into account the old rule above referred to, whereby any contract may be annulled by the Courts on the ground of lesion.

Under our law, lesion, as between persons of the age of majority, does not exist (C.C. 1001, 1012). Therefore, our Canadian law on the subject of money-lenders had to depart more or less from foreign and English legislation, and it has regulated loan upon interest in rather simple fashion. Let us now examine it. Loans upon interest of sums exceeding $500 remain subject to the entire freedom of contracts as regulated by our Civil Code; saving only the restrictions contained in the chapter of the Revised Statutes of Canada, 1906, concerning interest; ch. 121, respecting pawn-brokers; and lastly, ch. 122, respecting money-lenders. The object of the Canadian law is evidently to come to the help of small borrowers, of those who require sums of less than $500. To attain this object it authorizes the civil Courts to set aside any stipulation of interest exceeding 12 per cent. per annum, and it further authorizes the criminal prosecution of the offending lender, who may be condemned to a maximum of one year's imprisonment or a fine of $1,000. Sections 11 and 6 define the incriminating circumstances of a loan of less than $500 as follows:—

11. Every money-lender is guilty of an indictable offence and liable to imprisonment for a term not exceeding one year, or to a penalty not exceeding one thousand dollars, who lends money at a rate of interest greater than that authorized by this Act.

6. Notwithstanding the provisions of the Interest Act, no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under five hundred dollars, a rate of interest or discount greater than 12 per centum per annum. . . .

Let us now examine the facts:

The facts.

The loans made by the respondent to Greenberg happened between September, 1911, and March, 1912. Greenberg swears to this and the notes discounted by the respondent and his cheques to Greenberg's order, seized under a search warrant, establish the fact. The amount discounted totals from $35,000 to $40,000. At least thirty-five of respondent's cheques are filed of record as well as about one hundred notes signed or endorsed by Greenberg. The trial Judge found that most of these notes had been discounted in bunches, the total amount of which in every case exceeded $500, and held, in consequence, that secs. 11 and 6 of ch. 122 could not apply to the respondent. The evidence shews that these notes were always signed or endorsed by different persons for various amounts and fell due at different periods. There is no evidence of record that there was any

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contract of open credit between Greenberg and the respondent, i.e., of any contract by virtue of which the respondent bound himself to advance to Greenberg a fixed sum of money. Moreover the respondent never required Greenberg to give his own note to cover the amount or sum total of paper which the latter brought to the respondent for discount. According to the evidence the respondent appreciated each note according to its value, weighed the risks of discounting and in each case charged a discount or interest of 60 per cent. per year.

As already stated the appellant in the Court below moved for a reserved case to this Court on the question of law which had arisen upon the order of nonsuit or discharge of August 1, 1912, and the trial Judge dismissed this motion on August 13.

The questions of law which this Court is now called upon to decide in accordance with its judgment of November 30, 1912, are the following:—

I. Were the transactions had between Louis Fredenberg, represented by the prosecutor, Moses Greenberg on one hand, and the accused on the other, from the month of October, 1911, inclusive, up to the month of February, 1912, inclusive, subject to the application of secs. 2, 4, 6, and 11 of the statute?

II. Did the agreement made between the said Moses Greenberg and the accused concerning the said loans of money or the discount of promissory notes in this case, take out, in law, the loans of money made by the accused to the said Moses Greenberg or the discount of the said notes by the accused for the said Moses Greenberg, from the application of secs. 2, 4, 6 and 11 of ch. 122 of the revised statutes of Canada, 1906?

III. Was it sufficient, in law, to support a conviction under sec. 11 of the said statute, to allege and to prove that the accused was carrying on the business of a money-lender, that he was not a registered pawnbroker, and that he did on frequent occasions, stipulate for the discount of certain negotiable paper, notes, drafts or cheques each for an amount less than $500, a rate of interest exceeding 12 per cent. per year?

IV. Was the fact of the accused having, on any one occasion, even on the same day, discounted at a rate of interest exceeding 12 per cent. per annum several promissory notes signed by different persons and payable to the order of Moses Greenberg & Co., and endorsed by the latter, but the aggregate amount of which exceeded $500 sufficient, all things being equal, to take the discounting of these notes out of the application of sec. 11 of ch. 122 of the revised statutes of Canada, 1906?

V. Assuming that at the inception of these transactions between the complainant and the accused, it had been agreed between them that the accused would receive from the complainant a rate of interest equivalent to 60 per cent. per year for the discount of certain promissory notes which the complainant might offer for discount to the accused, without, however, indicating the aggregate amount of such discount and the accused also reserving his right to refuse to discount those promissory notes which he would deem proper to refuse, would such an agreement be sufficient to take the operations had between the complainant and the accused from the application of sec. 11 of the said statute, it being assumed that each of the said notes discounted from the month of October, 1911, to the month of February, 1912, was for an amount less than $500?

The law.

What answer is to be given to each of these questions? Did the respondent act as a money-lender? To be in a position to answer in the affirmative we must find that the respondent did make loans of money, that is to say, that he discounted notes and exacted an interest greater than 10 per cent. per year. Now, it is in evidence that the respondent discounted over eighty notes, each of them of less than $500, on each of which he charged an interest of 60 per cent. a year. The Court, therefore, answers the first question in the affirmative.

In the second place what answer should this Court give to questions 2, 4 and 5? In other words, did the respondent become free of the application of sec. 11 of ch. 122, owing to the fact that he discounted at one and the same time several notes, the aggregate amount of which exceeded $500? As already said, the evidence does not disclose any contract of open credit between the parties, nor any loan made by the respondent to Greenberg on his personal credit guaranteed by the notes of prior endorsers. The evidence clearly reveals that the discount of each note gave rise to a distinct and independent appreciation of a commercial document regarding each one of which the respondent had a separate action.

What answer should be made to question 3, which is the counterpart of questions 3, 4 and 5? In order to sum up the answer to these it is better to state that it is implicitly contained in the answer to be given to questions 2 and 5. An affirmative answer should be given to sec. 3; a negative one to questions 2, 4 and 5.

Should these secs., 6 and 11 of ch. 122, be rigorously or only favourably interpreted as regards the respondent? I may state at once that the interpretation should be favourable rather than rigorous. True, loan upon interest at usurious rates is made, by exception, a criminal offence under our laws, but, curiously enough, only when made of a rather small amount, an amount less than $500. The loan of a sum of $501 at an interest of 100 per cent. per annum does not render the lender liable to any penalty under our laws; but if the lender be unfortunate enough to lend $499 at more than 12 per cent. per annum he becomes liable to prosecution. We are not called upon here to discuss the motive of the legislature in enacting such differentiating regulations. It was perhaps under the impression that borrowers of more than $500, usually under the obligation of finding solvent persons, jealous of their credit, to go surety for them, could not be exposed to the usurious exactings of a lender; whereas the small borrower, who frequently is unable to find any surety, is ready to promise any rate of interest and required legislative protection against too greedy lenders. In any event we have

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only to apply the law as we find it in ch. 122. How should a new penal law, as the present one, be construed?—a law which apparently derogates from all the prior and foreign legislation to which I have referred, in that it inflicts punishment only on the lender of small sums, and allows absolute impunity to the lender of a large amount.

Maxwell, on Interpretation of Statutes, 4th ed., 395 *et seq.*, sums up the doctrine in this subject in excellent fashion:—

It is unquestionably a reasonable expectation that when the former intends the infliction of suffering, or an encroachment on natural liberty or rights, or the grant of exceptional exemptions, powers, and privileges, it will not leave its intention to be gathered by mere doubtful inference, or convey it in "cloudy and dark words" only, but will manifest it with reasonable clearness. The rule of strict construction does not, indeed, require or sanction that suspicious scrutiny of the words, or those hostile conclusions from their ambiguity or from what is left unexpressed, which characterize the judicial interpretation of affidavits in support of *ex parte* applications, or of magistrates' convictions, where the ambiguity goes to the jurisdiction. Nor does it allow the imposition of a restricted meaning on the words, wherever any doubt can be suggested, for the purpose of withdrawing from the operation of the statute a case which falls both within its scope and the fair sense of its language. This would be to defeat, not to promote, the object of the legislature, to misread the statute and misunderstand its purpose. A Court is not at liberty to put limitations on general words which are not called for by the sense, or the objects, or the mischiefs of the enactment; and no construction is admissible which would sanction an evasion of an Act. But the rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment.

The degree of strictness applied to the construction of a penal statute depended in great measure on the severity of the statute. When it merely imposed a pecuniary penalty, it was construed less strictly than where the rule was invoked in *favorem vitæ*.

The Bankrupt Act of 1849, which disentitled a bankrupt to his certificate, if he had, within a year of his bankruptcy, lost £200 by "any contract" for the purchase or sale of Government or other "stock," was held to apply to one who had lost that amount in the purchase of railway "shares," and by several contracts.

The effect of the rule of strict construction might almost be summed up in the remark, that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to the intent of them that made it; and that all cases within the mischiefs aimed at are to be held to fall within its remedial influences.

Beal, on Cardinal Rules of Legal Interpretation, 443, says:

A penal statute is to be interpreted, like any other instrument, according to the fair common sense meaning of the language used.

Penal statutes should be construed strictly so that no cases shall be held to be reached by them but such as are within both the spirit and letter of such laws.

If there are two possible interpretations of a penal clause in a statute, one which would mitigate and the other which would aggravate the penalty, we ought to adopt that which will impose the smaller sum.

If there is a reasonable interpretation which will avoid the penalty in any particular case, it must be adopted.

If the words are merely equally capable of an interpretation that would, and one that would not, inflict the penalty, the latter must prevail.

In the present case the Court has come to the conclusion that in the absence of any contract of open credit, and in the absence of any discount made by the respondent directly to Greenberg with the risks in question accepted as collateral security, the respondent has discounted the notes in question and each one of them for an amount less than $500, but at a rate of interest or discount of 60 per cent. per annum. Now this is precisely what is forbidden by sections 6 and 11. Section 6 declares that no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement concerning a loan of money a rate of interest or discount greater than 12 per cent. per annum. Evidently, in the French version, the verb "allouer" which in its transitive form means "to grant," has really its passive form meaning. See. 6 means, no doubt, that the lender cannot "s'allouer," i.e., allow unto himself. In the text as it stands it is rather curious to say that it is the lender who "allows" the interest which the borrower is called upon to pay. The word "allouer" or "allow" as used here means that the lender cannot, in order to avoid stipulating or exacting, that is to say, in order not to speak, take interest of more than 12 per cent. per annum. The criminal circumstances of this case lies in the fact that the respondent stipulated on each note discounted a rate of interest exceeding 12 per cent. a year, as stated in the complaint. The respondent has therefore violated sec. 11. The word "lend" as used in this section does not bear the ordinary meaning of the word as argued by the respondent, but the special meaning given to it by sec. 6.

The question as to whether discounting is lending has been discussed and controverted between Hart, on Banking, 2nd ed., p. 616, and Falconbridge, Banking, at p. 110. The former says that it is a loan; the other that it is the purchase of a negotiable instrument. *The Law Quarterly Review* shares Hart's opinion. But in any event this controversy is unnecessary here because the statute declares it to be a loan. What our law prohibits, in sec. 11, is not the lending of money—which in itself is quite proper and useful—what our law prohibits is the "stipulating, allowing or exacting" an interest exceeding 12 per cent. per

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annum on any loan of less than $500; whether such loan be in the shape of a discount, or of ordinary contract of loan or of any other contract or agreement whatsoever. Sec. 6 uses the plural to clearly indicate that any contract, covenant or agreement gives rise to the application of sec. 11. A study of secs. 6 and 11 leads to the conclusion that he who discounts a note of less than $500, exacting therefore an interest exceeding 12 per cent. per annum, lends in violation of sec. 11. Besides, sec. 11 refers us back to sec. 6 by stating that it is forbidden to lend contrary to the provisions of the Act. Now, to lend contrary to the terms of the law is to lend contrary to the terms of sec. 6; i.e., to lend by way of discount, contract or agreement. Now in this case the respondent has loaned to the complainant by means of the discounting of about one hundred notes of different parties, of different amounts, falling due on different dates, each of them giving rise to a different action. In each case the accused entered into a distinct juridical transaction. The fact of the respondent paying to Greenberg in one single cheque the proceeds of the discount of several notes, does not constitute so much the forbidden loan as the offence of stipulating or exacting an interest on each of these notes exceeding 12 per cent. a year. For the offence does not lie in the payment for a bunch of discounted notes, after deduction of the interest. The offence lies in "exacting, stipulating or allowing" an interest exceeding 12 per cent. on the discount of a note of less than $500. Now, in the present instance, the respondent when discounting each note deducted the amount of the exorbitant interest charged and handed over the balance. But when the respondent turned over to Greenberg the difference between the face value of the notes and the discount charged he had already committed the offence of exacting, stipulating or allowing a forbidden rate of interest on a note of less than $500. The negotiation by Greenberg of a note of less than $500, the calculation of interest by the respondent, the keeping of the note by the latter, and then the confirmation of the payment of usurious interest even before the cheque representing the proceeds was handed over, constituted the "exacting" or "stipulating" a prohibited interest, of an interest forbidden by sec. 6, hence punishable under sec. 11. The handing over of the cheque to Greenberg was but the uncontrovertible evidence of the consummation of this offence of exacting a prohibited interest. And that is tantamount to stating that the respondent has violated sec. 11 as well as sec. 6 even after allowing him the benefit of the most favourable interpretation of the statute, a statute which speaks quite clearly, without being obscure, and which, having been enacted evidently in the public interest, must be applied in the same spirit.

Every one bears in mind the evils caused in this country by

usury. Press campaigns followed, and then a parliamentary agitation, and the Act was finally adopted. And the object of this Act—when we remember the circumstances under which it saw the light—was to extirpate from Canada usurious loans of small amounts, i.e., loans of less than $500 upon interest exceeding 12 per cent. per annum. Is Parliament to attain its object? It is for the Courts to declare this. And these cannot forget that, owing to the absence of sound laws against usury, many millions of men and women had to leave Central Europe during the first part of the nineteenth century and exile themselves to America. In my opinion ch. 122 has both an economic and social bearing of great importance. The terms are clear, precise and unequivocal, if only secs. 6 and 11 are read together. In stating that the respondent committed the offence punishable under sec. 11, that he loaned contrary to the provisions of the Act and incurred the penalties which it provides, we are not stepping beyond the text of the law nor of the allegations of the complaint, nor of the evidence of record.

The question of want of proof of guilty intent, which was raised at the hearing, cannot be taken into consideration upon this appeal, for the reason that neither the appellant nor the accused proposed to have it reserved by the Court below, for the decision of this Court. Moreover, had such a question been reserved, the Court would answer it in the negative, inasmuch as the absence of guilty intent upon violation of a mere penal statute, as the one in question, does not relieve the infractor from being punished for the mere infraction of such statute.

Any other interpretation of the 1906 statute would result in indirectly annulling the Act by an evasive interpretation condemned alike by authors and jurisprudence.

We are of opinion that questions 1 and 3 must be answered in the affirmative and 2, 4 and 5 in the negative.

We therefore come to the conclusion that the judgment of August 1, 1912, is erroneous and that the order of discharge or nonsuit must be annulled. The record shall be returned to the Court of Sessions and order made to it to call upon the respondent to declare whether he has any evidence to offer in his defence and to continue the case according to law.

Archambeault, C.J.

ARCHAMBEAULT, C.J., stated that he had been somewhat embarrassed as to whether the act of discounting constituted a loan or a purchase of a negotiable instrument. But finally the study of secs. 6 and 11 had convinced him that discounting under the statute did constitute a loan.

Trenholme, J.

TRENHOLME, J.:—I concur with the remarks of the Chief Justice and would add that if discounting is not a form of loan, the Act is perfectly useless.

Cross, J. (dissenting)

CROSS, J. (dissenting):—If a person were charged under

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secs. 6 and 11 of ch. 122, R.S.C., as being a money-lender with having lent a sum less than $500 at a rate of interest greater than that authorized by the Act by stipulating for a rate of interest or discount, on one or more negotiable instruments, greater than 12 per centum per annum, it would be no defence to prove that the loan had been made in furtherance of a contract by which he had agreed to discount acceptable paper at a stated rate (exceeding 12 per cent. per year), to the extent a total of $10,000 or of a larger sum. The offence created by the Act is not the making of such an agreement, but the making of a loan at the forbidden rate. The loan might have been made in the prohibited way either in pursuance of such an agreement or not.

The agreement relied upon by the defendant contemplated not one but many loans. The Act would strike at those, if any, which were of sums less than $500. The object of the Act was to protect needy borrowers, persons who would need less than $500 at a time.

I would, therefore, answer questions Nos. 2 and 5 in the negative, and add that there is no offence against the Act, if the amount of the loan is not under $500 even if the rate exceeds 12 per cent. per annum. Sec. 6 must be read as controlling sec. 11, because without sec. 6 there is no way of ascertaining what rate is meant by the words "rate of interest greater than that authorised by this Act."

In relation to questions 3 and 4, I would say that a money-lender does not violate sec. 6 by stipulating for a rate of interest or of discount greater than 12 per cent. per year in respect of a loan of $500 or more made on two or more negotiable instruments, the amount of each of which is less than $500. The word "principal" in sec. 6 finds its natural meaning in relation to the word "loan" in the preceding clause, but it does not have its natural meaning when made to relate, as contended for by the prosecutor, to the words "negotiable instrument," "contract," or "agreement."

Further, the words "interest" or "discount," in the next line find their natural meaning in relation to the word "principal."

It is true that by the wording of the section interest or discount is made to run, not on "principal" but on a "negotiable instrument, contract or agreement," and in that respect there is a departure from the natural meaning of the words "interest or discount"—at least of the former—but it is to be observed that the "negotiable instrument, contract or agreement" must concern a loan of money so that in practical effect the interest or discount stipulated for comes to mean interest on the loan.

This will be the more readily realized when it is considered that, though the negotiable instrument may in terms promise to

pay a rate of interest less than 12 per cent., the lender might violate the prohibition by stipulating for or exacting "on the instrument" within the meaning of the section, a rate greater than 12 per cent.

I would say, in answer to question No. 3, that in order to support a conviction under sec. 11 the accused party must have been charged with having lent money, and that whether the amounts of the note, cheques, or negotiable paper did or did not exceed $500 the loan, in respect of which interest at the excessive rate was stipulated on the note, cheque or negotiable instrument, must be proved to have been a loan of less than $500.

I would say, in answer to question No. 4, that the fact that the aggregate amount of the notes discounted in the circumstances set forth exceeded $500, would not take the discounting of them out of the application of sec. 11 if the amount advanced upon discounting was less than $500.

It seems opportune to refer to the fact that counsel for the prosecutor argued at the hearing that the proof did not shew that on each day of discounting the advance or loan exceeded $500, but the opposite. Looking at the interest referred to in that connection it would appear that, on one of the dates shewn, namely, the 9th of November, the aggregate of the amounts of the notes discounted is exactly $500.

As the operations were carried on by way of discounting, I would infer that the advance or loan on that day would be less than $500. On the other hand, in the stated case sent up by direction of this Court, it is specifically found by the Judge of Sessions that: "La preuve démontre encore que le principal de chaque prêt était de $500 au moins, bien que chacun des billets escomptés à l'occasion du prêt fut moindre que $500." The appellant has not asked to have the stated case amended or supplemented.

This is an appeal upon questions of law, not of fact. It is true that in the order for the stated case it was directed that a copy of the evidence should be sent up, and it has been sent up and we can read it. I, however, consider that it is not open to us to find a fact to be the opposite of what it is stated to be by the Judge of Sessions.

Speaking for myself, I would say that the order of dismissal should be affirmed. Independently of the considerations above set out, and in view of the fact that there has been an acquittal, I would hesitate to order a reopening of the trial, because, from what the prosecutor says of the wording of the indictment, it appears to be defective in that it fails to recite that the defendant was a money-lender of the particular kind defined in the Act.

That would be ordering a new trial on an indictment which could not stand unless amended.

Appeal allowed, CROSS, J., *dissenting*.

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Jan. 7.

REX v. HARVIE.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Martin, JJ.A. January 7, 1913.

1. APPEAL (§ I C—25)—RIGHT OF APPEAL — CRIMINAL CASES — ESTREAT ORDERS.

Whether or not the process in execution thereof is civil and not criminal process, the order of estreat made by a county judge presiding in a criminal court on the forfeiture of bail given for the appearance of the accused before a magistrate in proceedings under the Fugitive Offenders Act, R.S.C. 1906, ch. 154, is in itself a proceeding in a criminal matter, and no appeal lies therefrom to the Court of Appeal (B.C.)

[*Re Talbot's Bail*, 23 O.R. 65; *R. v. Creelman*, 25 N.S.R. 404, and *R. v. Starkey*, 7 Man. L.R. 489, distinguished.]

Statement

APPEAL by the bail from order of McInnes, Co.J., estreating the bail bond of the appellants.

The appeal was quashed.

A. J. Kappele, for the bail.

J. S. MacKay, for the Crown.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This is an appeal from the order of McInnes, Co.J., intituled in the County Court Judges' Criminal Court estreating the bail bond of the appellants which had been certified by a police magistrate to be forfeited by the non-appearance before him of one Captain Graham Harvie at the time fixed for the hearing in proceedings then pending against the said Harvie.

The preliminary objection was taken that there is no appeal from such an order to the Court of Appeal. I am of opinion that this objection must be sustained. All the proceedings down to and including the order of estreat, were in a criminal cause or matter, and were taken and had in criminal Courts, namely, the Magistrate's Court and the County Court Judges' Criminal Court. Neither the Criminal Code nor the Fugitive Offenders' Act, nor other federal legislation, gives a right of appeal in cases like the present. The Court of Appeal Act, R.S.B.C. 1911, ch. 51, does not extend to criminal causes. That extradition is a criminal cause or matter has already been decided by this Court in *Re Tiderington*, 5 D.L.R. 138, 17 B.C.R. 81.

Re Talbot's Bail, 23 O.R. 65, decides only that the process of execution after estreat is not invalid because issued out of a civil Court. Reading the sections of the Code relating to the estreatment of bail and execution thereunder, which in the event of *nulla bona* authorizes the taking of the body of the debtor, I should hold that it would not be irregular to let even the process in execution issue out of a criminal Court. It is, however, only necessary here to say that it is nothing in connection with the process of execution that is complained of, but the pro-

ceedings leading up to and including the order of estreatment, all of which were in a criminal Court. That being so, I think an appeal does not lie to this Court in virtue of the provisions of statutes which authorize appeals in civil cases.

The Queen v. *Creelman*, 25 N.S.R. 404, was relied on by Mr. Kappele as an instance of an appeal to the Court *en banc* in a case like the present, but that was not an appeal at all, but a review by the Court of its own process. It was a case like *Reg.* v. *Sproule* (1886), 12 Can. S.C.R. 140. The same remark applies to the Manitoba case of *Reg.* v. *Starkey*, 7 Man. L.R. 489.

I would quash the appeal.

Irving, J.A.

IRVING, J.A.:—This is an appeal from the order of His Honour Judge McInnes, estreating a bail bond given to secure the appearance of one Harvie, a fugitive arrested under the Fugitive Offenders Act, R.S.C. 1906, ch. 154, after an adjournment of the extradition proceedings, which were had before the Vancouver police magistrate.

By sec. 11 of the Act it is provided:—

> A fugitive, when apprehended, shall be brought before a magistrate, who, subject to the provisions of this Act, shall hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including the power to remand and admit to bail, as if the fugitive was charged with an offence committed within his jurisdiction.

On the 25th February, 1912, Harvie, with two sureties, Jones and Richardson, entered into a recognizance in large sums to be levied of their several goods and chattels if he, the said Harvie, failed in the condition following. The condition recited the fact that the accused was charged, and that the examination of the witnesses had been adjourned until the 4th of March, and then went on to provide that Harvie should "appear on the 4th March," "and on each adjournment thereof until the final disposition of this case . . . to answer further to the charge and to be dealt with according to law."

After these recognizances had been entered into, numerous remands were made, sometimes on the application of the Crown, sometimes on the prisoner's application; and on one occasion at any rate he was remanded by the police magistrate for a period longer than seven days. As to remanding beyond statutory period when on bail, see note E, on p. 319 of vol. 9 of Halsbury's Laws of England. This remand, we are informed, was made with the consent of prisoner's counsel. The prisoner's counsel denies that he ever gave any consent. It seems to me we must accept the magistrate's statement: *Rex* v. *Ball*, 9 Can. Cr. Cas. 509. The proceedings seem to have been conducted in a happy-go-lucky way, the prisoner not appearing in Court, on the various remands, and finally it was learned that he had gone to England.

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On the 25th June, 1912, the police magistrate endorsed the following certificate on the recognizance:—

> I hereby certify that the said Captain Graham Harvie has not appeared at the time and place in the within condition mentioned, but therein has made default, by reason whereof the within written recognizance is forfeited.
>
> H. C. SHAW,
> June 25th, 1912. *Police Magistrate.*

Mr. Kappele appeared and opposed the action of the magistrate, who at that time appeared to think that he had the power to estreat the bail. Later on application was made to the clerk of the County Court Judges' Criminal Court, who signed the list of forfeited recognizances, and afterwards application was made to His Honour Judge McInnes, who made the order now appealed from. The sureties had no notice of the application to the County Court Judge.

The grounds of appeal are:—

> (*a*) That no notice of application to the said County Court Judge was given to either F. M. Richardson or Walter Jones, the bondmen above mentioned, or to their solicitor.
>
> (*b*) The said recognizance should not have been declared forfeited and estreated, as the said Graham Harvie was released from his recognizance by the action of Magistrate Shaw, before whom the said Graham Harvie appeared, in adjourning the action against the said Graham Harvie for a period longer than that permitted by the provisions of the Fugitive Offenders Act under which the said Graham Harvie was apprehended.

In this case the recognizance is for something to be done in the Magistrate's Court. His certificate shews that this something was not done. By sec. 1097 (2) this certificate is *primâ facie* evidence of non-compliance with the condition. If that certificate is to be reviewed, such review, in my opinion, must be brought about by *certiorari*.

Sec. 1097 provides for the transmission of the recognizance to the proper officer. In this province the proper officer is the clerk of the County Court having jurisdiction at the place where the recognizance was taken. After that has been done the matter becomes the collection of a debt due to the Crown. It is to be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited by such Court: sec. 1099.

The roll having been made out by the clerk, is by him (sec. 1105) transmitted to the sheriff with a writ of *fi. fa.* and *capias*, form 74, a conditional writ, if one may use that expression. The form contemplates a day being named as return day, whereon the person named therein can appear and raise any point he likes. By sec. 1109 provision is made for hearing the case on the return day by the Judge, and by sec. 1110 the Judge is authorized to relieve in the case of hardship. The procedure is

very much the same as that laid down in 1822 by 3 Geo. IV. ch. 46, secs. 1109 and 1110, being reproductions of secs. 5 and 6 respectively. In the present case the officer in charge of the collection of this recognizance was not satisfied with the clerk's list, but applied to the Judge for an order. The same course was followed in *Reg.* v. *Justices of West Riding* (1837), 7 A. & E. 583, a *certiorari* case, and although it was there contended that the making of this order was mere surplusage in that it only confirmed what the clerk was bound to do, the Court set it aside. The order in this case declares the recognizances estreated, and directs that an unconditional writ of *fi. fa.* and *capias* be issued instead of a writ in the form No. 74.

On the question of jurisdiction, I think the statutory provision in sub-sec. 2 of sec. 1099, directing the County Court to enforce and correct the recognizance in the same manner as any other fines in the same Court, would give the person aggrieved an appeal to this Court under the Provincial Court of Appeal Act from any order made by a Judge of the County Court; but as the order of the 26th of July, 1912, was made in the County Court Judges' Criminal Court, the appellant's proper course is either to apply to the County Court Judge himself to discharge the order as improvidently made, or to have it quashed on *certiorari* proceedings. No jurisdiction has been given to this Court to deal with an order by a Judge of the Criminal Court.

MARTIN, J.A.:—I concur with Macdonald, C.J.A. Martin, J.A.

Appeal quashed.

Re MARA and WOLFE.

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Ontario Supreme Court, Middleton, J. February 25, 1913.

1. WILLS (§ III G 2—127)—ENLARGING LIFE ESTATE—POWER OF APPOINTMENT.

Where a general power of appointment is given to a daughter under a will, to be exercised by the daughter either by deed or will, she is substantially the one who is solely and beneficially interested and entitled, and when she transfers or conveys the life estate also given to her under the will and executes a deed of appointment she may demand that the executors shall convey to her appointee in pursuance of the appointment, and this irrespective of a provision in the will that the executors shall convey at the death of the daughter.

Statement

MOTION by the vendors, under the Vendors and Purchasers Act, for an order determining a question arising on the will of the late Ann Mara, as to the ability of Charlotte S. Mara, with the concurrence of the surviving trustee under the will, to make title to land.

W. A. Proudfoot, for the vendors.

L. M. Singer, for the purchaser.

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Middleton, J.

MIDDLETON, J.:—The estate is given to trustees, and the daughter Charlotte S. Mara is given a life estate and a general power of appointment, by deed or by will, and the executors are directed to convey in accordance with the appointment "in the event of my daughter C.S. dying." If she has made no appointment either by will or deed and dies unmarried, there is a gift over; and, if she dies married and leaving children or their issue, there is a gift to them.

The power of appointment being general and exercisable either by will or deed, the daughter is in substance the sole person beneficially entitled; and, when she conveys her life estate and executes a deed of appointment, she is entitled to call upon the trustees to convey in pursuance of her appointment. They hold in trust for her and her appointee.

The only difficulty arises from the direction in the will that the executors shall convey at her death. There is nothing to prevent the appointment being made at any time, and I think nothing to prevent a conveyance of the legal estate at any time to the appointee, who is solely beneficially entitled. What was really in the testator's mind was the fixing of the death of Charlotte as a time when a new duty would arise in the executors, if she had not made an appointment either by deed or will.

I think a good title can be made by a properly drawn con-

Judgment for vendors.

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Jan. 8.

Re MANITOBA COMMISSION COMPANY, Ltd.

Manitoba King's Bench, Macdonald, J. January 8, 1913.

1. JUDGMENT (§ II A—63) — RES JUDICATA — CONCLUSIVENESS OF ORDER —APPLICATION FOR WINDING-UP ORDER—DIFFERENT MATERIAL AND PARTIES, BUT SIMILAR PURPOSE.

The objection that a second application for a winding-up order under the Winding-up Act, R.S.C. 1906, ch. 144, cannot be made after the first application has failed, on the ground that the matter is *res judicata*, does not apply where on the second application it appears that the parties are not the same and the material urged in favour of the second application is different, although the purpose of this application is similar to that of the former.

[*Re Manitoba Commission Co., Ltd.*, 2 D.L.R. 1, 22 Man. L.R. 268, referred to.]

2. CORPORATIONS AND COMPANIES (§ VI F 1—345)—WINDING UP—CREDITOR'S RIGHT TO WINDING-UP ORDER, HOW LIMITED.

The general rule that an unpaid creditor of a company is entitled to a winding-up order under the Winding-up Act, R.S.C. 1906, ch. 144, as a matter of right, is subject to the exception (among others) that it will not be granted where there are no assets and the petitioning creditor would get nothing by the order; if, however, there is anything, though it is impossible to say whether it is of any value, the order should be granted.

[*Re Georgian Bay Ship Canal, Etc., Co.*, 29 O.R. 358; *In re Chapel House C. Co.*, 24 Ch.D. 259, applied; *Re Manitoba Commission Co., Ltd.*, 2 D.L.R. 1, 22 Man. L.R. 268, referred to.]

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RE MANITOBA COMMISSION CO., LTD.

Macdonald, J.

THIS is an application by the National Elevator Company, Limited, and the Atlas Elevator Company, Limited, to wind up the Manitoba Commission Company, Limited, on the ground that the company is insolvent.

The winding-up order applied for was granted.

W. H. Curle, for applicant.

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

MACDONALD, J.:—The history of the company and the facts relating to it are fully recited in the judgment of the learned Chief Justice, *Re The Manitoba Commission Co. Ltd.*, 2 D.L.R. 1, 22 Man. L.R. 268.

A similar application was made before the Chief Justice and dismissed on the ground that the material submitted did not justify a winding-up order.

Objection is taken on behalf of the company that this being a second application, it cannot be considered, as the matter is *res judicata*.

Although the petition is for a similar purpose as the one dismissed, the applicants are not the same, nor yet is the material.

As a general rule an unpaid creditor of a company is entitled to a winding-up order *ex debito justitiæ*, but that rule is subject to exceptions. It will not be granted where there are no assets and the petitioning creditor would get nothing by the order. If, however, there is anything, and it is impossible to say if of any value, the order should be granted: *Re Georgian Bay Ship Canal & Power Aqueduct Company*, 29 O.R. 358.

The order is the means of having the assets of a company applied in payment of its debts, and therefore a creditor generally, where the company is insolvent, is entitled to the order as a matter of right: *In re Chapel House C. Co.*, 24 Ch.D. 259.

Under the Winding-up Act, R.S.C. 1906, ch. 144, a company is deemed insolvent,—

(*a*) If it is unable to pay its debts as they become due;

(*b*) If it calls a meeting of its creditors for the purpose of compounding with them;

(*c*) If it exhibits a statement shewing its inability to meet its liabilities;

(*d*) If it has otherwise acknowledged its insolvency.

For the purpose of this application these are sufficient grounds for consideration.

(*a*) The company was indebted to the petitioners the National Elevator Company and were unable to pay them, and action was brought and judgment recovered against the said Manitoba Commission Company in the County Court of Winnipeg to the amount of $499.85, on October 3, 1912. Upon the judgment execution issued, under which the bailiff of the said

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County Court did seize and levy upon and take in execution some of the goods, chattels and property of the said company.

H. S. Paterson, the manager of the company, in opposing the application for a winding-up order, files an affidavit in which he deposes that this judgment was paid, and the execution issued thereon satisfied. The truth of this statement is denied by Jacob Hall Holman, the bailiff of the County Court of Winnipeg, who, by affidavit, sworn to herein, says that it is not true the judgment referred to has been paid and the execution issued thereon satisfied, that certain moneys were realized under the said execution, but that at the time a writ of attachment was in his hands against the goods of the said Manitoba Commission Company at the suit of the Atlas Elevator Company, Ltd., and the moneys realized under the execution of the National Elevator Company, Ltd., were held for distribution under the provisions of the County Courts Act respecting executions against traders.

It appears plain to me, therefore, that the company is deemed to be insolvent in being unable to pay its debts as they become due.

It also appears that on or about the 2nd November, 1911, the company called a meeting of its creditors for that day at 3 p.m. in the Council Chamber, and a notice was sent to the petitioners, the Atlas Elevator Company, requesting them to have representatives meet with creditors at that meeting. Mr. Douglas Laird, secretary-treasurer of the Atlas Elevator Company, attended on behalf of that company and at that meeting Mr. Paterson, manager of the Mantioba Commission Company, stated that his company was unable to pay its debts and he offered to compound with its creditors at sixty-five cents on the dollar. This, I take it, is a sufficient acknowledgment of the company's insolvency and of the object of the meeting being for the purpose of compounding with its creditors.

From the evidence before me, it is plain that the petition for winding-up is amply verified, and grounds sufficiently established to entitle the petitioners to a declaration in conformity with the prayer of their petition, and to a winding-up order, and there will be an order accordingly.

Winding-up order made.

BRADSHAW v. SAUCERMAN.

(Decision No. 2.)

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Martin, JJ.A. January 7, 1913.

1. MINES AND MINERALS (§ III B—85)—MINERS' LIENS—PRIOR MORTGAGEE—PRIORITIES—NOTICE.

Under sec. 7 of the Miners' Lien Ordinance, 1906 (Y.T.), requiring that a claim of lien shall state the name and address of the owner of the property to be charged, and also of the person for whom and upon whose credit the work was done, a mortgagee of the property, whose mortgage was registered prior to the work done and material supplied and who was not in possession when the work was done and material supplied and who had not contracted for or been in any way privy to the hiring of the workmen, need not be named in the claim of lien.

[*Bradshaw* v. *Saucerman*, 4 D.L.R. 476, affirmed.]

2. MINES AND MINERALS (§ III F—105)—MINERS' LIENS—PROCEDURE—PARTICULARS OF WORK DONE, REQUIREMENTS.

A statement in the claim for a lien under the Miners' Lien Ordinance, 1906 (Y.T.), that it is "for wages for work and labour done and performed on and in respect to certain mining claims," followed by the amounts set out in their respective time checks for wages and giving the dates of employment, is a sufficient statement of the work done within the meaning of sub-sec. (*b*) of sec. 7 of that Act.

[*Bradshaw* v. *Saucerman*, 4 D.L.R. 476, affirmed; *Barrington* v. *Martin* (1908), 16 O.L.R. 635, distinguished.]

3. MINES AND MINERALS (§ III C—90)—MINERS' LIENS—FOR WHAT WORK OR MATERIALS—WOOD CUT FOR MINE, DIVERTED.

A claim of lien by workmen for wood cut for a mine properly includes all the wood cut by the workmen which was intended for use in the mine, though part of the wood was diverted to other purposes by the owner, such diversion not being under the control of the workmen.

[Miners' Lien Ordinance 1906 (Y.T.), referred to.]

4. MINES AND MINERALS (§ III—75)—MINERS' LIENS.

The Miners' Lien Ordinance, 1906 (Y.T.), must be read and construed in the light of the history of the lien laws in the several provinces and their progenitors, the lien laws of the United States. (Dictum *per* Macdonald, C.J.A.)

5. MINES AND MINERALS (§ III A—80)—MINERS' LIENS — MECHANICS' LIEN LAWS—POTENTIAL RIGHT TO LIEN, UNTIL LAUNCHED.

The underlying principle of the mechanics' lien laws in the several provinces is that the lien attaches by reason of a contract with the owner of the premises, qualified by the provision that the statute does not give a lien, but only a potential right of creating it. (Dictum *per* Macdonald, C.J.A.)

[*Edmonds* v. *Tierni*, 21 Can. S.C.R. 497, *per* Strong, J., referred to; Miners' Lien Ordinance, 1906 (Y.T.), referred to.]

6. APPEAL (§ II C—60)—QUESTIONS OF TITLE—MINERS' LIENS.

A claim for a miner's lien does not involve "title to real estate" nor any "interest therein" within the meaning of sec 2 of the Act to amend the Yukon Amendment Act, 2 Geo. V. (Can.) ch. 56, so as to permit an appeal from the Yukon Territorial Court to the British Columbia Court of Appeal, notwithstanding that the amount in controversy was less than $500. (*Per* Irving, J.A.)

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7. MINES AND MINERALS (§ III E—100)—MINERS' LIENS—HOW WAIVED OR DEFEATED—EXCESSIVE CLAIM, EFFECT OF.

A claim for a miner's lien should not be rejected merely because the sum claimed is more than the claimant is entitled to, but the claimant should be allowed to establish that he is entitled to a lien for some part of the claim. (Dictum *per* Irving, J.A.)

Statement

APPEAL by the defendant from the judgment of Macaulay, J., of the Yukon Territorial Court, *Bradshaw* v. *Saucerman*, 4 D.L.R. 476.

The appeal was dismissed.

Pattullo, for appellant.

Chas. Macdonald, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The grounds of appeal relied on by the appellant's counsel were: (1) that the claim of lien did not name the mortgagees, Lilly & Co., as owners; (2) that it did not sufficiently describe the work done, and (3) that all the wood cut by the workmen was not used on the mining claims.

Before dealing with the first objection, which is that upon which most of the argument turned, I shall deal shortly with the other two.

I entirely agree with the learned Judge's conclusion on the third ground mentioned above. I do not think workmen are to be deprived of their rights because of circumstances beyond their control. At the time the wood was cut or manufactured, it was, or appeared to them to be intended for use on the mining claims in question here, and a subsequent diversion of part of it by the owner could not in my opinion divest them of their rights.

On the second ground I entertain grave doubt. As to the sufficiency of the description of the work done, it may be that the inferences to be drawn from the whole document (the claim of lien) sustain the learned Judge's finding, and as my learned brothers are agreed that they do, I do not dissent. I would like to add, however, that a better statement of the work done was practicable and desirable. It is only reasonable that the claimant should state the general character of the work he claims to have done so as to shew that it was such as falls within the purview of the ordinance. This case very well illustrates the desirability of this, since one of the claimants was a cook and joined in the claim of lien without the character of his claim being disclosed. It was disallowed, and rightly so: *Davis* v. *Crown Point M. Co.* (1901), 3 O.L.R. 69.

There remains, then, the first ground of appeal which Mr. Pattullo, appellant's counsel, frankly stated was the substantial one. Stated shortly, it is this: Is a mortgagee whose mortgage was registered prior to the work done and wood supplied, and who was not in possession when the same was done and supplied and who had not contracted for or been in any way privy to the hiring of the men, an "owner" within the meaning of that

expression as used in the said ordinance? As defined in the interpretation clause the expression "includes a person having any estate or interest in the mine," etc. The ordinance was apparently framed as a rough and ready measure designed to meet conditions in a new mining district. It was not prepared with that care and elaborateness displayed in the framing of the lien laws in the several provinces, but I think it ought to be read and construed in the light of the history of those laws and their progenitors, the lien laws of some of the United States. The underlying principle of those laws is that the lien attached by reason of a contract with the "owner." "The statute does not give a lien, but only a potential right of creating it": *per* Strong, J., in *Edmonds* v. *Tierni*, 21 Can. S.C.R. 407. A claimant may not himself have had such a contract, but if not he must base his right to a lien upon that of some contractor. There may be several owners, each of whom may subject his interest in the property to liens, but in no case, so far as I know, has one owner been given the right to subject the interest of another to such liability without his concurrence. The nearest approach to such a thing is when, as, for example, in Ontario, and several other provinces, lien-holders are given priority over prior encumbrancers for the increased value accruing through the work done or material furnished, and in the ordinance now under review, by which the lien-holder is given priority over prior encumbrancers to the extent of a moiety of the property irrespective of whether it has or has not been increased in value by the work done or material furnished. But these examples are in reality only a postponement in part of one encumbrancer to another.

By the several provincial lien Acts the definitions of "owner" are adopted in conformity to what was considered in *Bank of Montreal* v. *Haffner* (1881), 29 Can. S.C.R. 319, to be the meaning attached to the expression "owner" by the United States Courts under lien Acts in which there was no definition of owner. I am not sure that Proudfoot, J., conveys altogether a correct impression of those decisions, because while in some of the state enactments owner was not defined, yet the owner was indicated as the person with whom the contract was made. The Miners' Lien Ordinance does not expressly indicate the owner in this way, and therefore *Bank of Montreal* v. *Haffner*, 29 Can. S.C.R. 319, and the United States cases referred to, are not of much assistance in the interpretation of this ordinance. I rely more upon the fundamental principle underlying all mechanics' lien laws which seems to have been borne in mind by the legislatures which enacted them, that it is only the party who procures the work to be done, or the material to be supplied, or someone who concurs with him, whose estate or interest is to be charged. Having said this, it is important to look at the whole ordinance in question to see whether or not the mortgagee was intended

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to be included in the expression "owner." Sec. 6 shews that as between mortgagee and lien-holder it is a matter of priority. Sec. 14 directs the Judge to determine and fix the "liability of the owner of layman for wages due to the claimant," and the sections under the caption "encumbered mines," secs. 20 to the end, referring, it is true, to mortgagees who were such before the passing of the ordinance, yet using the term "owner," as I must assume, in the sense defined in the interpretation clause, repeatedly employ the expression "owner" in contradistinction to "mortgagee."

To impose upon the miner the obligation before filing a claim to ascertain the names and addresses of all encumbrancers would benefit no one. It is sufficient that he make the encumbrancers parties to the proceedings before the Judge or lose his right of priority. Nor is there any reason to suppose that a departure from other like enactments was intended; that unusual obstacles were to be placed in the way of miners in that distant part of the country, namely, that they must ascertain and insert in their claims the names and addresses of any encumbrancers before filing them. The rights of such encumbrancers are amply protected without requiring such to be done. They must be made parties to the proceedings before the Judge and thus they will retain all their priorities.

I would dismiss the appeal with costs.

Irving, J.A.

IRVING, J.A.:—Sec. 2, ch. 56, of the Yukon Amendment Act of 1912, passed 1st April, 1912, in conferring jurisdiction on this Court, authorizes an appeal where the matter in controversy amounts to $500 or upwards, or where the title to real estate or some interest therein is in question.

Lilly & Co. (mortgagees of certain creek claims), being dissatisfied with the judgment by which the plaintiffs were declared entitled—under the Miners' Lien Ordinance, 1906—to a miners' lien for work on the said claims, has brought this appeal. The respective amounts found due to three men, namely, Bradshaw, Veale and Robertson, are less than $500. The first question is: Does an appeal lie from the judgments given in their favour?

Gabrielle v. *Jackson* (1906), 15 B.C.R. 373, and *Gillis Supply Co.* v. *Allan* (1910), 15 B.C.R. 375, turn on the wording of B.C. statutes, but the principle established that a lien-holder, or claimant, does not by joining in one summons (as required by the ordinance, sec. 15) lose any advantage given to him by another section, or another Act, seems in point.

I would hold that as to these three men there is no appeal, under the second section of the Yukon Amendment Act, 1912, the matter in controversy being less than $500, unless, of course, the case comes within the words "where the title to real estate or some interest therein is in question." There is no "title"

to real estate in question, but it is said the title to an interest in real estate is involved.

I have read the sections in the Yukon Placer Mining Act to which Mr. Pattullo has referred us, and I am not satisfied that the plaintiff's proceedings to make the appellants' interest under their mortgages responsible for the wages, can be regarded as bringing an "interest in land" into question.

Our B.C. Mining Act contains a provision that the interest in a claim shall be deemed a chattel interest equivalent to a lease for a year. There is no similar section in the Yukon Placer Mining Act, ch. 64.

I would, therefore, dismiss the appeal as against Bradshaw, Veale and Robertson.

As to the other six plaintiffs who are respondents to this appeal, in my opinion the objection taken to their claim of lien, namely, that by omitting the name of Lilly & Co. as "owners" they had failed to satisfy the requirements of sec. 7 of the Miners' Lien Ordinance, 1906, cannot prevail. Sec. 7 requires that the claim of lien shall state: (*a*) the name and address of (X) the owner of the property to be charged, and (Y) also of the person for whom and upon whose credit the work was done, etc. For convenience I have labelled these two persons with the letters X and Y. In the interpretation clause "owner" is made to include X and Y, and all persons claiming under either X or Y if such rights are acquired after the work has been begun.

Now the appellant's case rests on this: "Owner" in sec. 7 means everybody falling within the definition given in the interpretation clause. If that contention is sound, why did not the draftsman say: "You shall mention in your claim every owner." That would bring in every person included in the definition. For some reason or other sub-sec. (*a*) was made to read this way: "You shall state name and address of (X) the owner and also (Y) of the person upon whose credit the work is done. It looks as if the latter person (Y) would not be mentioned as owner. Or, in other words, as if "owner" in sub-sec. (*a*) was not to receive the full meaning attributed to it in sec. 2. There is a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed too as particular if the intention be particular, that is, they must be understood as used in reference to the subject matter in the mind of the Legislature, and strictly limited to it: Maxwell, 1896 ed., p. 85.

The object in requiring the name of the owner (X) and the person (Y) for whom and upon whose credit the work was done, and a description of the property, was to give notice in the registry office. It would be sufficient for ordinary purposes if the names of persons primarily responsible were given. To require a complete list of names and addresses of every person interested

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in any way, shape or form in the property, would make the Act unworkable. Again, the provisions of secs. 4, 5 and 6, dealing with a mortgagee's liability, seem to shew that mortgagees are distinguished from "owners." On the whole I think the requirements of the Act were satisfied by inserting the names of Saucerman, Duggan and Davin as the owners.

The lien claimants claim "in respect of and for wages for work and labour done and performed in respect of the said claims by . . . . Royston (for example) between 10th July and 28th August, amounting to $ . . . ." That seems to me to be a sufficient way of putting forward the claim. I arrive at that conclusion without regard to *Barrington* v. *Martin* (1908), 16 O.L.R. 635, which is a decision on a very different statute. In that Act there is an express provision that substantial compliance shall be sufficient. If the sum claimed is larger than the claimant is truly entitled to I do not think his claim should be rejected on that account. Compare *Scarf* v. *Morgan* (1838), 4 M. & W. 270, 7 L.J. Ex. 324; *Dirks* v. *Richardson* (1842), 4 M. & G. 574; but it would be open for the claimant to establish at the time that he was entitled to a lien for some part of it. I quite agree with the opinion of Davie, C.J., in *Weiler* v. *Shupe* (1897), 6 B.C.R. 58. The headnote to that case goes beyond the judgment. Drake, J., and McColl, J., gave their views based on the affidavit. There is no authority in the judgment for the statement put forward in the headnote that a claim of lien is bad because it embraces labour for which a lien can be had, as well as material as to which there is no lien. The result is that although Walkem, J., in *Knott* v. *Cline*, 5 B.C.R. 120, took a view different to that held by Davie, C.J., in *Weiler* v. *Shupe* (1897), 6 B.C.R. 58, there is no binding authority one way or the other.

It appears that 230,000 feet of lumber were cut for the mine, but it was afterwards sold or removed. It is conceded that for the cutting of this the men are entitled to a lien, but the claim for a lien for removing it to the mouth of the creek, after it had been determined not to use it in the mine, is objected to. That objection was not raised by notice of appeal and therefore cannot be dealt with.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—I am of the opinion that:—

(1) A mortgagee is not by virtue of interpretation, sec. 2 (*o*), an owner in the sense that he is required to be named as such in the claim of lien: sec. 7 (*a*).

(2) The statement in the claim for lien that it is "for wages for work and labour done and performed on and in respect of said (*i.e.* mining) claims," followed by the amounts set out in their respective time checks for wages and giving the dates of employment, is a sufficient "statement" of "the work done"

under said sec. 7, sub-sec. (*b*). No one living in a mining country could, in my opinion, entertain any real doubt that the claimants were working as labourers on the mining claims specified, or "in respect to" them, as sec. 3 has it. No "particulars of the kind of work done" are required to be set out as *e.g.* in *Smith* v. *McIntosh* (1893), 3 B.C.R. 28, a decision under the Mechanics' Lien Act, 1888, ch. 19, sec. 5 (*b*). The language of the ordinance as to the lien is similar to that statute upon which *Anderson* v. *Godsal* (1900), 1 M.M.C. 416, 7 B.C.R. 404, was decided, wherein also it was held that a cook could not have a lien.

(3) The ruling of the learned trial Judge as to the lumber (at p. 111, A.B.) is the correct one, in view of Saucerman's evidence at p. 31.

(4) Not necessary to consider other points in view of the above.

Appeal should be dismissed.

Appeal dismissed.

EDMONTON VINEGAR CO., LIMITED v. FRIEDRICHS.

Alberta Supreme Court. Trial before Stuart, J. March 13, 1913.

1. MASTER AND SERVANT (§ III A 2—291)—LIABILITY OF EMPLOYER—ACT OF EMPLOYEE BEYOND SCOPE OF EMPLOYMENT.

A teamster who is hired with his team and waggon by a wood-dealer at a fixed rate per day to deliver wood, is not the servant of the wood-dealer so as to render him liable for damages where in making delivery of a load, the teamster, under the special direction of the buyer of the wood, took the load down an excavation into a basement under a building which was being moved, and after unloading it, and with assistance getting his teams and waggon turned around, on going out from the basement caught and knocked out one of the supports, and caused the floor above, which was heavily weighted with merchandise and machinery to collapse.

[*Jones* v. *Mayor, etc., of Liverpool*, 14 Q.B.D. 890, applied.]

Statement

ACTION for damages for negligence.

The action was dismissed.

J. Cormack, for plaintiff.

G. B. O'Connor, for defendant.

Stuart, J.

STUART, J.:—The plaintiff company had a small vinegar factory on Sutherland street in Edmonton. They were extending their premises and had shifted their old factory, which was 20 feet by 30 feet in size, upon the new foundation, intending to make it part of their new building. The length of the old building was to become the width of the new one. The old building was resting on the new cement foundation on three sides. Excavation for a cellar had been made under the old building in its new position and was just approaching completion. The excavators with their teams were, however, still at work.

Then the plaintiff's manager ordered a load of wood from

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the defendant, who was a wood-dealer. The defendant was hiring teams and waggons, with teamsters, at the time from another company, the Edmonton Ice Company. He paid that company $6 a day for the use of each outfit, consisting of teamster, waggon and team. The Ice Company paid the teamster's wages at $2.75 a day. They sent their men to the defendant's woodyard each morning and the defendant did not know what particular man and team would be sent. They came, however, and proceeded to haul wood for the defendant as he instructed them. One Brown, one of these teamsters, was given the order of the plaintiff company by the defendant to deliver. He got the load of wood and took it to the plaintiff's premises, and was about to unload it in a vacant yard when the plaintiffs' manager directed him to take the load around by a lane and to drive down the slope of the excavation and into the basement below the building which had been moved. This building, it will be remembered, was 30 feet from end to end, or according to the new plan, from side to side. It was 20 feet in depth backward. It was supported in addition to the cement foundation on three sides by sills, one along the front of it and another 10 feet back. These, of course, would be 30 feet long. In the centre, from the outer to the inner sill, a beam was placed which supported the two sills and this beam rested on two posts, one at the outer edge and the other beneath the inner sill ten feet to the rear.

The teamster Brown drove down on the left hand side of the basement and delivered his wood on the ground. With the assistance of some of the excavators he got his team and waggon, which had a united length of 26 feet, turned around in this 20 x 30 feet space with two posts in the centre of it, but in going out, by some means or other the hub of one of his wheels, either the front or rear right-hand hub, caught the outer post and knocked it out. The whole beam resting on the two posts of course collapsed; and, as there was a weight of from 40 to 50 tons on the floor of the building, consisting of 1,500 gallons of vinegar and some machinery, the sills and the floor broke down and all the vinegar was spilled and lost, as well as considerable damage done to the other articles.

The plaintiffs sue the defendant for the damage done on the ground that it was due to Brown's negligence and that Brown was at the time the servant of the defendant.

I think the plaintiff's action fails on the ground taken by defendant's counsel that Brown was not the servant of the defendant. I can see no distinction in principle between the present case and the two cases cited on behalf of defendant *Laugher* v. *Pointer*, 5 B. & C. 547, and *Quarman* v. *Burnett*, 6 M. & W. 499, which were both followed and applied in *Jones* v. *The Mayor, etc., of the City of Liverpool*, 14 Q.B.D. 890.

In the latter case the defendants, an urban authority, owned

a watering cart used to water streets. They contracted with one Margaret Dean at nine shillings a day, who agreed to supply them with a horse and driver for their cart. One Frederick Dean was the driver supplied, but he was paid by Margaret Dean. By Frederick Dean's negligence injury was done to the plaintiff's carriage. Grove and Manisty, JJ., held that Dean was not the servant of the defendant, although their inspector who superintended the street-watering gave him directions as to what streets to water.

The present case is stronger in favour of the defendant. He did not own even the waggon. And in so far as a special control was exercised this was done rather by the plaintiffs themselves in ordering the man Brown to go into a very unusual spot to unload the wood. It is a grave question in my mind whether Brown could be held to have been at that moment acting within the scope of his employment. Certainly the defendant knew nothing about the proposed delivery in such a place.

In Jones v. *Mayor, etc., of Liverpool*, 14 Q.B.D. 890, Grove, J., referring to the inspector, said, "If he had interfered when the accident happened by directing the driver of the cart what to do, the case would be different." And a similar suggestion will be found in *Quarman* v. *Burnett*, 6 M. & W. 499. In the present case so far from the defendant interfering, it was the interference of the plaintiffs in directing unloading in a very difficult place that led up to the accident.

I do not think the fact that the plaintiffs had a contract with the defendant can make any difference. The contract to deliver the wood was fulfilled. It was after it was fulfilled that the accident happened. In any case I do not think there was a contract to deliver anywhere except at a reasonably convenient place and I do not think the basement was such a place.

Neither do I think that the fact that Brown collected the price of the wood from the plaintiffs for the defendant is sufficient to alter the position. He was collecting agent, but it was not in connection with the collection that the accident happened.

I can see no distinction between the present case and the case of a wholesale importer of goods who orders a carload of goods from a manufacturer. The manufacturer hires a car from the railway company to deliver them and the car is taken to the importer's siding beside his warehouse to be delivered. The engineer or brakeman in charge of the car by their negligence, injure property of the importer at the siding. Is the engineer or the brakeman to be called the servant of the manufacturer who has hired the car for delivery of the goods? No one would suggest such a thing.

It is not necessary to discuss the question of actual negligence, and indeed I think it would be inadvisable for me to do so.

The action will be dismissed with costs.

Action dismissed.

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STRACHAN v. McGINN.

Saskatchewan Supreme Court, Newlands, J. January 14, 1913.

1. ESTOPPEL (§ III K—135)—VENDEE OF LAND—ESTOPPEL BY CROPPING—RESCISSION—DAMAGES—FALSE REPRESENTATIONS.

A vendee of land loses his right to rescission of the agreement of sale, on the ground of false representations by the vendor, where, after he learns that the representations are untrue, he remains on the land and puts in a crop; but he is entitled to a set-off for any damages he may have sustained by reason of such false representations.

Statement

ACTION for rescission of agreement for the sale of land because of vendor's misrepresentations.

Judgment was given for plaintiff for damages to be set-off against purchase price and rescission denied.

P. M. Anderson, for plaintiff.

J. A. Allan, for defendant.

Newlands, J.

NEWLANDS, J.:—The plaintiff bought a section of land from the defendant, relying upon certain representations made by the defendant, the plaintiff not having seen the land in question. When the plaintiff went upon the land he found some of these representations to be untrue, and they were untrue to the knowledge of the defendant. The plaintiff, however, remained upon the land and put in a crop after he knew the representations to be untrue. By this action he acquiesced in the agreement and accepted the land, and is, therefore, not entitled to have the agreement set aside, but he is entitled to damages. The representations were untrue to the knowledge of the defendant as to the weeds and stones on the land, as to its distance from Glenavon, and as to the condition it was in as to being ready for crop, and I fix the plaintiff's damages at $1,280, being at the rate of $2 per acre, for which amount the plaintiff is to have judgment with costs with leave to set the same off against the defendant's claim for instalments due on the agreement for sale. The defendant will have judgment for the balance of his claim after giving the plaintiff credit for the above set-off, the defendant to have the ordinary costs of action on his claim up to but not including the trial and the costs of entering up judgment.

Judgment accordingly.

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Ontario Supreme Court, Latchford, J. March 5, 1913.

1. DOWER (§ C—18)—BAR BY MORTGAGE—LIMITED EFFECT.

Where the wife joins in a mortgage under the Short Forms of Mortgages Act (Ont.) for the purpose of barring her inchoate right of dower, and her husband is at such time seized in fee of the lands, her bar of dower will operate only to the extent necessary to give effect to the rights of the mortgagee; so where the mortgage had been paid off prior to the husband's assignment for creditors whereby his interest in the lands was conveyed to the assignee, but without any bar of dower by the wife, the wife's dower will accrue on her husband's death, although a statutory discharge of the mortgage was not registered until after the making of such assignment for creditors and although the husband died seized of no estate either legal or equitable in the lands.

[*Re Auger*, 26 O.L.R. 402, referred to.]

Statement

THE plaintiff, the widow of James McNally, deceased, brought this action for a declaration that she was entitled to dower in certain lands in the town of Aylmer.

W. R. Meredith, for the plaintiff.

W. H. Barnum, for the defendant.

Latchford, J.

LATCHFORD, J.:—The lands were purchased by the deceased in 1895, and about the same time mortgaged for $350. The plaintiff joined in the mortgage to bar her dower. In 1899, the husband of the plaintiff assigned to one Pierce for the benefit of his creditors, conveying to the assignee his right of redemption. Such title as Pierce obtained under the assignment was transferred by various mesne conveyances—all duly registered—to the defendant, who asserts that he acquired an absolute title to the lands freed from the plaintiff's right to dower.

The mortgage in which the plaintiff had joined to bar her dower was given when her husband was seized in fee of the lands. It was paid off, and a discharge thereof executed before the assignment was made; but the discharge was not registered until after the assignee had conveyed to one of the defendant's predecessors in title. The plaintiff's husband died intestate after the conveyance to the defendant had been made and registered.

The lands at the date of the assignment were apparently subject to the mortgage. The discharge, as stated, had not been registered. If the mortgage was paid off before maturity, and therefore void, the fact was not established in the admissions on which the trial proceeded. In the view I take, the point is not material.

The plaintiff is, on other grounds, entitled to succeed. As soon as her husband acquired the land in fee, her right to dower arose. Her bar of dower in the mortgage did not operate to

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any greater extent than was necessary to give effect to the rights of the mortgagee: R.S.O. 1897 ch. 164, sec. 7, sub-sec. 1; now 9 Edw. VII. ch. 39, sec. 10, sub-sec. 1. See *Re Auger*, 26 O.L.R. 402. When the mortgage was paid off, her suretyship was at an end. It is quite true that the husband died seized of no estate, legal or equitable, in the lands. But he was the owner of an estate in fee during coverture. The plaintiff's right of dower then arose. It was not barred except for the purpose of the mortgage; and, when the mortgage was paid off, her right was as complete as if the mortgage had not been given.

She is entitled to dower as claimed, and to the costs of this action.

There will be a reference to the Master at St. Thomas, if the parties cannot agree upon the amount payable. Costs of reference to the plaintiff.

Judgment for plaintiff.

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SMITH v. BOOTHMAN.

Ontario Supreme Court (Appellate Division), Mulock, C.J. Ex., Riddell, Sutherland and Leitch, JJ. February 14, 1913.

1. NEW TRIAL (§ II—5)—FOR ERROR OF COURT—FAILURE TO TAKE DOWN EVIDENCE IN WRITING—DIVISION COURTS ACT (ONT.).

Where, in a Division Court action for the recovery of a sum exceeding $100, the Division Court judge has not complied with the statute (10 Edw. VII. (Ont.) ch. 32, sec. 106), by taking down the evidence in writing, a letter from the judge setting out the facts which, in his view, were proved at the trial, will not be looked at by an appellate court, and a defendant appealing is entitled to a new trial, he not being responsible for the irregularity.

Statement

APPEAL by the defendant from the judgment of the Junior Judge of the County Court of the County of Wentworth upon a Division Court plaint to recover $176.70, made up of the amount of a promissory note signed by the defendant, $175, and $1.70 for interest thereon.

The learned Judge in the Division Court gave judgment for the plaintiff for the amount claimed with costs.

The appeal was allowed and a new trial directed.

L. E. Awrey, for the defendant.

H. S. White, for the plaintiff.

Mulock, C.J.

The judgment of the Court was delivered by MULOCK, C.J.:—On the appeal first coming before us for argument, it was found that the appeal case was incomplete, the evidence not having been certified to this Court. Accordingly, it was impossible to hear the appeal, which stood over in order, as provided by sub-

sec. 2 of sec. 128 of the Division Courts Act, to enable the clerk of the Division Court to amend the appeal case by certifying the evidence. On the appeal again coming on for argument, the Registrar of this Court produced a letter from the Judge who tried the case, wherein it was stated that "the Division Courts here are not supplied with a stenographer, and, therefore, the evidence was reduced to writing only on a memorandum which, probably, no one but myself would understand;" and the letter then proceeded to add the facts which, the learned trial Judge says, were proved at the trial.

The Division Courts Act, 10 Edw. VII. ch. 32, sec. 106, declares that in all actions in which the sum sought to be recovered exceeds $100, unless the parties agree not to appeal, "the Judge shall . . . take down the evidence in writing and leave the same with the clerk;" and, in the event of an appeal, sec. 127 of the Act enacts that, at the request of the appellant, the clerk shall "certify to the clerk of the central office at Osgoode Hall, Toronto, the summons with all notices endorsed thereon; the claim and any notice of defence; the evidence and all objections and exceptions thereto," etc.

Thus it was the defendant's right, under the statute, to have the evidence at the trial taken down in writing by the trial Judge, and certified to this Court. This has not been done; and, in the absence of the evidence, we are unable to have any opinion as to the correctness or otherwise of the judgment appealed from. Without questioning the view of the learned trial Judge as to what facts were, in his opinion, proved at the trial, we think that the statement embraced in his letter as to what was proved is not admissible as evidence on this appeal—nothing less than the complete evidence itself meeting the requirements of the statute.

The defendant cannot be held responsible for the evidence not being forthcoming; and, the Court being unable, in its absence, to determine the rights of the parties in connection with the issue involved in the case, the only way out of the impasse is to direct a new trial, which we accordingly order. The costs of the former trial and of this appeal to be costs in the cause.

Order for new trial.

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YOLLES v. COHEN.

Ontario Supreme Court, Middleton, J., in Chambers. February 12, 1913.

1. ATTACHMENT (§ III A—45)—AFFIDAVITS FOR ORDER, WHEN CONDITION PRECEDENT—ABSCONDING DEBTORS ACT (ONT.).

Section 4 of the Absconding Debtors Act, 9 Edw. VII (Ont.) ch. 49, requiring that an application for an attaching order shall be supported by corroborative affidavits of two persons other than the applicant, is an imperative provision, and an order made in the absence of such affidavits will be set aside.

2. COSTS (§ II—20)—PRACTICE—RIGHT TO RECOVER — NON-COMPLIANCE WITH CON. RULE 362 (ONT.).

Upon an application to set aside an order irregularly made, the applicant will get no costs if his notice of motion does not comply with Con. Rule 362, and does not set out the irregularity complained of and the several objections intended to be insisted on.

Statement

MOTION by the defendant to set aside an attachment order issued on the 5th February, 1913, by the Master in Chambers.

A. Cohen, for the defendant.

J. P. MacGregor, for the plaintiff.

Middleton, J.

MIDDLETON, J.:—Upon the argument of this motion it clearly appeared that the plaintiff's proceedings were very faulty. The defendant is not in a position to avail himself of the defects appearing, as his own practice is not above reproach. His notice of motion does not comply with Con. Rule 362, in that it does not point out or mention any of the irregularities complained of.

I deal with the motion upon one ground only. The Absconding Debtors Act, 9 Edw. VII. ch. 49, sec. 4, provides that the order may be made upon an affidavit by the plaintiff and upon the further affidavit of two other persons that they are well acquainted with the defendant and have good reason to believe, and do believe, that he has departed from Ontario with intent to defraud, etc.

The application was here granted by the Master upon the plaintiff's own affidavit, without the necessary corroborative affidavits. These are, I think, made by the statute a condition precedent to the making of the order. The plaintiff now files affidavits, but I do not think this can help him.

As the applicant is himself irregular, and has made no affidavit of merits, I think this affords justification for setting aside the order, as I do, without costs. This will be without prejudice to any application that the plaintiff may make for a similar order; but, as counsel for the defendant stated that his client was returning to the city to-day, the order should not be made upon stale material.

Attachment vacated.

Re GRAND TRUNK R. CO. and ASH.

Re GRAND TRUNK R. CO. and ANDERSON.

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Ontario Supreme Court, Britton, J., in Chambers. February 11, 1913.

1. COSTS (§ I—8)—EMINENT DOMAIN—EXPROPRIATION BY RAILWAY—COSTS OF ARBITRATION.

The fact that a land-owner has not appealed from or moved to set aside an award made in arbitration proceedings to ascertain the compensation to be paid for the taking of his lands by a railway, does not preclude him from objecting to the payment of the company's costs of arbitration with which the arbitrators assumed to deal although without jurisdiction to do so.

2. COSTS (§ I—8)—REQUIREMENTS OF STATUTORY NOTICE AS CONDITION PRECEDENT TO COSTS—EXPROPRIATION.

A railway company expropriating lands must give the notice contemplated by the statute, *i.e.*, offering to pay "a certain sum or rent, as compensation," in order to be entitled to costs in the event of the arbitrators finding that the offer of the company was for sufficient compensation.

Statement.

APPLICATIONS by the railway company for orders directing the taxation and payment of their costs of arbitration proceedings to ascertain the compensation to be paid to two land-owners for lands taken for the purposes of the railway, under the Dominion Railway Act.

Bicknell, Bain & Co., for the railway company.

Grayson Smith, for the land-owners.

Britton, J.

BRITTON, J.:—The offer of the railway company, pursuant to which the arbitration was held, was not a mere declaration of willingness to pay a certain sum of money as compensation for the land which the company wanted, but it was an offer to pay $40 in cash to Ash and $20 to Anderson together with something else in each case. The notice is set out in the award, as follows: "The railway company offered to pay the owner of said land the sum of $ and to dedicate to and permit the use of by the land-owners owning lands abutting upon the lane shewn upon plan No. 135, the use of and right of way over those parts of 10 and 11 coloured green, as shewn upon a plan of said lands prepared by J. W. Fitzgerald, O.L.S., dated the 22nd March, 1912 . . . in addition to the use of and the right of way over said lane on plan 135 by the adjacent land-owners, and in addition to all other rights enjoyed by them, the said adjacent land-owners, in respect to the said lane, and for all purposes for which and to the same extent as the said lane may be used by the said adjacent land-owners from time to time, as full compensation for all damages," etc.

This notice was accompanied by the certificate of J. W. Fitzgerald, O.L.S., that the said sum of $ and the aforesaid dedication of the land coloured green was a fair compensation, etc.

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Britton, J.

The offer was, in substance, the same, except the amount, in each case, and was refused by each land-owner. Apart from agreeing to give crossings under or over railway lands, or to make culverts and work of that kind, I know of no authority to permit a railway company or its surveyor or engineer to compel or bind a land-owner to accept some other land, or the use of some other land, by way of compensation for land taken for or injured by the railway.

Arbitration followed, and an award was made by two of the arbitrators—one dissenting and declining to sign.

The award recites that the railway company have agreed, and by their counsel undertaken, to dedicate the said lands coloured green on the plan of the 22nd March, 1912, and to register the said plan, and, if necessary, further sufficiently to assure to the owners of the land abutting on the lane shewn on the said registered plan No. 135, and their assigns, the use of the said land coloured green as a lane or right of way for the intents and purposes and to the full extent and in the manner set forth in their partly-recited offer of compensation.

Then in the award itself the arbitrators say in part as follows: "And the said railway company having agreed and undertaken with regard to the lands coloured green as is hereinbefore more fully set out, we have in making our award fully considered and given weight to such undertaking and agreement." Then the award concludes that the sum of ($40 and $20), under the circumstances set forth in the notice of offer, is sufficient compensation.

I am of opinion that the present application must be refused, upon two grounds.

(1) The first ground is, that the offer itself is not such an offer as contemplated by the statute. It embraces things which the land-owner may not want, and which may or may not reduce the compensation which the owner of the land is entitled to. Such an offer introduces into an arbitration things in the future which may never be carried out. Section 198 of the Railway Act, R.S.C. 1906 ch. 37, compels the arbitrators to "take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party through or over which the railway will pass, by reason of the passage of the railway . . . or by reason of the construction of the railway, and shall set off such increased value . . ." See Fisher v. Great Western R.W. Co., [1910] 2 K.B. 252.

(2) Then, I think, the agreement of counsel to do something not in the original offer—which agreement the arbitrators specially considered and on which they relied—brings this case

within the authority of *Ontario and Quebec R. Co.* v. *Philbrick*, 5 O.R. 674, affirmed by the Supreme Court of Canada, 12 Can. S.C.R. 288.

The arbitrators assumed to deal with the costs—that was in excess of their jurisdiction.

I am of opinion that the fact that the land-owners have not appealed or moved to set aside the award does not preclude them from objecting to the payment of the company's costs of arbitration.

The motion will be dismissed, but without costs.

Motion dismissed.

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PLAYFAIR v. CORMACK.

Ontario Supreme Court, Middleton, J., in Chambers. February 12, 1913.

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1. DISCOVERY AND INSPECTION (§ IV—20)—RELEVANCY OF INTERROGATIONS UNDER PLEADINGS.

The right to discovery is limited to matters relevant to the case set up in the pleadings.

[*Hennessy* v. *Wright*, 24 Q.B.D. 445, followed.]

Statement

APPEAL by the defendant Steele from an order of the Master in Chambers, 4 O.W.N. 647, requiring the appellant to attend and be further examined for discovery.

W. D. McPherson, K.C., for the appellant.

Harcourt Ferguson, for the plaintiff.

Middleton, J.

MIDDLETON, J.:—It is a cardinal rule that discovery is limited by the pleadings. Discovery must be relevant to the issues as they appear on the record. The party examining has no right to go beyond the case as pleaded and to interrogate for the purpose "of finding out something of which he knows nothing now which might enable him to make a case of which he has no knowledge at present:" *Hennessy* v. *Wright*, 24 Q.B.D. 445. Much less is it the function of discovery to extract from the opponent admissions concerning a case which he has not attempted to make by his pleadings.

Upon the record here the issues are simple. The plaintiffs say they sold to the defendants Cormack and Steele certain stocks, and that there is a balance of the purchase-price due to them. Cormack sets up as a defence that the purchase of stock, if made at all, was made by him upon the faith of some promise made by the plaintiffs by which they agreed to carry the stock for him without any liability on his part, and that the stock purchased was sold by the plaintiffs without authority.

Steele confines his defence within narrow limits. He was not the purchaser, and was a mere go-between, carrying certain communications from the plaintiffs to Cormack and from Cor-

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mack to the plaintiffs. In this he was agent for his co-defendant, and known to the plaintiffs as agent only: and credit was given to Cormack alone. He further alleges that the suit was originally brought against Cormack alone, and that in that suit the plaintiffs, on a motion for judgment, swore that the indebtedness was the indebtedness of Cormack. He further says that he had some transactions with the plaintiffs other than those giving rise to this action, and that for these he settled and received a full discharge.

Upon the examination it appears that Steele was an officer of the mining company whose shares form the subject-matter of the action. Counsel seeks to interrogate him as to his agreements with the mining company and his transactions with stock in that company. This, I think, is irrelevant.

The appeal should be allowed, with costs to the appellant in any event.

Appeal allowed.

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HOODLESS v. SMITH.

Ontario Supreme Court, Falconbridge, C.J.K.B. February 11, 1913.

1. COVENANTS AND CONDITIONS (§ IV—55) — COVENANTS RUNNING WITH THE LAND—ASSIGNEE OF COVENANTOR.

Where two adjoining parcels of land were bought by the same purchaser and similar building restrictions were imposed by the separate deeds of conveyance under the purchaser's covenant for himself and his assigns, a sub-purchaser of one of the parcels from such covenantor has no status to enforce against the sub-purchaser of the adjoining parcel the covenant entered into by their common grantor in favour of a prior owner and his assigns, particularly where the defendant had bought without knowledge of the covenant.

[Compare *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, 69 L.J. Ch. 652, and *Formby* v. *Barker*, [1903] 2 Ch. 539.]

Statement

ACTION for a mandatory injunction requiring the defendants to convert a building containing a shop and flats into a dwelling-house, or to pull down the building, and for damages and other relief.

The plaintiff purchased lands from M., covenanting for himself, his heirs, executors, administrators and assigns with his vendor, her heirs, executors, administrators and assigns, not to erect any building on the said lands, of which the front or any wall should be within less than 6 feet of the street, and not to erect any building on the said lands other than dwelling-houses of brick, stone or cement, etc. The defendant purchased lands immediately adjoining the plaintiff's lands on the south from M., and covenanted with her, her heirs, executors, administrators and assigns on behalf of himself, his heirs, executors, administrators and assigns not to erect any building on the said

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lands of which the front or wall should be within less than 6 feet of the street. M. had purchased both these parcels from the Cumberland Land Co., giving in each case a covenant similar to that which she exacted from the plaintiff.

M. Malone, for the plaintiffs.

M. J. O'Reilly, K.C., and *A. H. Gibson*, for the defendants.

FALCONBRIDGE, C.J.:—At the hearing I dismissed that part of the plaintiffs' claim which alleged that their building or property had been injured by reason of the defendants' excavation for their cellar.

As to the claim for breach of an alleged covenant running with the land in erecting a shop and flats, I fail to see how the defendants' position is at all improved by Mrs. Markle procuring the conveyance to her of the 25th April, 1912, from the Cumberland Land Company, which had no longer any interest in the lands in question.

But I also am unable to find that there is here any covenant running with the land in favour of the plaintiffs. They are not purchasers from the Cumberland Land Company, to whom the covenant was given, but they and the defendants are purchasers from Mrs. Markle, who gave the covenant.

No case cited seems to me to have any application to the point. *Pearson* v. *Adams*, 7 D.L.R. 139, 27 O.L.R. 87, cited by the plaintiffs, has just been reversed by the Court of Appeal (4 O.W.N. 779).

The merits are with the defendants. The district is not residential, and they bought without knowledge of the alleged covenant.

Action dismissed with costs.

JOCELYN v. SUTHERLAND.

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Feb. 27.

Manitoba King's Bench, Galt, J., in Chambers. February 27, 1913.

1. JURY (§ I B 1—10)—TRIAL BY—PERSONAL INJURY ACTION.

Where the injury is serious and the damage in case of success would be substantial, in a negligence action for damages for personal injuries, an order for a jury trial is properly made under the Manitoba King's Bench Act, R.S.M. 1902, sec. 59.

[*Navarro* v. *Radford-Wright Co.*, 8 D.L.R. 253, followed.]

APPEAL from an order of the referee for trial by a jury. Statement

The appeal was dismissed.

W. H. Curle, for plaintiff.

J. B. Coyne, for defendants.

GALT, J.:—I regret that, owing to the press of other mat- Galt, J.

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ters, I have not the time to consider more fully the authorities cited.

But whatever my own views on this matter may be, I am bound by and ought loyally to follow what I find laid down by the Court of Appeal in *Navarro* v. *Radford-Wright Co.*, 8 D.L.R. 253, 22 W.L.R. 665. Chief Justice Howell there says:—

> The learned Judge informed me that he thought it was a case which might well be tried by a jury, if the plaintiff had satisfied him that the injury which he sustained was of a serious character. . . . The only reason for his refusing the order was that he was not satisfied that the plaintiff had set forth such facts that if he succeeded the damages would be substantial.

I regard that as a practical decision that if the damages are substantial, that is a proper case for trial by a jury and the plaintiff is entitled to obtain it. The plaintiff says here that his physician told him he would suffer from disabilities for the rest of his life. He was in the hospital 21 weeks. In *Navarro* v. *Radford-Wright Co.*, 8 D.L.R. 253, 22 W.L.R. 665, the plaintiff was there only 20 days. In that case it is true, as Mr. Coyne points out, there was semi-paralysis affecting his arm and leg. I cannot help feeling it would be idle to say that where a man is run into by an automobile and confined for 21 weeks in the hospital and there is a continuance of weakness, he is not *primâ facie* entitled to substantial damages if the defendant is in the wrong.

Navarro v. *Radford-Wright Co.*, 8 D.L.R. 253, practically makes it a rule of law in this province that where the injury is serious and the damages in case of success would be substantial, the plaintiff is entitled to a trial by a jury. For this reason, the appeal is dismissed with costs.

Appeal dismissed.

REX v. BROUSE.

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Ontario Supreme Court, Britton, J., in Chambers. January 16, 1913.

1. SUMMARY CONVICTIONS (§ VIII—85)—DUPLICITY AND UNCERTAINTY.

An information for an infraction of the Inspection and Sale Act, R.S.C. ch. 85, charging that the accused did unlawfully "offer, expose *or* have in his possession for sale" ten barrels of apples packed in contravention of that statute, discloses an offence; and an objection by reason of setting forth the alternative methods by which the offence may have been committed must be taken before entering a plea of guilty, and cannot effectively be raised for the first time in certiorari proceedings in respect of a summary conviction similarly worded made upon such plea.

2. SUMMARY CONVICTIONS (§ VIII—85)—DUPLICITY AND UNCERTAINTY.

Section 725 of the Criminal Code 1906 (former sec. 907 of Cr. Code 1892) applies to validate a summary conviction stating the offence

to have been committed in one or other of the different modes specified in the statute whereby a single offence is declared, *ex. gr.*, under the Inspection and Sale Act (Can.) the offering for sale, the exposing for sale or the having in possession for sale.

[*R.* v. *McDonald*, 6 Can. Cr. Cas. 1, followed.]

Statement

MOTION to quash a conviction of the defendant, John A. Brouse, made by George O'Keefe, Police Magistrate for the City of Ottawa, on the 16th December, 1912, for the offence of violating the Inspection and Sale Act.

The motion was dismissed.

Gordon S. Henderson, for the defendant.

W. J. Code, for the Department of Agriculture.

J. A. Ritchie, for the Crown.

Britton, J.

BRITTON, J.:—On the 11th December, 1912, one Charles M. Snow, fruit inspector, laid an information against the defendant for that he did, at the city of Ottawa, on or about the 30th day of October, 1912, unlawfully offer, expose, or have in his possession for sale, ten barrels of apples packed contrary to the provisions of sec. 321 of the Inspection and Sale Act, R.S.C. 1906 ch. 85.

Upon this information, the accused appeared before the Police Magistrate on the 16th December. The information was before the Police Magistrate; and the accused, upon being charged, pleaded "guilty," whereupon the Police Magistrate imposed a fine of $20 and costs, fixing the costs at $2, ordering payment forthwith, and, in default, one week in gaol. The formal conviction, made on the same day, followed the information, and is, "that John A. Brouse, on or about the 30th day of October, 1912, at the city of Ottawa, did unlawfully offer, expose, or have in his possession for sale, ten barrels of apples packed contrary to the provisions of section 321 of the Inspection and Sale Act."

The objections to the conviction are: (1) that neither the information nor the conviction discloses any offence mentioned in sec. 321 of said Act; (2) or, as that section, taken as a whole, creates several offences, then the information and conviction in this case are bad, as they contain more offences than one; and (3) that the information did not conform to the provisions of sec. 321, and was not sufficiently definite to enable the accused to plead thereto; and, therefore, the plea of "guilty" entered by the accused was inoperative and of no effect.

Upon the construction I am bound to put upon sec. 321, the information does state an offence.

The offence charged is that of offering for sale, or exposing for sale, or having in his possession for sale, fruit (apples) packed contrary to the provisions of sec. 321 of the Inspection and Sale Act. After the prohibition contained in sec. 321, the

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rest of that section states the circumstances under which the offence may be committed. It mentions the acts which, if committed, will be proof of the offence.

With a statement such as there is—alleging an offence—it is too late, after a plea of guilty, to object. If the objection had been taken before the Police Magistrate, and before the plea of "guilty" was recorded, the information could, if necessary, have been amended. Section 321 creates at most three offences: (1) to sell, offer to sell, expose for sale, or have in possession for sale, packed fruit in closed packages, unless the packages are packed as provided in the Act; (2) if marked "Fancy Quality," it is an offence, unless the fruit is as described in the sub-section; if marked "No. 1 Quality," it is an offence unless the fruit is as described in the sub-section; if marked "No. 2 Quality," it is an offence unless the fruit is as described in the sub-section; (3) it is an offence if the faced or shewn surface of fruit packed gives a false representation of the contents of the package.

The information, according to this division of the section, discloses the first offence named—if it can be said that the section creates more than one—and I think the information discloses only one offence, and so is not open to the objection taken.

This falls within the decision in *Rex* v. *McDonald*, 6 Can. Crim. Cas. 1, where the offence is only one, but which may be committed in one of several ways.

I have considered in disposing of this case the following, which I cite without further comment: Criminal Code, secs. 724, 852; *Rex* v. *James*, 6 Can. Crim. Cas. 159; *Regina* v. *Hazen*, 20 A.R. 633; *Regina* v. *Alward*, 25 O.R. 519.

The motion will be dismissed with costs.

Motion dismissed.

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PALLANDT v. FLYNN.

Ontario Supreme Court, Middleton, J., in Chambers. February 13, 1913. And Appellate Division, February 20, 1913.

1. INTERPLEADER (§ I—10)—BY SHERIFF—SEPARATE CLAIMANTS.

Where there is a contest in interpleader proceedings between an execution creditor and several persons who set up alleged assignments as prior to the execution, there should be only one issue directed between them for the guidance of the sheriff and for the adjustment of the rights of the several claimants.

[*Merchants Bank* v. *Herson*, 10 P.R. 117, applied.]

2. INTERPLEADER (§ I—10)—BY SHERIFF—STOCK CERTIFICATES NOT HELD BY SHERIFF—ALLEGED PRIOR ASSIGNMENT—RIGHT TO INTERPLEAD.

A sheriff, on making seizure of shares of a company in the statutory manner by service of notice upon the company, is entitled to interplead, though he has not actual possession of the share certificates, where a claim is made under an alleged prior assignment of the shares which is denied by the execution creditor.

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3. EVIDENCE (§ II—95)—BURDEN OF PROOF—SHIFTING—ASSIGNMENT OF STOCK—PLEDGEE'S RIGHTS IN INTERPLEADER.

Where in interpleader proceedings an issue is directed between a bank, claiming as assignee of mining shares alleged to be transferred to it as security for advances, as plaintiff, and an execution creditor as defendant, if the plaintiff proves a valid transfer prior in date to the execution, the onus is shifted to the defendant.

[*Kinnee* v. *Bryce*, 14 P.R. 509, referred to.]

4. EXECUTION (§ I—3)—AGAINST WHAT — EXECUTION CREDITOR — PRIOR MORTGAGEE OR PLEDGEE—SALE OF COMPANY SHARES—ENGLISH PRACTICE, WHEN GUIDE.

Where the sheriff seizes under an execution certain stock of a mining company, and certain other claimants set up alleged prior assignments of such stock securing loans, the right of the execution creditor to press an immediate sale of the stock, at the risk of sacrificing it, should be determined upon all the circumstances of the case, keeping in view the rights of the prior assignees in the event of their establishing in due course the validity of their alleged assignments; and in this respect the determining principle of the English practice, as to the forced sale of property under an execution where there is a prior mortgage against it, ought to be the guide in Ontario so far as consistent.

Statement

MOTION by the Canadian Bank of Commerce, claimants, for leave to appeal to the Appellate Division of the Supreme Court of Ontario from the order of Britton, J., 4 O.W.N. 681.

R. C. H. Cassels, for the applicants.

J. Jennings, for the execution creditor.

R. J. Maclennan, for the Sheriff.

Middleton, J.

MIDDLETON, J.:—The execution creditor caused a seizure to be made of some 3,000 shares in a mining company, standing in the books of the company in the name of the execution debtor. Before the stock was brought to a sale, the bank served notice upon the Sheriff, claiming that the stock had been transferred to the bank as security for advances, and that there was some $2,000 due thereon.

Subsequently, one Albert Freeman claimed the stock, on the ground that it had been assigned to him as security for advances to the extent of over $8,000.

Upon an application being made for interpleader, the Master in Chambers made an order directing the trial of an issue, in which the Canadian Bank of Commerce are to be plaintiffs and the execution creditor defendant; reserving directions with reference to any claim between the defendant Freeman and the execution creditor until after the trial of this issue.

The execution creditor does not admit either the making of the transfer of the stock to the bank or that there is anything due to the bank; and, moreover, contends that the assignment, even if executed, was inoperative, because the stock was transferable only upon the books of the company, and the alleged transaction was by an endorsement upon a stock certificate,

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not recorded: the contention being that until recorded the title does not pass.

The merits of this contention are not ripe for discussion upon the present motion. The bank contend, first, that an interpleader issue ought not to have been directed, because the Sheriff is not in possession. I agree with the learned Judge that this objection is not well taken, and that, a claim having been made to property which has been seized in a manner authorised by statute, the Sheriff is entitled to interpleader.

A more substantial question will arise upon the trial of the issue, as to which I express no opinion. It may be that the only matter which will be open upon the trial of the issue will be the existence of the assignment and the ascertaining of the amount due the bank. See *O'Donohoe* v. *Hull*, 24 Can. S.C.R. 683, and *Keenan* v. *Osborne*, 7 O.L.R. 134.

The second complaint by the bank is, that the bank are made plaintiffs in the issue. As pointed out in *Kinnee* v. *Bryce*, 14 P.R. 509, if the bank have a transfer of stock as alleged, on proving the document and the date, the onus will be shifted; so this point is not of importance.

The third point urged is this: by the order it is provided that the bank do within 14 days pay into Court $8,000, or give security in the sum of $15,000, for the payment of $8,000 according to any direction that may hereafter be made; and, upon such payment or security, the Sheriff do withdraw his seizure; but, in default of such payment or security, the Sheriff do sell the stock. This, the bank contend, compels them to purchase this stock at $8,000, a sum which is said to be ascertained from a newspaper report of the market quotations, or to submit to the stock being sold by the Sheriff.

This provision appears to me to be entirely unauthorised and unfair. I can see no reason why the bank should be compelled to submit to a sale of the stock at the present time. It would seem more reasonable to require the execution creditor to put up enough to answer the bank's claim, if any, and take the stock if he desires to sell it, or to provide that the stock should not be sold for less than enough to pay the bank in full if they succeed.

The bank are ready to submit to either of these alternatives, but the execution creditor refuses his assent. Of course, if the stock can be sold for any such sum as $8,000, the bank are not concerned; but the bank fear that the placing of as much stock as this upon the market, for a sale without any reserve, may result in the stock bringing much less than the amount necessary to satisfy the bank's claim.

The principle which, it seems to me, ought to guide is that laid down in England with respect to the sale of property under an execution where there is a mortgage. The sale of an equity

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of redemption is not provided for there, as here. The property must be sold free from the charge, and the execution creditor is required to give security to the mortgagee against any loss.

As I think the order ought to be reviewed with respect to this matter, and as the matter is obviously one of importance, I give leave to appeal; and, as the matter is to be reviewed, I think it better not to handicap the parties by restricting the leave in any way. The appellants may confine their appeal as advised.

There is another matter, not argued, but outstanding on the face of the papers. The course pursued by the Master with reference to the claim of Freeman seems to me inexplicable. If the assignment to Freeman is good, then the execution creditor has no right to the stock. No matter what the form of issue, the real test is, whether this stock shall be taken to satisfy the execution. In *Merchants Bank* v. *Herson*, 10 P.R. 117, Sir Adam Wilson thought that there should be one issue, in which all the execution creditors should be on one side and all the claimants on the other.

The proceedings are for the guidance of the Sheriff, and not for the adjustment of the rights of the claimants as between themselves. If the appellants desire to argue this question also, leave is granted to introduce it.

Proceedings may be stayed meantime.

February 20, 1913. The Appellate Division (MULOCK, C.J. EX., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.).

The Appellate Division, by consent of all parties, varied the order below by directing that, on the appellants failing to give security by their undertaking, within fifteen days, a sale of the shares seized may be made by the Sheriff, through brokers, but not for less than $2,000 net; the proceeds of sale to be paid into Court to abide the result of the interpleader issue. Costs reserved.

GUIMOND et al. (plaintiffs, appellants) v. **FIDELITY-PHENIX FIRE INSURANCE CO.** (defendants, respondents).

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin, and Brodeur, JJ. December 10, 1912.

1. INSURANCE (§ III D—65)—FIRE POLICY—MEANING OF "RAILWAY."

The word "railway" as used in a warranty by the insured in a policy of fire insurance covering lumber, that no railway ran within a specified distance of the insured property, is not limited to railways opened and used for general public traffic but also embraces railways in course of construction upon whose tracks construction trains and occasional freight trains are being operated to the knowledge of the insured.

[*Guimond* v. *Fidelity*, 2 D.L.R. 631, affirmed.]

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2. PRINCIPAL AND AGENT (§ I—1)—FIRE INSURANCE—KNOWLEDGE OF AGENT.

The relationship of principal and agent is not established between an insurance company and a person not in its employ who upon being requested to procure insurance on certain property by the owner sent the application to a general agent in another place who placed a portion of the insurance applied for with the said company and therefore the company could not be charged with any information acquired by such person as to the nature of the risk or value of the property insured.

[*Guimond* v. *Fidelity*, 2 D.L.R. 654, affirmed.]

3. CHATTEL MORTGAGE (§ I—1) — WHAT IS — WAREHOUSE RECEIPT UNDER BANK ACT (CAN.).

A statutory receipt in the nature of a warehouse receipt given under sec. 88 of the Bank Act, R.S.C. 1906, ch. 29, as security to a chartered bank is not a "chattel mortgage" within a warranty condition of a fire insurance policy that the insurance shall be void if the insured property "be or become encumbered by a chattel mortgage." (Dictum *per* Duff, J.)

Statement

APPEAL from a decision of the Supreme Court of New Brunswick, *Guimond* v. *Fidelity-Phenix Co.*, 2 D.L.R. 654, setting aside a verdict for the plaintiff at the trial and dismissing the action.

The appeal was dismissed.

In an action on a policy insuring sawn lumber on the northwest of the Tobique road in Campbellton, N.B., several defences were raised, namely, fraud and misrepresentation as to quantity and value of lumber; non-compliance with a condition requiring statement as to origin of fire and other matters; that the fire was wilfully set by plaintiffs; defective proofs of loss; non-compliance with arbitration condition; breach of condition against encumbrance on lumber; and breach of warranty that no railway passed near it. The plaintiffs recovered at the trial, the jury's findings being all in their favour, among them being findings that the breaches as to encumbrance and the railway were waived. On the trial the defendants abandoned the charge of arson and failed to prove fraud and misrepresentation. The verdict against them was set aside by the full Court on grounds of defective proofs, failure to arbitrate before action, breach of warranty as to the railway and breach of condition against encumbrances on the lumber. The plaintiffs appealed to the Supreme Court of Canada.

Argument

Hazen, K.C., and *F. R. Taylor*, for the appellants:—The Court below was wrong in holding that there was a breach of the arbitration clause. As defendants denied all liability there was nothing to arbitrate: *Margeson* v. *Guardian Fire and Life Assurance Co.*, 31 N.S.R. 359; *Morrow* v. *Lancashire Ins. Co.*, 26 A.R. (Ont.) 173.

The defendants are estopped by their actions from objecting to the proofs of loss as informal: *Western Assurance Co.* v. *Doull*, 12 Can. S.C.R. 446. The International Railway, being

only in course of construction, was not a railway within the meaning of the policy. See McGillivray on Insurance, 295; *Wing* v. *Harvey*, 5 DeG. M. & G. 265, at 270. If it were, the company, through their agents, had full knowledge of its existence and location when they issued the policy and the finding of the jury must stand. See *Crozier* v. *Phœnix Ins. Co.*, 13 N.B.R. 200. The security given to the bank was not a chattel mortgage, and, therefore, not within the conditions as to encumbrances. See *Hazzard* v. *Canada Agricultural Ins. Co.*, 39 U.C.Q.B. 419.

Argument

Teed, K.C., and *J. H. A. L. Fairweather*, for the respondents:—The insurance brokers who examined the property were not our agents and the knowledge they obtained as to the railway cannot be imputed to the defendants. The finding of the jury as to waiver was based on such knowledge and cannot stand: *McLachlan* v. *Aetna Ins. Co.*, 9 N.B.R. 173. The security to the bank avoided the policy: *Hunt* v. *Springfield Fire and Marine Ins. Co.*, 196 U.S.R. 47. The policy calls for arbitration before action: See *Guerin* v. *Manchester Fire Assurance Co.*, 29 Can. S.C.R. 139, at 151; *Spurrier* v. *La Cloche*, [1902] A.C. 446.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I would dismiss this appeal.

Davies, J.

DAVIES, J.:—This is an appeal from the unanimous judgment of the Supreme Court of New Brunswick setting aside a verdict entered for the plaintiffs, appellants, and directing a verdict to be entered for the defendant company, respondent. The action was one brought to recover the amount insured by the respondents upon a quantity of sawn lumber of the appellants piled in their lumber yard in or near the town of Campbellton, N.B.

A great many questions were submitted by the trial Judge to the jury and nearly all were answered by them in the plaintiffs' favour resulting in a verdict being entered by the trial Judge for them for $3,875, the full amount claimed. The reasons given by the Supreme Court for setting aside the verdict and directing judgment to be entered for the defendants are set forth by Chief Justice Barker with great clearness and fullness, and were rested upon four distinct grounds:—

1. That there was a breach of warranty as to railway track.
2. Non-compliance with the arbitration or appraisement clause.
3. Non-compliance with several conditions precedent in the proofs of loss.
4. That the policy was voided by the security given to the bank on August 15th.

Mr. Justice White, who concurred in the judgment appealed

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from, expressly refrained from giving any opinion as to the sufficiency of the proofs of loss or as to the questions of waiver and estoppel in respect to the same.

As I have reached the conclusion that the appeal must be dismissed upon the ground that there was a breach of warranty as to the railway track, it will not be necessary for me to touch upon or express any opinion upon any of the other points relied upon by the Court below for its judgment. They were argued before us at great length and the respective contentions of the contesting parties as to non-compliance with the conditions of the policy and the waiver by the insurance company of compliance with such conditions and as to estoppel and alleged over-insurance and as to the effect of the statutory security given to the bank on the lumber, were presented to us very fully.

The property insured, the amount, and certain special conditions of the risk are described in the following passage, which was typewritten, taken from the face of the policy:—

FOUR THOUSAND DOLLARS.

On sawn lumber, piled and lying on northwest of Tobique road, in the town of Campbellton, N.B.

Other concurrent insurance permitted without notice until requested.

Loss, if any, payable to La Banque Nationale.

Subject to condition of average hereto annexed.

It is warranted by the assured in accepting this policy that a clear space of 300 feet shall be maintained between the lumber hereby insured and any standing wood, brush or forest, any steam or water-power saw-mill, planing mill or other special hazard, and that no railway passes through the lot on which said lumber is piled, or within 200 feet.

It was admitted at the argument that the track of the International Railway was within the prohibited distance when the policy was issued and when the loss occurred, in fact that the jury so found in one of their answers. The jury also found that the insurance company

had either by itself or its duly authorized agent waived performance of the conditions of the policy (*e*) in regard to there being a railway running through the yard where the lumber was piled; that an agent of the company had inspected the plaintiffs' lumber yard immediately before and as a preliminary to the placing of the insurance upon the lumber piled therein; that the company or its agents were aware at the time of insuring the lumber that it was within one hundred feet of the railway,

and that the railway was not open for "general business" before the lumber was destroyed by the fire. The contention put forward by the plaintiffs in their pleadings and at the trial was that the word "railway" in the warranty necessarily means only a completed railway authorized to be operated for general

public traffic, and does not include such a railway as the International Railway here in question which was at the time of the issuance of the policy and also when the fire occurred a railway in course of construction only, and not open for general public traffic. I cannot accept this contention.

Although the International Railway Company only began to operate with respect to general *public traffic* a short time after the fire, it had been in operation for all construction purposes and *for freight traffic* for some length of time before the policy issued. The evidence is clear and was not questioned that this International Railway was so far completed and operated past this lumber yard as to carry freight and that as a fact all the lumber in the plaintiffs' lumber yard covered by the policy sued on had been hauled over this railway from plaintiffs' mills to the yard, a distance of some 12 or 15 miles. It also appeared that large quantities of lumber sold by the plaintiffs to their customers were carried by this railway from the plaintiffs' mill past the lumber yard to Campbellton and to the wharf for shipment and elsewhere, and that this had been going on, if not after the policy issued, at any rate up to within a very short time before it issued. The issues submitted for trial and actually tried did not render necessary any proof of the actual running of trains along the railway past the lumber yard during the time the policy was in existence and neither party offered any evidence on that point. The only inference to be drawn from the evidence is that the operation of the railway for the purposes of freight traffic was under legal authority. It was not suggested by any one that the railway had been illegally operated as regards freight traffic, and we cannot assume that to have been the case. Mr. Hazen's further submission, however, on this branch of the case was first, that there was sufficient evidence to justify the findings by the jury above referred to as to the waiver by the defendants of the condition or warranty in the policy that "no railway passed through the lot on which the lumber was piled, or within 200 feet," and as to their knowledge when issuing the policy of the existence of this railway; and secondly, that no specific evidence of the actual running of trains along this railway from the time of the issuance of the policy had been given.

On the question of the alleged knowledge of the company of the existence of this railway and of their waiver of the warranty in the policy, I am of the opinion that there was no evidence whatever to justify the findings of the jury. These could only be upheld on the ground that Frink and Shannon were the agents of the company when the policy issued and that the knowledge they may have obtained from such an inspection of the premises as they made must be imputed to the defendants,

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their principals, or if only one of them should be held to be such agent, that his knowledge should be so imputed.

I agree with Chief Justice Barker in his conclusion after reviewing the evidence on this point, that there was nothing to sustain the contention that "Frink acted or was in fact the defendants' agent." As he says, "the evidence was all the other way. Neither he nor Shannon had any connection direct or indirect that I can see with the defendants. To attempt, under such circumstances to fix the defendants with knowledge of facts which they had as in any way affecting this insurance seems to me altogether useless." Moreover, there is no evidence that either of them had any knowledge that the railway had been operated for any purpose. But, even if the findings of the jury could be sustained of the company's agents having knowledge of the existence of this railway within the lumber yard, I cannot see how such knowledge on their part could avail to overcome, either on the ground of estoppel or waiver, the express warranty which the company chose to require from plaintiffs as a condition of their insurance contract attaching. There is nothing whatever to indicate that either Frink or Shannon had communicated any information respecting the existence of this railway or its relation to the lumber yard to the defendant company.

I see no essential element of estoppel present in the facts as proved, and I cannot see how the doctrine of waiver can be applied to an express warranty written in the body of the policy and forming part of the contract. The plaintiffs must be assumed to have read their policy and if they did not read it cannot plead their ignorance of the existence of the warranties on which it is expressly issued as an answer to evidence of their breach. I understand waiver to mean something said or done, some agreement made or assumed to have been made, subsequent to the condition or warranty, whereby the performance or observance of the condition or warranty need not be carried out, made nor proved. But that is not the case here. Nothing of the kind is alleged respecting this warranty and if there was any question of its waiver there is nothing to shew that the waiver was in writing and attached to the policy as required by its conditions.

As to the suggestion or argument not presented in the pleading nor in the appellants' factum, but advanced here by Mr. Hazen, that because evidence was not given of the actual running of trains over the railway past the lumber yard during the period covered by the policy, therefore there was no breach of the warranty proved, I am unable to accept it. The warranty was that no railway passed through the lot on which the lumber was piled. The company pleaded this warranty and

alleged that the International Railway ran through the lot. The plaintiffs rejoined that when the policy was written and the loss occurred, the said railway was not completed and was not a railway within the meaning of the policy. That was the issue and the evidence admittedly shewed that such a railway did *de facto* exist, and had carried all the lumber insured from the plaintiffs' mills to the lumber yard, and other lumber of the plaintiffs from the mills and the lumber yard to Campbellton, and to the wharf and other places. If the plaintiffs had shewn that neither construction nor freight trains had been run past the lumber yard during the currency of the policy, they might have been in a position at least to argue that the railway had ceased to continue as such within the meaning of the policy. The warranty was not that no train would pass along the railway during the continuance of the policy, but that no railway passed through the lumber yard. When it was proved that a railway did *de facto* so pass, and that construction and freight trains were in the habit of passing over it and that the very lumber insured had been then recently carried by such trains to the lumber yard, and other lumber of plaintiffs to their purchasers past the yard, it seems to me the fact of a railway being there was sufficiently shewn.

It could hardly be said to be arguable that a railway in process of construction, over which construction trains were passing, and which had authority to carry freight and had exercised for a long time that authority, was not a railway within the meaning of such a warranty as that contained in this policy. If the plaintiffs in this case under the issues of fact joined desired to shew that although it had been a railway it had ceased to be one, either because it had been abandoned, or because the company had stopped running trains over this part of the tracks either for construction purposes or for carrying freight or for any other purpose, it was their duty to have given some evidence of the facts. A railway running trains for construction purposes or for carrying freight was as much a railway within the meaning of the term used in the warranty as one having statutory authority to operate for all purposes. The risks against which the warranty was obviously inserted to guard existed as much in the one case as the other.

IDINGTON, J.:—The appellants sued on a fire insurance policy wherein appeared in the typewritten particulars thereof, amongst other things, the following:— Idington, J.

> It is warranted by the assured in accepting this policy that a clear space of three hundred feet shall be maintained between the lumber hereby insured and any standing wood, brush or forest, any steam or waterpower saw-mill, planing mill or other special hazard; and that no railway passes through the lot on which said lumber is piled, or within 200 feet.

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The verdict obtained was set aside on appeal to the Supreme Court of New Brunswick on the ground, amongst others, that there was a breach of this warranty (which was not observed by the assured, and indeed, was broken as soon as made), and thus the right of recovery defeated. The lumber in fact was piled on a lot within the prohibited two hundred feet from a railway. This railway had been constructed for twenty miles or more and ran past the place where the lumber in question was piled, but the railway company had not been given the authority of the Railway Commission to run passenger cars and do general business. It was contended we must, therefore, hold that it was not a railway within the meaning of the words in said warranty. It had been in use not only for construction purposes, but also for carrying freight, and amongst other freight had carried for appellants this very lumber now in question, and a great deal more. Having regard to the manifest purpose of such a condition as this warranty in an insurance policy, it seems impossible to read it in the restricted sense asked by the appellants. The contention that the respondent knew all this has no evidence to support it. The brokers who induced appellants to apply to the respondent for insurance were neither in fact its agents nor held out in any way by it to give them the appearance of agents for it and thus to lead people to believe them such. The objection thus raised, therefore, seems fatal to recovery herein. No good purpose can be served so far as I can see by deciding here the validity or invalidity of the several other objections taken.

I may, however, be permitted to observe that some, if not all, of them might by according due weight to some cases cited by appellants, have been overcome had there been in force in New Brunswick legislation dealing with conditions in or upon insurance policies similar to what has existed in Ontario for a great many years and also for some time past in some, if not all, of the Western provinces. The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—On the ground stated in the judgment of my brother Idington I think this appeal should be dismissed. It is strictly unnecessary to discuss any of the other grounds upon which the respondent company supported the judgment of the Court below, but one point is relied upon to which, I think, it is right to refer. The policy contained the following clause:—

> This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured . . . or if the subject of insurance be personal property and be or become encumbered by a chattel mortgage . . . or if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance.

On the 15th August, 1910, after the risk attached, the appellants gave La Banque Nationale security for loans amounting to $29,133.15 upon part of the personal property which was the subject of the risk under section 88 of the Bank Act. It is argued that in consequence of giving this security "the subject of insurance" became "encumbered by a chattel mortgage." The proposition upon which the contention rests is, of course, that a security taken by a bank under section 88 of the Bank Act is a chattel mortgage within the clause above quoted. I cannot agree with this contention. It is not necessary to say whether or not a security taken under section 88 of the Bank Act has such legal effect and such legal incidents as would technically justify one in describing it as a mortgage. The term "chattel mortgage" is a term of common use in those provinces in which the legal system is based upon the law of England. In most, if not all, of those provinces the class of instruments understood to be designated by that term is *eo nomine* the subject of legislation; and that legislation has, of course, nothing whatever to do with securities of the description in question. In the Bank Act itself such securities are nowhere alluded to as "chattel mortgages," and in common speech, whether of lawyers or laymen, that term would not be taken to comprehend such securities and I do not think any legal draftsman would regard "chattel mortgage" as an apt term for the purpose of designating them. As the phrase does not necessarily include such a security it seems to follow in accordance with the general rule governing the construction of insurance policies that the insurance company must submit to that construction which accords with the common understanding of the words employed and which is most favourable to the insured. There is here, of course, no suggestion of a controlling context.

ANGLIN, J.:—I concur in the judgment of Mr. Justice Davies in so far as it is based on the ground that the proximity of the International Railway to the plaintiffs' lumber yard constituted a breach of warranty and on the absence of any evidence that either Mr. Frink or Mr. Shannon was an agent of the defendant company. Beyond this I wish not to express an opinion, which is unnecessary to the decision of this appeal, on the questions of waiver and estoppel discussed in my learned brother's notes.

Anglin, J.

BRODEUR, J.:—This appeal should be dismissed. It was the duty of the appellants when they received their policy to examine it and see whether the contract as expressed therein was acceptable or not. There was, in the main body of the policy, a typewritten clause to the effect that the insured warranted that

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no railway was passing within 200 feet of the lumber insured. As it has been decided by this Court in the case of *The Provident Savings Life Assurance Society of New York* v. *Mowat*, 32 Can. S.C.R. 147, the insured or his agent had opportunity to examine the policy and he cannot now be heard to say that it did not contain the terms of the contract agreed upon and that the warranty stipulated was of no effect.

Appeal dismissed with costs.

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KELLY v. ENDERTON.

Judicial Committee of the Privy Council. Present: The Right Honourable Viscount Haldane (Lord Chancellor), Lords Dunedin, Atkinson, and Moulton. December 17, 1912.

Dec. 17.

1. BROKERS (§ II A—6)—REAL ESTATE BROKERS—OPTION TO PURCHASE—COMMISSION.

The fact that the payment of a commission, if a sale was made, was provided for in an agreement giving a person an option to purchase property does not constitute him the vendor's agent.

[*Kelly* v. *Enderton*, 5 D.L.R. 613, affirmed.]

2. BROKERS (§ II A—6)—REAL ESTATE BROKERS—OPTION TO PURCHASE.

An option contract for the purchase of land made in favour of a firm of real estate brokers who were under no fiduciary relationship to the owner who gives the option, may also provide for payment by the owner to the firm of brokers of a stated commission whether they become the buyers themselves or procure another to carry out the terms of the option as the purchaser in substitution for the brokers; and such stipulation for payment of commission will not alone constitute the brokers the agents of the owner so as to create the fiduciary relationship of principal and agent between them.

[*Livingstone* v. *Ross*, [1901] A.C. 327, 85 L.T. 382, distinguished.]

3. CONTRACTS (§ V C 3—402)—RESCISSION — AGENCY—FIDUCIARY RELATIONSHIP—DEALING AT ARM'S LENGTH.

A communication from a person representing a real estate agent made to an owner of land from whom he was trying to get a contract of option for the purchase of his property, that there were no other property transactions going on in the neighbourhood in which this property was situated, although the person making the communication may have known that his principal had been buying other pieces of property in that neighbourhood, is not a misrepresentation *dans causam contractui* which would be ground for rescission, where the parties were dealing at arm's length and there was no duty of disclosure.

[*Kelly* v. *Enderton*, 5 D.L.R. 613, 22 Man. L.R. 277, affirmed.]

Statement

APPEAL from a judgment of the Court of Appeal for Manitoba, *Kelly* v. *Enderton*, 5 D.L.R. 613, 22 Man. L.R. 277, affirming a judgment of Mathers, C.J., at the trial before him without a jury, in favour of the respondents, the defendants below.

The action was brought to set aside a sale of land to the respondents under circumstances which appear fully in the judgment of their Lordships.

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Argument

Sir R. Finlay, K.C., *O'Connor*, K.C. (of the Manitoba Bar), and *R. O. B. Lane*, appeared for the appellants, and argued that the appellants were induced to enter into a contract by false and fraudulent misrepresentations, and the concealment of material facts, and in any case it was a contract of agency under which the agent could not bind his principal to sell to him. They referred to *Livingstone* v. *Ross*, [1901] A.C. 327, 85 L.T.R. 382; *Lewis* v. *Hillman*, 3 H.L. Cas. 607; *Gordon* v. *Street*, [1899] 2 Q.B. 641, 81 L.T.R. 337.

Buckmaster, K.C., *Andrews*, K.C. (of the Manitoba Bar), and *Geoffrey Lawrence*, who appeared for the respondents, were not called on to address their Lordships.

Their Lordships' judgment was delivered by

Lord Dunedin.

LORD DUNEDIN:—The appellants in this case, Messrs. Kelly, were proprietors of some ground in the city of Winnipeg. They were approached by a person of the name of Russell, one of the defendants to the action, with a view to procuring an option of the purchase of the property. Russell at first made a proposal for an option in favour of a person called Bell on certain terms. The negotiations were abortive. He subsequently procured from the Kellys a document which has been called exhibit 2, and was in these terms:—

> We, Martin and Michael Kelly, of the city of Winnipeg, gentlemen, in consideration of one dollar, for which we hereby acknowledge receipt, agree to give C. H. Enderton & Co. the option to purchase lot eight hundred and eighty-nine (889), block 3, according to a map or plan of part of lot one (1) of the parish of Saint John, being in the city of Winnipeg, in the Province of Manitoba, registered in the Winnipeg land titles office as plan No. 129, for the sum of seventy thousand four hundred (70,400.00) dollars on the following terms: Twenty-five thousand dollars cash on completion of title papers, and the balance, forty-five thousand four hundred (45,400) dollars, as follows: Thirteen thousand two hundred dollars (13,200 dollars) in two consecutive payments on the fifteenth day of March, 1912, and 1913, and the balance the purchaser to assume in a mortgage which is now on the property, dated on or about the first of October, 1910, which is payable twice yearly; one thousand dollars of principal and interest at 6 per cent. (6%) per annum. This mortgage expires on the first day of October, 1915. Deferred payments to bear interest at 6 per cent. per annum. Taxes and rents to be adjusted to date of purchase. We hereby agree to pay one thousand dollars commission to C. H. Enderton & Co., on sale of above-described property on the above-described terms. This option is to expire at six o'clock in the afternoon of Wednesday, the fifteenth day of March, 1911. We hereby agree to close this sale by deed and mortgage.

This was signed by the Kellys on the 11th March. On the 15th March, the day of the expiration of the option, Messrs. Kelly received a letter from Messrs. Andrews, a firm of solicitors in Winnipeg, in the following terms:—

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We beg to advise you that Messrs. C. H. Enderton & Co. have placed in our hands 24,000.00 dollars cash in order to carry out the terms of the option given by you to them expiring at six o'clock p.m. this day, for the sale to that firm of lot 889, block 3, according to a map or plan of part of lot one (1) of the parish of St. John, being in the city of Winnipeg in the Province of Manitoba, registered in the land titles office as plan No. 129; said firm of C. H. Enderton & Co. have also placed in our hands the necessary funds to make the adjustments of taxes and rents as provided in the option, and we now notify you on behalf of the said firm of C. H. Enderton & Co. that they are now ready and willing to make the purchase of the said property on the terms set out in the said option, and that they are ready to close the matter out with you at any time to-day that you may be ready. We are now preparing the mortgages from the purchaser, and will have same ready for delivery over in exchange for deed of transfer. If you have any solicitor acting for you in the matter kindly advise us, so that no delay may occur in having the matter closed out.

Following upon this, the money, so far as due, was duly paid, and the name of one Simpson was given as the person in whose favour the conveyance was to be made. The conveyance was executed and the mortgage by the purchaser was executed.

The plaintiffs allege that they subsequently discovered that Simpson was a clerk in Enderton's office, and that the true purchasers were the Endertons themselves. They bring this action to set aside the conveyance and recover the property upon the ground, first, of false representations by Russell, and second, upon the ground that the sale being to Endertons, which fact was concealed from them, was bad, in respect that no agent to sell can bind his principal to sell to himself, the agent.

As regards the first ground of action, the false representation is said to consist in this, that in the course of the negotiations the plaintiffs asked Russell whether there was anything doing in Portage avenue, meaning thereby whether there were any other property transactions going on in the neighbourhood in which this property was situated, and that he said, "No," whereas in point of fact, he knew that the Endertons, for whom he was really acting, had been buying other pieces of property there. It is enough as to this to say that the trial Judge came to the conclusion that the false representation, which was denied by Russell, was not in fact made; and that, as this depends solely on the credibility of Kelly on the one hand and Russell on the other, their Lordships would be slow to come to a different conclusion. Even if the question had been so asked and so answered, they think that a general communication of this sort between parties at arm's length, where there was no duty of disclosure, would fall short of that specific misrepresentation *dans causam contractui* which would be ground for rescission. They say "between parties at arm's length" because, be it ob-

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served, in this branch of the case, the plaintiffs must treat Russell as the agent of Enderton & Co. to obtain the contract contained in exhibit No. 2.

As regards the second ground of rescission, the defendants deny that Simpson was a mere *prête-nom* for Enderton & Co., but the inquiry whether that is so is needless unless the contract contained in exhibit 2 is a mere contract of agency and not a contract under which Enderton & Co. had a right to purchase for themselves. It therefore becomes necessary to consider first of all what is the true import of the document, exhibit 2. *Primâ facie*, the undertaking is exceedingly clear. The Kellys bind themselves to give Enderton & Co. the option of purchasing on certain terms. The only argument which can be found in favour of this being anything but an option is the clause near the end: "We hereby agree to pay one thousand dollars commission to C. H. Enderton & Co. on sale of the above-described property on the above-described terms." It is said that this shews that the agreement is not an agreement for sale on option, but is a mere agency agreement. Their Lordships are unable to accede to this contention. The option of buying is given to Enderton in plain and unequivocal terms, and it would require to be shewn that the subsequent clause as to commission was necessarily inconsistent with an option of buying to induce them to construe the clause in other than its natural way. But where is the inconsistency? It seems quite a natural thing to say: "You are to have an allowance of commission of one thousand dollars for finding a purchaser who is able to pay the twenty-five thousand dollars cash and come under the further obligations, and that whether you are yourselves the purchasers or you give the benefit of the option to another purchaser."

Their Lordships are referred to the case of *Livingstone* v. *Ross*, [1901] A.C. 327, 85 L.T. Rep. 382, where an agreement was held to be a mere agreement of agency and to give no right to the agent to introduce himself as purchaser. Obviously each agreement must be judged of according to its own terms, and they think that the distinction between the agreements in that case and in this is obvious and vital. In that case no option in favour of Livingstone was expressed; and the opinion of the board is expressly rested on the fact that, if sale on option and not agency had been intended, such option would have been expressed by the insertion of the words, "to you" after the words, "We offer to sell." The expression "to you" was indeed employed in an ancillary clause dealing with timber on the ground; but it was held that this could not supply the crucial omission just mentioned. In this case, as already mentioned, the offer to sell to Endertons by name stands in the forefront of the contract. Further, in that case, the moment

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that Livingstone assumed to accept, Ross at once repudiated that view of the agreement. Here, there is neither challenge nor repudiation of the letter of the 15th March, and the conveyance for which the only warranty was the offer contained in exhibit 2, and the acceptance in the letter of the 15th March, was duly executed in favour of Enderton & Co.'s nominee.

This being their Lordships' view of the construction of the contract contained in exhibit 2, it becomes unnecessary to consider whether Simpson is really an independent assignee of Enderton & Co., or whether he truly holds as a trustee for them. Their Lordships are therefore of opinion that the result to which the trial Judge and the Court of Appeal came was correct, and they will humbly advise His Majesty that this appeal ought to be dismissed.

The respondents, Enderton & Co. and Russell, will have their separate costs of the appeal, and the respondent Simpson will have such costs as he may be entitled to.

Appeal dismissed.

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PARSONS et al. (defendants, appellants) v. **SOVEREIGN BANK OF CANADA** (plaintiff, respondent).

Judicial Committee of the Privy Council. Present: Viscount Haldane (Lord Chancellor), Lord Macnaghten, Lord Atkinson, and Lord Shaw of Dunfermline. October 13, 1912.

1. RECEIVERS (§ II—15)—POWERS AND LIABILITIES.

The authority of a receiver appointed in a debenture-holders' action in respect of a company's manufacturing business is limited by the terms of the order appointing him, and he is neither an agent of the debenture-holders to pledge their credit, nor the company's agent so as to be under the company's control.

2. RECEIVERS (§ II—16)—DEBENTURE-HOLDERS' ACTION—POWER TO CONTINUE THE BUSINESS.

Where the possession of a manufacturing undertaking and its assets are given by order of the court in a debenture-holders' action to receivers and managers appointed by the court for the express purpose of continuing and carrying on the business, subsisting contracts with customers for the manufacture and supply of merchandise by the company to such customers are not thereby terminated.

[*Sovereign Bank of Canada* v. *Parsons*, 24 O.L.R. 387, reversed; *Reid* v. *Explosives Co., Ltd.*, 19 Q.B.D. 265, distinguished.]

3. RECEIVERS (§ II—21)—DEBENTURE-HOLDERS' ACTION—USING COMPANY'S NAME.

Where receivers and managers have been appointed by the court in a debenture-holders' action brought for sale of the undertaking and liberty has been given the receiver to continue the business they may use the name and exercise the powers of the corporation for the fulfilment of contracts current at the time of their appointment and made in the ordinary course of the company's business.

[*Moss Steamship Co.* v. *Whinney*, [1912] A.C. 254, distinguished.]

4. SET-OFF AND COUNTERCLAIM (§ I D—20)—AS AGAINST ASSIGNEE—NON-FULFILMENT OF CONTRACT SUED UPON.

Where receivers and managers of a manufacturing company, appointed in a bondholders' action with power to continue the busi-

ness, proceeded to carry out the company's existing contracts for the supply of customers, but reserving the power afterwards to refuse to fulfil the same, their subsequent refusal to carry out a current contract gives rise to an immediate cause of action for damages against the company which the customer is entitled to counterclaim in an action for the price of goods sold and delivered under the contract, even as against assignees of the latter claim to whom it had been pledged as security for advances to the receivers as such, where notice of such assignment was not given to the customer until after the notice of refusal.

[*Sovereign Bank* v. *Parsons*, 24 O.L.R. 387, reversed.]

5. CORPORATIONS AND COMPANIES (§ VI A—306)—DISSOLUTION AND FORFEITURE—RECEIVERSHIP.

In the absence of a liquidation the *persona* of a corporation remains legally intact notwithstanding the appointment by the court of receivers and managers of the company's business made in a bondholders' action to enforce their security.

Statement

APPEAL from the judgment of the Court of Appeal for Ontario in *Sovereign Bank* v. *Parsons*, 24 O.L.R. 387, whereby the majority of that Court affirmed the judgment of BRITTON, J., at the trial, refusing to the defendants the set-off of damages claimed by them.

MR. JUSTICE R. M. MEREDITH, dissented in the Court of Appeal.

The Judicial Committee allowed the appeal with costs.

The Sovereign Bank sued as assignees of the receivers appointed in a bondholders' action for the Imperial Paper Mills Co., Limited, claiming the invoice price of goods purchased by Parsons *et al.* defendants.

The paper company had entered into divers contracts with the defendants for the manufacture and supply of paper. In an action brought by mortgagees for the bondholders of the paper company, receivers and managers of the company's business were, in October, 1906, and January, 1907, appointed by the Court, and carried on the manufacture of paper and supplied paper to the defendants. The receivers and managers, under the authority of the Court, borrowed certain money from the bank and assigned to the bank their money claim against the defendants for the price of paper supplied. The bank sued for the amount of the claim. The defendants alleged that the claim of the plaintiffs arose by virtue of certain contracts made by the paper company and assumed and adopted by the receivers and managers, and by reason of new contracts with the defendants and the carrying out thereof by the receivers and managers, and that the contracts with the company had not been carried out by the receivers and managers, and the defendants sought to set off the damages which they had sustained by the breach against the money claim of the plaintiffs.

Argument

Buckmaster, K.C., and *H. S. Preston*, and *G. L. Smith* (of the Ontario Bar), for the appellants, referred to *Young* v. *Kit-*

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chin, L.R. 3 Ex. D. 127; *Newfoundland Government* v. *Newfoundland R. Co.*, 13 A.C. 199, at 212, 213; *Mersey Steel and Iron Co.* v. *Naylor*, L.R. 9, A.C. 434; *Re Newdigate Colliery Co.*, [1912] 1 Ch. 468.

Sir R. Finlay, K.C., *Bicknell*, K.C. (of the Ontario Bar), and *Geoffrey Lawrence*, for the respondents, referred to *Moss Steamship Co.* v. *Whinney*, [1912] A.C. 254; *Burt* v. *Bell*, [1895] 1 Q.B. 276; *Reid* v. *Explosives Co.*, 19 Q.B.D. 264; *Midland* v. *Attwood*, [1905] 1 Ch. 357; *Re Newdigate Colliery Co.*, [1912] 1 Ch. 468; *Re Thames Ironworks Co.*, 28 Times L.R. 273; *Boulton* v. *Jones*, 2 H. & N. 564; Benjamin on Sales, 5th ed., 94.

The judgment of the Board was delivered by

Viscount Haldane, L.C.

VISCOUNT HALDANE, L.C.:—The appellants are paper merchants, and the respondents are bankers. The Imperial Paper Mills Company was incorporated under Ontario law in 1903. It has carried on the business of paper manufacture at Sturgeon Falls in Ontario, and has had numerous business contracts with the appellants from a date prior to October 27, 1906. A receiver and manager of the Paper Mills Co. was then appointed by the Court in a debenture-holders' action, but the business relations with the appellants continued. On September 14, 1906, the Paper Mills Co. had made an agreement with certain parties who included the respondents, under which the respondents and others, being already creditors, were to make certain advances for assisting the business of the company on the terms that the accounts for goods sold by the company should be hypothecated, and a certain supervision of the business should be established. On October 27, 1906, under the order already referred to, John Craig was appointed receiver and manager with liberty to continue the business in accordance with this agreement. By another order of January 9, 1907, George Edwards was appointed receiver and manager along with Craig, and they were given liberty to continue the business, but not to act as managers after June 1, 1907, without the leave of the Court.

At the date of the first appointment of the receiver and manager there were contracts for the supply of paper which were current between the appellants and the Paper Mills Co. These contracts were for the supply, periodically, of quantities of paper, and the contracts extended over considerable periods. The appellants' practice was from time to time to send directions to the Paper Mills Co. for the delivery of paper under the contracts. By notice in writing on June 17, 1907, the receivers and managers declared the contracts cancelled. Prior to

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this date, on June 14, the receivers and managers had assigned amounts due from the appellants for paper delivered to them to the extent of upwards of $15,000 to the respondents. Notice of this assignment was for the first time given to the appellants on July 27. The respondents claimed these sums as due to them. The appellants replied that the company had broken its contracts, and that the appellants had suffered heavy loss, the amount of which they claimed to set against the sums due to the respondents. It appears to have been agreed in the Courts below that if the appellants were justified in this claim the amount of their damages exceeded what was due to the appellants. The question in this appeal is whether the claim of the appellants to set off the damages they had suffered was a good one. The answer to this question depends upon whether the appellants are able to establish that the goods delivered to them were delivered under the old contracts with the company, and not under new contracts made with the receivers and managers: for, on the latter footing, the debt assigned would not be a debt due to the company, and it could be assigned free from any claim for damages for breach by the company of its contracts. The Ontario statute which enables assignment of choses in action is in substantially the same terms as is sec. 25 of the English Judicature Act, 1873, and enables such assignments to be made, but only subject to equities. No doubt, a claim for damages for breach would be such an equity if it arose under the same contract, and the point in the case is therefore, whether the appellants took the deliveries in respect of which the sums assigned were claimed under new and single contracts made with the receivers and managers, as to which there could be no such question of breach, or under the original contracts with the company for delivery over fixed periods, contracts which had undoubtedly been repudiated, and for breach of which the company was responsible.

In order to answer this question it will be convenient, in the first place, to look at the position in point of law of the receivers and managers. A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business. The company remains in existence, but it has lost its title to control its assets and affairs, with the result that some of its contracts, such as those in which it stands to an employee in the relation of master to servant, being of a personal nature, may, in certain cases, be determined by the mere change in possession, and the company

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may be made liable for a breach. But it does not follow that all the contracts of the company are determined even, to put the highest case, when a mortgagee acting under a power in his mortgage assumes control of the business of the mortgagor. The mortgagee may be in a position to say that he has authority to carry out in the name of the mortgagor contracts with a third person, *e.g.*, for the manufacture and delivery of goods; and the third person may have no right to allege a breach on the ground of mere change of those who actually manufacture and deliver the goods for the company. Such a contract usually involves no stipulation as to the identity of those by whom the work of the company is to be performed, and the legal *persona* of the company may continue to subsist. In the present case the receivers and managers, were, by the terms of the orders of the Court, obviously intended to carry on the actual business of the company with as little breach of continuity as possible; and there was no reason why they should not use the name and powers of the company for the purpose of fulfilling existing orders. It is, no doubt, true that *primâ facie*, any new contracts they made would ordinarily be made by them personally in reliance on their right of indemnity out of the assets, as happened in the recent case before the House of Lords of *Moss Steamship Co., Ltd.* v. *Whinney*, [1912] A.C. 254, where a new contract made by the receiver was held, as matter of construction, to have been entered into by him personally. But in the present case the contracts were contracts entered into before the receivers and managers were appointed, and had been entered into in the ordinary course of the business of the company in manufacturing and delivering paper; and there is, in their Lordships' opinion, no ground for presuming that the receivers and managers intended to act otherwise than in the name of the company to carry to a conclusion the business which was current, or that they meant to repudiate the obligations of the company. In the absence of a liquidation the *persona* of the contracting company remained legally intact though controlled by the receivers and managers.

When their Lordships turn to the evidence it appears to them that the course taken was to carry out the old contracts in this fashion. Mr. Craig states, in his cross-examination, the course of business:—

> Q. Then at the time you were appointed receiver and manager on the 27th of October, you found these other contracts (being those the subject of the appeal) that you have mentioned here in existence there in the books of the company? A. I found them there.
>
> Q. And you continued to ship paper under these as you had done before? A. There were certain orders that were there at the time which we filled, and then we received fresh orders from Parsons Brothers.

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The position of Mr. Craig must be borne in mind. He had been the managing director of the company, and under the financial agreement of September 14, 1906, already referred to he had been one of the three members of the committee of supervision and management. By the order appointing the receiver and manager he had been appointed on behalf of the debenture-holders, whose security included the entire undertaking and assets, but with liberty to continue the business pursuant to and in accordance with the agreement of September 14, and to borrow money for this purpose. It was apparently contemplated that the business should be carried on without change, and Mr. Craig himself took this view. For, replying to an inquiry from one of the appellants, he wrote on November 3, 1906:—

> The appointment of Mr. Tait and myself as receivers was made in a friendly application, and was for the purpose of carrying through the re-organization scheme. This was done with a view to prevent any creditor or bondholder from intervening, and perhaps, upsetting the arrangement unless he were bought out, and was done in the interest of the general body of bondholders and the creditors. There is not only no likelihood of the mills being shut down, but in this appointment every assurance that the mills will be run. The agreement made with the banks under which the mills have been running since the 15th September was confirmed by the Court and instructions given me to continue to act under it so long as seemed suitable to the receiver.

Mr. Craig's action was entirely in accordance with this view. He continued to treat the current contracts as in existence and to accept from the appellants a series of orders which specifically referred to these contracts and were based on the conditions as to price and delivery fixed by them. On January 10, 1907, Mr. Craig wrote a letter in which he was not bound to accept or fulfil the contracts of the company. But he intimated that he was unwilling to act on this view. He probably had in mind, that, if he did so, the company might be wound up and the business destroyed. In a letter of March 23, he again refers to this power which, as in possession of all the assets, he doubtless possessed. On April 1, he defined the position still more precisely. He wrote that the receivers were not bound by any engagement prior to the order of October 27, 1906, and that they had accepted the appellants' subsequent orders only as single orders, and that the contracts made prior to that date were null. He asked for a remittance on account and threatened that if it were not made the appellants' orders would not be fulfilled. To save the situation the appellants, without in terms accepting his view, made a remittance, and the

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placing of orders continued. The receivers wrote again on April 6, 1907, that,

> regarding the position of contracts with us, we were filling the contracts simply and solely as single orders as they came in, and, while not legally bound to accept any more we feel equally that we are not morally bound to do so in respect of our having filled some parts of them during the past few months. We certainly cannot possibly agree to confirm them, subject to a four or six months' notice. The situation is such that we cannot guarantee to accept another specification. Each specification as it comes in will be accepted or rejected as if it were a new order independent of any contract. Further than this we cannot go. We may say that morally we do not feel at all bound to continue these contracts, as, had you been acting as agents for the mills and studied the mills' interests at the time these contracts were placed, and previous, we should have been in such a position with regard to orders that we should not have been asked by you to take them at all, nor would we have taken them had we been asked. As you are well aware we were forced into these contracts against our will. These contracts are now being considered by one of my co-receivers with a view to ascertaining what is the exact return to the mill. We do not seem to be getting the net return which was proposed to us, and on faith of which we, relying on your statements, accepted them as a company. If the general run of these shew out, by reason of your deductions and debits, to be less to the mill than the figures we supposed we were getting when the contracts were originally accepted, you may be perfectly certain that the balance of the orders will be cancelled. Your action in sending forward claims has had the effect of bringing this question up for consideration.

On May 29, Mr. Craig again wrote, enclosing a formal letter in which the receivers asked to know what price the appellants would take to relieve the mill of certain of the current contracts, and adding that the suggestion was entirely without prejudice to the receiver's rights of cancelling these contracts without paying any compensation whatever. In the covering letter, Mr. Craig wrote that he thought it would be good policy on the part of the appellants to relieve the mill of these contracts, and that he had been advised that it was not incumbent on the company to continue them beyond such time as would suffice to give the appellants reasonable notice, and that steps were likely to be taken to terminate these contracts not later than August 1.

The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants. That such a breach would give rise to claims for damages against the company which might lead to

its winding-up, or to counterclaims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force. The inference is that as between the company and the appellants the contracts continued to subsist. The receivers and managers were exercising the powers of continuing the business given to them under the orders of the Court by taking no actual steps to determine the relations between the company and the appellants. The state of matters was one totally different from that in *Reid* v. *Explosives Co., Ltd.*, 19 Q.B.D. 264, where the appointment by the Court of receivers and managers was held, having regard to the character of the contract in that case, which was one of personal service, to have put an end to it. As Fry, L.J., however, points out in his judgment, at p. 269, even in the case of contract of service it by no means follows as matter of principle that all such contracts are determined when a mortgagee takes possession. It is, for example, far from clear that in the absence of a bankruptcy the mere appointment, although compulsory, of a manager to continue in the name of the mortgagor the existing management of an agricultural estate would effect such a disturbance of the owner's possession as to determine the agreements with the farm labourers employed on the property. In the case of contracts to deliver paper, such as existed in the present case, there appears to be no reason for saying that the possession of the undertaking and assets, given by the order of the Court for the express purpose of carrying on the business, put an end to these contracts. The company remained in legal existence, and so did its contracts, until put an end to otherwise.

Their Lordships think that the first repudiation that was made by the receivers and managers took place when the letter was written to the appellants on June 17, 1907, declaring the contracts cancelled. As the result, a right arose to counterclaim against the company, damages for breach, and neither the company nor its assignees could sue for the price of the paper delivered excepting subject to this counterclaim which was in existence when the notice of assignment to the respondents was given some time later, on July 30. It was agreed that, if this view was the true one, there could be nothing due to the respondents, by reason of the amount of the damage recoverable against the company exceeding the amount of the claim. Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the action dismissed. The respondents must pay the costs here and in the Courts below.

Appeal allowed.

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Re STEWART, HOWE & MEEK.

Ontario High Court, Middleton, J. December 21, 1912.

1. CORPORATIONS AND COMPANIES (§ V B 2—180)—STOCK SUBSCRIPTIONS—PAYMENT BY PROMISSORY NOTE.

Where a promissory note was given for an original subscription to the stock of a company in payment for the stock, the liquidator, on the winding-up of the company, cannot place the name of the maker of the note upon the list of contributories, where the note had been transferred by the company to a *bonâ fide* holder.

2. CORPORATIONS AND COMPANIES (§ V F 4—276)—STOCK SUBSCRIPTIONS—PROCEEDINGS TO ENFORCE—ESTOPPEL AS SHAREHOLDER.

Where it appears that the president of a company subscribed to additional shares of stock in the company for the purpose of obtaining supplementary letters patent, and the shares were allotted to him at a shareholders' meeting at which he presided and the allotment was recognized by the directors, and supplementary letters patent were issued on the strength of this subscription, and it further appears that in the annual report to the Government the president was treated as a shareholder holding a certain number of shares of which the part allotted in question were unpaid, which report was verified by the oath of the president himself, the latter is properly placed upon the list of contributories in respect of his subscription, on the winding-up of the company, notwithstanding a subsequent by-law for conversion of common stock into preference stock to an amount which could not be made up without the shares in question, where the preference stock was not in fact issued.

3. CORPORATIONS AND COMPANIES (§ IV G 2—116*a*)—POWERS OF MANAGER—BOOKKEEPING ENTRIES.

The manager of a company, who, upon a proposed transfer of assets to another company, has himself charged on the company's books with various debts of the company, will not be liable as a contributory, on its winding-up, as having been guilty of misfeasance, where such charging of debts to himself was done merely as a matter of bookkeeping and the company was not thereby prejudiced.

Statement

APPEAL by the liquidator from the decision of Mr. Cameron, Official Referee, dismissing the application of the liquidator to place Charles S. Meek upon the list of contributories, and to make the said Charles S. Meek liable in respect of certain misfeasance and breach of trust in relation to the company.

The appeal was allowed in part.

W. N. Tilley, for the liquidator.

H. E. Rose, K.C., for Charles S. Meek.

Middleton, J.

MIDDLETON, J.:—Three distinct questions arise. First, it is said that Meek is liable in respect of seventy-five shares, parcel of the original subscription; secondly, that he is liable in respect of a further subscription of one hundred shares; thirdly, that he is liable in respect of certain moneys charged to him in the books of the company, of which he was at the time general manager.

Dealing with these in order—Meek subscribed for the 75 shares. He gave his promissory note for this amount, payable

to the company. The company transferred the note to another company, known as the Stewart, Howe & May Company, and this company claims to be the holder of it.

I think the note is payment for the stock, and that the referee was right in refusing to place Meek on the list of contributories in respect thereof.

The agreement entered into at the time of the organization of the company appears to be intelligible, and there is some ground for supposing that the facts connected with the organization of the company and the transfer of the note have not been adequately investigated. It may be that the officers of the company are liable for misfeasance in parting with this note, and it may be that the transfer of the note can be attacked. The liquidator has not attempted to assert liability on the part of Meek for misfeasance, except in respect of the one matter hereinafter mentioned; and the order should be modified so as to make it clear that the claim made against Meek for misfeasance, and which was dismissed by the referee, is the only claim for misfeasance as yet adjudicated upon, and that the dismissal is without prejudice to any other claim open to the liquidator to make.

The second claim referred to arises out of a totally different set of circumstances. The company was originally incorporated with a capital of one hundred thousand dollars. An increase of the capital to $150,000 was afterwards desired. The amount of stock subscribed was less than ninety per cent. of the original capital. By the Companies Act, 7 Edw. VII. ch. 34, sec. 13, subsec. (a), it is provided "that the capital of a company shall not be increased until ninety per centum thereof has been subscribed and ten per centum paid thereon."

The stock that had already been subscribed in this company, —except the 75 shares subscribed by Meek—had been paid for by the transfer of business assets from the Stewart, Howe & May Co., to the Stewart, Howe & Meek Co., and Meek had paid for his 75 shares by his note, which had been transferred to the Stewart, Howe & May Co.; so that not a dollar of cash had been put into the venture.

For the purpose of obtaining the supplementary letters patent, Meek subscribed for one hundred shares of stock. On the 9th of December, a meeting of the shareholders of the company was held, at which all the shareholders were present or represented. At this meeting the hundred shares were allotted to Meek, and it was directed that a stock certificate should issue to him. See minutes of the meeting of that date, attested by Meek himself as President. This allotment is also recognised by the directors—See minutes of directors' meeting of the same day.

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Upon the strength of this subscription, the application was made and the supplementary letters patent were issued; the necessary affidavit proving the subscription for more than ninety per cent. of the stock being made and lodged with the Department.

Thereafter—on the 23rd of January, 1909, Meek transferred a patent for a skirt supporter and waist holder to the company, in consideration of the allotment to him of 260 shares of the stock of the company as paid-up stock.

It does not appear from the minutes that this 260 shares includes the 100 shares for which Meek had subscribed.

In September, 1909, the company determined to increase its capital stock from $150,000 to $200,000. It was again necessary that ninety per cent. of the capital should have been subscribed; that is, 90 per cent. of $150,000. Meek treated himself, and his associates treated him, as a stockholder in respect of both sums, and application was made for the supplementary letters patent upon that basis. The papers deposited shewed that Meek was a stockholder in respect of this hundred shares upon which nothing had been paid.

In making the annual returns to the Government, as required by the statute, for the year 1908, Meek is shewn as a stockholder in respect of 891 shares, on which $10,000 is unpaid; and in the return made in February, 1910, he is shewn as a stockholder for 926 shares, on which $10,000 is unpaid. This proves conclusively that the $10,000 stock was not supposed to be part of the 260 shares allotted for the patent.

Meek himself verifies these returns, not merely by his signature, but by his oath; and his explanation that the amount was carried forward by a mere oversight cannot be accepted, as the returns were apparently prepared in typewriting, but a correction is made in ink, shewing the $10,000 as still due.

The learned referee has exonerated Meek in respect of this sum, because he says there was no stock which could be issued. At the time the stock was allotted and the resolution was passed directing its issue, there was stock. What took place subsequently is what the referee relies upon. I do not think it has any bearing upon the case. On the same day as the resolution allotting 260 shares—23rd January, 1909—more than six weeks after the 100 shares had been allotted on the 9th November, 1908—by-laws were passed for the purpose of converting some of the common stock into preference stock. Four hundred and forty shares were directed to be sold, allotted, and issued as preference shares.

If Meek was already the holder of the hundred shares and also the holder of the 260 shares, there were not 440 shares capable of being so converted.

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The referee seems to regard this as in some way rescinding the previous allottment of a hundred shares. I cannot follow this reasoning. The 440 shares never were in fact allotted: the whole scheme of flotation of these preference shares seems to have been abortive; and it was after this date that the solemn application was made for the increase of stock, in which Meek was shewn as the holder of the shares in question, yet unpaid. I think that the referee ought to have placed him upon the list of contributories in respect of this subscription.

There then remains the third matter. In the last agonies of the company it was proposed to transfer the assets to a new organisation. For the purpose of adjusting the books in connection with this transfer, certain amounts appearing to be due by two concerns were as a matter of bookkeeping charged to Meek. It is impossible to understand what was in the mind of the instigator of this transfer; but the bookkeeping entry does not, I think, amount to misfeasance. The company was in no way worse off if the transaction were made; and I cannot see anything by reason of which it can be said that this amounted to misfeasance which would make Meek liable.

The report in review will therefore be amended by holding Meek liable in respect of the ten thousand dollars, and will be affirmed in respect of the other two matters, and will be modified as above indicated so as to leave the liquidator free to prosecute any other charge of misfeasance.

As success is divided, I do not give costs.

Appeal allowed in part.

Re SEGUIN and VILLAGE OF HAWKESBURY.

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Dec. 26.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton and Riddell, JJ. December 26, 1912.

1. MUNICIPAL CORPORATIONS (§ II C 1—50)—BY-LAWS—HIGHWAYS.

Where the Ont. Municipal Act, sec. 632 (1) provides for notice of proposed by-laws for closing roads, the publishing of an intended by-law to sell the same is not such a notice as is required by the Act, and the by-law itself is irregular.

[See annotation to this case.]

2. MUNICIPAL CORPORATIONS (§ II C 1—50)—BY-LAWS—QUASHING UNNECESSARY BY-LAWS.

The fact that a by-law was unnecessary will not prevent the Court from quashing a municipal by-law if it be irregular.

[*Re Seguin and Village of Hawkesbury*, 6 D.L.R. 903, varied.]

3. HIGHWAYS (§ III—113)—DIVERSION—MUNICIPAL BY-LAW.

Where a by-law for closing a street at the instance of a railway company in exchange for new streets to be opened by them contained no provision for compensation as is required by sec. 629 of the Ontario Municipal Act, the Court will quash the by-law at the instance of the person to be compensated for the closing of the street unless the municipality agrees to pay such damage as may be awarded and to proceed in due course to have the amount fixed.

[*Re Seguin and Village of Hawkesbury*, 6 D.L.R. 903, varied.]

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RE SEGUIN AND VILLAGE OF HAWKESBURY.

APPEAL by the applicant Seguin from the order of Middleton, J., 6 D.L.R. 903, 4 O.W.N. 239, refusing motion to quash by-law No. 179 of the village corporation.

The appeal was allowed and the order varied.

A. Lemieux, K.C., for the appellant.

H. W. Lawlor, and *A. J. Reid*, for the corporation.

FALCONBRIDGE, C.J.K.B.:—I agree in the result.

Britton, J.

BRITTON, J.:—I agree in the result.

Riddell, J.

RIDDELL, J.:—In and through the town of Hawkesbury runs a branch of the Canadian Northern Railway, practically north and south. It is carried on trestles at the northern part of the town, adjoining the River Ottawa, which it crosses.

Recently the railway company determined to fill in, making an embankment, which is, of course, much safer than trestle-work. This eminently proper scheme the town was willing to assist so far as reasonable, and that willingness, instead of being made, as it was on this motion, a matter of reproach to the town, should rather receive commendation—the railway company instead of desiring to save money were to spend money to make their railway safer for passengers, etc.

The railway crossed Union Street near the river, and the company desired to fill in the street. The town at first intended to sell the street (or part of it) to the railway company; and gave the notices required by the Municipal Act, sec. 632, for that purpose. A change was made in the plan, and the by-law that was passed was not to sell the street, but to close it.

Union Street is a narrow and little frequented street near the Ottawa; the applicant Seguin owns certain land north of Union Street and west of the railway, and also an island on the river. What I have called the Main street [on a sketch made by the learned Judge] is one of the chief arteries of the town.

The by-law provided that the railway should open two streets of equal width with Union Street, the one west and the other east of the railway, and running from Union Street to the Main street. No provision was contained in the by-law for compensation to those injured. Seguin moved to quash the by-law; my brother Middleton refused the application (November 7th, 1912), and this is an appeal from that decision.

In the Municipal Act, sec. 632 (1) provides for notice of proposed by-laws for closing roads—it cannot be successfully contended that notice of an "intended by-law" to close a road is given by publishing a notice of an intended by-law to sell it. And after a great deal of backing and filling, counsel opposing the appeal admitted that the by-law was irregular.

The next argument in support of the by-law was that it was

unnecessary. This argument seems to be based upon a misunderstanding of a remark of my learned brother in the course of his judgment. Mr. Justice Middleton, of course, did not state that the by-law was or might be unnecessary, making that fact a ground for refusing to quash it.

And my mind is wholly unable to understand why the fact of a by-law being unnecessary can help to support the by-law. If a by-law is necessary, there might be ground for sustaining it, but not the converse.

The contention that the by-law was unnecessary was pricked when, on counsel, (nominally for the town, in fact for the railway company), being asked if he would consent to the by-law being quashed—he at once answered in the negative.

Then we were told that Seguin was not in fact injured by the closing of the road, even if the town did close it. This is the usual contention of municipal lawyers and officers—but that is a question of fact which a court does not decide either on affidavit or on statement of counsel.

The next contention is that any harm that can accrue to the applicant, will not be due to the town closing the road, but to the railway filling it in with its embankment. I do not agree. As soon as the by-law was passed and became effective, Seguin had no right on the closed part of the street; he might, indeed, probably without interruption go along the street if and so long as this was physically possible, but it would not be as of right. If he sued the railway company the company would say that they had not interfered with any right he had—and their answer might well be considered perfect.

In *Canadian Pacific Railway* v. *Brown* (1908), 18 O.L.R. 85, affirmed *sub nom. Brown Milling Co.* v. *Canadian Pacific R. Co.*, 42 Can. S.C.R. 600, I thought that when a person was in possession of land belonging to another, and with some kind of expectation that a lease formerly held would be renewed, he might claim damages from a railway company who took the land; but the Court of Appeal did not agree, nor the Supreme Court. All the railway company will do here they will do with the consent of the municipality, which now may exclude Seguin from the street. At all events, Seguin should have the right to test the question if so advised.

The town refused to agree that if Seguin should sue them for damages, they will not set up or rely upon sec. 468 of the Municipal Act—the by-law standing, he could not succeed in an action at law. No provision is made for compensation to him, as there should have been under sec. 629—and it would be grossly unjust to deprive him of all relief.

I do not think that the municipality can complain if we place them in the position they would have been in had they

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proceeded regularly—had they proceeded regularly, compensation would have been provided for. If this were done, the applicant will be in as good a position as if the by-law were quashed—his damages would be assessed by arbitration and not by a jury, that is all the difference. If then the town will undertake to proceed at once to determine the compensation which should be paid to Seguin, and to pay it when determined, the by-law need not be set aside. In this case, as the applicant has been fought on all grounds and at every point, the town should pay the costs here and below.

If this undertaking be not given in 14 days, the by-law will be quashed with costs here and below.

We give no opinion whatever on the validity of the order of the Railway Board. If the by-law is quashed, the applicant must take his chances as to any defence based on that order.

Order varied.

Annotation

Opening of highways

Annotation—Highways (§ I A—8)—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways and streets.

SCOPE NOTE.

This note excludes the remedies for and the practice and procedure in taking advantage of any irregularity in proceedings for the opening and closing of highways and streets. It merely states irregularities which have occurred in such proceedings and the effect of such irregularities upon such proceedings, but the methods by which advantage may be taken of such irregularities are omitted.

GENERAL STATEMENT.

It is the general principle of law in proceedings of this character that the opening or closing of a highway or street must be done according to the statute, and all statutory enactments must, as a rule, be literally followed and, although a statutory proceeding for the establishment of a highway over private land may be totally defective, yet if the public used the *locus in quo* as a highway and the public authorities recognized is as such for the requisite statutory period it becomes such by prescription, the user and recognition generally being referable to a claim of right in the public: *Elmira Highway Commissioners* v. *Osceola Highway Commissioners*, 74 Ill. App. 185; *Richards* v. *Bristol County Commissioners*, 120 Mass. 401.

Where selectmen of several towns are authorized and empowered by statute to lay out ways for the use of those towns, the act is to be done by them independently and without any direction, and, therefore, a town vote directing the selectmen to lay out a particular town way is unauthorized and improper: *Kean* v. *Stetson*, 5 Pick. (Mass.) 492.

Under a statute prescribing that where there shall be an occasion for a highway, the selectmen are empowered, on application made to them, if they see cause, to lay out the same, it was held that a road was not

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Annotation *(continued)*—Highways (§ I A—8)—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways and streets.

legally established where a town, at a meeting called merely for the purpose of finding out if it would instruct the selectmen to lay out the road, voted so to instruct, and the selectmen returned that pursuant to the vote they did lay out the road: *State* v. *Newmarket*, 20 N.H. 519.

Where a town passes a vote that certain persons have liberty to make a road, but nothing of importance towards the execution of this vote is afterwards done, the vote is a mere license, and must be executed and the road made in a reasonable time and manner for public travel, or the vote will cease to have any efficacy, and consequently a highway laid out under these conditions will be illegally constructed: *Curtis* v. *Hoyt*, 19 Conn. 154, 48 Am. Dec. 149.

NOTICE.

Statutory proceedings to establish highways generally provide that notice of a proceeding of the commissioners shall be given to those interested therein, or those over whose lands they are about to make the location; and a statute, providing for notice of proceedings to establish a highway, which statute provides for such notice to those interested therein as the Court shall order, leaves to the discretion of the Court only the mode in which the notice shall be given and the Court has no right to omit the giving of the notice entirely: *Shelton* v. *Town of Derby*, 27 Conn. 414.

And it has been held that notice of proceedings to establish highways is a matter of right to the owner of land through whose property a public road may pass: *Plymouth* v. *Barrows*, 5 Kulp (Pa.) 115.

It is immaterial that the owner knew of the view if he was not properly notified thereof: *Re Grapevine Road*, 18 Pa. Co. Ct. 637.

The omission in a special Act of any provision for notice of a meeting of the commissioners appointed to locate the road does not invalidate the Act where the provision of the general statute relating to highways regulates the manner of giving notice: *State* v. *Hogue*, 71 Wis. 384.

And under the construction given some of the statutes, the required notice of proceedings to establish highways is a condition precedent to action on the part of the commissioners and in its nature jurisdictional, failure to give notice invalidating the proceedings: *Town of Audubon* v. *Hand*, 231 Ill. 334; *People* v. *Smith*, 7 Hun. (N.Y.) 17; *Greenwood Township Road*, 23 Pa. Co. Ct. 85.

But a notice to one of the occupants of land affected is insufficient: *Austin* v. *Allen*, 6 Wis. 134.

However, notice of the proceedings to establish a highway relates not so much to the laying out of the route as to the compensation, and the omission to give notice is merely a matter of complaint by the person neglected, and a report of commissioners will not be set aside upon the ground that the notice to the selectmen and landholders, of the hearing was insufficient, in the absence of anything to shew that anyone was prejudiced: *The Petition of Ford*, 45 N.H. 400.

Some definite point or locality must be given and stated in the notice, and the sight of a proposed road "one mile long" is not such place or locality. *Town of Audubon* v. *Hand*, 231 Ill. 334.

And a notice of the place of meeting "as the sight of the proposed road

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Opening of highways

Annotation *(continued)*—**Highways (§ I A—8)—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways and streets.**

in said town" is too indefinite, and proceedings based thereon are void: *Hammon* v. *Highway Commissioners*, 38 Ill. App. 237.

And a notice must even describe the starting-point of the road to be laid out; but a notice of the meeting to finally determine on the laying out of the road which fails to describe the starting point of the road with certainty, is not fatally defective where it refers to the petition in which the route is clearly described, and the party objecting has not been misled, it being held, however, that the notice must describe the land included in the proposed highway: *Behrens* v. *Melrose Highway Commissioners*, 169 Ill. 558.

A notice must likewise be authenticated by a responsible signature, which means either the clerk, the viewers, a person interested, or some other responsible person or persons (*Springfield Township Road*, 6 Del. Co. (Pa.) 94), and a notice of hearing signed by the chairman of the board is sufficient where the statute does not direct by whom it shall be signed: *Pearce* v. *Wolfborough*, 37 N.H. 286.

So a notice signed by a majority of the committee and duly served upon the landholders interested is sufficient: *Goodwin* v. *Weathersfield*, 43 Conn. 437.

But in the absence of a provision to the contrary, notice need not be given in writing if the owner is notified personally and attends the survey: *Humboldt County* v. *Dinsmore*, 75 Cal. 604.

A rule requiring written notice of a road view to be given to the owner or occupier of lands is not complied with by giving verbal notice to the tenant: *Clinton Township Road*, 3 Pa. Co. Ct. 170.

Personal notice is necessary where required by rule of Court: *Re Tower Township Road*, 6 Pa. Dist. 686, or by statute: *Damon* v. *Baldwin Town Board*, 101 Minn. 414.

However, where personal notice is required, such notice to owners residing out of the city is unnecessary, notice by mail being reasonable notice: *Crane* v. *Camp*, 12 Conn. 464.

But where notice of proceedings by viewers to lay out a road was served on one who was the agent of a corporation, it was held not to bind the corporation where it did not purport to be notice served upon the corporation's agent: *Evans* v. *Sentana Live Stock, etc., Co.*, 81 Tex. 622.

On the other hand, however, under some statutes, personal notice is not necessary: *Murphy* v. *Beard*, 138 Ind. 560.

And it has been held that notice by posting or by publication, or by advertisement, is sufficient: *Frizell* v. *Rogers*, 82 Ill. 109, and so publication of a notice by highway commissioners of the time and place appointed for viewing a proposed road, in a newspaper printed within the county, is sufficient: *Re Sterrett Township*, 114 Pa. St. 627.

One Court goes so far as to hold that the appointment of commissioners and viewers and their visiting the proposed ground to be circumstances of such validity of the Act as to put all persons on their guard that they may know when to attend Court to be heard: *Re Baldwin Township Road*, 3 Grant (Pa.) 62.

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Opening of highways.

Annotation *(continued)*—Highways (§ I A—8)—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways and streets.

The return or record of a proceeding must shew that a proper notice of the meeting of commissioners or viewers has been duly served, published or posted; otherwise the proceedings will be void: *Skinner* v. *Lakeview Avenue Co.*, 57 Ill. 151.

Thus a committee appointed by the Court to locate a highway must in their return state specifically what notice was given persons interested: *Lancaster* v. *Pope*, 1 Mass. 86, and this must appear by the return and cannot be proved *aliunde*: *State* v. *Rynier Van Geison et al.*, 15 N.J.L. 339.

A municipal by-law to close a public highway, the passage of which is authorized by statute, is *ultra vires*, unless passed in compliance with the provisions of the statute including such requirements as notice to the owners of the land abutting on the highway in question and public notice by advertisement: *Re Bassano*, 7 D.L.R. 601.

In the case last cited Walsh, J., says:—"When a by-law is prescribed by the statute as the method for exercising the power thus given to the corporation, such power can only be exercised in that way and effect cannot be given to a mere resolution especially when, as in this case, the wording of the resolution is quite inadequate to effect the closing of the streets"; and in that connection the Court further said: "The power of a town to close a public highway is conferred by sub-sec. 17 of sec. 163 of the Towns Act, which authorizes the passing of a by-law for that purpose. This sub-section contains many provisions, which must be complied with before the by-law can be passed, for notice to the owners of lands abutting on the highway and public notice by advertisement."

ACTS OF COMMISSIONERS, WHEN DEFECTIVE.

Proceedings of two of three commissioners who are authorized to view a road are erroneous where one of the three does not qualify or act: *Re Wells County Road*, 7 Ohio St. 16.

But a majority of the commissioners may decide and make a report: *Babcock* v. *Lamb*, 1 Cow. (N.Y.) 238, *Jones* v. *Andover*, 9 Pick. (Mass.) 146.

This may not be done, however, if the statute expressly otherwise provides: *Colony* v. *Dublin*, 32 N.H. 432.

ACTS OF COMMISSIONERS; IMPROPER CONDUCT.

Any irregular conduct or improper evidence which appears to have unduly prejudiced the determination of the commissioners will furnish grounds to set the determination aside; and so a report of an alias jury is set aside where it appears that the jury were informed that a previous jury had granted a road over the same route and that their report had been set aside for a technical error and the names of the former jurors given: *Re Willistown Township Road*, 5 Pa. Co. Ct. 303.

Furnishing transportation to a viewer is no ground for setting aside the report of viewers appointed for the opening and construction of a highway: *Re Springfield Township Road*, 24 Pa. Co. Ct. 625; *Blake* v. *Norfolk County Commissioners*, 114 Mass. 583, but, if the entertainment is of such a nature as to unduly influence the commissioners or viewers, it may be ground for setting aside their proceedings, as where commissioners

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Opening of highways

Annotation (*continued*)—Highways (§ I A—8)—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways and streets.

while engaged in the hearing of a petition for a highway repeatedly drank spirituous liquors furnished them by petitioners and the commissioners reported in their favour: *Re Newport Highway*, 48 N.H. 433.

And so the report will be set aside where the entertainment is in violation of a rule of Court: *Re Sadsbury Road*, 9 Pa. Co. Ct. 521.

But, although the entertainment of a highway committee may invalidate proceedings by them in laying out a highway, if properly objected to, parties who proceed with the hearing without objection, cannot, after a decision adverse to them has been rendered, raise the objection for the first time: *Williams* v. *Town of Stonington*, 49 Conn. 229.

WHEN AND WHERE COMMISSIONERS MUST MEET.

If the commissioners meet to transact business at a time or place different from that designated by the notice or order of Court, their proceedings are void and will be set aside: *Hobbs* v. *Tipton County Commissioners*, 103 Ind. 575.

LACHES IN OBJECTING AND WAIVER OF OBJECTION.

An appeal to the supervisors on the merits is a waiver of the irregularity in failing to adjourn from day to day: *Allison* v. *Highway Commissioners*, 54 Ill. 170.

And a failure to object in due time to the report of a road commissioner upon the route of a proposed highway, because of his failure to comply with the provisions of the statute directing him to report whether a yard, garden, orchard or part thereof, will be taken if the road is established, is a waiver of such objection: *Jeter* v. *Board*, 27 Gratt. (Va.) 910.

But where viewers, before they were sworn, viewed a greater portion of the road, such irregularity is not a matter which counsel could waive, and hence his silence at the time cannot estop the party interested from making the objection afterwards: *Re Foster Township Road*, 1 Kulp (Pa.) 249.

And also the appearance by one claiming to be the attorney of the land owners and his argument against the necessity of the highway has been held not to be a waiver of objection to the failure of the commissioners in their report to follow the description of the road as stated in the application, pursuant to statute: *People* v. *Stedman*, 57 Hun. (N.Y.) 280.

But where parties entitled to notice of the time and place of the meeting of commissioners or viewers appear and make no objection at the time to the notice or service, such appearance is a waiver of the right to notice: *Re Byberry Road*, 62 Phil. (Pa.) 384.

And appearing to protest against the report of the jury is not a waiver of notice: *McIntyre* v. *Lucker*, 77 Texas 259.

Thus it has even been held that a land owner appearing at a meeting of viewers appointed to lay out a road and assess damages and filing exceptions to their report, does not thereby waive the statutory right to notice of the meeting: *Beck* v. *Biggers*, 66 Ark. 292.

And attendance as a witness in obedience to a subpœna is not deemed a waiver of notice: *People* v. *Osborn*, 20 Wend. (N.Y.) 186.

So also where a rule of Court required notice of the time and place

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Annotation (*continued*)—Highways (§ I A—8)—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways and streets.

of the meeting of the viewers to be given to the supervisors of the township or townships in which the road was located, such notice was not waived by the casual presence at the meeting of the viewers of one of the supervisors, his presence having no reference to the view: *Re Upper Fairfield Township Road*, 11 Pa. Co. Ct. 396.

But an objection to the proceeding upon some specified ground is a waiver of objections upon other grounds: *Commonwealth* v. *Westborough*, 3 Mass. 406.

And although the statutory requirements as to time of notice has not been complied with, one who having informal notice of a meeting allowed the road to be made and expenditures to be incurred is estopped to deny the sufficiency of the notice: *Rutland* v. *County Commissioners of Worcester*, 37 Mass. 71.

WHO MAY OBJECT.

County commissioners entitled to notice of road view where the county must pay the damages, have the exclusive right to object to the want of such notice: *Re Friendsville, etc., Road*, 60 Pa. Co. Ct. 172.

And under a statute directing the committee to give reasonable notice to the selectmen of a town in which a highway is to be laid out, failure to give notice to the selectmen of one of two towns, both of which were parties to the proceedings, cannot be taken advantage of by the other: *Windsor* v. *Field*, 1 Conn. 279.

Thus where a rule requires written notice of a road view to be given to the owners or occupiers of land, and the only notice given was verbal notice to a tenant, no objection can be made thereto, except by the owner: *Re Clinton Township Road*, 3 Pa. Co. Ct. 170.

WHO TO MAKE REPORTS.

Where an order of commissioners of highways, consisting of three members, is signed by only two without a meeting of the three or notice to the third, it is void unless it appears that the town had only two commissioners: *People* v. *Williams*, 36 N.Y. 441.

But an order is valid, although made by two of three commissioners, in the absence of any finding that the third did not meet and deliberate with the others: *Marble* v. *Whitney*, 28 N.Y. 297.

COMMISSIONERS' RETURN OR REPORT, WHAT TO CONTAIN.

Proceedings to lay out a highway are defective if the commissioner's report to the town clerk does not shew that the hearing upon the application took place: *Moetter* v. *Grosse Pointe Highway Commissioners*, 39 Mich. 726.

However, the report of road viewers need not affirmatively state that the viewers met at the time and place designated. In the absence of evidence to the contrary or of an inference to be drawn to the contrary from something on the face of the report, it will be presumed that the jury did their duty: *Re Grantwood Township Road*, 27 Pa. Super. Ct. 549.

And under a statute providing that surveyors appointed to locate a highway, or a majority of them when they had met, on due proof of the performance of certain conditions precedent, shall view the premises, etc.,

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Annotation *(continued)*—Highways (§ I A—8)—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways and streets.

the return signed by four of the board composed of six, reciting that on the appointed day two of them met and on due proof that proper notices were given, adjourned, etc., is insufficient, since it shews the required proof to have been made before less than a majority: *State* v. *Hall*, 17 N.J.L. 374.

Under a statute providing that the commissioners of highways "shall, at the time appointed, proceed to view the premises described in the application and notice, and to ascertain and to determine the necessity for laying out, altering or discontinuing a highway pursuant to such application, etc., "it is a jurisdictional prerequisite that the commissioners' return shall state positively that he has ascertained and determined the necessity for taking the land for purposes of highway: *Truax* v. *Sterling*, 74 Mich. 160.

But the rule is otherwise in California: *Humboldt County* v. *Dinsmore*, 75 Cal. 604.

And in New Jersey, in laying out a road, the requirements of the statutes that the surveyors shall so lay out "as may appear to them will be more for the private and public convenience," and "in such manner as to do the least injury to private property," are matters of substance, and the return of the surveyors must shew a compliance with them: *State* v. *Lippincott*, 25 N.J.L. 435.

So also the report must shew a finding as to the damage which would result to property owners from the establishment of the proposed road: *Commissioners* v. *Coons*, 240 Mass. 249.

And this is so although the viewers were ignorant of the law: *State* v. *Everitt*, 23 N.J.L. 378.

Thus where road viewers laid a road through the land of an owner whose name did not appear upon the draft and to whom no damages were awarded and from whom no release was reported, on the reasonably prompt application of such owner of proof that he had no actual notice of the proceedings, confirmation of the report was denied: *Re Kingston Township Road*, 8 Kulp (Pa.) 489.

On the other hand, however, it has also been held that proceedings of county commissioners in laying out a highway will not be quashed because no damages are awarded to the owners of the land taken, as it is to be presumed that they decided that no damages were sustained: *Detroit* v. *Somerset County Commissioners*, 52 Me. 210.

The report of viewers and the draft accompanying it must specify the quantity of land taken, the length and width, the courses and distances, etc., so clearly that the report thereof will define the laying out of the street, the grade thereof, and the boundaries of the property thereon: *Boyington* v. *Holmes*, 5 N.B. 74; *Re Yardley Borough*, 22 Pa. Co. Ct. 179.

And under some statutes the report must state the width of the road: *Boyington* v. *Holmes*, 5 N.B. 74; *Matter of Fencay*, 20 Misc. (N.Y.) 272.

But it has been held that in laying out a proposed road, an uncertainty in one part of a commissioner's report is not fatal, if from the whole may be gathered a description leaving no difficulty in locating the road: *Todemier* v. *Aspinwall*, 43 Ill. 401.

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Annotation (*continued*)—Highways (§ I A—8)—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways and streets.

COMMISSIONERS' REPORTS, WHEN TO BE FILED.

Statutes requiring the report of proceedings to be made and filed within a specified time have sometimes been held to be merely directory: *People* v. *Lake County*, 33 Cal. 487.

On the other hand, if the report is not so returned before the date specified, the proceedings have been held to be irregular and the report may be set aside: *Re Servickley Township Road*, 26 Pa. Super. Ct. 572.

So a report of surveyors presented to Court on September 2nd when the time for holding the Court at the term to which it had been returnable expired on August 27th is too late: *Re Upper Mahonoy Township Road*, 12 Pa. Co. Ct. 613.

And the failure of viewers to report at the next term of Court without a continuance of the order is fatal: *Re Nanticoke Borough*, 4 Kulp (Pa.) 513.

Thus where the report of a surveyor under 50 Geo. III. ch. I. sec. 3, was dated July 3, 1837, and the notice given stated that it would be laid before the Quarter Sessions on the 11th and so far as appeared nothing was done at the July Sessions, but the report was confirmed at the October Sessions following, it was held that the highway had not been legally established as the power of confirmation had been confined to the Sessions next after the report, and the fact of user was immaterial, the presumption of dedication being rebutted by the proof of the origin of the road: *Regina* v. *Great Western Railway Co.*, 32 U.C.Q.B.R. 506.

Approval *nunc pro tunc* at a subsequent term will not remedy this irregularity: *Re Gibson, etc., Mill Road*, 37 Pa. St. 255.

On the other hand, the confirmation of a report may be entered at a subsequent term where objections have delayed a final decision: *Re McConnell's Mill Road*, 32 Pa. St. 285.

WHO MAY TAKE ADVANTAGE OF DEFECTS.

Only those persons owning land through which the route of the state road is located and who consider themselves aggrieved can object to the approval of the commissioners' report: *Bernard* v. *Callaway County*, 28 Mo. 37.

WHEN OBJECTIONS MUST BE MADE; ESTOPPEL.

Inaction during expenditure works an estoppel: *Re Woolsey*, 95 N.Y. 135.

Objections made or delivered after judgment are invalid: *People* v. *Mills*, 109 N.Y. 69.

On the other hand, a consent to a private road does not estop a person from objecting to a public road: *Pagel* v. *Fergus County Commissioners*, 17 Mont. 586.

However, the acceptance of damages estops the owner from objecting: *Hartshorn* v. *Potroff*, 89 Ill. 509; *Taft* v. *Commonwealth*, 158 Mass. 526.

And so a town may likewise be estopped the same as an individual: *Freetown* v. *Bristol County Commissioners*, 9 Pick. (Mass.) 46.

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Annotation

Opening of highways

Annotation (*continued*)—Highways (§ I A—8)—Establishment by statutory or municipal authority—Irregularities in proceedings for the opening and closing of highways and streets.

VACATING A ROAD.

Practically the same proceedings are required in vacating a road as in opening or establishing one, and it is almost universally provided that to authorize the local authorities to vacate a public highway, notice must be given: *Houpt* v. *Dutton*, 170 Ind. 69.

Sometimes, rarely, however, no notice is required: *Haynes* v. *Lassell*, 29 Vt. 157.

The owner of a parcel of land not fronting upon any highway and whose only outlet is a private way two rods wide belonging to him and extending therefrom to a public highway, is entitled to notice of proceedings to discontinue such public highway as much as if his whole parcel abutted upon it: *People* v. *China Highway Commissioners*, 35 Mich. 15.

But where a highway is laid out entirely over the lands of one who owns the land abutting on the north, the abutting owners on the south are not interested in the highway: *McCotter* v. *Town Council*, 20 R.I. 43.

And notice to an adjoining owner is necessary only when his land is affected thereby: *Sullivan* v. *Robbins*, 109 Iowa 235.

VACATING A HIGHWAY; REPORT.

Under the provisions of an Act whereby notice must be given to the supervisors of the town or towns affected by the roads to be vacated, a copy of such notice properly attached must be filed among the records of the Court having cognizance, and a failure to do so will be sufficient grounds for an application to set aside the proceedings: *Re Cutrain Township Road*, 33 Pa. Co. Ct. 328.

VACATING A ROAD; NOTICE REQUIRED.

In the absence of a legislative requirement on the subject, it is sufficient to post copies instead of the original of the notice of the presentation of the petition: *Vedder* v. *Marion County*, 22 Ore. 264.

And under a statute providing that proceedings for discontinuing a highway must be had after ten days' notice, such proceedings at a hearing on June 6th pursuant to notice given June 1st, are irregular and void: *Price* v. *Stagray*, 68 Mich. 17.

And in a municipal by-law having for its object the closing of a portion of a certain road, in which the word "by" was omitted, with the result that by strict grammatical construction of the by-law a former by-law dealing with the same road was declared closed, instead of the road itself, it was held that certain words in an enacting clause should be regarded as a parenthetical expression, and as descriptive of the portion of the road referred to, thus giving the by-law the meaning it was intended to have: *Esquimalt Water Works Co.* v. *City of Victoria*, 10 B.C.R. 193.

VACATING A ROAD; WAIVER OF NOTICE.

An appearance of a person entitled to notice operates as a waiver thereof, the same as in opening a road: *Chrisman* v. *Brandes*, 137 Iowa 433.

TOWN OF OUTREMONT v. JOYCE.

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Judicial Committee of the Privy Council. Present: The Right Hons. The Lord Chancellor (Viscount Haldane), Lords Atkinson, and Shaw, and Sir S. Evans. October 30, 1912.

1. HIGHWAYS (§ III—103)—IMPROVEMENTS — CONTRACT FOR EXEMPTION WITH DONOR OF LAND—"COST OF OPENING."

Under a grant by the landowner to the municipality of land for a public street, made upon condition that no special assessment should be levied upon the remainder of his land to defray the "cost of the opening" of the street and further providing that such condition should not be construed as exempting the lands from special assessments for drains and macadamising such street, the words "cost of the opening" must be held to include all the work of whatever kind necessary to render the contemplated street fit to be used by the public for the traffic usual in that community and the grantor is exempt from assessments for grading, filling in, rock cuttings and levelling undertaken by the municipality in respect thereof.

[*Town of Outremont* v. *Joyce*, 20 Que. K.B. 385, affirmed. As to irregular proceedings in compulsory openings of highways and streets, see *Seguin* v. *Hawkesbury*, 9 D.L.R. 487, and Annotation to same.]

Statement

APPEAL by special leave from a judgment of the Court of King's Bench for the Province of Quebec, *Outremont* v. *Joyce*, 20 Que. K.B. 385, affirming a judgment of the Superior Court, Davidson, J., in favour of the respondent, in an action brought against him by the appellants for a special assessment tax. An attempted appeal to the Supreme Court of Canada had failed for want of jurisdiction: see *Outremont* v. *Joyce*, 43 Can. S.C.R. 11.

The present appeal was dismissed.

Sir R. Finlay, K.C., *Lafleur*, K.C. (of the Quebec Bar), and *Geoffrey Lawrence*, appeared for the appellants.

Davidson, K.C., and *MacMaster*, K.C. (both of the Quebec Bar), who appeared for the respondent, were not called on to address their Lordships.

Their Lordships' judgment was delivered by

Lord Atkinson.

LORD ATKINSON:—This is an appeal by special leave from a judgment of the Court of King's Bench (appeal side), for the Province of Quebec, dated the 23rd March, 1910, confirming a judgment of the Superior Court of the said province dated the 12th October, 1909.

By this latter judgment the claim of the appellants to recover from the respondent a sum of $1,132.53 with interest at 4½ per cent. per annum was dismissed. The sum claimed was the first of twenty instalments of special assessments on land in the town of Outremont belonging to the respondent, in respect of the cost incurred by the appellants in "macadamizing" certain public streets of that town named Villeneuve street, Nelson street, and McNider street, upon which the

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said lands of the respondent abutted. The appellant municipality was incorporated in 1895, by an Act of the Legislature of the Province of Quebec (58 Viet. ch. 55), under the name of "The Town of Outremont." This statute was amended by 63 Viet. ch. 55 and 4 Edw. VII. ch. 58.

The facts and circumstances out of which the claim arises are, so far, as material, as follows: The appellants were minded to make three new streets in their town, to bear the names already mentioned, over land theretofore private property not subject to any public right-of-way. The respondent, who was a member of the municipal body, and had theretofore filled the office of mayor of the town, by an instrument in writing bearing date the 15th May, 1905, generously granted to the appellants, free of charge, certain portions of his land which were to form or help to form the sites of these new streets. The grant was made by the respondent and accepted by the appellants on this express condition, amongst others, that as to each of these streets respectively the appellants should "form a public street of a uniform width of 66 feet to be forthwith opened by the said town for use as a public street."

This instrument contained in addition a provision upon which the sole question for decision turns. It ran as follows: "That no special assessment shall be levied upon the remainder of the said lots Nos. 29 and 30, to defray the cost of the opening of the various streets hereinbefore referred to; but this shall not be construed as exempting the lands bordering on said streets from special assessments for drains, macadamising such streets and sidewalks therein. That the town shall pay the cost of this deed and its registration."

The three new streets have been made. The respondent has been specially assessed in respect of this land of his with the cost of all the word done upon these streets other than procuring the land to form them. The appellants contend that on the proper construction of the above-mentioned clause, the cost "of opening streets" merely means the cost of obtaining the land to form them, and, that as the streets cannot be macadamized till they have been prepared for the final operation of placing the broken road metal upon their surface, the work of all kinds involved in this preliminary preparation, such as grading, filling up hollows, cutting through rocks where necessary, and levelling, etc., are covered by the word "macadamising," and are comprehended in the work which it describes. The respondent, on the other hand, in his case, contends that the term "macadamising," which has been adopted in the vernacular of both the French and English languages, is not a term of doubtful meaning, but is used to denote the finishing process of covering a road with small broken stones to form a smooth surface. Their

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Lordships have not to decide on this appeal between these two constructions. The only question which they have to decide is whether the appellants' construction of this clause in the agreement is its true construction. If it be the true construction, then the only return which the respondent will receive for his generosity in making a present of his land to the appellants is probably this, that he will escape being assessed for the professional costs and charges incurred in vesting his own land in the appellants, and proclaiming to the public that the acquired soil was open and free to them to traverse. In all other respects he will stand in the same position as any other owner whose lands abutted on those new streets.

Their Lordships are, for several reasons, quite unable to adopt the construction of this clause contended for by the appellants. First amongst these reasons is this, that in the conditions contained in the agreement the use of the words "to be forthwith opened by the said town for use as a public street," evidently imposes upon the appellants the obligation to have done on the land granted, all the work of whatever kind, necessary to render the contemplated street fit to be used by the public for the traffic of the various kinds which, in such communities, is carried over public streets. It would be quite irrational to suppose that the respondent had contented himself with putting the appellants under terms merely to announce to the public that they might traverse the land which he had given to the municipality in the state in which it then was. Frontage rights on such a highway would be worthless. There is nothing in these conditions about grading, levelling, macadamising, or anything of that kind. The duty to do all these things is imposed by the words "to be forthwith opened by the said town for use as a public street," and yet, according to the appellants' contention, this phrase, so wide and comprehensive, is, when it comes to dividing the costs of the operations it includes, to be narrowed into meaning, little more than a mere proclamation to the public that they may traverse the land bestowed upon them by the respondent.

Again, the very words of the excepting clause above extracted seem to suggest of themselves that the words "to defray the costs of opening," mean the cost of making the streets fit for traffic, else it would be quite unnecessary to provide, as is provided, that these words are not to be construed as exempting the lands bordering on the streets from special assessment for "drains" and "macadamizing" the streets and sidewalks. The natural construction of such a clause would appear to their Lordships to be that but for these latter words the respondent's lands were to be exempted from assessment for the costs of all kinds of work necessary to make the road into public streets fit

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for such traffic as is usually carried over public streets in this town. On the consideration of the agreement itself, therefore, it would seem to their Lordships impossible to hold that the parties to it intended at the time at which it was entered into to give to the word "open" the meaning now contended for. An examination of the statute incorporating the appellants, and of the by-laws which they have passed supports this conclusion.

In the 20th sub-section of sec. 23 of this statute dealing with existing roads the word "macadamising" is used in a restricted sense, as opposed to planking—*i.e.*, making the surface of the road.

By sub-sec. 29 (*b*) the cost of making any of the improvements mentioned in the preceding sub-section is thrown on the owners of property abutting on any street, alley, boulevard, and, on referring to the earlier sub-section, it will be found that these improvements are "to open, widen, prolong, alter, grade, level, or otherwise make or pave any street, etc." Much reliance was placed on this enumeration. It was contended that it shewed that grading, or levelling, or paving a street were not included in the word opening. Their Lordships do not think this is a legitimate deduction from the use of the words relied upon. The sub-section deals with existing streets as well as with new streets, streets which have already been opened, as well as those about to be opened, and consequently naturally uses terms which apply to improvements to be effected on either description of street. That, however, does not at all lead to the conclusion that these words "grading," or "levelling," or "paving," are not, in the case of a new road, intended to be covered by the phrase "open for public use."

Lastly, the fourth of the by-laws passed on the 20th October, 1905, by the appellants dealing with all streets, all roads or sections thereof which may be required for public utility, old or new, uses the word "macadamising," and, this is the vital point, draws a distinction between macadamising and grading. There seems to be no warrant, therefore, for the contention that the word "macadamising" in the exempting clause of this agreement bears a meaning, not only inconsistent with the earlier provisions of the agreement itself, but differing altogether from that which it bears in the statute which incorporated the appellants, and in the by-law which they themselves have passed. Their Lordships are therefore of opinion that the construction contended for by the appellants is not the true construction of clause 6 of the agreement, and that the appeal fails and must be dismissed, and they will humbly advise His Majesty accordingly. The appellants must, in accordance with the undertaking given by them on the hearing of the petition for special leave to appeal, pay the respondent's costs of the appeal as between solicitor and client.

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Dec. 14.

Ontario High Court. Trial before Middleton, J. December 14, 1912.

1. Estoppel (§ III K—135)—By receiving benefits—Improvements on lands induced by promise to grant.

While a person who expends money on property in which he has no interest has, as a rule, no lien therefor against the owner, particularly where the expenditure was incurred independently by such person for good and sufficient reasons of his own, although resulting in direct advantage to the owner; yet where the latter stands by and allows the defendant to spend money on certain farm lands in the expectation that the owner will receive the benefit of it, such defendant is entitled to a lien for the increased value resulting from the expenditure; and this principle applies where the expenditure is made upon the faith of a statement by the owner of his intention to give the lands to the defendant who makes the improvement, and the defendant is entitled to a lien for the reasonable and just value of such improvements in so far as they are permanent.

[*Dominion of Canada* v. *Province of Ontario* (*Indian Treaty Case*), [1910] A.C. 637, 646; *Macclesfield* v. *Great Central R.*, [1911] 2 K.B. 528; *Unity Joint Stock Bank* v. *King*, 25 Beav. 72; *Plimmer* v. *Mayor, Councillors, and Citizens of the City of Wellington*, 9 A.C. 699; *Ramsden* v. *Dyson*, L.R. 1 H.L. 129, referred to.]

2. Improvements (§ I—4)—Compensation for, where benefit is taken advantage of—What are improvements.

Where the owner of farm lands by stating that he intends to give them to the defendant induces him to spend money thereon, such statement being made by the owner in expectation that he will receive the benefit of any improvements so made, and where the defendant is subsequently awarded a lien for the increased value resulting from such expenditure, an allowance will be made for the value of improvements of a permanent nature such as fencing and draining, but not for mere repairs to the dwelling-house which do not properly come under the caption of permanent improvements.

Statement

Action to recover possession of the east half of lot three in the second concession of Wallace.

G. Bray, for the plaintiff.

J. C. Makins, K.C., for the defendant.

Middleton, J.

Middleton, J.:—Catherine McBride was in her lifetime the owner of the lands in question, by virtue of a Crown patent dated the 12th August, 1848. She died on the 26th June, 1912. The right of the plaintiff as her administrator to possession of the land was admitted at the trial, although denied in the pleadings.

The defendant claims to be entitled to a lien upon the land for improvements said to have been made under mistake of title, by virtue of the statute, and also claims a lien apart from the statute.

The facts giving rise to the present situation are as follows: The deceased and William McNeil lived together as man and wife for many years, but they never intermarried, as they had both been theretofore married, and were living separate from

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their respective spouses. The plaintiff David McBride was the lawful issue of Catherine McBride and her wedded husband. The defendant is one of several children, issue of the unlawful union. As Catherine died intestate, the plaintiff will take her entire estate beneficially.

The late William McNeil, and Catherine, settled upon the lot in question many years ago. The patent for the west half was taken in the name of one of the sons of William. The patent for the east half was taken in the name of Catherine.

In the first place the defendant bases his claim upon the fact, as he says, that he thought the patent to the east half had been taken in his name. He says he inferred this from the fact that the patent for the other half had been taken in his brother's name; but he admits that upon his father's death some 24 years ago his mother claimed to be entitled to the land in question; and although he says he did not believe that she was entitled, he then made an agreement—or, rather, a series of agreements—with his mother by which he occupied the property with her and maintained her upon the property, paying the taxes. He says he made this arrangement because he thought that his mother had a life interest; a statement which is quite inconsistent with the idea that he was the patentee. He also admits that he was the custodian of his mother's papers, and that he had the patent in his possession for all these years. He said that he did not read the patent until recently.

The defendant had acquired title to the west half by purchase from his brother; and during the 24 years the whole lot was worked, as it always had been, as one farm. The house was upon the east half, and the barn was upon the west half. A well was constructed upon the west half, close to the boundary. Over the well a windmill was erected; two of the legs of this windmill being planted upon the east side of the boundary. A road was laid out upon the centre line, half upon each side of it; and considerable money and labour was expended upon making this road of value to both halves of the farm. Some clearing was done upon the east half, also some fencing.

I am unable to find that any of the improvements made were made under a mistake of title. I think it is obvious that for many years, probably ever since the father's death, the defendant has known the real position of the title. I am confirmed in this view by the defendant's own statement that he had arranged with his mother to make a will by which she would leave him this property, but that it had been put off from time to time and had been finally neglected.

I think that some of the improvements made upon the property have increased its selling value, and that as a matter of fairness the defendant ought to be allowed a lien for this increased selling value.

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I do not think that an allowance should be made for the road, as the proper inference from the evidence is that this road was constructed upon an agreement between the defendant and his deceased mother which amounted to a dedication of the land used for the road, the purpose being to have a common way, serving both the east and the west half. This may be so declared.

The fencing is an improvement of a permanent nature; so also is the draining.

The repairs to the house I do not think are in the nature of permanent improvements, but were mere repairs.

The replanting of the fruit trees, etc., is a trivial matter, and was in the nature of ordinary husbandry.

No claim can be sustained for the pump, well, or windmill, these being on the west half. It was arranged at the trial that the legs of the windmill which rest upon the east half of the land should be allowed to continue as they are.

As to the increased value, the evidence was unsatisfactory. The witnesses entirely failed to apprehend the real question: that is, the increase of the value of the land by reason of the improvements. The defendant goes so far as to claim a sum greatly in excess of the cost. Giving the matter the best consideration I can, I think $600 would be a fair sum to allow to cover all improvements made by the defendant.

There is no dispute concerning the defendant's right as to the $143.05, being amounts paid since the death of Catherine McBride, for which a claim ought to have been sent in to the administrator.

The general rule is well stated in Halsbury, vol. 19, p. 19: "A person who has expended money for the benefit of another, or on property in which he has no interest, has as a rule no lien in respect of such expenditure against such other person or against the owner of the property"—a rule which is quite in accord with the recent decision of the Privy Council in the *Indian Treaty case, Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637, at p. 646; where it is stated that there is no right to recover "expenditure independently incurred by one party for good and sufficient reasons of his own, but which has resulted in direct advantage to another." See also *Macclesfield* v. *Great Central Railway*, [1911] 2 K.B. 528.

To this general rule there is, I think, an exception, based upon the principle of estoppel. As stated by Halsbury (p. 21) "Where the owner of property stands by and allows a person to spend money thereon in the expectation that he will receive the benefit of it, such person is entitled to a lien for the increased value resulting from the expenditure." This principle was applied in a case by no means dissimilar from the present one: *The Unity Joint Stock Bank* v. *King*, 25 Beav. 72, where a

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father owning certain property allowed his sons to have possession of it and to make lasting improvements thereon. At that time he contemplated and intended at some future time to make over the lands to them; but he never did so. They were in truth mere licensees. The sons assumed to convey the lands to the bank, from which they had borrowed money. It was held by Sir John Romilly, M.R., that the father "could not have taken possession of that land again without allowing to his sons the amount of money they had laid out upon it." The same principle was acted upon in *Plimmer* v. *Mayor, Councillors, and Citizens of the City of Wellington*, 9 A.C. 699; a case arising upon a statute, which provided that in determining a compensation "the Court should not be bound to regard strict legal rights, but should do what is reasonable and just." *Ramsden* v. *Dyson*, L.R. 1 H.L. 129, recognizes both the rule and the exception, which I think exists. There the estoppel rested upon the fact that the owner stood by and allowed the defendant to spend the money, knowing that he did so upon the mistaken belief that he owned the land.

I think that Sir John Romilly's decision justifies me in holding that the same principle applies where the expenditure is made upon the faith of a statement by the owner of his intention to give the land to the person making the improvement.

In the case in hand, the defendant says that his mother encouraged him to improve the place by telling him that he would ultimately have the benefit of his labour and expenditure; and, although I might not have been disposed to accept the defendant's own statement, because he was manifestly ready to shift his ground as he thought would best serve his purpose, yet the corroboration of his statements by disinterested witnesses leads me to accept them.

I do not think that the defendant is entitled to enforce his lien by retaining possession of the land. Judgment will therefore be for possession, and declaring that the defendant is entitled to a lien upon the land for the sum of six hundred dollars. A time—say three months from the date of the judgment—should be fixed for payment, in default of which payment the defendant ought to be at liberty to proceed to enforce his lien by sale.

The judgment will further declare that the road between the east and west halves has been dedicated as a way between both half lots. It may also be declared that the defendant is entitled to the $143.05 as a creditor.

I think each party may well be left to pay his own costs.

Judgment accordingly.

GAST v. MOORE.

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Ontario Divisional Court, Boyd, C., Latchford, and Kelly, JJ. December 26, 1912.

D. C. 1912

Dec. 26.

1. TAXES (§ III F—148*a*)—SALE—OWNER'S RIGHT TO STATUTORY NOTICE.

Under statute 4 Edw. VII. ch. 23, sec. 165 (2), requiring a written notice, as prescribed by sub-sec. 6, sec. 46, to be sent to a non-resident owner of land, which has been sold for arrears of taxes, giving him thirty days' time in which to redeem his property, the notice must be sent to the last address lodged by the owner in the city treasurer's department; and the fact that the city treasurer had obtained outside information that letters addressed to the owner at the address on file in his office did not reach their destination, does not excuse sending the notice to the address given, in the absence of a direct revocation of the address filed by the owner himself, and it is immaterial whether he had in fact a different address in New York so long as the prescribed notice under sub-sec. 6, sec. 46, stood unrevoked.

Statement

APPEAL by the plaintiff from the judgment of Riddell, J., of October 21, 1912, in an action to set aside a tax sale of certain lots by the city of Toronto, and for an injunction restraining the defendant from selling or otherwise disposing of said lands. At the trial the action was dismissed with costs.

The appeal was argued.

J. M. Ferguson, for the plaintiff.

A. J. Anderson, for the defendant.

Boyd, C.

SIR JOHN BOYD, C.:—The scheme of the Municipal and Assessment Acts contemplates and provides for a continuity of official life in the finance department. This scheme provides for the raising of money for municipal purposes and is administered by various officers; treasurer, collector, assessor and the like; each has his own functions yet all are to work together for one and the same end. Pains are taken in the Acts to provide for the proper discharge of the fundamental work of assessment and all of its incidents to make sure of the identification of the ratepayers by name and address. This is to safeguard him in regard to all notices and demands requiring personal service or in the case of a non-resident service by post and registered letter. As to non-residents they can notify the department of their post office address and this is to be the continuing place of address till a change is made by the person himself. The address so communicated to the department is applicable to and is meant to apply to all stages of the proceedings in the imposing and collection of taxes even till the ultimate act comes when the lands are being disposed of to pay the arrears. This preamble is applicable to the case in hand.

This land was sold for taxes under the special power given by the statute of 1898, 61 Vict. ch. 55, sec. 16, by which lands

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of non-residents in the town of Toronto Junction might be sold if the taxes were in arrear for twelve months; as against the three years' grace given by the general Assessment Act.

The plaintiff had bought the lands in 1892 and had paid taxes for 15 years but made default in 1906 and 1907 and the sale took place in November, 1908. He did not know of the time being shortened by statute; as he had left Toronto for New York about 1894. Before leaving he notified the assessment department and the treasurer, of his New York address, "136 Liberty street," and this was never changed by him, although he some time after had the address, "80 John street, N.Y." The situation is correctly summed up by him in a letter addressed to the purchaser in March, 1910, when he found out that the land had been sold; he says: "I could hardly believe this as I had never been notified that this sale was going to take place, although my address had been with the tax collector all these years and he had always sent me assessment notices and the tax assessment."

He puts in as addressed to and received by him at 136 Liberty street, New York, assessment notices and demands for payment of taxes in a continuous series from 1906 to 1911, the last being in a registered letter postmarked in April, 1911. The only exception which appears in the evidence is two friendly letters sent by the treasurer after the sale and calling attention to it sometime in the year 1909 prior to the expiration of twelve months from the sale. These were addressed to Liberty street; were, I suppose, not registered and both came back to the treasurer, Jackson. No copies were kept and no such letters were received by the plaintiff. But the others, all of official character and I suppose registered, were duly received by him up to 1911.

The land was originally situate in the town of Toronto Junction; in 1908, its location was changed to the city of West Toronto, and in 1909, that city was annexed to and became a part of the city of Toronto. Jackson was the last treasurer who conducted the sale and after the absorption he was placed in a prominent position in the office of the city treasurer. After the sale the tax deed had to be given by the city of Toronto, and this was the first and only time that the city officials had to do with that West Toronto tax sale. The officer charged with the collection of arrears, Mr. Fleming, says he consulted Mr. Jackson the (former) treasurer, "in all these matters." Mr. Jackson told of his experience with the two unofficial letters and as a result without further investigation so far as appears the all-important notice required by the statute of 1909, 4 Edw. VII. ch. 23, sec. 165 (2), was posted to the address derived from the land titles office which was "T. J. Gast, manufacturer, Toronto." This notice, of course, came back to the treasurer and the last chance for redemption disappeared.

Jackson when asked as to the letters he sent being addressed to Liberty St., answered, "The only address I ever knew," p. 39.

Such is the precise fact; that is the only address he knew and that was the address lodged with the department by the plaintiff as his address and that direction the plaintiff never revoked.

The learned Judge finally held that the address of the plaintiff was not known to the treasurer (for the time being). That conclusion on this evidence I am unable to follow. The statutory notice called for by sec. 165, which is an essential pre-requisite before the right of redemption can be extinguished by a tax deed, says it is to be sent to the owner's address "if known to the treasurer." What is the meaning of that? Not his personal knowledge as an individual but the knowledge which he has or is required to have as an official. Here the new treasurer knew nothing *per se* of the address of a West Toronto taxpayer, but he was required to possess himself of the knowledge held by the department which was taken over by the city. The evidence is simply overwhelming that to the municipality of Toronto Junction, later West Toronto, and the treasurer, assessors and collectors and clerks of that place the address and the only address they would regard was that given by the plaintiff and known to them all and acted on by them all for nearly 20 years. None of the official notices in all these years had miscarried or been returned to the senders. Why was there a break as to this most important of all the statutory notices required? A lame excuse is given; granting the truth of all said by Jackson, at most it is that two private letters did not get to the address given by the plaintiff. That did not import a revocation; it may have given rise to a doubt as to whether the address was a right one and such a doubt may exculpate the officer or the treasurer from a charge of culpable mistake, but it does not exonerate either from fulfilling the statutory requirement. They knew the address given by the plaintiff and they should have acted as theretofore in sending the official notice to that and no other address. It would then have been received by the plaintiff and his land would have been redeemed. The mandate of the plaintiff was to send to that address—that was, as contemplated by the statute—the then current address and whatever the doubt may have been as to its reaching him that did not justify the ignoring of it and making search after a formal address in the records of the land titles office which was applicable to the whereabouts of the plaintiff in 1892. Had they exercised any reflection it would have been obvious that such a manner of picking and choosing could only serve to frustrate the real intention of the law, namely, to bring the exigence of affairs home to the person most interested.

The judgment should be reversed; the plaintiff's right to re-

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cover the land established on payment of the proper statutory charges claimable by the purchaser and other taxes paid by him, which may be settled by the registrar if the parties do not agree —and then be deducted from the costs of action and appeal to be paid by the defendant.

I agree with my brother Latchford and take advantage of the detailed account of the law which he has given and thereby avoid repetition.

Latchford, J.

LATCHFORD, J.:—The plaintiff purchased the lands in question in 1892, when he resided in Toronto. They were unoccupied lands; and at the time were comprised within the limits of the town of Toronto Junction, which became in 1908, by 8 Edw. VII. ch. 118, the city of West Toronto. About 1894 Gast went to the city of New York where he has since resided. The assessor for both municipalities was aware that Gast was a "non-resident"; and had notice that his address was 136 Liberty Street, New York.

Under the Assessment Act of 1892 (sec. 47) the assessor was obliged "before the completion of his roll to transmit by post to every non-resident who has required his name to be entered thereon, a notice of the sum at which his property has been assessed." A similar provision is contained in sec. 51 of the revision of 1897. In the Assessment Act of 1904, 4 Edw. VII. ch. 23, the notice is required—sec. 46, sub-sec. 3—to be transmitted by post to the non-resident's address, "if known." Each of the Acts of 1892 and 1897 provides that the owner of unoccupied land may give the clerk of the municipality notice of his address, and require his name to be entered on the assessment roll for the land of which he is the owner: 55 Vict. ch. 48, sec. 3; and R.S.O. ch. 224, sub-sec. 3. Sec. 46 of the consolidation of 1904 provides (sub-sec. 6) that in case any person furnishes the assessment commissioner, or if none, the clerk, with a notice in writing giving the address to which the notice of assessment may be transmitted to him, and requesting the same to be so transmitted to him by registered letter, the notice of assessment shall be so transmitted. Then the last cited enactment proceeds, "and any notice so given to the assessment commissioner or clerk, as the case may be, shall stand until revoked by writing." The provision in sec. 3 and sec. 46 of the earlier acts is: "It shall not be necessary to renew such notice from year to year, but the notice shall stand until revoked or until the ownership of the property shall be changed."

It is in evidence and uncontradicted that the plaintiff notified the treasurer of the town of Toronto Junction that his address was 136 Liberty Street, New York. Upon the collector's rolls of each of the three municipalities which had in succession the

right to impose and collect taxes on the lands of the plaintiff, that address appears unrevoked. To him at that address, as required, "if known," were sent the statutory notices of his assessment. To him at that address were also transmitted from time to time the "statement and demand of the taxes charged against him in the collector's roll," necessary to be addressed in accordance with the notice given by such non-resident, if such notice has been given: sec. 101 of 4 Edw. VII. ch. 23. Here I venture to express the opinion that the plaintiff was not required by sec. 101 to file a new notice of his address. His address stood unrevoked upon the assessor's and collector's rolls, and the statement and demand called for by the statute were required to be sent to him there. They were in fact so sent. The plaintiff produced at the trial statutory notices from the town of Toronto Junction for 1906 and 1907; from the city of West Toronto for 1908, and from the city of Toronto for 1909, 1910 and 1911—each and all addressed to him at the address standing unrevoked upon the assessment and collector's rolls of the several municipalities as the address and the only address of the plaintiff.

That he had in fact a different address in New York I regard as wholly immaterial. His address as formally made known to the municipalities, and as known and recognised by them—except in one instance—was 136 Liberty Street, New York, and all the statutory notices there addressed to him were duly received by him.

The exception referred to was made when, a year after the sale for taxes, the defendant applied to the city of Toronto for a deed of the lands which he had purchased. It then became the duty of the treasurer, under sec. 165, before executing the deed, to search in the registry office and in the sheriff's office and ascertain whether or not there were mortgages or other incumbrances affecting the lands, and who was the registered owner of the land.

The treasurer had the prescribed searches made. It appears there were no incumbrances. The plaintiff was registered as owner of the lands. Sub-sec. 2 of sec. 165 requires the treasurer to send to the registered owner by registered letter mailed to the address of such owner . . . if known to the treasurer, and if such address is not known to the treasurer, then to any address of such . . . owner appearing in the . . . deed, a notice stating that the . . owner is at liberty within thirty days from the date of the notice to redeem the estate sold. . . ."

Mr. Fleming, of the city treasurer's office, Toronto, has charge of the collection of all arrears of taxes. He made inquiry of James T. Jackson, who had been treasurer of Toronto Junction and West Toronto, regarding the plaintiff's address.

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Why he should have so inquired when the plaintiff's address appeared upon the assessment rolls of the city of Toronto at the time is not clear. Jackson told Fleming that he had written in the year following the sale two letters to the plaintiff at 136 Liberty Street, New York, and that these letters were returned as undelivered. Jackson did not make copies of the letters, or a record of their dates, nor did he preserve them when returned. His evidence regarding them is accepted as true by the learned trial Judge. It is not pretended, however, that these letters were more than friendly intimations to the owner that his lands had been sold, nor is it suggested that they were sent in conformity to the requirements of sec. 165.

Fleming's evidence is, as to his interview with Jackson, brief and may be quoted in full.

"HIS LORDSHIP: Who is Mr. Jackson? A. He was treasurer of West Toronto, and when we came to search through the lands in default the next year we consulted him with reference to them to see if he could give us any information and he told me that the two years he had sent it to——

"HIS LORDSHIP: Subject to objection.

"WITNESS: They had been returned from that address, 136 Liberty Street, New York, so all we could do was to send them according to what information was there."

His Lordship in his reasons for judgment summarises the conversation. "Jackson told Fleming what was the truth, as I find —that he had sent on notices (the letters) himself to Mr. Gast at this address, 136 Liberty Street, New York, and that they had been returned to the post-office, not having been called for. That being so the address of the owner was not known to the treasurer."

With great respect, I am of a different opinion. It seems clear to me Fleming was informed that, (1) the owner's address was 136 Liberty Street; (2) that letters so addressed to him were received back by the sender.

Mr. Fleming had knowledge that certain letters addressed to the plaintiff at 136 Liberty Street, New York, had not reached the plaintiff; but he also had knowledge that 136 Liberty Street, New York, was the address of the plaintiff. With that knowledge in his mind, he chose not to transmit to the plaintiff at that address the notice required to be sent under sec. 165, and addressed it instead to Toronto—a course he could properly pursue only when the address was not known to him.

The whole salutary purposes of sec. 165—the last opportunity for redemption "betwixt the stirrup and the ground," "inter pontem et fontem," would, in my opinion, be rendered nugatory if municipal treasurers were permitted in cases like this to disregard the unrevoked address of a non-resident owner of record

under the statute upon the books of the municipality—merely because they have information that letters or notices so addressed have failed to reach their destination.

The notice addressed to the plaintiff at Toronto was not in my humble judgment a compliance with the requirements of section 165. The plaintiff should be allowed in to redeem on the usual terms.

I would allow his appeal with costs here and below.

Latchford, J.

KELLY, J.:—I agree with the conclusions arrived at by my learned brothers. The failure of the city treasurer to recognize the New York address of the plaintiff, as it appeared in the books of the assessment office and in the books of the city of West Toronto, in use before its annexation to the city of Toronto, was fatal to the completion of a valid tax sale in the defendant.

Kelly, J.

The Assessment Act meets just such a case as this. The material parts of the Act as well as the facts of this case are sufficiently set forth in the reasons for judgment of my brother Latchford, and I need not repeat them.

The false step made in the treasurer's department was in ignoring the address of the plaintiff—136 Liberty st., New York, —as it appeared in the books of the municipality, and in relying on information received from James T. Jackson that two letters written by him to plaintiff at that address had been returned to the writer undelivered to the plaintiff.

These letters were written within a year after the time the tax sale was held. At the time of the sale the lands were within the city of West Toronto, of which Jackson was the treasurer. He says that 136 Liberty st., New York, was the only address of plaintiff that he knew, and that he received no letter notifying him of any change of address.

Subsequent to the sending of the letters by Jackson, statutory notices of assessment and demands of taxes were sent by the city to this same address, of the plaintiff and none of them were returned. With this is to be considered the fact that the books of the city of West Toronto and of the city of Toronto contained this address of the plaintiff, which the city recognised and made use of in sending these notices and demands, and that no written notice of change of address had been given, as required by 4 Edw. VII. ch. 23, sec. 46, sub-sec. 6.

The treasurer attaching this importance to the return of the letters sent by Jackson and ignoring the address shewn in the books, assumed that plaintiff's address was unknown and proceeded to carry to completion the tax sale on that assumption.

The plaintiff had a right to expect that until he gave the notice changing his address in compliance with the requirements of the Act, the address appearing on the books would be recog-

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nized, and that he would not be put in peril of losing his right to redeem his property until the thirty days' notice required by sub-sec. 2 of sec. 165 of the Assessment Act would be given to him at that address.

That the notice was not so given is, in my opinion, fatal.

The appeal should be allowed and the plaintiff be given the right to redeem the property in the manner and on the terms set out by the learned Chancellor.

Appeal allowed.

CURRIE v. HOSKIN.

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Dec. 20.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. December 20, 1912.

1. APPEAL (§ VII L 3—509)—TRIAL WITHOUT JURY—FINDINGS OF COURT—REVIEW—EVIDENCE MISAPPREHENDED OR OVERLOOKED, EFFECT.

While an appellate court should be loath to interfere with a finding of fact by a trial judge who has tried a case without a jury, the court will nevertheless scrutinize the evidence with great care where it appears that the trial judge has misapprehended the effect of the evidence or failed to consider a material part of it, and in this respect will not support his finding.

[*Beal* v. *Michigan Central Railway*, 19 O.L.R. 502, followed; *Nassar* v. *Equity*, 8 D.L.R. 645, 4 O.W.N. 340; *Kinsman* v. *Kinsman*, 7 D.L.R. 31; *Bateman* v. *Middlesex*, 6 D.L.R. 533, 27 O.L.R. 122, specially referred to.]

Statement

APPEAL by the defendant from the judgment of the Senior Judge of the County of York, in an action by real estate agents for $525, commission for lands alleged to have been sold by them for the defendant.

The appeal was allowed.

J. E. Jones, for the defendant.

R. L. Honeyford, for the plaintiffs.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B.:—I agree with the judgment of RIDDELL, J.

Britton, J.

BRITTON, J.:—I agree in the result.

Riddell, J.

RIDDELL, J.:—The plaintiffs are real estate agents who sue for a commission: the trial Judge, the Senior Judge of the County Court of the County of York, has awarded them $525, and the defendant appeals.

That the plaintiffs were authorised to sell is admitted; that they obtained a purchaser seems not to be disputed—and the only question is whether their authority had lapsed before they proffered the purchaser to the defendant.

The plaintiffs say that their employment began on the 27th

April; the defendant, the 20th April—that it was to last for 10 days is agreed upon.

When we find that the plaintiffs advertised in the Toronto Star this property for sale on the 26th April, representing that they had exclusive sale of it—we require some very clear explanation before coming to the conclusion that they had no authority to deal with the property till the next day. To my mind the attempted explanations do not explain—and they are not consistent. Currie says—"We had a right to because we had a similar property running at the same time: that did not have any reference to Mr. Hoskin's property . . . particularly." Then on being pressed and shewn that this property must be referred to, he says "Supposing I did: probably my partner did on his own accord: we almost thought we had it." His partner says that this property was what was meant, that it was advertised "just to draw the people's attention" before the defendant had authorized the plaintiffs to sell or offer the property for sale—that when they advertised they did not know what the plaintiff was asking for it, "nothing definite about prices," they did not know what the defendant was going to ask for the property.

The office diary is produced by the plaintiffs to support their story—and, of course, wrongly permitted to be so used. Evidence of a more self-serving character cannot be thought of: and there was no pretence that the book was needed to refresh the memory of the witnesses. But even with the book we have the evidence of the plaintiff Sterry that entries were made by him therein when he knew that he meant to go to law—that he took the book to his solicitor for that purpose and he adds, "When we were going over it, he (i.e. the solicitor) said 'You have got it (i.e. a particular entry) on the Wednesday' and I said, "That is easy enough; I can strike it out?' And he did strike it out on the Wednesday," the day which would not suit his case, and entered it on the preceding day, which would.

Books kept by a person having such a conception of their value, I can place no dependence upon, even if they were evidence. Moreover there are throughout circumstances of a most suspicious character which have not been explained.

We are always very loath to interfere with the finding of fact by a trial Judge: *Lodge Holes Colliery* v. *Mayor, etc., of Wednesbury*, [1908] A.C. 323, at p. 326; *Bishop* v. *Bishop* (1907) 10 O.W.R. 177. But we must reaffirm the principle laid down in *Beal* v. *Michigan Central Railroad* (1909), 19 O.L.R. 502: "Upon an appeal from the findings of a Judge who has tried a case without a jury, the Court appealed to does not, and cannot, abdicate its right and its duty to consider the evidence."

Where there is "some unmistakeable document or something

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of that kind" which shews that the Judge has made a mistake, or which he has failed to take into consideration, or to which he has not given such effect as it deserves, an appellate Court should scrutinize the whole evidence with great care: *Nassar* v. *Equity* (1912), 8 D.L.R. 645, 4 O.W.N. 340. Where the Judge has misapprehended the effect of the evidence or failed to consider a material part of it, the case falls within the *Beal* case: *Re Graham* (1911), 25 O.L.R. 5, at p. 9; *Leslie* v. *Hill* (1911), 25 O.L.R. 144; *Kinsman* v. *Kinsman*, 7 D.L.R. 31, and *Bateman* v. *Middlesex*, 6 D.L.R. 533, 27 O.L.R. 122, are recent cases in which the findings of a trial Judge have been reversed.

The County Court Judge in this case has paid no attention whatever to the advertisement of the 26th April—to me a most cogent piece of evidence—and I think we cannot support his finding in this respect.

Nor does the defendant "claim that his memory is not very good"—the only time he is asked about his memory he denies that it is defective. He does not pretend to have an independent recollection of dates without tracing them back and comparing them with other dates which he can verify—probably the same thing would be said of (and by) ninety-nine per cent. of reliable witnesses. And such a witness is in most instances to be preferred to one who boasts that he has the dates "by heart."

The period given to the plaintiffs was admittedly 10 days—that would expire 30th April—the time was extended "a few days," "a few more days," "no particular time mentioned, just a few more days," "You will have to hustle . . . you have got a few more days to work in, "three or four days were the words he used," "the words he used 'a few more days,'" "Mr. Currie says, 'we will get it through in three or four days,'" and he said, "it was all right."

No offer was obtained by the plaintiffs and tendered to the defendant till, at the earliest, the 7th May—I think the 8th May. In the diary of the 8th May is an entry, "Hoskin Sr. refuses to sell estate to client: says he sold property yesterday to his son." This is in ink and it is the entry "on the Wednesday" which would not suit the plaintiffs' case—it is scored through, and under Tuesday, May 7th, is inserted an entry in pencil "presented offer to Hoskin."

In any case, 7th or 8th, that was beyond the time for which the plaintiffs were authorised to sell—and their agency had come to an end.

I think the appeal should be allowed with costs and the action dismissed with costs.

Appeal allowed.

REX v. CLARKE.

ONT.

Ontario Divisional Court, Mulock, C.J.Ex.D., Sutherland, and Middleton, JJ. December 28, 1912.

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Dec. 28.

1. INTOXICATING LIQUORS (§ III F—82)—"DISPOSAL" OF LIQUOR IN PROHIBITED HOURS—PREVIOUS SALE CONTRACT.

Where a bottle of whiskey was sold by a licensed tavern keeper, during the business hours allowed by the Liquor License Act, and was "laid away" in the kitchen attached to the licensed premises, for the purchaser, who called for it on a Sunday when sales and disposals of liquor are prohibited by the Act, the tavern keeper by then delivering it to the purchaser is guilty of an illegal "disposal" thereof.

2. INTOXICATING LIQUORS (§ III A—56*a*)—WHAT IS A "DISPOSAL."

The word "disposal" in sec. 54, of the Liquor License Act is used in a liberal sense and may or may not be associated with selling, and any transaction respecting the physical change of possession of whiskey is included under the term "disposal" and is prohibited by the Liquor License Act, if accomplished during forbidden hours, and particularly if resorted to for the purpose of defeating the purposes of the statute.

Statement

APPEAL from the judgment of the Judge of the District Court of Algoma, dismissing an appeal from the decision of the Police Magistrate for the district, who acquitted the respondent from the charge of selling or disposing of liquor contrary to the provisions of sec. 54 of the Liquor License Act.

The appeal was allowed.

J. R. Cartwright, K.C., for the Crown.

The respondent was not represented by counsel.

Mulock, C.J.

MULOCK, C.J.:—The respondent, the keeper of a licensed tavern in the village of Ryderback, sold one Morrison a bottle of whiskey between the hours of six and seven p.m. on Saturday, the 13th day of April. The purchaser then paid for it, but did not remove the liquor, which "was laid away" for him by the respondent in his kitchen in the hotel. The next day (Sunday) the purchaser called for the liquor, when the respondent took it from the kitchen and delivered it to him in the hotel hall.

Section 54 of the Liquor License Act is as follows: "In every place where intoxicating liquors are authorised to be sold, by wholesale or retail, no sale or other disposal of such liquors shall take place therein, or on the premises thereof, or out of or from the same to any person or persons whomsoever from or after the hour of seven of the clock on Saturday night to six of the clock on Monday, thereafter," etc.

The neat question here to determine is whether the act of the respondent in handing to the purchaser the bottle of whiskey in question in the hall of the hotel on Sunday was "a sale or other disposal" within the meaning of this section.

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The sale was completed on the Saturday, and for the purposes of this appeal it may be conceded that the property in the liquor then passed to the purchaser, although he did not obtain actual possession until the next day, Sunday. In the meantime the hotel keeper had the actual custody of the liquor. As said by Wills, J., in *Pletts* v. *Beattie*, [1896] 1 Q.B. 519, 523: "The provisions of the License Act were not framed with regard to the niceties which sometimes enter into the consideration of a contract for goods sold and delivered."

The learned Judge has dealt with this case as if it turned upon the question of title to the liquor. The actual sale may have given the purchaser title to it, but the Act prohibits more than mere selling, and in view of this object a liberal construction should be placed on the words "or other disposal."

In my opinion, these words as here used are intended to include transactions respecting liquor whether or not connected with its sale. If the words were to be given the narrow construction contended for by the respondent, the object of the Act in seeking to suppress the traffic in liquor on Sunday could readily be defeated. Any person desiring to obtain liquor on Sunday could complete his purchase within lawful hours on Saturday, leaving the liquor then purchased in the hotel until Sunday and then call and obtain it. The legislation in question does not, I think, contemplate a licensed hotel becoming a base for such operations, and I interpret them as covered by the prohibitory words "or other disposal." The word "disposal" is not here used in a strict technical, but in a liberal sense. According to the dictionaries it has many meanings; some of them associated with selling, others with the mere matter of possession. The following are some of the meanings given by the dictionaries: "An act disposing of something by gift, sale, conveyance, transfer, or the like; the act of putting away, getting rid of, settling or definitely dealing with; bestowing, giving, making over, alienation or parting with by sale or the like," etc.

The handing of the bottle of whiskey to the purchaser was a transfer of the actual possession of it and as such was, in my opinion, an act of disposal prohibited by the section.

I, therefore, think this appeal should be allowed with costs here and below, and the case should be referred back to the magistrate to be dealt with.

Sutherland, J.
Middleton, J.

SUTHERLAND and MIDDLETON, JJ., concurred in allowing the appeal.

Appeal allowed.

RUFF v. McFEE.

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Dec. 21.

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

1. LANDLORD AND TENANT (§ II D—30)—LEASE — RESCISSION—ALTERING DEMISED PREMISES—EFFECT ON RESCISSION CLAIM.

Rescission of a lease will not be allowed at the instance of the lessee because of the refusal of the municipality to permit the rebuilding of a wooden building in the locality under its building and fire limit by-laws, where it appears that, though he accepted the lease and entered into possession of the premises relying on the lessor's promise made in good faith to see that the lessee got a permit for the alterations which he, the lessee, desired to make, the latter had equal means of knowledge from the outset that it was against a local building by-law to grant a permit for the rebuilding of or extensive alterations to a "frame building," and, nevertheless, went on after refusal of the permit and altered the condition of the premises so that at the time of seeking rescission he was not in a position to give up the premises in the same condition as when he received them, or in a condition, without the expenditure of money, to be available to the lessor.

Statement

APPEAL by the defendant from the judgment of the Judge of the County Court of the County of Lambton, in an action to set aside a lease, and for damages for breach of agreement, fraud, and misrepresentation.

The appeal was allowed.

R. I. Towers, for the defendant.

F. McCarthy, for the plaintiff.

Falconbridge, C.J.

FALCONBRIDGE, C.J.K.B., agreed in the result.

Britton, J.

BRITTON, J.:—The plaintiff, in my opinion, is not entitled to recover in this action. So far as the facts are set out in the statement of claim, these were as well known to the plaintiff as to the defendant, and there is nothing that would give the plaintiff the right of action by reason of fraud. The plaintiff entered into possession of the premises and made such alterations in them as he thought would suit his purpose; he is not now in a position to give up these premises in the same condition as when the plaintiff received them, or in a condition, without the expenditure of money, to be available for the defendant; the plaintiff, therefore, is not entitled to a rescission of the lease. As to the alleged permit from the town, no doubt both parties acted in good faith, but the plaintiff knew as much about the by-law and terms under which a permit would be granted, as did the defendant, or, if the plaintiff did not know, he ought to have known, as he had equal means of knowing as the defendant. The defendant did nothing to prejudice the plaintiff. The plaintiff's other alleged cause of action is upon a collateral agreement. Apart from the legal difficulty in the plaintiff's way, the agree-

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ment sought to be set up was too vague and indefinite to found an action upon. The appeal should be allowed. In the unfortunate situation which has arisen, the best disposition which can be made of the case, is to strike out the counterclaim without costs, and without prejudice to any action the defendant may take to enforce such counterclaim, or any claim he may have against the plaintiff by reason of the lease, and to allow the appeal without costs and dismiss the action without costs.

Riddell J.

RIDDELL, J.:—The plaintiff resides in Port Huron, Michigan, and is in the creamery business—desiring to establish a plant in Sarnia, he came over in April, 1911, to secure a suitable building. Failing in this, he was seen in May by the defendant in Port Huron and asked to go over to Sarnia again to look at some places there which the defendant had. He went over twice, the second time with one Schultz, apparently a builder or architect. The defendant shewed them at length a building which was almost a total wreck but which it was proposed should be fixed up for a creamery. The repairs in contemplation were to be frame and the amount was estimated by Schultz in the presence of both plaintiff and defendant at from $500 to $600, considerably more than one-third of the value of the building. Both plaintiff and defendant knew that a permit was necessary; the plaintiff asked the defendant, "How about the permit?" And the defendant said he would see that the plaintiff got it. The defendant also said that it was a very easy matter to get a permit, he knew the officer and he knew there would be no trouble in getting a permit. Although the plaintiff was at the trial not allowed to answer categorically whether he would have taken the lease without the permit—the defendant's counsel objecting—all the circumstances shew that he was relying on the defendant's promise to see that he got a permit and believed that the defendant would have no trouble in getting one. He relied upon this representation, I think. It turned out that it was against the by-law to give a permit for this work—a less amount of frame repair might have been allowed but not enough for the purposes of a creamery.

The plaintiff went into possession and pulled the building to pieces; then, finding that his efforts to get a permit were a failure, abandoned the premises and brought this action claiming (1) rescission; (2) damages for breach of agreement and general relief—the defendant counterclaims for piping, etc., taken from the premises by the plaintiff and also for rent.

The case came on for trial before Judge McWatt of the County Court of the county of Lambton; and judgment was given for rescission with costs.

The defendant now appeals.

I think that rescission cannot be awarded: the plaintiff says

that after he had applied to the engineer and been refused a permit, he had Mr. Grace, his contractor, go on and "tear away the rubbish," that this went on until the town stopped the work by an injunction. It is plain that after he found that it was no easy matter to get a permit, he went on and altered the condition of the premises.

The only thing which the plaintiff can rely upon is the express promise of the defendant to get a permit for him. (The promise made after the lease was signed is wholly without consideration.)

The promise to get a permit is a promise to do something forbidden by law—illegal. It is clear that a promise to do an illegal act may be repudiated with or without alleging a reason and the repudiation may be justified on the ground of illegality: *Cowan* v. *Milbourn*, L.R. 2 Ex. 230; Leake on Contracts, 6th ed., pp. 564, 565. No action lies for damages for breach of such a contract.

The plaintiff has himself to blame for his position—had he at once abandoned the property when he found that he had been misled, though there is no evidence that the defendant did not honestly believe all he said, that would not help him against the plaintiff: *Adam* v. *Newbigging* (1888), 13 A.C. 308. But knowing he had been misled he saw fit to keep possession of the premises and materially alter them. Such conduct, it is elementary law to say, destroyed all right of rescission.

There is no total failure of consideration to justify a refusal to enforce the defendant's counterclaim—but there is no evidence upon which we can dispose of it.

The appeal should be allowed but without costs and the action dismissed without costs: the counterclaim should be struck out, but leave given to the defendant to sue substantively for this if so advised.

Appeal allowed.

HARGRAVE v. HART.

Manitoba King's Bench. Trial before Mathers, C.J.K.B. November 25, 1912.

1. NEGLIGENCE (§ II B 1—88)—INJURY CAUSED BY AUTOMOBILE—CONTRIBUTORY NEGLIGENCE OF CHILDREN.

Contributory negligence may be attributed to a boy eleven years of age who, while he is playing on a public street, is injured by suddenly turning and running in front of an automobile through his failure to look out for approaching vehicles.

[See Annotation to this case.]

Statement

THE plaintiff, Eddie Hargrave, a boy of 11 years of age, brought this action by his father as next friend against Hart, a chauffeur, for damages.

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Statement

On April 28, 1912, while the boy was running across Maryland street, he was knocked down and run over by an automobile driven by the defendant, in consequence of which his left leg was broken above the knee and he was bruised and injured on the head and back.

The evidence shewed that the boy, with others, was playing tag on the street about 9 p.m., and started to run across the street to escape being tagged. He was nearly across the street when some of the other boys shouted that an automobile was coming, and he then turned and started to run back to the side of the street from which he had come, and, in doing so, ran in front of the automobile. If he had continued straight on or had not run back he would have been all right.

G. Moody, appeared for the plaintiff.

No one appeared for the defendant.

Mathers, C.J.

MATHERS, C.J.K.B., dismissed the action, but, under the circumstances, without costs. During the progress of the trial it was urged that the plaintiff could not be guilty of contributory negligence. His Lordship made some comments on the evidence given, and stated he thought the boy was of an age to know that it was dangerous to run across a street frequented by motor cars without taking care not to run in front of an approaching car. The boy was of an age to appreciate the danger, and he should have looked out and taken care where he was going. His Lordship also stated that parents should take more care of their children and not allow them to run and play on the streets in the indiscriminate manner in which some parents allow their children to do. It was unfortunate the child had suffered the injuries he had, but as a matter of fact, it was his own fault and arose through his own recklessness or panic, and was not due to any negligence on the part of the defendant.

Action dismissed.

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SCOPE NOTE.

This note does not include cases where children are injured while crossing railroad or street railway tracks, or by reason of defects or obstructions in highways or public streets.

Inasmuch as we are dealing here with the question of what constitutes contributory negligence in a child, the doctrine of imputed negligence may be eliminated, since such negligence is not the contributory negligence of the child, but is the concurrent negligence of a third person which, by a fictitious principle of the law of agency, is in some jurisdictions imputed to the infant.

There is a sharp conflict of authority on the question whether the negligence of the parent of a child *non sui juris* can be imputed to the child so

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as to bar a recovery by the child in an action brought for his benefit. The doctrine of visiting the transgressions of the parent on an innocent child was promulgated by a New York case in 1839 (*Hartfield* v. *Roper*, 21 Wend. 615, 34 Am. Dec. 273), and has been adopted in a number of other states in the United States, though the great weight of authority is against imputing the negligence of the parent or those standing *in loco parentis* to the child, so as to bar a recovery by him. See Cyc. Tit. Negligence, vol. 29, p. 552 *et seq.*

In England it has been held that the negligence of a person in the actual custody of a child at the time of its injury which contributes to the injury may be imputable to the child: *Waite* v. *North Eastern Railway Co.*, El. Bl. & El. 719, 96 E.C.L. 719.

In Ontario, however, it is questionable whether the negligence of a mother having control of a child will prevent recovery: *Sangster* v. *T. Eaton Co.*, 25 Ont. 78, affirmed 21 Ont. App. 624, affirmed 24 Can. S.C.R. 708.

APPLICABILITY OF THE LAW OF CONTRIBUTORY NEGLIGENCE TO CHILDREN IN GENERAL.

The rule of law is clear that the doctrine of contributory negligence, which precludes a recovery by an injured person, is applicable in the case of an infant the same as an adult, except where the child is so young as to be incapable, as a matter of law, of exercising judgment or discretion. However, the degree of care required is different. The cases uniformly recognize the rule that, in determining the question of contributory negligence of an infant, he is not to be judged by the standard of intelligence or judgment applied to adults, but he is required to exercise such care and prudence in the presence of danger as is commensurate with one of his age and intelligence: *Lynch* v. *Nurdin* (1841), 10 L.J.Q.B. 73; *Serano* v. *N.Y. Central, etc.*, 188 N.Y. 156, 80 N.E. 1025.

The most important elements to be taken into consideration are the age of the child and the judgment and prudence which might be expected from an ordinary child of that age: *Bernier* v. *Généreux*, 12 Que. K.B. 24; *Delage* v. *Delisle*, 10 Que. K.B. 481.

If the child is possessed of greater natural capacity and intelligence than the average boy of his age, he is bound to use a degree of care proportionately greater: *Marius* v. *Motor Delivery Co.*, 146 N.Y. App. Div. 608, 131 N.Y. Supp. 357.

The Courts uniformly recognize that what may be contributory negligence in an adult may not amount to contributory negligence in the case of a child of tender years: see *Lay* v. *The Midland Railway Co.* (1875), 34 L.T. 30.

AGE AT WHICH CONTRIBUTORY NEGLIGENCE IS CHARGEABLE.

In *Gardner* v. *Grace*, (1858), 1 F. & F. 359 a *nisi prius* decision, the defendant was driving when the plaintiff, age 3½ years, ran into the road and was knocked down and run over. Channell, B., says: "The doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover, it must be shewn that the injury was occasioned entirely by his own negligence."

The above quotation is cited with approval by Sir Henry Strong, C.J.

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in *Merritt* v. *Hepenstal*, 25 Can. S.C.R. 150, affirming the Supreme Court of New Brunswick, sustaining a verdict for the plaintiff.

But the law has laid down no definite age at which it can be said that a child has arrived at such a state of maturity so as to be capable of exercising judgment and discretion, though practically no cases are found holding that a child under six years of age can be charged with negligence: see 29 Cyc. 538. The law does not define when a child is *sui juris*.

For collection of cases holding children of various ages between one and seven *non sui juris* as matter of law, see Am. & Eng. Ency. of Law, Tit. Contributory Negligence, 405 *et seq*; and *Palermo* v. *Orleans Ice Mfg. Co.* (1912), 40 L.R.A. (N.S.) 671.

DEGREE OF CARE REQUIRED OF CHILDREN.

Apart from the question whether the child is *sui juris*, the recovery may yet be barred if it be shewn that the child did not exercise such care and discretion as might reasonably be expected of a child of his age, intelligence and experience in a similar situation.

In *Ricketts* v. *Village of Markdale*, 31 Ont. 610, the rule of law is given by Ferguson, J., as follows: "Then as to the alleged contributory negligence of the unfortunate boy set up by the defence. The boy was under seven years old. In the excellent and exhaustive work, the Amer. and Eng. Encyc. of Law, 2nd ed., vol. 7, pp. 405 and 406, it is stated that 'children so young as to be *non sui juris* cannot be guilty of contributory negligence, And children who have attained an age where they are not wholly irresponsible are not required to exercise the same care and prudence that would be demanded of an adult similarly situated, but only the care of a child of equal age and ordinary childish care and prudence. And even when a child has reached years of discretion, and become, as a matter of law, responsible for his conduct, no higher degree of care will be exacted of him than is usually exercised by persons of a similar age, judgment and experience.' And at p. 408, Encyc.: 'Nor will a child negligently injured upon a railroad, or by defects in a public highway, or by dangerous machinery, or by explosives or in any other way, be charged with contributory negligence, if, at the time of such injury, he was doing what might have been expected of an ordinarily careful and prudent child of the same age, making due allowance for the natural instincts of childhood.' "

Whether or not the child has complied with these requirements is a question of fact for the jury to determine under all the facts and circumstances of the case.

In *Tabb* v. *Grand Trunk Railway Co.* (1904), 8 Ont. R. 203, Garrow, J.A., says: "It is for the jury to say whether, upon all the facts, the child had displayed on the occasion in question reasonable care, or such reasonable care as was to be expected from one of his tender years."

RECIPROCAL DUTIES OF DRIVERS OF VEHICLES AND FOOT PASSENGERS.

The rule of law in regard to the degree of care required of foot passengers in crossing a street or highway is well settled. In an early case, Pollock, C.J., enunciates the rule as follows: "It is the duty of a foot-passenger to use due care and caution in crossing a street, and if the negligence of the plaintiff contributed in any way to the accident, he cannot recover:" *Williams* v. *Richards* (1850), 3 Car. & K. 81.

Annotation (*continued*)—Negligence (§ II B 1—88)—Contributory negligence of children injured on highways or streets through negligent driving.

As to the degree of care required of one driving an automobile, see *Campbell* v. *Pugsley*, 7 D.L.R. 177.

DUTY OF DRIVER OF VEHICLES TOWARDS CHILDREN ON HIGHWAY OR STREET.

In *Cork* v. *Canada Ice Co.*, 3 O.W.R. 106, a four-year-old child was injured by the carelessness of the driver of a waggon. The Court said: "It was the duty of the driver to drive slowly, cautiously and carefully at the crossing, keeping a watch on foot passengers and warning them, if necessary." See also *Thies* v. *Thomas*, 77 N.Y. Supp. 276; *Kuebler* v. *Mayor of City of New York*, 15 N.Y. Supp. 187.

REQUISITES FOR RECOVERY.

In dealing with the liability of a defendant for negligence resulting in injury to a child who is alone on the street or highway, it is, of course, fundamental that the negligence of the defendant be established. Then the question comes up whether the actions of the child at the time of the injury constituted such contributory negligence on its part as would bar a recovery. Here we have to determine (1) was the child *sui juris*—that is, was the child old enough at the time to exercise judgment or discretion, and, if so, (2) did the child exercise that degree of care which can be reasonably expected of one of his age and condition under the same circumstances. If he failed to exercise that care and such failure contributed to his injury, a recovery is barred: *Atchason* v. *United Traction Co.*, 90 N.Y. App. Div. 571, 86 N.Y. Supp. 176.

RIGHT OF CHILDREN TO PLAY ON STREET OR HIGHWAY.

It is immaterial whether the child was injured while rightfully crossing the street or highway or playing thereon.

In *Ricketts* v. *Village of Markdale*, 31 Ont. 610, the rule is stated, in the language of Boyd, C., as follows: "Children may play on the highway when there is no prohibitory local law and where their presence is not prejudicial to the ordinary user of the street for traffic and passage." Citing *McGarry* v. *Loomis*, 63 N.Y. 108; *The Quincy Horse, etc., Co.* v. *Gnuse*, 38 Ill. App. 223. See also *Schaffer* v. *Baker Transfer*, 29 N.Y. App. Div. 459, 51 N.Y. Supp. 1092.

ABILITY OF CHILD TO APPRECIATE DANGER.

Whether a child should be presumed to know of the existence of a danger and be chargeable with a duty to use some degree of care in avoiding it is a difficult question to determine. The Courts are loath to lay down, as a matter of law, that certain acts on the part of a child constitute contributory negligence. The language of a recent New York case is very instructive on this point. In that case a bright and active girl, 3½ years old, was sitting on a sidewalk nearly in front of the tenement where her parents lived, when defendant's waggon approached so near as to pass over her legs, which were projecting beyond the curb. The question came up squarely whether the law would presume that such a child, under the facts presented, could use sufficient care, if not exercised, to justify an inference of negligence, to detect the waggon, and to appreciate that its continuance on its course in close proximity to her feet would cause it to come in contact with them and do injury, and that she could intelligently escape it.

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The Court said: "To hold her capable of care, she must have usable capacity (1) for some prudence and inclination therefor, in keeping traffic under observation; (2) for measuring in distance the relation of the waggon to the curb; (3) for apprehending that the proximity of the waggon to the curb was such that her protruding feet would fall within the intervening distance; and (4) ability to withdraw herself from the danger. It is not a question whether such a child can ever use care, but the facts in this case do not permit the inference that she had such ability to a degree that demanded care on her part."

The language of the Court in this case on the psychology of this question is very instructive: "Whether a child should know a given danger and use some care to avoid it depends upon elements that constitute it. From no intelligence a child progresses in experience, and thereby, step by step, learns what is hurtful and what she should avoid, and she gains control of herself for protection, and, making allowance for the known intentness of children upon their immediate amusements, the child is judged by such experience. She early learns that she should not put her hand in fire, and if, unless through uncertainty in controlling her locomotion, she place her hand in fire, she would be held to some care, not that of an adult, as the child is not expected to have in mind to the same extent surrounding dangers, even if she knew them to be such. But little by little her knowledge of sources of danger progresses. She appreciates, first, the danger of the direct act; that is, that if she does a simple thing or omits it she will be hurt. But accidents are usually the result of a combination of co-operating circumstances. To appreciate such result she must have gained the synthetic capacity. She must by experience have passed on from simple to complex conceptions. She may at quite an early age be able, in her little sphere and environment, to combine one known thing with another and form an infantile judgment. Such conceptions, however, usually relate to the familiar matters of the home, but the activities beyond that, for instance, in the street, are as to their causes and effects quite unknown and are like mere passing pictures. But even as to these she gains in time knowledge, trifling and inaccurate at first, and from which she can form no conception as to their safety or danger; but the enlargement of her contact with them increases her ability to conceive of their relation to themselves and to her. She would learn after repeated use of the streets, and the warnings that are given in her presence, or from observing the conduct of others, that moving objects must be avoided, the manner of avoiding them, the care required, and the distances she must keep from them to escape. So she goes on maturing in ability to form judgments and to act upon them until she reaches such ability as belongs to youth, gradually passing on into such maturity as brings the full responsibility that attaches to persons who are *sui juris*. The facts in the case at bar do not indicate that this little girl, intended to be kept by her mother's side, or under her eye in the house, or in her custody if taken beyond it, could have learned that on the sidewalk she should, if her feet projected, watch lest a team should drive so near the curb as to encounter them. If she did in fact see a team so near as to frighten her, she would know that her feet should be drawn out of the way. But she could not be deemed competent to watch for it in anticipation of its coming. But, assume that she did see it approaching, she would not be able to gauge its distance from her, so as to

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conclude that she should take measures to avoid it. There enter into such considerations the further element that so young a child is, in her nature, concerned only with what she is doing and the recognised fact that such abstraction is not disturbed by a sense of watchfulness, and that, even if aroused by finding horses and waggons upon her, she might well err, in time or in action, in escaping from them, and it is impossible to conclude that she would be capable of any appreciable self-protection, such as, in quality or quantity, a jury could measure. She may have been capable of some care, but it was negligible:" *Barretto* v. *Mouquin, etc.*, 126 N.Y. Supp. 1009.

ILLUSTRATIVE CASES.

(*a*) *Crossing Street in Front of Approaching Horse or Vehicle.*

While it is not negligence, as a matter of law, for a child to attempt to cross the street ahead of a team (*Gerber* v. *Boorstein*, 113 N.Y. App. Div. 808, 99 N.Y. Supp. 1091; *Johnson* v. *Kelleher*, 155 Mass. 125, 29 N.E. 200), yet the facts and attending circumstances may be such as to warrant no other inference than that the child failed to exercise due care and caution, in which case the Court will hold the child guilty of contributory negligence as a matter of law.

Thus, in *United Breweries Co.* v. *Bass*, 121 Ill. App. 299, a boy of ten, who was shewn to be of at least average intelligence, experience and capacity to know and appreciate the danger in attempting to cross a roadway in the face of an approaching team, which he saw when it was fifty or sixty feet distant from him, was held as a matter of law to have failed to have exercised ordinary care, where it appeared by his own testimony that he saw the waggon which caused his injury approaching in ample time either to have crossed the street in front thereof or to have retraced his steps in safety.

In *Hayes* v. *Norcross*, 162 Mass. 546, 39 N.E. 282, a child, 5½ years old, was injured by darting over the sidewalk and running against a slowly trotting horse, before the child had gone six feet, at a place other than a crossing. The Court said: "There is no view that can be taken of any of the testimony that would warrant a finding that he was ordinarily careful. That there may be other boys who carelessly expose themselves on the street does not help him in his suit. The standard of care is the conduct of boys who are ordinarily careful." The Court quotes from *Collins* v. *South Boston Railroad*, 142 Mass. 301, at page 315: "It would seem that, if children unreasonably and intentionally run into danger, they should take the risks, and that children as well as adults should use the prudence and discretion which persons of their years ordinarily have, and that they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless, because children are often reckless and mischievous."

A boy of seven, of ordinary intelligence and who is sufficiently competent to testify as to carelessness resulting in his being injured by an automobile on a public highway, is not altogether exempt from the exercise of care in approaching a known danger, and if he is *sui juris* and has been the heedless instrument of his own injury, he cannot recover: *Verdon* v. *Crescent Automobile Co.*, 76 Atl. 346 (N.J.).

But in the majority of cases the question of due care is left for the deter-

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mination of the jury. Thus, in *Brown* v. *Sherer*, 155 Mass. 83, 29 N.E. 50, a girl of six, on her way home from school, persisted in skipping across the street at a crossing ahead of a carelessly driven vehicle. She did not see the vehicle, although she had been warned repeatedly not to cross the street in that manner. The question of her negligence was left to the jury, the Court saying, "No high degree of caution in guarding against careless driving can be expected of such a child, and the doctrine of voluntary assumption of risk can have but slight application. Skipping across the street was not of itself negligence, as a matter of law."

In *Streitfeld* v. *Shoemaker*, 185 Pa. 265, 39 Atl. 967, a boy of 13 looked both ways at a crossing and saw a waggon "some distance away," which was being driven at a rapid rate of speed. There was nothing to obstruct the view of either the driver or the boy after he started to cross the street. While upon the crossing and between the tracks of a street railway he was run over by the team. The evidence tended to shew that the driver paid no attention to hallooing intended to prevent the occurrence, and did not check the speed of the team at the crossing. A nonsuit was held improper, the question of negligence of the driver being held for the jury. The Court said that, though there was no obligation on the part of drivers to haul up their horses to stop at every crossing, nor an obligation on the part of pedestrians to look in every possible direction for vehicles approaching and determine how long it will take them to arrive at the crossing, each must use reasonable and ordinary care. The obligation is mutual.

In *Matley* v. *Whittier Machine Co.*, 4 N.E. 575, 140 Mass. 337, a child 6½ years old, while crossing a street in front of an advancing team, which she saw about 250 feet away, stopped to pick up a bundle which she had dropped. While she was stooping to pick it up, she heard someone cry out to the driver to stop. The Court held that it could not be said, as matter of law, that the plaintiff, by stopping to pick up the bundle, was guilty of contributory negligence, but that it was for the jury to determine whether the plaintiff was using such care as is reasonably to be expected of one of her years.

In *Moebus* v. *Herrmann*, 108 N.Y. 349, 15 N.E. 415, a child of seven was attempting to cross a street at a place other than a crossing. The driver was sitting on a high seat, with his view unobstructed, and, after hitting the child, he drove on, not checking the horses nor heeding the cries of the bystanders. The Court said, "The driver was clearly negligent," adding that "the rule of vigilance applies to children as well as to adults, but a child of immature years, whilst bound to exercise care, it is held to no higher degree of forethought than would be expected of one of his age. If the boy failed to adopt the means known to him to be effective in protecting him against danger and was injured thereby, he cannot recover."

In *Dealey* v. *Muller*, 149 Mass. 432, 21 N.E. 763, a child seven years old was struck by a team on the run, while the child was crossing a public street diagonally. The question of contributory negligence was held for the jury.

In *Johnson* v. *Kelleher*, 155 Mass. 125, 29 N.E. 200, a child between ten and eleven, of at least the ordinary intelligence and capacity of children of her years, attempted to pass between two teams, one following the other at a short distance on a bridge. The question whether the child was negligent was held for the jury, the Court saying: "She was a child, and was

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required to exercise only that degree of care, prudence and foresight which is reasonably to be expected of children of her age. She committed no unlawful act in leaving the sidewalk and walking across the driveways to the side of the bridge, or in standing at the side to look at the boat or in attempting to return. Whether her conduct in all that led up to the accident was or was not negligence was for the jury."

In *Wiksberg* v. *Olson*, 138 Cal. 479, 71 Pac. 511, a child of six, with a number of other children who had just been dismissed from school, was running across the street on the sidewalk in the immediate vicinity of the place where the injury occurred. The driver drove through and among the children, the horse trotting rapidly. The child was attempting to cross the street and the driver was trying to frighten some boys who were climbing on the waggon, and was looking backwards without attempting to stop the horse. The child did not see the waggon, or, if she did, she apprehended no danger. A verdict for the plaintiff was held supported by the evidence.

Birnbaum v. *Lord*, 7 Misc. (N.Y.) 493, 28 N.Y. Supp. 17, is a case where a boy, twelve years old, was carrying a load of empty boxes, and before crossing the street he saw a team approaching slowly in the middle of the block. While the boy was crossing the street, the driver urged his horses, and the boy began to run across in front of the waggon, and the boy was struck in running from them. The Court said: "It was not imprudent for the boy to cross at that time. Whether it was prudent on the boy's part, when he heard and saw the driver and the horses commenced to run, to cross in front of the horses, or whether he should have stepped back, was a question for the jury; and it is for them to say whether he exercised that care which was to be expected of a boy of his age."

(*b*) *Failure to Look Both Ways.*

The rule is well settled that the mere fact that a child did not look both ways before attempting to cross a public street does not constitute contributory negligence as a matter of law. See *Gerber* v. *Boorstein* 113 N.Y. App. Div. 808, 99 N.Y. Supp. 1091 (child nine years old).

In *Lynch* v. *Shearer*, 75 Atl. Rep. 88 (Conn.), a boy, eleven years old, while attempting to cross a street in front of an automobile, running at an excessive rate of speed, failed to look either way, and yet the Court held that it was for the jury to determine whether the child exercised such care as could reasonably be expected from one of his age, judgment and experience.

And so in *Rottenberg* v. *Segelke*, 6 Misc. (N.Y.) 3, 25 N.Y. Supp. 997, affirmed without opinion, 148 N.Y. 725, the plaintiff, a child of eight, on her way to school, accompanied by her sister, a child of twelve, was knocked down by a horse attached to defendant's waggon. The Court held that, as a matter of law, persons crossing a public street are not bound to look both ways, either at the crossing or elsewhere, and that the plaintiff had a right to assume that the driver would not turn a sharp corner and run over her without warning.

(*c*) *Sudden Peril.*

Contributory negligence will not be imputed to a child where he is confronted by a sudden peril and there is no time to form an intelligent and deliberate judgment as to the best means of escape: *Birnbaum* v. *Lord*, 7 Misc. (N.Y.) 493, 28 N.Y. Supp. 17, citing *Quill* v. *Railroad Co.*, 11 N.Y. Supp. 80, affirmed; 126 N.Y. 629, 27 N.E. 410.

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Thus in *Thies* v. *Thomas*, 77 N.Y. Supp. 276, where a child of six was killed by an automobile, the Court said: "If the automobile in question came upon the deceased under circumstances calculated to produce fright or terror, and such fright or terror was produced thereby, and this caused an error of judgment by which the boy ran in front of the automobile, it was not contributory negligence."

(d) Child Injured while Playing on Street.

In *Jordan* v. *American Sight-Seeing Coach Co.*, 129 App. Div. 313, 113 N.Y. Supp. 786, a boy of eleven years stood on the sidewalk on a bright day, some boys nearby were playing with a ball and the ball rolled under a sight-seeing automobile, proceeding at a moderate rate of speed. The boy, seeing the ball, darted from the sidewalk, where he was standing, and ran suddenly in front of the automobile and was struck and killed. He was held guilty of contributory negligence as a matter of law.

In *Zoltowski* v. *Gzella*, 159 Mich. 620, 26 L.R.A. (N.S.) 435, a boy, thirteen years of age, was playing tag on a well-lighted public street, and run into or was struck by an automobile driven by defendant. The Court held that it was contributory negligence, as a matter of law, for a boy of that age "to become so engrossed in play as to run across a city street and immediately in front of an approaching automobile without thought to look to see whether such a machine or any other vehicle was approaching."

Where a boy between eight and nine years of age was engaged in the dangerous sport of riding upon the runner of a sleigh, and was struck by a team coming from behind, after he suddenly left the runner of the sleigh, the Court held that a direction for the defendant was proper. The evidence tended to shew that the plaintiff saw the defendant's team approaching and yet he thoughtlessly and imprudently put himself in a position of danger. *Messenger* v. *Dennie*, 141 Mass. 335.

In *Turner* v. *Hall*, 74 N.J.L. 214, 64 Atl. 1060, the Court said: "That it was for the jury to determine whether it was contributory negligence for a boy of twelve to throw a ball and run into the middle of the street to catch it, where he was struck by an automobile driven by defendant at full speed without giving warning by horn, bell, whistle or other sound, and when it approached the boy it suddenly twitched and hit him."

In *Schaffer* v. *Baker Transfer*, 29 N.Y. App. Div. 459, 51 N.Y. Supp. 1092, a bright boy, 8½ years old, while roller skating on the street, was run over by a truck approaching from behind. There was a direct conflict between the witnesses as to the question of negligence on the part of the plaintiff. The Court held that this question was properly for the jury under the circumstances. In the course of the opinion, the Court says: "It was not negligence, as a matter of law, for the boy to be in the street; nor, as matter of law, can it be said that he was guilty of contributory negligence in failing to note that the truck coming behind him at a rapid rate placed him in a position of danger. For, if he had been aware of the approach of the truck behind him and of its proximity, upon the evidence it was a question for the jury to determine whether he had not a right to infer, as there was nothing to prevent the truck from passing upon the right side of the street, which at the time was not occupied by other vehicles, that the driver would select that passageway in preference to running him down."

Annotation (*continued*)—Negligence (§ II B 1—88)—Contributory negligence of children injured on highways or streets through negligent driving.

In *Dowd* v. *Tighe* (1911), 209 Mass. 464, the plaintiff, a child of about four years, was playing on a public street while a team was backing into a yard nearby. The evidence tended to show that before the accident the driver of the team had been waiting for an opportunity to drive from the highway into the yard; that a number of children had been playing around and near the team, some of them having climbed upon the waggon; that, as soon as an opportunity to enter the yard occurred, the driver ordered the children off the waggon and, without looking behind him, backed the team and ran over the plaintiff, who at the time was crying and calling out for a shovel which a playmate had thrown under the waggon. The question of negligence was left to the jury, the Court saying, "If the jury were satisfied that the plaintiff, who was three years and eight months old when injured, was capable of going upon the street unattended, the degree of care required of her was that of a reasonably careful and prudent child of her age. It could not have been ruled as matter of law that she should have anticipated that the team might be backed against her, as she stood in the street crying for a toy shovel which a playmate had taken from her and thrown under the waggon: *Sullivan* v. *Boston Elevated Railway*, 192 Mass. 37, 44, and cases there collected. If the jury determined that she was incapable of properly caring for herself, then the question of her sister's negligence, in whose care she had been placed temporarily by their mother, also was a question of fact, for reasons so fully stated in *Butler* v. *New York, New Haven and Hartford Railroad*, 177 Mass. 191, and *Sullivan* v. *Boston Elevated Railway*, 192 Mass. 37, that it is unnecessary to repeat them or to recite the evidence from which they would have been justified in finding that her sister had not been unfaithful. See also *Ingraham* v. *Boston and Northern St. Railway*, 207 Mass. 451."

(e) *Child Injured while Sitting on Curbstone.*

The law will not presume that a girl 3½ years old could use such care that, if not exercised, it would justify an inference of negligence, where she failed to detect an approaching waggon and to appreciate that it would come in contact with her, while she sat on a curbstone with her legs extended into the street: *Barretto* v. *Mouquin, etc.*, 126 N.Y. Supp. 1009.

In *O'Shaughnessy* v. *Suffolk Brewing Co.*, 145 Mass. 569, 14 N.E. 779, an eight-year-old child, on her way to school, sat down on the curbstone of a sidewalk, with one leg under her, and the other leg projecting in the gutter. She leaned over to sharpen a pencil and the defendant's waggon hit her. The question whether she was exercising such care as was reasonably expected of her was held for the jury.

In *Knebler* v. *Mayor of City of New York*, 60 Hun. (N.Y.) 584, 15 N.Y. Supp. 187, a bright boy of 9½ years, sitting on the edge of a sidewalk, with his legs extended outward across the gutter, was struck by a slowly moving cart. It was dusk at the time and the boy was trying to revive a fire which had been made in the gutter. He was held guilty of negligence as a matter of law. The language of the Court follows: "The driver was undoubtedly bound to look out for persons or vehicles, and, if possible, to avoid running over the one or into the other; but his attention would ordinarily be directed to persons standing upright in or crossing the street, and he could scarcely be expected to be equally observant of the surface of the highway or of objects almost upon a level therewith. If the occurrence had been in broad

MAN.

Annotation

Children's negligence on highways

Annotation (*continued*)—Negligence (§ II B 1—88)—Contributory negligence of children injured on highways or streets through negligent driving.

daylight, and the driver had been proceeding at an unusual rate of speed, or if there had been any direct evidence of actual inattention, a different question would be presented. In the entire absence, however, of any such direct evidence, we are here left to mere conjecture; and that, certainly, will not answer to fix responsibility upon the defendant. We think, too, that the boy's own negligence contributed to the accident. He was, as we have seen, old enough and bright enough to be able to take care of himself; and he was responsible for the exercise of such care as might reasonably be expected of one of his years and capacity. In the most liberal view of this rule, it cannot be said that the burden of shewing freedom from contributory negligence has here been met, either by direct evidence or by the drift of surrounding circumstances. If boys as old and as bright as the deceased sit down in the streets, or upon the curbstones with their legs extended into the streets, they must expect to get into trouble. At all events, they knowingly run a great risk. The inference here is that the boy either saw the cart slowly approaching and paid no attention to it, or that his attention was so engrossed with blowing upon the smouldering fire that he did not observe the approach of danger. In either case his carelessness contributed to the accident."

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Jan. 24.

Susan McGOWAN, guardian of the persons and estates of Bessie McGowan, Andrew McGowan and Bruce McGowan (plaintiff) v. HUNTER (defendant).

Saskatchewan Supreme Court, Parker, M.C. January 24, 1913.

1. DEPOSITIONS (§ I—2)—RIGHT TO TAKE—REQUIREMENTS.

In an application by the plaintiff, under Rule 365 (Sask.), for an order for the examination of the plaintiff and one of her witnesses before a special examiner in another province, it must be shewn, among other things, by the applicant: (1) that it is necessary "for the purposes of justice" that the witnesses be examined away from the jurisdiction; (2) that there is some good reason why they cannot be examined before the court in which the venue is laid, or that the witnesses cannot be brought or will not come to the place of trial; and mere saving of expense would not be a sufficient ground.

[*Macaulay* v. *Glass*, 47 Sol. Jour. 71, referred to.]

2. DEPOSITIONS (§ I—2)—RIGHT TO TAKE—COMMISSION AT INSTANCE OF PLAINTIFF.

A defendant is *primâ facie* entitled to have the plaintiff and plaintiff's witnesses before the court in order that they may be orally cross-examined, and that their demeanour in giving their evidence may be observed by the court or jury.

3. DEPOSITIONS (§ I—2)—RIGHT TO TAKE—EXAMINATION OF PLAINTIFF AT HIS OWN INSTANCE.

In some respects the same general rules as to granting an order for the examination of witnesses outside of the jurisdiction on the application of the plaintiff, under Rule 365 (Sask.), apply in regard to his own examination on commission, but such rules will be more strictly applied, where the person to be examined is the plaintiff himself.

[*Lawson* v. *Vacuum Brake Co.*, 27 Ch.D. 137, 143, referred to.]

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APPLICATION by the plaintiff under Rule 365 for an order for the examination of the plaintiff and one of her witnesses, James Eserig, before a special examiner at Barrie, in the Province of Ontario.

The motion was dismissed.

A. G. McKinnon, for the applicant (plaintiff).

P. M. Anderson, for the defendant.

Parker, M.C.

PARKER, M.C.:—On an application of this kind it must be shewn among other things by the applicant: (1) that it is necessary "for the purposes of justice" that the witness be examined away from the jurisdiction; (2) that there is some good reason why they cannot be examined before the Court here, or that the witnesses cannot be brought here, or will not come here. From the material filed, I am of the opinion that none of these conditions have been complied with. In the first place the defendant is *primâ facie* entitled to have the plaintiff and her witnesses before the Court in order that they may be orally cross-examined, and that their demeanour in giving their evidence may be observed by the Court or jury. There is absolutely nothing in the affidavit filed on behalf of the plaintiff to shew that the "purposes of justice" will be better served by having the witnesses examined out of the jurisdiction rather than before the Court, and the burden is on the plaintiff to shew this. The affidavit is further objectionable in that it is not made by the plaintiff herself, and is based almost entirely on information and belief. See the judgment of Baggallay, L.J., in *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137, at 141 and 142, where the circumstances are almost exactly similar to the case at bar. In the second place before an order for examination will be made it must be shewn that there are very strong reasons for the witnesses not coming before the Court, and to quote Cotton, L.J., in the same case at p. 143, it must be shewn that the witness "could not be induced to come here, or that the plaintiff could not reasonably be expected to bring him here," and in such a case he says "a heavy burden lies on the party who wishes to examine the witness abroad, to shew that he cannot be reasonably expected to come here." Mere saving of expense is not a sufficient ground for making the order: *Macaulay* v. *Glass*, 47 Sol. Jour. 71.

The same rules as to granting the order for examination apply in regard to a plaintiff as to any other witnesses, but will be more strictly applied. See judgment of Cotton, L.J., in *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137, at p. 143, and *Coch* v. *Allcock*, 21 Q.B.D. 178 at 181.

As to costs, it was argued by counsel for the plaintiff that if his application was dismissed it should be with costs in the

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cause, because on the taxation of his bill of costs it might be contended that he should have applied to have his witnesses examined by commission, instead of going to the expense of bringing them here. I do not think I should give effect to this contention in view of the insufficiency of the plaintiff's material, and its failure to shew any reasonable grounds for granting the order. It seems to me that counsel should be well satisfied on these points before making an application. The motion will, therefore, be dismissed with costs.

Motion dismissed.

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Jan. 14.

James DODD (plaintiff) v. J. W. VAIL (defendant), and P. Vail and B. Vail (claimants).

Saskatchewan Supreme Court, Lamont, J. January 14, 1913.

1. LEVY AND SEIZURE (§ II—30)—MODE AND SUFFICIENCY—ENTRY WHERE GOODS LIE.

An entry by the sheriff or his bailiff upon the premises of an execution debtor on which goods are situated, together with an intimation of an intention to seize the goods, constitutes a valid seizure.

2. LEVY AND SEIZURE (§ III—35)—RIGHTS AND LIABILITIES GROWING OUT OF LEVY—SHERIFF ABANDONING POSSESSION.

After a valid seizure has been made by the sheriff, the question whether or not the sheriff has abandoned possession of the goods seized is always a question of fact.

[*Lumsden* v. *Barnett* (1898), 2 Q.B. 177, referred to.]

3. LEVY AND SEIZURE (§ I B—25)—PROPERTY IN CUSTODY OF LAW—KEEPING SHERIFF'S OFFICER IN POSSESSION.

Where a sheriff has made a valid seizure of the goods of an execution debtor it is not necessary in order to retain possession, for a sheriff to put a person on the premises for the purpose of holding the goods, as against those who have notice of the seizure.

[*Dixon* v. *McKay*, 21 M.L.R. 762, referred to.]

4. ESTOPPEL (§ III J—120)—BY INCONSISTENCY IN ACTS—LEVY AND SEIZURE—BOND FOR DELIVERY OF GOODS AND SPECIAL STIPULATION.

Though a mere statement by a sheriff to an execution debtor, made in the office of the sheriff, that certain goods belonging to the debtor were seized by virtue of an execution against him, does not constitute a valid seizure, yet where the debtor admits the seizure and gives a bond for the delivery of the goods to the sheriff, he is estopped from setting up that the goods are not under seizure.

[*Brook* v. *Booker*, 41 Can. S.C.R. 331, referred to.]

5. LEVY AND SEIZURE (§ II—30)—MODE AND SUFFICIENCY—PHYSICAL ENTRY NEAR GOODS AND INTIMATION OF INTENTION TO SEIZE.

In order for a sheriff to make a valid seizure of the goods of an execution debtor, it is necessary for the sheriff or his bailiff (1) to be upon the premises where the goods are, or so close thereto that if his authority to seize is disputed by one in actual possession he is in a position to lay hands on the goods; (2) to intimate an intention of seizing the goods.

6. INTERPLEADER (§ I—10)—BY SHERIFF—GOODS UNDER SEIZURE—CLAIM BY THIRD PARTY—RIGHT TO INTERPLEAD, TESTS.

To entitle the sheriff to interplead where a claim is made by third persons to goods of an execution debtor seized by the sheriff, it must

be shewn: (1) that the goods claimed were taken or intended to be taken in execution under a process of the court; (2) that the sheriff has no interest in the goods other than for his costs; (3) that there is no collusion between the sheriff and any of the claimants; (4) that the sheriff is willing to pay or transfer the goods seized into court. (Rules 559 and 563, Sask.)

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Statement

APPEAL from the decision of the Local Master at Moosomin holding that the sheriff had a right to interplead.

The appeal was dismissed.

T. S. McMorran, for appellants.

A. D. Carrothers, for the execution creditors.

Lamont, J.

LAMONT, J.:—The facts are that on October 2, 1912, the sheriff, having in his hands two writs of execution against the goods of the defendant, instructed James M. Currie, his bailiff, to make a seizure of the defendant's chattels. The bailiff went to the defendant's farm and found about one hundred acres of wheat standing in stook, and in addition thereto a quantity of oats which were not then cut. The defendant was not at home. The bailiff made out and handed to the defendant's wife a notice styled in the Court out of which the executions had issued, and consisting of the following: "Schedule of goods and chattels (save and excepting legal exemptions) of J. W. Vail, the defendant, seized under and by virtue of the writ of execution in this cause, namely, about one hundred acres of wheat in stook." The notice was signed, "James M. Currie, bailiff." Currie then left the premises and did nothing further. On October 8th the defendant went to the sheriff's office and told him that the oats were then cut and in stook. The sheriff said he would send out and have them seized, whereupon the defendant asked him not to incur the additional expense of sending out the bailiff, that he would admit the seizure of the said grain. The sheriff then told the defendant that the oats were seized under the execution, and he took from the defendant and one J. Joll, a bond which recited that the wheat and oats had been seized and taken into execution, and it was conditioned on the said defendant and Joll delivering to the sheriff the goods seized whenever he should require the same to be delivered. This is all that was done to constitute a seizure of the grain. On the same day, October 8th, the sheriff was notified that the claimants claimed an interest in all the crop grown upon the defendant's farm. The execution creditors refused to admit the claim of the claimants, and the sheriff made an application for an interpleader order. After hearing argument, the Local Master held that the sheriff was entitled to interplead. From this decision the claimants now appeal.

On their behalf it is contended that the sheriff had no right to interplead, because what took place did not constitute a valid

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seizure either of the wheat or the oats, and further, that if the wheat was validly seized, the departure of the bailiff from the premises without leaving a man in charge constituted an abandonment of that seizure. It was also contended that the sheriff was not in possession of either the wheat or oats at the time he made application for the interpleader order, and therefore was not entitled to interplead.

As to the wheat, there can be no question but that it was validly seized. An entry upon premises on which goods are situated, together with an intimation of an intention to seize the goods, will constitute a valid seizure: Halsbury's Laws of England, vol. 14, p. 54; *Swann* v. *Falmouth*, 108 E.R. 1112. Then, did he abandon that seizure? The question whether or not a sheriff abandons possession of goods seized is always a question of fact: *Lumsden* v. *Barnett* (1898), 2 Q.B. 177. The taking of a bond on October 8th is strong evidence that neither the sheriff nor the defendant considered there had been an abandonment. On the material filed I am satisfied there was not the slightest intention of abandoning the seizure. It is not necessary for the sheriff to put a man in possession in order to hold goods of which he has made a valid seizure as against those who have notice of the seizure: *Dixon* v. *McKay*, 21 M.L.R. 762. As to the oats, the statement of the sheriff to the defendant that they were seized would not constitute a valid seizure. A sheriff cannot sit in his office and by a purely intellectual operation make a seizure of goods miles away: *Brook* v. *Booker*, 41 Can. S.C.R. 331. To make a valid seizure he must be upon the premises where the goods are, or so close thereto that if his authority to seize is disputed by one in actual possession he is in a position to lay hands on the goods. He must also intimate an intention of seizing the goods. In this case, however, while as against third parties *bonâ fide* acquiring the property in the oats after October 8, they could not be held under the execution, yet as against the defendant they can be so held, for the defendant, by his conduct in requesting the sheriff not to send the bailiff out, and in admitting the seizure of the oats and giving a bond for their delivery to the sheriff, has estopped himself from setting up that they were not under seizure. If, therefore, the oats on October 8th were the property of the defendant, they are, as against him, in the custody of the law under the execution. If they were not his property, they were, of course, not exigible under execution. In this appeal I am not called upon to determine the right of the claimants to the grain, but only to determine the right of the sheriff to interplead. To be entitled to interplead the sheriff must satisfy the Court that the goods claimed were taken or intended to be taken in execution under a process of the Court; that he has no interest in the goods other

than for his costs; that he does not collude with any of the claimants, and that he is willing to pay or transfer the goods seized into Court. Rules 559 and 563.

I have held that as against the defendant the grain in question was taken into possession by the sheriff under the execution. I am also of opinion that the right to the delivery of the grain which he has under the bond is sufficient to enable him to comply with the rule requiring him to be willing to transfer the subject-matter of the seizure into Court. The other requisites entitling him to interpleader were not disputed. I am therefore of opinion that the decision of the Local Master was right, and should be affirmed.

The appeal will be dismissed, with costs.

Appeal dismissed.

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PERIARD v. BERGERON.

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Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. November 11, 1912.

1. CONTRACTS (§ V A—379)—REPUDIATION—STOCK BOUGHT AT RATE ON DOLLAR INVOICE PRICE.

Where, under the terms of a written contract a stock of goods had been bought at "the rate of one hundred and ten cents on the dollar, invoice price," the failure of the seller to produce invoices for all of the goods is not sufficient ground to justify the buyer in repudiating the contract, if the buyers' representative had been engaged in the store for a month preceding the stocktaking, and had been given the private cost mark and had every opportunity to acquaint himself with the price marking system in force, and if the buyers did not insist on the production of the missing invoices at the time of the stocktaking.

[*Periard* v. *Bergeron*, 2 D.L.R. 293, reversed.]

2. EVIDENCE (§ IV R—485)—MARKS—PRIVATE COST MARKS.

Private cost marks on merchandise or its containers in the usual course of business are admissible as evidence to fix the cost price of goods as to which the seller is unable to produce invoices under an agreement of sale at invoice price plus ten per cent.

[*Plank* v. *Gavila*, 3 C.B.N.S. 807, referred to.]

Statement

APPEAL from the judgment of the Court of Appeal for British Columbia, *Periard* v. *Bergeron*, 2 D.L.R. 293, affirming the judgment of Morrison, J., at the trial, by which the plaintiff's action was dismissed with costs. The action was to recover damages for breach of a contract to purchase a stock of merchandise and the trade fixtures in a shop in Vancouver, B.C. The circumstances of the case are stated in the headnote and the questions raised on the appeal are fully discussed in the judgments now reported.

The appeal was allowed, DUFF, J., dissenting.

Newcombe, K.C., appeared for the appellant.

Ewart, K.C., and *W. L. Scott*, for the respondents.

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DAVIES, J.:—I think this appeal must be allowed. I agree with the opinion of Chief Justice MacDonald in the Court of Appeal and see no ground for imputing any dishonesty in the transaction in question to the appellant or to those who acted for her.

The appellant was unable, it is true, to produce all the invoices shewing the prices at which she had bought the goods, but she gave the best evidence in her power and the production of these missing invoices was not insisted upon at the stocktaking by the parties. The custom of the appellants had been to mark the boxes containing goods and other packages and parcels with the selling price and also with a private mark representing the cost price. Bergeron, one of the respondents, had been with the appellant in the store for nearly a month before the stocktaking, with every opportunity afforded him of acquiring a thorough knowledge of the business and merchandise he had contracted to purchase. The inference I draw from the evidence, which I have carefully read, is, that in the cases where disputes arose as to the cost price and the invoices could not be produced, these disputes were practically settled either by reference to the private marks on the packages shewing the cost price, or by the decisions of Mr. French, who was called in by both parties to determine what should be allowed. These disputes I gather were, considering the quantity of the goods in question, comparatively few. The conclusion I reached from a perusal of the evidence was that they arose from the fact of Periard having paid more for some classes of her goods than a close and good buyer could have purchased them at. But this, if true, would not justify the purchasers in repudiating their contract, which was that they would pay Periard for her "merchandise at the rate of one hundred and ten cents on the dollar invoice price." This was subsequently increased to $1.13 to cover freight charges. Whether, therefore, the Periards had purchased skilfully and closely or improvidently and carelessly had nothing to do with the question of prices. The one thing that had to be determined was what had been *bonâ fide* paid by Periard as the purchase price of the goods.

My conclusions were, after considering the whole evidence, that the appellant had, on the stocktaking, given the best evidence she could of the cost prices of the goods and that though there was much wrangling over some of these prices they were adjusted and settled more or less satisfactorily with the aid and assistance, when he was called in, of Mr. French.

I think the true secret of the attempted repudiation by the respondents of their contract to purchase this stock of goods lies in the fact that the total amount of the purchase money was found largely to exceed that which was anticipated.

My conclusion is that the question of the non-production of the invoices was only resorted to as an excuse to escape from a bargain, the obligations of which were found, after stocktaking, to be much heavier than had been anticipated.

I would allow the appeal and remit the case back for assessment of plaintiff's damages.

IDINGTON, J.:—Undue importance was attached in the Courts below to the evidence of Mr. French. In answer to a question as to how much of the time of stocktaking he was present at, he says:—

Not a great deal of the time. I was busy attending to my own business. I was sent for, as I say, possibly four or five times. I think the first day I was up there a couple of times, and I don't think any more. I was up in the morning once, and in the afternoon, and possibly the next day about the same. It may have been four or five times that I went up altogether. My man that works with me was up there assisting.

And in answer to a question relative to the substantial quantities of goods he had spoken of, he says:—

Oh, yes—fair quantities—particularly the hosiery, there was a considerable quantity of that there, and the shirts I cannot recollect how many dozens there were of those—and the ties there was a considerable number of them.

When we find that the stocktaking had involved three days of preparatory arrangement of said stock, and then parts of three days thereafter, making in all two full days' work for the staff employed by both parties checking it over and setting down the results in the lists used by each party; that the character of the stock was so varied as to embrace gents' furnishings and boots and shoes, and clothing, and other things which, in the whole, made a total of nearly $18,000 estimated value; that an examination of the stock-lists so made out discloses, when roughly estimated, nearly four thousand entries of different items; that the witness French was only professing to be an expert as to classes of the goods involving, according to his own estimate, one-half of the total stock, and was called upon only in respect of disputed items of such half; that of the half-dozen things he was called to give an opinion upon some were satisfactorily explained; and that as to each and every one of such, according to the evidence of a number of witnesses, including Corderoy, the accountant, called by the respondent, the prices reached after hearing him (Mr. French) were set down in the list as settled, it seems impossible to rightly give much weight to his evidence as a determining factor in support of the judgment in the case.

There was not a single item of the thousands in question in the stocktaking reserved for future consideration, and no mark

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or note made of remonstrance for want of invoice or objection in that regard or otherwise. And when we find these occasional appeals to Mr. French resorted to and that coupled with absence of record or note of any sort of objection in other instances, surely it must be concluded that these others had all been satisfactorily adjusted between those engaged in the work. The calling him in to help to settle differences in half-a-dozen cases demonstrates how the parties concerned had felt and acted at the time relatively to the other items.

Mr. French denies being a party to any settling or agreement in the result, as to the items regarding which he was called upon to give his opinion, but he cannot, and does not swear they were not adjusted. I pressed respondents' counsel to explain the absence of any record of objectionable items and he frankly and properly admitted he could not and that such a record would be what one might expect if permanent importance were to be attached to the objection relative to the want of invoices.

The erroneous taking of French's opinion on what the legal meaning of so plain and ordinary a phrase as "invoice price" implies seems to have misled the Court. This was a purchase on a basis of price ascertainable either by the production of the original invoice, or such satisfactory evidence as would convince fair-minded business men skilled in such business of the truth of what the original invoice had, or of necessity must have, exhibited if correctly made out. Neither party could be bound by an error in the original or deprived of his bargain because of the destruction of the original piece of paper. The price that appeared or ought to have appeared therein was the basis to be used. If Mr. French had made such a bargain and was deeply impressed with the idea that he had made one which should yield him a profit of ten thousand dollars, for example, and it was found when time arrived for taking stock that a thief had removed all original invoices, or other destruction, of which the vendor was innocent, had overtaken them, and his vendor had been tempted to resell the goods at an advance of five thousand dollars and set up the impossibility of producing the invoices as a defence or reason excusing himself from observing the contract, I must be permitted to think he (Mr. French) would be constrained to see the absurdity of what he so persistently maintained in his evidence. True, he finally, under pressure, lessened his pretension, but that pretension and its sorry consequences seem, I respectfully submit, to have borne fruit.

It is to be observed that the evidence for the appellant shews that the invoice prices were discoverable from the private markings on the goods, or boxes holding them, that the respondent Bergeron had, as agreed, been engaged as a clerk in the shop for a month preceding the stocktaking, had been given every op-

portunity for acquainting himself with such marks, inspecting the goods, verifying the systems and invoices, and comparing the latter with these markings, and that Erisman, a fellow-clerk, describes very well how he had availed himself of his opportunity and ends his account of what had transpired by saying:—

Well, really, Mr. Bergeron and I took stock of the whole store before the stocktaking took place.

Bergeron was called for the defence after this witness had given such evidence, but never ventured a word of either denial or explanation of what Erisman says. It seems, I submit, rather an impudent thing on his part, after such an opportunity for investigation, and that investigation, to impute fraud to the appellant and fail so signally, not only to make no proof, but not even to try, and shew in a single instance, that the private markings in truth had been deliberately made to appear different from the original invoice.

It is absurd to suppose any merchant would in ordinary practice systematically put upon his goods or cases a false instead of the true private marking, which is intended only for the use of himself or his servants. It could only deceive himself.

It is conceivable that a systematic fraud of that kind might be resorted to by a man intending to sell his stock, but inconceivable he should invite his purchaser to spend a month in his shop and be given every opportunity to detect it. And there is not a word even from Bergeron, who had such opportunity of discovery to suggest that a single change had been made in such markings. It is sworn by Erisman that Bergeron had, whilst so engaged in his own investigation, gone over "those invoices," meaning, no doubt, those invoices to be had relative to what he had examined. If he could have shewn a false system had been adopted, or even a few instances suggesting it, no doubt he would gladly have done so. He would not then have had to set up such a cry as is made about the palpable mistake of a few shirts put in the wrong box. If there was an intention to commit fraud in the way suggested it was about as easily detected as possible to conceive of.

I go further and submit that it was the duty of the respondents to have exposed the fraud if it existed. If half the energy put by the respondents' solicitors into the fortnight of correspondence that ensued had been applied to investigate such a charge and to demonstrate its truth they could easily have done so if any foundation had existed for it. In the event of failure they ought to have submitted another alternative than this litigation.

I conclude from reading and considering every bit of evidence in this case that the defendants never had any reason

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to say that they were being unfairly dealt with in the matter of the invoices. Their own conduct throughout destroys the pretension and makes it sound hollow. If they had held over any items for production of invoices, had called for account books to verify anything, had specified certain items or varieties of the stock-in-trade and, where invoices were wanting, had insisted on duplicates as means of testing the questions involved, or done in short anything that ordinary business men anxious to complete a bargain would likely have done under the circumstances, then suspicion or surmise as to their motives might have been in order.

On the contrary, without, so far as the evidence shews, anything of that kind having influenced the action of the defendants or been present to the mind of Mr. French, he called defendants aside at the close of the stocktaking and said the deal could not go through. It was he who acted and not they. They knew from hour to hour over three days such, if any, difficulties as want of invoices had created. It had produced no operative effect on their minds. He, as I have shewn, knew very little of what had transpired. And as to want of any invoice, he had called for them twice, he thinks, and failed once to get them produced; whether one item or what is not explained. But, to do Mr. French justice, he says it seemed as if they "could not produce the invoices" asked for and not produced, and he shews that he had no proper opportunity of deciding as to the validity of such a contention as is raised. Then he says that, at the close of the stocktaking, he called defendants aside and told them "we (meaning, I take it, the firms he represented) could not go on," and then adds:—

I also had a conversation with Mr. Periard in which I told him unless he could alter his prices and make the thing a little more satisfactory than it was then that I would not have anything to do with it, and I would not advise these men to go on with it paying the price they were paying for the stock;

he says also, that Periard and his daughter came to see him in his office another day and, though he cannot recall the conversation exactly, believes he told the man at the time

that I did not care to go on with the thing as long as he was taking the stand he was in regard to prices.

Such was the attitude of French, who had from the inception been the directing mind. It was not the want of invoices to verify prices, but the prices and the result of a total which he had not expected. Appellant may have been loaded up with too much old stock at high prices, compared with what French's backers could have supplied such a stock for. And adding 13 per cent. to these prices when the total reached nearly $18,000, and a couple of thousand more for fixtures, and thus made the

total figures rather high for men who had calculated on, and only provided for, fifteen or sixteen thousand dollars all told.

It is quite clear that that was the true situation and it was a surprise. French had undertaken to acquire for respondents a business on the unusual terms of invoice price plus 13 per cent., which might not be an extravagant thing if applied to a small stock with the purpose of expanding the business after acquisition, but when applied to a large one, probably the safe limit to carry in any case, and not permitting expansion meant, using French's own words, "commercial suicide." He never ventured, when shewn the result, to challenge Periard to produce evidence of the actual invoice prices and that then he would pay. And when the matter passed into the hands of the respondents' solicitors they insisted on "invoices or copies of same," a thing probably impossible in many cases, and waived aside appellant's suggestion of verification "in any reasonable way" in cases where invoices could not be produced. This proposal ought to have been accepted.

The appeal should be allowed with costs here and in the Courts below and judgment be directed for appellant and the case remitted for assessment of damages with costs thereof to the appellant.

Duff, J. (dissenting).

DUFF, J. (dissenting):—This appeal is from the judgment of the Court of Appeal for British Columbia dismissing an appeal from the judgment of Morrison, J., by which the appellant's action—for the recovery of damages for breach of contract to purchase a stock of goods in Vancouver—was dismissed. The contract upon which the action was brought is contained in three letters, set out in the statement of claim as follows:—

A. J. Periard,
Attorney for S. Periard,
Vancouver.

Vancouver, June 1st, 1910.

DEAR SIR,—We, the undersigned, beg to submit the following proposition for the purchase of your stock of merchandise contained in the premises known as 135 Hastings St. East. We will pay you for said merchandise at the rate of one hundred and ten cents on the dollar, invoice price ($1.10). Fixtures to be taken at a valuation. Each party to have them valued. Failing to come to an agreement the matter to be left in the hands of a third party by mutual consent. Terms of sale to be half cash on taking possession of the business, and the balance at the rate of one thousand dollars per month ($1,000), bearing interest at the rate of seven per cent. (7%) per annum on approved notes, with the option of paying all cash at the time of taking possession. The date of said possession to be August 1, '10, or sooner, if so desired, or not later than the 15th of August. You to agree to immediately cancel all goods purchased by you for the coming fall, and to reduce the stock in the interval of tak-

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ing possession as much as possible. One of the purchasers to have the privilege of working in the store during the month of July.

In consideration of this offer, we enclose our marked cheque for one hundred dollars ($100).

Awaiting your reply by letter, we remain,

Yours truly,
NOAH BERGERON.
W. RICKSON.

Witness:
A. French.

Vancouver, June 1st, 1910.

Messrs. Bergeron & Rickson,
Vancouver.

DEAR SIRS,—Replying to your letter of this date, I hereby accept your offer for my stock at the rate of $1.10 cents on the dollar, with 3% added for freight. And I further want the sum of $2,000 deposited in any chartered bank as an evidence of good faith on your part. I will also deposit a like sum as an evidence of good faith on my part.

The other conditions of sale mentioned in your letter are quite satisfactory to me.

Yours truly,
S. E. PERIARD.
A. J. PERIARD.
Attorney.

Witness:
A. French.

Vancouver, June 2, 1910.

A. J. Periard,
Attorney of S. E. Periard,
Vancouver.

DEAR SIR,—In reply to your letter of the 2nd inst. we beg to say that we accept the terms as laid down by you, viz., the 3% for freight, and we have deposited the sum of two thousand dollars ($2,000) in the Merchants Bank of Canada here to your credit, pending the taking over of the stock by us.

Yours truly,
NOAH BERGERON.
W. RICKSON.

The learned trial Judge held that it was a condition of the contract that the appellant should produce reasonably satisfactory evidence of the prices at which the goods comprising her stock had been purchased by her in time to enable the purchasers to complete the contract and take possession at the date fixed in the first letter; and that the appellant had not produced such evidence and had given the purchasers reasonable grounds for thinking that her husband, who acted for her, was not acting in good faith in the matter of the information furnished by him respecting the prices alleged to have been paid for the

goods and consequently that the respondents were justified in terminating the agreement. In the Court of Appeal, Irving, J., agreed with the trial Judge. Galliher, J., was unable to say that the trial Judge was wrong, and McDonald, C.J., thought the judgment of the trial Judge ought to be reversed on the ground that, in the last week of July, the goods were gone over by the husband of the appellant and the respondents and that an inventory was made in which were entered the prices which the parties agreed were to be paid for the goods and that this agreement the appellant is entitled to enforce; and the contention in this Court was that the appellant is entitled to succeed upon that ground. I think this view cannot be sustained and that the appeal ought to be dismissed.

The prices at which the goods, according to the agreement of June, were purchased were the "invoice prices" plus 10 per cent. Until these prices were ascertained with sufficient precision to fix the amount to be paid by the respondents in figures there could, of course, be no completion of the contract; and it is quite obvious that the contract contemplated the ascertainment of these prices before the time fixed for completion, the first, or at latest the 15th, of August. The information, moreover, which would be required for this purpose being presumably in the possession of the appellant, the contract further contemplates that it shall be produced by her. It is not necessary to say that she was bound in every case to produce the original invoice, but it is clear that the respondents were, in cases in which invoices could not be obtained, entitled to some reasonable substitute, something which a business man would regard as satisfactory evidence of the price paid for the goods. The respondents were not bound to accept the appellant's own unverified statement; the appellant, on the other hand, was clearly bound to give, in good faith, every reasonable assistance to the respondents to enable them to get at the true facts.

As regards a large portion of the goods (the respondents say 50 per cent., and the appellant admits 25 per cent.), it is quite clear that invoices were not produced. Nor is it suggested that in such cases there was any satisfactory evidence of what the prices paid actually were. The appellant must, therefore, succeed, if she can succeed at all, on the ground that the parties had agreed upon some other way of fixing the price of the property sold; and it is, as I have said, argued that this was done by agreement between the parties.

The inventory referred to contained an enumeration of goods and prices set opposite them. It was stated by the appellant's husband, her daughter (and by one or two other witnesses who were in her employ at the time) that these prices were assigned only after the parties had agreed to them as the

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prices the appellant should receive under the contract. This is contradicted by all the witnesses called by the respondents.

One of these witnesses, a Mr. French, is a partner in one of the two well-known firms of manufacturers who were financing the respondents, and he was present during part of the time while the inventory was being compiled. The learned trial Judge has accepted his evidence as reliable and I do not think there is the slightest ground for casting a doubt upon his candour. His evidence is as follows:—

I called on Mr. Periard on Saturday, and he said he would be ready to take stock on Monday, and on Monday we went up with Mr. Bergeron and Mr. Rickson and Mr. Corderoy, and Mr. Periard said he would not allow us in the store, as he proposed to take stock himself before we went in, and that consumed three days. On Thursday we were allowed to go in, and we were not there probably more than five minutes before a dispute arose about invoices which were not produced, and this continued throughout the two days, I may say. I was not there all the time, but I was frequently sent for and called up to try and settle disputes that arose between them. This lasted up until Friday afternoon, when they were through. . . . They claim, I believe, that I settled these prices and passed them, and I certainly did not.

Q. By Mr. Reid: What is the last? A. They claim, I believe, that I agreed to these prices. I certainly did not, it would have been absurd.

COURT: Those are the prices in the stock list?

Witness: Those are the prices put down in the book—taken down.

COURT: And you did not agree to that?

A. No. There was so much disputing, and so much unpleasantness, that if we had not gone down and got the thing put down in some shape we would probably have been there now, trying to get it settled. I thought when I got through that I would have been able to make some reasonable settlement with Mr. Periard, but the further matters went the worse they were getting, and when they got into other lines that I did not know anything about the same disputes were cropping up, but these I can only speak of that I know of.

. . . . . .

COURT: And you got them? A. No, I only saw the one invoice; that was the underwear, that Mr. Pickson insisted on getting.

Q. Now, what was Miss Periard's attitude on the question of producing invoices? A. Well, it appeared to me that they just simply could not produce them.

Q. Now, do you know whether this stock was ever approved of by Rickson & Bergeron? A. It certainly was not approved by them. It was not approved when we got through because I said, "We cannot go on."

Mr. Reid: I object. Who did you tell?

COURT: Just wait.—Was Mr. Periard there when you told something to some one?

Witness: No, I called Rickson and Bergeron to one side, and told them we could not go on, and also had a conversation with Mr. Periard in which I told him unless he could alter his prices and make the thing a little more satisfactory than it was then that I would not have anything to do with it, and I would not advise these men to go on with it, paying

the price they were paying for the stock. And Mr. Periard, I believe, took the construction from one of my remarks that these men could not finance it. Well, that was not right. We had $20,000 in sight, and could have got more, if necessary. But I would not have anything to do with it, or would not allow either of the firms I was representing to go into the thing and take over the stock at what it was listed down at.

. . . . . .

Q. Then you thought, Mr. French, that Mr. Periard ought to be compensated in some way? A. Yes and no. I did not think that Mr. Periard acted in good faith with us, because, as far as damages are concerned, these other men purchased goods to the extent of several thousand dollars.

COURT: That is the defendants? A. Yes, they advertised that they were going into business. We ourselves shipped goods to Vancouver for them, and we lost money, because they had to be sold for the cost less the freight. They had made all their arrangements to go into business, and they were acting in good faith and I don't think that Mr. Periard was acting in good faith, and as far as damages are concerned, it is horse and horse with them. But I did think, and I do think, as these men were leaving the matter pretty much in my hands——

COURT: The defendants? A. Yes.

COURT: Well, just refer to them as that. A. Yes. When I took in the situation, and saw the trouble we were going to have, I do think that I make a mistake in not stopping right there—at the very commencement, when the trouble and disputes arose. In the first place, Mr. Periard had no right to close up his store Monday, Tuesday and Wednesday and not allow us to go in; it is a thing I never heard of in the mercantile business before. I never heard of a seller refusing the purchaser the right to go in and take stock with them.

Q. On what ground did you think that an offer should be made to Mr. Periard for compensation? A. For the two days that they had him closed. I said: "Give him what he thinks is reasonable," and I suggested this matter of settlement with Mr. Periard, but Mr. Periard had his head full of this $2,000 that was in the bank, and he said he was going to have it and the matter ended there.

Both Bergeron and Rickson also deny that they agreed upon the prices put into the inventory, and this evidence was accepted and acted on by the trial Judge. The evidence on behalf of the appellant on the other hand was not accepted and was distinctly discredited by the trial Judge, who took the view that the appellant's family (who were really in charge of the business) were not acting in good faith. There are several instances given by French of what would appear to have been rather bold attempts at overcharging in respect of classes of goods with which he was familiar and I agree with Mr. Justice Irving in thinking that the learned Judge's view is supported by the evidence as it appears in the record.

The learned trial Judge evidently thought that the respondents having made their arrangements to take over the appellant's business and desiring, if possible, not to withdraw from the project (entailing, as such a course would necessarily, not

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a little loss to themselves), went on with the inventory even after they became aware that the appellant was not living up to the contract in the matter of the verification of prices in the hope that a satisfactory arrangement might ultimately be reached; and that neither party entertained the idea that the respondents by the part they took in connection with the inventory were irrevocably committing themselves to purchase at the unverified prices entered in it. That this was so appears to me to be demonstrated by the subsequent conduct of the parties. The appellant's husband and daughter admit that they were informed by French, shortly after the completion of the inventory, that the respondents would not go on with the purchase on account of the absence of invoices. Almost immediately a correspondence ensued between the solicitors for the appellants and the solicitors for the respondents.

The respondents' solicitor at once took the position that the agreement had fallen through because of the failure of the appellant to produce evidence of the cost prices of the goods, and proceeded to discuss a fresh arrangement. To this position he adhered throughout the two weeks during which the correspondence lasted. The appellant's solicitor insisted that she was under no obligation to produce invoices, but nowhere is there a suggestion that the parties have agreed upon the inventory prices. The whole correspondence, indeed, is inexplicable on that assumption. In a letter of August 1st, Mr. Reid, who acted for the appellant, proposes to leave the question of "what is the invoice price of any goods concerning which the invoice cannot be produced to arbitration," and proceeds to say that "she contends" not that the invoice price of such goods has been settled by agreement, but that "the exact invoice price has in all cases been affixed to the articles in question."

On the same day he writes:—

> We deny the inability to produce invoices to carry out the agreement for sale or that the agreement for sale requires the production of invoices.

Not a word about prices having been agreed upon.

Again, on August 4th:—

> Is it necessary to again point out that the production of invoices is not required by the contract? An inventory has been made out, submitted, checked over and verified by your clients, and in a great majority of cases the prices have been verified by invoices. There are some cases where the invoices cannot be found. In these cases, if your clients think that the prices put by my clients are not the correct invoice prices, the matter may be verified in any reasonable way.

Not easily reconcilable with the contention that the inventory prices had at that time been accepted by the purchasers.

Then, on August 9th:—

We find on consultation with our clients that about 75% of the stock can be vouched for by invoices, and that these were passed by your clients when stocktaking was done.

This by implication is a distinct admission that the only items "passed" by the respondents were those in respect of which invoices were produced.

These passages are consistent with the general tenor of the letters and they appear to be incompatible with the hypothesis on which the contention I am considering is based. The attitude indicated by these letters was not departed from by the appellant down to the trial. The respondents in their defence set up the failure of the appellant to produce evidence of "invoice price." In reply the appellant dealt specifically with this defence by simply denying the facts alleged; there is no suggestion of an agreement to purchase at the inventory prices nor of waiver of the production of invoices, or evidence of "invoice price." It is impossible to believe (if the appellant's husband had really understood the respondents were binding themselves to accept the prices appearing in the inventory), that the appellant's solicitor could have so long remained in ignorance of this crucial point.

All these considerations convince me that the appellant's contention has no substantial basis and I think the appeal should be dismissed.

Anglin, J.

ANGLIN, J.:—Although I was, at the close of the argument, inclined to the view that this appeal should be dismissed, after carefully reading the evidence several times I am convinced that the conclusion in the defendants' favour reached by the British Columbia Courts was erroneous and that the dissent of the learned Chief Justice of the Court of Appeal was well founded.

Assuming that the defendants were *primâ facie* entitled to have the prices of the stock which they had purchased vouched by the production of invoices, I am satisfied that in cases where such invoices were called for on the stocktaking and were not forthcoming, production of them was waived and either the prices demanded by the plaintiff were accepted or compromise prices were then agreed upon and such prices were thereupon inserted in the stock list. When the stocktaking was completed, on the Saturday afternoon, the prices of the entire stock had been settled and the defendants did not then take the stand that they would require the production of such invoices as the plaintiff had failed to exhibit. Neither did they keep any question of prices open by protest or other step taken for that purpose. It was not until the following Monday, when the defendants and their backer, French, had determined, for an entirely differ-

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ent reason, to escape from their bargain, that they brought forward the failure to produce certain invoices as a pretext for repudiating the contract. The real difficulty was that it then appeared that the plaintiff's stock would cost much more than the defendants had anticipated or had provided for and that at the unusually high figure they were paying for it—$1.13 on the dollar of invoice prices—the venture was likely to prove unprofitable, or much less profitable than they had expected. French, too, had then realized that with such a stock on the defendants' shelves their orders for his principals, manufacturers and wholesale dealers, could not be as extensive as he had hoped for and he probably began to doubt the wisdom of the latter advancing upwards of $12,000 to enable the defendants to carry out their purchase.

I have no doubt that these were the true reasons why the defendants repudiated the contract. They were not warranted in doing so. Their attitude from the Monday after the stock-taking and their final letter of repudiation on the 16th of August, justified the plaintiff in refraining from taking steps towards ascertaining the value of the fixtures by arbitration. The fact that in this letter the failure of the plaintiff to make a deposit of $2,000—which it is admitted had been waived at an early stage of the negotiations—is put forward as one of the chief grounds for the defendants' withdrawal confirms me in the view that they were looking for excuses and that the objection based upon non-production of invoices to verify prices and that based upon the plaintiff's failure to deposit $2,000 are of the same type—both of them pretexts to escape from an unsatisfactory bargain.

I have had the advantage of reading the judgment of my brother Idington. I concur in his views upon the effect of the evidence as a whole, and in his appreciation of the testimony of French, to which I fear the learned trial Judge attached quite too much importance.

The appeal should be allowed with costs to the plaintiff throughout and the action should be remitted to the Supreme Court of British Columbia for the assessment of the plaintiff's damages according to the usual practice of that Court.

Brodeur, J.

BRODEUR, J.:—In selling her stock at invoice price, it does not necessarily follow that the appellant was bound to produce the invoices themselves.

The sale of the stock was made under the conditions which have become of a very common practice. No lump sum is stipulated, but the price is fixed at so much as the goods cost. In the cases where a merchant has been in business for many years, it would become absolutely impossible to shew the invoices or to establish their relation to the goods that are in the store.

In this case, however, if the invoices that would cover all the goods that were inventoried were not produced, a large number of them were shewn or could be shewn if they had been asked for. The parties relied evidently upon the cost prices that had been put on the boxes containing the goods.

Some disputes arose as to the value of some of these goods; they seem to have been adjusted during the inventory. And if there is some doubt as to whether the prices mentioned in the inventory were accepted or not, the respondents had the opportunity as shewn by the correspondence to indicate later on the articles against the value of which they objected.

They refused to accept that proposition and preferred to stay their case on the ground that the invoices should be produced.

That question has already come up before the Courts in England and we find a case of *Plank* v. *Gavila*, 3 C.B. (N.S.) 807, where the agreement provided that the commission of the plaintiff was to be fixed on the invoice price, it was held

that it was competent to the plaintiffs to shew the proximate value of the consignments upon which they claimed commission without producing the invoices.

It is evident to me that the respondents and their indorsers did not want to carry out the agreement after they found that the stock was larger than what they expected.

They at first claimed that the contract was at an end. But later on they saw how weak their position was in that respect and they carried on a correspondence which shewed very clearly their intention to repudiate their obligations. Because if they had been willing to stand by their contract they should have accepted the offer made by the appellant to arbitrate on the value of the goods in cases where they thought they were too high. No, they waited until the date which had been fixed for the delivery of the stock, and they formally declared that the plaintiffs not having put up a deposit and not having produced the invoices, they had to withdraw from the deal.

That claim as to the deposit is only a pretext, for it had been understood that such a deposit would not be made; and their request for the production of the invoices was not founded in law.

I have come to the conclusion that the action in damages instituted by the appellant for breach of contract ought to be maintained.

The appeal should be allowed with costs of this Court and of the Courts below and the case sent back to the Supreme Court of British Columbia to assess the plaintiff's damages.

Appeal allowed; DUFF, J., *dissenting.*

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Oct. 18.

FREEMAN v. DE BLOIS.

Supreme Court of Nova Scotia, His Honour Judge Pelton, Master and County Judge. October 18, 1912.

1. LIMITATION OF ACTIONS (§ II D—50)—TRUSTS—FRAUDULENT REPRESENTATION OF AUTHORITY—EXPRESS TRUST.

Where money is handed over to the defendant by the plaintiff to pay off the mortgage of the latter to a third person upon defendant's false and fraudulent representation that he, the defendant, is the mortgagee's agent, and the money is not paid over to the mortgagee, the defendant becomes an express trustee of the money for the plaintiff from whom he received it, and the Statute of Limitations applicable to ordinary claims of debt does not apply.

Statement

HEARING of action against an absconding debtor.

Daniel Owen, for plaintiff.

No one, *contra*.

Judge Pelton.

JUDGE PELTON (Master):—In *Smith* v. *Cuff*, 3 N.S.R. 12, where the claim was on a promissory note and no appearance had been entered for defendant the Court held that the Court will not allow judgment to be entered up against an absent debtor for a debt barred by the Statute of Limitations, and if the claim in this action was for an ordinary debt, such as a promissory note, money had and received, money lent, etc., I would have to be bound by that decision, and refuse an order for judgment.

The claim proved before me, however, is not for an ordinary debt, the facts disclosed by the evidence shew that the money sought to be recovered in this action was handed by the plaintiff to the defendant for the special purpose of taking up a certain mortgage to a third person, and under false and fraudulent representations by defendant, that he was the authorized agent of the mortgagee. Under the circumstances the defendant became an express trustee for the plaintiff of such money, and the statute is no bar: *North American Land and Timber Co.* v. *Watkins* [1904] 1 Ch. 243; see also same case on appeal, [1904] 2 Ch. 233. On this ground the plaintiff is entitled to recover, the defendant having failed to pay over the money to the mortgagee or return it to plaintiff.

Order for judgment.

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March 3.

REX v. BECHTEL.

(Decision No. 2.)

Alberta Supreme Court. Trial before Stuart, J. March 3, 1913.

1. TRIAL (§ III E 5—260)—CRIMINAL CASE—INSTRUCTION AS TO CORROBORATION OF ACCOMPLICE.

It is the duty of the trial judge to inform the jury in a criminal case, in which the evidence of an accomplice is given on behalf of the prosecution, that it is inadvisable to convict on such evidence unless corroborated.

2. APPEAL (§ VII M 4—615)—INSTRUCTIONS TO JURY—PREJUDICIAL ERROR ON REFUSAL OF APPLICATION TO MODIFY—CRIMINAL CASE.

Where due warning has been given in the judge's charge against crediting the uncorroborated evidence of an accomplice, the fact that further references to the subject in the charge and the refusal of the Crown's request for a specific direction that they might convict if they saw fit upon such evidence may have led the jury to understand that it was not competent for them to find a verdict on such evidence, should not be made a ground for placing the accused twice in jeopardy by ordering a new trial on an appeal by the Crown after his acquittal; such circumstances are insufficient to constitute a "substantial wrong or miscarriage" in the terms of Cr. Code, sec. 1019, limiting the right of an appellate court to grant a new trial.

[*Rex* v. *Bechtel* (No. 1), 5 D.L.R. 497, discussed and doubted.]

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MOTION for judgment after a verdict found against the accused on a charge of attempting to procure an abortion. This was a new trial of the case as directed in *R.* v. *Bechtel* (No. 1), 5 D.L.R. 497, 19 Can. Cr. Cas. 423, 21 W.L.R. 665. Statement

J. Short, K.C., for the Crown.

A. H. Clarke, K.C., for the accused.

STUART, J. (oral):—The accused was convicted by a jury of six men of having used an instrument on one Mrs. Cronsberry with the intention of procuring an abortion or miscarriage. Upon the same facts practically and upon the same evidence, the accused was acquitted last June by a jury of six. Mr. Justice Walsh, who tried that case, directed the jury, as it was his duty to do, that they should not convict upon the evidence of an accomplice, unless it was corroborated. He refused to tell them that they might do so legally if they were so inclined. On account of his refusal to do this after the acquittal of the accused a reserved case was taken upon the point as to whether he should or should not have told them that they were at liberty to do so if they saw fit, and without corroborative evidence. I was a member of the Court of Appeal who sat on this man's case on that appeal and it is only because I was a member of that Court of Appeal that I have ventured to say anything about it. If I had not been a member of that Court of Appeal it would have been exceedingly improper for me to make any observations about the matter but I was a member of that Court of Appeal and this man's case was then presented to me along with my brother Judges and I have a share in the responsibility upon my shoulders as to what happened then. Now for the reasons I am going to give I am overwhelmed with the conviction that that acquittal should never have been set aside as a matter of law and I am making this observation because I feel a deep sense of personal responsibility that it was partially owing to my own slackness of apprehension as a Judge, the slowness of my own mind that a certain question was never brought up in the hearing of that appeal that should have been brought up and Stuart, J.

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should have been discussed. I was not alone responsible, but I was partially responsible. Section 1019 of the Code says:—

> No conviction shall be set aside nor any new trial directed, although it appears that 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 on the trial.

Now section 1019 was never mentioned before the Court of Appeal. The subject was never brought up by me. It never occurred to me. It was never spoken of, and if you will look at the judgment of the Court of Appeal you will find that sec. 1019 is not mentioned in it, and the words "miscarriage of justice" are not referred to or uttered there at all. The accused's case was argued in that Court of Appeal by a counsel who was called out of bed about fifteen minutes before the Court of Appeal sat to hear his case so it cannot be said that he was very properly represented. In this connection I want to read the words of Mr. Justice Osler in the case of *Rex* v. *Karn*, 5 O.L.R. 704:—

> This expression of opinion will probably be sufficient as a guide in future cases of a similar kind, as we are not obliged, nor do I think it would be right even if we had the power to do so, to direct a new trial, the defendant having been tried and actually acquitted; though, it may be, in consequence of an erroneous direction. The cases ought to be extremely rare in which the Court would think it right to place the accused a second time in jeopardy for the same offence contrary to what has hitherto been one of the fundamental principles of English law.

They are the words of a Judge than whom there was no more distinguished a Judge in the Court of Appeal in Ontario. This man's case was this. He was acquitted by a verdict of six men and a reserved case was taken and the very point upon which in these cases a new trial may be directed, namely, when there had been a substantial miscarriage of justice, was never referred to. I think there was a slight reference to it in one of the factums of the accused which was prepared after the argument and handed in, but I doubt, in the hurry of that appeal whether these factums were fully read. I know I never read them and I doubt if anybody else did. Now, that in itself is sufficient to convince me that something went wrong, for which I was partially responsible on the hearing of this man's appeal. But supposing the cases had come up before us and I had thought of that, where would the miscarriage of justice have lain? The law says, when you attempt to convict a man on the evidence of an accomplice, that the Judge should tell the jury that they ought not to convict unless that evidence is corroborated. Mr. Justice Walsh told the jury that they ought not to convict, that they should not convict unless Mrs. Cronsberry's evidence was corroborated

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in some material particular implicating the accused, and that was not objected to. I told the jury that last Friday and it was not objected to and it is admittedly the proper direction, and yet because the jury were not given a legal opportunty of doing a thing which it was the duty of the Judge to tell them they ought not to do, it is said that there was a miscarriage of justice, or it might be suggested, I suppose, but it is not even said, as the subject was never discussed. Sec. 1019 was never referred to before the Court of Appeal. Now it is for this reason that I entertain, as I said at the beginning, the most profound conviction and belief that this man's first acquittal should never have been set aside, and I am partially responsible for that, as I said, because of my slowness of apprehension in the hearing of this case when it was brought before me. I do not know what remedy there is. I do not see that there is any remedy unless possibly an application for a writ of *habeas corpus* to the Supreme Court of Canada, which I am doubtful about, but that is not for me. However, he has been convicted. His earlier acquittal was set aside and now he has been convicted. It may be suggested that he is guilty, and why not impose a heavy sentence upon him, but I hope I have a somewhat deeper apprehension of my legal duty and to act solely on that, although I do think that he is guilty. It is very important that guilty people should be convicted, but it is a thousand times more important that they should be convicted according to law, which I do not believe this man was, and it is for that reason that I propose to impose a sentence which I know the laymen will say, and possibly a large part of the profession will say, is too lenient, but it is because I have on my own conscience the fact that this condition, partially owing to my fault, is only due to an acquittal which should never have been set aside. You are, therefore, sentenced to three months in the Lethbridge gaol without hard labour.

Sentence accordingly.

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Alberta Supreme Court, Walsh, J. January 4, 1913.

1. MUNICIPAL CORPORATIONS (§ II G—195)—LIABILITY FOR DAMAGES — TORTS NOT UNDER POWER OF COUNCIL—FORM OF ACTION.

The provisions of sec. 10 of title 27 and sec. 26 of title 35 of the charter of the city of Medicine Hat, providing for the appointment of an arbitrator to fix the compensation of one whose lands have been "injuriously affected in the exercise of any power of the council," in the event of the council not being able to agree with the claimant as to the amount of compensation or damages, do not apply to a claim for damages of an owner of lands abutting on a street the grade of which has been cut down by the city, since such action by the city is not an "exercise of any power of the council," but is a tortious interference by the city with the owner's right of free access to the street, in the absence of any express or implied provisions in the charter granting such power to take away from the owner such right of access, and the correct remedy is by action against the city.

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2. ACTION (§ II—35)—FORM OF REMEDY—INGRESS AND EGRESS UPON ABUTTING STREET.

The right of an owner of land to have access to his property from the street is a private right and any wrongful interference with such right gives rise to a cause of action against the wrongdoer.

[*Chaplin* v. *Westminster*, [1901] 2 Ch. 334, referred to.]

3. MUNICIPAL CORPORATIONS (§ II G 5—260)—PRESENTING CLAIMS AGAINST —ARBITRATION—INJURY TO LANDS BY GRADING STREET.

On an application for the appointment of an arbitrator to fix compensation for altering the grade of a street, under sec. 10 of title 27 of the charter of the city of Medicine Hat, the fact that the applicant's property is benefited rather than injured by the change of grade, or that the city has not yet completed its work upon the street, is not fatal to such application.

Statement

AN application for the appointment of an arbitrator to fix compensation for altering the grade of a street.

The application was refused.

G. H. Ross, for the plaintiff.

J. J. Mahaffy, for the defendant.

Walsh, J.

WALSH, J.:—The applicant, alleging that the city has cut down the grade of Montreal street, upon which property owned by him abuts, asks for the appointment of an arbitrator to fix the compensation to which he is entitled by reason of the same. He claims that the grade of this street in front of his property has been so lowered that he can neither get to the street from his house, which is upon this land, nor get to his house from the street, and that access from and to his house can only be had by the lane in the rear of the same. This contention seems to be established by the material filed on this application and is not seriously disputed by the corporation. If arbitration is the proper remedy for the wrongs of which the applicant complains, he has, in my opinion, amply established his right to it. The objections urged by Mr. Mahaffy, that the applicant's property is benefited rather than injured by this change of grade, that the city has not yet completed its work upon this street, and that no claim can be asserted because the corporation has not yet published the notice called for by sec. 4 of title 27 of the city's charter are not entitled to prevail. The only question which, in my view of the matter, is open for discussion is whether the damages, if any, to which the applicant is entitled, must be determined by arbitration, or in an action brought by him against the city. This phase of the question was not discussed before me. Mr. Mahaffy submitted that the proper remedy was by action, but as he did not develop any argument in support of this contention, I do not know upon what he rested it. When, in my examination of the charter, after the argument, this view impressed itself upon me, I asked Mr. Ross to point out to me all of the sections of the charter which he could find to support his application, so that, if necessary, I might have the motion re-argued

upon this point. He has done this, but as the opinion which I had already formed against the application remains unchanged, I am disposing of it without further argument.

The sections of the city charter which are relied upon by the applicant in support of his contention that arbitration is his proper form of remedy, are sec. 10, of title 27, which title is headed "Expropriation," and section 26, of title 35, which title is headed "Public Works." Section 10 reads as follows:—

> Where a claim is made for compensation or damages by the owner, or occupier of or other person interested in lands taken by the council *or which is alleged to have been injuriously affected in the exercise of any power of the council*, in the event of the council not being able to agree with the claimant as to the amount of compensation or damages, the same shall be settled and determined by the award of a Judge or of an advocate to be appointed by him.

Section 26, above referred to, is as follows:—

> The city shall do as little damage as may be *in the execution of the powers by this Act granted to them and shall make reasonable and adequate satisfaction to the owners, occupants or other persons* interested in the lands, water, rights or privileges entered upon, taken or used by the city or *injuriously affected by the exercise of its powers*, and in case of disagreement, the compensation or damages shall be ascertained as provided in like cases in title 27 hereof.

The applicant's lands have been neither entered upon, taken or used by the city and the case must therefore be brought within those portions of either one or other of these sections which I have italicised, before the city can be forced into arbitration over it. The simple question, therefore, is whether the cutting down of this street in the manner complained of was done "in the exercise of any power of the council," or was done wrongfully. If the former, the applicant's damages must "be settled and determined by the award of a Judge or an advocate to be appointed by him; "if the latter, the applicant will be driven to his action, for there is no provision of the charter under which a tortious interference by the city with such a right as the plaintiff alleges can be otherwise dealt with. As Sir Francis Jeune says, in *Goldberg* v. *Mayor, etc., of Liverpool*, 82 L.T. R. 366:—

> The whole of this case appears to me to turn upon this, whether in fact they had that statutory authority or not. If they had not power to do the exact thing which they have done, then I agree that there is authority in the case of *Metropolitan Asylums District Board* v. *Hill*, 6 A.C. 193, for saying that although Parliament may have authorized them in a sense to do what they did, still Parliament must not be taken to have authorized them to do it at the expense of creating a nuisance and so invading private rights.

The applicant's right to have access to this property from the street is a private right, wrongful interference with which gives

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him a right of action against the wrongdoer: *Fritz* v. *Hobson*, 14 Ch.D. 542; *Attorney-General* v. *River Thames Conservators*, 1 Hem. and M. 1; *Lyon* v. *Fishmongers Company*, 1 A.C. 662. As Mr. Justice Buckley puts it in *Chaplin* v. *Westminster*, [1901] 2 Ch. 334:—

> A person who owns premises abutting on a highway, enjoys as a private right the right of stepping from his own premises on to the highway, and if any obstructions be placed in his doorway, or gate-way or, if it be a river, at the edge of his wharf, so as to prevent him from obtaining access from his own premises to the highway, that obstruction would be an interference with a private right.

I have examined with care the city charter, which is chapter 63 of the provincial statutes of 1906, with a view to determining whether or not there is conferred upon the city, either expressly or impliedly, the power to take away from an owner of lands his right of access to the same from the street on which they abut, and I have been quite unable to find anything which justifies the conclusion that any such power is hereby given to it. Title 29 is headed "Highways and Public Places," and one would naturally look under that heading for the provision conferring such power if it exists. Not one word appears in it, however, which is even suggestive of such a power. Jurisdiction over its highways is thereby vested in the city and power is given to it to close, lease, or sell the whole or any portion of a street and to plant trees upon and regulate the width of the travelled portion of the streets and the liability of keeping the streets (including grades) in repair is imposed upon it. But I cannot find in any of these provisions anything which authorizes the city to so cut down the grade of a street as to deprive the owner of land abutting on it of his right of access to it from the street. Mr. Ross refers me to section 1 (a) of title 34, headed "Local Improvements," under which the term "local improvement" includes the grading of any street. I do not see, however, how that helps him. There is no evidence before me that this work was undertaken as a local improvement. On the contrary, I take it from the examination of the city engineer that it was not. But even if it was, I think that this would not advance the matter. I do not doubt the power of the city, in the exercise of its general jurisdiction over the streets, to grade the same, but I do not think that the simple power to grade, without more, confers the right in the exercise of that power, to do what is here complained of. There is nothing in the sections to which I have referred which, in my opinion, justifies these acts, and I have been unable to find, nor has Mr. Ross referred me, to any others.

It is significant that sec. 10 of title 27 is to be found amongst provisions which relate to expropriation and that sec. 26 of title 35 appears under the heading of public works, by which is meant, if one may judge from the context, public utilities, such as water-

works, telephone systems, street railways, or tramways, etc., and that it appears amongst enactments which seem to deal with everything but highways. I am inclined to think from their surroundings, that the intention was that these sections should be limited to claims arising out of the exercise, by the city, of its powers of expropriation, and to construct public works respectively. My impression that these sections do not cover such a claim as this is strengthened by the fact that under sub-sec. 1, of sec. 3, of title 29, relating to highways and public places, provision is made for awarding compensation by arbitration to persons whose lands will be injuriously affected by the closing, selling or leasing of a street, an express mention of arbitration as a means of adjusting these specified complaints which might be fairly said to exclude other highway grievances from the operation of the arbitration clauses of the charter. Another reason which appeals to me against this application is that sec. 15, of title 27, provides that

> The award shall not be binding on the city unless it is adopted by the city by by-law within one month after the making of the award, and if not so adopted, the property shall stand as if no arbitration had been held and the city shall pay the costs of the arbitration.

The award referred to in this section is the award authorized by sec. 10. If this claim must be settled by arbitration, the city might under section 15 refuse to adopt the award if it was against them and then the applicant would be remediless. I think that the plain intention of sec. 15 is to give the city an opportunity to determine beforehand just what it will cost it to exercise any of its powers when the compensation or damages to be awarded against it are to be determined by arbitration, so that if the cost is found to be excessive, the project may be abandoned, and then

> The property shall stand as if no arbitration had been held.

But the section as it stands would plainly apply to an award made in this matter, and this emphasizes the correctness of the view that arbitration is not the proper remedy for this wrong.

Lord Blackburn, in *Metropolitan Asylums Board* v. *Hill*, 6 A.C. 193, 208, says:—

> It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals to shew that by express words or by necessary implication, such an intention appears.

Lord Watson in the same case at p. 213 says:—

> Where the terms of the statute are not imperative but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights and did not intend to confer license to commit nuisance in any place which might be selected for the purpose.

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Similar expressions of opinion run through many other cases, such as *London and Brighton Railway Company* v. *Truman*, 11 A.C. 45; *Stockton & Darlington Railway Company* v. *Brown*, 9 H. & L. Cases 246, and *Goldberg* v. *Liverpool*, 82 L.T.R. 366.

Being, for these reasons, of the opinion that what is complained of here was done by the city, not in the exercise of any of its powers, but wrongfully, I am satisfied that the applicant's remedy is not by arbitration, and I, therefore, dismiss the application with costs. The clerk, however, will not allow any costs in connection with the affidavits of M. A. Brown, W. H. Doty, Nelson Spencer, or Frederick Russell. These affidavits are all directed to the fact that the applicant's property has been improved rather than damaged by the works complained of. That is a question which I could not determine on this application, and which, in my opinion, was unnecessarily introduced here.

Application refused.

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HART v. BROWN.

Alberta Supreme Court, Harvey, C.J. January 28, 1913.

1. INJUNCTION (§ III—138)—AFFIDAVITS—FALSE.

A preliminary injunction obtained *ex parte* on an affidavit which the applicant knew was false, or which he stated to be true as of his own personal knowledge, while as a matter of fact it was false, will be dissolved on motion of the defendant.

2. INJUNCTION (§ II—134)—DISSOLUTION AND CONTINUANCE — ALBERTA PRACTICE.

While in England the usual practice in granting an interim injunction on an *ex parte* application is to grant the injunction for a definite period, the practice has become quite common in Alberta to grant it "until further order," since this method avoids the necessity of a second application where there are no real grounds of objection to the injunction; but where a motion is made to dissolve the injunction, the burden of supporting the injunction is still on the party who applied for it, in the same way and to the same extent as if the motion were one by him to continue the injunction. (Dictum *per* Harvey, C.J.)

3. CONTEMPT (§ V—50)—PURGING CONTEMPT—INJUNCTION — MOTION TO DISSOLVE, APPLICANT IN CONTEMPT—PRECEDENCE.

Where the defendant moves to dissolve an injunction restraining him "until further order from interfering with the plaintiff in his use and occupancy of" certain premises, and where upon this motion coming up for hearing it appears that a prior motion to commit the defendant for breach of the injunction had been instituted, the motion to commit will, under the Alberta practice, take precedence over that to dissolve, and, it appearing that the defendant had been guilty of contempt by disobeying the injunction, such contempt must be purged before the application to dissolve will be heard.

Statement

MOTION by plaintiff to dissolve an injunction.

The injunction was dissolved.

G. B. O'Connor, for plaintiff.

A. N. G. Bury, for defendant.

HARVEY, C.J.:—On January 15th inst. plaintiff issued a writ and on the same day he obtained *ex parte* an injunction from my brother Scott restraining the defendant "until further order from interfering with the plaintiff in his use and occupancy of the premises No. 114 Jasper avenue west, Edmonton," leave being reserved to either party to apply on two days' notice to rescind or vary the order.

On January 21st the defendant moved before me to dissolve the injunction. Owing to the defendant's title not being sufficiently shewn, the motion was adjourned, leave being given to defendant to supplement his material. Later on the same day plaintiff mentioned a motion to commit defendant for breach of the injunction. As defendant had not been served personally, the motion was enlarged till the same day as the other motion, leave being given to serve the defendant substitutionally with the notice of motion, it appearing that he was evading service. On January 24th the latter motion came on, and it appearing from the evidence that defendant had disobeyed the injunction by keeping plaintiff out of the premises, I allowed the motion to stand till the next day to give the defendant an opportunity to purge his contempt. I also refused to hear his application to dissolve the injunction while he was in contempt. On the following day defendant's counsel stated that instructions had been given to allow plaintiff to have undisturbed possession of the premises, and he offered an apology for the defendant's acts. Plaintiff's counsel expressing satisfaction with what had been done, I accepted the apology and imposed no further penalty than the costs of the motion.

I then heard defendant's motion to dissolve the injunction. As above indicated, the injunction, though granted *ex parte*, was not for a definite period, but simply until further order. While this is not in accordance with the usual practice in England, it is a practice which, while not universal, has become quite common in this jurisdiction, and has in my opinion certain advantages. Experience shews that a large percentage of injunctions granted *ex parte*, whether for a definite period or otherwise, are continued on the hearing of both parties. In many cases they are continued as a matter of course. The making of the order as in the present case avoids the necessity of a second application where there is no real ground of objection to the injunction. In my opinion, however, though this practice casts on the party enjoined the onus of bringing the matter before the Court if he wishes to be freed from the injunction, yet having done this, the burden should then be on the other party to support his injunction in the same way and to the same extent as if the motion were one by him to continue the injunction. In the present case this is perhaps of little significance, but in most cases it may be of considerable importance.

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The evidence shews that one Lee, the owner, leased the premises in question for thirteen months from March 1st, 1912, to one Macdonald for $80 a month, and subsequently on May 1st, 1912, demised the premises with other lands to the defendant, subject to the lease in question, the benefit of which was assigned to defendant. The plaintiff claims possession under the lease to Macdonald, and produced a purported assignment dated 19th December, 1912, which is executed by himself and purports to be executed by Macdonald, by one C. V. McDonald, but without witness to the execution by either. An affidavit has been filed on this application made by one Christina V. McDonald, who from the signatures appears to be the person who executed the assignment, and she swears that she is stenographer for the C. A. McDonald Company, who occupied the premises. On January 11th the adjoining building was destroyed by fire and the premises in question damaged to some extent, in consequence of which plaintiff vacated them. The defendant, who had been out of Edmonton from December 21st to January 5th, had a few days before the fire called on the plaintiff and asked to be shewn the authority by which he claimed the right to be there. Defendant states that he refused to shew it, and the plaintiff admits that he did not shew it, and that defendant stated that he would not recognize it. After the fire defendant refused to allow plaintiff possession again, and the action was begun and injunction obtained.

The evidence on which the application was made was the affidavit of the plaintiff, the second and last paragraph of which are as follows: "2. The said lease contains a covenant against the assigning or subletting of the said premises without the consent of the lessor; and on the occasion of the assignment thereof to me this defendant by the said Christopher A. MacDonald in the last paragraph hereof, referred to the consent of both the said Robert Lee and the said defendant were duly obtained.

7. Save where otherwise appearing, I depose to the within facts of my own personal knowledge.

On the return of the motion before me affidavits were read by Lee and defendant, each swearing that he never gave any consent to the assignment to plaintiff. On behalf of the plaintiff the affidavit of Christina V. McDonald states that defendant when asked in the office on the 29th of November by McDonald, in the presence of Mr. Gibbons, the manager, if he would consent to the assignment of the lease, "verbally consented to such assignment."

Plaintiff's counsel also read the affidavit of Mr. Gibbons, the manager of C. A. McDonald Co., though with some apparent reluctance. This affidavit confirms the preceding affidavit, but Mr. Gibbons apparently had some regard for the sacredness of an oath, and did not consider it quite honest to mislead by telling only part of the truth, for he goes on to say that when

the consent was written out, as was apparently intended to be done when it was asked for, the defendant refused to sign it unless he received some consideration for it, and offered to do so if he received an additional $20 a month rent, and that McDonald, instead of agreeing to this, charged him with not being a man of his word and ordered him out of the office. It was stated on the argument by plaintiff's counsel that the consideration actually paid McDonald for the lease which had nearly three and a half months to run, was $500. It is apparent from this that, not merely was there no consent to the assignment to the plaintiff, but that whatever general consent had been given was withdrawn almost immediately, and that the sworn statement made by the plaintiff in order to obtain the injunction was false, and the only justification counsel can offer is that plaintiff was speaking from information and believed the facts to be as stated, though, as the last paragraph of the affidavit shews, he swore that he was speaking from his own personal knowledge.

Plaintiff's counsel, however, urges that, the lease containing no proviso for re-entry on breach of covenant, the only remedy for breach of the covenant not to assign without leave is an action for damages. I do not propose to consider whether that is the law or not. It will probably require to be determined later in the case, but for the present it is enough that it has been clearly established that the plaintiff obtained the injunction by a statement which was false, and which, if he did not know to be false, he stated that he knew to be true.

It may be taken as a general principle that a party cannot be allowed to hold an order which he obtains in such a manner, and as to injunctions, it is quite clear that an order will be set aside in a much less flagrant case than this: see Kerr, 4th ed., p. 586. Of course, the setting aside of the injunction on this ground does not in any way determine the rights of the parties to possession, nor does it restore the conditions which existed when the injunction was granted. A determination on any other ground would, however, not have the latter effect. Possibly if the defendant, instead of taking the law into his own hands, had moved immediately to dissolve the injunction, he might have been able to preserve the then status so as to put the burden on the plaintiff instead of having to carry it himself, as he now has. However, if so, that may be considered as one of the penalties of his disobedience.

I may add that I have consulted my brother Scott, who granted the injunction, and he fully concurs with me in the view that it should be dissolved for the reasons I have stated.

The order will go, therefore, dissolving the injunction, with costs in the cause to the defendant in any event.

Injunction dissolved.

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ARBUTHNOT v. CITY OF VICTORIA.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Martin, JJ.A. January 7, 1913.

1. PLEADING (§ I S—146)—STRIKING ENTIRE PLEADING—LEAVE TO AMEND—ACTION AGAINST MUNICIPALITY—LOCAL IMPROVEMENT BY-LAW.

In an action to annul an assessment by-law for local improvements on the ground of irregularity and uncertainty but without setting up any allegation of fraud against the defendant municipality, the statement of claim may be struck out if upon its face it appears that the action is brought after the time limitations contained in secs. 512 and 513 of the Municipal Act, R.S.B.C. 1911, ch. 170, by virtue of Order 25, rule 4, of B.C. Supreme Court Rules, 1906; but leave may be given to amend by filing a new statement of claim.

2. APPEAL (§ VII D—305)—PRESUMPTIONS—STATED CASE BASED ON PLEADING.

Where an appeal is taken to the British Columbia Court of Appeal by a submission of a stated case based upon certain paragraphs of plaintiff's statement of claim, the court may assume for the purposes of submission that the facts are as stated in those paragraphs. (*Per* Macdonald, C.J.A.)

3. LIMITATION OF ACTIONS (§ II I—75)—IMPROVEMENT ASSESSMENTS BY MUNICIPAL CORPORATIONS—ACTION ARISES, WHEN—YEAR TO YEAR LEVIES.

An action against a municipality by reason of the imposition of an assessment alleged to be irregular comes within the purview of secs. 512, 513 of the Municipal Act, R.S.B.C. 1911, ch. 170, requiring certain actions against a city to be commenced within a limited time, and the period of time begins to run from the time of the making of such assessment, notwithstanding that the assessment was to be levied from year to year.

Statement

APPEAL by the plaintiff from judgment of Hunter, C.J.B.C., striking out the whole of the plaintiff's statement of claim and allowing the plaintiff to amend.

The appeal was dismissed.

Harold Robertson, for the appellant.

McDiarmid, for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—This case comes before the Court in the form of what is in effect a stated case based upon the statement of claim and pars. 7, 8, 9, 10 and 11 of the statement of defence. We have, therefore, to assume for the purposes of this submission that the facts are as therein stated save as affected by laches, that being excepted from the submission. Such facts may be summarized briefly to be that "by-law No. 509 is null and void and *ultra vires* of the council, in that it does not ascertain and determine the said works and improvements, and that no plan, description or specification of the proposed works was ever prepared, and that the defendant purported to pass the same on an untrue and false statement of facts, and that the same is uncertain."

The by-law referred to is known as the Richardson Street Improvement By-law, and was passed on the 13th May, 1907.

Par. 11 of the statement of claim then recites that "on the 16th day of March, 1908, the defendant purported to pass a by-law to be known as the "Richardson Street Improvement Assessment By-law, 1908," and that this by-law purports to assess the plaintiff's land in the sum of $536 under the authority of said by-law 509.

The defendant contends that the action was not maintainable because of secs. 512 and 513 of the Municipal Act, which provide that all actions against a municipality for the unlawful doing of anything purporting to have been done by such municipality under the powers conferred by any Act of the Legislature, and which might have been lawfully done by such municipality if acting in the manner prescribed by law, shall be commenced within six months as to one section and one year as to the other, from the time the cause of action arose. It is unnecessary to distinguish in this case because the action was commenced more than a year after the cause of action set forth in the said paragraphs of the statement of claim arose, if my view of the case is the correct one.

The relief prayed for at the end of the statement of claim, so far as it affects this case, is an injunction restraining defendant from assessing or charging the plaintiff's lands under said assessment by-law, and in the alternative that the defendant be ordered to pay to relieve the plaintiff from said assessment.

The order appealed from strikes out the plaintiff's whole statement of claim, and gives leave to amend as the plaintiff may be advised. There were no reasons for judgment, but I take it that the learned Chief Justice came to the conclusion that the action was barred by reason of the sections of the Municipal Act above referred to.

While the by-law, No. 509, is to be assumed to be null and void as stated, yet it is to be so because of the informalities above recited, and the untrue and false statement of facts upon which it is alleged to have been based. Subject to the determination of any question of fraud which may be affected by laches, I think that said sections of the Act are a bar to the relief claimed. It was contended on behalf of the plaintiff, and this was the real reason for the submission, that the assessment was to be made from year to year, but I cannot agree with that. I think the assessment was made once and for all by the assessment by-law; the fact that it is to be levied and collected from year to year makes no difference in so far as the question submitted to the Court is concerned.

I would therefore dismiss the appeal.

I will only add that I do not understand why the whole statement of claim should have been ordered struck out. The submission shews that only the paragraphs above mentioned

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were to be passed upon by the Court. It is, however, a matter of no great consequence, as the plaintiff was given leave to amend as he might be advised.

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IRVING, J.A.:—I would dismiss the appeal on the ground that the assessment was made once and for all when the by-law, No. 552, was passed on the 16th March, 1908. The fact that the "amount of the rate assessed as aforesaid" was payable in ten instalments makes no difference. The imposition of the assessment was the "cause of action" and the plaintiff ought to have brought his action within the time limited by sec. 513.

In my opinion the form of the order appealed from was in the discretion of the learned Chief Justice.

Martin, J.A.

MARTIN, J.A., agreed in dismissing the appeal.

Appeal dismissed.

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ANDREWS v. CANADIAN PACIFIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Martin, J.J.A. January 7, 1913.

1. RAILWAYS (§ II D 2—37)—LICENSEES AND PERMISSIVE USERS OF RIGHT-OF-WAY.

Where a railway company owning a tramway line leading to their railway station constantly permits the public to walk on the tracks of the tramway line without interference, it owes a duty to exercise reasonable care in the operation of the tramway to avoid running down a person walking on the tracks, to or from the station, as such circumstances create a leave and license to him to so use the tracks.

[*Grand Trunk R. Co. v. Anderson*, 28 Can. S.C.R. 451, referred to.]

Statement

APPEAL by defendants from judgment of Morrison, J. The appeal was dismissed.

Sir C. H. Tupper, K.C., and *McMullen*, for appellant.
Ritchie, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal. There is evidence that the public were allowed to walk over the portion of the defendants' tramway line in question in going to and coming from the company's station. The plaintiff was, therefore, where he was by leave and license of the defendants. Even if the plaintiff was guilty of negligence, as to which there is no finding by the jury, the motorman could, by exercising reasonable care have avoided running him down. The defendants owed a duty to the plaintiff to exercise such care, and are responsible for the non-fulfilment of it.

Irving, J.A.

IRVING, J.A.:—By sec. 408 of the Railway Act, ch. 37, walking upon the railway track is forbidden. Notwithstanding that section, people do walk on the railway track in the vicinity of

the scene of this accident—scores of people do it—everybody does it. On Sundays it is a promenade for young ladies and their beaux.

In these circumstances I think the railway company ought to take care not to run these people down if the company's servants are aware of their presence on the track. If people are run down when the company could by reasonable care avoid doing so, I can see no reason why those injured should not be at liberty to succeed in an action for damages.

In the case before us there was evidence from which the jury might infer want of care on the part of the defendants' servants.

G. T. Railway v. *Anderson* (1898), 28 Can. S.C.R. 451, was relied on by the company. There the man was killed in walking through a storm on the railway track, and both the Divisional Court and the Court of Appeal for Ontario thought the action could be maintained. The Supreme Court of Canada, Taschereau, and King, JJ., dissenting, thought the action would not lie. In that case it would appear that the storm blinded the engine-driver because the whistle was not sounded, nor was the bell rung until the engine had struck McKenzie. Then, too, in that case the track was completely surrounded and guarded by a fence, so that in *Anderson* v. *G. T. Railway*, the plaintiff's case depended entirely upon proof of the accident having been caused by breach of a duty cast upon the defendants by reason of some permitted practice on their part involving invitation or permission by the company to persons to walk on their track. See the judgment of Osler, J., in 24 O.R. 675.

Here the evidence is very different. In this case the evidence was that the user of the track was so general that I think knowledge of it must be imputed to the company. I quite agree that it is not sufficient to shew some servant of the company had a knowledge of the practice, to bind the company, but here is evidence that the track was used as a promenade, and if the company neglects to provide fences, or to prosecute offenders, they ought to run their trams—on Sundays particularly—with a due regard to those whom they are encouraging to come on their premises: *Cooke* v. *Midland R. of Ireland*, [1909] A.C. 229, turned on leave and license.

In *Degg* v. *Midland R.* (1857), 1 H. & N. 773, Bramwell, B., in delivering the judgment of the Court, said:—

> We desire not to be understood as laying down a general proposition that a wrong-doer never can maintain an action. If a man commits a trespass to land the occupier is not justified in shooting him, and probably if the occupier were sporting or firing at a mark on his land, and saw a trespasser, and fired carelessly and hurt him, an action would lie.

This seems very like the principle in *Davies* v. *Martin*:—

> Some acts are absolutely and intrinsically wrong, where they dir-

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Irving, J.A.

jectly and necessarily do a wrong, as a blow; others only so from their probable consequences. There is no absolute or intrinsic negligence. It is always relative to some circumstances of time, place or person.

Had I been giving the verdict, I think I should have found the plaintiff guilty of contributory negligence, but as was pointed out in the Exchequer Chamber in *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 313, that question is for the jury, and the Judge would not have been right in nonsuiting.

You require very clear evidence before you can take the case away from the jury on the ground of the plaintiff's own negligence: *King* v. *Toronto Street R.*, [1908] A.C. 260. The Judicial Committee avoided this question in *Grand Trunk* v. *Barnett*, [1911] A.C. 366. That case was decided on the ground that Barnett was a trespasser. Whether a person is or is not a trespasser is a question of fact—the jury has found in this case that the plaintiff ought not to be treated as a trespasser, and so there being no objection to the sufficiency of the charge to enable the jury to determine the question of trespasser or no trespasser, the verdict and judgment must stand as there was evidence from which the jury might infer negligence.

I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A., agreed with MACDONALD, C.J.A.

Appeal dismissed.

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Mar. 11.

McARTHUR et al. v. THE "JOHNSON."

Exchequer Court of Canada (British Columbia Admiralty District), Hon. Mr. Justice Martin, Local Judge in Admiralty. March 11, 1913.

1. COSTS (§ I—2)—DISCRETION TO REFUSE ON DISMISSAL—JOINING UNWARRANTED DEFENCE.

Costs may be refused the ship owners on dismissal of an action for seamen's wages, if the owners, in addition to the defence upon which they succeeded, have pleaded other alleged grounds of defence not warranted by the facts, and thereby added to the expense of the trial.

Statement

ACTION for seamen's wages; the plaintiff McArthur claiming the sum of $150 for two months' wages as engineer on the gasoline launch "Johnson," and the plaintiff McKenzie claiming $375 for five months' wages on the same vessel.

The actions were both dismissed.

D. S. Tait, for plaintiff.

Sydney Child, for ship.

Martin, L.J.

MARTIN, L.J.:—Owing to the unusual circumstances and the prior relationship of the plaintiff McKenzie with the vessel's owners as their guest, I have had not a little difficulty, on the largely conflicting evidence, in arriving at a conclusion as to the true state of the case, but I am finally of the opinion that

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the said plaintiff has failed to establish an express contract of hiring, or one based upon *quantum meruit*. Apart from other things, it is particularly unfortunate for him in the circumstances that he should not even have made a request for his wages for the whole time of his employment. The inference to be drawn from such a strange omission was pressed by defendant's counsel, and is hard to overcome where the witnesses disagree. On the other hand, I am satisfied that he performed useful and valuable services to the owners over and above his board and lodging, and to such an extent that it was never contemplated by them that he should account for the various small sums of money that were given to him occasionally or for the bill of goods amounting to $202.50, which he got from David Spencer, Limited, on the arrangement that they were to be charged to Mrs. Anderson. Therefore the so-called counterclaim for $300 fails, even assuming that it is properly set up and that it is of such a nature that this Court could entertain it: *Bow McLachlan & Co.* v. *"Camosun,"* [1909] A.C. 597. The result of this plaintiff's action is that it must be dismissed, but, as the defendants have set up a largely misleading defence against his claim which almost invited further controversy, and did considerably prolong the trial, I exercise the discretion conferred upon me by rule 132, and make no order for costs in their favour as against McKenzie.

With respect to the plaintiff McArthur, in view of the positive denials to both the defendants of any authority given to McKenzie to engage him, and of their version of the explanation given of his presence on the vessel, the evidence is not sufficient to support his claim, and it must be dismissed with costs.

Actions dismissed.

MONRUFET v. B.C. ELECTRIC R. CO.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Martin, JJ.A. January 7, 1913.

1. Appeal (§ VII L 2—476)—Review of verdict on appeal—Finding as to contributory negligence—Propriety of finding, test.

Where the verdict of a jury was not only against the weight of the evidence, but also was one which a jury, reasonably viewing the whole of the evidence, could not properly find, it should be set aside.

[*Metropolitan* v. *Wright*, L.R. 11 A.C. 152, applied; see also *Solomon* v. *Bitton*, 8 Q.B.D. 176.]

2. Automobiles (§ III B—260)—Duty when approaching street crossing—Coming into a main traffic artery.

It is the special duty of a person driving a motor vehicle to keep a good lookout while approaching a tramway crossing, and it is the duty of such person coming out from a cross-road into a main artery of traffic to wait and give way to that traffic, and not to throw himself headlong into the advancing traffic along the main travelled road. (*Per* Irving, J.A.)

[*Campbell* v. *Train* (1910), 47 Sc. L.R. 475, applied.]

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Macdonald, C.J.A.

APPEAL by defendants from verdict of jury.

The appeal was allowed, MARTIN, J.A., dissenting.

S. S. Taylor, K.C., for appellant.

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

MACDONALD, C.J.A.:—At the close of the argument I had no doubt as to what I ought to do in this case, and further consideration of it has not changed my opinion, that the accident was caused by the plaintiff's own negligence. I might state the case even more strongly against him, and say his own deliberate misconduct in continuing on his way against every dictate of caution and of duty towards his passengers, after he saw the tramcar coming on a down grade, and as he describes it himself, at a rate of thirty or forty miles an hour. While he could have stopped his own vehicle almost instantly, he continued on and ran into the back part of the tramcar as it passed in front of him. I do not think that reasonable men could reasonably acquit him of contributory negligence in these circumstances.

I would allow the appeal and dismiss the action.

Irving, J.A.

IRVING, J.A.:—The plaintiff was driving in an easterly direction on a cross road, 6th avenue, and was about to turn into a main travelled road, Mahon avenue, on the westerly side of which the defendant had their track, a single line, when a collision took place between the plaintiff's motor and the defendants' street car which was travelling at a high rate of speed in a southerly direction, down Mahon avenue, the front of the motor coming in contact with the right side of the street car, near the forward part of the street car; later, as the motor car was turned to the right, the back step of the street car struck the left rear wheel of the motor. The accident took place in broad daylight and when the converging cars had an uninterrupted view of one another. The driver of the street car saw the motor car when about 87 feet away. The driver of the motor car, when he was 20 feet from the crossing on Mahon avenue, saw the street car coming along at 30, 40 or 50 miles an hour. He, the driver of the motor car, was in his second gear going only at 4 or 5 miles an hour.

The motor car, to get into the travelled portion of Mahon avenue had to cross and get clear of the track (p. 24). Between the crossing and the track there was a space, and in that space there was a ditch 8 or 10 feet wide (p. 29).

With all respect to the jury who found the plaintiff was not guilty of contributory negligence, it seems to me that the plaintiff overlooked several rules which he ought to have observed. In the first place, he should have remembered that as he had to get clear of the track before he could turn to the south, where he was going, he owed a special duty to keep a good look-out as

he approached a tramway crossing. There are two Scotch cases cited in the 21st volume of Halsbury, at p. 414, to which I would call attention. These cases lead me to believe—something I have always understood was incumbent on a person driving on a cross-road—that it is the duty of persons coming out from a cross-road into a main artery of traffic to wait and give way to that traffic, and not to throw themselves headlong into the advancing traffic along the main travelled road: *McAndrew* v. *Tillard* (1908), 46 Sc. L.R. 111; and *Campbell & Cowan* v. *Train* (1910), 47 Sc. L.R. 475.

If we take the distances stated by the plaintiff we find that when he was going slowly at 4 or 5 miles an hour, he saw the defendants' car whirling and rocking along, and he (the plaintiff) did not bring his car to a stop until he had travelled a sufficient distance to bring the front of his car—the left mud guard I take it—right to within a foot or so of the westerly rail—that would be 30 feet or more; even then he had not brought his car to a stop, but to avoid the shock of the collision as much as possible, he, when 3 or 4 feet from the track (p. 26) turned his car down to the right into the ditch, when the hub of his left rear wheel and the rear step of the street car fouled each other.

Metropolitan v. *Wright*, L.R. 11 A.C. 152, lays down the test that it is not enough that the Judge who tried the case might have come to a different conclusion on the evidence than the jury, that the Judges in the Court where the new trial is moved for might have come to a different conclusion, but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable, and almost perverse that the jury when instructed and assisted properly by the Judge should return such a verdict. Having that rule before me, I nevertheless cannot uphold the verdict in so far as it acquits the plaintiff of contributory negligence.

The plaintiff does not appear to have stopped his speed before he reached the crossing. When "very close" to the crossing, say 20 feet, going at six miles an hour, he would only have about four seconds before he reached the west rail of the track. I think his negligence was two-fold, first, in not looking out at a sufficiently early time for the street car before he got too close to the track; secondly, when he did see the approaching car in not realizing that he could not clear the tracks at the speed he was going.

MARTIN, J.A. (dissenting):—The verdict of the jury should not, in my opinion, be interfered with because, at pp. 15, 16, 25, 26, 33, 38, 39, 49, 50, 55, 61, and 62, there is ample evidence to sustain it. The explanation of the accident is clearly to be found in the belief expressed by the motorman, at pp. 55

Martin, J.A. (dissenting)

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and 61, that he had "the absolute right-of-way." Even if there had been a finding of contributory negligence on the part of the plaintiff, the case would still, in my opinion, be one of ultimate negligence on the part of the defendants' servant, therefore, as Justice King puts it in *Halifax Electric Tramway Co.* v. *Inglis* (1900), 30 Can. S.C.R. 256, at 258-9, the plaintiff's

> act of negligence could no longer be considered as a contributing efficient cause, but would be reduced merely to a link in the chain of anterior circumstances, without which the accident could not have happened.

Appeal allowed, MARTIN, J.A., *dissenting*.

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PENTLAND v. MACKISSOCK.

Manitoba King's Bench. Trial before Galt, J. January 7, 1913.

1. VENDOR AND PURCHASER (§ I E—28)—RESCISSION OF CONTRACT—FAILURE TO PAY PURCHASE MONEY—EQUITABLE RIGHT TO REDEEM, THREE MONTHS.

In an action brought by an assignee of an agreement of sale against the purchaser for a declaration that the agreement of sale shall be declared to have been cancelled and that the assignee be entitled to retain any moneys paid under it and to possession of the lands, because of the purchaser's failure to pay pursuant to the terms of the agreement, the defendant is entitled to the usual three months within which to redeem, although liability is admitted and the only relief asked for by the defendant on the trial is the usual order granting time for redemption.

[*Canadian Fairbanks Co.* v. *Johnston*, 18 Man. L.R. 589, followed.]

2. PLEADING (§ I L—80)—RELIEF UNDER PLEADINGS—VENDOR AND PURCHASER—ASKING RIGHT TO REDEEM, PRACTICE.

It is not necessary to ask expressly in the pleading for the usual time in which to redeem, in an action against the purchaser under an agreement of sale, for a declaration that the agreement of sale shall be declared cancelled and that the assignee be entitled to retain any moneys paid under it and to possession of the lands.

Statement

THE defendant, a married woman, bought certain property from her husband for $8,250 on an agreement of sale, which provided she was to assume a mortgage for $4,250; the cash payment was $750; the balance to be paid by instalments. Subsequently the husband assigned his rights under the agreement to the plaintiff.

As the purchaser of the property had not paid two of the instalments due, the plaintiff as assignee of the agreement, gave her 30 days' notice of cancellation under the clause in the agreement. He then brought this suit to have the agreement foreclosed.

The defence set up was that the purchaser had made 2 subsequent payments of $225 and $325 to the original vendor without notice of the assignment to the plaintiff, and that, therefore, she was not in default under the agreement and the agreement could not be foreclosed, being in good standing by reason of such payments.

It was shewn on her examination for discovery that a registered notice of the assignment had been actually received by the defendant and the proper notice of cancellation had been personally served on her.

Judgment was given for the plaintiffs with right to the defendant to redeem within three months.

H. Phillipps and *C. S. A. Rogers*, for plaintiff.

A. E. Dilts, for defendant.

GALT, J.:—In this case, the plaintiff asks for a declaration that the agreement for sale in the pleadings mentioned shall be declared to have been cancelled and that he be entitled to retain any moneys paid under it and to possession of the lands. The purchase money was over $8,000 and the defendant paid $750 on account and assumed a mortgage of $4,250 as part of the consideration.

GALT, J.

A plaintiff seeking such relief has certainly an awkward course before him, owing to the conflict of decisions on the subject. In the present instance the plaintiff is further embarrassed by the fact that the defendant is a married woman, not apparently engaged in business and not conversant with the particular features of the law applicable to such transactions as this.

Under the terms of the agreement, the whole amount of the purchase money had become due. The defendant did not make payment of the amount within the thirty days stipulated in the agreement and notice, and on the 14th November, 1912, this action was commenced.

It appears from the examination of the defendant for discovery, that she was under the impression at first that she had not received the notice of the assignment of the agreement, or of the intention of the plaintiff to cancel the agreement, but upon being cross-examined on the subject and upon production of documents, she admitted both. It was argued strenuously, by Mr. Phillips, on behalf of the plaintiff, that the denials in the statement of defence and the subsequent corrections of it in the evidence given by the defendant for discovery indicate a lack of *bonâ fides* on the part of the defendant, and for this reason, among others, it was urged that the cancellation of the agreement should be immediate, without the usual time limit being granted to the defendant.

By an arrangement made within the last day or two between the parties no witnesses were called on either side, so the parties have argued this case upon documents verified by affidavit, and upon the evidence given by the defendant upon discovery. This leaves the Court in ignorance as to several material points of the case, for instance as to whether or not the defendant actually paid to Mackissock and Thomas the moneys she says

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she paid on account of the agreement. It is quite true that Mackissock and Thomas were not the vendors, but it might well have been that Peter Mackissock, the husband, might have instructed his wife that a payment to Mackissock and Thomas would be a payment upon the agreement. Then, again, when the defendant went to consult Mr. Coopar, her solicitor, we have no evidence of what took place except what the defendant herself says. There are other points also on which some material evidence might have been produced by the parties, but they have thought fit to leave the case as it is; the defendant admitting liability and only asking for the usual order granting her three months in which to redeem.

I have never been able myself to understand when parties sign a definite agreement as to what is to take place on non-payment, or other default by one of them, why, in the absence of accident or mistake the Court should paternally interfere in order to relieve the party in default.

In many cases a vendor might decline to sell unless he felt that his rights in that respect were protected, but the decisions of the Courts in Manitoba and the western provinces seem to leave the matter at such loose ends that it would be almost impossible for a lawyer, much less a layman, and especially a married woman, to know exactly whether, in any given case the Court would, or would not, grant the usual three months for redemption.

It has been decided in *Canadian Fairbanks Co.* v. *Johnston*, 18 Man. L.R. 589, that, under circumstances very similar to those in question here, the defendant was entitled to time for redemption, notwithstanding a breach of the agreement.

Under these circumstances, I feel that it would be too much to expect that the defendant in this case could anticipate that her default would meet with any worse result than occurred in the *Fairbanks* case, and in several other cases. I therefore find that the plaintiffs are entitled to succeed in the action, but that the defendant is entitled to the usual three months within which to redeem.

It was argued on behalf of the plaintiff that the defendant had not expressly asked for this relief in her defence.

I do not think that was necessary. The plaintiff comes to Court aware of the law as laid down in the *Fairbanks* and other cases and of the usual judgment giving time for redemption.

Under these circumstances, I think that judgment must be entered as indicated. Of course, the plaintiffs are entitled to their costs of the action, but not costs as between solicitor and client for which I see no special reason in this case.

Judgment accordingly.

FYSH v. ARMSTRONG.

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Jan. 8.

Saskatchewan Supreme Court. Trial before Johnstone, J. January 8, 1913.

1. EVIDENCE (§ X C—695)—PARTY'S ACTS AND DECLARATIONS—PROOF OF SCOPE OF AGENT'S AUTHORITY.

Where it appears that an owner of real estate listed his property with an agent, but a dispute arises later as to the authority of the agent to sign a contract of sale with the purchaser, the owner claiming that the agent had authority only to procure and submit an offer, a telegram from the agent to the owner stating that he had sold certain lots at the listed prices, followed by a reply by the owner that he understood that he had taken those lots "off the market" and declining to sell, instead of answering that the agent had no authority to sell, is evidence tending to shew that the agent did have authority to sell and not merely to find and submit an offer from a prospective purchaser.

2. EVIDENCE (§ IV Q—475)—STENOGRAPHIC MEMORANDA — ADMISSIBILITY AS EVIDENCE OR TO REFRESH MEMORY.

In an action for specific performance of an alleged contract entered into by an alleged agent for the sale of defendant's land, where the defence is that the agent had no authority to sell the land in question, a memorandum taken by the alleged agent's stenographer of portions of a conversation between the owner and the alleged agent, when instructions of some sort were given, but which memorandum was not signed by the defendant, is inadmissible in evidence to prove the authority of the agent, but it may be used by the stenographer for the purpose of refreshing her memory on the witness-stand when called to prove the conversation.

3. CONTRACTS (§ I E 5—97)—SUFFICIENCY OF WRITING — STATUTE OF FRAUDS—SEVERAL PAPERS.

Several documents may be read together in order to spell out a good and sufficient agreement under the Statute of Frauds.

[*Rogers* v. *Hewer* (No. 2), 8 D.L.R. 288; *Andrews* v. *Calori*, 38 Can. S.C.R. 588; *Conley* v. *Paterson*, 2 D.L.R. 94, referred to.]

4. CONTRACTS (§ I E 5—97)—FORMAL REQUISITES—STATUTE OF FRAUDS—SEVERAL PAPERS—OWNER, SALE OF LAND.

An objection that a contract for the sale of real estate is defective under the Statute of Frauds, in that it does not disclose the name of the owner of the land, is ineffective if the vendor can be ascertained from some other document which is sufficiently connected with the contract in question.

[*Rogers* v. *Hewer* (No. 2), 8 D.L.R. 288; *Conley* v. *Paterson*, 2 D.L.R. 94, referred to.]

Statement

THIS is an action for specific performance of an alleged contract entered into by an alleged agent for the sale on behalf of the defendant of lands and premises in the city of Moose Jaw, known as the Armstrong livery barn.

Judgment was given for the plaintiff.

G. E. Taylor, for plaintiff.

W. B. Willoughby, for defendant.

Johnstone, J.

JOHNSTONE, J.:—It is denied by the defence that one Bie, the alleged agent of the defendant, had authority to sell, but it is averred that he (Bie) was the agent of the defendants solely for the purpose of procuring a purchaser. The further defence is raised that there was no memorandum or agreement in writ-

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ing to satisfy the Statute of Frauds. The authority to sell, if any, was verbally given. The exhibit marked by the clerk as exhibit A, put in at the trial, was not admitted to be given in evidence by the plaintiffs, and was improperly marked as an exhibit at the trial by the clerk. I refused to admit this document on the ground that it was not signed by the defendant, but was merely a memorandum taken by the agent's stenographer of portions of a conversation between the plaintiff and the defendant when instructions were given by the defendant to the plaintiff to sell or to procure a purchaser. I permitted, however, the writing to be used by the stenographer for the purpose of refreshing her memory.

The onus, of course, was upon the plaintiff to shew that the agent, Bie, had the requisite authority to enter into a contract of sale of the lands in question. Bie stated, in giving evidence at the trial, that Armstrong listed the property with him and gave him instructions to sell, if possible, at the price of $15,000, payable $4,000 cash, the balance to be paid in eleven annual instalments of $1,000 each, with interest at 7 per cent. per annum. The stenographer who was present and heard the conversation is not positive as to what occurred. Armstrong, on the contrary, swore positively that he gave the agent no such authority, that all the authority the agent had was to secure a purchaser. I was not impressed very much with the evidence of this witness. He answered without due deliberation; his statements were incoherent and otherwise unsatisfactory. I think that if the statements of Armstrong were true, that on receipt of the following telegram, exhibit C, from the agent:—

Rec'd No.	Sent by	Date	Sent by	Time	Date
6	C.N.I.	Feb. 9th.			

Received at Morton's Drug Store, 54 Dundas St.
Check 33 Lttr. From Moose Jaw, Sask. 8th.
To James Armstrong, 185 Argyle Street.

I have sold lots nine and ten, block forty-three, at fifteen thousand, the price and terms exactly as listed, purchaser wants possession at once, when will you be home to sign contracts?

A. R. BIE.

that Armstrong, instead of answering as he did:—

No. 195 WN BR X 45 Paid N.L.
C.W. Toronto, Ont., Feb. 9.
A. R. Bie, Moose Jaw, Sask.

I understood that I took that off the market before I left, cannot sell now as I have bought a car of horses and will ship on Monday or Tuesday. I thought you understood that I had taken it off, could not give immediate possession.

JAMES ARMSTRONG,

would have wired the agent, "I gave you no authority to sell," and further, it would not have been necessary to "take it off the market" if he had never given the agent authority to sell.

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I therefore find as a fact that the agent had the requisite authority to sell the lands upon the terms upon which they were sold to the plaintiff.

As to the other question, that there was no agreement or memorandum in writing to satisfy the Statute of Frauds: on February 8th, 1912, the plaintiff, by cheque (exhibit G) paid to the agent $100 as part payment on the "Armstrong barn." On the same day the plaintiff received from the agent a receipt for this payment of $100, exhibit B, which reads as follows:—

February 8, 1912.

Received from Reginald Fysh the sum of $100, on account of purchase of lots 9-10 in block 43, plan, old No. 96, Moose Jaw.

The price to be $15,000, and the terms as follows: $4,000 upon the completion of sale and the balance in equal payments of $1,000 each year until paid, with interest at 7 per cent. payable annually.

A. R. BIE,
As Agent.

As stated before, the agent, Bie, by telegram, exhibit C, advised the defendant of the sale, to which the defendant replied as in exhibit D.

In my opinion, reading these documents together, that is "B," "C," and "D," they constitute a good and sufficient agreement. They contain all the terms necessary to constitute a legal and binding contract: *Rogers* v. *Hewer*, 1 D.L.R. 747, 19 W.L.R. 868; see in appeal, *Rogers* v. *Hewer* (No. 2), 8 D.L.R. 288; *Andrews* v. *Calori*, 38 Can. S.C.R. 588; *Conley* v. *Paterson*, 2 D.L.R. 94, 20 W.L.R. 722; *Rosenbaum* v. *Bilson*, [1900] 2 Ch. 267.

Objection was taken by the defendant's counsel that the contract was defective in not disclosing the name of the owner, the defendant Armstrong. I cannot give effect to this objection, for if it could be ascertained who was the vendor from some document which is sufficiently connected with the memorandum by clear reference to such owner, this will cure the defect of the omission from the memorandum of the name of the owner. I refer to the cases already mentioned, together with *Williams* v. *Gordon* (1877), 6 Ch. D. 517, 520; *Warner* v. *Willington* (1856), 3 Drewry 523, 530; *Hague* v. *Senior*, 8 M. & W. 834, 844; *Rossiter* v. *Miller*, 3 A.C. 1124; *McCarthy* v. *Cooper* (1885), 12 A.R. (Ont.) 284.

In my opinion the plaintiff is entitled to judgment for the specific performance of the contract entered into by the agent.

There will, therefore, be a reference to the local registrar to inquire as to title, encumbrances, and possession, his report to be filed on or before the 1st day of February now next.

Further directions and the question of costs to be reserved.

Judgment for specific performance.

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Jan. 6.

MOIR v. O'BRIEN.

Saskatchewan Supreme Court. Trial before Johnstone, J. January 6, 1913.

1. CONTRACTS (§ II B—135)—ENTIRETY — COMPLETE PERFORMANCE FOR KNOWN PURPOSE—ENTIRE AND INDIVISIBLE, WHEN.

An agreement to clear stones from and to steam plough a certain number of acres of land before a specified date is an entire and indivisible contract, where the surrounding circumstances shew that the parties were anxious to get the land in shape for cropping by the time set in the agreement; and hence no recovery can be had for work done under the contract where plaintiff has not performed the entire contract.

[*King* v. *Low*, 3 O.L.R. 234, applied.]

2. CONTRACTS (§ IV C 1—345)—RIGHT OF RECOVERY ON PART PERFORMANCE.

In an action by way of *quantum meruit* for the partial performance of a contract to do certain work on the defendant's premises, where it appears that the plaintiff contracted to do the work for a specific sum to be paid on completion of the whole, the plaintiff is not entitled to recover anything until the whole work is completed, unless it is shewn that the performance of his contract was prevented by the default of the defendant.

[See *Appleby* v. *Myers*, L.R. 2 C.P. 651, and *King* v. *Low*, 3 O.L.R. 234.]

Statement

THIS is an action by the plaintiff for work done under a written contract which he had not completed. The defendant disputes the plaintiff's claim, setting up the contract as entire and indivisible, and counterclaims for defective workmanship as to the work actually done.

Judgment for the defendant as to the plaintiff's claim and for the plaintiff as to the defendant's counterclaim.

W. B. Willoughby, for plaintiff.

W. M. Martin, for defendant.

Johnstone, J.

JOHNSTONE, J.:—On the 22nd of May, 1911, the plaintiff and one Douglas and the defendant entered into a written agreement on the terms following:—

Moose Jaw, Sask.

I, John Moir, of Moose Jaw, contracts to steam plough 640 acres to T. R. O'Brien and Dr. Douglas at $4.50 an acre, S.W. of 16 and W. half of 15 and north-west quarter of 10, all in 17, 25, W. 2, the same to be a first-class job and to be done by now, and the 10th of July. The stone to be all taken of or piled up at this price. $800 dollars to be paid when first 160 is broken and the balance $2,080 to be paid on or before the first of November, 1911, with interest at 8 per cent. per annum from the date the work is finished until paid.

T. R. O'BRIEN.
JOHN MOIR.

Douglas dropped out, and it was arranged that the plaintiff alone might undertake the work, and he entered upon the work agreed to be done under the said contract, and on the 28th of

July, 1911, when he ceased work, he had completed 560 acres, leaving unfinished or incomplete about 80 acres of the acreage undertaken.

The defendant paid to the plaintiff the respective sums of $200 and $600, constituting the first payment called for by the said contract, and having refused payment of any further sum until the plaintiff had completed his contract, the latter sued.

In setting forth his cause of action, the plaintiff does not rely upon the written agreement further than to say that he had steam ploughed for the defendant 560 acres in all for which the defendant had agreed in writing to pay $4.50 per acre, with interest at eight per cent. from the date the ploughing was finished until paid. The ploughing, the plaintiff further alleged, had been finished on the 28th of July.

The plaintiff, prior to entering into the agreement with the defendant, had been engaged in steam ploughing in the immediate neighbourhood of the lands agreed to be ploughed, had been across the defendant's lands, and had every opportunity to inspect the condition thereof. He knew the kind of land to be ploughed, and, I find as a fact, entered into the contract to plough relying on his own knowledge of the conditions of the subject of the contract. He was not induced in any way to undertake the work by misrepresentation of the defendant, as claimed by him. In my judgment the plaintiff failed to perform his contract with the defendant by reason of having undertaken to do too much. He had contracted not only to plough a large area of land for the defendant, but for others as well, and the season proved very short, too short in fact to enable the performance of the work and to make a first-class job for the defendant as he had agreed.

He went into the arrangement with his eyes open, knowing these lands were to be brought under cultivation by the defendant; he contracted, not only to do the steam ploughing, but also to remove all stones off or to pile the same on the lands to be ploughed. He failed even in doing this in accordance with his contract. Even the work done, or most of it, was not performed in a workmanlike manner. I have had, very reluctantly I must say, to reach the conclusion embodied in the contention of the counsel for the defendant, that the contract to clear from stones and to plough the 640 acres was one entire and indivisible contract, and that the plaintiff is not entitled to succeed in this action. All the circumstances surrounding the letting of the contract, the doing of the work and the wording of the contract itself point in this direction.

All the land, as I have said, had to be brought under cultivation, and that early in the season of 1911, namely between the 22nd day of May and the 10th of the following July, sufficiently early, in fact, to enable the recently ploughed land to be backset or disced and got into a fit state for cropping for the year 1912.

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On the question of an entire contract, see *King* v. *Low*, 3 O.L.R. 234, 238, and cases there cited.

The defendant has counterclaimed for a considerable sum of money, firstly because a greater portion of the ploughing done was not done according to contract in a first-class manner. In view of my judgment as to the plaintiff's claim, it becomes unnecessary for me to consider the defendant's right to recover under his amended counterclaim, that is to the 640. Neither is he, I find, entitled to damages under the 10th paragraph of his defence and counterclaim, a claim for further damages by reason of breach of contract. He omitted to shew damage in this respect.

There will be judgment for the defendant as to the plaintiff's claim with costs and for the plaintiff on the counterclaim, with costs.

Judgment accordingly.

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Jan. 18.

PICARD v. REVELSTOKE SAW MILL CO. et al.

British Columbia Supreme Court. Trial before Morrison, J. January 18, 1913.

1. CORPORATIONS AND COMPANIES (§ IV G 2—116*a*)—POWERS OF MANAGING DIRECTOR.

A managing director of a lumbering company with authority to manage and conduct the business of the company has no implied authority to sell the entire assets of the company as a going concern, since such a sale is not a matter that has any relation to the carrying on of the company's business.

Statement

ACTION for commission on the sale of certain properties. The action was dismissed.

Bodwell, K.C., and *D. A. Macdonald*, for the plaintiff.

S. S. Taylor, K.C., and *G. S. McCarter*, for the defendant.

Morrison, J.

MORRISON, J.:—In this action the plaintiff claims a commission from the defendants upon the sale of certain properties. The action was launched against the defendants the Revelstoke Saw Mill Co., Ltd., Yale Columbia Lumber Co., Ltd., Charles F. Lindmark, William A. Ward, Dominion Saw Mills and Lumber, Ltd., and General Agency Corporation, Ltd., but was discontinued as against all of them except the three first named.

The properties involved consist of saw mills and timber limits situate in British Columbia. The instrument in writing upon which the plaintiff claims his commission is dated the 29th day of November, 1909, and is made between Charles F. Lindmark, who is described as managing director of the Revelstoke Sawmill Company, Ltd., of the one part, and the plaintiff of the other. Supplemental to this agreement was the following letter addressed to the plaintiff and signed by Lindmark to which the plaintiff appended his name as agreeing to its terms:—

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To Edmond Picard:

Sir,—Regarding the option of purchase of the property of the Revelstoke Saw Mill Co., Ltd., and the property of the Yale Columbia Lumber Company, Ltd., at Westley, given you this day it is understood and agreed that in the event of your bringing about a completed sale and purchase of the said properties or either of them you will receive and be paid a commission of nine per cent. upon the purchase price, if and when received by the vendor and not otherwise. In the event of a sale being arranged and completed with a customer found or introduced by you directly or indirectly although for a less price than that mentioned in the option your commission shall nevertheless be nine per cent. of the selling price if and when received by the vendor. Should it happen that a sale be made by you for more than $220,000 for the Yale Columbia property and for more than $375,000 for the Revelstoke Sawmill property you will be paid in addition to your commission of nine per cent. on selling price mentioned in the option the whole of the surplus obtained over and above the said option price.

Dated at Revelstoke, B.C., this 20th November, 1909.

I agree. CHAS. F. LINDMARK,
EDMOND PICARD. *Vendor.*

Witness to signatures:
W. I. BRIGGS,
Notary public. (Notary's seal.)

The plaintiff, who is a broker and lives in France, whilst on a voyage across the Atlantic fell in with one Andre Weill, another gentleman of France, who it seems had an agreement, which has been referred to as an option, from the defendant Lindmark covering substantially the above properties. The plaintiff and Weill became friends and upon arrival in New York at once began collaboration on this option. In due course the plaintiff came in touch with Lindmark, who apparently was not impressed by Mons. Weill, the result being that Weill was as far as Lindmark is concerned eliminated from the negotiations and the plaintiff solely remained dealing with Lindmark, who, during the periods relative to this suit, lived in Revelstoke, B.C., to which place the plaintiff came and would remain for considerable time, off and on negotiating with Lindmark. Interviews and correspondence took place and were maintained between them. The plaintiff gravitated between Paris, London, New York, Michigan, Chicago, Seattle, Vancouver and Revelstoke apparently in search of a buyer under his option but no result followed. The plaintiff impressed me as an exceedingly intelligent person and I am bound to say that very little information could escape him relating either to the companies in question or to the persons who were most interested in the disposal of their assets, so that it is a matter of comment that of all points of negotiation and enquiry in the east frequented and canvassed by him, Minneapolis, the home of Mr. Bowman, who was a controlling spirit in the companies concerned, was the one

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place he seemed to have overlooked or avoided, although frequently and for considerable periods in the vicinity and doubtless always or occasionally passing through that city en route east and west. Lindmark more than once during their intercourse referred to the "Eastern interest" in a manner which should have led a less astute person than Mr. Picard to see the advisability of communicating with Mr. Bowman at certain junctures. For example on the 17th November, 1909, Picard wired Lindmark that an option for 60 days with owner's signature was required. This was from Chicago. See exhibits 36 and 37. But notably the incident of the postscript to the option of the 29th November, 1909. Picard admits Lindmark asked him to have this clause cancelled in case the Eastern owners would not agree. On the 29th of November, 1909, the very day the option was signed, Mr. Bowman wrote Lindmark that an option was not wanted. I accept the evidence of Bowman, Hess and Poole that they did not know of any authority to Lindmark as claimed and that as a matter of fact none was given him. I also accept their evidence that they did not know of any option from Lindmark to Picard at any time during the period material to this action and that Mr. Picard was unknown to them even by name as they allege.

I find that Mr. Picard had no contractual relationship whatever with the defendant companies. He neither got in touch with them nor attempted to do so.

I cannot, therefore, accede to the contention on behalf of the plaintiff that I may infer authority on Lindmark's part to sell the assets of the defendant companies. That such authority ought to be implied in the circumstances of this case is, in my opinion, even more hopeless. I do not think that the doctrine annunciated and alleged as being found in articles 95 and 100 of the articles of association relied upon by Mr. Bodwell on the question of authority and paraphrased by him as follows, namely:—

> That the directors can do anything which the company can do except such matters as would have to be decided in meetings and further that they can employ agents to sell property and delegate to any one their authority,

help me on this point of implied authority to wipe the companies out of existence. It seems to me that the "sale" of substantially the whole of the company's assets is not a matter that has any relation to the carrying on of the company's business. Such a "sale" was not within the scope of any implied authority (assuming any implied authority existed) given him for the purpose of managing and conducting their business so that the plaintiff must in such a case prove affirmatively that Lindmark, who he contends affected to bind the companies, had been

authorized to do so: *Smith* v. *Hull Glass Co.*, 8 C.B. 677. But Lindmark was not at the date of the option, nor for some months before, managing director. As against the defendant companies I therefore dismiss the action.

Alternatively, it is further claimed that there should be, in any event, judgment against Lindmark personally. I think that the plaintiff fails as against him also.

Lindmark, as far back as April 19, 1909, suggested withdrawing from their then arrangement owing to delay. The work being done by the plaintiff all along was purely tentative. There was no more reason for Lindmark to suppose that Picard's efforts would result conclusively at or about the time that the letter of cancellation was dispatched, than previously. Under all the circumstances of this particular case I think Lindmark was justified in taking the course he did. Picard's efforts covered a wide field and he came in contact with many people who dealt in the kind of proposition (business) he had in hand. Unquestionably it is a work requiring ability of a sort, persistence and diplomacy. Picard I find entered into the agreement in question with his eyes open. I do not think, from his ability to appreciate the exact relation which Lindmark bore to the properties involved, he could have been in any way misled by Lindmark. Had Lindmark chosen to have given notice of cancellation at a.y previous juncture (when Picard was dealing with Spry for instance) he might, with equal plausibility, have contended that it was premature and that he should have had time to consummate his dealings. I do not think the fact that he could shew that ultimately Spry had in fact bought would affect the notice of cancellation. The giving of this notice of cancellation was a contingency never remote during the pendancy of Picard's negotiations. He chose deliberately and voluntarily to specify a certain particular address to which such notice would have to be sent. To that address it was sent and I do not think Picard should now be heard to complain of that. I accept Lindmark's evidence as to his reasons for cancelling the option. There are several incidents which, though in my opinion of secondary importance, yet, because they have been emphasized, I shall deal with. For instance in the recital to the option of November 29, 1909, Lindmark is put down as being managing director of the Revelstoke Company. This, I think, was simply copied from the earlier option to Weill, when he was in fact managing director. The solicitor or his clerk, doubtless so described him. Of course, he did not sign the document as such. Again, when the clause after the signature to this option was scored out, doubtless Lindmark was confident that he could get his people in the East to confirm his arrangement with Picard in the case of a *bonâ fide* sale, which sale all the defendants were willing to effect.

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Then as to the appearance in the negotiations of those people, some of them interested in the sale which ultimately took place, it seems to me that it was quite open to Lindmark to anticipate Picard's failure to consummate a sale through them, assuming he knew that Picard was negotiating with them (which he says he did not) and to cancel his option with a view of concluding a sale himself or through someone else. He gave Picard a fair trial and was not satisfied. I cannot find that in the course he took Lindmark acted fraudulently or with a view to defeat Picard's commission, unless, indeed, I do so by a process of what might not even be good guessing. I find that the contractual relations between the plaintiff and Lindmark were, pursuant to their agreement, ended by the letter of cancellation.

This action is, therefore, dismissed with costs.

Action dismissed.

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JAN. 8.

CHAPPELL & Charles R. McKEEN doing business as The International Realty Company v. PETERS.

Saskatchewan Supreme Court. Trial before Lamont, J. January 8, 1913.

1. BROKERS (§ II B 1—12)—COMPENSATION — SUFFICIENCY OF BROKER'S SERVICES.

Where the employment of the real estate broker by the owner is a general one as distinguished from a special employment and a minimum price is fixed for a certain period with a proviso for notice thereafter of withdrawal from sale or of increase or decrease in price, the broker will be entitled to commission at the stipulated rate per acre although the selling price finally agreed upon between the owner and the purchaser whom the agent procured is less than the price named to the agent as the lowest at which he might sell.

[*Burchell* v. *Gowrie and Blockhouse Collieries, Ltd.*, [1910] A.C. 614, followed.]

2. BROKERS (§ II B 1—12)—SUFFICIENCY OF BROKER'S SERVICES—SPECIAL EMPLOYMENT.

If an agent employed to sell real estate has a special employment as distinguished from a general employment, he is entitled to commission only when he brings himself within the terms of the special employment.

[*Moaro* v. *Beischel*, 1 S.L.R. 238, followed.]

3. BROKERS (§ II B 1—12)—SUFFICIENCY OF BROKER'S SERVICES.

Where property is listed with a real estate agent for sale, with a stipulation that the sale was to net the owner a certain price per acre, and the agent's commission was to be a certain price per acre above the net price, the employment is a special one and the sale must be made above the stipulated net price in order to entitle the agent to a commission.

[*Wrenshall* v. *McCammon*, 5 D.L.R. 608, considered; *Rowlands* v. *Langley*, 17 W.L.R. 443; *Stratton* v. *Vachon*, 44 Can. S.C.R. 395, distinguished.]

4. BROKERS (§ II B 1—10)—COMPENSATION OF REAL ESTATE AGENT—CONTINGENT COMMISSION—NET PRICE TO OWNER.

Where land is listed with a real estate agent for sale under a contract of special employment whereby he is to negotiate a sale to net

the owner the latter's minimum price over and above the commission, it is the owner's duty to ask from prospective purchasers with whom he may negotiate, a sufficient price to cover both the net price and the commission; but, where the purchaser will not pay more than the net price and there is no collusion between the owner and the purchaser to deprive the agent of his commission, the owner will not be liable for any commission on a sale *bonâ fide* closed at the net price, although the purchaser was introduced by the agent. (Dictum *per* Lamont, J.)

[See *Wrenshall* v. *McCammon*, 5 D.L.R. 608.]

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ACTION for commission alleged due on the sale of certain lands. Statement

The action was dismissed.

J. D. Murphy, for plaintiffs.

LAMONT, J.:—On February 6th, 1912, the defendant listed section 26, township 4, range 4, W. 2nd, containing 640 acres of land, with the plaintiffs for sale. The terms of listing were as follows: price $16,000; cash, $2,000; balance, half-crop payments. The listing contained the following clause:— Lamont, J.

I hereby agree to place the above described land with the International Realty Company (plaintiffs) for sale for the next two months, and thereafter to give ten clear days' notice in writing of withdrawal or increase or decrease in price. Their commission to be above quoted price.

It was expressly agreed that the defendant should be at liberty to sell the land either by himself or other agents, and the commission to the plaintiffs was to be one dollar per acre. The plaintiffs communicated the terms of the listing to a Mr. Burgess, a sub-agent of theirs at Boissevain, Manitoba, who saw one Crummer in reference to the place. The price quoted to Crummer was $26 per acre, that is, the net price to the defendant plus one dollar per acre commission. Crummer said he was not able to make the $2,000 cash payment, and Burgess wrote to the plaintiffs to see if a reduction in this payment could be made. The plaintiff Chappell saw the defendant and told him they had Crummer in view as a purchaser. About this time, one Hewitt, who also had the land for sale, met Crummer, and Crummer told him he had been negotiating with Burgess for the farm, but that the cash payment was too high for him. Hewitt wrote to the defendant, who telegraphed him to bring Crummer up. Hewitt and Crummer came up. The defendant asked $26 per acre for the land. Crummer would not give this amount, but offered to give $25 per acre if the defendant would take over two houses he had in Boissevain at $5,000, and no cash payment. The defendant held out for $26 per acre until he saw that he would lose the sale if he did not agree to take $25, which he finally did, on condition that Crummer would throw $500 off the

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price at which he was putting in the houses. Crummer agreed, and the deal was closed. The defendant paid a commission to Hewitt on the sale. The plaintiffs asked the defendant for their commission, and on being refused, brought this action.

There is no question but that it was the plaintiffs' agent, Burgess, who introduced Crummer to the land, and it was the plaintiffs who first told the defendant that Crummer was the man with whom they were negotiating. The plaintiffs, therefore, in my opinion, found the purchaser, and were the efficient cause of the sale, although the sale was effected by the defendant himself, and on terms different from those given to the plaintiffs. Where an agent finds a purchaser for an owner, the agent's right to a commission or remuneration for his services depends upon the terms, either express or implied, upon which he was employed. In *Toulmin* v. *Miller*, 58 L.T. 96, Lord Watson states the principle of law governing cases of this kind as follows:—

> In order to found a legal claim for commission, there must not only be a causal, there must also be a contractual relation between the introduction and the ultimate transaction of sale . . . When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations.

What is meant by the term "general employment" used in this case by Lord Watson is stated by the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries, Limited*, [1910] A.C. 614, as follows:—

> This means, however, that Burchell's (agent's) contract was, that should the mine be eventually sold to a purchaser introduced by him, he would be entitled to commission at the stipulated rate, although the price paid should be less than or different from the price named to him as a limit.

Where, however, the agent's employment is not a general but a special employment, he is only entitled to commission when he brings himself within the terms of that special employment: *Blackstock* v. *Bell*, 16 W.L.R. 364; *Monro* v. *Beischel*, 1 S.L.R. 238. The question here, then, is, was the employment of the plaintiffs a general or a special employment? In other words: can it be said that the agreement between the plaintiffs and the defendant was that the plaintiffs were to be paid a commission

if a sale was effected to a purchaser introduced by them, although on less advantageous terms than those contained in the listing? Under the terms of the listing, the commission was to be over and above the $16,000 or $25 per acre to the defendant. This means that the defendant was to get the full $25 per acre. This amount was to be net to him, and to entitle them to a commission the plaintiffs must find a purchaser who will give a commission in addition to this amount. This is inconsistent with the idea that the plaintiffs were to be paid a commission in case of a sale at a lower price. The plaintiffs' employment was, therefore, not a general but a special one. This was the view taken in *Monro* v. *Beischel*, where an employment to sell at $28 per acre net to the vendors was held to be a special employment. The plaintiffs did not find a purchaser who was willing to give a commission in addition to the net price. Crummer was never, so far as the evidence shews, willing to pay more than $25 per acre. The cases of *Burchell* v. *Gowrie and Blockhouse Collieries*, above referred to, and *Stratton* v. *Vachon*, 44 Can. S.C.R., 395, were cited as authorities shewing that the plaintiffs were entitled to recover. In both these cases, however, the agent's employment was a general one: *Rowlands* v. *Langley*, 17 W.L.R. 443, was also cited. In that case the net price to the owner was $100,000. The agent's commission was to be $5,000, which was to be obtained over and above the net price. The agent introduced a purchaser who was willing to give $105,000 for the property, and the agent told the owner that he had quoted the price at $105,000. The purchaser remained at the owner's place a couple of days, and then, having made up his mind to purchase, asked the owner his price. The owner said $100,000, at which price a sale was effected. It was held that the owner was liable for the commission. The owner did not in that case ask a price sufficient to allow him his net price and provide for the agent's commission besides. The purchaser would have paid $105,000, and by not asking that amount the owner deprived the agent of his chance of earning his commission. In such a case the owner is liable upon the principle approved of in the *Burchell* case above mentioned, that "wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it." In the present case the owner did ask a price sufficient to give him his $16,000 and provide for the agent's commission, but the purchaser, as I find, *bonâ fide* refused to pay more than the $16,000 for the farm, and that only on condition that the defendant would take as part payment two houses belonging to the purchaser. I cannot find on the evidence that there was any collusion between the defendant and Crummer. Although I am not altogether satisfied that, in

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writing Hewitt to bring Crummer up, the defendant was not endeavouring to get away from the plaintiffs' commission, there is no evidence from which it can be inferred that when Hewitt came, the defendant did not honestly endeavour to get $26 per acre, but Crummer would not pay it. Under these circumstances I do not think the defendant was put in the position of either losing the sale or paying commission to the plaintiffs. I adhere to what I said in *Wrenshall* v. *McCammon*, 5 D.L.R. 608, 21 W.L.R. 842, that

> Where an owner lists land for sale with an agent at a price net to him, there is no agreement on his part, either express or implied, that he will pay a commission to the agent except out of the excess of purchase-money over and above the stipulated net price.

Of course, if the purchaser was willing to pay more than the net price—and it is the duty of the owner to ask sufficient to cover both the net price and the commission—or if there was any collusion between the owner and the purchaser by which the agent was deprived of a commission which otherwise would have been his, the owner would be liable. But where the purchaser *bonâ fide* will not pay more than the net price, I am of opinion that the owner is not obliged to lose the sale because the purchaser will not pay in addition thereto a sum equivalent to the commission. If an agent wishes to protect himself, he must either make sure that his purchaser will buy on the terms stipulated by the owner, or else he must secure from the owner a general and not a special employment. If he accepts special employment he must abide by the terms of that employment.

As the plaintiffs' employment in this case was a special one, and as they did not produce a purchaser willing to comply with the special terms, I am of opinion that they are not entitled to recover.

There will, therefore, be judgment for the defendant, with costs.

Action dismissed.

GRAVES v. THE KING.

(Decision No. 4.)

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Supreme Court of Canada, Davies, Idington, Duff, Anglin, and Brodeur, JJ. February 24, 1913.

1. NEW TRIAL (§ II—8)—CRIMINAL CASE—SUBSTANTIAL WRONG—MISDIRECTION.

Where a charge of murder is based upon a fatal gun-shot wound inflicted while the gun was in the hands of the deceased, being used by him as a club to strike one of the accused with the stock, and upon the allegation that the acts of the accused which had led to the deceased clubbing his gun and striking therewith were done with an unlawful object, the jury must be instructed that before convicting of murder they must find not merely that the conduct of the accused had, in fact, led to such act of the deceased, but also that the accused knew or ought to have known that their acts were likely to cause death; and failure to so instruct is a substantial wrong or miscarriage entitling the accused to a new trial after conviction.

[*Rex* v. *Graves* (No. 3), 9 D.L.R. 175, reversed.]

2. NEW TRIAL (§ II—8)—PARTIAL MISDIRECTION AS TO CONSTITUENTS OF CRIME.

Where a charge of murder is based first, upon unlawful acts of the accused which the prosecution alleges were the cause of the deceased doing an act that resulted in his inflicting upon himself a gun-shot wound from which he died, and secondly, upon alleged brutal treatment accelerating the death of the deceased after the gun-shot wound, and both aspects of the case were presented to the jury upon the evidence, misdirection as to the essential constituents of the crime of murder upon either aspect of the case will entitle the accused to a new trial, although the case may have been properly presented upon the other aspect, as it is impossible to know upon which of the grounds the verdict was based or whether upon both.

[*Rex* v. *Graves* (No. 3), 9 D.L.R. 175, reversed.]

3. HOMICIDE (§ I—6)—ENGAGING IN UNLAWFUL ACT—CONSTRUCTIVE HOMICIDE.

Where defendants are charged with homicide as resulting from the physical act of the deceased himself, but alleged to have been caused by the unlawful acts in which the accused were then engaged towards the deceased, not involving physical force or compulsion on their part against him, they are not guilty of culpable homicide unless the act of the deceased from which death resulted (*i.e.*, in this case using as a club a gun reversed) was induced by threats or fear of violence, or by deception.

[Cr. Code, 1906, sec. 252, considered.]

Statement

APPEAL from the judgment of the Supreme Court of Nova Scotia, *Rex* v. *Graves* (No. 3), 9 D.L.R. 175, affirming, on an equal division of the Court, the conviction of the accused on a charge of murder The application for leave to appeal is reported, *Rex* v. *Graves* (No. 2), 9 D.L.R. 30.

A new trial was ordered without costs.

W. E. Roscoe, K.C., for appellants.

E. L. Newcombe, K.C., for the Crown.

Davies, J.

DAVIES, J., concurred with ANGLIN, J.

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IDINGTON, J.:—The appellants were convicted of murder as result of a trial by the learned Chief Justice of Nova Scotia and a jury. Their counsel took some thirty-nine objections to the learned Judge's charge to the jury, asked for a reserved case thereon, and being refused, appealed to the Court *en banc* which directed the learned Chief Justice to state a case as to thirty-four of the grounds for these objections. The result was that in disposing of his statement of case framed as thus directed the Court was equally divided and hence this appeal. Of these thirty-four alleged points of law I may say that the great majority of them are in law without foundation. In the result reached by this Court it is needless to shew why I have come to such conclusion or to say more about all of them than this: With the one exception I am about to deal with, and a few other instances in which the remarks objected to may have a bearing more or less direct on that one point, it seems to me these points would never have been directed to be stated or upheld if due regard had been had to the curative provisions governing criminal appeals. I have selected that point on which Mr. Justice Drysdale put his finger as containing the pith of all that was objectionable and which I find so well founded as to entitle appellants to a new trial. That objection is No. 28, stated as follows:—

> 28. Whether the law applicable to the case was stated sufficiently to enable the jury to determine whether if the defendants were guilty of homicide such homicide was murder, and the facts applicable to such law pointed out.

I think the first question we must ask ourselves in all criminal appeals where the objections taken are well founded or arguable, is whether or not we can say that, in our "opinion some substantial wrong or miscarriage was occasioned thereby at the trial." I am not disposed to interpret this statutory duty in any narrow metaphysical sense, for if we did so we might frame a judgment in every case of mistake no matter how trivial so as to demonstrate that there might have been somebody in the jury panel that might have taken another view of the matter if this supposed error had not taken place. I think this and every other appellate Court acting under our Criminal Code must grasp the matter presented with a strong hand and not allow the trivial error to lead them into the land of speculation founded on some shade of possibility. We must see, however, that the trial has been one of the legal offence charged.

We must also, I submit, assume that the jurors have brought to the subject dealt with that close attention to what has taken place in the course of the trial and that strong common sense that would enable them in the light thereof to apprehend the language of the learned trial Judge in charging them, and in many

instances mentally, and automatically as it were, correct the accidental slips of the tongue the most careful Judge may chance to make. In this case we have illustrations in many of the objections made of how this should work out. The learned Chief Justice, it appears, used expressions which, isolated and read without having regard to the evidence and general scope of his charge, might be held to be misdirection, partly of law and partly relative to fact, but which ought not to lead astray or be supposed to have led astray any intelligent jury acting in the spirit which, I submit, should be presumed to have governed them.

The general outline of the evidence herein was so clear and simple that properly marshalled there should not have been any misapprehension in this regard of the duties such evidence had cast upon the jury in this case. Simple as the case in this regard is there happened to be two phases of the problem to be solved which were not kept as clearly separated throughout as they might have been, and there is thus the greater difficulty in escaping from the conclusion I have reached, or of applying the curative provision I have referred to. Briefly put, the facts in outline as presented for the prosecution were that on a Sunday afternoon the appellants, who had been drinking, carried one or more bottles of liquor with them, drank more, and when thus in an intoxicated condition in front of deceased's premises stopped and trespassed on his lawn. There they used grossly offensive language and though asked by deceased to retire, refused. The deceased and his wife and others who had been on the verandah, withdrew into the house or outbuildings.

The appellants remained on the lawn, or on the highway, continuing their unseemly conduct. The deceased after a time loaded his gun and proceeded therewith to the verandah in front of his house. The appellants gave evidence on their own behalf, and it was said by one or more of them that deceased asked them to go away or he would shoot them. They do not pretend that he ever came from his position on the verandah, which was fifty-six feet distant from the highway where they say they then were. The wife of deceased heard a rush of feet on the walk up to the verandah where deceased stood and immediately thereafter an explosion of a gun. It seems tolerably clear that the gun had been used as a club by deceased in resisting the onset of one or all of these appellants, and in the result an explosion of the loaded gun lodged its contents in the upper part of the thigh of deceased, from the ultimate effects of which, I assume for the present, he died, whether necessarily so if not further ill-treated, might form another question. A hole was found in the screen door of the dwelling and a bottle, or remains of one, were, immediately after this, found in the

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hall inside, which facts, coupled with the other facts and especially the possession of a bottle or bottles by appellants, left ground for inference I need not dwell upon. The wife of deceased rushed out and found all three appellants on the verandah or steps therefrom. Up to this rush from the highway or lawn, whichever was the place they are supposed to have rushed from, there was not anything which took place that in law could properly be held as provocation so rousing the passions of appellants as to reduce the gravity of the offence, if any, committed by the appellants, or any of them, to manslaughter.

The charge, I respectfully submit, rather confuses thought in not restricting this question of manslaughter to be dealt with in treating of the later phase of the case and including there the whole. The evidence warrants the inference that the appellants had unlawfully come to attack the deceased and as the charge puts it, that he, resisting or anticipating it, struck the foremost of them violently on the head with the butt end of the gun and thereby produced the explosion. But there are other possible inferences as to the exact cause of the explosion quite as much within the range of the consideration of the struggle and its consequences. It may be possible to consider any of these and yet the result of guilt or innocence be open to a jury. Now, all the errors, if any, in the learned Judge's charge bearing only upon the evidence or its application so far, I count as nothing that need concern us.

Let it be assumed, for argument's sake, that the attack made or threatened by appellants or any of them was intended to be only an assault, the question arises whether or not the consequence which followed can be made the basis of a charge for murder.

The learned Chief Justice charged as follows:—

> Although they could not have contemplated that the gun would be discharged as the result of their action, yet, as in the result it did they would be responsible for it and it would constitute the crime of manslaughter, provided there was no malice on their part in doing what they did. On the other hand, if a party while engaged in the commission of a felony kills another it becomes murder and not manslaughter. What is meant by that is this: Suppose these men had come there at night for the purpose of committing burglary and in the course of the commission of that act Mr. Lea had been killed, that would be murder because they then would have been there committing a felony. . . .
>
> I will next draw your attention to the law bearing upon one of the most important features of the case. There is a common idea, or I have heard it said, that because Mr. Lea held in his own hand the gun the discharge of which inflicted the wound which proximately contributed to his death, the accused are not responsible for that

part of the affray. I have heard that—and probably you have—that they did not shoot him. It would be a sorry business if that were the law. It would be absurd if such were the law. They are responsible if they caused Mr. Lea to do the act which resulted in the discharge of the gun as much as if they seized the gun and discharged it into him. Did they rush at him with the intention of assaulting him and did Mr. Lea then use his gun? If so they are as responsible as if they seized the gun and discharged it into him. "A person may be responsible for the death of another either as murder or manslaughter, provided it was caused by his unlawful act resulting in corporal injury." The unlawful act here, as I have pointed out, would be the men assembling in a disorderly way, and trespassing on Mr. Lea's property and refusing to go away when asked.

Now, on the facts I have outlined and bearing in mind the law to be applied, I think this charge misapprehended that law, and consequently misdirected the jury. The foundation of the law is in sec. 252 of the Code defining culpable homicide, and can be properly referred to as aiding anyone to understand and interpret the later sections. When we want to find the definition of the specific offence of murder applied and that applicable to this case, we must look to sec. 259 of which subsections (*b*) and (*d*) are as follows:—

(*b*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not. . . .

(*d*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.

I refer to sub-sec. (*b*) because the learned Chief Justice says he read that sub-sec. to the jury, but he does not seem to have read or at all referred to and explained sub-sec. (*d*). With the greatest respect, I must hold this omission was misdirection. I do not think, as at present advised, the evidence in this case warranted much reliance being placed on sub-sec. (*b*). I need not elaborate. Let anyone consider the facts and read this sub-sec. and see how ill-fitted they are to that sub-section. I think sub-sec. (*d*) was that to which attention should have been called and its meaning, which is not clear to those ignorant of the history of the law, should have been expounded to the jury in such clear terms that they would understand the ground upon which they ought to have proceeded. If the evidence would not warrant a conviction on this section, then it would be our manifest duty to say so and set the verdict aside on that ground alone. I do not, however, so hold, but, on the contrary, think and hold there was evidence which would warant the jury in finding thereupon a verdict of murder, resting it on this sub-sec. (*d*). It is to that sub-section, I submit, the learned Chief

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Justice ought to have addressed himself in all he said relative to death resulting from the pursuit of an unlawful object and the bearing thereof on the charge of murder. There are other specific unlawful purposes as in sec. 260 not appropriate to the peculiar facts in this case.

His general remarks as to the pursuit of an unlawful object do not seem to me to exactly fit the case. The unlawful, uncalled for and utterly unjustifiable attack on a man with a loaded gun in his hands was liable to produce a scuffle resulting as this did in the death of someone. The person or persons making the attack must according to their evidence for the defence, have known the gun was likely to be in a loaded condition and liable to explode as it did and so result. This or something like it was what I conceive was quite competent for the jury to have adopted as mode of reasoning to found a verdict of murder upon such facts as were presented. I am not to be taken here as doing more than illustrate a possible line of thought and by no means determining the legal result.

The learned Chief Justice did refer to a number of analogous cases. But each case in a matter of this kind must stand upon its own bottom. In applying these precedents or rather as it seems to me this sub-section substituted as codification of the law touching such like cases the measure of its utility and reasonable application in any case must abide the judgment of the jury. No one can in all that branch of the law of homicide anticipate or do more than see that the jury are so fully and accurately instructed that they can intelligently address themselves to the task set before them by the law in said sub-sec. (*d*). Theirs is the responsibility when once so instructed. Their understanding of the evidence within the scope of such instructions and application thereof is alone the limit of the practicable operation of the law that must determine the fate of the accused in any such case. In the absence of proper legal instructions in regard thereto there was no legal trial of the real issue of murder. Hence there was no possibility of applying the curative provision I have referred to.

Much was said of malice which is aside from the true issue presented here. The doing an unlawful act or rather the pursuing an unlawful object carries with it the implication of malice in all the consequences thereof so far as the sub-section may reach. I am by no means to be understood as implying thereby that evidence of hate or ill-will external to that so implied or the operation of such other malice upon the mind of one pursuing an unlawful object is to be discarded. The existence of such and the possible influence it may have had on the conduct of one pursuing any unlawful object may be of value in helping those having to reach a conclusion in such a

complex case. But I repeat it is not an essential of the evidence which may otherwise and independently thereof point to a conclusion of guilt. I purposely omitted above all reference to evidence of the treatment meted out by the accused to the deceased after the explosion of the gun, for it seems to my mind we can by separating the two phases of the case the more clearly reach a proper conception of the law which must govern the case so far as the charge of murder resting upon the explosion of the gun is concerned. I am not to be understood, however, as by any means holding that the evidence of such later action is to be discarded as not having any proper place for consideration in connection therewith. It, may or may not shed light, but only, as I have suggested regarding evidence of hate or ill-will, have a value in enabling a proper estimate to be made of the whole conduct of the parties and of their responsibility in the way of holding they ought to have known regarding the reasonably possible result of their conduct under the circumstances. It is the basis also herein of the other phase of the case relative to the charge of murder and for that should be given separate consideration.

If there is any ground for the charge that thereby the death of the wounded man was accelerated, this branch of the evidence touches directly upon that, and it is in that connection alone that there was ground for referring to provocation resting on the severe wound the blow with the gun had inflicted on one of the assailants. I do not see misdirection in what was said in that regard and need not dwell thereupon, but simply say that it would be better understood by distinct and separate treatment in any charge in such a view of the case.

The questions relative to manslaughter need not be dwelt upon but allowed to remain for the future trial and take their proper place in any future charge.

I think the appeal must be allowed and a new trial be had.

DUFF, J., concurred with ANGLIN, J. Duff, J.

ANGLIN, J.:—In this case I am to deliver the judgment of my brothers Davies, Duff, and Brodeur, as well as myself. Anglin, J.

With very great respect for the learned Chief Justice [of Nova Scotia] who tried this case, a close study of his charge, which we have read and re-read, has driven us to the conclusion that he misdirected the jury in regard to what, under the circumstances of this case, it was essential that they should find in order to warrant a verdict of murder. He not only failed to bring to their attention at least one inference of fact which it was necessary that they should draw, but his charge, read as a whole, was tantamount to a direction that they might assume

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that fact—that they might properly bring in a verdict of murder without passing upon it.

The Crown charged the prisoners with murder (*a*) because they did certain unlawful acts which caused the deceased to do an act that resulted in his inflicting upon himself a gun-shot wound from which he died; and (*b*) because by their subsequent brutal treatment of him they accelerated his death.

Both aspects of the case were presented to the jury. It is impossible to know whether their verdict of murder was based upon both grounds or upon only one of them; and, if upon one only, it is impossible to know upon which. Misdirection as to the essential constituents of the crime of murder upon either aspect of the case would, therefore, amount to such a substantial wrong or miscarriage that it would entitle the defendants to a new trial, although the case had been properly presented upon its other aspect. Having reached the conclusion that there was such misdirection in connection with the degree of responsibility of the defendants for the infliction of the gun-shot wound which caused the death of Mr. Lea on the assumption that his death was not accelerated by what was afterwards done by them but happened when it did solely as a result of the wound, we deal with the case as if there had been no subsequent ill-treatment of the deceased by the accused.

By sec. 252 (2) of the Criminal Code it is provided that

> Homicide is culpable when it consists of the killing of any person . . . . by causing a person by threats or fear of violence or by deception to do an act which causes that person's death. . . .

There is no evidence upon which it could be found that the acts of the deceased in "clubbing" his gun and striking Fred Graves over the head with its stock were the result of physical force or compulsion on the part of the defendants. These acts were, physically at all events, the acts of the deceased himself. Upon the evidence they were the immediate cause of his receiving the gun-shot wound from which he died. In order that responsibility for that result should rest upon the defendants so as to make them guilty of culpable homicide under sec. 252, it was necessary that the jury should find that such acts of the deceased were caused, *i.e.*, induced, "by threats or fear of violence, or by deception." There was here *no* suggestion of deception; but there were facts from which a jury might infer, if properly instructed, that the deceased acted through fear of violence on the part of the accused. Yet, although the learned Chief Justice read to the jury other portions of sec. 252, he entirely omitted to direct their attention to the vital provisions of sub-sec. 2 above quoted. He neither stated their effect to them, nor, as Mr. Justice Graham points out, did he give them any direction from which they should have gathered that they

must find that the "clubbing" of the gun by the deceased and striking Fred Graves upon the head with it were acts induced by fear of violence. That was in itself a serious non-direction, which might amount to such a substantial wrong or miscarriage as would necessitate a new trial. But we do not dwell further upon it because there appear to be even more serious objections to those portions of the charge in which the learned Chief Justice directs the jury as to the facts they must find and the inferences which they must draw in order that what may have been culpable homicide on the part of the accused should amount to the crime of murder.

Without determining that the definition contained in secs. 259 and 260 of the Criminal Code is exhaustive, under the circumstances of the present case it was, in our opinion, necessary for the Crown to establish and for the jury to find, in order to warrant a verdict of murder, such facts as would constitute that crime under clause (*d*) of sec. 259, read with sub-sec. 2 of sec. 252.

> 259. Culpable homicide is murder. . . .
>
> (*d*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person though he may have desired that his object should be effected without hurting anyone.

For the purposes of this appeal I assume that under this provision it was not necessary, in order to bring the charge of culpable homicide within it, that the jury should have found that the acts of the defendants were such as they knew or should have known were likely to cause the very acts to be done or the precise situation to arise which in fact resulted in the homicide, or to cause the death of the person who was killed, but that it would suffice if the jury had found that the accused did an act which they knew or should have known would be likely to induce the doing of anything or to bring about any situation likely to cause the death of some person—the person killed or any other person. That construction of sec. 259 (2) is the least favourable to the accused.

There was no suggestion that the defendants meant to cause the death of Mr. Lea or to cause him any bodily injury likely to cause his death. The evidence would not support such a finding. Yet the learned Chief Justice read to the jury clause (*b*) of sec. 259; but he neither read clause (*d*) nor stated its effect; nor does his charge contain any equivalent statement of the law. It was assumed that the acts of the accused, which, it was charged, had led to the deceased clubbing his gun and striking Fred Graves with the stock, were done for an unlawful object. But the jury were not instructed that before convicting of murder they must find not merely that the conduct of the ac-

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cused had in fact led to the doing of that which resulted in death, but also that the accused knew or ought to have known that their acts were likely to cause death—to lead to the deceased so handling or using the gun that some person would probably be killed—that this was, under the circumstances, such a natural or probable consequence of their conduct that the defendants should have anticipated it. On the contrary the learned Chief Justice told them distinctly and repeatedly that if in doing what they did the defendants were actuated by spite or ill-will towards Mr. Lea they should be found guilty of murder. I quote some of the passages in which this view was impressed on the jury.

Early in the charge, after reading section 259 (*b*) to the jury, the learned Judge says:—

> If a man goes on the property of another as a mere trespasser, and in the course of such trespass commits an assault or anything of that kind upon the owner of the property and death results, although he may have had no malice, if he is there unlawfully, he is guilty of manslaughter. If, on the other hand, he went there with some wicked purpose or with the intention of committing a felony it would be murder. That is the distinction that the law draws between the two offences. The rule that will reduce the crime of killing another from murder to manslaughter is the absence of malice or ill-feeling towards the deceased. If there was no malice or ill-will the crime would be manslaughter. If the evidence satisfies you that the accused, although not intending to kill the deceased, were actuated by malice and ill-will in what they did and that his death resulted as a consequence of their unlawful conduct it will be murder and not manslaughter.

A few lines lower down he says:—

> They are responsible if they caused Mr. Lea to do the act which resulted in the discharge of the gun, as much as if they seized the gun and discharged it into him.

A little earlier he had said:—

> Although they could not have contemplated that the gun would be discharged as the result of their action, yet, as in the result it did they would be responsible for it and it would constitute the crime of manslaughter, provided there was no malice on their part in doing what they did.

Further on he says:—

> Now, as I said before, you must judge their motives from their conduct, whether they were actuated by malice, spite and ill-will in this inhuman treatment of Mr. Lea. Does the evidence satisfy you that in acting and behaving there as they did they were gratifying an old grudge that they bore towards Mr. Lea. If you find that they were actuated by malice and ill-will in going there and behaving as they did, even though they did not intend to injure him, the crime is murder.

Towards the close of the charge we find the following passage:—

> Now, just a few words in conclusion. I have explained to you as fully as I could, the difference between murder and manslaughter. I have told you that if you believe these men were actuated by ill-will or malice towards Mr. Lea and did what has been detailed here, that would be murder, and that all of them should be found guilty. On the other hand, if you think that there was no ill-feeling, that it was a mere fracas, without previous ill-feeling, then your verdict should be manslaughter. I have called your attention to the various witnesses who have come here and testified to different expressions of ill-will towards Mr. Lea, and you have heard the expressions that they used on this occasion. You must weigh these. If you believe them it is evidence of malice and it is for you to consider them.

The jury subsequently returned to Court and requested directions on the subject of malice. The notes of the ensuing proceedings are in part as follows:—

> I thought I had defined that fully, "malice" is where a man has ill-will towards another—any kind of wicked feeling towards his neighbour. If you come to the conclusion that what these men did resulted from hatred or dislike or ill-will, that would make it murder. If there is evidence to satisfy you that these men were influenced by spite or ill-will, and that with the other facts would constitute murder. But you must not find them guilty of murder unless you are satisfied from the evidence that they had a grudge, or spite, or ill-will against Mr. Lea.
>
> *A juryman* asked for further directions as to premeditated murder and malice.
>
> THE COURT:—Premeditated murder would be an agreement to commit murder before they went there. There is not the slightest evidence of that. But if the grudge was there and they went there without any premeditated intention, if their acts were induced through ill-feeling that would constitute murder. If you are satisfied that what they did was not done through ill-will that would be manslaughter.
>
> *A juryman*:—Then we do not need premeditation; all we need is malice?
>
> THE COURT:—All you need is malice.
>
> *A juryman* asked for further instructions as to the distinction between murder and manslaughter.
>
> THE COURT:—It is enough if they did the acts with malicious intent. If in carrying out the acts that they did after they got there, there was malice that would be malice sufficient to constitute murder.
>
> . . . . .
>
> If, after they got there, they were carrying out a grudge, if they had it, it constitutes murder.
>
> *A juryman*:—If they had malice it is as bad as if they had premeditation?
>
> THE COURT:—Yes.
>
> *A juryman*:—Would they have to have that malice at the time he was shot?
>
> THE COURT:—Yes, they would have to have the malice at the time. If they had these malicious feelings or this antipathy towards the

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deceased, it must have existed at the time they did what caused his death, even though they had no intention of doing it before they went there. You must gather the existence or non-existence of malice from what they did at the time. You must take into consideration the threats made beforehand, although I do not know what value you would put on them to shew bad feeling towards Mr. Lea.

A juryman:—Is it necessary to prove that just before the crime was committed—a few minutes before—they had malice.

THE COURT:—What I have told you is that if there was malice you can gather it from the facts of the whole transaction. If you think from the facts proved that they had this ill-feeling during the time that they were doing the injuries, then it was malice.

(The jury then retired.)

When the jury next returned to the Court-room it was to deliver their verdict of guilty of murder.

The vital distinction—that, while, to sustain a charge of manslaughter, it would suffice that the acts of the accused, whatever their character, should in fact have aroused in the mind of the deceased a fear of violence which induced him to do that which resulted in his death (sec. 252, (2)), in order that that culpable homicide should amount to murder those acts of the accused must have been such that they knew or should have known that the death of some person would be likely to be caused by them (sec. 259 (*d*))—was not brought to the attention of the jury.

Whether the acts of the accused were of that character it was for the jury to determine; and the inference which they should draw would depend to a great extent upon whether in their opinion the accused knew or ought to have known that the gun in the hands of the deceased was loaded and whether they knew or should have known that their acts would be likely to lead to the deceased making some use of it which would be likely to cause death. Upon neither point can it be said that, under the circumstances disclosed in the evidence, a conclusion in favour of the Crown was so necessary that no reasonable man could have found otherwise. Indeed, the learned Chief Justice appears to have gathered the impression from the evidence that the deceased produced his gun not to shoot with it, but merely to frighten the accused. May not they have had the same idea; and, if so, may they not have thought that the gun was not loaded? Again, there is no evidence whether the deceased clubbed the gun before or after the accused are supposed to have rushed at him. If before, may not that act have led them to think that a gun so handled was not loaded? Can it be said that the use of the gun by the deceased in a manner likely to cause death was under the circumstances so clearly a natural or ordinary consequence of the acts done by the prisoners that the jury, acting as reasonable men, could not have found otherwise than that they knew or should have known that the de-

ceased was likely to so use that gun? Upon both these matters of fact it was the function of the jury to determine what inference should be drawn. Upon neither were they given the opportunity of doing so. On the contrary, they were directed that if they should "come to the conclusion that what these men did resulted from hatred or dislike or ill-will that would make it murder."

It is not possible to read the charge of the learned Chief Justice without realizing that the jury were instructed that, although in the absence of personal grudge or ill-will on their part towards the deceased the acts done by them and the consequences which ensued would have rendered them guilty only of manslaughter, those same acts and consequences, if accompanied by spite or ill-will towards the deceased, would make them guilty of murder. The only question really left for the consideration of the jury in determining whether their verdict should be one of murder or of manslaughter was whether in doing what they did the defendants were actuated by ill-will to the deceased.

With great respect, this involved ignoring the requirement of the Code that the acts of the accused must have been such as they knew or should have known would be likely, under the circumstances, to cause death, or an assumption by the learned Judge himself of the function of the jury in regard to that vital question of fact, or a direction that the acts of the accused were of such a character that as a matter of law the jury should assume that they knew or should have known that they would be likely to cause death.

Under such a direction the jury may have convicted of murder without at all considering whether the conduct of the accused was such that it was probable that it would cause the deceased to act in a manner likely to result in some person being killed. Indeed, they might return such a verdict although no reasonable man could say that such a result from the acts of the accused should or even might have been reasonably anticipated. That this was a vital misdirection amounting to a substantial wrong or miscarriage in the trial seems only too plain. It is unnecessary to express our views upon any of the numerous other points raised in the stated case. It is abundantly clear that this is not a case in which we should exercise the power conferred by section 1018 of the Criminal Code sub-section (*d*) to direct that the appellants should be discharged. For the foregoing reasons we are of the opinion, however, that their conviction must be quashed and a new trial had.

BRODEUR, J., concurred with ANGLIN, J. Brodeur, J.

Conviction quashed and new trial ordered.

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FLORSHEIM SHOE CO. v. BOSTON SHOE CO., Ltd.

Quebec Superior Court, Beaudin, J. March 10, 1913.

1. SALE (§ III B—64)—STOPPAGE IN TRANSITU.

An unpaid vendor of goods has the right of stoppage *in transitu* in the event of the vendees' insolvency while the goods are still in the course of transit; their retention by the carrier entrusted with the delivery of the goods, or the handing of them over to a wharfinger, or to the selling agent of the vendor, will not defeat this right.

[*Phelps* v. *Comber*, 29 Ch.D. 813; *Kendall* v. *Marshall*, 11 Q.B.D. 356, and *Swanwick* v. *Sothern*, L.R. 1 P. & D. 648, referred to.]

2. SALE (§ III B—64)—STOPPAGE IN TRANSITU—GOODS IN CUSTOMS.

Goods deposited in a customs warehouse or held by a carrier pending the passing of an entry through the customs may be stopped *in transitu* by an unpaid vendor, where the vendee has become insolvent. (Dictum *per* Beaudin, J.)

[See *Ascher* v. *Grand Trunk R. Co.*, 36 U.C.R. 609; *Burr* v. *Wilson*, 13 U.C.R. 478; *Morgan Envelope Co.* v. *Boustead*, 7 O.R. 697.]

3. SALE (§ III B—64)—STOPPAGE IN TRANSITU—INSOLVENCY OF VENDEE.

Under article 1543 Quebec C.C. as amended, an unpaid vendor is not entitled to the right of stoppage *in transitu* where goods have been sold and shipped to a limited liability company more than thirty days before the date of the winding-up order if the company had taken delivery of the goods.

4. SALE (§ III B—64)—STOPPAGE IN TRANSITU—INSOLVENCY OF VENDEE.

Under article 1543 of the Quebec C.C. as amended, an unpaid vendor has the right of stoppage *in transitu* where goods have been sold and shipped to a vendee within thirty days of the insolvency of the latter, even where delivery has been made.

Statement

HEARING of a petition for the possession of thirty cases of goods containing one thousand pairs of boots and shoes.

The petition was dismissed in part and allowed in part.

A. R. McMaster, K.C., for petitioner.

S. W. Jacobs, K.C., for liquidator.

Beaudin, J.

BEAUDIN, J.:—The Boston Shoe Company, Limited, was ordered by this Court to be wound up on the nineteenth day of December, 1912, and on the 23rd December, 1912, the petitioner served on the provisional liquidator a petition in which it alleges that during the month of May, nineteen hundred and twelve, the respondent gave an order to the petitioner for a number of articles of footwear, and in the month of October, 1912, a second order; that the goods mentioned in the first order were shipped to the respondent on or about the 2nd of July, 1912, and the goods mentioned in the second order were shipped on or about the 14th November, 1912; that actual delivery of the goods in question was never taken by the respondent, and the goods are presently in the bonded warehouse of the *mis-en-cause*; that the two shipments consisted in all of one thousand pair of boots and shoes, contained in thirty cases, and the said goods are entire and in the same condition as they were when shipped;

"that your petitioner is willing to pay all charges of freight, duty and advances made in respect of the said goods, to any one entitled thereto."

The petitioner alleges also that the said orders were taken on the condition that the property and ownership of the said goods so sold were not to pass to the respondent until payment was made for the same, the contract being of the nature of a suspensive or conditional sale; but the petitioner has made no proof of this last allegation, and the prayer for the return of the goods and the resolution of the sale is based on the other allegations of the petition.

Mr. Vincent Lamarre, who has been appointed the permanent liquidator, after having been authorized by the inspectors and the Court, has contested the petition, and he alleges in substance that the goods sought to be recovered by the petitioner herein were duly delivered to the said Boston Shoe Company, Limited, in the ordinary course of business, and were stored in the bonded warehouse of the *mis-en-cause*, for and on account of the said company, and all warehouse and other charges for same were debited to and paid by the said Boston Shoe Co., Ltd., many months before the insolvency of the said Boston Shoe Co., Ltd.; delivery of the goods in question was made to the Boston Shoe Company as soon as such goods were held by the *mis-en-cause*, subject to the order of the Boston Shoe Company, Limited, and from the moment that the warehouse and other charges were debited to or paid by said Boston Shoe Co.; the delay given by law, within which the petitioner may have the right to recover the goods in question, had lapsed long before the insolvency of the Boston Shoe Co., Ltd.; and respondent is entitled to retain such goods for the estate of the said company, and the general benefit of the creditors.

The petitioner denies the allegations of the answer and tenders the respondent a promissory note, dated Montreal, December 14th, 1912, signed by the Boston Shoe Co. for $3,069.90, which was not met at maturity.

The facts as they appear by the pleadings and the evidence may be summed up as follows:

The first order, amounting to $2,550.85, was given on the 2nd July, 1912, to be delivered on the 1st October. Terms: Net sixty days from this latter date. The second order, amounting to $519.05, was given on the 14th November, 1912, the goods to be shipped immediately and payable in the same manner.

Although no special mention seems to have been made at the time of the order whether the goods were sold f.o.b. Chicago or f.o.b. Montreal, it appears that they must have been sold f.o.b. Chicago, as the Boston Shoe Company paid the freight

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after the goods had arrived at Montreal, the first lot of twenty-five cases being shipped in the beginning of July, by the Grand Trunk, and the second lot, containing five cases at the end of November, by the C.P.R. There also the freight was paid by the Boston Shoe Co.

They took possession of the goods, gave the invoices to the *mis-en-cause*, doing business under the name of Blaiklock Brothers, as warehousemen; the *mis-en-cause* passed the entry at the customs house, for the Boston Shoe Co., and in the name of the Boston Shoe Co., paid whatever charges there were to pass such entry, warehoused the goods in their public bonded warehouse, for the Boston Shoe Co. and charged them for the storage, and the goods were insured by the Boston Shoe Co., in their name, and the insurance premium paid by the said company.

The *mis-en-cause* declared that the goods were at the disposal of the Boston Shoe Company, which could have taken possession of one or more cases, or even of the whole of the cases, at any time, provided the duties were paid.

On the 14th December the Boston Shoe Co. gave their promissory note to the petitioner for the full amount, payable ten days after date. On the 19th December a winding-up order was issued against the said Boston Shoe Company, Limited, and the question of law which arises is as to whether delivery of the goods had been made to the Boston Shoe Company, and whether the petitioner is entitled to revendicate those goods.

The petitioner wants to exercise what is commonly known as the "Stoppage in transitu" under article 1543 of the Civil Code.

The article originally read as follows:—

In the sale of movable things, the right of dissolution by reason of non-payment of the price, can only be exercised while the thing sold remains in the possession of the buyer; without prejudice to the seller's right of revendication, as provided in the title of privileges and hypothecs.

Under that clause, the unpaid vendor could always ask for the resolution of the sale, so long as the goods had not passed in the hands of a third party, provided they were entire. It was found that this article as originally drawn, was working injuriously to the creditors in cases of insolvency, and we see that this article was amended by the statute of Quebec, 48 Viet. ch. 20, sec. 1, and the following paragraph was added to the said articles:—

In the case of insolvency, such right can only be exercised during the fifteen days next after the delivery.

And subsequently, by 54 Viet. ch. 39, sec. 30, the word

"thirty" was substituted for the word "fifteen." Consequently the above paragraph now reads as follows:—

In the case of insolvency, such right can only be exercised during the thirty days next after the delivery.

In the present case, the winding-up order having been given on the 19th of December, 1912, the petitioner is well founded as to the second lot of five cases, as they were delivered on the 26th or the 28th of November, 1912, and consequently within the thirty days of the insolvency of the said Boston Shoe Co. But the petitioners pretend that they are entitled to the first lot as well, because the word "delivery," in said paragraph, means actual delivery, in the actual possession, and in the store of the Boston Shoe Co. and not a constructive delivery, such as the one that was made in the bonded warehouse of the *mis-en-cause:* and they say that the possession of the customs was the possession of the Chicago company, or, at least, the customs had possession for both parties, and they (petitioner) could stop those goods "in transitu."

On the other hand, the liquidator pretends that the fact that these goods were taken possession of by the Boston Shoe Co. from the carrier, by paying the freight, entering the goods at the customs in their name, paying the charges for the storage or undertaking to pay them, insuring them in their name and paying the insurance, and being able to get these goods without the consent or the control of the Chicago company, at any time, by simply paying the duty, was a delivery within article 1543.

The articles of our Code regarding delivery are the following:—

1492. Delivery is the transfer of a thing sold into the power and possession of the buyer.

1493. The obligation of the seller to deliver is satisfied when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him, and all hindrances thereto are removed.

1495. The expenses of delivery are at the charge of the seller and those removing the thing are at the charge of the buyer, unless it is otherwise stipulated.

1496. The seller is not obliged to deliver the thing if the buyer does not pay the price, unless a term has been granted for the payment of it.

Here, as we have seen, a delay of sixty days for the payment of the goods had been given by the petitioner to the Boston Shoe Co.

The petitioner has referred to a number of cases in England, where it has been held that the goods can be stopped "in transitu," if they are in possession of the customs, and some decisions, either in Upper Canada or here, where the same principle has been held.

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I come to the conclusion, however, that the present case has to be determined by the principles found in our own Code, particularly in the articles which I have cited, although, I think, that the principle laid down by the decisions referred to by the petitioner do not clash with the conclusion to which I have arrived.

A study of those decisions, as well as of the jurisprudence, has convinced me that each case must be decided according to the special circumstances surrounding it. Most of those cases that have been cited, refer to the case of a carrier who was in possession of the goods, and the goods not delivered to the consignee, or a wharfinger, or a steamship company, or the selling agent of the seller, who had sent those goods to his representative in Montreal, and the goods had been warehoused by that agent until they were delivered to the consignee or buyer. I would certainly follow those decisions if the same circumstances existed in the present case; for instance, if the goods were still in the possession of the Grand Trunk Railway or the Canadian Pacific Railway, or if the Boston Shoe Co. had refused to accept delivery when the goods arrived in Montreal, and those goods had been put in the warehouse of the *mis-en-cause* by the Chicago company or representatives, I would not hesitate to say that the goods could be stopped "in transitu." Or else, it might happen that the Chicago Company would have arranged with the Boston Shoe Company that the goods would have to be put in a bonded warehouse until they had been paid for; then again the delivery would not have taken place. But taking into consideration the facts as I have related them, it seems to me that the Boston Shoe Company had taken delivery of those goods, that they could do whatever they liked with them; they could take possession of them without the consent of the Chicago company, or anybody else, except the customs; they would have been responsible for their loss, if they had been destroyed by fire after they had passed the customs and had been put in the warehouse of the *mis-en-cause*, in their name; and for the lot of twenty-five cases, delivered in July, I come to the conclusion that the petition cannot be granted.

The decisions in England on this question are very numerous. They are collected in Mew's Digest, vol. 12, title "Sale of Goods," sub-title "Stoppage in Transitu," from pp. 598 to 625. It would be sufficient to refer to the following cases, which I think support the view I take of the present case: *Phelps* v. *Comber*, 29 Ch.D. 813, 54 L.J. Ch. 1017; *Foster* v. *Frampton*, 6 B. & C. 107; *Kendall* v. *Marshall*, 11 Q.B.D. 356, 52 L.J.Q.B. 313; *Ex parte Gibbes, Re Whitworth*, 1 Ch.D. 101, 33 L.T. 479; *Swanwick* v. *Sothern*, 1 P. & D. 648. See also 26 Am. Encyc., 2nd ed., 1100, title "Stoppage in Transitu."

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I would dismiss said petition as regards the twenty-five cases of goods shipped in July, 1912, but grant said petition as regards the five cases of goods delivered on or about the 28th November, 1912, and order the liquidator and the *mis-en-cause* to deliver to the said petitioner the said five cases of goods, upon payment of the said sum of $10.48, to the said *mis-en-cause*; with costs of the petition against the said liquidator *es qualité* as in a case between five and six hundred dollars, but without costs against the *mis-en-cause*.

Judgment accordingly.

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Feb. 5.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., and Russell, and Drysdale, JJ. February 5, 1913.

1. BROKERS (§ II B—16)—REAL ESTATE AGENTS—COMPENSATION ON PRINCIPAL'S FAILURE TO CONTRACT.

Where a real estate broker employed to sell, has obtained a contract of purchase and the land owner after accepting the deposit of the purchaser declines to carry it out and gets the purchaser to take back the deposit, the claim of the broker for negotiating a sale has nevertheless accrued for the full commission stipulated for, as upon the complete performance of the broker's part of the contract, and is not restricted to a claim upon a *quantum meruit*.

[*Austen* v. *Canadian Fire Engine Co.*, 42 N.S.R. 77, applied. As to real estate broker's commissions generally, see annotation to *Haffner* v. *Grundy*, 4 D.L.R. 531.]

Statement

APPEAL by defendant from the judgment at trial in favour of plaintiff company, a body corporate, carrying on a real estate and brokerage business at Sydney, C.B., for the sum of $500 as being the amount of commission agreed on between the parties for negotiating a sale of property owned by defendant at the price of $20,000. After the sale had been arranged, defendant repudiated the agreement and refused to carry out the same and returned to the purchaser a sum of money paid and accepted as part payment on account of the sale. Defendant pleaded generally in denial.

At the trial the learned Judge left it to the jury to say whether they believed the plaintiff's witnesses in preference to those for defendant and directed them that in the former case their verdict must be for plaintiff for the amount claimed. He declined to instruct the jury on the question of *quantum meruit*.

The jury found that plaintiff was entitled to the commission claimed and judgment was ordered accordingly.

Finlay Macdonald, for defendant, appellant.

C. J. Burchell, K.C., and *J. L. Ralston*, for plaintiff, respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—This case, to my mind, is

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a very simple one. The plaintiff company sued defendant on a special contract alleged to have been entered into for the payment of a commission of $500 on making a sale of defendant's land. The defendant denies making any such agreement and denies that any sale was effected, and further denies that he employed plaintiff company at all. The evidence was entirely directed to this issue which was the only one presented in the pleadings. The learned Judge instructed the jury that it was entirely a question for them to be answered in favour of plaintiff company or defendant according to which set of witnesses they believed, and that the plaintiff company were entitled to recover the $500 or nothing. That, in my opinion, was a perfectly correct direction. Only one matter in his directions is complained of, that is to say, that he should have left it to the jury to say whether plaintiff company should only recover on a *quantum meruit* as the sale was not carried out, and not have instructed them, as he did, that it must be for $500 or nothing.

In my opinion such an instruction would have been wrong. There is nothing in the pleadings to justify the Judge in so placing the matter before them. There is no claim put forward on a *quantum meruit*, nor were there any so-called common counts in the statement of claim, nor was any amendment asked for. Not even in the questions submitted by defendant's counsel to be put to the jury was there any suggestion of the kind. The Judge declined to grant any questions, but in the general verdict taken any one of those suggested must be taken to have been answered adversely to the defendant.

This motion should be dismissed with costs.

Graham, E.J.
Drysdale, J.

GRAHAM, E.J., and DRYSDALE, J., concurred.

Russell, J.

RUSSELL, J.:—The only objection made to the charge of the learned trial Judge in this case is that he told the jury the defendant must pay what he agreed to pay and that he refused to instruct them as to a *quantum meruit*.

The case of *Prickett* v. *Badger*, 1 C.B.N.S. 96, is cited as authority for the proposition that the defendant was entitled to have the question of a *quantum meruit* submitted. That was a case where the agent effected a sale which the purchaser declined to complete and the point chiefly under discussion was that the plaintiff should have sued in a special action against his employer for damages for withdrawing his authority to proceed with the transaction. The Court held that this was not necessary and that he could sue for the value of his services, and Willes, J., held that the proper measure of damages would be the amount of the compensation agreed for. That is substantially the instruction given by the learned trial Judge in this case.

I think the learned Judge properly refused to put the question of a *quantum meruit*. If he had done so it is probably a fair contention that he would have been obliged to leave it open to the jury to find that the agreed amount was more than the services were worth even if those services had been fully performed, the agreement being only evidence for the jury as to the value of the services. I think, however, that it is conclusively settled by the case of *Austen Bros.* v. *Canadian Fire Engine Co.*, 42 N.S.R. 77, that the plaintiff having done all that he agreed to do has fully earned his commission and is entitled to be paid according to the agreement and that it would have been an error on the part of the learned Judge if he had instructed them that they could award less than that amount.

Appeal dismissed.

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Alberta Supreme Court, Trial before Stuart, J. January 6, 1913.

1. ACTION (§ I B—5)—PREMATURE—SALE OF LANDS—AGENT'S COMMISSION—PURCHASE PRICE PAYABLE IN STOCK—WRIT ISSUED BEFORE ALLOTMENT.

Where an agreement between an owner of real estate and an agent employed to sell the same provides that the agent's commission "shall be due and payable and shall be made out of the first instalment of the purchase price when and as the same is received by the owner," an action against the owner who has sold the property for stock in a corporation to be formed, is prematurely brought if, at the date of the writ no allotment of shares had been made to the owner, nor had he yet become entitled to demand the shares.

2. CONTRACTS (§ II D 2—165)—TRANSFER OF PROPERTY—LANDS—SALE.

A transfer of lands by the owner thereof to a corporation for which transfer the owner receives a majority of the stock of the corporation, is a sale and not an exchange.

[*Burchell* v. *Gowrie*, [1910] A.C. 614, distinguished.]

3. CONTRACTS (§ II D 2—165)—TRANSFER OF PROPERTY—LANDS—EXECUTORY CONTRACT FOR SALE—AGENT'S COMMISSION PAYABLE FROM PURCHASE PRICE.

An executory contract for the sale of lands made by the owner thereof, comes within the meaning of an agreement between the owner and an agent whereby the agent was to receive as commission a certain percentage of the gross selling price of all lands "sold" during the continuance of the agreement, such commission accruing whether the sale be made by the agent or the owner, and being payable out of the first instalment of the purchase price.

[*Rex* v. *Canadian Pacific R. Co.*, [1911] A.C. 328, applied.]

4. JUDGMENT (§ I E 3—35)—CONFORMITY TO PLEADINGS — DECLARATORY JUDGMENT, WHEN DENIED.

A declaratory judgment will not be rendered where the statement of claim not only does not ask for it, but also fails to ask for damages.

5. PLEADING (§ I L—81)—PRAYER FOR FURTHER RELIEF, SCOPE OF—SPECIFIC ALLEGATIONS.

A prayer in plaintiff's statement of claim asking for further relief is not sufficient to justify a separate kind of relief, different alto-

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gether from that suggested by the facts alleged and specifically claimed.

[*Cargill* v. *Bower*, 10 C.D. 509, followed.]

6. PLEADING (§ II L—80)—RELIEF UNDER PLEADINGS—ACTION FOR DISCOVERY.

To entitle the plaintiff to an action for discovery he must allege in his statement of claim some facts as to absence of knowledge on his part constituting a ground for such relief.

Statement

THIS is an action by the plaintiff, a real estate agent, for $140,426.66, as 10 per cent. commission upon the alleged sale at $1,404,266.66 of certain parcels of land owned by the defendant, near Calgary. The plaintiff sets up an agency agreement with defendant, under which the plaintiff was to be installed in an office and give all his time to promote the sale in parcels of all the land in question, and under which he was to be paid 10 per cent. out of the proceeds of all sales, whether made by himself or any other person, from first moneys collected.

The defendant, after his agreement with the plaintiff, organized a syndicate, and, in form, a sale was made of his lands to that syndicate, he taking in payment the bulk of the shares of the company organized under the syndicate project.

The plaintiff alleges that such a sale, with payment in capital stock of the company, was a sale within the meaning of the agreement. The defendant sets up that it was not such a sale, and further that the stock had not actually been transferred at the time the action was brought.

The plaintiff, in addition to claiming the 10 per cent. commission, also claims an account and a judgment for the sum found due by such account. He also claims, in the alternative, discovery of the sale made by the defendant, and judgment for the payment of any amount received by defendant on the sales up to the 10 per cent., and, in case of deficiency, judgment for any further sums up to the 10 per cent., and such further and other relief as the nature of the case may require.

Defendant pleads no sale, no moneys received, no indebtedness, no cash or shares received at date of writ. Defendant also counterclaims for an account.

Judgment was given dismissing the plaintiff's action and the defendant's counterclaim.

Lougheed & Co., and *Wm. P. Taylor*, for the plaintiff.

E. P. Davis, K.C., and *Clifford T. Jones*, for the defendant.

Stuart, J.

STUART, J.:—On the 21st April, 1911, the defendant, who was the owner of certain lands near Calgary, entered into an agreement in writing with the plaintiff, whereby he appointed the plaintiff his sole and exclusive agent to sell the lands in question and whereby the plaintiff undertook and agreed to act solely and exclusively as agent for the defendant for the sale

of the same and to give his exclusive time and attention to the business of obtaining purchasers therefor until the land was all sold.

The defendant retained the right of approval of all sales. It was also agreed that the defendant should furnish a schedule of prices and should approve a general form of sale agreement, reserving the right to alter it, provided the alteration was not more onerous to the purchaser. The agreement also provided that the defendant should pay to the plaintiff:—

> As and for commission and compensation for his services, time, expenses and outlay, ten per cent. of the gross selling price of all lands which are sold during the continuance of this contract, whether the same be sold by the agent (the plaintiff), or by the owner (the defendant), or by any other person, and such payment shall be due and payable and shall be made out of the first instalment of purchase price when and as the same is received by the owner.

The agreement contained other clauses not material to this case. The lands covered by the agreement were set forth in a schedule.

The plaintiff opened an office in Calgary and actively prosecuted the business of selling the property to the entire satisfaction of the defendant, during the spring and summer of 1911. In December, 1911, the defendant went to London, England. There, on the 7th day of February, 1912, he entered into an agreement with a company called Canadian Securities, Limited, whereby it was agreed that the company should, on or before March 30th, 1912, form and register a company under the Companies Clauses (Consolidation) Act, 1908, having a nominal capital of two hundred and eighty thousand pounds, sterling, divided into two hundred and eighty thousand shares of one pound each, for the purpose of acquiring the property hereinafter set forth, which property included the property covered by the agreement between the plaintiff and the defendant but also other property belonging to the defendant which was not comprised therein. The defendant agreed to sell to the said company, Canadian Securities, Limited, and that company agreed to buy from the defendant "as on and from the 1st day of February, 1912," the land mentioned in the agreement at the sum of two hundred and sixty thousand pounds to be paid and satisfied as follows: As to one hundred and thirty thousand pounds by the allotment to the defendant or his nominees of 130,000 fully paid up shares in the capital of the new company of one pound each and as to the balance at the option of the directors of the new company either in cash or by the allotment to the defendant or his nominees of fully paid-up shares in "the company" (which by a strict reading of the agreement would mean Canadian Securities, Limited, but which, as it was assumed on the hearing, and as was evidently intended, meant the

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new company) to be treated as of par value, or partly in cash and partly in shares fully paid up. There was a proviso that the purchase price to the new company should not exceed two hundred and sixty-eight thousand pounds and that the balance, eight thousand pounds, payable to Canadian Securities, Limited, should be paid in cash and for (by) shares in the same proportions as the second one hundred and thirty thousand pounds of the purchase price should be payable to the defendant. The agreement provided that the conveyance should be completed on or before May 30, 1912, or at such later date as should be agreed upon in London on allotment of all the shares representing purchase money and on payment of not less than fifty per cent. of the cash purchase money (if any), the balance (if any), of cash, to be paid within six calendar months thereafter, the defendant in the meantime having a vendor's lien for such cash and to be at liberty to file a caveat for the purpose of securing the same. The defendant was given a power of cancellation in case of default upon giving one month's notice in writing. The agreement was to be filed with the registrar in pursuance of sec. 89 of the Companies Consolidation Act, 1908. It was also agreed that the new company should, upon conveyance, enter into a covenant with the defendant to observe and perform the terms and conditions of the agreement first mentioned between the plaintiff and the defendant.

In pursuance of this last agreement, Canadian Securities, Limited, did promote and organize a new company under the name "Bowness Estates, Limited." The memorandum of association was filed with the registrar on March 12, 1912, and the first object of the company stated therein was

> to enter into and carry into effect (with or without modification) an agreement which has already been prepared, etc.,

being the agreement between the Canadian Securities, Limited, and the defendant.

On March 25, 1912, an agreement was entered into between Canadian Securities, Limited, and Bowness Estates, Limited, whereby, after a recital of the two former agreements, the one between the plaintiff and the defendant, and the one between the defendant and the Canadian Securities, Limited, it was agreed that Canadian Securities, Limited, should sell to Bowness Estates, Limited, and the latter should purchase the lands covered by the second agreement for the sum of two hundred and sixty-eight thousand pounds, as provided in the second agreement, and that all the provisions of the second agreement should (except as to clause 1) *mutatis mutandis* be deemed to be incorporated therein, and Bowness Estates, Limited, agreed to make all the payments and do all acts required to be done by the second agreement.

It will be convenient hereafter to refer to the agreement between plaintiff and defendant as the first agreement, and to that between the defendant and Canadian Securities as the second agreement, and to that between the two companies, as the third agreement.

The second and third agreements were both filed with the registrar on April 10, 1912.

The plaintiff took no part in the formation or negotiation of the second and third agreements, and gave no assent thereto, and was not asked to do so.

The plaintiff commenced this action on April 22, 1912. The defendant appeared on May 14, 1912, and on the same day the plaintiff filed an amended statement of claim, which set forth the first agreement and alleged that by an agreement dated March 29, 1912 (amended at trial to read February 7, 1912), the defendant had sold the balance of the land covered by the first agreement then remaining unsold, for the sum of two hundred and sixty-eight thousand pounds "equivalent to, at par of exchange, $1,404,266.66."

Upon which sale it was alleged the plaintiff is entitled to a commission of "ten per cent., being $140,426.66, as by the said agreement provided."

It was also alleged that the defendant had received as the first instalment of the selling price of the said land an amount sufficient to pay the plaintiff's commission and compensation according to the terms of the said agreement. It was also alleged that the plaintiff had, under instructions of the defendant, and in the course of his duty, paid out money for the defendant and that the defendant had received moneys for commissions and for interest on commissions owing and payable by the defendant to the plaintiff, and that accounts had not been stated and settled between them.

The plaintiff claimed: (1) Judgment for $140,426.66; (2) An account and judgment for the sum found by such account to be due from the defendant to the plaintiff; (3) Interest; (4) In the alternative, discovery of the sale made by the defendant and judgment for the payment immediately of any moneys which the defendant may have received on the said sale up to the amount of the plaintiff's total claim with interest, and as to any balance which may be owing, judgment for the same payable as and when the same is received by the defendant; (5) Such further and other relief as the nature of the case may require; (6) Costs.

The defendant, in his statement of defence, after a general denial, pleaded specially the making of the second and third agreements and that at the date of the writ, the conveyance of the property had not been completed. He also pleaded that no

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sale of the property had been made, that he had received no moneys on the second or third agreements and was not indebted to the plaintiff in any sum, that neither any cash or any shares had been received at the date of the writ, that the plaintiff had due notice of the making of the second and third agreements and as to the provisions thereof, that he thereafter neglected to perform his obligations under the first agreement, that the plaintiff never asked discovery of the terms of the second agreement, and that the defendant was always ready and willing to make full disclosure of the same. The defendant also counterclaimed for an account.

This defence and counterclaim were filed on May 21, 1912.

The plaintiff, in his reply, pleads an estoppel on the ground that the defendant had, before action was brought, stated to the plaintiff that the lands had been sold, that he had received cash thereon, and that stock had been allotted to him, and that the plaintiff, relying upon these statements, as he had a right to do, had declined to perform any further services under the first agreement, except for the defendant himself, and on the ground that he was not bound to act as agent for the purchaser, Bowness Estates, Limited, as set forth in the second and third agreements, and he pleads also that that clause of the final agreement which refers to a uniform contract of sale had been violated without his consent.

At the trial no oral testimony was given. The evidence adduced by the plaintiff consisted of the agreement in question, a certain prospectus of Bowness Estates, Limited, and documents connected therewith, and certain portions of the defendant's examination for discovery.

The defendant, at the conclusion of the plaintiff's case moved for a nonsuit, which I refused, and he then decided to offer no evidence.

It is necessary to observe that the defendant's examination for discovery did not take place all on one day. It began on June 11th, It was resumed on June 27th, and was again resumed and completed on October 7th.

In his examination of 27th June, the defendant stated that there were public subscriptions for shares in Bowness Estates, Limited, that the property had not been sold, but that, as he then said, "it is to be transferred," that Kennerley had not been asked to consent to the sale, that there was an arrangement by which the sale of Bowness lots in England was withdrawn for a year because he had sold to the International Realty Company on behalf of Bowness Estates, Limited, eighty acres of land on an undertaking not to offer any lots in England, that Kennerley had never sold any of the lots in England, and that his, defendant's, interest in the property was then (*i.e.*, at the

date of his examination) represented by shares in the company. This statement, however, was explained earlier in his examination, where he said that he was not then a shareholder, but that he would be. He explained that he was then a director, having applied for a minimum and paid cash, two hundred pounds, for the purpose of qualifying as a director. He stated that he then had reason to believe that the directors of Bowness Estates, Limited, were going to give him only fifteen thousand pounds in cash and two hundred and forty-five thousand pounds in shares; he stated that at that time the transfer of the property had not yet been made and that the secretary would not sign the shares until the transfer had been made.

The transfer of the land in question from the defendant to Bowness Estates, Limited, was put in evidence. It is dated twenty-eighth June, 1912, but was not registered until July twenty-third.

In his adjourned examination of October seventh, the defendant stated that he had then received the shares and the money to which he was entitled under the agreements, that 245,870 paid up shares had then been allotted to him, that he could not state accurately without going into the figures how many of these he owned himself absolutely, but that some of them were held for a firm of Astley & Shackle and that that firm had nineteen thousand pounds coming to them out of the allotment. The reason for this is not given, but I presume it was for assistance in putting the arrangement through in England.

Aside from the question as to the inclusion in the second and third agreements of property not covered by the first agreement, the two main questions raised on the argument were, first, whether what took place was in fact a sale at all or not, within the meaning of the first agreement; and, second, whether the action, having been begun on April twenty-seventh, some months before the defendant was actually allotted the shares stipulated for, was not in reality premature.

Counsel for plaintiff cited *Burchell* v. *Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, in support of the contention that a sale had actually taken place. That case is certainly a very strong one, at first blush at least, in the plaintiff's favour. There are, however, as it appears to me, certain points of difference which deserve some consideration at any rate. The sale in *Burchell* v. *Gowrie*, [1910] A.C. 614, was made through the efforts of the plaintiff and in pursuance of an intention to sell the whole property at once. It was made to accompany North Atlantic Collieries Limited, who owned adjoining mines, and the price received consisted of three hundred thousand dollars in first mortgage bonds of the purchasing company, $350,000 preferred stock and $450,000 common stock. It does

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not appear to what extent this gave the vendors, the defendants, control of the purchasing company. In the present case the original purpose of the first agreement was that the plaintiff should be the exclusive selling agent of the defendant for the purpose of selling off, in separate lots, the property in question. The sale was not made by the plaintiff, but by the defendant and his assistants, and as the net result of the proceedings in England which, it is contended, constituted a sale, the defendant owns 226,000 out of a total of 280,000 shares of the capital stock of the purchasing company. He, therefore, controls the company absolutely. And the company has bound itself, by the third agreement at least, to Canadian Securities, Limited, to carry out the terms of his contract with the plaintiff in respect to selling off the property in lots. That, of course, does not mean very much. But certainly, as long as Hextall retains his controlling interest in the company, he is able to place Kennerley in as good a position with relation to the company as he was with relation to Hextall himself. It does not appear whether Hextall ever offered to secure for Kennerley a contract with Bowness Estates, Limited, upon the same terms as those of the first contract. If he had done so, and Kennerley had refused, it would seem clear that Kennerley's position would not be quite so meritorious as was Burchell's case against Gowrie, etc., Limited. I would assume from the plaintiff's pleadings, and from the remarks of his counsel, that he would refuse in any case to take a substituted contract on the same terms, with Bowness Estates, Limited. No doubt, in strictness, he is entitled so to refuse.

I have made these observations, not so much to distinguish *Burchell* v. *Gowrie*, [1910] A.C. 614, on the strict point of law, as to the question of sale or barter, because I think that in that respect the cases are indistinguishable, but to distinguish the position of Kennerley from that of Burchell, so far as a meritorious claim is concerned.

I think *Burchell* v. *Gowrie*, [1910] A.C. 614, is conclusive at least of the point that we have here a case of sale, rather than one of exchange or barter. But there are other aspects of the question to be considered. Was this a sale within the meaning of the first agreement? At the date of the issue of the writ, there was nothing more in existence than certain executory contracts of sale. Notwithstanding *Rex* v. *Canadian Pacific Railway Company*, [1911] A.C. 328, in which a mere executory contract of sale was held not to come within the meaning of the word "sold," in the C. P. R. contract with the Dominion Government, I think a mere executory contract would come within the meaning of the agreement in question here, because the commission is declared to be payable "out of the first instalment of

the purchase price." These words shew that an executory contract was intended to be covered by this agreement.

I have, however, felt some doubt on another ground, whether what was done here, while no doubt, in strictness, a sale should be considered to be a sale within the meaning of the agreement. If we read the agreement as a whole, the question must occur to anyone whether the sale of the whole property *en bloc* to a purchasing company, in which the vendor acquired about four-fifths of the stock, should really be taken to have been within the contemplation of the parties, as disclosed by such a reading. The agreement refers to a schedule of prices to be fixed, and a regular form of agreement of sale to be approved. In *Burchell* v. *Gowrie, etc., Limited*, [1910] A.C. 614, a sale of the whole of the property was contemplated from the beginning. If it were absolutely necessary to decide the point, I should feel very much hesitation in holding that the sale to Bowness Estates, Limited, was within the meaning of the words "all lands which are sold," as used in clause five of the agreement, reading that clause in the light of all the rest. This would leave the plaintiff to a remedy in damages only, and it is to be observed that the judgment in *Burchell* v. *Gowrie*, [1910] A.C. 614, was itself a judgment for damages. However, in my opinion, the plaintiff cannot succeed in his action because of that portion of clause five in the agreement, which says that the commission shall be paid "out of the first instalment of the purchase price when and as the same is received by the owner." The evidence shews that on April 27th, when the writ was issued, no shares had yet been allotted to the defendant and he had not yet received the sum of fifteen thousand pounds in cash, which he ultimately did receive before trial. It had occurred to me that as the second and third agreements were filed on April 10th, it might be suggested that by virtue thereof the defendant had become entitled to his shares, and should be treated as having received them, *i.e.*, as being at that date at any rate, a shareholder. Counsel for the plaintiff, however, raised no such contention, and I think if there was anything in it, he would have raised it. Besides, the second agreement distinctly says that conveyance and allotment of shares were to be concurrent.

It seems, to me, therefore, to be clear, that if the rights of the parties are to be decided as of the date of the writ, the plaintiff cannot succeed, because at that time the defendant had not "received" his purchase price or any part of it, even assuming that the sale was one within the meaning of the first agreement. This was the chief ground relied upon by the defendant, and I am unable to see how it can be met. I know of no law giving a person the right to sue for money before

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it is due him and no authority was cited to me to shew that even in this case he could do so. I think this was because no such authority exists.

Mr. Bennett contended, however, that the plaintiff is entitled to a declaratory judgment. The trouble with this is that the statement of claim does not ask for a declaratory judgment. Neither does it ask for damages. Both were asked for in *Burchell* v. *Gowrie*, [1910] A.C. 614. The prayer for relief does indeed ask for such further or other relief as the plaintiff is entitled to, but it is settled, I think, that this is not sufficient to justify a separate kind of relief, different altogether from that suggested by the facts alleged and specifically claimed. In *Cargill* v. *Bower*, 10 C.D. 509, Fry, J., said:—

> The notion that the prayer for further relief will cover a claim for the rescission of the contract seems to me to be excluded by this consideration, that such a prayer must always be limited by two things —the facts which are alleged, and the relief which is expressly asked. You cannot, under a general prayer for relief, obtain any relief inconsistent with that relief which is expressly asked for.

Now it may be said that a judgment, declaring the plaintiff to be entitled to ten per cent. of what the defendant has received from Bowness Estates, Limited, for the property in question, making an allowance for a proportionate part, on account of other property being included in the sale, is not inconsistent with what is specifically asked for. But I gather from what Fry, J., says, and from such cases as *Vaughan* v. *Sharpe*, 6 A.R. Ont. 417; *Jessup* v. *Grand Trunk*, 7 A.R. Ont. 128; *Phillips* v. *Royal Niagara Hotel Company*, 25 Gr. 358, and the other cases cited in Ont. Dig. (1903), col. 5377, that the facts alleged must be such as to point to such a relief as being the proper one to give. In the present case, however, there is not a hint in the facts alleged in the statement of claim, that there was any necessity to ask or any intention to ask for a judgment declaring the plaintiff's right as to ten per cent. of the money and shares to be received by the defendant. A simple sale for two hundred and sixty thousand pounds is alleged, and a simple claim for ten per cent. of it is made. There is, indeed, a hint, in one of the prayers for relief, namely, the prayer for discovery of the terms of the agreement of sale, that the plaintiff was not sure of his ground; but a suggestion, not in the allegations of fact, but in a prayer for relief, that the real facts are unknown to the plaintiff, is surely no ground for saying that the statements of fact are sufficient to base a prayer for a declaratory judgment upon. No amendment of the pleadings was asked for, and it seems to me, therefore, impossible to make any declaratory judgment in the plaintiff's favour, even if, on the facts proven, he were clearly entitled to one, as to which I have some doubt. Damages are not asked, and were

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not suggested in the argument, except by the defendant's counsel.

Some suggestion was also made, that the plaintiff was entitled to bring his action for discovery only. There seem to be some cases in which an action purely for discovery may still be brought (see Halsbury, vol. 2, p. 39); but whether this is such a case or not, it would surely be necessary for the plaintiff to allege in the statement of claim, some facts as to absence of knowledge on his part, which would give a ground for such relief. Instead of doing that, the plaintiff has, as I have pointed out, given in his pleadings no hint of ignorance of something which he wishes to discover, except as to the account.

The result therefore, is that aside from the claim and counterclaim for an account of the dealings of the parties prior to the sale in England, the action must be dismissed, and with costs.

The matter of an account was not mentioned on the argument by either counsel, and as no evidence on that subject was adduced by either party, I assume that it was intended that the matter should be dropped.

The action and counterclaim will both be dismissed with costs.

Action and counterclaim both dismissed.

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Alberta Supreme Court, Scott, J. January 14, 1913.

1. LANDLORD AND TENANT (§ II D—33)—LEASE—WAIVER OF FORFEITURE —ACCEPTING RENT FROM SUB-LESSEE.

Although, under the terms of a lease, the tenant is prohibited from assigning or sub-letting the premises under penalty of forfeiture, still where he does so to the knowledge of the landlord, the acceptance of rent from the sub-lessee by the landlord, constitutes a waiver of such forfeiture.

2. CONTRACTS (§ I E 3—75)—LEASE — FORMAL REQUISITES; STATUTE OF FRAUDS.

Where a parol agreement provides for a rental for a year certain, with a right of renewal from year to year for two years more, and possession is taken thereunder, the agreement is not void under the Land Titles Act (Alta.), nor under the Statute of Frauds.

[*Hand* v. *Hall*, 2 Ex. D. 355, applied.]

3. LANDLORD AND TENANT (§ II C—24)—OPTION TO RENEW ON NOTICE — PAYMENT OF RENT ON RENEWAL TERM.

Where a rental agreement provides an option of renewal for subsequent years, the acceptance of rent for portions of one of such subsequent years is evidence of the tenancy having been created for that year, apart from the question of its effect as a waiver of an alleged forfeiture through failure to give prior notice as stipulated.

[*Bishop* v. *Howard*, 2 B. & C. 100, applied.]

Statement

THIS is an application by the landlord for an order for the delivery of possession by the tenant of the demised premises.

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The application was dismissed.

J. Landry, for landlord.

E. B. Edwards, K.C., for tenant.

SCOTT, J.:—In December, 1910, Dr. Archibald, who then owned the premises, entered into a verbal agreement with one Campbell to lease them to him. The evidence as to the terms of the agreement is contradictory. Campbell states that it was a lease for three years at a rental of $25 per month for the first year, $30 for the second year, and $35 for the third year. Dr. Archibald states that it was a lease for one year at $25, and that Campbell was to have the right to renew for a second year at $30 and for a third year at $35, provided that he gave two months' notice of his intention to renew for each year. I accept Dr. Archibald's version of the agreement for this reason. Shortly after the agreement was entered into a lease for a term commencing on 1st January, 1911, embodying in effect the terms of the agreement as stated by him and containing other usual terms, conditions and covenants, was drawn up at his instance, and submitted to Campbell, and although it was never executed by either party, it appears that at a later date, when Campbell was negotiating with one Sheppard for the assignment of the lease to the latter, they both state that they spoke to Dr. Archibald about the matter, and that they then referred to the unexecuted lease for the purpose of ascertaining the terms of the tenancy. No objection was then taken by Campbell to the terms there stated, and I therefore assume that he accepted them as correct.

Campbell entered into possession of the premises under the verbal agreement and carried on business as a merchant therein until some time in the month of January, 1911, when he sold out the business to one Sheppard, and one of the conditions of the sale was that the latter should take over the lease of the premises. They both state that at that time they together saw Dr. Archibald, who agreed to accept Sheppard as tenant for the remainder of the term, that he (Dr. Archibald) then suggested that he should execute a new lease direct to Sheppard for that period and that he then took away the lease to Campbell for the purpose of having the new lease prepared.

Dr. Archibald, however, denies that he ever made such an arrangement with them or either of them or that he ever accepted Sheppard as tenant, and, as the unexecuted lease to Campbell contained a covenant on his part that he would not assign or sublet without leave, the present landlord contends that there was a breach of that covenant. I hold that Dr. Archibald did accept Sheppard as tenant. The former admits that he knew that the latter was in possession of the premises, and it is shewn

that he paid the rent therefor which accrued during the year 1911. The acceptance by Dr. Archibald of such rent would, in my opinion, constitute a waiver of the forfeiture.

Some time later in the year 1911 Sheppard transferred the business and his interest in the lease to the present tenant, which then entered into possession. During the year 1912 it has paid the present landlord rent for the premises at the rate of $30 per month.

The present landlord bought the premises from Dr. Archibald about January 13, 1912, but it is not shewn whether it has obtained a certificate of title. Dr. Archibald states that by reason of Campbell not having executed the lease submitted to him, he became merely a monthly tenant. He does not state that there was any agreement between them that that would be the effect of his refusal or omission to execute it, and his statement is merely an expression of his opinion as to the legal effect. In my opinion he erred in his conclusion. It was contended on behalf of the landlord that the lease to Campbell extended for a period of more than three years from the time the agreement was entered into and that it was therefore void under the first section of the Statute of Frauds by reason of its not being in writing.

In *Hand* v. *Hall*, 2 Ex.D. 355, it was held by the Court of Appeal that a lease for a year certain in which the right was reserved to the tenant to renew from year to year for a term exceeding three years from the making, was not a lease for more than three years from the making, and was therefore within the exception mentioned in that section. This contention must therefore fail.

It does not appear that the tenant gave notice of his intention to renew the tenancy for the year 1912. It may be that the acceptance by the landlord of rent for portions of 1912 at the increased rate would constitute a waiver of the forfeiture which may have resulted from the omission to give such notice. It is, however, unnecessary to decide that question on this application, as the acceptance of the rent would constitute a tenancy for the whole of the year 1912, a term which had not expired when this application was made: see *Bishop* v. *Howard*, 2 B. & C. 100, 26 R.R. 291.

It was also contended that the verbal agreement is void under the Land Titles Act. Sec. 54 provides that when any lands for which a certificate of title has issued is intended to be leased for a term of more than three years, the owner shall execute a lease in the form prescribed by the Act, and sec. 43 provides that the lands mentioned in any such certificate shall be subject, among other things, to any subsisting lease or agreement for a lease for a period not exceeding three years where there is actual occupation of the land under it.

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A distinction might be drawn between the expression in the Statute of Frauds, "leases not exceeding three years from the making thereof" and that in the Land Titles Act, "a lease for a period not exceeding three years." Were it not for the judgment of the Court of Appeal in *Hand* v. *Hall*, 2 Ex.D. 355, 46 L.J. Ex. 603, I think I would have been inclined to hold that the lease to Campbell was within the former statute, but, in my opinion, it could not in any event be held to be a lease for a term of more than three years, and I therefore think the present landlord's title is subject to it.

The agent who purchased the property for the landlord and who has since been managing it, was ignorant of the fact that the tenant claimed to hold the property otherwise than as a monthly tenant. When purchasing it he appears to have relied upon the statement of Dr. Archibald that such was the nature of the tenancy. His ignorance of what I hold to be the true nature of the tenant's interest should not and, in my opinion, cannot affect that interest.

For the reasons I have stated I dismiss the application with costs.

Application dismissed.

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Jan. 16.

DOMINA v. GUILLEMAUD.

Manitoba King's Bench. Trial before Curran, J. January 16, 1913.

1. BROKERS (§ II B 1—13)—REAL ESTATE BROKERS—REVERSING RIGHT OF INDEPENDENT SALE—AGENT'S OFFER PRODUCED BEFORE INDEPENDENT SALE LEGALLY EFFECTED.

Where the owner employing a real estate broker expressly reserves the right of independent sale he will be liable to the broker for the agreed commission on the latter submitting an offer in accordance with the listing terms from a purchaser able and willing to carry it out; and such right to commission is not displaced by the owner's offer previously made independently of the agent for the sale of the property to a company subject to approval and acceptance by the company's directors, but not in fact accepted by them until after the offer of the agent's customer had been submitted, where the owner was not legally committed or bound to the company at the time when the agent submitted his customer's offer, and this, although the owner completes the transaction with the company and not with the agent's customer.

[As to real estate agents' commissions generally, see Annotation, 4 D.L.R. 531.]

Statement

ACTION for commission for the sale of land.

Judgment was given for the plaintiffs.

J. F. Fisher, for the plaintiffs.

A. Dubuc and *J. A. Beaupre*, for defendant.

Curran, J.

CURRAN, J.:—The plaintiffs sue for commission on the sale of certain lands of the defendant. The amount claimed is $720, being five per cent. on the total purchase price of $14,400, and is the sum to which the plaintiffs are entitled unless their right

is defeated by the defendant's exercise of the right reserved to him in the agency contract of selling the lands himself.

Certain written admissions were made and put in at the trial which confined the matter for determination by the Court to this simple question: Did the defendant himself effect a sale of the lands to another not the plaintiffs' nominee before the sale of same was made by the plaintiffs and communicated to the defendant in respect of which they claim commission? If the defendant did so, then the plaintiffs' right to commission fails. If he did not, the plaintiffs are entitled to judgment for their commission.

All facts material to establish the plaintiffs' right to the commission sued for are admitted "unless the defendant can shew that the plaintiffs are disentitled by reason of the reservation in the employment above referred to." The quotation is from the third of the written admissions.

Upon this question of a sale by the defendant evidence was produced by both parties. Owing to the admissions made the onus of proof is on the defendant, and if he fails to discharge this onus by proving a prior sale of the lands by himself, the plaintiffs will be entitled to a verdict.

The defendant called only one witness, one de la Gielais, manager of La Compagnie Foncier de Manitoba, Limited, which company became the purchaser of the lands from the defendant. It appears from the evidence of this witness that the defendant came to the company's office in Winnipeg on March 13, 1912, about 2.30 o'clock in the afternoon, and saw the witness, and wanted the company to buy his equity in the land. Witness then and there informed the defendant that the company would buy the land, but that the sale would have to be approved by the directors, and that no money could be paid over until such approval was obtained. The land had previously been owned by this company, who had sold it to the defendant and had a claim for unpaid purchase money of some $10,000 in respect of this sale. The company had full information about the land and $60 per acre was the price at which the defendant then offered to sell, and which the witness de la Gielais said the company would pay. This is the same price at which the land was listed with the plaintiffs for sale.

The defendant's offer was informally—that is, individually—approved by the directors on March 14, and formally at a directors' meeting on March 18. The amount due the defendant after making necessary adjustments, $3,944.63 was paid to the defendant by the company on the 16th of March, two days prior to the formal approval of the purchase by the company.

The witness de la Gielais further said that about five o'clock on the 13th of March, one of the plaintiffs, Domina, came to the company's office with the defendant; that Domina told the

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witness and the defendant that he had found a purchaser for the land, and offered the defendant a cheque for $300 received on account of the purchase price as a deposit, which cheque the defendant refused to accept.

This, practically, is all the defendant's witness has to say about the purchase of the land by this company. Apart from any evidence given on the plaintiffs' behalf, does the foregoing evidence of de la Giclais establish a sale to his company on the 13th of March, prior to the notification to the defendant by the plaintiff Domina of the plaintiffs' sale, or at all upon this date?

Had de la Giclais been buying the land for himself probably what took place before Domina appeared on the scene might have amounted to a sale of the land to him at common law, and might have disentitled the plaintiffs to their commission, as admittedly no notice of the plaintiffs' sale reached the defendant personally before five o'clock of the same day, or about an hour and a half after the offer to sell had been made by the defendant to de la Giclais. But de la Giclais was not buying the land for himself but for his company. It is not contended that he had authority to purchase without reference to the directors, and in fact he did not assume to do so but distinctly informed the defendant that the proposal must be first approved of by his directors before the sale could be considered as made or any money paid over in respect of it.

The offer of the defendant to the company on the 13th of March was not accepted by the company when the plaintiffs' sale was communicated to the defendant by Domina. There was then in fact no sale to this company, for, to constitute a sale, I think there must not only be an offer to sell by the vendor, but an acceptance of that offer by the intending purchaser. The matter was wholly tentative, and might come to nothing. It was entirely dependent upon the directors' acceptance, and they did not act, even informally, until the following day. This informal action, even if it constituted a sufficient acceptance of this offer on the part of the company, was, in my opinion, too late, as the defendant was then bound by the sale made by his agents, the plaintiffs, and was no longer free to effect a sale himself.

Counsel for the defendant cited *Fenson* v. *Shore*, 6 D.L.R. 376, 22 W.L.R. 202, apparently to shew that a verbal agreement to sell land is valid at common law, and that such a sale was here effected. There is no doubt that a verbal agreement to sell land is valid at common law, and if I could hold upon the evidence, that the defendant did effect a sale which would be valid even at common law before notified of the sale effected by the plaintiffs as his agents, possibly that would be sufficient to defeat the plaintiffs' claim to commission, and it may well be that such a sale, although not evidenced as required by the Statute of Frauds, would be sufficient for this purpose. I express no opin-

ion upon this point, for it is unnecessary, because I find as a fact that no sale, even at common law, by the defendant to this company was in fact made on March 13, during the whole of which day it was open to the plaintiffs to exercise their right as defendant's agents by selling the land if they could. They did sell it and notified the defendant of the sale before he had concluded any bargain with, or sale to, this company. At this time the defendant was free to carry out the sale made by his agents, and was in no way legally committed or bound to the company in respect of his offer.

Why he refused to carry out the plaintiffs' sale does not appear, but that he was in a position to do so is certain. He elected to repudiate what his agents had lawfully done on his behalf, and notwithstanding the fact that they had effected a sale, the defendant went on and completed the sale to the company. It looks as if he was endeavouring to avoid paying a commission, but he cannot be allowed thus to defeat the plaintiffs' undoubted rights, and I hold that the plaintiffs are entitled to succeed.

There will be judgment in favour of the plaintiffs for $720 with costs of the action.

Judgment for plaintiffs.

WALLACE v. LINDSAY.

Manitoba King's Bench. Trial before Metcalfe, J. January 28, 1913.

1. NEW TRIAL (§ V B—40)—MOTION—JURISDICTION ON EX PARTE APPLICATION.

Section 330 of the County Courts Act, R.S.M. 1902, ch. 38, providing that "a new trial or a re-hearing may be granted or a judgment reserved in any action or suit or in any matter or proceeding upon sufficient cause being shewn for that purpose," gives jurisdiction to a County Court Judge to entertain an application for such relief *ex parte*, although such a course is not to be commended.

Statement

AN action to have a judgment of the County Court declared void and to vacate the registration thereof and for a declaration that the certificate issued does not bind the lands of the plaintiff.

The action was dismissed.

A. C. Campbell, for plaintiff.

J. E. Adamson and *C. A. Adamson*, for defendant.

Metcalfe, J.

METCALFE, J.:—The plaintiff is the owner of the lands in the statement of claim described. He claims that the defendant entered an action in the County Court of Winnipeg against the plaintiff and others; that judgment was rendered dismissing the action against the plaintiff; yet, notwithstanding, the defendants pretend that judgment was subsequently recovered

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against the plaintiff; that the defendants have registered a certificate of such judgment; and that the plaintiff is thereby hindered from dealing with the said lands.

He claims:—

(*a*) That the County Court judgment be declared void.

(*b*) That the registration be vacated.

(*c*) A declaration that the certificate does not bind the lands.

At the trial the plaintiff put in an exemplification of the judgment. The following entries in the exemplification are material:—

July 26, 1911. Trial and judgment for plaintiff against defendant K. Smith for $491.25, debt, together with $——— costs. Action dismissed as to other defendants.

Aug. 5, 1911. Affidavit of intention to appeal.

Aug. 19, 1911. Paid in as security for costs, $25.

Aug. 22, 1911. Trial and judgment for plaintiffs for $496.35, debt, together with $47.45 costs.

Aug. 24, 1911. Certificate of judgment.

No explanation was given by the plaintiff as to the reason why there was a second trial.

Were it not for an amendment to the statement of defence, I would have had no hesitation in dismissing the plaintiff's action. There are various ways in which a new trial might properly be had, and I would assume that the learned Judge of the County Court proceeded regularly.

The defendant, however, has set up as an alternative defence that subsequent to the first trial the defendants made an *ex parte* application to the County Court Judge, who caused the second judgment to be entered. It therefore appears that after the action had been dismissed against this plaintiff there was a subsequent disposition of the cause without notice to this plaintiff, whereby a judgment was rendered and entered against him. I do not think that practice should be followed: certainly it should not be generally allowed. But, if the learned County Court Judge had jurisdiction to entertain such an application *ex parte*, then the judgment is not a nullity and I can make no declaratory order.

Section 330 of the County Courts Act, R.S.M. 1902, ch. 38, provides as follows:—

> A new trial or a re-hearing may be granted or a judgment reversed or varied in any action or suit or in any matter or proceeding upon sufficient cause being shewn for that purpose.

While it seems to me contrary to all principle that these proceedings should have been taken *ex parte*, I think that this section gives jurisdiction to the learned Judge of the County Court.

The action will be dismissed with costs.

Action dismissed.

REX v. DUROCHER.

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Feb. 25.

Ontario Supreme Court, Kelly, J., in Chambers. February 25, 1913.

1. STATUTES (§ II A—101)—PENALTY FOR INFRACTION UNDER BOTH FEDERAL AND PROVINCIAL LAW.

Where an act which is not an offence at common law is the subject of a distinct absolute prohibition by provincial statute on public grounds, the offence so created is one for the wilful commission of which an indictment will lie under the provisions of the Criminal Code, R.S.C. 1906, ch. 146, sec. 164, where no other mode of punishment is expressly provided by law.

[*R.* v. *Meehan*, 3 O.L.R. 567, referred to.]

2. ELECTIONS (§ II D—76)—OFFENCES—MUNICIPAL ELECTIONS.

It is an indictable offence in Ontario by virtue of the Cr. Code (Can.) sec. 164 and the Ontario statute, 3 Edw. VII. ch. 19, sec. 193 for a person to fraudulently put into any ballot box any paper other than the ballot paper which he is authorized by law to put in, at the taking of a poll under the Consolidated Municipal Act (Ont.).

Statement

MOTION by the defendant for an order prohibiting the Police Magistrate for the City of Ottawa from proceeding on an information, on the ground of want of jurisdiction to deal therewith.

The information was laid under sub-sec. 1(*b*) of sec. 193 of the Consolidated Municipal Act, 3 Edw. VII. ch. 19, which provides that "no person shall . . . fraudulently put into any ballot box any paper other than the ballot paper which he is authorised by law to put in." By sub-sec. 3, a person (other than the clerk of the municipality) guilty of any violation of the section "shall be liable to imprisonment for a term not exceeding six months, with or without hard labour."

G. F. Henderson, K.C., for the defendant.

J. A. Ritchie, for the Crown and the Police Magistrate.

Kelly, J.

KELLY, J.:—The act prohibited by sub-sec. 1 (b) of sec. 193 is not indictable per se. It is urged on behalf of the defence that sec. 164 of the Criminal Code cannot be applied, as sec. 193 names a punishment; and that, therefore, the Police Magistrate has no jurisdiction.

Section 164 of the Criminal Code declares every one to be guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any Legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

There are many cases dealing with acts done in contravention of statutes prohibiting the doing of such acts. The subject and the application of numerous decisions are discussed in Russell on Crimes, 7th ed. (1909), p. 11 et seq. It is there stated that where an act or omission, which is not an offence at

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common law, is made punishable by a statute, the question arises whether the criminal remedies are limited to the particular remedy given by the terms of the statute, or, in other words, whether the remedy given by the statute is exclusive of or alternative to other remedies given by other statutes or the common law; and that where an act or omission is not an offence at common law, but is made an offence by statute, an indictment will lie where there is a substantive prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given. The author cites from *Clegg* v. *Earby Gas Co.*, [1896] 1 Q.B. 592, at p. 594: "Where a duty is created by statute which affects the public as the public, the proper mode, if the duty is not performed, is to indict or take the proceedings provided by the statute." When a new offence is created by statute, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty; but he may proceed on the prior clause, on the ground of its being a misdemeanour: *Rex* v. *Harris*, 4 T.R. at p. 205.

In Russell on Crimes, 7th ed., p. 12, it is said: "Where the same statute which enjoins an act to be done contains also an enactment providing for a particular mode of proceeding, as commitment, in case of neglect or refusal, it has been doubted whether an indictment will lie." The author, however, adds: "But all that the authorities establish on this point is, that where there is a substantial general prohibition or command in one clause, and there is a subsequent clause which prescribes a specific remedy, the remedy by indictment is not excluded."

The question was gone into by the late Mr. Justice Robertson in *Rex* v. *Meehan*, 3 O.L.R. 567, both as to the power of the Legislature to enact the Municipal Act and to regulate elections thereunder, and to prescribe the penalty or forfeiture for a wilful breach thereof, and also as to the cases where indictment will lie; some of the authorities there cited have a bearing on the present case.

Lord Denman, C.J., in *Regina* v. *Buchanan*, 8 Q.B. at p. 887, declares that wherever a person does an act which a statute, on public grounds, has prohibited generally, he is liable to an indictment. He agrees, however, that where, in the clause containing the prohibition, a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued; but he explains this by saying that the case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment; and he adds, "But, where there is a distinct absolute prohibition, the act is indictable."

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In the present case there is in one clause of the statute a distinct, absolute prohibition, the penalty being provided by a separate and substantive clause.

It appears to me that these authorities are applicable here, and that they are distinctly opposed to the defendant's contention.

In that view the application must be dismissed. I see no reason for relieving the applicant from payment of costs; and the dismissal is, therefore, with costs.

Prohibition refused.

McFARLANE v. FITZGERALD.

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Feb. 27.

Ontario Supreme Court, Middleton, J. February 27, 1913.

1. SCHOOLS (§ III A—55)—SCHOOL TAXES—FUNCTIONS OF BOARD.

The school board of a township school district in Ontario has the legal right itself to receive whatever money it regularly calls for and to arrange and liquidate its own debts unhampered by the township council.

[For various prior decisions relating to the same matter, see *Re West Nissouri Continuation School*, 1 D.L.R. 252, 3 D.L.R. 195, 4 D.L.R. 847.]

Statement.

MOTION by the plaintiffs for an interim injunction to restrain the defendants from acting upon a resolution passed by the council of the defendants the Municipal Corporation of the Township of West Nissouri.

See *Re Henderson and Township of West Nissouri*, 3 O.W.N. 65, 24 O.L.R. 517; *Re West Nissouri Continuation School*, 1 D.L.R. 252, 3 D.L.R. 195, 3 O.W.N. 478, 726, 25 O.L.R. 550; *Re West Nissouri Continuation School*, 4 D.L.R. 847, 3 O.W.N. 1623, 4 O.W.N. 497.

The motion was turned by consent into a motion for judgment.

W. R. Meredith, for the plaintiffs.

G. S. Gibbons, for the defendants.

Middleton, J.

MIDDLETON, J.:—This is another chapter in the unfortunate litigation over the continuation school in West Nissouri. The facts appear sufficiently in the judgments already reported.

Upon a mandamus being sought to compel the school board to apply for the money necessary for the maintenance of the school, it was suggested that the county council might repeal the by-law for the establishment of the school, to which it was answered that it would be contended that the county having created could not destroy, and that it was hoped that, even if it had the power, the county would not repeal the by-law in question.

When that motion was before me, I refused to delay judgment, as the demand had to be made before a day named in the

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statute; and, being of opinion that the trustees were bound to make the demand, I awarded a mandamus (4 D.L.R. 847, 3 O.W.N. 1623).

An appeal was had; and, pending the appeal, the demand was made without prejudice to the rights of the parties. Upon this appeal judgment was reserved to see what action (if any) the county council might take and to allow the validity of any repealing by-law to be determined. The county took no action, and judgment was then given dismissing the appeal (4 O.W.N. 497).

In the meantime the township council was doing its best to forward its views and secure a repealing by-law from the county, and those interested in the establishment of the school were opposing any such by-law, both upon the ground of absence of power and inexpediency.

The educational committee of the county council reported against any attempt to repeal, "on account of the uncertainty of liability resulting from legal action now pending and judgments already given;" but added that, "as soon as the expense and costs are paid by either the school board or municipal council, the resolution and by-laws should be repealed."

To fortify its position, the township council passed a resolution that the township "guarantee the payment of all legal debts" incurred by the school board, "and that the same be deposited with the county treasurer as soon as ascertained."

This meant that the township intended, instead of obeying the mandamus to pay the $2,000 to the school board, to have an inquiry as to the debts of the board and to pay sufficient to the county treasurer to enable him to pay the creditors. As the mandamus was still in the hands of the appellate Court, this was not intended to be contumacious, and was only intended to be a means of satisfying the county council that, in the event of repeal, the debts would be paid.

As a counter-move the plaintiffs brought this suit to restrain any action upon this resolution.

The county council finally determined to take no action upon the request for repeal, and returned the resolution to the township. There is, therefore, nothing in the action now—beyond the question of costs.

The township had no power to divert the money from the school board or in any way to interfere with its affairs. The school board has the right to receive the money it calls for and to arrange and liquidate its own debts. What the township sought to do, when it proposed to pay to the county sufficient to pay the debts of the board, to be proved before the county treasurer, is quite foreign to anything that is authorised by the Municipal Act, and ultra vires. This ultra vires action of the municipality and improper payment of municipal funds can, I think, be restrained by a ratepayer in a class action.

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Looked at from a broader point of view, the costs of this action really form part of the expense of an unsuccessful attempt by the township to get free from an obligation imposed by law; and the fairest disposition of costs is to direct payment out of the township funds rather than to impose the burden on the individual.

For these reasons the injunction may be made perpetual, and the defendant township should be ordered to pay costs.

Injunction ordered.

CARVETH v. RAILWAY ASBESTOS PACKING CO.

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Feb. 28

Ontario Supreme Court, Middleton, J. February 28, 1913.

1. MASTER AND SERVANT (§ I E—22)—GROUNDS FOR DISCHARGE—DISSATISFACTION WITH RESULTS—MISCONDUCT—INCOMPETENCY.

Where, under a written contract of hiring the defendants employed the plaintiff as travelling salesman at a fixed salary and commission for one year certain, the hiring to be extended for another year if defendants were satisfied with the results, but there was not expressly reserved any right of dismissal for mere dissatisfaction within the first year; and where, under such agreement the plaintiff acted faithfully, pursuant to instructions, but because of want of results the defendants before the expiry of the first year became dissatisfied and upon that ground alone dismissed the plaintiff; such dismissal was wrongful in the absence of misconduct or incompetence on plaintiff's part.

2. COURTS (§ I B—12)—JURISDICTION OVER NON-RESIDENTS—CONTRACT IN OTHER PROVINCE.

A statement in a written contract of hiring that the parties elect domicile at a place located in another province of Canada should not be construed as an agreement not to sue in the courts of another province to which the plaintiff might otherwise resort.

Statement

ACTION for wrongful dismissal.

D. Inglis Grant, for the plaintiff.

W. N. Tilley and *R. H. Parmenter*, for the defendants.

Middleton, J.

MIDDLETON, J.:—The hiring was under a written agreement, dated the 29th March, 1912, made at Sherbrooke, in the Province of Quebec, where the factory of the defendant company is situated.

The agreement is between the company, on the one part, and one King and the plaintiff, on the other part. The company employed King and Carveth to introduce, sell, and dispose of "goods of the plaintiff, being a certain lubricant then about to be placed upon the market, manufactured under a certain patent granted to the president of the company as inventor." The agreement provided that King and Carveth should place and sell 12,000 shares of the company's capital stock at $1 per share before the 1st June, in consideration of which they were to be

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allowed, jointly, 2,000 shares at par—presumably paid-up. It is then stated that King and Carveth are hired for one year, with the option to the company to extend for a further period of a year, if satisfied with the results of their services and work. A commission is then provided upon the amount of the sales; and it is stipulated that King is to work in the Province of Quebec only, and Carveth in Ontario only. "Legitimate expenses" are to be kept to "a minimum figure;" daily reports are to be sent; and, in addition to the commission, King and Carveth are each to be paid $2,500 per annum, in weekly instalments.

The product in question was not upon the market at all. Some brands of it were suited for use as a lubricant upon railways and street railways. If a railway or large street railway, such as the Toronto Street Railway, could be induced to adopt it, the sales would be very large, and the result would be immensely greater than what could be expected from sales to individual factories or by retail, where the amount required would be, comparatively speaking, insignificant.

King apparently made no success in his endeavours in the Province of Quebec; and, in a few weeks, the defendants made up their minds to dismiss him. Carveth, at this time, was giving entire satisfaction. It was assumed that a failure to sell the 12,000 shares by the 1st June would justify discharge. Carveth was asked not to sell, so that the company might be in a position to get rid of King. He assented. King was got rid of, and Carveth continued; the result being that the terms of the agreement would continue to govern, so far as he was concerned, save that he was removed from the obligation, originally joint, with respect to the sale of the stock.

Carveth, through acquaintances, was able to secure an introduction to the Toronto Railway Company, and to the Canadian Northern Railway Company. He began a series of demonstrations of the efficiency of the lubricant in question. His success was not unqualified, partly because the manufacture was yet in the experimental stages, and the product of unequal quality.

Carveth was sanguine and optimistic, perhaps to an unreasonable degree, and was ready to assume much from any encouragement that he received from those in charge of the affairs of these railways. I think that he honestly did his best to accomplish the introduction of the wares in question; and, while his correspondence is perhaps too rosy and optimistic, I acquit him of any intentional misleading or dishonesty. The importance of securing the adoption of the lubricant by these railways was quite manifest to the company. Carveth was told to devote himself to the street railway and let all else go; and, while in the result nothing was accomplished, I am not sure that he was entirely to blame.

It is to be borne in mind that the hiring was for a year certain, to be continued for another year if the company were satisfied. The position was such, when the dismissal took place in August, that the company might well with perfect honesty say that the situation was not satisfactory; but they had not by the agreement reserved to themselves the right to dismiss at any time if dissatisfied.

I do not think there was any such incompetence or misconduct as would justify dismissal. The result was not as satisfactory as either Carveth or the company hoped for; and the company made up their minds to change the mode of carrying on their business and to close the Ontario office and concentrate their endeavours on the obtaining of a foothold elsewhere. As a matter of business policy this was probably wise; but this did not entitle them to take the course they did with the plaintiff. In every such hiring, where the master does not expressly reserve the right to dismiss at any time, the employee is taken, to some extent, for better or for worse. There must be, as I understand the cases, more than mere dissatisfaction with the result; there must be incompetence or misconduct.

It is significant that in this case there is not, throughout the correspondence, voluminous and extensive as it is, any complaint. The expense accounts were regularly sent in. No doubt, these included expenses for cigars and entertainment to those engaged with the two companies in question. The employees of these companies were, no doubt, put to some inconvenience, and were, no doubt, asked for favours, so these expenditures were not without reason; but, beyond that, they were the very things contemplated by the expression "legitimate expenses," and there never was any objection to what was being done, until the defendants decided to change their plan of operations. The evidence of the defendants' representatives was most unsatisfactory.

The question as to the plaintiff's right to sue in Ontario was raised at an early stage, and a conditional appearance was entered. The existence of assets within Ontario to an amount exceeding $200 was admitted at the trial, though it had been denied on the motion to set aside the service; so there is now no question so far as Con. Rule 162 is concerned.

The right to sue in Ontario is also denied upon another ground. By the contract the parties elect domicile at Sherbrooke, where the contract was made. It is said that this not only permits but compels resort to the local Court at Sherbrooke. The Civil Code of Quebec, art. 85, provides that in such case "demands and suits relating thereto may be made at the elected domicile and before the Judge of such domicile." Article 94 of the Code of Civil Procedure makes it plain that, even within the Province, this does not prevent suit elsewhere, as

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a defendant may be summoned either before the Court of his domicile or the Court of domicile elected, as well as before the Court where served, or, in certain cases, the Court where the plaintiff resides.

This falls far short of an agreement not to sue in any foreign Court to which the plaintiff might otherwise resort.

Quite apart from this, the right to resort to our Courts is determined by the Rules, which have the force of statutes. This is so stated in *Western National Bank of City of New York* v. *Perez Triana & Co.*, [1891] 1 Q.B. 304; and probably any agreement not to resort to our Courts, even when made abroad, would be regarded as against public policy and void.

The plaintiff's claim is exaggerated, and, I think, should be confined within the bounds indicated at the trial, namely, for the period between his dismissal and the date when he secured other employment, plus the $8 due him on expense account: in all $358. I think this should be with County Court costs and without a set-off.

Judgment for plaintiff.

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March 8.

Re WILSON.

Ontario Supreme Court, Middleton J. March 8, 1913.

1. EXECUTORS AND ADMINISTRATORS (§ IV C 1—108)—DISTRIBUTION — SEPARATE TRUSTS—EXPENSES OF ADMINISTRATION.

Where a testator directs the creation of a trust fund from one of his properties and the investment of same by the executors during the minority of the beneficiaries, the general estate is chargeable with the costs of the creation of the trust fund but not of its investment and distribution; the latter costs are to be paid by the fund itself bearing the expenses of its own administration in like manner as if there had been a direction to pay it over to separate trustees instead of its being managed by the executors of the testator's estate.

[*Re Church*, 12 O.L.R. 18, applied.]

Statement

MOTION by the executors of the will of Samuel Wilson, deceased, for an order, under Con. Rule 938, determining two questions arising upon the construction of the will.

W. G. Thurston, K.C., for the executors and the residuary legatee.

F. L. Button, for adults interested in the proceeds of lot 17.

E. C. Cattanach, for infants interested in the proceeds of lot 17.

Middleton, J.

MIDDLETON, J.:—Two questions arise on the construction of this will: first, with respect to the sum of $2,000 charged upon the proceeds of lot 17; second, with reference to the incidence of the executors' compensation and costs regarding the execution of the trusts declared as to the same lot.

The testator gave his farm and certain other lands to his son Robert, charged with the payment of $2,500 to his daughter Mary. He then gave his executors lot No. 17 upon trust, with

power to sell, and out of the proceeds to pay to Mary $2,500, "also to pay $2,000 toward paying my just debts;" the residue to be invested for the benefit of the children of the deceased son William, and to be divided between them when they attain age. The residue of the estate, real and personal, after payment of the testator's debts, is then to go to Robert.

At the time of the testator's death, he was indebted in a considerable sum, far exceeding the $2,000. He left property of very substantial value other than that specifically devised.

The first question is this: can Robert, as residuary devisee, call upon the executors for the $2,000 towards the debts, or are the proceeds of that lot only to be resorted to if the residuary estate is not sufficient to pay the debts?

It is said that the words used are not sufficient to charge the proceeds of this realty and to exonerate pro tanto the residuary estate, because the residue is to go to Robert "after the payment of my just debts."

I do not think that this is the real meaning of the will. The testator, I think, intended $2,000, part of the proceeds of lot 17, to be applied in and towards payment of his debts, and then gave the residue after the debts had been paid—that is, after the residuary estate had been resorted to, to the extent necessary to supplement the $2,000—to his son Robert.

Reading the will as a whole, and without seeking to import into it technical rules that probably were not present to the mind of the testator, his language seems to me plain and sufficient.

The second question depends upon the effect to be given to the principle laid down in *Re Church*, 12 O.L.R. 18. There the testatrix directed her residuary estate to be divided into four equal shares, three of which were to be paid over at once, and the fourth to be held upon trusts covering an extended period of time. It was held that the expense of administering the trust, after the share in question had been set apart, should be borne by the share itself, and not by the general estate.

Applying that principle to this will, the general estate must bear all the costs of the creation of the trust fund arising from lot 17; but the costs of investing this fund during the minority of the beneficiaries, and of its distribution, must be borne by the fund itself. It is just as if the testator had directed his executors to pay the residue of the proceeds of lot 17 to an independent board of trustees. Until the fund should be created and paid over, the expense would fall upon his general estate. After payment over, the fund would have to bear the costs of its own administration.

Costs of all parties may come out of the estate; of the executors as between solicitor and client.

Judgment accordingly.

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March 8.

DODD v. MATHIESON.

Saskatchewan Supreme Court, Parker, Master in Chambers. March 8, 1913.

1. COSTS (§ I—14)—SECURITY FOR COSTS—DELAY IN APPLYING.

A motion by defendant for security for costs is warranted at any stage of the proceedings under Rules 714 and 715, of the Sask. Practice Rules 1911, and may be granted after the case has been placed on the trial list.

[*Lydney, etc., Co.* v. *Bird*, 23 C.D. 358 and *Re Smith, Bain* v. *Bain*, 75 L.T. 46, applied.]

Statement

MOTION for security for costs. The pleadings had been closed, and the case appeared on the list for trial at the sittings of the Court at Regina, on March 11th. The plaintiff contended that the defendant is too late in making the motion, and that security should not be ordered at this stage of the proceedings.

E. B. Jonah, for applicant (defendant).

H. F. Thomson, for plaintiffs.

Parker, M.C.

PARKER, M.C.:—Our rules 714 and 715 are similar to English rule 981. Under that rule, in *Lydney, etc., Co.* v. *Bird*, 23 C.D. 358, 52 L.J. Ch. 640, security for costs was ordered after the defence was filed and notice of trial given. This case was followed in *Re Smith, Bain* v. *Bain*, 75 L.T. 46, where the Court of Appeal held that security for costs might be ordered at any stage of the proceedings. There is also an unreported judgment of Newlands, J., *St. John* v. *Friel*, decided December 23rd, 1905, in which the above cases were followed and security ordered, although the defence was filed and the action set down for trial.

There will, therefore, be an order that the plaintiffs give security for the defendant's costs in the sum of $300, either by bond or by cash deposit. The costs of the motion will be costs in the cause. Counsel for the plaintiffs made a request that if security were ordered the trial be postponed until the next regular sittings of the Court, in April, and the order for security will include a provision to this effect.

Security ordered.

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March 10.

NESS v. BABCOCK.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. March 10, 1913.

1. MASTER AND SERVANT (§ I C—10)—SERVICES WITHOUT SPECIFIC CONTRACT—QUANTUM MERUIT.

Where the court finds that there was no concluded agreement of hiring for the specific length of time contended for by the employer, as the employee had never understood that the hiring was for such term, nor assented thereto and the agreement was not in writing, the employee will be entitled to recover upon a *quantum meruit* for the services he had rendered.

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APPEAL by the plaintiff from judgment at trial dismissing action brought to recover wages alleged to be due.

The appeal was allowed.

N. R. Craig, for appellant.

No one *contra*.

The judgment of the Court was delivered by

Newlands, J.

NEWLANDS, J.:—The plaintiff brought this action for wages from November 25, 1910, to March 13, 1911, at $10 per month; from March 13 to August 13, at $35 per month; and from August 13 to November 25, 1911, at $40 per month.

The wages from November 25, 1910, to March 13, 1911, are admitted to be due by the defendant, but as to the other wages claimed, he says that on March 10, 1911, the defendant agreed to work for him for a year from March 13, 1911, for the sum of $335; that the defendant worked until November 25, 1911, and then left his employment without any cause. To this defence the plaintiff replies the Statute of Frauds. I think this reply is no answer to the defence, for the reasons given by North, J., in *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch.D. 266, at 279.

As to the facts of the case: the learned trial Judge held that the defendant's version of the hiring was the correct one. But he says:—

> The evidence is very conflicting in this action, and I am of the opinion that the trouble has arisen because of the plaintiff's failure to thoroughly understand the nature of the bargain made.

Now, if the plaintiff did not understand the nature of the bargain made, I do not see how he can be said to have agreed to it, and as the real dispute between the parties is the length of time the plaintiff was to work for the defendant, then the plaintiff, if he did not understand he was to work for a year from March 13, 1911, did not agree to do so, and if there was no concluded agreement between the parties, the plaintiff is entitled to recover upon a *quantum meruit*, upon which he claims in the alternative. I may say that the learned trial Judge, by not giving costs to the defendant, the successful party, has shewn that he thought the plaintiff was not in default, excepting, as he states, in not understanding the bargain he is alleged to have made.

Under this finding of the learned trial Judge, I think the plaintiff is entitled to recover the amount claimed, with costs.

Appeal allowed.

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March 10.

MARS v. DRURY.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, and Brown, JJ. March 10, 1913.

1. NEW TRIAL (§ II—6a)—TO DEFENDANT ON REVERSING NONSUIT.

While a defendant moving for a nonsuit at the close of the plaintiff's case takes the risk of having the case disposed of on appeal without evidence for the defence, the appellate court may grant him a new trial on reversing the nonsuit, if it be shewn that he was prepared at the trial to adduce evidence in answer had the nonsuit not been granted, particularly if it appears that the risk of taking the nonsuit was not brought to the attention of defendant's counsel.

[*Craig* v. *McKay*, 8 O.L.R. 651; *Macdonald* v. *Worthington*, 7 A.R. 531, referred to.]

2. COSTS (§ I—2c)—ON APPEAL—NEW TRIAL.

On the allowance of an appeal from a judgment granting a nonsuit, on the defendant's application, at the close of plaintiff's case, the costs of the appeal and of the abortive trial may be awarded against him as a term of granting a new trial to enable him to adduce evidence in answer.

Statement

THIS is an action for the recovery of a sum of money alleged to be due the plaintiff for breaking certain land. At the conclusion of the plaintiff's case, and at the request of counsel for the defendant, the learned trial Judge who tried the case nonsuited the plaintiff. The plaintiff appeals from such decision to this Court, and asks to have judgment entered in his favour. Counsel for the defendant supports the judgment, and in the alternative asks for a new trial.

The appeal was allowed and a new trial ordered.

E. L. Elwood, for appellant.

T. D. Brown, for respondent.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—The trial Judge gives no reason whatever for so disposing of the action; and, with deference, I find myself quite unable to find any good reason why he should have done so. I am of opinion that the plaintiff, at the time he was nonsuited, had clearly made out a *primâ facie* case for judgment in his favour. This being so, we are now called upon to decide the question whether or not there should be a new trial. It has been shewn that the defendant was prepared at the trial with evidence which tended to contravene the plaintiff's case. Although counsel for the defendant, at the conclusion of the plaintiff's case, asked for a nonsuit, it was not brought home to him that in having his request granted he took the risk of being denied a new trial in the event of an appeal being successful. Under such circumstances I am of opinion that a new trial should be granted: see *Craig* v. *McKay* (1904), 8 O.L.R.

651; *Macdonald* v. *Worthington* (1882), 7 A.R. (Ont.), 531.* Odgers, 6th ed., 312, on the question of nonsuit, says:—

Strictly, there is no longer such a thing as a nonsuit: *Fox* v. *Star Newspaper Co.*, [1900] A.C. 19. But the word is now used to denote the act of the Judge when he withdraws the case from the jury and directs judgment to be entered for the defendant without (or in spite of) their verdict. The proper time for the defendant's counsel to submit to the Judge that there is no case for him to answer is at the close of the plaintiff's case. Some Judges, however, decline to allow the question to be argued at this stage of the action, unless defendants' counsel at once announces that he intends to call no witnesses.

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As counsel for the defendant asked for the nonsuit, the defendant must pay the costs of this appeal and the costs of the trial which has been thus rendered abortive.

Appeal allowed and new trial directed.

UHLENBURGH v. PRINCE ALBERT LUMBER COMPANY.

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Saskatchewan Supreme Court, Haultain, C.J., Newlands, and Lamont, JJ. March 10, 1913.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—ASSESSMENT OF DAMAGES AFTER DISMISSAL OF NEGLIGENCE ACTION.

Where an independent action for damages for personal injury to a workman alleged to have resulted from the negligence of the employer is dismissed at the trial for lack of evidence to shew negligence, the trial judge may, on the application of the plaintiff, proceed to assess and award compensation under the Workmen's Compensation Act, Statutes of Sask. 1910-11, ch. 9.

Statement

THIS was an action for $4,000 damages which the plaintiff claimed for the loss of his hand, occasioned, as he alleged, by the negligence of the defendants, in whose employ he was at the time. At the trial, on the close of the plaintiff's case, the learned trial Judge found that there was no evidence of negligence on the part of the defendants, and dismissed the action, but on request of counsel for the plaintiffs proceeded to assess compensation under the provisions of sec. 8 of the Workmen's Compensation Act, and found the plaintiff entitled to $2,000. The defendants now appeal on the ground that the amount of the compensation so adjudged was not arrived at in accordance with the principle laid down in the Act.

The judgment was reduced to $1,600.

H. Y. MacDonald, for appellants.

W. M. Martin, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.

HAULTAIN, C.J.:—Section 15 of the Act reads as follows:—

*This case was affirmed *sub nom. Worthington* v. *Macdonald*, 9 Can. S.C.R. 327, where the judgment below was affirmed with a variation.

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15. The amount of compensation recoverable under this Act shall not exceed either such sum as is found to be equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade employed during those three years in a like employment or the sum of $1,800, whichever is larger, but shall not exceed in any case the sum of $2,000.

The only evidence on this point is the evidence of the plaintiff, which shews that he was engaged during the milling season of five or six months in each of the years 1911 and 1912, at a wage of $2.25 per day. This evidence does not, in my opinion, afford a sufficient basis for finding what sum is "equivalent to the estimated earnings during the three years preceding the injury of a person in the same grade employed during those three years in a like employment."

The learned trial Judge has found that the plaintiff is entitled to the maximum compensation allowed by the Act; but as there is no evidence to shew that the estimated earnings for the three years would exceed $1,800, the amount adjudged must be reduced to that sum.

The notice of appeal in this case sets up two grounds of appeal:—

1. That the honourable Justice who made the said award had no jurisdiction under the Workmen's Compensation Act to award compensation under the said Act.

2. That the said honourable Justice in granting the said compensation acted upon a wrong principle in exercising his discretion with respect to the amount of the said compensation.

The first ground was discreetly abandoned by counsel for appellant.

The second ground questions the principle acted upon by the trial Judge in exercising his discretion as to the amount of compensation. If that means anything it means that the compensation allowed is excessive. The only limit imposed on the exercise of this discretion by the Act is as to the maximum amount to be allowed. The Judge may allow any amount up to the limits imposed by the Act, but if he decides to allow the maximum amount that amount must be arrived at by the method of calculation provided by the Act. The mistake made by the learned trial Judge in this case was that he did not employ the proper method of calculation, or rather, that there was no sufficient basis provided by the evidence for that calculation.

The point upon which the case turns was not taken by the appellant either at the trial or in his notice of appeal; and while the compensation adjudged must be reduced to $1,800, there will be no costs of appeal.

Judgment below varied.

SHAVER v. SPROULE.

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March 15.

Ontario Supreme Court, Britton, J. March 15, 1913.

1. INDEMNITY (§ I—5)—COVENANT IN DEED—AGAINST WHOM ENFORCEABLE.

A purchaser's covenant for indemnifying a vendor against all claims, actions, or demands in respect of a mortgage of the lands conveyed, similar in terms to a prior covenant on the part of the vendor in the conveyance of lands to him, may be enforced by the vendor, notwithstanding that he has not paid the principal interest and costs due on the mortgage; but the judgment will direct payment into court by the defendant of the amount to be applied in satisfaction of the mortgage debt.

[*Re Richardson, ex parte Governors of St. Thomas's Hospital*, [1911] 2 K.B. 705, followed.]

MOTION by the plaintiff for judgment upon the statement of claim, in default of defence. Statement

The plaintiff claimed a declaration that the defendant was bound, under a covenant of indemnity contained in a conveyance from the plaintiff to the defendant, to procure the plaintiff's release or discharge from his liability to the mortgagor from whom the plaintiff bought the lands in question, and to whom the plaintiff had given a similar covenant of indemnity, for principal, interest, and costs under the said mortgage, and a judgment directing the defendant to procure such release or discharge by payment of the said liability or otherwise and to indemnify the plaintiff against the said liability.

George Halliday mortgaged certain lands in the township of Gloucester to J. P. Band, to secure $8,000 and interest. Subsequently, Halliday conveyed the equity of redemption to the plaintiff, and the plaintiff covenanted to pay the mortgage and to indemnify the mortgagor against all actions, claims, and demands on account thereof. The plaintiff, in turn, conveyed the same equity of redemption to the defendant, and the defendant gave the plaintiff a covenant of indemnity in the same terms. The mortgage fell in arrear, and the mortgagee recovered a personal judgment against the mortgagor Halliday on his covenant to pay the mortgage-moneys, and the usual order nisi for foreclosure was made. The mortgagor threatened to sue the plaintiff upon his covenant of indemnity, but the plaintiff, instead of first paying the amount due upon the mortgage to the mortgagor or the mortgagee, commenced this action, in the Supreme Court of Ontario, against the defendant upon the covenant of indemnity entered into by the defendant.

F. A. Magee, for the plaintiff.

No one appeared for the defendant.

BRITTON, J., following *Re Richardson, Ex p. Governors of St. Thomas's Hospital*, [1911] 2 K.B. 705 (C.A.), and other Britton, J.

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cases cited in Halsbury's Laws of England, vol. 22, p. 390, foot-note (k), held that the covenant of indemnity could be enforced, notwithstanding that the plaintiff had not paid the debt.

The judgment as entered contained a declaration in the terms asked for, an order that the defendant should pay into Court to the credit of the cause on or before the 1st April, 1913, the amount due to the mortgagee for principal, interest, and costs, the same to be applied in payment of what was due to the mortgagee; or, if the mortgagor had paid the mortgagee, then in payment of what was due to the mortgagor. The judgment further directed that, in default of such payment into Court, the plaintiff should recover from the defendant the sum due for principal, interest, and costs. [See *Boyd* v. *Robinson*, 20 O.R. 404.]

Judgment for plaintiff.

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HOWSE v. SHAW.

Ontario Supreme Court. Trial before Britton, J. March 19, 1913.

1. SOLICITORS (§ II A—22)—LIABILITY TO CLIENT—NEGLIGENCE.

A solicitor is not to be held liable in a negligence action brought by his client against him, merely because his advice on the question of the applicability of a Statute of Limitations to the client's case against a municipal corporation may have been wrong or was not sustained by the court, if the solicitor's opinion was honestly formed and given in good faith upon the question of law.

[Compare *Taylor* v. *Robertson*, 31 Can. S.C.R. 615.]

2. EVIDENCE (§ II B—105)—ONUS OF PROOF IN ESTABLISHING ALLEGATIONS.

In an action by a client against his solicitor for damages for negligence in not instituting the client's action against a municipal corporation at an earlier date so as to prevent the operation of a Statute of Limitations, the onus of proof is upon the client to establish that the solicitor was given and accepted instructions to sue, and not merely to write a letter, as he did, demanding a settlement and so leaving the question of future proceedings open for further instructions.

Statement

ACTION against a solicitor for negligence.

The action was dismissed.

Gordon Waldron and *G. G. Martin*, for the plaintiff.

C. St. Clair Leitch, for the defendant.

Britton, J.

BRITTON, J.:—On the 27th June, 1911, the plaintiff, while driving upon a highway in the township of Southwold, was thrown from his "rig" and quite severely injured. The plaintiff attributed his accident to a defective roadway. He was well versed in municipal law, having, as he stated, been for seven years a member of a township council, and also for two other years a member of a county council. He knew that it was necessary, if he intended to hold the township corporation

liable for his injury as occasioned by nonrepair of the highway, to give the township corporation notice within thirty days of the time of the happening of the accident, and to bring his action within three months.

On the 25th July, 1911, William Bole, of West Lorne, at the request and on behalf of the plaintiff, wrote out signed, and delivered to the plaintiff to be mailed, a notice in the words and figures following:—

"West Lorne, Ontario, July 25th, 1911.

"To the Reeve of the Township of Southwold,

"Dear Sir:—Take notice that on June 27th I was severely injured by being thrown from my rig owing to defective highway just east of Shedden, and as a result of such injuries I claim damages to the amount of $500. If so I can, I will wait on your council, when next you meet, if you will let me know the date, as having been a member of the township council here seven terms, and of the county council two terms, I would like to talk matters over with you, before further procedure.

"Yours truly,

"Barnum Howse,

"per W. H. B."

This notice was received by the Reeve of Southwold —but the exact date of such receipt or indeed of the mailing was not shewn. Nothing turns upon that, in view of what happened. The claim was rejected by the township council. The plaintiff apparently had hopes of getting a settlement even up to and after the 16th August, that being the day when he consulted the defendant—and the day when, as he contends, he retained the defendant to bring an action against the township corporation. The defendant's account of the interview and alleged retainer on the 16th August is, that the plaintiff spoke hopefully of a settlement and gave reasons for his hope, and he wanted a strong letter—"a bluffing" letter—written to the Reeve, as he, the plaintiff, thought that such a letter would assist in bringing the settlement about.

There is a direct contradiction between the plaintiff and defendant as to what took place at that interview. The plaintiff says that he told the defendant to commence the action if no settlement followed the letter and to commence it in time. The plaintiff further says that, at other times and later on, he told the defendant to issue the writ, and that the time within which the writ must issue was discussed between him and the defendant. The defendant says that the negotiation was still on between the plaintiff and the council, and he, the defendant, was not instructed to issue the writ; but, on the contrary, he was to wait until further instructed, and he was not, within the three

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months from the time of the accident, instructed so to do. The defendant says he was not instructed to commence the action until October, 1911. A letter such as the defendant describes was written on the 16th August, 1911.

The plaintiff says that up to within three or four days of the expiry of the time for bringing his action, he knew that the writ had not issued, and he told the defendant's clerk of the delay and complained of it. The plaintiff is not corroborated in this, and the defendant denies it, so far as having the matter brought to his notice by either the plaintiff or by the stenographer or any one in his (the defendant's) office. As to what took place in October, the plaintiff says that he knew he was late; and, when the defendant suggested issuing a writ, the plaintiff said "no use;" that the defendant looked up the law, and came to the conclusion that the three months' limitation did not apply, and that then the plaintiff said: "If you go on, you do so at your own risk—I will not be responsible."

The defendant's account of it is, that, when the plaintiff wanted the writ issued, he (the defendant) raised the question of expiration of time, or that it might have been suggested by the plaintiff; that he (the defendant) did look up the law, and he came to the conclusion that it was a case of misfeasance, and so the action was not barred; that he told the plaintiff so, and the plaintiff then directed the issue of the writ, and it was done. A special case was agreed upon, which was heard by Mr. Justice Middleton, and the action was dismissed: see *Howse* v. *Township of Southwold*, 5 D.L.R. 709, 3 O.W.N. 1295. This was affirmed by a Divisional Court: see 5 D.L.R. 709, 3 O.W.N. 1592, 27 O.L.R. 29.

In May, 1912, the plaintiff determined to look for damages from the defendant by reason of the defendant's negligence in not commencing the action in time.

The writ issued herein on the 24th August, 1912. Since the issue of the writ, the costs of the action, including the appeal, in *Howse* v. *Township of Southwold*, 5 D.L.R. 709, were taxed against the plaintiff at $148.66, and on the 10th October, 1912, the plaintiff paid to the Sheriff, in full of the amount of execution for these costs and for the Sheriff's fees, in all, the sum of $170.

The plaintiff's alleged causes of action are: (1) that the defendant neglected to commence the action against the township corporation until the plaintiff's right of action had become barred by the provision of the Municipal Act; and (2) that the defendant, without consulting with the plaintiff and without any instructions from the plaintiff, entered an appeal to a Divisional Court from the decision of the trial Judge.

I am of opinion and so find that the plaintiff is mistaken in saying that the defendant was actually retained and instructed on the 16th August, 1911, to issue the writ without further instructions from the plaintiff.

I find that the plaintiff did not give further instructions to the defendant until after three months from the time of the accident. No doubt, the plaintiff knew, as did the defendant, of the time-limit—but the plaintiff waited until some further opportunity to get a settlement. That was the plaintiff's desire, and he gave the defendant to understand that influence was being used on his behalf with the council; so time went by. The plaintiff and defendant were both busy men, and the defendant was exceptionally busy during September, but not likely to forget to have a writ issued, had he been instructed to have that done.

The plaintiff took his chances of the defendant being right in his contention that the limitation clause of the statute did not apply, in case that clause should be pleaded in bar of the plaintiff's claim.

It was, in my opinion, a case of oversight or forgetfulness on the part of plaintiff not to see that the defendant, or some other solicitor, was specifically instructed and in time.

Upon the question of damages, the defendant objects on two grounds: (1) that the notice of action, which the plaintiff himself gave, was insufficient; and (2) that the plaintiff had not a good cause of action against the Corporation of the Township of Southwold—so that the plaintiff could not have succeeded had the action been fought out on its merits.

I think the plaintiff's notice of the accident and action was sufficient in form, and apparently the township corporation took no objection to that, but promptly disputed the plaintiff's right to recover upon the facts of the accident, in addition to their objection that the action was not brought in time.

As to the second objection, I must say that, upon the facts so far as presented to me, I have grave doubts as to the plaintiff's right to hold the township corporation liable; and, if this case does not end with my decision, and if necessary, this objection may remain to be pressed by the defendant.

Mr. Waldron contended that, if the retainer and instructions were proved, the plaintiff was, in any event, entitled to nominal damages. *McLeod* v. *Boulton*, 3 U.C.R. 84, supports that view.

As the matter stands, the plaintiff has not satisfied the onus which was upon him of establishing his cause of action. The plaintiff affirms, and the defendant as strongly denies. The account the defendant gives of his part in the matter, as I have stated above, is a reasonable one; and that the plaintiff should have allowed the time to go by is not improbable.

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The plaintiff, in my opinion, acquiesced in the case being carried to appeal in the ordinary way without any undertaking on the part of the defendant to do so at his own cost. That the defendant should have come to the conclusion that the Corporation of the Township of Southwold, if liable at all, would be liable for misfeasance, is not actionable negligence. If an attorney or counsel can be held to warrant the correctness of his opinion, honestly formed and honestly given on a question of law, Judges may fear lest an attack be made upon them for difference of opinion.

The action should be dismissed, and with costs.

Action dismissed.

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March 20.

THE KING v. **Eva WILLIS and Victor Cyril POPLE.**

Manitoba King's Bench, Galt, J. March 20, 1913.

1. CONTINUANCE AND ADJOURNMENT (§ II—8)—CRIMINAL TRIAL—PREJUDICE OF JURY BY PRESS COMMENTS.

The postponement of a criminal trial should be ordered on motion of the accused, where the court is satisfied upon the affidavits filed on the motion that the minds of the jurymen in attendance have been affected to the prejudice of the accused by the publication of press notices stating that the accused had confessed the crime.

[*R.* v. *Davies*, [1906] 1 K.B. 32, approved.]

2. TRIAL (§ I D—20)—CRIMINAL PROSECUTION—ALLEGED CONFESSION—OPENING CASE.

Counsel for the Crown in a criminal prosecution may not, in opening the case to the jury disclose the facts relied upon as constituting a confession by the accused until the court has decided that the evidence is admissible. (Dictum *per* Galt, J.)

Statement

APPLICATION on behalf of the two prisoners for a postponement of the trial until next assizes.

The trial was postponed.

H. P. Blackwood, for the Crown.

C. H. Locke and *J. F. Davidson*, for prisoners.

Galt, J.

GALT, J.:—The application on behalf of Eva Willis is supported by an affidavit of Charles Holland Locke, which shews that the accused persons were arrested on March 11, 1913; that on March 13 the *Manitoba Morning Free Press*, a paper having a very large circulation throughout the city of Winnipeg and the Province of Manitoba, published on the front page of the morning edition of said paper, in large type, the words following:—

Jury returns verdict of murder. Chief Marcil states Mrs. Willis confessed to murder of child,

and following the said heading there was printed a long article

purporting to be descriptive of the alleged confession of Mrs. Willis, commencing as follows:—

We've killed the child. We've done wrong, but it is done and cannot be undone. Mrs. Yeoman spoke to us about taking the child away, saying that it was keeping the other boarders in the house awake. We tried to place it in a home, but we could not find a place for it anywhere; we then decided to kill it,

and the article then proceeded to give in part what purported to be a confession made by the accused Willis to the said chief of police.

Several other extracts from the *Free Press* are also detailed in the affidavit, quoting what was supposed to have been admitted by the prisoner.

The affidavit then shews that on the same day *The Winnipeg Telegram*, a daily paper published in the city of Winnipeg, and having a very large circulation throughout the said city, published a sensational story in regard to the crime alleged herein. On the front page there was printed, in large type:—

Chief of police gives startling evidence of mother's confession. Strangled baby, then left her in boat.

On page 12 of the same issue of the *Winnipeg Telegram* there was a large photograph of both the accused, with the following heading:—

Young man and woman who confessed to having murdered baby.

The affidavit further states that on the same day an account of the alleged confession was also published in the *Winnipeg Tribune*, an afternoon paper published in the city of Winnipeg, with a very large circulation, and states that by reading the articles above referred to and other articles which have been published in the said daily papers since the arrest of the accused herein, the jurors who will be called upon to try the said case will, before any evidence is tendered by the Crown and before said trial is commenced, be led to believe that both of the accused persons above-named have confessed to the murder of the child.

The affidavit proceeds to allege certain reasons for a contention on behalf of the accused Eva Willis that the alleged confession by her would be inadmissible in evidence against her at the trial, and Mr. Locke further states that he believes that in order that the accused Eva Willis may have a fair trial on proper evidence herein before a jury uninfluenced by the publication of statements, such as above-named, it is necessary that the trial herein may be postponed until the next assizes to be holden for the eastern judicial district, when a jury may be summoned who will be able to deal with the case uninfluenced by any consideration other than the evidence which is produced before them in proper form.

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And the affidavit concludes with a statement that the application is made in good faith and with no other end in view than that the said Eva Willis may have a fair and impartial trial.

An affidavit was also read, made by Joseph F. Davidson, solicitor for the accused Victor Cyril Pople, stating that the time is too short for said accused to be ready for trial on the date fixed for it, namely, March 26th, and that he believes a fair trial of the defendant could not be had at the present assizes on account of the publicity which has been given to this matter by the daily newspapers of this city, and that he believes that public opinion at the present time is very much against the said accused, and that in consequence thereof his interests are very greatly prejudiced.

Mr. Davidson further relates an incident of overhearing a certain conversation between two of the jurymen who might be called on this trial, but whom he does not know. One of them stated to the other that, "if that fellow comes up for trial, and I am on the jury, he will not get any consideration from me," or words to that effect.

Mr. Blackwood, appearing for the Crown in this matter, opposes the motion upon the ground that no sufficient cause is shewn for a postponement; that all the matters published by the papers, with the exception of the headings, were matters which were given in evidence at the inquest, to which the public would be admitted; and he reads an affidavit made by himself, shewing the difficulty of keeping witnesses here, and offering, on behalf of the Crown, to empanel another jury, if needful; but he presses the necessity of proceeding with the trial without unreasonable delay.

It appears to me that the newspapers in question entirely over-stepped the limits of justice and fair dealing towards the prisoners in publishing broadcast the items in question, and especially the head-lines, which must have been prepared by the newspapers themselves. One of the first requisites of our administration of criminal law is that everyone accused of crime shall have, as far as possible, a fair and impartial trial.

The law with regard to confessions is, perhaps, not very clearly understood by newspapermen; but the admissibility of a confession is hedged about with many difficulties, for it has been found in practice that confessions have been extracted from prisoners which were subsequently found to have been erroneous in many particulars, and, in some cases, absolutely without foundation in fact. I only mention this for the purpose of shewing that every confession is attended with a certain amount of difficulty. This is so well understood by lawyers that counsel for the Crown, even when relying upon a confession

which he feels sure of having admitted in evidence, is not allowed, in opening his case to the jury, to disclose what the confession is until after it has been decided to be admissible in evidence by the Judge.

The material before me shews that the newspapers of Winnipeg have anticipated the course of justice, and deprived the prisoners' counsel of any benefit which the prisoners might have by the confession or confessions being ruled out as inadmissible. It is impossible, in my opinion, to say that the two prisoners are not most seriously prejudiced by the publication of the articles in question.

I have not had much opportunity of looking into this matter since granting leave to the accused yesterday to bring on the motion; but I would like to refer to the case of *The King* v. *Davies*, [1906] 1 K.B. 32, as shewing the principles which should govern the Court as regards the effect of such publication. There the application was on behalf of a prisoner to attach an editor for contempt of Court. The following language used by Wills, J., in delivering the considered judgment of the Court, at 34, indicates the principles on which the Court acted. He says:—

> This is an application to commit the defendant for contempt of Court. The circumstances which have given rise to it are as follows. A woman was arrested on September 2, 1905, on a charge of abandoning a child at Morriston, in the county of Glamorgan. She was brought before the magistrates at Swansea on September 5. The defendant is the editor, printer and publisher of the *South Wales Daily Post*, a newspaper published at Swansea. In the issue of the paper published on the evening of September 5, there appeared a report of the proceedings before the justices, followed by a statement headed, "Antecedents of the accused," and in the issue of September 8, another article entitled, "Traffic in babies," and in the issues of September 9 and 12, further articles relating to the accused person. They contained a great number of statements calculated to give an exceedingly unfavourable impression of the prisoner, and notably the article of September 8 stated that she had been guilty of wholesale child farming, and alleged her identity with one Dora Johnstone, who, it was alleged, had more than once been convicted of fraud; but it is not necessary to give any more specific account of their contents, as Mr. Bankes, who appeared for the defendant, admitted that nothing could be said in defence or even in palliation of the act of publishing such articles concerning a person under remand upon a charge which might lead to her committal. He confined his argument to denying the jurisdiction of this Court to deal with the present application, on the ground that as the crime charged could be tried at quarter sessions the publication was an offence against the quarter sessions, and could not be dealt with summarily by this Court.
>
> It would perhaps be enough to say that, inasmuch as the question whether the committal should take place to the assizes or quarter sessions depended in all probability upon the mere accident of which tribunal

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might hold its sittings before the other, it was just as much contempt of the assize Court as of quarter sessions, and, if so, our judgment in *Rex* v. *Parke*, [1903] 2 K.B. 432, applies. We adhere to the view we expressed in that case that the publication of such articles is a contempt of the Court which ultimately tries the case after committal, although at the time when they are published it cannot be known whether there will be a committal or not. Their tendency is to poison the stream of justice in that Court, though at the time of their publication the stream had not reached it; and as such articles are calculated to interfere with the power of the Court (whatever it be) that tries the case to do effective justice, it is a contempt of any Court which very well may try the case, but in fact does not do so, as well as of the Court which actually tries it.

Then the learned Judge goes on to say:—

It matters not whether the uncertainty at the time the articles were published extended only to the forum to which the case should be sent, or to the question whether a committal would take place at all, or to both. In each of such cases the mischief is the same, and the Court which might have to try the case would find its authority undermined beforehand.

Then, further on, he says:—

The reason why the publication of articles like those with which we have to deal is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists, namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it. Their tendency is to reduce the Court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned.

Then, again, at p. 40, he says:—

What then is the principle which is the root of and underlies the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders? It will be found to be, not for the purpose of protecting either the Court as a whole or the individual Judges of the Court from a repetition of them, but of protecting the public, and especially those who, either voluntarily or by compulsion, are subject to its jurisdiction, from the mischief they will incur in the authority if the tribunal be undermined or impaired.

The learned Judge concludes the judgment of the Court as follows, p. 48:—

Thinking as we do that the application now before us asks for nothing more than the legitimate application to new circumstances of the old principles of the common law, we have come to the conclusion that we ought to grant the remedy invoked, and it remains only to consider the penalty that ought to be inflicted. We have again looked through the articles complained of; they contain a number of statements respecting the person charged of a character likely to seriously prejudice her case, to create a feeling against her, and to affect the minds of persons who might take part in her trial. In our opinion such a case demands a severe punishment. We order David Davies to pay a fine of £100, and the costs of these proceedings.

In the present instance, looking at the material before me, I cannot resist the conclusion that every man upon the jury must have had his mind affected by the publication of these articles in the Winnipeg papers during the present assizes. To what extent our newspapers may circulate throughout the country I do not know; but it appears to me that, so far as any trial at the present assizes goes, the authority of the Court has been undermined to a large extent, and the minds of the jurors cannot but be seriously affected against the prisoners by the publication of their alleged confessions, which may or may not, at the trial of the case, be admitted in evidence at all.

Mr. Blackwood has suggested that the Crown would be quite willing to empanel another jury in order to proceed with the trial as promptly as possible; but I do not think, that, under the facts as disclosed by the affidavits, that would meet the justice of the case. I think it is absolutely necessary, in order to secure a fair trial of these two prisoners, that the case should stand over until the next assizes.

Trial postponed.

KINGDON PRINTING CO. v. MALCOLM et al.

Manitoba King's Bench. Trial before Curran, J. January 6, 1913.

1. EVIDENCE (§ II J—305)—PRESUMPTIONS AND BURDEN OF PROOF—CIRCUMSTANCES AND COURSE OF BUSINESS—PRINTING CONTRACT.

In an action by the plaintiffs, a printing firm, on a disputed account for printing work done and delivered, the following circumstances raise a presumption against the claim (*a*) absence of plaintiff's customary records shewing the various orders for or the execution or delivery of the alleged work; (*b*) plaintiff's delay of about four years in pressing the claim after its repudiation by the defendant; (*c*) plaintiff's admission that a large portion of the claim is for work never delivered.

Statement

THE plaintiffs seek to recover from the defendant F. H. Malcolm the sum of $5,959.93, the amount of a printing account.

The action was dismissed.

W. H. Curle and *F. M. Burbidge*, for plaintiffs.

R. M. Dennistoun, K.C. and *C. H. Locke*, for defendants.

Curran, J.

CURRAN, J.:—The case may be conveniently divided into two branches, the one in which redress is sought against the defendant F. H. Malcolm, as above, and the other in which relief is sought against the wife of the male defendant, in the nature of a declaration that she is a trustee for her husband of certain lands in St. Boniface to the extent that such lands may be made available to satisfy creditors' claims against her husband.

It is unnecessary to consider the second branch of the case

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unless I come to the conclusion that the defendant F. H. Malcolm is indebted to the plaintiffs, and to what extent.

It appeared that the defendant F. H. Malcolm, in and prior to the year 1907, had been acting as promoter of an institution known as the Colonial Bank of Canada. It was intended to change the name of this bank to the National Bank of Canada, and to reorganize and commence business under that name. The defendant F. H. Malcolm undertook to promote the organization of this bank and to secure subscriptions for a certain proportion of its capital stock. According to the arrangement made by him with the projectors of this institution he was to bear the expense of organization in return for receiving a commission on stock sold.

In connection with his organization work the defendant F. H. Malcolm employed the plaintiff company to do certain printing in the nature of prospectuses, applications for stock, circular letters, etc. No specific arrangement as to quantities or prices seems at first to have been made. The defendant Malcolm had previously done business with the plaintiff company and he and the president of that company, Abraham Kingdon, were well known to each other. It seems that Malcolm simply placed orders verbally with the plaintiffs for such work as was required in the earlier stages of his promotion of this bank, the work was executed, and charged up in the ordinary course as to any other customer at prevailing prices.

This course of dealing prevailed during the months of June, July and most of August, 1907, when, for some reason not disclosed, the defendant F. H. Malcolm appears to have desired a more formal understanding with the plaintiffs as to future printing for the National Bank. Possibly one reason for this was a desire to secure a more favourable price. Accordingly, on August 29, 1907, the defendant F. H. Malcolm wrote the letter, exhibit 32, to the plaintiffs.

This letter refers to a previous conversation between them as to the National Bank and to verbal quotations as to prices and quantities previously made by Kingdon to the defendant F. H. Malcolm. This letter purports to confirm these prices and provides for special methods of delivery of the printed matter when completed from time to time. The defendant Malcolm swears that the president of the plaintiff company, Abraham Kingdon, admitted to him that he had received this letter. No formal answer to the letter was written by the plaintiff company, and although the plaintiffs' president denies having received the letter, I accept the statement of the defendant F. H. Malcolm upon this point, and hold that the letter was received and was acquiesced in by the plaintiff, and it therefore formed the basis of the contract for printing subsequent to its date between the plaintiff company and the defendant F. H. Malcolm.

It was shewn in evidence on the part of the plaintiffs that their usual course of dealing with orders for printing was that such orders should be entered in a book, called the order book, exhibit 2, by the person who received the same. The plaintiff's foreman then prepared dockets or envelopes of the orders received, containing specifications and details as to the execution of the work. These dockets were used by the plaintiffs' workmen in executing the work, and when completed the executed work was charged up in a journal, exhibit 1. From exhibit 1 the items were posted direct into the customers' ledger.

Had this course been followed in the present case, the plaintiffs would have experienced much less difficulty in establishing their account; but unfortunately for them, such a course was not followed as to a considerable portion of the work which they claim Malcolm had ordered on behalf of this bank; that is to say, no orders appear in the order book, exhibit 2, for a large proportion of the work included in the plaintiff's account now sued for. No explanation of the omission to so enter these orders is forthcoming, and in view of the fact that the defendant F. H. Malcolm positively denies having placed orders for any such large quantity of work as he is charged for by the plaintiffs, this omission raises a grave question in my mind as to any orders having been given by Malcolm at all for the work so omitted. The defendant F. H. Malcolm does not deny that the plaintiff did, on his account, considerable printing for the National Bank, but he claims that the plaintiffs have been overpaid for all work which they could legitimately charge him with.

The questions, therefore, for my consideration, are

(1) Did the defendant F. H. Malcolm order the work sued for?

(2) If so, did the plaintiffs execute and deliver all of the work sued for?

I hold, as to deliveries, that the plaintiff company were bound by the terms of exhibit 32, and that deliveries could be made either to the mailing department of the postal authorities at the C.P.R. station, or at the offices of the bank. In the case of deliveries direct to the bank, receipts shewing such deliveries were required to be obtained by the plaintiff company. The checking of deliveries, therefore, was to be made from the post office department return and from such receipts. No delivery receipts are produced, but a certificate from the postal authorities shewing the number of mailings is put in, exhibit 26.

Unfortunately much of the evidence of a documentary character, which it is said would have assisted the plaintiff in proving its account, has been lost or destroyed, such as the receipts shewing deliveries to the bank, a large quantity of printed matter, some complete and some incomplete, said to have been still in the

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plaintiffs' hands when the work was stopped, and the dockets or envelopes containing the specifications and details of work done.

Work was stopped on October 26, or very shortly after, by the plaintiff's president, on the ground, it is alleged, that the banking institution could not be successfully floated, and that the project had failed.

It is alleged that there was at this time a large quantity of printed matter on hand, some complete and some incomplete, and that all this printed matter was subsequently destroyed by Kingdon's orders, and that inadvertently at the same time other papers that would have thrown considerable light on this dispute were also destroyed.

The onus is clearly on the plaintiffs to shew that they are entitled to payment for the work sued for and to do this they must bring themselves within the terms of their agreement with the defendant Malcolm as set out in exhibit 32.

Under ordinary circumstances a well-kept set of books verified by those who had charge of them, would have gone a long way towards assisting the plaintiffs in establishing their claim, but unfortunately, in the present instance, the plaintiff's books are not by any means reliable. It appeared in evidence that work was charged up in full as having been actually performed when it was not in fact completed, or nearly completed. A certain percentage of the work charged for in the plaintiffs' account was in this condition. It is impossible to tell how much, as none of the witnesses are in a position to make any statement based on knowledge upon this point. A notable instance of charges made for work which was not done is to be found in the journal entry, exhibit 1, at p. 15. These entries were made by LaCappelain, the plaintiff's foreman, and he says that the work represented by these charges was not then wholly done.

It is admitted by the plaintiffs that some of the work charged for was not actually done, but no one has been produced who can say to what extent or in what quantities or of what value such work was. LaCappelain estimates the value at $700, but admits that this is only guess-work on his part. Kingdon says there were some waggon-loads of printed and partly printed matter in his hands undelivered when the work was stopped by him. He claims to be entitled to payment for this on the ground that the printing had been done and the paper used, and if left on the plaintiff's hands it was of no use or value to them. This might be a good argument if the plaintiffs could produce orders, which they do not, to shew that the defendant F. H. Malcolm had really ordered all of this work to be done. The defendant positively denies that he ever gave such orders and says that it was unreasonable and absurd, under existing circumstances, which were well known to the plaintiffs, to print such large quan-

tities of material as are charged for without definite orders from him.

I have gone over the books as well as I can, particularly the order book, exhibit 2, in which ought to appear, if the plaintiffs' usual course of business had been followed, entries of all work placed on order. I find that many entries appearing in the ledger, exhibit 5, at p. 350, for work said to have been done, have no counterparts in this order book. Notably of the items charged in the ledger at p. 350, in September, and in the journal, exhibit 1, at p. 15, only the first three, under date of September 5, amounting to $761 and three others under date September 1st, amounting to $18.45, appear in the order book. The total cost of the work represented by these September items is $4,423.45, and the value of that for which orders appear is only $779.45, to which possibly might be added the charge on September 17th, 150,000 envelopes $405, as to which there is an entry in the order book at page 60, "F. H. Malcolm, envelopes." No quantity is stated, nor does it appear that this order is in any way connected with the National Bank business. It may well be that it was, judging from the quantity charged under this date to the bank, and allowing that this quantity was ordered, the total value would be $1,184.45 of ordered work, as against $4,423.45 for work charged in the account.

Again, I find that of the charges to the National Bank on p. 19 of the journal, exhibit 1, no orders appear in exhibit 2 for work to the value of $1,105, being the items charged on October 4th, unless it is intended that a second order for 20,000 prospectuses, 20,000 letters and 20,000 applications, appearing on page 68 of the order book are intended to cover such charges appearing in the journal on October 4th. No evidence has been given by LaCappelain, who made both these entries in the order book at p. 68, to explain how it comes that two separate orders for the same quantities of the same material appear in the order book directly following one another. It seems reasonable to suppose that had both orders been given at the same time one entry for the whole quantity of each kind would only have been made instead of two. It looks to me as if, by mistake, the entry had been duplicated, and that separate orders for these exceptionally large quantities were not in fact given, especially in view of Malcolm's evidence generally as to the October printing, denying that he in fact ordered the quantities charged for. If separate orders were given at this date, why did LaCappelain, when charging the work in the journal enter it on page 19 as having been ordered on different dates, namely the 1st and 4th of October. The dates of the orders are, or ought to be, the dates in the journal. The change of date looks to me suspicious, and to have been made to lend colour to the transaction. I do not think that both orders were given, and so hold upon the evidence.

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Again, no orders appear for any of the items at the top of p. 20 of exhibit 2, under date of October 21, amounting to $550.35. It seems strange, then, that if orders for such a large quantity of printing had actually been received from the defendant Malcolm on these dates, that the employees who received the orders did not take the trouble to record them in the book kept for that express purpose, and in conformity with the established course of conduct of the plaintiffs' business. As I said before, no explanation had been given as to why these alleged orders do not appear in the order book, and I think the omission in this respect is very significant, and strengthens my impression that orders were not in fact given for a large part of the work charged for.

A reference to the order book discloses that it appears to have been systematically used in the plaintiffs' business, judging from the entries appearing therein from day to day. If an omission of one or two orders had been found this might have been explainable as the result of an oversight, but I cannot look upon these wholesale omissions from the order book touching so great a proportion of the work sued for in this light, and I think it imposes a still stronger onus on the plaintiffs to shew that this work was actually ordered.

It is to be noted that the account in question is of long standing and the defendant F. H. Malcolm swears that the plaintiffs did not apply to him for payment or make any effort to collect the account from him until this action was commenced in April, 1912, a period of nearly four and a half years. This is not denied by the plaintiffs and the only excuse given by Kingdon is that the defendant F. H. Malcolm was financially worthless. I do not consider this excuse a valid one, at any rate, in view of the fact that when the account was exhibited to the defendant F. H. Malcolm on October 31, 1907, a matter to which I shall hereafter refer, the defendant refused to accept the account as correct and in fact disputed it entirely. It certainly behooved the plaintiffs to have an adjustment with the defendant at that time arrived at so that the amount could be fixed, even if payment was not available.

It appears that the account in full was for the first time rendered to the defendant Malcolm by one Hillier, the plaintiffs' bookkeeper, on October 31, 1907. This is admitted. Hillier took the account to Malcolm and asked him to O.K. it. The account was made out to the National Bank, and would necessarily have to be presented to the persons representing that institution, and at this date Malcolm had, to the knowledge of the plaintiffs, severed his official connection with the bank and his place had been taken by Mr. H. F. Forrest, who had the custody of the bank's funds. This fact was also known to the plaintiffs' presi-

dent. The defendant F. H. Malcolm swears that Hillier presented the account to him at his house, and that he then and there positively refused to O.K. it, because it was incorrect, and that nothing, as he contended, was then owing to the plaintiffs. This statement of Malcolm is not denied, and I think there can be no doubt that this actually took place. Why, then, did not the plaintiffs, if they believed their account was justly owing by the bank, or by Malcolm, or by both, take steps to enforce payment at the time when the matter was fresh in the minds of the parties, and when the best evidence was available to establish the truth. The plaintiffs did not do this, however, and, apart from some other proceedings taken by them against other members of the bank syndicate to obtain payment, no resort whatever was made to Malcolm for payment of the account until the present action was brought.

The only direct evidence produced as to actual deliveries is contained in exhibit 26, the certificate from the post office authorities, which shews mailings of envelopes containing sets of the printed matter—namely, prospectus, applications for shares and circular letter—to the number of 54,775. In addition to this, there is some evidence of deliveries direct to the bank of some 7,000 prospectuses, etc., making a total of 61,775. LaCappelain says the order book does not contain or shew orders for more than 62,100 prospectuses, etc., so it would appear that the actual deliveries proven very nearly equal the printed matter for which orders appear in the plaintiffs' books. LaCappelain says the remainder of the printed matter, namely, about 100,000 prospectuses, etc., must have remained in the plaintiffs' shop undelivered. The total number of prospectuses printed, according to the plaintiffs' account, and charged against the defendant F. H. Malcolm, is 157,000, and there would be an equal number of circular letters and applications for shares to complete the mailing set, of this printed matter.

I hold that the plaintiffs have failed to prove that all of the work charged for was ordered by the defendant F. H. Malcolm, or to shew what portion of the account sued for was ordered, and its value. In view of LaCappelain's evidence, and the statement made under oath by Abraham Kingdon, that some waggon-loads of the printed matter were in the plaintiffs' shop at the time the work of printing was stopped, it is certain that all of the work sued for was not delivered. There is no evidence upon which a finding could be based as to how much of the plaintiffs' account is legally payable by the defendant. I cannot ascertain what work was ordered, except such as appears in the order book, and this, according to LaCappelain, was considerably less than one-half the quantity charged for. I am unable to find what quantities were delivered, except what the postal authorities' cer-

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tificate, exhibit 26, indicates, and the additional 7,000, before referred to. I cannot find the value of these deliveries. The prospectuses were of different sizes, varying from 8 to 20 pages, and there is no evidence to shew how many of each size were included in these deliveries.

Upon the whole, there is no evidence, in my opinion, upon which any Court could find what amount, if any, is still owing to the plaintiffs upon this account, and for which a verdict in the plaintiffs' favour ought to be entered.

I have been asked to infer or deduce from different incidents and circumstances, not amounting to direct proof, that deliveries must have been made, or orders given, for the work sued for, and in the face of the defendant's positive denial of his liability, I am further asked to hold, upon such inferences and deductions, instead of direct proof, that the defendant is liable. I decline to do this. It is for the plaintiffs to establish their claim by proper evidence, and this, in my opinion, they have failed to do. It would appear, indeed, in the view I take of the case, that the defendant F. H. Malcolm has considerably overpaid the plaintiffs; but as to this I express no opinion, as the question is not raised upon the pleadings.

An application for leave to amend the statement of defence was made by the defendant's counsel during the course of the trial. I decided to receive such evidence as might be tendered and reserve the question of allowing the amendment. I now allow the amendment in the terms asked for, in case there should be an appeal, and the record will be amended accordingly.

In view of the grounds of my decision, resting as they do wholly upon the lack of evidence to support the plaintiffs' case, it is not necessary for me to deal with the second branch of the case against the female defendant, or the various legal grounds of defence raised by the record, and argued by the defendant's counsel at the trial.

The plaintiffs' action will be dismissed with costs.

Action dismissed.

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. January 7, 1913.

1. PRINCIPAL AND AGENT (§ II C—20)—AGENT'S FRAUD—EXCHANGE OF LANDS—AGENT REPRESENTING BOTH PRINCIPALS.

Where a real estate broker acting for both parties upon an exchange of land procures a transfer to his own nominee of the lands of one of such parties for the purpose of effecting the proposed exchange, but closes the exchange agreement by transferring to the other party only a part thereof, retaining the remainder for his own benefit as a secret profit, the property so retained does not belong to the customer to whom he pretended it would have to be conveyed, if at no time in the negotiations was it offered to the latter; it should revert to the party from whom it was fraudulently obtained by the agent.

2. FRAUD AND DECEIT (§ VIII—35)—REMEDIES—AGENT FOR BOTH PRINCIPALS—JUDGMENT RE-VESTING PROPERTY TRANSFERRED THROUGH AGENT'S FRAUD.

Where the plaintiff, the original owner, was rightfully entitled to land of which his agent had obtained from him a transfer made secretly for the agent's benefit and not in pursuance of the contract of the latter with a third party as the agent had represented, has obtained and holds a judgment against the agent and the latter's nominee in whose name the transfer had been taken, re-vesting the property in himself, the plaintiff's rights thereby declared will be made effective in an action against such third party claiming under a decree which the latter had obtained against the agent and the agent's nominee declaring the retained property to belong to such third party as a part of the consideration for his contract, if the court in the action by the original owner against the latter finds that it was not in fact a part of the consideration and the third party had no equity as a *bonâ fide* purchaser or otherwise to call for a transfer of same to himself, and further finds that the original owner was not a party to the action brought by the third party nor had he acquiesced therein by his conduct.

Statement

APPEAL by plaintiffs from judgment of Clement, J.

The appeal was allowed, MARTIN, J.A., dissenting.

D. G. Macdonell, for appellant.

S. S. Taylor, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I concur with judgment of Galliher, J.

Irving, J.A.

IRVING, J.A.:—It is established that Tipping, the real estate agent of the plaintiff, and also of the defendant, by false pretences, obtained from Tonucci, lots 7 and 8, by falsely pretending they were part of the consideration which the defendant Livingstone was to receive in exchange for one half of the ranch which he was conveying to Tonucci. The lots were conveyed to a trustee for Tipping. Tonucci never having really assented to convey these lots except for that purpose, was entitled to recover them back from Tipping and his trustee. On June 4, 1909, he brought an action against Tipping accordingly. Afterwards, in June, 1909, Tipping having informed him that he (Tipping) had sold them to a *bonâ fide* purchaser without

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notice, a settlement of this action with Tipping was made, Tonucci, for his interest in the two lots, accepting $550 and discontinuing the action.

That settlement, under ordinary circumstances, seems to me to be an end of his claim against Tipping in respect of the two lots. The conveyance to Tipping's trustee would then, so far as he was concerned, be unassailable. Later on, Tonucci learned that the lots had not been conveyed to a *bonâ fide* purchaser for value without notice, but that they were being held by Mrs. Dowd, Tipping's mother-in-law, for Tipping. He thereupon, in a second lawsuit (18th April, 1910), against Tipping and Mrs. Dowd, attacked the compromise and the original fraud, and succeeded, the defendants making default. A decree (June 28, 1910) was made against them both, revesting the property in Tonucci.

In the meantime, Livingstone, having learned of the settlement of the first action, by which Tonucci resigned his claim against the lots, brought his action against Tonucci to have the lots declared his. It was at the trial of this action that Tonucci learned who Mrs. Dowd was; that is to say, that instead of being the innocent purchaser, as represented by Tipping, she was really Tipping in disguise.

Livingstone succeeded in his action, and obtained (March 2, 1910) a declaration that the lots had passed to and belonged to him, as part of the consideration he had agreed to accept for conveying to Tonucci; but before he had succeeded in getting his title registered, Tonucci obtained his default judgment of June 28, 1910, declaring the lots had not passed from him. Tonucci being unable to get his title registered by reason of the *lis pendens* filed by Livingstone, then brought this action against Livingstone to set aside the Livingstone-Tipping judgment.

The learned Judge stopped the plaintiff's case after hearing plaintiff's evidence. He felt that as Tonucci had not reprobated the settlement that he had made with Tipping until after Livingstone had secured his decree vesting the lots in him (Livingstone) that it was too late for the Court to put the matter right, particularly in view of the fact that Tonucci was aware of the litigation going on between Livingstone and Tipping as to these two lots.

But on the other hand Livingstone, when he brought his action against Tipping was fully aware that Tonucci had been defrauded out of the lots, and there is no evidence yet adduced that Livingstone ever bargained that the two lots were to be part of the consideration he was to receive.

The learned Judge thought as Tipping was Livingstone's agent, he (Livingstone) was entitled to anything Tipping might make in the deal, over and above his just commission.

But Tipping was also Tonucci's agent. If Tonucci was defrauded by Tipping, neither Livingstone or any other man can claim the benefit of that fraud.

I would set aside the judgment in the action and also the judgment on the counterclaim.

MARTIN, J.A. (dissenting):—I think the learned Judge below took the correct view and that the appeal should be dismissed.

GALLIHER, J.A.:—This matter is somewhat complicated owing to the different actions between the parties.

Shortly stated, the facts are that one Tipping was employed by Tonucci as agent to negotiate an exchange of certain city property owned by him, and consisting of the east half of lot 12, block 16, D.L. 182, Vancouver, known as the Harris street property, on which was a house, and also of lots 7 and 8 in block 94, D.L. 264 "A," Vancouver, for certain farm property owned by Livingstone, consisting of 160 acres, being the south-west quarter of sec. 28, tp. 10, grp. 1, New Westminster district.

As a result of negotiations through Tipping, the Harris street property was exchanged for the north half of the farm (80 acres) and agreements for the purpose of carrying this out were entered into.

In order to effectuate the said exchange, Tipping had Tonucci (who is an Italian and cannot read English) execute a deed of the Harris street property, dated May 9th, 1908, and an assignment, May 11, 1908, of the agreement, which Tonucci held for the purchase of lots 7 and 8 to one Bridget Dowd.

Livingstone executed an agreement in favour of Tonucci of the north half of the farm property on May 11, 1908, and took an agreement of purchase from Dowd of lot 12, the Harris property, dated May 23, 1908.

So far there is no dispute between the parties, nor does Livingstone claim that at the time the exchange was made he understood he was to receive or expected to receive more than the Harris street property for the north half of the farm. It appears from the evidence before us that for some time after the exchange above referred to, Tipping and Tonucci had conversations about the disposal of lots 7 and 8, and matters ran on until June 4, 1909, when Tonucci brought action against Tipping claiming an account for moneys received by Tipping as his agent in respect of lots 7 and 8, and for damages. This action did not go to trial, but was settled by Tipping paying Tonucci.

Paragraph 6 of the statement of claim in the above action (see A.B. 131 and 132) described Livingstone's farm as the north half and not the whole of the south-west quarter of 28, and alleges that Tipping represented that Livingstone would

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trade this north half for the whole of the Tonucci property which would include lots 7 and 8, and that Tonucci consented thereto.

Paragraph 7 explains how 7 and 8 got into the name of Bridget Dowd. Paragraph 8 sets out the exchange of the Harris street property for the Livingstone farm as described in paragraph 6.

In September, 1909, Livingstone sued Tipping to recover lots 7 and 8, his claim based on the pleadings above alluded to being that Tipping as his agent had received lots 7 and 8 as well as the Harris street property (lot 12) for the purpose of exchanging them for one half of his farm, and had withheld said lots; in other words, that Tipping had represented to Tonucci that Livingstone would trade half his farm for the three lots, and obtained Tonucci's consent thereto, and then went to Livingstone and represented that Tonucci would exchange lot 12 for half the farm, and had retained lots 7 and 8 as a secret commission.

At the trial of this action, Livingstone subpœnaed Tonucci as his witness, but on learning that he would be adverse to him he was not called, and was excluded from Court during the taking of evidence, but was present when judgment was pronounced in favour of Livingstone granting him lots 7 and 8. This judgment was delivered March 2, 1910, and on April 18, 1910, Tonucci brought a second action against Tipping to recover these lots. This was undefended, and on motion for judgment, Murphy, J., who had previously pronounced judgment in favour of Livingstone for these lots, ordered judgment in favour of Tonucci, and directed the registrar to execute a conveyance evidently not appreciating that he had on March 2nd already awarded these lots to Livingstone, and his attention not being called to it.

Livingstone filed a *lis pendens* against these lots, and this action is brought to cancel and remove the *lis pendens*, and to have it declared that the judgment of March 2, 1910, is of no effect against the plaintiff.

At the close of the plaintiff's case the learned trial Judge dismissed the action on the ground that the plaintiff was estopped (*a*) by reason of his settlement with Tipping in the first suit brought; and (*b*) by reason of the judgment in *Livingstone* v. *Tipping*.

From this the plaintiff appeals.

The first important point to settle, to my mind, is: Did Tonucci ever turn over to Tipping lots 7 and 8 as well as the east half of 12 to be exchanged for the north half of the Livingstone farm? In reading the statement of claim in the suit of June, 1909 (A.B. 131-2), *Tonucci* v. *Tipping*, I was at first inclined

to the view that the description of the Livingstone farm in par. 6 as the north half instead of the whole of the south-west quarter of 28 was a pleader's error, but on a careful perusal of pars. 7 and 8, I do not think that is so.

Paragraph 3 described the property owned by Tonucci; par. 6 described Livingstone's farm, and stated that Tonucci consented to exchange the properties described in par. 3 for the property described in par. 6.

Paragraph 7 sets out that in pursuance of such agreement, and in consequence of the representations, the agreements for lots 7 and 8 were assigned by Tonucci, and finally, par. 8, that an exchange was made of the east half of 12 for the *said* Livingstone farm, referring, of course, to the farm as before described.

The following words, too, at the end of par. 7 are significant:—

> And the defendant (Tipping) agreed with the plaintiff to do his best for the plaintiff and to make the best possible terms in the trade or exchange with the said Livingstone.

The best possible terms resulted as set out in par. 8, so that whatever attitude the plaintiff may now assume in the action before us, it seems impossible to get away from the conclusion that Tonucci did give into the control of Tipping for the purpose of negotiations with Livingstone for half the farm, lots 7 and 8.

These pleadings are put in by the defendant in this action so that he is not in a position to deny the truth of any part of them. My reading of these pleadings as a whole then is this:—

Tonucci on the representation of Tipping gave to Tipping authority to exchange the east half of 12 and lots 7 and 8 for the north half of the south-west half of sec. 28, with, however, this limitation that he was to make the best possible terms he could in Tonucci's interest.

I take that to mean that, while Tonucci was willing to give the three parcels of land for half the farm if necessary, Tipping was, if possible, to secure it for less.

According to the pleadings, Tipping was Tonucci's agent, and as such agent went to Livingstone and represented as in fact was his duty under his agreement with Tonucci, and as his agent, that Tonucci would give the east half of 12 for half the farm.

Livingstone was satisfied with this, and did not contract for anything else, and at that time never expected anything else and the deal went through on that basis.

Properly read, these pleadings could in no way mislead Livingstone, and it was upon these his suit was based, and it is the only evidence Mr. Taylor, counsel for Livingstone, can now point us to in support of his contention.

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Now, supposing there had been no subsequent proceedings and the matter came before us for the first time to decide on the state of facts I have just outlined as to whether or not Livingstone had any interest in these lots, I should not hesitate to say he had not. If, then, Livingstone acquired no interest in 7 and 8 by virtue of the transactions above set out, how can it be said (subject to what I will say later) that the plaintiff in this action is estopped by reason of his settlement of the suit of June 4, 1909, against Tipping. The evidence is that Tipping falsely represented to Tonucci that lots 7 and 8 had been sold to some third party and could not be recovered back, and Tonucci, acting on such representation, and believing that his only remedy was in damages, made the settlement on that basis. As Tonucci says, "I thought I could not get the lots and wanted to get what I could out of it." The evidence also shews that Tonucci did not discover until the trial of *Livingstone* v. *Tipping*, some time afterwards that Bridget Dowd, to whom the properties were transferred, was the *alter ego* of Tipping. On discovering this fact he brought action against Tipping and Dowd, and had the assignment set aside, and lots 7 and 8 re-vested in himself, in the manner I have before pointed out.

Tonucci's evidence in the case at bar is clear that he never supposed at any time after the deal with Livingstone went through that lots 7 and 8 formed any part of that deal.

Tipping's evidence, for what it is worth, is to the same effect, and no witnesses were called on behalf of the defence.

There remains, however, the question of the judgment of March 2, 1910, vesting lots 7 and 8 in Livingstone. If the defendant was an innocent purchaser for value, or if he was acting under a misapprehension of his rights, and the plaintiff, knowing his own rights, stood by and allowed the defendant to acquire an interest in the property in dispute, he would be estopped from now attacking that interest.

But is this the position here? I have already decided that Livingstone had no interest in the property by virtue of the transactions between Tonucci, Tipping and himself.

He has, however, a judgment of the Court declaring that he is entitled to the property in question. To the proceedings upon which this judgment is based Tonucci was not a party, and although present on subpœna as a witness for Livingstone, was not called, and was excluded from Court by Livingstone's counsel, hearing only the pronouncement of the judgment, and we find him asserting his right to the lots to Livingstone even as late as the morning of the trial upon which the above judgment was pronounced.

We have not before us the evidence taken at that trial, but from the judgment which is made a part of the appeal book it is

clear that the learned trial Judge discredited Tipping and his witnesses, and I think proceeded upon the ground that Tonucci had given Tipping authority to exchange the three pieces of property for one half the farm without qualification, that Tipping had only given Livingstone lot 12 and secretly kept back for himself lots 7 and 8.

Can Livingtsone be treated as an innocent purchaser for value? He gave no value for these lots—the trade of one half the farm for lot 12 was all he was offered, and all he asked for; his claim can only have foundation if Tonucci authorized Tipping without reserve to give 7 and 8 as well for one-half the farm.

The pleadings, exhibit 5, put in by Livingstone's counsel do not support this, and the only other evidence before us is in direct contradiction of such a contention.

Can this judgment obtained without a full dielosure of the facts in the light of the evidence now before us be successfully pleaded as a bar to the plaintiff's action? I may be wrong, but it seems to me to so hold, under all the circumstances of this case, would be to work an injustice.

I would allow the appeal with costs.

There should be judgment for the plaintiff below as prayed.

Appeal allowed, MARTIN, J.A., *dissenting*.

COLLINS v. GOULD.

Alberta Supreme Court. Trial before Scott, J. January 14, 1913.

1. MALICIOUS PROSECUTION (§ II A—10)—CRIMINAL PROSECUTION—MALICE.

In the absence of direct evidence of malice on the part of the defendant, in an action against him for malicious prosecution, malice may be inferred from the absence of reasonable and probable cause in taking the criminal proceedings complained of, or from the fact that in taking them the defendant was actuated by indirect or improper motives.

2. MALICIOUS PROSECUTION (§ II A—10)—CRIMINAL PROSECUTION—INDIRECT MOTIVE—RECOVERY OF PROPERTY.

That the defendant laid a charge of theft against a person to whom he had entrusted a horse for a sale, merely for the purpose of recovering possession of the horse which the agent refused to deliver up, may be an indirect motive from which malice may be inferred against him in an action for malicious prosecution, where he knew that the agent claimed possession solely for the purpose of selling it on defendant's account under an agreement between them not limited as to time whereby such agent was to receive for his services and expenses any sum he should receive in excess of a minimum net price to be turned over to the defendant.

Statement.

THE plaintiff's claim is for damages for malicious prosecution and for the breach of an agreement whereby plaintiff was to be entitled to the possession of defendant's stallion "Flagship" for the purpose of selling same. The plaintiff also claims

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$400 balance due him in respect of the sale by him for the defendant of a stallion named "Passevant." The defendant counterclaimed for damages for the detention of the stallion "Flagship" and of the pedigree of a stallion named "Iphis."

Judgment was given for the plaintiff.

S. A. Dickson, for plaintiff.

H. H. Parlee, for defendant.

Scott, J.

SCOTT, J.:—At the conclusion of the trial, for the reasons then stated by me, I held that the plaintiff was entitled to recover $200 as the balance due him in respect of the stallion "Passevant" and that he was not entitled to recover anything in respect of his claim for the breach of the agreement relating to the stallion "Flagship." I dismissed the defendant's counterclaim and reserved the question of the plaintiff's right to recover in respect of his claim for damages for malicious prosecution.

I find the following facts:—

About 6th July, 1911, the plaintiff obtained from the defendant possession of his stallion "Flagship" under an agreement whereby the former was authorized to sell same at a price not less than $700, and was to receive by way of remuneration for his services and expenses any sum he should receive in excess of that amount upon the sale. There was no agreement between them as to the time the plaintiff was to be entitled to possession for the purpose of making a sale. He, on that day took it from Edmonton into the country and endeavoured to make a sale to different persons. A few days prior to 10th July he had the animal at the livery stable of one Colquhon at Leduc and was then negotiating with some Galicians for its sale to them. He saw defendant in Edmonton about 9th July and told him about these negotiations and the latter then told him that he must either have the money or the horse. They went together to Leduc on the following morning and when there, finding that the sale to the Galicians was not going through, the defendant demanded possession of the horse. Plaintiff claimed the right to hold it for the purpose of selling it. By reason of these conflicting claims Colquhon refused to deliver it to either party until the dispute was settled. On 15th July plaintiff went to Leduc and on pretence of taking the horse out for exercise (a privilege which Colquhon had previously accorded him) he took it away from Leduc and removed it to a stable occupied by him near his residence at Stratheona. When Colquhon found that the horse was gone he started out to search for it. He ascertained that it was at plaintiff's place, and on 16th July he informed the defendant where it was. On the following day the defendant laid an information before Inspector

Worsley, a justice of the peace, charging the plaintiff with stealing the animal, and shortly afterwards the horse was removed from plaintiff's stable. The evidence is not conclusive as to what became of it but the reasonable inference from the evidence is that it was taken by a constable of the Royal North West Mounted Police and delivered by him to the defendant.

The plaintiff, having heard that a warrant had been issued for his arrest, saw the defendant, who told him that he had nothing to do with it and that it was Colquhon he should look to. Plaintiff then went to see Inspector Worsley and it was then arranged between them that he should appear on 21st July to answer the charge. He did appear upon that day and the justice, after hearing evidence upon it, dismissed the charge. It does not appear that the plaintiff was ever arrested upon it.

It appears that on 16th July, after Colquhon had told defendant where the horse was they went together to see the latter's solicitor who advised him to wait until next day and then to get the mounted police to go and take the horse, that he went the next day to see Inspector Worsley and that the latter took steps to get it.

Inspector Worsley, who was examined as a witness for the plaintiff, states that he has no doubt the defendant told him the whole circumstances of the case and that, from what he told him, he thought the proper course was to take the information.

The Inspector appeared to have only a vague recollection of the case. He was unable to state whether he had issued a warrant for the plaintiff's arrest or whether he had been under arrest. In fact, he was unable to state with any certainty anything about it which did not appear upon the information and the record of the proceedings at the hearing. It is, to my mind, open to serious doubt whether the defendant did tell him all the circumstances of the case. All the material facts were then within the knowledge of the defendant, and it is unreasonable to assume that if they had been disclosed to the Inspector he would have taken the information and then afterwards dismissed it upon the same facts being given in evidence before him.

In my opinion, the defendant had not reasonable or probable cause for charging the plaintiff with stealing the horse. He knew that the plaintiff claimed to be entitled to its possession under the agreement between them solely for the purpose of selling it upon the defendant's account and that he had taken it away from Ledue for that purpose alone. His retaining possession of it under that claim after demand had been made for its return, on his having obtained it from Colquhon by a subterfuge after the latter had refused to return it to him, would not constitute theft. It does not appear that the defendant

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was ever advised that it would, and I am satisfied that he did not so think. His sole object in consulting his solicitor and the Inspector and in taking the proceedings he did was to obtain possession of the animal, and in attaining that object in the manner he did, he entirely disregarded, or at least failed to consider, the effect of the proceedings upon the reputation and character of the plaintiff.

In order to entitle the plaintiff to recover it must be shewn that the defendant was actuated by malice in taking the proceedings. He has expressly denied that he was so actuated, but malice may be inferred from the absence of reasonable and probable cause for taking the proceedings, or from the fact that, in taking them, the defendant was actuated by indirect or improper motives. I have already expressed the view that his sole motive was to obtain possession of the horse and that was manifestly an indirect motive. I, therefore, think that there is sufficient evidence to support the conclusion I have reached that there was malice on the part of the defendant.

I give judgment for the plaintiff for $250 on his claim for damages for malicious prosecution. If judgment has not yet been entered for him in respect of the $200 I held at the trial that he was entitled to in respect of another portion of his claim, he will now be entitled to enter judgment against the defendant for $450, with costs of suit. The plaintiff will also have judgment for costs of defendant's counterclaim, which I dismissed at the trial.

Judgment for plaintiff.

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BRADEN v. REID & CO.

Alberta, District Court at Calgary, Judge Carpenter. January 18, 1913.

1. CONTRACTS (§ II C—140)—TIME—CONTRACT OF HIRING—MONTHLY PAYMENTS AND NOTICE.

Where a contract of hiring provides that the salary is to be payable at a certain rate per month and that either party has the right to terminate the hiring by giving a month's notice, the hiring is to all intents and purposes a monthly one, although other terms of the contract refer to the hiring as being upon a yearly basis.

2. MASTER AND SERVANT (§ I E—21)—RIGHT TO DISCHARGE—DISREGARD OF INSTRUCTIONS.

An employer is justified in discharging, without notice, a travelling salesman employed by him where it appears that the salesman disregarded instructions to keep in communication with the employer, and failed to travel with his trunks, in spite of instructions from his employer that this was absolutely essential, notwithstanding that the contract of employment provided that it was terminable by either party by giving a month's notice.

Statement

ACTION for the recovery for services rendered to the defendants, travelling expenses and a hotel bill.

Judgment was given for plaintiff.

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Judge Carpenter.

Selwood, for the plaintiff.
Wright, for the defendants.

JUDGE CARPENTER:—It seems to be immaterial whether the contract of hiring that is the ground of this action was for the term of a year or a mere monthly hiring. I am satisfied that the letter of the defendants of January 2, 1909, contained the essential terms of the contract, and that these terms must be read into the later contract of hiring that was entered into between plaintiff and the defendants. From this letter I gather that, though the hiring is spoken of as being on a yearly basis, the salary was payable at the rate of $100 per month, and that either party had the right to terminate the hiring by giving a month's notice, and it results in the hiring being to all intents and purposes a monthly one. It also appears that it was understood by the defendants, and the plaintiff was aware of the fact, that he was being taken into their employment as an experienced crockery traveller.

The plaintiff entered into the defendant's employment on May the 16th, 1909, and on July the 21st of the same year the defendants wrote plaintiff that they could not continue him on the road under the then existing conditions, and offering to continue him in their employment on a commission basis. This letter plaintiff says he received about July 26, and I think this can be taken as the termination of the hiring, as the plaintiff did not accept the defendant's offer to continue with them on a commission basis, and in a telegram to the defendants, dated August 3, the plaintiff stated that he considered himself wrongfully dismissed. On July 27 there was a wire from the defendants to the plaintiff at Edmonton, stating that as the plaintiff had not confirmed their offer of the 20th of July (it appears that this should really be the 21st of July) *i.e.*, to continue on a commission basis, he must consider himself dismissed.

I think the evidence goes to shew that the plaintiff did not keep in communication with the defendants as he was instructed to do, and that he did not travel with his trunks in spite of the instructions from the defendants that this was absolutely essential, and these, I think, were sufficient reasons to justify the defendants in dismissing the plaintiff without notice. There is further the point that the plaintiff undoubtedly was taken on as an experienced traveller, and from what I gather by the evidence I think I am quite safe in saying that the facts brought out by this evidence shew that such was not the case.

The plaintiff, as I say, entered into the services of the defendants on the 16th of May, 1909. I have found plaintiff's salary was to be paid in monthly instalments of $100 each. Up to the 16th of July two months' salary had accordingly accrued, making a total of $200, and as to this amount there is no question but

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that the defendants cannot retain it from the plaintiff. The defendants in their statement of defence plead that they suffered great loss and damage through the plaintiff failing to perform his duties and follow their instructions and place this loss at $400, which they plead as a set-off and counterclaim. In their amended statement of defence, however, although the defendants plead that they suffered such loss and damage for similar reasons, they apparently do not plead it as a set-off or counterclaim, but in any event there has been no evidence given to shew what the damage, if any, amounted to through any default on the part of the plaintiff, and so far as any set-off or counterclaim is concerned, that must fail.

As to the broken period of time that the plaintiff remained in the employ of the defendants, that is, from July 16 to July 26, if the plaintiff was rightfully dismissed, that is, dismissed for cause, he cannot recover for such period. If I could, I would allow the plaintiff his proportion of salary for this period in view of the nature of the communications that the defendants were continually sending, which were, to say the least, somewhat bewildering.

The plaintiff paid out the amount of $368.60 for travelling expenses, and that, with the $200 of salary, makes a total sum of $568.60. The defendants have charged up against the plaintiff the amount of $655.18. Of this amount, however, there is an item of $100, being the amount of a draft drawn on the defendants and endorsed by a Mr. MacKenzie. The defendants refused to pay this amount and it was made good by MacKenzie and was subsequently paid to MacKenzie by the plaintiff, so that the defendants cannot in any event succeed in regard to this item. There is included in this $655.18 a further sum of $75 which the defendants have charged up to the plaintiff's account, being the amount of a draft drawn on the defendants by one Jacquot, a traveller in the defendants' employ, this draft being payable to the order of the plaintiff. Plaintiff swears that he did not get any of this money, but that Jacquot got it, and that his endorsement was merely as an accommodation for Jacquot. There is no evidence to the contrary, and I think this item should not be charged to the plaintiff's account. There is a further item of $5.18 charged by defendants against the plaintiff for cancellation of his letter of credit. I do not see any reason why this should be so charged, so that in all an amount of $180.18 must be deducted from the $655.18, leaving $475 chargeable against the plaintiff, which amount is admitted by the plaintiff to have been received by him.

There is, further, an item of $46.70, the amount of plaintiff's hotel bill at the Alberta Hotel in Calgary, this amount being paid by the defendants. In view of the letters of the defendants to the plaintiff, instructing him to await the arrival of

Mr. Reid in Calgary, I think that the plaintiff was kept waiting in Calgary at the instance of the defendants, and I think that the defendants may well pay this account.

The plaintiff's account amounts in all to $568.60, upon which there is to be credited the amount of $475, leaving a balance still due him of $93.60, and there will be judgment for the plaintiff for that amount. Upon a consideration of the circumstances connected with the matters in dispute, I do not feel that I should deprive the plaintiff of his costs on the large debt scale and the judgment will be with costs on such scale.

Judgment for plaintiff.

HILBORN v. REILLY.

Saskatchewan Supreme Court, Parker, M.C. January 27, 1913.

1. WRIT AND PROCESS (§ III—58)—IRREGULARITIES IN WRIT AND SERVICE THEREOF.

An objection on the ground that the address for service of the plaintiff endorsed on the copy of the writ served on the defendant was not within three miles of the place where the writ was issued as required by statutory rules, should be raised by a motion to set aside the writ itself and copy for service as well as the service and not by a motion to set aside the service alone which can be made only for irregularity in the method of service.

[*Anon.* 1 Dow. Prac. Cas. 654, applied.]

Statement

APPLICATION to set aside the service of the writ of summons in this action on the ground that the address for service of the plaintiff is endorsed on the copy of the writ served on the defendant as being at the office of the plaintiff's solicitors at Regina, instead of some place within three miles of Arcola in the judicial district of Cannington, where the writ was issued.

The motion was dismissed.

F. L. Bastedo, for the defendant (applicant).

H. F. Thomson, for the plaintiff.

Parker, M.C.

PARKER, M.C.:—The application is supported by the affidavit of the defendant's solicitor proving service of the copy of the writ and making the copy an exhibit to the affidavit. The affidavit is objected to as insufficient on the following grounds: that there is nothing to shew (1) that a correct address for service was not delivered at the time of service of the writ or subsequently; (2) that the copy produced was the only copy served; (3) that a discontinuance was not filed, and (4) that no merits are alleged. It was argued that the application was purely technical, that the defendant was not misled, and that his affidavit being defective as above mentioned could not support an application which is *strictissime juris* and without merits, and the following cases were cited in support of this

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contention: *Scott* v. *Burnham*, 3 Ch. Ch. (Ont.) 399; *Leslie* v. *Foley*, 4 P.R. (Ont.) 246, and *Hunter* v. *Thurtell*, 4 U.C.Q.B. 170.

In my opinion, however, the affidavit having shewn the service of the writ and the wrong address for service is sufficient for this application. I am further of the opinion that this application is not purely technical or without merits, so that these cases do not apply. It was argued that giving a wrong address was equivalent to an omission to give an address and that therefore the local registrar's office where the writ was issued was the proper address for service. I do not agree with this contention. A wrong address is quite a different thing from no address, and the defendant might very easily be misled by it. In fact, if the application had been to set aside the writ, or the copy, or the service, the defendant would probably have been entitled to succeed at least in having the copy and service set aside though the practice now appears to allow an amendment of the proceedings: Annual Practice (1913) 27; *Lloyd* v. *Jones*, 1 M. & W. 549, and *Toby* v. *Hancock*, 16 L.J. Q.B. 33.

The application, however, is to set aside the service of the writ only, not the writ itself, or the copy and as no irregularity in the service has been shewn, the motion must fail. Where there is an objection in point of form which applies as well to the writ as to the copy, the defendant cannot move to set aside the service of the writ only, but he must move to set aside both writ and copy. There must be some irregularity in the service to warrant a motion to set aside the service only: *Anon.*, 1 Dow. Prac. Cas. 654, Mews' Digest, vol. 11, p. 146. Where a writ was irregular, but the service was regular, and the defendant moved to set aside the service for irregularity the Court discharged the rule: *Hasker* v. *Jarmaine*, 1 C. & M. 408, 2 L.J. Exch. 166. The motion will therefore be dismissed, but as the plaintiff has given a wrong address for service, he will be ordered to amend by stating the correct address. There will be no costs to either party.

Motion dismissed.

J. GAINER & COMPANY v. THE ANCHOR FIRE AND MARINE INSURANCE COMPANY.

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Alberta Supreme Court. Trial before Scott, J. January 27, 1913.

1. INSURANCE (§ III E I—81) — FIRE — OWNERSHIP — STATUTORY CONDITIONS—CONSTRUCTION—INNOCENT CONCEALMENT.

Where the building insured against fire under a policy issued to a partnership in its firm name was the property of one of the partners alone, the property insured is to be considered as owned by a party "other than the assured" under the statutory condition 10 of the Fire Insurance Policy Act, R.S.S. 1909, ch. 80, under which the insurance company is not liable for loss of property "owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy"; and an action brought by the firm as such will be dismissed where the policy did not state the interest of the firm in the building insured, although it was shewn at the trial that under the terms of the partnership agreement it was entitled to possession free of rent in consideration of its keeping the property insured.

[*Davidson* v. *Waterloo Mutual Fire Ins. Co.*, 9 O.L.R. 394, distinguished.]

Statement

THE plaintiffs' claim is upon a policy of insurance issued to them by defendant company on the 19th November, 1909, whereby the plaintiffs were insured for one year to the amount of $2,000 against loss by fire in respect of the abbatoir premises occupied by them in Strathcona.

The action was dismissed.

Frank Ford, K.C., and *A. L. Marks*, for plaintiff.

A. A. McGillivray, for defendant.

Scott, J.

SCOTT, J.:—The premises were destroyed by fire on September 24, 1910, and the plaintiffs' claim is for $1,259.43, being the amount which the defendant company's adjuster found should be paid by it in case it should be found liable under the policy.

At the time the policy was issued and up to the time of the fire the property was owned by John Gainer who is a member of plaintiffs' firm. It was occupied by the firm under the partnership agreement by the provisions of which the firm was entitled to its use during the continuance of the partnership free from rent in consideration of their keeping it insured against fire.

There was no application by the plaintiffs in writing for the insurance. Their secretary telephoned from Strathcona to Magrath, Hart & Company, the defendant company's agent at Edmonton, asking them to place it on the property. No particulars as to the nature or extent of the plaintiff's interest in it appears to have been given, nor were any applied for, and there is nothing on the face of the policy to shew what their interest was.

The policy is stated to be subject to the usual statutory conditions with certain variations thereof.

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The defendant company among other defences rely upon that portion of the 10th statutory condition which provides that it shall not be liable for the loss of property owned by any other party than the assured, unless the interest of the assured is stated in or upon the policy.

In *Davidson* v. *The Waterloo Mutual Fire Insurance Company*, 9 O.L.R. 394, the plaintiff who was the lessee of certain machinery and who was held to have as such an insurable interest therein, applied to the company's agent for an insurance thereon. There was no application by the plaintiff in writing but it appears that at the time the verbal application was made the plaintiff communicated to the agent the fact that he was the lessee of the machinery. The agent without knowledge of the plaintiff thereupon drew up a formal application in writing which he himself signed and forwarded to the company. In that application the only question relating to the plaintiff's interest in the property was, "under what title is the property to be insured held," and this was not answered. The policy issued by the company did not contain any reference to the plaintiff's interest in the property. The company in their defence to the action, relied upon a condition of the policy, similar to the 10th statutory condition referred to. It was, however, held that the plaintiff was entitled to recover on the policy.

The circumstances of that case differ from the present case only in the fact that there the plaintiff had informed the company's agent that he was merely the lessee of the property insured and it was mainly upon that ground that the plaintiff was held entitled to recover, the holding being to the effect that the plaintiff, having in his verbal application informed the agent that he was the lessee of the property, the company was bound by that notice and that under a condition of the policy similar to the 2nd statutory condition in the present policy, if the company did not accept the application as for an insurance of the plaintiff's interest as lessee, it was bound to give the plaintiff notice to that effect. Meredith, C.J., however, in his judgment at p. 398 expresses the view that, from the fact that in the written application sent in by the agent the only question relating to the plaintiff's interest in the property remained unanswered, it was apparent that the company did not deem it important that it should know what the interest was,—Idington, J., in his judgment at p. 404, intimates that the company had no right to assume from the written application that the plaintiff's request for insurance was to be in the character of an owner in the restrictive sense unqualified in any way, and he quotes from the Standard dictionary, to shew that one definition of the word "owner" is one who has possession, and he refers to *Lister* v. *Lobley*, 7 A. & E. 124, as holding that the term "owner or pro-

prietor" may include a lessee. He, however, expressly refrains from holding that the term used in the 10th statutory condition is open to that construction.

Mr. Magrath, one of the defendant company's agents at Edmonton by whom the policy was prepared, in reply to a question by plaintiffs' counsel at the trial, "would it have made any difference to your acceptance of the policy if you had known that the plaintiffs had the right to use the property on condition that they insure it?" replied that if he had known that the property was under lease in that way he would no doubt have mentioned it in the policy. I deduce from his evidence that if it had been within the discretion of the firm it would have accepted the plaintiffs' application for an insurance of their leasehold interest. It appears, however, that, although the firm was authorized to prepare the policies upon applications received in its office, it was not authorized to issue them without first submitting them to the defendant company's manager for his approval.

Notwithstanding the expressions of opinion in the reasons for judgment in *Davidson* v. *Waterloo Mutual Fire Insurance Company*, 9 O.L.R. 394, to which I have referred, I am forced to the conclusion that, by reason of the plaintiffs not having complied with the provisions of the 10th statutory condition, they cannot recover upon their policy.

To hold otherwise would be practically to hold that that condition is of no effect as I cannot conceive under what circumstances it could be of any effect if it could not be relied upon by the defendant company in the present case.

The condition is one that the Legislature has deemed it expedient to permit insurance companies to insert in their policies as a reasonable protection. The fact that in this case there was no fraud or intentional concealment on the part of the plaintiff, does not in my opinion render the condition the less binding upon them, as it was clearly their duty to read the policy and ascertain what conditions they were required to observe.

I give judgment for the defendant company with costs.

Action dismissed.

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TURRIFF v. R. L. KING.

Saskatchewan Supreme Court. Trial before Brown, J. January 28, 1913.

1. PHYSICIANS AND SURGEONS (§ II—39)—DUTIES—DEGREE OF CARE AND SKILL REQUIRED—MALPRACTICE.

The public practice of the profession of a physician involves an undertaking by the practitioner that he has the ordinary skill and knowledge necessary to perform his duty towards those resorting to him in that character; but he will not be answerable in an action for malpractice merely because some other practitioner might have used a greater degree of skill or because he himself might have used more care.

[Beven on Negligence, 3rd ed., 1162, specially referred to. See also *Town* v. *Archer*, 4 O.L.R. 383, 388; *Hodgins* v. *Banting*, 12 O.L.R. 117; *James* v. *Crockett*, 34 N.B.R. 540.]

Statement

ACTION for malpractice against a physician.

R. Mulcaster, for plaintiffs.

C. E. Gregory, K.C., and *F. W. Halliday*, for defendant.

Brown, J.

BROWN, J.:—The defendant is a medical practitioner, and this action is brought against him for damages resulting from alleged negligence on his part in the treatment of the plaintiff Isabella Turriff, whom I shall hereafter refer to as "the plaintiff."

About June 23rd, last, the defendant was called in to attend the plaintiff, who was suffering from a lumbar abscess. As a result of the trouble, the plaintiff was confined to her bed, and had been so confined for several weeks. She was suffering intense pain in the left side towards the back; her left leg was flexed, causing much pain; there was considerable nausea, accompanied at times by vomiting; and she also had a marked temperature. The defendant diagnosed the trouble either as rheumatism of the sciatic nerve or as neuritis, sometimes calling it the one and sometimes the other. The plaintiff had been treated for a stone in the kidney by Dr. Moreau, and the defendant was so informed on his first visit. The defendant, by way of treatment, prescribed medicine and ordered the leg to be massaged, and this treatment was continued during all the time that the plaintiff was under the defendant's care. The plaintiff, under this treatment did not shew any signs of improvement, and continued to suffer much pain, which was only intensified by the massage treatment. At the defendant's suggestion, on the 2nd day of July, the plaintiff was taken in an ambulance to the hospital, in order—as the defendant stated—that the leg might be stretched and the temperature reduced, and there the plaintiff was given an anæsthetic and the leg was stretched. This operation, however, did not appear to have any other result than to add to the suffering of the defendant. The leg, when released, became flexed again, and the massage treatment was

continued. After the leg was thus stretched, the plaintiff, under instructions from the defendant, endeavoured to walk around to some extent, but this, also, only served to intensify the suffering. Just shortly before the plaintiff was taken to the hospital, a slight swelling became noticeable over the kidney in the region of the pain and this swelling continued to get larger and more noticeable, until, by July 25th, it had become so large that it caused the ribs in that region to bulge out. On July 24th, the plaintiff left the hospital, and not having improved at all under the defendant's treatment, she called in another physician, Dr. Stewart Reid. On July 25th, Dr. Reid examined the plaintiff, and concluded at once that she was suffering from kidney trouble, and that the swelling was caused by the formation of a large abscess. On the day following this examination, Dr. Reid, accompanied by Dr. Strong, made a further examination, probing the abscess with a needle, and found that it contained pus; and he then concluded that it was an abscess of the kidney resulting from a stone in the kidney. For this abscess irrespective of its cause the evidence is conclusive that the only proper treatment was to cut down on it and evacuate the pus. The plaintiff was removed to the hospital on July 26th, and on July 27th, Dr. Reid operated, and took away from the abscess about two quarts of pus. Immediately after the operation the pain ceased, the leg assumed its normal position, and the condition of the plaintiff has ever since continued to improve. The defendant states that he was not aware of any swelling in the lumbar region, but the great preponderance of evidence is to the effect that he must have known of this swelling, that it was pointed out to him by the plaintiff, and that in any event he should have seen it and its presence should have constituted an important element in the diagnosis of the case. The temperature chart which was taken while the plaintiff was under the care of the defendant indicated the presence of pus. The symptoms which characterised this case—namely, pain in the lumbar region and a swelling there; the flexed limb, and its painful condition; the nausea; and the high temperature—together, point almost conclusively to the existence of a pus abscess in the lumbar region; while, on the other hand, flexion of the limb cannot be accounted for by any disease of the sciatic nerve, and there is no evidence that it is at all characteristic of neuritis. The condition of nausea has no connection with either neuritis or any disease of the sciatic nerve. The swelling over the lumbar region is not shewn to be in any way connected with neuritis or any disease of the sciatic nerve. In fact, one wonders how a mistake could have been made, because the text-books, portions of which were put in evidence, shew that the symptoms which characterize this case point conclusively to the presence of an abcess in the lumbar region, and that the only

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remedy for such a case is the one that was adopted by Dr. Reid with such satisfactory results. Neither the giving of medicine nor the massage treatment was of any use as a treatment for this disease.

When a medical man finds that his treatment, after fair trial, does not assist the patient, one wonders that he is not willing to nobly admit defeat and advise the calling in of someone who may be more expert. Such a course would not, it seems to me, be at all humiliating, and in any event no man with a proper appreciation of the value of human life should hesitate for a moment to adopt it. In this case it is very fortunate that the plaintiff herself called in more expert assistance, as otherwise very soon the consequences would probably have been of a most serious character. The amount of skill required of a medical practitioner is set forth in Beven on Negligence, 3rd ed., pp. 1156, 1161, as follows:—

> The principle of most extensive scope, prevailing through all classes of skilled labour, and not confined to medical practitioners, is that he who undertakes the public practice of any profession undertakes that he has the ordinary skill and knowledge necessary to perform his duty towards those resorting to him in that character. . . . The general rule of skill required from a medical or surgical practitioner is formulated by Erle, C.J., that a medical man is certainly not answerable merely because some other practitioner might possibly have shewn greater skill and knowledge; he is bound to have a degree of skill and knowledge which is undefinable, but which must be a competent degree in the opinion of a jury. It is not enough that medical men of far greater experience or ability might have used a greater degree of skill, nor that the person charged himself might have used more care. The question is whether there has been "a want of competent care or competent skill" to such an extent as to lead to the bad result; or, as it is stated in an American case, whether the amount of care and skill bestowed is up to "the average of the reasonable skill and diligence ordinarily exercised by the profession as a whole, not that exercised by the thoroughly educated, nor yet that exercised by the moderately educated, nor merely of the well-educated, but the average of the thorough, the well, and the moderate—all, in education, skill, diligence, etc.;" and to this must be added—with allowance for particular circumstances of position, whether urban or rural, near a centre of population or remote.

I am satisfied under the evidence that the defendant did not exercise in this case that degree of skill and diligence that is thus required.

As to damages; the plaintiff was put to unnecessary expense at the hospital while the defendant attended her, and she unnecessarily suffered intense pain for at least two or three weeks, pain which was only intensified by the defendant's treatment. I do not find under the evidence that the plaintiff has lost her kidney as a result of the defendant's treatment, although

it is so alleged by the plaintiff. The evidence leaves that very much in doubt. Under the evidence it is quite possible that her kidney is still unimpaired; in any event, it is quite probable that, if impaired, the impairment largely took place before the defendant was called in to take charge of the case. The damages which I allow are:—

Hospital account	$ 22.00
Medicine	2.00
For pain and suffering	200.00
Total	$224.00

I allow the plaintiffs their costs on the District Court scale, but without any right of set-off on the part of the defendant.

Judgment for plaintiff.

MOON v. MOON.

Saskatchewan Supreme Court. Trial before Brown, J. January 29, 1913.

1. DIVORCE AND SEPARATION (§ III A—18)—GROUNDS FOR SEPARATION — LEGAL CRUELTY—LANGUAGE.

A charge made by a husband against the chastity of his wife without a shadow of foundation in fact, does not constitute legal cruelty justifying an action for alimony on the part of the wife, though the charge was made by the husband in the presence of his wife and their little girl and as a result thereof they left the husband's house and remained away up to the time of bringing the action, the husband in the meantime expressing a willingness to take them back, but not retracting or apologizing for making the charge, but, on the other hand, persisting in denying that he said it.

[*Russell* v. *Russell*, [1897] A.C. 395, followed.]

2. COSTS (§ I—2)—ON DISMISSAL—SPECIAL POWER IN ALIMONY ACTIONS.

The court may in a proper case order the defendant husband to pay his wife's full costs of an alimony action where satisfied that his conduct has been reprehensible although insufficient to constitute legal cruelty so as to entitle her to a decree.

Statement

TRIAL of an alimony action.

The action was dismissed.

J. F. Bryant, for plaintiff.

D. Mundell, for defendant.

Brown, J.

BROWN, J.:—This is an action for alimony brought by the plaintiff against the defendant, her husband. The parties were married in the year 1898, and have lived together as man and wife practically all the time since then. They have one child, a girl now thirteen years of age, and who, with the plaintiff, were the only witnesses put forward by the plaintiff at the trial.

At Christmas, 1911, the plaintiff and the defendant gave a Christmas party, which was attended by a number of the

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neighbours and friends, and was continued throughout the night. The defendant seemed to think that the plaintiff did not use him just right on this occasion. He complained that she refused to sing and dance with him, and that she was too free with other men who were present. There is absolutely nothing to shew that the plaintiff was guilty of any impropriety whatever, and only the jealous disposition of the defendant accounts for the complaint which he made. On the day following the party, the defendant used some strong language towards the plaintiff, and with the result that considerable feeling was aroused between them. A few days after this incident, and, I assume, largely as a result of it, the defendant accused the plaintiff of having come home from a dance held some time previously in company with a man called Sapple, and of allowing Sapple to stay with her all night, meaning thereby that she had been guilty of adultery. He made the charge in the presence of their little girl, and persisted in the truth of it notwithstanding the denial on the part of the plaintiff. There was absolutely no ground for any such accusation. As a matter of fact the plaintiff went to the dance in question and came home again with Walter Moon, the defendant's brother. The plaintiff and her little girl, as a result of such accusation, then left the defendant's place and have remained away ever since. The defendant subsequently interviewed the plaintiff, and although he asked her to return to his home he reiterated the charge, saying, "It was God's truth, and furthermore, that if she had a child it would not be his, because he had not slept with her for six months." The defendant did not, by his pleadings, or in his evidence contend that the charge thus made by him was true, but simply denied that he ever made it. The evidence given by the plaintiff and her daughter at the trial clearly shews that the cause of the separation was the charge thus made and subsequently persisted in by the defendant. There were a number of other matters of complaint, covering a period of years, put forward by the plaintiff at the trial, but I am satisfied that at the time the plaintiff left the defendant none of these matters were regarded as serious by her, that they did not in any way cause her to leave the defendant, and have not since influenced her in staying away. In fact, I find that if the defendant had withdrawn the charge that he made, instead of persisting in it, the plaintiff would have gone back to live with him. That being so, it cannot be very well contended that the other matters complained of constitute a material element in the consideration of this case. The defendant through his solicitors informed the plaintiff that he was ready and willing to take her back, and during the trial, while in the witness-box, he himself made a statement to the same effect. While making this profession of regard for his wife, however, the defendant does not

in any way retract or apologize for making so foul a charge or for his contemptible conduct in connection therewith. I am not disposed to deal leniently with the defendant under the circumstances, and yet I must administer the law as I find it. The ground on which the plaintiff bases her right to recover is that of cruelty, and under the evidence that is the only possible ground open to her.

Does the charge made by the defendant against the chastity of his wife, and persisted in by him without a shadow of foundation in fact constitute cruelty such as is contemplated in an action of this character? The case which is the recognized authority on the point in question is that of *Russell* v. *Russell*, [1897] A.C. 395, being a decision of the House of Lords; and there Lord Herschell, in delivering the judgment of the majority of the Court, lays down the law that in order to constitute legal cruelty the treatment must be such as to cause bodily injury or a reasonable apprehension of bodily injury. The charges made by the wife against the husband in that case were of the most cruel character, as the word "cruel" is ordinarily understood, and yet, although the husband was a member of the House of Lords, it was held that legal cruelty had not been established. In view of the law as laid down by that authority I must give judgment for the defendant. In doing so, however, I am glad to have precedent for ordering, and I do order, the defendant to pay the plaintiff's full costs of action.

Judgment for defendant.

McCORMICK v. TRIGGS.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. January 30, 1913.

1. PLEADING (§ I N—118)—AMENDMENTS—AT CLOSE OF TRIAL — APPLICANT'S HANDS NOT CLEAN, EFFECT.

Where a plaintiff suing for purely equitable relief is shewn to be disentitled thereto because of his own reprehensible conduct in the transaction, and his claim at law, if any, is contingent upon a future payment by another of certain purchase money, the plaintiff's action should be dismissed without permitting him to amend his pleadings so as to obtain a declaration of such contingent legal rights; the court, under such circumstances should leave the plaintiff to establish such rights by action at law after they shall have accrued.

Statement

APPEAL by the defendants from judgment of Clement, J., in an action for specific performance of an agreement whereby the defendant gave the plaintiff an option to purchase certain real estate.

The appeal was allowed, MARTIN, J.A., dissenting.

W. E. Martin, for appellant.

W. J. Whiteside, for the respondent.

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MACDONALD, C.J.A.:—This action, as framed in the statement of claim, is for specific performance of an agreement whereby the defendant gave the plaintiff an option to purchase fifty acres of land. The plaintiff claims that he elected to take the land and that he re-sold it to one Nichols at an advance of $25 per acre. He then obtained defendant's signature to an agreement of sale to Nichols. Afterwards, when it was found that the description of the land was defective or uncertain, defendant was asked to sign a new agreement with Nichols with a corrected description, which he refused to do. Nichols, who is not a party to this action, refused to give up the signed agreement, the result being that the defendant became bound to Nichols at the request of the plaintiff.

The defendant's contention is that the so-called option agreement was given for the purpose of constituting the plaintiff, or his *alter ego*, the People's Trust Company, Limited, exclusive sales agent for the time therein mentioned, and that it was so represented to him. He is willing to carry out the sale to Nichols, but contends that he is entitled to the whole purchase money, and liable only to the plaintiff for commission payable under the express terms of the so-called option agreement. It was conceded at the close of the trial that under these circumstances, the plaintiff could not succeed in this action as framed, but the learned Judge in effect amended the pleadings to conform to the facts brought out before him, and made a decree declaring that the option agreement was valid, and that upon Nichols making the first payment of purchase money to the defendant, the plaintiff should become entitled to $1,250 thereout, being the amount of his said profit on the re-sale.

It is by no means certain that the sale to Nichols will ever be carried out, even if it be one which could be enforced, as to which I express no opinion.

The plaintiff invokes the assistance of a Court of equity in a transaction which, leaving aside any question of pleadings for the moment, was entirely discreditable to the plaintiff. The relationship of principal and agent prior to the transaction in question is admitted, and we have the evidence of Cook, manager of the People's Trust Co., Ltd., for whose benefit the option was obtained, admitting in the box that he dared not tell the defendant the true nature of the transaction. The learned Judge intimates very plainly that in his opinion the defendant, who is an illiterate man, was "over-reached" by the plaintiff and the said Cook.

In these circumstances, and in view of the equitable nature of the relief sought, I have, with respect, come to the conclusion that the action should have been dismissed, and that the plaintiff should not have been assisted by an amendment of the plead-

ings at the close of the trial, but should have been left to his action at law when the time shall come, if ever, for making and substantiating, if he can, a claim upon the defendant for moneys which he shall have received from Nichols on account of the purchase price.

I would allow the appeal and dismiss the action.

IRVING, J.A.:—I agree with the judgment of Macdonald, C.J.A.

MARTIN, J.A. (dissenting):—In the light of the view the learned trial Judge took of the evidence, which I think he was fully justified in doing, and the conclusions on which are embodied in the formal judgment, I am unable to see how any valid exception can be taken to his action in allowing the amendment set out at p. 70 of the appeal book, and it follows, in my opinion, that the judgment he pronounced was the correct one in the result. Though the judgment does not expressly so state, as it might better have done, yet in substance it really, and in effect declares the defendant to be trustee, *pro tanto*, for the plaintiff in the carrying out of the special arrangement made between them as to the manner in which their contract should be specifically performed. Looked at in this light, on the main facts as found, and recited in the judgment, I think, but not without some doubt, because of the view taken by two of my learned brothers, that it may be supported as it stands, and in such case the Statute of Frauds presents no obstacle, nor is there any necessity to make Nichols a party to the action. We would not be justified in assuming that Nichols will not carry out his bargain, nor indeed are we concerned therein. Any objections on his part, so far as they appear, are simply matters of survey and conveyancing and may easily be overcome.

GALLIHER, J.A.:—I agree with the judgment of Macdonald, C.J.A.

Appeal allowed, MARTIN, J.A., *dissenting*.

COMO v. CANADIAN NORTHERN ALBERTA R. CO. and CANADIAN NORTHERN R. CO.

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Alberta Supreme Court. Trial before Walsh, J. January 31, 1913.

1. EMINENT DOMAIN (§ III A—105)—EXPROPRIATION PENDING A TRESPASS ACTION.

Where, pending an action against a railway company for trespass, the company takes expropriation proceedings in respect of the land in question, judgment may be given for the plaintiff for such damages as he has sustained apart from the compensation which he would be entitled to claim in the arbitration to be held in respect of the expropriation of the land.

TRIAL of action for damages for trespass to land.

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E. B. Edwards, K.C., for the plaintiff.
S. B. Woods, K.C., for the defendant.

WALSH, J.:—I think that the plaintiff's claim in respect of all matters which can properly be disposed of by the arbitrators appointed under the order of Mr. Justice Scott on the 27th January, 1913, should be determined by that tribunal, and I therefore do not award the plaintiff anything in respect of the same as he will get by the award of the arbitrators everything that he is entitled to in that respect. I think that the sum of twenty-five dollars paid into Court by the defendant fully covers the damage resulting to the plaintiff from the trespasses complained of over and above those for which compensation will be awarded to him by the arbitrators. The judgment will, therefore, be for the plaintiff against the Canadian Northern Alberta R. Co. for twenty-five dollars.

I think that the plaintiff is entitled to his full costs of suit on the Supreme Court scale. He was within his strict legal rights in commencing action as he did, and the defendant the Canadian Northern Alberta R. Co. was, upon the facts which existed at the time of the commencement of the action, undoubtedly liable to him for the trespasses committed by it. This condition of affairs remained until very near the trial of this action. This defendant's statement of defence was amended on January 13, 1913. By this amended defence it alleged a payment into Court of twenty-five dollars but the certificate of the clerk of the Court, which has been left with me since the trial, shews that, as a matter of fact, it was not paid in until the 24th day of January. I do not think the expropriation proceedings became effective until the order made by my brother Scott on January 27, 1913, which was within two days of the trial. Upon these facts I think that this defendant did not place itself in its proper position towards the plaintiff until two days before the trial began and for this reason I cannot see that he should be deprived of any of his costs. I will, however, fix the counsel fee at an amount which will, I think, under the circumstances, do ample justice to all parties.

I cannot help thinking, as I said during the trial, that the plaintiff has, to some extent at least, taken advantage of a mistake made by this defendant through some unexplained cause. If the agreement which he signed had been with this defendant company instead of with the Canadian Northern he certainly would have been confined to its terms in the amount of his compensation, and it seems to me that he is, to some extent at any rate, taking advantage of this mistake to press the claim which he otherwise would not have had. At the same time, this defendant is not entirely free from blame. The agreement with the plaintiff was made on June 13, 1910, and the plaintiff got his title

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in January, 1912. Under the terms of the agreement the purchase money should have been paid to him then, and no reason has been given for the long delay which took place after that in endeavouring to make a settlement with him. There have, undoubtedly, been faults on both sides.

As to the defendant, the Canadian Northern R. Co., there does not appear to have been the slightest excuse for joining it in this action. If the laying of the grade across the plaintiff's land was done by this company, as the plaintiff, in his evidence alleged, it had the right to do it under the agreement to which I have referred. If, on the other hand, this work was not done by this company, as I fancy is the fact, then it committed no trespass and can be liable in no manner to the plaintiff. The action is, therefore, dismissed as against this defendant, with costs.

Action dismissed against C.N.R. Co. and judgment for plaintiff against C.N.A.R. Co.

REICHNITZER v. EMPLOYERS' LIABILITY ASSURANCE CORPORATION.

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Feb. 28.

Ontario Supreme Court, Boyd, C. February 28, 1913.

1. BONDS (§ II B—23)—FIDELITY INSURANCE BOND.

The right of recovery under a fidelity insurance bond, given for the purpose of guaranteeing the assured against loss by reason of any default of a named employee, is not defeated merely by reason of the business of the assured being carried on in the name of a company in which the employee had been given a right to a share of the profits by his employer to encourage greater business activity on the employee's part, where the entire capital had been contributed by the assured and the insurance or bonding corporation knew the true state of affairs when it entered into the bonding contract.

Statement

ACTION to recover from the defendant corporation, $5,000 on a policy to guarantee the plaintiff against loss by reason of the default of his employee, the defendant Munns, and to have the policy reformed so as to express the true intent.

Sir George C. Gibbons, K.C., for the plaintiff.

T. G. Meredith, K.C., for the defendants.

Boyd, C.

BOYD, C.:—The justice of the plaintiff's claim commends itself; not so the defences raised by the corporation, which savour of technicality. For value paid by the plaintiff, the defendants (the corporation) undertake to guarantee the honest dealing of the defendant Munns in his conduct of the business of the plaintiff in Europe and at Berlin. The agent of the defendants who made the contract knew that the essence of the transaction was to protect the plaintiff, and that the Dressed Casing

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Company was substantially a synonym for the plaintiff, who had put all the capital in, and merely shared profits with his employee Munns to encourage him to greater exertion and faithfulness. The guarantee company had no reason to suppose or understand that their engagement was other than this.

The evidence leads me to believe that Munns has been guilty of considerable defalcation; the exact extent cannot perhaps be measured till the accounts are taken as to his interest in the Dressed Casing Company—but, apart from this precision, the circumstances proved indicate that he has dishonestly made away with the money and goods of the plaintiff to the extent of, say, $2,000.

The judgment may be entered for this amount with costs, subject to variation at the instance of either party by reference to the Master. If such reference is desired, and the amount is reduced, costs of reference will be paid by the plaintiff; if it is increased, costs of reference will be paid by the defendant corporation.

The Dominion Dressed Casing Company may be added as a party now or in the Master's office (if there is a reference), and is to be bound by the judgment.

Judgment for plaintiff.

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WHIDDEN v. McDONALD.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., and Russell, Drysdale, and Ritchie, JJ. March 3, 1913.

1. FRAUDULENT CONVEYANCES (§ III—10)—ADVANCES MADE BY ADMINISTRATOR TO HEIR ON ACCOUNT OF SHARE OF ESTATE—DEED TO ADMINISTRATOR—RELATION BETWEEN ADMINISTRATOR AND HEIR.

Where the administrator of an estate advances money to one of the heirs on account of his share of the estate, taking a deed to himself on account of such advances, the advances made do not constitute the ordinary relation of debtor and creditor, and the deed taken is not open to attack as being in effect a fraudulent preference as against creditors in contravention of the Assignments and Preferences Act, R.S.N.S. 1900, ch. 145.

Statement

APPEAL from the judgment of Laurence, J., and the order made thereon setting aside a conveyance made to defendant, administrator of the estate of John McDonald, deceased, by Alexander McDonald, one of the heirs of said John McDonald, in consideration of advances made to him by the administrator on account of his share in the estate. The deed was attacked as made fraudulently against creditors in contravention of the statute.

C. J. Burchell, K.C., in support of appeal.

J. B. Kenny, contra.

Russell, J.

RUSSELL, J.:—John McDonald, the father of Alexander, Andrew and Frank McDonald, died in November, 1909, leaving

an estate worth about $6,000. Administration was taken out by Andrew and it was arranged among them that the whole property, real and personal, should be "pooled." The precise meaning of this term is not explained, but it is fairly to be inferred from the conduct of the parties that Andrew was to manage it for all concerned and as a matter of fact he proceeded to advance from time to time moneys to Alexander and also to Frank on account of their respective shares of the property. A question was made at the trial as to the date of this arrangement. Andrew said it was made "from the start," by which he explained that he meant from the time administration was taken out, and the trial Judge so understood it, because when Mr. Griffin contended that the plaintiff should have particulars as to this agreement, his Lordship said: "We have it that it was made immediately after he was appointed administrator." Andrew, later on, endeavoured to sell the property and advertised it in the *Casket*, but there were no offers or inquiries. He then wrote to his brothers desiring that they should take it over. He did not wish to take it over himself and preferred that they should do so, but although they made efforts to buy it they did not succeed. One lot, however, had been sold. Failing a satisfactory disposal of the property, Andrew continued to make advances to Alexander from time to time as he had been doing all along on account of his share. Down to November 30, 1910, he had advanced $1,499.22 in this way. There is clear documentary evidence as to part of this amount that it was advanced on account of Alexander's share of the estate. It is in the form of orders addressed to Andrew as administrator but signed by Alexander as "one of the heirs" to the estate of John McDonald. The address to the administrator is explained by the arrangement as to pooling and the signature as "heir" while not in itself conclusive, points, *primâ facie*, to an interest in the real estate as the subject of the transactions. But I really do not know why I should labour this point because it does not seem to me to make any difference whether the money was so advanced on real or personal estate or on both real and personal. The essential thing is that it was paid by way of advance to the brother on account of and as part of his share in the estate of their common father. There is a casual expression as to which I, at first reading, thought it must be conceded that it gave some colour to the notion that the defendant had treated his brother as a debtor, but on second thoughts it becomes clear that it proves the very opposite. Speaking of a certain receipt in evidence he says he does not remember the date, "but it was before I sent Alexander an account that he was indebted to me as administrator." The admission of the relation of debtor and creditor is rendered perfectly innocuous by the last two words. If Andrew had been advancing money to Alexander

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on the security of his share the latter would have been indebted to the former personally, not as administrator. When he speaks of him as being indebted to him "as administrator," it becomes perfectly clear that his advances were made to him on account of his share of the estate which had been pooled, as they called it, and which Andrew was managing for the benefit of all concerned. That this is his meaning is rendered certain from the fact that in the same breath in which he speaks of Alexander being indebted to him as administrator he refers to the receipt as a memorandum of cash and goods advanced to him on account of his share as one of the heirs of the estate. And when we examine the receipt referred to, which was given November 30, 1910, long before the conveyance attacked in this action, we find that it is an acknowledgment from Alexander that he had received from Andrew C. McDonald as administrator of the estate of their father the sum of $1,499.22 "on account of my distributive share of the estate."

It would be impossible after this settlement of accounts for Andrew to treat Alexander as a debtor as to this amount. He was not merely lending him money on the credit of his share of the estate. He was making him advances as part of his share of the estate. If he had at this stage of the proceedings sued to recover back the money as a loan, there would have been a perfect defence to the action. It was not a loan, it was an advance and was so treated by the brothers. When the amount of the so-called distributive share was fully advanced Andrew would be entitled to a conveyance and transfer of the interest, real and personal of Alexander in the property, and it would be only upon a refusal to so convey and transfer that Andrew would be entitled to fall back upon his count for money received. The greater part of the share must have consisted of real estate, because it is in evidence that the personal property only amounted to $150, of which Alexander would be entitled to only $50. But as I have already said, I do not know that this fact is of any importance one way or the other.

The advances continued after November 30th, and on the date of the final transactions between the brothers, May 15 or 16, 1911, the amounts so advanced to Alexander on account of his share of the estate aggregated $1,980. It was then agreed that Andrew should take a deed of the unsold portion of the real estate at a valuation of $1,690. He then raised $1,500 on a mortgage of this property, $1,200 on one lot and $300 on another and settled with his brother Alexander on the basis of the valuation mentioned, paying him $20.02 as the balance of his share. He also took a bill of sale of Alexander's individual personal property for which he advanced him a further sum of $140, the validity of which is not attacked on this appeal.

It is now claimed on behalf of certain creditors of Alexander that this conveyance of the real estate is void against them because made in contravention of the Act against preferences and the learned trial Judge, although he seems to have held, as the evidence amply warranted him in holding, that the payments by Andrew to Alexander were made on account of his share in the estate, nevertheless has treated Andrew as an ordinary creditor and has set aside the conveyance to him as a preference. His exact words are as follows:—

> The defendant, Alexander, became indebted to a number of persons, the plaintiff being a creditor to $260, and in payment of his debts, from time to time, gave orders on his brother Andrew (the administrator) which orders were in most cases paid by Andrew as against Alexander's share in the estate until he had advanced or paid in all the sum of $1,980.

Again he says:—

> I must regard Andrew as to the money advanced by him from time to time as representing or on account of Alexander's interest or share in the land as a creditor to that extent and Alexander his debtor to that amount.

The correspondence between Andrew McDonald and Chisholm, Sweet & Co., clearly shews that these creditors understood that the advances to Alexander were being made as part of his share of the estate, and, as to the plaintiffs, it must have been plain to them as early as August 13, 1910, that the defendant was advancing on account of Alexander's interest in the property. If this was the understanding between Alexander and Andrew, I do not see how it can be said, that the transfer from the former in pursuance of this undertaking can be regarded as anything more than what the transferor was equitably under obligation to do. Andrew was in effect by his advances purchasing Alexander's interest in his father's property. They were tenants in common of the property and it seems to me a very singular condition of the law if one tenant in common can advance to his co-tenant moneys from time to time on account of his share in the common estate and when he has at length paid the last instalment and taken a conveyance of the property, be told that it is a fraud on creditors. The enormity of the proposition in the present case is emphasized when we consider that the money paid by Andrew to his brother was to a very large extent, or at all events to a very considerable extent, supplied in order that he should satisfy the demands of some of the very creditors in whose interest the conveyance is now attacked as a preference. That is to say, Andrew pays for Alexander's share of the property in advance to enable him to satisfy *pro tanto* his creditors and when he obtains the consideration for his advances he is asked to surrender it for distribution among the same creditors and come in along with them for a dividend on his advances. He is not

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to be as well off as they are even as a creditor. They get the money that he paid for the land, or a large or considerable portion of it, and then get their proportion of the land that he has already paid for, while he is restricted to his dividend out of the land after having paid for it in full. There must be something wrong about that proposition, and I think the fallacy is in considering Andrew in the light of a creditor at all. He is a purchaser. When he is advancing money on account of Alexander's share there is an implied agreement that he is acquiring an interest in that share. When he had advanced the whole amount of the share it did not require any express agreement that he should have the share. That was the very consideration for which he was paying out his good money.

The position of the parties may have been equivocal before November 30, 1910, and it might have been changed after that date if anything had come of the negotiations looking to the taking over of the property by Alexander or Frank. But nothing came of those negotiations and the situation whatever it was in November 30, 1910, remained unchanged except for the additional payments which certainly could not affect Andrew's position for the worse. On that date it was definitely understood and explicitly acknowledged that the payments made by Andrew were advances on account of Alexander's share of the property. When one pays money to another for property to which the other has the title the implication is irresistible that he means to acquire an interest in the property. When the other acknowledges receipt of the payment on such account he does not expect to be called upon to repay it and he certainly does not mean to hold the money and the property too. It must be their mutual intention that when the property is wholly paid for it will be transferred to the purchaser.

The essence of fraudulent preference is that something has been abstracted from the estate of the debtor and engrossed by a single creditor. If Andrew was not a creditor and he did not take anything from the debtor's estate, the money that he advanced for Alexander's property stood for the creditors in the place of the property. If the property was obtained on a fraudulent undervaluation, of course the transaction could be attacked on that ground, but nothing of that kind is contended for, and the transaction was a perfectly honest one. I therefore think that the appeal should be allowed with costs.

Drysdale, J.

DRYSDALE, J.:—The advances in this case were made on account of the interest of the defendant, Alexander McDonald, the grantor, in his father's estate. Inasmuch as the personalty belonging to the father was a very small proportion of the estate the agreement to advance must, I think, in the light of the surrounding circumstances be construed as an agreement to ad-

vance money on the share of the real estate coming or belonging to the defendant from his father. The advances so made should not, I think, be treated as creating the ordinary position of debtor and creditor, but should be considered as a specific advance on the heir's interest in the real estate. I do not think the position was changed by a common consent to offer the real estate for sale, but that such offer should only be considered as a fair attempt to ascertain values. No purchaser offering, the defendant took a deed of the lands upon which he made the advances, and which it seems only fair to say he had the right to. This, I think, destroys the suggestion that it was a preference conveyance and open to attack under the statutes relating to unjust preferences.

I would allow the appeal.

RITCHIE, J.:—The plaintiff brings this action on behalf of himself and the other creditors of Alexander McDonald.

These creditors, including the plaintiff have received practically the full amount of Alexander's share in his father's estate, the same having been paid to them by the defendant, Andrew McDonald, upon orders drawn upon him by the defendant, Alexander. The plaintiff now, on behalf of himself and the other creditors asks for a declaration that the deed from Alexander to Andrew given in consideration of the advances made by Andrew, be set aside as being an unjust preference under the statute. If this attempt is successful the creditors will have the proceeds of Alexander's share advanced by Andrew, and also (subject to the mortgages) have Alexander's interest in the lands.

This is so obviously inequitable that it shocks the conscience. I agree that if the relationship between Andrew and Alexander was merely that of debtor and creditor, then to save this conveyance from being set aside as a preference there must be a definite antecedent agreement, but the position of the parties is in writing, exhibit G/e as follows:—

Antigonish, Nov. 30, 1910.

$1,499.22.

I acknowledge having received to date from Andrew C. McDonald, administrator of the estate of John McDonald, late of Antigonish, builder, the sum of fourteen hundred and ninety-nine dollars and twenty-two cents on account of my distributive share of the estate. This supersedes all prior receipts if any.

(Sgd.) ALEXANDER McDONALD.

The day after this document was given and accepted, shewing the real transaction between Andrew and Alexander, if Andrew had brought an action for money lent, I think he could not have recovered, because the money was not a loan, but an advance on account of Alexander's share. There is, I think, in addition to exhibit G/e satisfactory evidence that this was

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the arrangement from the time when Andrew made the first advance.

Except to a *bonâ fide* purchaser for value without notice, I am of opinion that Alexander could not have made a valid conveyance of his interest in the lands to any person other than Andrew because Andrew having advanced Alexander's share upon the faith of receiving his interest in the estate equitable considerations arise from the circumstances of the case which shew it to be unconscionable that Alexander should convey to anyone other than Andrew. This being so, we have a clear case of a trust by implication or construction of law and to trusts of this class the Statute of Frauds has no application. I do not see how the creditors can be in any better position than Alexander.

I agree with the views expressed by my brother Russell, and it is therefore not necessary for me to prolong this opinion.

I would allow the appeal with costs.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—With considerable doubt, I concur in the judgments read. My doubt is in the first place as to whether there was a valid agreement proved as required under the authorities referred to in *McCurdy* v. *Grant*, 32 N.S.R. 520, in our own Court, and in the next place, whether the parties occupied the position of debtor and creditor. That is the real doubt I have, but under the circumstances, I will not dissent.

Appeal allowed with costs.

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PROCTOR v. PARSONS BUILDING CO.

(Decision No. 1.)

Saskatchewan Supreme Court, Parker, M.C. March 8, 1913.

1. PLEADING (§ I—I—65)—ORDERING PARTICULARS—EMPLOYER'S LIABILITY ACTION.

In a workman's action to recover from his employer damages for personal injuries due to the alleged defective condition of a crane used in building operations, in which it is alleged in plaintiff's pleadings that the crane and its equipment was defective and in an unsafe condition and unfit to be used for the work, and by way of particulars it is charged: (1) that the crane was badly constructed; (2) that it was made of poor material, and (3) that its chain was defective, a motion for further particulars is properly refused if it appears that the defendants have equal or better means of knowing, than would the plaintiff, any further details as to the condition of the crane which the defendants were operating at the time of the accident.

[*Spedding* v. *Fitzpatrick*, 38 Ch.D. 410, applied; *Rostrom* v. *C.N.R. Co.*, 3 D.L.R. 302, and *Lafvendal* v. *Northern Foundry Co.*, 2 D.L.R. 155, 22 Man. L.R. 207, referred to.]

2. PLEADING (§ I—I—65)—PARTICULARS—RES IPSA LOQUITUR.

In so far as a personal injury action depends upon the doctrine of *res ipsa loquitur*, no order for particulars should be made.

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Statement

THIS is an action for damages for injuries caused by the alleged defective condition of a crane operated by the defendants in the construction of a building at the corner of 5th avenue and Broad street in the city of Regina, and in connection with which the plaintiff was employed at the time of the accident. The defendants make this motion for particulars of paragraphs 1, 2, 3, and 4 of the statement of claim. Paragraph 1 sets up that the plaintiff, at the time of the accident, was employed as a carpenter to do certain work on the building in question, and particularly to assist in the hoisting of building material by means of the alleged defective crane.

J. N. Fish, for the applicant (defendant).
F. B. Bagshaw, for the plaintiff.

Parker, M.C.

PARKER, M.C.:—I do not think any further particulars of the nature of the employment need be given. If there are any further facts in connection with the plaintiff's duties, these should be as much within the knowledge of the defendants as of the plaintiff himself.

Paragraph 2 is as follows:—

> By the negligence and default of the defendant the said crane with its equipment was defective and in an unsafe condition and unfit to be used for the said work which the defendants well knew or ought to have known, but of which the plaintiff was ignorant. To wit: the said crane was badly constructed, of poor material, and too light to be used for the said work, and the chain of the said crane was defective and unfit and unsafe for the said work.

Counsel for the plaintiff relied on the doctrine of *res ipsa loquitur* and contended that he was not bound to furnish any further particulars than those set out in paragraph 2. It seems to be well settled that if the doctrine of *res ipsa loquitur* applies, no particulars are necessary: *McCallum* v. *Reid*, 11 O.W.R. 571. This doctrine is stated in the case of *Rostrom* v. *C.N.R.*, 3 D.L.R. 302, as follows:—

> The principle of *res ipsa loquitur* applies in cases where there was a duty to take care, and danger was to be anticipated unless care was exercised; and means that where, under such circumstances, an accident happens, the occurrence itself raises a presumption of negligence.

This doctrine was applied in the case of *Lafvendal* v. *Northern Foundry Co.*, 2 D.L.R. 155, 20 W.L.R. 714, 22 Man. L.R. 207, and the circumstances there are sufficiently similar to the present case to impress me with the contention of the plaintiff's counsel, that in this action he may be entitled to rely upon the doctrine in proving the plaintiff's case.

Aside from this, however, there are two specific allegations of defects, namely, that the crane was too light to be used, and

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that the chain of the crane was defective and unfit and unsafe for the said work. I do not see how it can be possible for the plaintiff to give any further or better particulars, as any information upon these allegations, or any others, with respect to the condition of the crane should be as well, or better known to the defendants as to the plaintiff. And as stated by Cotton, L.J., in *Spedding* v. *Fitzpatrick*, 38 Ch.D. 410:—

> The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense and avoid allowing parties to be taken by surprise.

If the plaintiff at the trial is unable to rely on the doctrine of *res ipsa loquitur* and is obliged to prove some specific acts of negligence, it is quite possible that he may have to rely upon the evidence of some of the officers or servants of the defendant company who may be adverse to him. There seems to me, therefore, to be very little likelihood of the defendants being ignorant of what case they have to meet, or of being taken by surprise at the trial. Under similar circumstances, Anglin, J., in *Smith* v. *Reid*, 12 O.W.R. 659, refused to order particulars.

As to paragraphs 3 and 4, the plaintiff sets up several general and specific injuries, *i.e.*, the loss of the sight of one eye, injuries to his right arm and shoulder, his left hand and forearm, his hip, his shin, his face, and lastly, his nervous system. Paragraph 3 ends with the words, "and is otherwise injured," and it is to these words that the defendants object. I do not think further particulars of the plaintiff's injuries should be ordered. He will get damages, if at all, only for such injuries as he proves resulted from the accident. If he does not prove that he was injured "otherwise" than as he alleges, he will get no compensation therefor.

I think the motion should be dismissed with costs in the cause.

Motion dismissed.

Re TAYLOR and CANADIAN NORTHERN R. CO.

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. March 17, 1913.

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Mar. 17.

1. EMINENT DOMAIN (§III C 1—148)—RIGHTS OF OWNER—VALUE AT WHAT TIME—RAILWAY ACT (CAN.).

The exception of arbitrations then "pending" from the amendment made by 8 and 9 Edw. VII. (Can.) ch. 32, to the Railway Act, R.S.C. 1906, ch. 37, as to the time in relation to which the value of property expropriated is to be fixed where title is not acquired by the railway within a year from the date of depositing the plans, does not apply so as to exclude the application of the amending Act, unless the arbitrators had taken office before the statute took effect after having been sworn in under sec. 197; so where prior to the amending statute (1909), an order had been made appointing arbitrators, but one of them declined the appointment and a new arbitrator was not appointed until after the passing of the amending Act, the "arbitration" was not "pending" when the latter Act was passed.

[*Robinson* v. *C.N.R. Co.*, 17 Man. L.R. 583, referred to.]

Statement

APPEAL from award of arbitrators made under the provisions of the Railway Act, R.S.C. 1906, ch. 37.

The appeal was allowed, CAMERON, J.A., dissenting.

A. B. Hudson and *H. V. Hudson*, for Taylor.

P. A. Macdonald, for the Canadian Northern R. Co.

Howell, C.J.M.

HOWELL, C.J.M.:—In this matter, the railway company desired to acquire lands to extend their station grounds, not under sec. 177, but under sec. 178 of the Dominion Railway Act, and, having got the necessary order, they were required by sub-sec. 6 to deposit with the registrar of deeds "such duplicate authority, plan, profile, book of reference and application." I assume that the "application" referred to in that sub-sec. is a copy of the "application in writing" referred to in clause (*b*) of sub-sec. 3, a notice of which is to be served on the owner by sub-sec. 2.

I think sec. 191 clearly is intended only to refer to the acquiring of the right of way provided for under secs. 159, 160, and 177, and sec. 192 is for the purpose of acquiring title to this right of way, where the owners are unwilling to sell, and I am fortified in this by the language used in sub-sec. 7 of sec. 178, wherein it is provided that "all the provisions of this Act applicable to the taking of lands without the consent of the owner for the right of way or main line of the railway shall apply, etc.," and then follows the exception that the requirements of secs. 159 and 160 as to filing plans shall not be necessary in matters coming under sec. 178.

This matter was submitted to the Board on September 22nd, 1906, and on that day an order was made "That upon and subject to the conditions hereinafter set forth the applicant company be and it is hereby given authority to take and acquire the lands and premises hereinafter described as follows:" and the papers required by the Act were deposited in the registry office on the 1st day of November following.

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Not until the deposit of this plan did the company have any power to take this property. Section 192 states that the deposit in the registry office "and the notice of such deposit" shall be notice to all. Now what notice does that refer to? I should say the notice by publication in the newspaper under sec. 191 which it seems to me cannot apply to this case. Section 193 prescribes what "the notice served upon the party shall contain" but nowhere in the Act that I have seen is it declared that such a notice shall be served.

On October 26, 1906, the company served on Taylor a notice which complies with the requirements of that section and sec. 194, wherein they offer the owner the sum of $7,500. It will be seen that the notice was served before the deposit of the plans, but all parties acted upon it and appeared before a Judge, who, on January 10, 1907, made an order appointing three men, Christie, Scott and Galt, "arbitrators to determine such compensation" in the language of the order. I assume that Taylor had not given notice under section 196 that he accepted the sum offered.

Nothing apparently was done under this order, and on April 19, 1910, the solicitors for Taylor wrote to the solicitors for the company as follows:—

Re Taylor v. C.N.R. Arbitration.

DEAR SIR:—In this matter, we are willing to consent to your making another offer of settlement on condition that same is made at once, and upon the further condition that in the event of our client not being satisfied to accept same that you will appear with us in Judge's Chambers next Monday for the purpose of having the arbitrators appointed.

Please let us have a letter confirming this arrangement.

And thereupon the company served on the owner the following notice:—

The Railway Act.

To William A. Taylor, of the city of Winnipeg, in the province of Manitoba, fruit dealer.

Take notice that the Canadian Northern Railway Company hereby withdraws the offer of seven thousand five hundred (7,500) dollars made in its notice of expropriation dated the 26th day of October, 1906, and served upon you the same day, and substitutes therefor the offer of seventeen thousand (17,000) dollars, which said sum it is now ready to pay as compensation for the property described in said notice, being, "in the city of Winnipeg in Manitoba and being in accordance with the special survey of said city of Winnipeg and being lot thirty-three (33) in block one (1) which lot is shewn on a plan of survey of part of lot one (1) of the parish of St. John, registered in the Winnipeg land titles office as plan No. 129.

Dated at Winnipeg this twenty-first day of April, A.D. 1910.

The Canadian Northern Railway Company.

Per CLARK & SWEATMAN,
their solicitors.

This was followed by an order of Mr. Justice Prendergast, as follows:—

Upon the application of counsel for the above named W. A. Taylor, and upon it appearing that by an order of this Court dated tenth day of January, 1907, George F. Galt, W. J. Christie and James Scott were appointed arbitrators for the purpose of hearing the arbitration herein.

And it further appearing that the said George F. Galt has refused to act as such arbitrator, and upon counsel for the said railway company consenting thereto,

It is ordered, that C. H. Newton, W. J. Christie and James Scott be and they are hereby appointed arbitrators for the purpose of hearing and determining the arbitration in this matter.

Dated the 4th day of May, 1910.

From the minutes filed, I infer that the arbitrators appointed under the last order took the oath of office under section 197 on May 14th, 1912, and met for the first time on that day as arbitrators pursuant to a notice served on the owner. Witnesses were called and after evidence was taken the arbitrators made an award in writing, which recites that by order bearing date 4th May, 1910, they were appointed arbitrators in this matter and further that they had taken upon themselves the burden of the said arbitration and they awarded to the owner as compensation the sum of $16,950.

In taking the evidence the arbitrators assumed that the date of deposit of the plans in 1906 was the time at which they should consider the value of the property in estimating the compensation to be awarded and they refused to take evidence of the value in 1912.

I shall assume that the deposit referred to in the second sub-section of sec. 192 is the deposit required by sec. 178, sub-sec. 6, as well as that required by sec. 160, and this involves a consideration of 8 & 9 Edw. VII. ch. 32, sec. 3. That section is an amendment to sub-sec. 2 above mentioned, and was intended to remedy a manifest wrong, a wrong that would have taken place in this case but for my view of the application of the amendment to this case. Parliament considered, no doubt, that if the owner chose not to accept the offer, he found his land tied up, he could not sell and he dare not improve the property which he wished to occupy and perhaps even at the last moment the company might, under sec. 207, "abandon the notice and all proceedings thereunder," and there is some authority that this might be done by the company even after all the evidence has been submitted to the arbitrators and while they are considering their award.

Sec. 3 of ch. 32 adds to sub-sec. 2 of sec. 192, the following:—

Provided, however, that if the company does not actually acquire title

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to the lands within one year from the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation or damages shall be ascertained; and provided further, that the foregoing proviso shall not prejudice the operation of any award, or of any order or judgment of any Court of competent jurisdiction, heretofore made, or any arbitration now pending and any appeal from any such award, order or judgment shall be decided as if the foregoing proviso had not been enacted.

This section became law on 19th May, 1909.

Parliament might have said that it should not apply to any case where the deposit in the registry office had then been made or where the notice under sec. 193 had been served, or where arbitrators had been appointed, and the matter then would have been clear; but instead of that the limitation is to such an advanced step as an award of order or judgment heretofore made, and "to any arbitration now pending." All these are put in the same class and this indicates to me that parliament intended that active proceedings must have been taken towards finding the value in order to prevent the application of this wholesome law.

Section 197 sets forth the first step to be taken towards an award and the order creating the tribunal who made this award was issued on 4th May, 1910. They acted solely on this order and commenced the actual arbitration by meeting and taking the oath and examining witnesses in 1912.

In sections 199 and 201 the word "arbitration" is used, but it does not assist in giving a construction to the amendment. It might be said that when the company applied to the board for the order or at all events after the order was made and before deposit in the registry office an arbitration was "pending," but if the man in the street or even the average legislator was asked "when is an arbitration pending," I venture to say that he would answer "after the arbitrators have taken office," or at all events after they have been appointed.

Considering the object of this remedial legislation, it seems to me that parliament intended by the words "any arbitration now pending" to mean any matter where arbitrators had been appointed and had taken office at least, under sec. 197. I have not overlooked the remarks of the Chief Justice of the King's Bench in *Robinson* v. *C.N.R. Co.*, 17 Man. L.R. 583. That case involved only the question of costs and perhaps the acts incidental to or leading up to arbitration in expropriation proceedings might justly be allowed.

The first offer of the company was $7,500, and four years later they decided that this offer was less than fifty per cent. of what it ought to be and offered $17,000. Two years later the arbitrators fix the value as this sum less $50. One wonders if they were influenced by the question of costs under sec. 199.

During the six years apparently the company did not particularly require this land, for they took no proceeding to acquire possession, as they might have done under sec. 215, and during all that time the owner was crippled in the user of his property for he dare not build or add to the simple stable then upon the land.

The two arbitrators who signed the award do not tell us how they arrive at $16,950, the third arbitrator gave details of how he arrived at a sum more than twice that found by the majority and amongst these details is an item of $2,500 as ten per cent. on the value of the land because of a compulsory sale. Mr. Justice Idington, in *Dodge* v. *The King*, 38 Can. S.C.R. 149, 155, seems to indicate that a sum of that kind might well be added for damages done to business carried on on the premises by reason of being turned out of possession; but I should certainly think that no such item of that kind ever entered into the minds of the majority of the arbitrators. It seems to me the facts in this case shew strongly the reasons which induced parliament to pass the statute amending the Railway Act, of 1906, shifting the date for taking the value to a later period than the deposit in the registry office. Having come to this conclusion, the other points raised need not be considered.

A great number of cases were cited by counsel, but as they do not apply to this branch of the case, I have not referred to them. There is, of course, no evidence upon which this Court can fix the value at the date of the arbitration or at the date when the company could acquire title under sec. 210, which section seems to provide that the making of the award really confers a title. The appeal is allowed with costs and the award is set aside.

PERDUE, J.A.:—I have had the privilege of reading the reasons for judgment prepared by the learned Chief Justice of this Court, and I agree with them. I would add the following observations upon what is the crucial point in this case, namely, is the valuation of the land in this case to be made as of the date of acquisition, under 8 & 9 Edw. VII. ch. 32, sec. 3, or does this case fall within the second proviso in that section as being an arbitration pending when the above Act came into force?

In considering this question we must endeavour to gather as well as we can what was the intention of parliament in making the amendment made by the above section. It appears to me that the intention was to prevent land from being tied up by a railway company for a long time without steps being taken to ascertain its value, and then having the valuation made as of a time long past, although the real value of the land may have been greatly enhanced in the interval. By the amending sec-

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tion a railway company is allowed a year from the deposit of the plan, etc., in which to acquire title to the lands. If the company fails to acquire title within the year, then the date of the acquisition shall be the date with reference to which the compensation shall be ascertained. But manifestly it would be unjust to make this provision apply to awards, orders or judgments pronounced before the Act came into force. It was also deemed proper that an arbitration then pending should also be excepted from its operation.

What is meant by an "arbitration now pending" as referred to in the Act? A suit is pending as soon as it is commenced by writ or other process, and remains so until its conclusion. An arbitration also is pending as soon as it has been actually commenced and is proceeding towards completion. Counsel for the company contends that before the amending Act came into force, the preliminary steps were taken and three arbitrators were appointed by a Judge's order as far back as January, 1907. These arbitrators were not sworn as required by the Railway Act, and never entered on their duties. One of them, Mr. Galt, appointed by the Judge, but not named by one of the parties, refused to act: see order of 4th May, 1910, in which this refusal is stated. In 1910 another notice was served by the company making a new or substituted offer of $17,000 instead of $7,500 as originally offered. Shortly thereafter the order of 4th May, 1910, was made appointing a new board of arbitrators, Mr. Newton being substituted for Mr. Galt. Still, the company contends that all along since January, 1907, arbitration was pending.

An arbitration cannot be held to have been commenced until arbitrators have been appointed. An arbitrator is not appointed until he has both been named in the order and has accepted office as such: *Ringland* v. *Lowndes*, 17 C.B.N.S. 514; and he enters on the reference, not when he accepts the office, or takes on himself the functions of arbitration by giving notice of his intention to proceed, but when he enters into the actual matter of the reference: *Baker* v. *Stephens*, L.R. 2 Q.B. 523.

No arbitration had, therefore, been commenced when 8 & 9 Edw. VII. ch. 32, came into force, and if none had been commenced, it seems to me clear that none was pending. The preliminary steps that had then been taken, such as giving notice and appointing arbitrators, only shew that an arbitration was contemplated, not that it was actually going on or pending.

Whatever may have been done in this case, with a view to arbitration, at the time the above Act came into force, it was subsequently abandoned by the company. A new offer of a very largely increased amount was made in 1910, after the Act had come into force, and the refusal by Taylor to accept this

new offer formed, under secs. 193 and 196 of the Railway Act, the very basis upon which a board of arbitrators was afterwards appointed, a board which actually proceeded with the reference and made the award against which this appeal is brought. The arbitration which took place in 1912 and which dealt with the question of the compensation to be allowed was certainly not pending when the amending Act came into force.

It is claimed that the notice given by the company in 1906 tied up the land so that Taylor could not deal with it. The company itself was not bound to take the land. They allowed several years to elapse before making a reasonable offer of compensation or bringing on an arbitration, and this, while the value of the land was largely increasing. Now they contend that Taylor is bound to take the value of the land as it was in 1906. I think the intention in passing the amendment, 8 & 9 Edw. VII. ch. 32, sec. 3, was for the very purpose of remedying such an injustice as that. Unless, therefore, the company can bring this case clearly within the second proviso in sec. 3, so that the remedy afforded by the earlier portion of the section does not apply, the date of acquisition is the date with reference to which the compensation must be ascertained.

No evidence as to the value of the land at the time of the reference was received by the arbitrators. It is, therefore, impossible for this Court to find from the evidence the amount of the compensation to be allowed. It seems to me that the only course is to allow the appeal with costs and set aside the award.

Cameron, J.A. (dissenting)

CAMERON, J.A. (dissenting):—This is an appeal from an award made under the provisions of the Railway Act, R.S.C. ch. 37. The property in question is lot No. 33, fronting on Wesley street, in the city of Winnipeg, as shewn on the plan filed, which, with certain adjacent property, was dealt with by the Board of Railway Commissioners in an order dated September 22, 1906. By that order the railway company was given authority to acquire these lands from the owners upon certain conditions, one of which was, that the documents required by sec. 153 (now 192) of the Railway Act to be deposited should be deposited and the notice provided by sec. 154 (now 193) should be given on or before November 1st, then next following. There was a further provision continuing the use of the then existing facilities in connection with a railway siding to the owners until possession should be taken by the railway company, possession in the meantime remaining with the former.

The notice of expropriation under the statute was duly given, October 26, 1906, expressing the intention of the railway company to take the property and its willingness to pay

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the sum of $7,500 as compensation. The plans were filed November 1st, 1906. An order was taken out January 10, 1907, appointing W. J. Christie, James Scott, and G. F. Galt, arbitrators. The time for fixing the value of the property as the proceedings then stood was, under sec. 192, November 1, 1906.

In 1909, sec. 192 of the Railway Act was amended by sec. 3, ch. 32, 8-9 Edw. VII., as hereafter set forth. By notice dated and served April 21, 1910, the railway company withdrew the offer of $7,500 made in its notice of expropriation and substituted therefor $17,000. By an order dated May 4, 1910, made upon the application of the owners, wherein is recited the order of January 10, 1907, above referred to, and that George F. Galt had refused to act as arbitrator, to which the railway company had consented, it was ordered that "C. H. Newton, W. J. Christie and James Scott be and they are hereby appointed arbitrators for the purpose of hearing and determining the arbitration in this matter."

Pursuant to this last order the arbitrators made their award July 4, 1912, fixing the compensation to be paid at $16,950. James Scott did not concur in this, and made a separate award.

The principal question discussed before us was with reference to the bearing on the case of the amendment of 1909, which is as follows:—

3. Sub-section 2 of sec. 192 of the said Act is amended by adding thereto the following: "Provided, however, that if the company does not actually acquire title to the lands within one year from the date of such deposit, then the date of such acquisition shall be the date with reference to which such compensation or damages shall be ascertained; and provided further, that the foregoing proviso shall not prejudice the operation of any award, or of any order or judgment of any Court of competent jurisdiction, heretofore made, or any arbitration now pending and any appeal from any such award, order or judgment shall be decided as if the foregoing proviso had not been enacted."

On the taking of testimony by the arbitrators, evidence was tendered by the owner of the then present value of the premises for the purpose of giving a basis on which to fix the value as of the date of the filing of the plan. The arbitrators did not receive the evidence. The contention that the arbitrators should fix the value as of the date of the award or arbitration and not as of that of the deposit of the plan was not specifically taken before the arbitrators, and it was urged that we should not now give effect to it. But if the amendment does affect the basis of compensation the fact that it was not brought to the attention of, or acted on by, the arbitrators ought not to prejudice the position of the owner. That this contention does not appear to be plainly disclosed in the notice of appeal cannot be material, as it would merely necessitate an adjournment which counsel for the railway company decided he did not want.

The principal point in controversy is whether the amendment of 8-9 Edw. VII. applies to this case so that the construction of the words "arbitration now pending" becomes important. On behalf of the railway company it is urged that the "arbitration" commenced before the day the amendment came into force. On the other hand it is contended that the arbitration cannot be said to have commenced until the arbitrators entered on their duties long after the date of the amendment.

The notice of expropriation in this case, given October 26, 1906, complied with the provisions of sec. 193, stating (*a*) the lands to be taken, and (*b*) "a certain sum," to wit $7,500, which the company was willing to pay therefor. If the owner does not give notice of his willingness to accept that amount then the Judge is, on the application of the company, to appoint a sole arbitrator, or, at the request of either party, three arbitrators. The latter was the course adopted in this case.

If the company desire to desist from or abandon the notice or to amend it, it can, where the notice improperly describes the lands, or where the company decided not to take them, abandon the notice and all proceedings thereunder, and shall thereupon be liable for damages or costs incurred (sec. 207). No other provision is made whereby the company can withdraw or modify the notice, once it is given. The subsequent notice, dated April 21, given by the company, increased the amount offered to $17,000. This had nothing whatever to do with any improper description of the lands or with a decision of the company not to take them, and therefore could in no way affect the first part of the original notice, stating the lands intended to be taken, and, in fact, the company never abandoned its intention to take the lands. Nor could it affect the second part of the notice as to the sum offered, as the statute gives it no such power. The parties might agree that it should be taken that the company might increase its offer and in such a case the amended offer might affect the costs of the arbitration under sec. 199. There was an agreement here that the company might amend its first offer, but there was nothing done that was intended or could be taken as intended to abandon wholly the notice of expropriation. It was intended merely to substitute $17,000 for the $7,500 originally offered by the company. It is not necessary here to consider what effect that substitution could have upon the costs of the arbitration.

In *Haskill* v. *G.T.R. Co.*, 7 O.L.R. 429, the company had actually taken possession of the land while here the company persisted in its declaration of intention to take, which was all it could do under the order of the Board. It did not desist or abandon, and it had no authority to do so, except on the grounds specified in section 207.

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The original order appointing arbitrators was made January 10, 1907. The Judge (of a Superior Court or County Court) making this order is *persona designata* and his order is not subject to review on appeal nor can he rescind or review it himself, except on the grounds set out in section 206, whereby if an arbitrator dies or refuses to act, the Judge shall appoint another. I refer to the judgment of Chief Justice Mathers in *Chambers* v. *C.P.R. Co.*, 20 Man. L.R. 277. The order, therefore, of May 4, 1910, reciting that Mr. Galt had refused to act, and, in fact, appointing Mr. Newton in his place, and in terms appointing the three arbitrators, two of whom, however, had been named in the previous order, must be taken as an exercise of the powers conferred by section 206. There is no order rescinding the first order. There was, in law, no authority for such. But there was, and is power, to substitute an arbitrator in the place and stead of one already appointed who had refused to act as had Mr. Galt in this instance. The last order was therefore an amendment of the first order made, under the authority of the Act, and its precise wording cannot be material.

Looked at in this light, the arbitration proceedings had their origin in the notice of expropriation of October 26, 1906, or, at the latest, in the refusal of the owner to express his willingness to accept the sum of $7,500 then offered. The arbitrators were duly appointed in January following and a substitution was made for one of them in accordance with the provisions of the Act by a later order. The arbitrators then entered upon the performance of their duties and made the award now appealed from. In those circumstances, what is the effect of the amendment above set forth?

In *R.* v. *Manley-Smith*, 63 L.J.Q.B. 171, an arbitration under two arbitrators and an umpire had been commenced under the Lands Clauses Act. Owing to the death of the umpire the parties agreed to submit the matter to a sole arbitrator. An award having been made exceeding the amount offered it was held that the owner was entitled to the costs from the initiation of the proceedings, and that the substitution by agreement of one arbitrator for the three originally appointed, did not put an end to the original submission. "Though the agreement here might be deemed a fresh submission, it was nevertheless a continuation of the statutory submission originally made," *per* Wright, J., p. 173.

Once the notice of expropriation is given, the relation of vendor and purchaser, to a certain extent and for certain purposes, arises:—

> The effect of this (*i.e.*, giving the notice to treat), as is now settled, was to create a relation between the company and the respondent an-

alogous to that of purchaser and vendor, but the price was not yet ascertained. Till that was done the land still remained the property of the respondent, in equity as well as at law, but the company had acquired a right to have the price ascertained, and for that purpose to summon a jury, and then, when the price is ascertained (by secs. 69 to 80), on tender of the price to have the land conveyed to them, or if the landowner could not or would not make a title, to deposit the price ascertained in the bank, and execute a statutable conveyance, on which the lands shall vest absolutely in the promotors of the undertaking. The landowner has a correlative right; if he pleases, he may at any time before the company have issued their warrant for summoning a jury, he may by mandamus compel them to do so.

Per Lord Blackburn in *Tiverton and North Devon R. Co.* v. *Loosemore*, 9 A.C. 480, 493.

Once the owner has allowed ten days to elapse without notifying the company of his acceptance of the offer it becomes imperative on the company to apply to a Judge for the appointment of an arbitrator and thereupon the proceedings cease to be proceedings to arrive at the damages by consent and become proceedings intended to fix it by arbitration. Is the term "arbitration" as used in the amendment of 1909 confined to that part of the proceedings subsequent to the order appointing the arbitrators or subsequent to the time when the arbitrators assume the burden of the arbitration by taking the requisite oath or does it refer only to those proceedings in which the arbitrators are actually engaged in the performance of their duties? Or, on the other hand, is "arbitration" a comprehensive term intended to include the proceedings from the giving of the notice or from the time when action under the statute is first taken in consequence of the owner's refusal to accept the company's offer or from the appointment of arbitrators under the Act?

The term "costs of the arbitration" in section 199 has been generally understood to include the costs of and incidental to the arbitration. But this may be due to the meaning given to the term "costs" by reason of sub-section (5) of the interpretation clause. The analogous section of the Lands Clauses Act contains the words "or incident thereto" which may make a difference between the English statutory provision and our own.

It is a well "recognized rule that statutes should be interpreted, if possible, so as to respect vested rights": *Hough* v. *Windus*, 12 Q.B.D. 224, 237, Bowen, L.J. It is not to be presumed that interference with existing rights is intended by the Legislature, and if a statute be ambiguous the Court should lean to the interpretation which would support existing rights: Craie's Hardcastle, p. 326.

Here we have the case where, on the notice of expropriation

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having been given, the parties stand in a new relation, analogous to that of vendor and purchaser, the price not being ascertained, but the company having the right to have it ascertained as of the date of the filing of the plan, and the giving of the notice and tender or payment of that price vests in the company the right to take possession (section 215); and, if immediate possession be necessary without an award or agreement, that can be had under sec. 217.

The term "vested right" is not readily capable of close definition. It may be defined as

> A right to do or possess certain things which the parties had already begun to exercise, which is either authorized by the statute or to the exercise of which no obstacle exists in the laws which have been enacted: the power one has to do certain actions, or to possess certain things, according to the laws of the land.

Cyc. XXXV. 199. See also further definitions in Cyc. VIII. 894.

Here the company had a right, vested or existing, to take over the possession of and title to the property in question upon the compensation or price payable therefor being ascertained in the manner fixed by the statute then in force, and the payment or tender thereof. An amendment to the general law fixed a later period as the date with reference to which the compensation is to be fixed and is not positively clear in its terms as to whether Parliament intended it to apply to cases wherein the proceedings have already been commenced to determine the compensation payable, but wherein the arbitrators have not yet actively entered on the performance of their duties. The aim of Parliament was, no doubt, to prevent railway companies employing dilatory tactics in these expropriation cases. But the general principle that it will be presumed that the Legislature did not intend to interfere with existing rights unless the contrary appears can be invoked in favour of corporations as well as of individuals and is of uniform application.

Under the statute and under the order of the Railway Board, the company in this case, by giving the prescribed notice and filing the necessary plans, acquired certain rights, the principal one of which was to take over the possession of the property and the title thereto on payment of the compensation therefor to be determined as of the date of the giving of such notice and filing of such plans. Clearly the amendment of 1909 fixes an entirely different measure of compensation from that in force at the date of the order of the Railway Board and of the original order appointing arbitrators, and thereby materially alters and disturbs existing rights of the railway company. Unless, therefore, there is, in the amendment itself, a clear indication of the intention of Parliament that its terms should apply

to cases where the arbitration proceedings have been instituted before its passage, it should not be held applicable to such cases, and I can read no such unambiguous declaration of intention in the words of the amendment. It is quite consistent with the policy of Parliament, having due regard for statutory rights previously created, to read the term "arbitration" as used in a comprehensive sense and as including not only the proceedings of the arbitrators when actually in session, but also the other proceedings necessarily incidental thereto. If we give effect to the owner's contention, then, had the three arbitrators originally appointed taken their oaths and entered actively upon their duties on the 20th day of May, 1909, the amendment in question must, nevertheless, have applied. It would seem difficult to hold that such could have been the deliberate intention of Parliament, and that the legal relations of the parties should be so fundamentally and summarily altered; especially would that be the case here where the arbitration proceedings were taken pursuant to an order of the Board of Railway Commissioners.

The provisions of all expropriation Acts are for the public benefit. Without them the construction of railways would, manifestly, owing to the excessive demands of land owners, be, in many cases, unreasonably costly, and, in some cases, impracticable. Such provisions are, under the Interpretation Act, remedial in character, and the amendment of 1909 stands in no peculiar position in that respect. So that we come back to the question whether there is expressed in the amendment a definite intention that the date fixed by the original statute for the ascertainment of compensation shall be wholly altered in all cases, saving only those, however, where the arbitrators have actually met and entered on the performance of their duties.

Upon consideration and with a due appreciation of the difficulties arising in the matter, I have reached the conclusion that the arbitration, as the term is used in the amendment, had its inception in this case in the order appointing arbitrators made January 10, 1907, and that the date fixed by the Act prior to the amendment of 1909, is the date as of which the compensation payable to the owner must be determined.

I have examined the evidence submitted to the arbitrators. It seems to me impossible to regard the claims for damages in respect of the warehouse intended to be erected by the owner as one that could be entertained. It is entirely too remote and speculative. As to the rest of the evidence, I would say that I cannot find that the arbitrators have acted on any wrong principle or that their award is not warranted by the evidence. I can discover no error of law or fact or excess of jurisdiction

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on the face of the award or on the evidence. There is no adequate reason, therefore, in my judgment, why the award should be disturbed.

HAGGART, J.A., concurred with HOWELL, C.J.M., and PERDUE, J.A.

Appeal allowed; CAMERON, J.A., *dissenting.*

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SCHWARTZ v. WINNIPEG ELECTRIC R. CO.

Manitoba Court of Appeal, Howell, C.J.M., Perdue, and Haggart, JJ.A. March 17, 1913.

1. EVIDENCE (§ II E 9—205)—PRESUMPTION—FROM SILENCE OR WITHHOLDING EVIDENCE.

In an action against a street railway company for personal injuries alleged to have been caused by starting the car while a passenger was getting off the rear platform, the fact that the conductor, who, by a rule of the company, was required to be on the rear platform when the car was stopped, was not called as a witness by the defendant company militates against the defence; and the jury may draw inferences against the defendants from the keeping back of evidence which is alone in their possession.

[*Euclid Avenue Trust Co.* v. *Hohs*, 24 O.L.R. 447, applied.]

Statement

APPEAL by defendants from verdict for $1,500 in favour of the plaintiff on the trial with a jury of an action for damages for negligence.

The appeal was dismissed, PERDUE, J.A., dissenting.

E. A. Cohen, and *R. W. McClure*, for the plaintiff.

E. Anderson, K.C., and *R. D. Guy*, for the defendants.

Howell, C.J.M.

HOWELL, C.J.M.:—I have had the advantage of reading the judgment of my brother Haggart, and I agree with him as to the disposition of this case.

The car in which the plaintiff was travelling was being rather closely followed by another, and the conductor was apparently chary about stopping, for he passed one street without any attention to the plaintiff's ringing the bell.

She rang again: it was his duty to stop the car: she swears the car stopped for an instant at all events: the jury find it did stop, and I think this finding cannot be disturbed.

She says she was on the top step with her hand holding the rail and lifted one foot to go down, and that is all she remembers until in the hospital. She was found by the conductor of the closely-following car lying on the street insensible. Winkler, a short block away, says he heard a shriek and looked up and saw the car, which she had been on, moving.

The jury find that the car started while she was alighting and that this caused the accident.

It was the duty of the defendants to so regulate matters that she could reasonably and safely alight, and apparently, for further safety, they have a rule requiring the conductor to be in the rear porch when the car stops. I assume that the conductor was there performing his duty when the car stopped. The defendants also have a rule that the conductor must at once report all accidents, and I assume this was reported. Neither the conductor nor the motorman was called as a witness, and no evidence is given as to any report. The conductor, an officer in the defendants' employ, could give all the facts in this matter, and, to use the language of Sir Charles Moss in *Euclid Avenue* v. *Hohs*, 24 O.L.R. 447, at 450: "The fact that he was not called by the defendants militates against them."

The jury is the proper tribunal to draw the inferences of fact and it seems to me there was as much to justify their findings in this case as in *Makins* v. *Piggott*, 29 Can. S.C.R. 188; *Grand Trunk* v. *Griffith*, 45 Can. S.C.R. 380, and *Ajum Goolam Hoosen & Co.* v. *Union Marine Ins. Co., Ltd.*, [1901] A.C. 362.

Counsel for the defendants stated that he did not ask for nor wish a new trial. The appeal is dismissed with costs.

PERDUE, J.A. (dissenting):—The plaintiff alleged in her statement of claim that she was a passenger on one of the defendants' cars on Logan avenue in the city of Winnipeg, and had rung the bell as a signal to the motorman to stop the car at Gunnell street, a street at right angles to Logan avenue; that in expectation of the car stopping she arose from her seat and walked to the vestibule; that the car when it reached Gunnell street did stop and the plaintiff prepared to alight; that while she was in the act of doing so,

> the said car did with a violent jerk move on, in consequence of which the plaintiff was thrown from the said car on to the roadway with such force that she became unconscious. . . .

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She claims that she was severely injured by the fall and alleges that it was caused by the negligence of the motorman or the conductor of the car, or both of them, in causing the car to start without observing whether the plaintiff had alighted, and also in causing the car to start in such a negligent manner as to make it jerk violently and at a speed that was not reasonable or proper in starting a car.

The action was tried before Prendergast, J., with a jury. At the close of the plaintiff's case defendants' counsel moved for a nonsuit. The learned Judge, with a good deal of hesitation, as he states, refused to enter a nonsuit. The defendants put in no evidence.

Eight questions were put to the jury, and upon the answers given to these, the Judge entered a verdict of $1,500 for the

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plaintiff. The following are the questions asked and the answers given:—

1. Did the car stop at or near the intersection of Logan avenue and Gunnell street? A. Yes.

2. Did the plaintiff on the occasion in question, whatever may have been the cause, meet with an accident in falling off or being thrown from the car? A. Yes.

3. If the plaintiff met with such accident, was she injured thereby? A. Yes.

4. Did the motorman or conductor, or both of them, at the moment when the plaintiff was proceeding to alight, cause the car to start? A. Yes.

5. If so, was the car started with a jerk and at an unreasonable rate of speed for a car to start? A. Cannot say.

6. If the car was started when the plaintiff was about to alight, do you believe it was such starting of the car that caused the accident? A. Yes.

7. Was such starting of the car negligent? A. Yes.

8. Did the plaintiff notify the conductor by ringing the bell that she wished to alight at Gunnell street? A. Yes.

The jury assessed the damages at $1,500.

The fourth question is the all-important one, because it contains the very gist of the action which the plaintiff set out to prove. The jury by their answer to that question found in effect that while the plaintiff was alighting from the car it was set in motion by the motorman, conductor or both. Let us now examine what evidence there was, if any, to support this finding.

The plaintiff states that on the night of the accident she got on the car which proceeded west along Logan avenue. She lived on Bushnell street, which runs at right angles to Logan avenue and she says she rang the bell to stop the car at that street, that the car did not stop there, that she then rang the bell for it to stop at Gunnell street, the next intersecting street. She says the car did stop at Gunnell street, that she passed into the vestibule and proceeded to alight, that she had her right foot on the first step and had hold of the rail with her right hand, but that after that she remembers nothing. This is all the evidence that was placed before the jury to enable them to answer the fourth question, and other following questions which depend upon an affirmative answer to the fourth. The only other witness called as to the happening of the accident, was one Winkler, and his evidence, which I shall examine later on, so far from assisting the plaintiff, contradicts her in important respects.

Taking the plaintiff's account of what happened, what negligence is there shewn upon the part of the defendants? She signalled to have the car stopped and it was stopped. She was on the step in the act of alighting while the car was at a standstill; but what occurred thereafter was a blank in so far as her recollection is concerned. She cannot say, and does not attempt to

say, what caused her fall. We are left to speculate as to the cause of her injury. Did she slip and fall while alighting? Was she seized with a sudden vertigo which caused her to fall from the step? Was she struck by a passing vehicle, or did the car move forward and cause her to lose her footing on the step? It appears to me that any one of these guesses is as plausible as another. If, indeed, the one the jury is asked to make, that the car was started forward before she had reached the ground, conveyed the true answer, it would be reasonable to expect that she would have some recollection of the car moving and of her losing her footing on the step and her hold upon the rail.

It is incumbent on the plaintiff to prove some negligent act or to establish facts from which negligence may reasonably be inferred. Where two inferences may be drawn one of which implies negligence and one which does not, and there is no presumption in favour of one view rather than the other, then the plaintiff fails to prove his case: *Wakelin* v. *London and S.W. Ry.*, 12 A.C. 41; *Pomfret* v. *Lancashire and Y. Ry. Co.*, [1903] 2 K.B. 718. In the *Wakelin* case Lord Halsbury said:—

> It is incumbent on the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegations of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition, *Ei qui affirmat non ei qui negat incumbit probatio.*

The same principle is affirmed by the Privy Council in *McKenzie* v. *Chilliwack*, 8 D.L.R. 692, [1912] A.C. 888. In that case the deceased had been confined in a wooden lock-up provided by the defendants. The lock-up caught fire from some unknown cause and deceased came to his death in the fire. Plaintiffs failed to prove how the fire was caused. It was held that if an inference was to be drawn it would not be unreasonable to infer that the place was set on fire by the deceased, or a fellow-prisoner of his, or both.

I have considered the present case so far upon the evidence of the plaintiff herself. But when we come to examine the evidence of Winkler, who was called by the plaintiff and is the only other witness who gives any facts bearing on the cause of the accident, the impropriety of drawing the inference she asks to be drawn becomes much more apparent. At the time of the accident, Winkler, who was returning to his home on Gunnell street, was at the corner of that street and Henry avenue, Henry avenue being the next street to Logan and par-

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allel to it. He says he heard some noise and saw a car running very fast and did not see it stop. He went to the place and found the plaintiff lying on the ground injured. A second car had come up and the conductor of that car assisted in removing the plaintiff from where she was lying. The plaintiff's husband and the conductor of the second car had both arrived on the scene before Winkler. The plaintiff, Winkler says, was lying in the middle of Gunnell street, and the place where the unfortunate woman had struck the ground was shewn by the mark of blood at about the centre or a little to the east of the centre, of that street. He says he saw the car crossing Gunnell street and going fast. The following extracts are taken from his evidence on cross-examination:—

Q. Could you see it crossing Gunnell street? A. Yes, I saw the car crossing.

Q. While it was crossing Gunnell street about how fast was it going, do you say? A. It was going fast and going straight ahead.

Q. Full tilt? A. Yes. . . .

Q. You were up on Henry street and you could see it coming up in the light and you never saw it stopping at all? A. No, I saw it going. . . .

Q. You were looking at it going across and you did not see it stop? A. No.

Q. And you heard the woman make a noise? A. Yes.

Q. And that was at the time you saw the car crossing? A. Yes.

In another part of his evidence the plaintiff's counsel put the question to him, "it didn't stop?' To this he answered, "No, perhaps a second it stopped and then went on."

But throughout his evidence the impression upon his mind is shewn, that the car ran rapidly across Gunnell street and did not stop there.

The evidence of Winkler, the plaintiff's witness, and the only witness beside herself who gave any facts relating to the accident contradicts her statement that the car stopped at Gunnell street. When one of the company's cars is signalled to stop at an intersecting street, the mode of operation is for the car to cross that street and stop at the farther crossing. This is a well-known rule in Winnipeg and was, I understand, referred to by plaintiff's counsel at the trial. In any event, the company's book of rules which was put in by the plaintiff shews that this is the rule to be observed when stopping cars in response to a signal (rule 201). The same rule says: "Do not stop cars so as to block cross-streets or cross-walks." It is reasonable to assume that the company's servants would in stopping the car observe the rule. The plaintiff says the car stopped in the middle of Gunnell street to permit her to alight. It is clear that she fell from the car in the middle of Gunnell street, or a little to the east of that point. If the car stopped there, it

was contrary to the above rule. But we have the additional fact that Winkler saw the car running fast across Gunnell street, going "full tilt" so that it is impossible that it stopped where the plaintiff fell. Taking the whole evidence that the plaintiff has presented, the most reasonable inference to draw is, it appears to me, that the plaintiff received her injury by falling from the step while the car was in motion and before it reached the proper stopping place. If such inference is the correct one, she herself caused the accident by her own negligence. She should not have been on the step or trying to dismount while the car was in motion. If such inference is true, the injury was not caused in the manner in which she claims it was caused, and which she undertook to prove, namely, by a sudden starting of the car from a standstill while she was in the act of alighting.

The car on which the plaintiff was riding was well filled with people, yet not one of these was called to prove that the car stopped at Gunnell street, or to prove any other fact in connection with the case. The plaintiff's husband was one of the first persons, if not the very first, to appear on the scene after the accident, yet he was not called as a witness.

The plaintiff relied on *Bridges* v. *North London R. Co.*, L.R. 7 H.L. 213. Without going into the facts of that well known case, it is sufficient to point out that there was in that case an inference which could be fairly drawn from the facts proved. There were not two or more conflicting inferences to be drawn, each of them equally consistent with the facts. In *Metropolitan R. Co.* v. *Jackson*, 3 A.C. 193, where the *Bridges* case was commented on, the view of Lord Justice Bramwell in the Court of Appeal (2 C.P.D. 134) was cited with approval:—

> Supposing the evidence to be consistent with negligence, namely, that negligence may have caused the matters complained of, it is equally consistent with no negligence, namely, that the matters proved may have been caused otherwise than by negligence, and it is an elementary rule that when evidence is consistent as much with one state of facts as with another, it proves neither:

(3 A.C. page 206).

The relative functions of Judge and jury where the subject matter of the action is negligence, are declared in *Metropolitan R. Co.* v. *Jackson*, 3 A.C. 193, by several of the Judges. Lord Cairns said:—

> The Judge has to say whether any facts have been established by evidence from which negligence may reasonably be inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred.

Lord Blackburn and Lord Gordon quoted with approval the statement of Willes, J., in *Ryder* v. *Wombwell*, L.R. 4 Ex. 32, 38, that,

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there is in every case a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the Judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant.

The rule laid down by Willes, J., which I have just cited, was accepted by the Privy Council in *Hiddle* v. *National Fire and Marine Insurance Co.*, [1896] A.C. 372, which was an action by insured against insurers on a policy of insurance. Lord Davy, in giving the judgment of the Court, after accepting the above rule, considered a nonsuit in the case proper,

although there may have been some evidence to go to the jury, if the proof was such that the jury could not reasonably give a verdict for the plaintiffs.

In the present case there is no evidence to shew what caused the plaintiff to fall, and no evidence to prove the negligence charged, namely, the sudden starting of the car while she was alighting. Even the plaintiff's evidence, insufficient as it was to lay the foundation for the inference she asked the jury to draw, is rendered worthless by the contradiction of her own witness, Winkler.

The plaintiff was, no doubt, severely injured and the jurors and everyone else naturally feel sympathy for her. But the defendants cannot be called upon to compensate her in damages unless it can reasonably be found that they by their negligence caused the accident.

In my view a nonsuit should be entered.

Haggart, J.A.

HAGGART, J.A.:—On the 27th of March, 1911, about ten o'clock in the evening, the plaintiff boarded a street car going west at the corner of Main street and Logan avenue, intending to ride to Bushnell street, which runs at right angles to Logan, and upon which the plaintiff then resided. Her story is that as the car was approaching Bushnell street, she rang the bell which was the signal to the motorman to stop. The car did not stop, whereupon she rang the bell again to stop at the next street west, called Gunnell street. As the car slowed up she went to the vestibule, and when it stopped, proceeded to alight, and just as she had her right foot upon the first step she either fell or was thrown from the car, and she remembers nothing more until some days afterwards when she recovered consciousness at the hospital. She states that the car had come to a stop before she proceeded to alight; her words are: "When the car stopped I put my foot on the first step and after that I don't remember anything." According to the doctors, the injuries sustained were serious.

The plaintiff then called a witness, Winkler, who lives on Gunnell street, who had been at the store on Henry street for groceries. When at the corner of Henry avenue and Gunnell street, a block distant and north of Logan avenue, on his way home, he says, "I heard some noise and I saw a car running very fast, and I didn't see it stop and a woman cried or made a noise," and he continues, in answer to the question, "Did you see the car stop?" he says: "I could not see the car stop because the car was going fast. I would be on the corner of Henry and Gunnell street and I heard a noise from the woman and left my groceries and went to her." When he got to her a second car had come from the east. The woman was removed, and the second car proceeded on its way. He then rendered what assistance he could to the plaintiff's husband, who was at the scene of the accident. Winkler, when asked further, "What happened to the car?" he answers:—

The first car went on. Q. It didn't stop? A. No, perhaps a second it stopped and then went on.

Q. That is the car on which the plaintiff was? A. Yes, I was too far away to see much of that.

The defendant's counsel urges that from the fact that the plaintiff was lying in the middle of Gunnell street, and that Winkler swore when he saw the car it was going fast, the legitimate inference to be drawn is that the plaintiff walked off or fell from the platform when the car was in motion and that the plaintiff is contradicted by her own witness when she testified that the car stopped in the middle of Gunnell street, when she proceeded to step down from the platform, and the plaintiff claims that the trial Judge should have withdrawn the case from the jury and entered a nonsuit.

Plaintiff relies upon a principle laid down in Odgers, p. 570:—

that where two equally credible witnesses called by one side contradict each other, it is not competent for the party calling them to seek to discredit one and accredit the other.

The authority given by the text-writer for this proposition is *Sumner* v. *Brown*, 25 Times L.R. 745. This was a ruling of Hamilton, J., at the Liverpool assizes. In this case the plaintiff's claim was admitted and the defendant counterclaimed for breach of a contract to sell potatoes. The defendant relied upon a railway company's delivery note which was a receipt for bags. The defendant put one of the plaintiffs in the witness-box to prove the signature to the delivery note, when the plaintiff stated definitely to his counsel that no contract had been made. The Judge disposes of the case in these terms:—

Upon the question of the plaintiff Levesley's evidence, Mr. Keogh had called him with his eyes open and with full knowledge of what he was

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likely to say, and it was not competent for the defendants to contradict him on the vital point of contract or no contract. It was not as if unexpected evidence had been given or there had been some contradiction in details. When two equally credible witnesses called by the same party flatly contradict each other, it was not competent for the persons calling them to pick and choose between them. They could not discredit one and accredit the other.

In the present case there is not a flat contradiction. It is never expected that all the witnesses on the same side should agree in every particular and a certain amount of discrepancy in details will not destroy the value of the testimony, indeed, if there is a concurrence in minute details there might arise a suspicion that the story was manufactured.

There were two witnesses to this incident, the victim, who is quite clear up to the point she fell or was thrown from the car, and Winkler, who, a block distant at ten o'clock at night, says he heard a woman's cry and saw a car passing along. The distance is considerable and his field of vision would be narrow looking along the street. From such different view points, I would expect that they might have different impressions as to what actually happened.

The question as to how far a party is bound by his own witness was very fully considered in *Stanley Piano Co.* v. *Thompson*, 32 O.R. 341.

The action was to restrain the defendants from manufacturing pianos from a scale or patterns belonging to the plaintiffs, and for a return of the scale and patterns. On the opening of the case the plaintiff read from the depositions of one of the defendants taken on a motion for an interim injunction certain questions and answers in which he swore that he had drawn a scale from a piano manufactured by the plaintiffs and had made his patterns from that scale. It was admitted he had the right to do that, as the scale and patterns were neither patented nor copyrighted, and that if that was the way they were obtained, the plaintiff could not succeed, but plaintiff's counsel proposed to shew that the defendants were manufacturing pianos similar to the plaintiff's, which could only be done from the plaintiff's own scale and patterns, a set of which had disappeared from their workshop where this defendant had previously worked, and in order to do that, tendered evidence that it was impossible to make the scale in the manner in which this defendant testified in his depositions he had done. Such evidence was objected to as being in contradiction of plaintiff's own witness, and the trial Judge refused to receive the evidence.

On the appeal to the Divisional Court, Chancellor Boyd and Ferguson, J., gave carefully considered judgments.

Chancellor Boyd, p. 343, says:—

Though one called as a witness (party or not) may disprove the case

of the plaintiff calling him, yet that case may be established by other witnesses called not to discredit the first, but to contradict him on facts material to the issue. This proposition was regarded as settled law of long standing prior to the statute on the subject passed in England in 1854, C.L.P. Act, sec. 22. It was one of the many rules of evidence which have grown up as the result of practice so as to become the law of the land. Unless explicitly altered by legislation, these rules are to be regarded as not affected or curtailed by permissive statutory enactments.

Ferguson, J., p. 349:—

It seems to me that the plaintiff had the right, without any ruling or leave of the trial Judge, to go on and give his evidence, though such evidence, being as it was, relevant to the issue should contradict the evidence already given by him and even though it would incidentally have the effect of discrediting his former witness. What the plaintiff wanted to do was simply to give more relevant evidence. I am of opinion that the law entitled him to do this, and I have not found any decision that I think forbids him so doing.

See *Ewer* v. *Ambrose* (1825), 3 B. & C. 746, 751; *Friedlander* v. *London Ass. Co.*, 4 B. & Ad. 193, at 195; *McNab* v. *Stinson*, 6 U.C.Q.B. (O.S.) 445; *Robinson* v. *Reynolds*, 23 U.C.Q.B. 560; *Greenough* v. *Eccles*, 5 C.B.N.S. 786, 802; Odgers' Law of Evidence, 705 (c), 705 (d).

I do not think the plaintiff and Winkler contradict each other. Even if they did differ in their versions under the salutory rule set forth the jury had the whole evidence before them and it was all relevant.

The defendants say there was no evidence of negligence that the case should have been withdrawn from the jury.

Metropolitan R. v. *Jackson*, 3 A.C. 193; Lord Chancellor, 197:—

The Judge has a certain duty to discharge and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred; the jurors have to say whether from those facts when submitted to them negligence *ought* to be inferred.

Page 198:—

The negligence must in some way connect itself with the accident.

Page 200:—

It is, indeed, impossible to lay down any rule except that which, at the outset, I referred to, namely, that from any given state of facts the Judge must say whether negligence *can legitimately* be inferred and the jury whether it *ought* to be inferred.

Lord Blackburn, p. 207:—

And if the facts as to which evidence is given are such that from them a further inference of fact may legitimately be drawn it is for the jury to say whether that inference is to be drawn or not; but it is for the Judge to determine, subject to review, as a matter of law, whether that further inference may legitimately be drawn.

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The plaintiff was a passenger on the railway, and having paid her fare, it was the duty of the defendants to carry her safely and land her safely at her destination. The failure to stop when signalled at the proper street shews that there was carelessness or inattention on the part of some one. The story of the plaintiff up to the moment she became unconscious is consistent and uncontradicted. She says the car stopped and Winkler does not swear that it did not stop. In a moment she is on the road unconscious. I would not assume that she courted injury. There is a blank, no one saw her fall; no one can tell how long the car stopped. Who can supply or fill that blank unless it be the defendant's servants? The defendants have a perfect right to say, we will not make the case for the plaintiff, but the keeping back of evidence alone in their possession may be the subject of comment by Judges, and jurors may draw their inferences.

As to Judges making observations, see the remarks of Moss, C.J., *Euclid Ave.* v. *Hohs*, 24 O.L.R. 447.

In *Bridges* v. *North London R.*, L.R. 7 H.L. 213, no one saw the deceased fall from the car. He was found by a passenger on a heap of rubbish in the tunnel. The jury had to draw their inferences. In this case I think the Judge was right in his ruling that there were facts established by evidence from which negligence might be reasonably inferred, and the jury on those facts having found that negligence ought to be inferred, we cannot disturb that verdict.

The observations in the judgment delivered by Lord Atkinson in *Toronto Street R. Co.* v. *King*, [1908] A.C. 260, where the tram car ran against a van and killed the driver, are applicable:—

> Their Lordships are, therefore, of opinion that the defendants were not entitled to a nonsuit, that there was evidence to go to the jury on the two issues: (1) whether the driver of the tram car was guilty of negligence; and (2) whether the deceased was guilty of contributory negligence. The jury have practically found these issues in favour of the plaintiffs. They are the tribunal entrusted by the law with the determination of issues of fact and their conclusions on such matters ought not to be disturbed because they are not such as Judges sitting in Court of Appeal might themselves have arrived at.

The appeal should be dismissed with costs.

Appeal dismissed, PERDUE, J.A., *dissenting.*

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(Decision No. 2.)

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Manitoba Court of Appeal, Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A. March 17, 1913.

Mar. 17.

1. FRAUD AND DECEIT (§ II—6)—SALE OF SHARES—SECRET PROFIT ON PURCHASE BY DIRECTORS.

When officers or directors of a company combine to dispose of all its property, the holding and disposal of which were the sole objects for which the company had been incorporated, under terms by which they would make a secret profit for themselves, the acquisition by them of shares at prices much below their real value obtained from various shareholders by suppressing the real terms of the offer received for the company's property is a fraud upon such shareholders in respect of which the court will grant them relief.

[*Gadsden* v. *Bennetto*, 5 D.L.R. 529, reversed; *Hyatt* v. *Allen*, 8 D.L.R. 79, applied; *Percival* v. *Wright*, [1902] 2 Ch. 421, distinguished; *Carpenter* v. *Darnworth*, 52 Barb. (N.Y.) 581, distinguished.]

2. CORPORATIONS AND COMPANIES (§ IV G 4—12)—FIDUCIARY RELATION—OFFICER PURCHASING STOCK FROM SHAREHOLDER.

Where directors of a landholding company passed a resolution appointing three of themselves as a committee to bring in a proposal for disposing of the whole of their lands and also of the corporate shares in the company, the responsibility of the members of the committee acting upon such resolution is more extensive than the ordinary duties devolving upon company directors; and, on any proposal of purchase being received by them which involved the acquisition of the land forming the entire assets of the company, the committee were under a duty to the shareholders whose rights as such, would, on completion of the sale, be limited to a reimbursement, *pro rata*, out of the purchase money, to make full disclosure to them as well as to the company, as represented by its directors and officers, of the terms of the offer. (*Per* Perdue, J.)

Statement

APPEAL by the plaintiff from judgment of Mathers, C.J.K.B., *Gadsden* v. *Bennetto* (No. 1), 5 D.L.R. 529, 21 W.L.R. 886.

The case below was the trial of an issue directed in winding-up proceedings to try the question of ownership in certain company shares and judgment had been given for defendants.

The appeal was allowed.

A. B. Hudson, for the plaintiff.

C. P. Fullerton, K.C., and *J. P. Foley*, for defendants.

Howell, C.J.M.

HOWELL, C.J.M.:—The company was incorporated simply to purchase, hold and sell one tract of land. Bennetto became managing director and treasurer and continued up to the liquidation to hold these offices.

The defendant Wellband was vice-president of the company, and while these defendants held these positions a resolution of the company was passed creating a committee consisting of the defendants and A. McCuteheon "to bring in a proposal for disposing of the lands and shares." Acting on this resolution Bennetto, with the assistance of X., who was acting as solicitor for

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the company, procured one Cooper to enter into a binding agreement to purchase the lands for $80,000, and further to pay Bennetto and X. a secret commission of $18,000. After this binding agreement was entered into the defendants arranged with the solicitor to purchase and did purchase the stock in question from Walker, a shareholder, secreting from him that the above sale had been made and procured a transfer, paying at the rate of $1,370 per share, about one-half of what each share was worth on the basis of the above sale.

The facts found by the learned Chief Justice should not, in my view, be disturbed. With great deference, I do not think that the law laid down in *Percival* v. *Wright*, [1902] 2 Ch. 421, and the American case of *Carpenter* v. *Darnworth*, 52 Barb. (N.Y.) 581, should govern this case. The two defendants were members of the committee appointed to sell this land, and after a sale was made, by suppressing the facts, they buy through X., but really for themselves, this stock. It is well to observe that they were authorized to sell the *land and shares;* probably it was thought that as selling the land was really a winding up of the company, the purchaser might require to get all the stock in order really to make title. The defendants, with X., conspired together to suppress the facts and get the shareholders' property. It would be strange if in such a flagrant case of fraud the Court could not grant relief, and I see no necessity for citing authorities. The very recent case of *Hyatt* v. *Allen*, 8 D.L.R. 79, is quite applicable, and justifies granting relief to the plaintiff.

The defendants claim, however, that Walker subsequently was informed of the fraud and that they bought him off and got a full release from him by giving him a portion of the purchase price to which he was entitled. Walker clearly had no right or power to make a settlement with the defendants for the shares which he did not own and which he simply held in trust, to the knowledge of X., and, therefore, to their knowledge. In 1908 Walker assigned all the shares which stood in his name to the defendants and his release in 1911 did not give any further title. He had no authority to give a release of this fraud as to the shares which were not his.

The onus of proof of this issue is on the defendants, and if the defendants fully explained all their frauds to Walker, and he acted and consented to take only part of what he was entitled to, perhaps he is bound, but I cannot see how he can so bind the plaintiff. It cannot be said that he was the plaintiff's agent to compromise this fraud and take from trustees less than the sum to which the plaintiff is entitled.

There is another view of the case which might justify relief. The general manager and treasurer of the company with the vice-president procured a sale of the entire assets of the company

in the performance of the business of the company, which would cause a winding up thereof, and by suppressing all the facts, they secretly, in the name of another, bought in the stock of shareholders. Is it not a case of a trustee suppressing facts and buying in secretly the rights of the *cestui que trust?*

The fraudulent action of Bennetto in securing $18,000 commission and in agreeing to divide this with the person he employed secretly to purchase the stock makes it difficult for a person to look at the whole transaction calmly. The appeal is allowed with costs, and the case disposed of in accordance with the details set forth in the judgment of Mr. Justice Perdue.

Perdue, J.A.

PERDUE, J.A.:—This is an interpleader issue to determine the ownership of five shares of stock in the Kootenay Valley Fruit Lands Co. The issue was tried before the Chief Justice of the King's Bench, who decided it in favour of the defendants Bennetto and Wellband. From this decision the present appeal is brought. No difficulty arises in regard to findings of fact in this case, as the appellant's counsel did not object to the Chief Justice's findings in that regard. It is only necessary to give a brief recapitulation of the main facts in the case.

The Kootenay Valley Fruit Lands Co. was incorporated for a very limited purpose, namely, to acquire and dispose of a single tract of fruit land in British Columbia. Apparently, when this single venture should be concluded the whole object of, and reason for, the company's existence would be achieved. The capital of the company was $40,000, divided into forty shares of $1,000 each, all of which had been allotted. Gadsden was the owner of two of these shares. The company had acquired the tract of land above mentioned in the spring of 1908, and its purpose was to dispose of this land at a profit. At this time Bennetto was the managing director and treasurer of the company. In the month of May he was in negotiation with one James Cooper, of Saginaw, Michigan, for the sale of the company's lands to the latter, nominally for the sum of $80,000, but actually for the sum of $98,000, the difference, $18,000, to be retained by Bennetto as a secret profit for himself.

On 20th May, 1908, the directors passed a resolution that if an offer of $80,000 and liabilities were made it should be accepted, that is to say, $80,000 over and above the company's liabilities in respect of their property. Either on that day or the next day the directors passed the following resolution: "That a committee be composed of Messrs. I. Bennetto, C. Wellband and A. N. McCutcheon to bring in a proposal for disposing of the lands and shares." This committee was composed of three directors, two of whom were Bennetto (the managing director and treasurer) and Wellband, the vice-president. The purpose of the committee was

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to find and bring in a proposal, not only for disposing of the land, but also of the shares.

According to the finding of the Chief Justice, Bennetto, after the offer from Cooper had been received, conceived the design of buying the shares of the minority faction of the shareholders, that is to say, the faction opposed to Bennetto and his associates. For this purpose he entered into a partnership with the defendant Wellband to carry out this scheme. They employed X., the legal representative of the company, to buy the shares, agreeing to give him a share of the profits. Sampson Walker, one of the minority shareholders, was approached by X., and Walker agreed to sell his shares at the price of $1,370 per share. Walker communicated with the plaintiff Gadsden, and the latter agreed to accept the same price for his shares. Gadsden then transferred the two shares he owned to Walker for the purpose of collection only. At this time neither Gadsden nor Walker, as the Chief Justice finds, was aware of the sale negotiated by Bennetto. Upon this sale going through, the shares would, on the basis of the purchase price of the land being $80,000, be worth $2,000 each. Upon receiving the transfer of Gadsden's shares, Walker entered into a written agreement with X. dated 26th May, 1908, for the sale to X. of twelve shares, two of which were Gadsden's and three of which were held by Walker as mortgagee only, one Teetzel being the owner of the equity of redemption. The total price was $16,200, payable in instalments. At the time of the sale X. was aware that Walker held Gadsden's shares as trustee only.

The sale of the company's land to Cooper was carried out and confirmed at a meeting of shareholders held on 13th August, 1908. Cooper agreed to pay the purchase price of $80,000 as follows: $5,000 in cash and the balance in one, two and three years, with interest at six per cent. per annum. After the cash payment had been made by him a resolution of the directors was passed authorizing the treasurer to divide it amongst the shareholders and to "collect and pay out" the balance of $75,000, as collected.

In November, 1908, the plaintiff purchased from Teetzel for $1,000 the equity of redemption of the latter in the three shares which Walker held as mortgagee. The learned trial Judge finds that this purchase was made by the plaintiff for his own benefit, but that he bought them for the purpose of selling them to X. for $1,370 per share. It is clear to me that any information received by the members of the committee as to the prices that could be obtained either for the land or for the shares would be received in a fiduciary capacity, not only for the company, but for the individual shareholders. If the intending purchaser decided that instead of merely buying the land, he would buy

the shares at a certain price per share, the committee was bound to disclose to the shareholders how much per share the purchaser was willing to give. It appears from the evidence that the negotiations with Cooper at one time assumed the form of a proposal to acquire the shares, but it resulted eventually in a purchase of the property.

The position of the members of the committee in this case is very different from that of ordinary directors of a company as regards their fiduciary relations, and is quite distinguishable from *Percival* v. *Wright*, [1902] 2 Ch. 421. In the present case the committee were acting outside the ordinary duties of directors, they were appointed for the purpose of securing and bringing in a proposal for disposing, not only of the land which was the property of the company, but the shares which were the property of the individual shareholders. On any proposal being received by them which involved the acquisition of the shares, they were bound to disclose to the shareholders, the interested parties, the nature of the proposal and the price offered. If the proposal took the form of acquiring all the company's property and leaving the shares out of account, the shareholders would be immediately interested in that proposal, because their shares would become worthless when the property was transferred and they could only look for reimbursement to their share of the purchase money on a distribution being made. If the committee, acting under its duties to the company and the shareholders, secured a highly advantageous offer, they were bound to make full disclosure of the offer to the company and the shareholders. The members of the committee were the confidential agents of the company and the shareholders. Their concealment of Cooper's offer, which so greatly enhanced the value of the shares with a scheme in view to buy the shares at a low price, was a breach of duty and a fraud upon the shareholders whose shares they acquired, by means of that concealment, at a price far less than their intrinsic value: *Walsham* v. *Stainton*, 1 DeG. J. & S. 678; *Hyatt* v. *Allen*, 8 D.L.R. 79; *Re Imperial Land Co. of Marseilles*, L.R. 4 Ch.D. 566.

The learned trial Judge dealt with the case as if Bennetto and Wellband were mere directors of the company and gave his decision upon the view that as directors no duty was cast upon them to make to the individual shareholders full disclosure of the negotiations that were pending with Cooper. Without expressing any opinion as to the duty of the directors to the individual shareholders in such a case, I think the learned trial Judge quite overlooked the fact that the three members of the committee were, by reason of the resolution appointing them and by their acceptance of the duty imposed by it upon them, acting outside the scope of ordinary directors, and that a fidu-

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ciary relationship had been established between them, on the one hand, and the company and the individual shareholders on the other. The defendants are fixed with notice through McLaws that Walker was a trustee for Gadsden as to the two shares.

The trial Judge has found that Gadsden by his subsequent conduct ratified the sale that Walker had made of the shares at $1,370 each. But this ratification, if such there was, was made while Gadsden was ignorant of the fact that a sale of the property had been made at $80,000, or really at $98,000, if Bennetto's secret commission is included. I cannot find evidence to prove that Teetzel knew the facts of the sale when he sold to Gadsden. Gadsden is in the position of Teetzel and is the owner of the three shares subject to the lien of Walker for the amount of the loan. I do not think that the defendants, who were engaged in the perpetration of a fraud, can avail themselves of the equitable doctrine of purchasers for value without notice. A formal release was given by Walker to the defendants on 15th September, 1911, but he had no authority to bind Gadsden by this release, either in respect of the two shares or the Teetzel shares.

The trial Judge called attention to the defective way in which the issue has been framed. The contest between the parties took the form of a suit in equity to set aside the sale of the shares to the defendants as having been induced by fraud in the circumstances shewn. If he had taken the view that the plaintiff was entitled to succeed, he would have been willing to amend the issue so that the real question could be determined. Both the questions in the issue should be answered as follows:—

In the circumstances disclosed in the evidence the shares referred to in both said questions are the property of the plaintiff James Gadsden as against the defendants Israel Bennetto and Charles Wellband. The Judge who will deal with the questions reserved until after the trial of the issue, can work out the amount of the credit that is to be allowed by Gadsden in respect of the shares for money already received by him and by Walker from the defendants, and will treat the money in Court as representing the shares and dispose of it accordingly.

The appeal should be allowed with costs; the judgment of Mathers, C.J., should be reversed and the questions in the issue answered as above, and the defendants should be ordered to pay the costs of the issue.

Cameron, J.A.

CAMERON, J.A.:—Upon the findings of the Chief Justice, I cannot resist the conclusion that the appellant is entitled to succeed. The facts here are very different from those set out in the cases referred to in the judgment appealed from. When the officers of a company combine to dispose of all its property (the holding of which was the sole object of its existence) at a secret

profit to themselves, the acquisition of shares by them from shareholders who are in ignorance of the subterranean facts of the sale, cannot surely be upheld by the Courts. The considerations which affect the transfer by Gadsden of the shares originally his own, affect also the shares acquired by him from Teetzel. Had Teetzel, before he finally disposed of his interest in his shares, with full knowledge of the material facts, elected to ratify the action of the defendants and discharge them from any liability, the situation would be different, but nothing of the kind is shewn.

It would be difficult to say that the so-called release of September 15, executed by Walker in favour of Wellband and Bennetto, would have been binding on him had he chosen to dispute it. He said he never read the part of the document relating to the secret commission. At any rate his action could in nowise affect Gadsden, who knew nothing of it. As to the Teetzel shares, the equity in these had been acquired by Gadsden in November, 1908. The learned Chief Justice finds that Gadsden "bought the equity in these Teetzel shares after the amount of the equity had been figured and stated to him by Walker."

No doubt the burden of establishing affirmation with knowledge rests on the defendants here, and "the evidence fails to shew that either Walker or Gadsden had elected to confirm the transaction with knowledge of the fraud."

The answers to the questions submitted in the order for trial in this matter must, in my opinion, be that the ownership of share certificates Nos. 24 and 16 is in the appellant James Gadsden as against Israel Bennetto and Charles Wellband. I concur in the disposition of the case and of the costs of the appeal and the issue in the manner stated by Mr. Justice Perdue in his judgment.

HAGGART, J.A., concurred.

Appeal allowed.

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Nov. 19.

McPHERSON et al. v. TEMISKAMING LUMBER CO., Limited.

Judicial Committee of the Privy Council. Present: The Earl of Halsbury, Lord Macnaghten, Lord Atkinson, Lord Shaw of Dunfermline, and Sir Charles Fitzpatrick. November 19, 1912.

1. LEVY AND SEIZURE (§ I A—10c)—TIMBER CLAIMS—CROWN TIMBER ACT (ONT.)—LICENSEE—EXIGIBILITY.

The rights of a licensee under a timber license obtained under the Crown Timber Act, R.S.O. 1897, ch. 32, are such an interest in lands as to be exigible under the Execution Act of Ontario, 9 Edw. VII. ch. 47, to the effect that a "writ of execution shall bind the goods and lands against which it is issued, from the time of the delivery thereof to the sheriff for execution."

[*Canadian Pacific R. Co.* v. *Rat Portage Lumber Co.*, 10 O.L.R. 273, disapproved; *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405, 70 L.J.P.C. 62, 20 Times L.R. 531, applied; *McPherson* v. *Temiskaming Lumber Co.*, 3 O.W.N. 36, 20 O.W.R. 13, reversed. As to rights to timber before and after severance under a mining license, see *Re Clarkson and Wishart* (Ont.), 6 D.L.R. 579, 586, 587; *Ronleau* v. *International Asbestos Co.* (Que.), 5 D.L.R. 434.]

2. TIMBER (§ I—12)—CROWN TIMBER ACT (ONT.)—ASSIGNABILITY NOTWITHSTANDING WRIT OF EXECUTION.

An execution against a debtor levied under the Execution Act of Ontario, 9 Edw. VII. ch. 47, does not interfere with the power of the debtor to assign or transfer his rights under a timber license obtained under the Crown Timber Act, R.S.O. 1897, ch. 32, subject to the security of the execution creditor not being impaired.

[*McPherson* v. *Temiskaming Lumber Co.*, 3 O.W.N. 36, 20 O.W.R. 13, reversed.]

3. LEVY AND SEIZURE (§ I A—10c)—TIMBER CLAIMS—CROWN TIMBER ACT (ONT.)—TIMBER SEVERED BEFORE EXECUTION—EXIGIBILITY.

Where timber has been cut and is lying on the land of a debtor on the date of an execution against him, such timber is subject to seizure under the Execution Act of Ontario, 9 Edw. VII. ch. 47, although the debtor is operating under a license obtained under the Crown Timber Act, R.S.O. 1897, ch. 32.

[*McPherson* v. *Temiskaming Lumber Co.*, 3 O.W.N. 36, 20 O.W.R. 13, reversed.]

4. LEVY AND SEIZURE (§ I A—10c)—TIMBER CLAIMS—CROWN TIMBER ACT (ONT.)—TIMBER SEVERED AFTER EXECUTION—EXIGIBILITY.

Timber cut by a licensee of timber land under the Crown Timber Act, R.S.O. 1897, ch. 32, subsequent to the date of an execution against him is attachable under the execution, notwithstanding that the cutting had been made by an assignee or a transferee to whom, in the interval between the laying on of the execution and the cutting of the timber, the licensee had transferred his rights, unless such transfer was made in good faith and for valuable consideration and without notice on the part of the transferee of the writ having been delivered to the sheriff and remaining unexecuted.

[*McPherson* v. *Temiskaming Lumber Co.*, 3 O.W.N. 36, 20 O.W.R. 13, reversed.]

Statement

APPEAL by plaintiffs from a judgment of the Court of Appeal for Ontario given on 20 September, 1911, *McPherson* v. *Temiskaming Lumber Co.*, 3 O.W.N. 36, 20 O.W.R. 13, reversing the judgment of Teetzel, J., *McPherson* v. *Temiskaming Lumber Co.*, 2 O.W.N. 553.

The present appeal was allowed and the case remitted to the

Ontario Court of Appeal (now the Appellate Division of the Ontario Supreme Court) to be disposed of in accordance with the judgment of the Judicial Committee.

Laidlaw, K.C., and *Wallace Nesbitt*, K.C. (of the Canadian Bar), for plaintiffs, appellants.

Sir Robert Finlay, K.C., and *Geoffrey Lawrence*, for the defendants, respondents.

The judgment of the Judicial Committee was delivered by

Lord Shaw.

Lord Shaw of Dunfermline:—This appeal arises out of interpleader issues. As put in the question for trial, the issue was whether certain goods and chattels consisting of saw-logs seized in execution by the sheriff of the district of Nipissing in the province of Ontario, under the writs of *fieri facias* after mentioned, "for the having in execution of the judgments" upon which the writs were issued, "were at the time of the seizure by the said sheriff exigible under the said execution of the said execution creditors as against the said claimants, the Temiskaming Lumber Company Limited." The execution creditors were the appellants, Allan McPherson and William Booth. Executions had been issued upon judgments recovered by these appellants respectively, the judgment being for the amounts of debts due by A. McGuire & Co., who were or had been lessees or licensees of certain timber lands in the district of Nipissing, in the province of Ontario. The writs dealt with by the trial Judge were three in number and were duly received by the sheriff as follows, namely: (1) at the instance of McPherson, received on the 2nd December, 1909, this being for the sum of $3,961; (2) and (3), at the instance of Booth, received on the 26th February, 1910, for $729 and $317, respectively. These two latter appear to have been repetitions of previous executions for the same amounts received by the sheriff on the 16th June, 1909.

The material circumstances of the case so far as the McGuires are concerned, are as follows: Annie McGuire, wife of Cornelius McGuire, obtained a timber license in ordinary form from the government of Ontario of certain parcels of land in the townships of Bryce and Beauchamp, on the 11th January, 1907. The license was subsequently renewed until the 30th April, 1912. Annie McGuire was the sole partner of A. McGuire & Co., and she appointed Cornelius McGuire, her husband, as manager. She obtained advances from, and incurred debts to, the appellants, who obtained judgments therefor. Writs of *fieri facias* were issued and delivered in regular form for payment of the moneys due against (to use the exact language of the writs) "the goods and chattels, lands and tenements, of A. McGuire & Co. in your bailiwick." In the course

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of the months of January, February, and March, 1910, considerable cutting operations were made and the logs cut were placed on the ice and floated down the rivers to Lake Temiskaming. The sheriff acting under the execution took exclusive possession of these logs on the 11th June, 1910. The interpleader order was issued on the 22nd of that month. There is no objection to the form of these proceedings. By the Execution Act in force in Ontario at their date, namely, the consolidation statute of the 13th April, 1909:—

> A writ of execution shall bind the goods and lands against which it is issued from the time of the delivery thereof to the sheriff for execution. Provided that subject to the provisions of the Bills of Sale and Chattel and Mortgage Act, no writ of execution against goods shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had, at the time when he acquired his title, notice that such writ had been delivered to the sheriff and remains in his hands unexecuted.

There is no dispute in this case that the respondents, the Temiskaming Lumber Company, Limited, had at least full knowledge of the writs of execution at the instance of the appellant McPherson. (The position of the company with regard to the rights of Booth and of McGuire's indebtedness in general is hereafter dealt with). Accordingly, no question arises as to the application of the proviso, it being an admission that the Temiskaming Lumber Company, thus charged with notice of the execution and proceedings, is in no better position to resist legal effect being given to these than the original debtors, Messrs. A. McGuire and Company, would have been.

The point, however, which has been taken by the respondents is this, that while it is conceded that under the law of Ontario execution may proceed against both the goods and the lands of a debtor, a timber license and all rights, privileges, and interests of the licensee thereunder, constitute, so long as the timber stands, neither the one nor the other, but form an unattachable legal entity. This point, and it is accordingly of much importance to the province, gravely affects the rights of timber licensees, their mercantile credit, and the security which they are able to afford in commercial dealings.

It is, therefore, expedient to consider the position of those holding timber licenses under the law of Ontario, in view of the contention that, valuable as these licenses may be to the licensees, they nevertheless constitute no source of legal credit, because they are unavailable to execution creditors. The statute regulating the effect of timber licenses in Ontario is that of 1897, ch. 32, of the Revised Statutes, known as the Crown Timber Act. After making provisions for the grant of licenses to cut timber on the ungranted lands of the Crown, at such rates and subject to such conditions, regulations, and restric-

tions as may be established by the Lieutenant-Governor-in-council, sec. 3 provides:—

> (1) The licenses shall describe the lands upon which the timber may be cut, and shall confer for the time being on the nominee the right to take and keep exclusive possession of the lands so described, subject to such regulations and restrictions as may be established.
>
> (2) The licenses shall vest in the holders thereof all rights of property whatsoever in all trees, timber, and lumber, cut within the limits of the license during the term thereof, whether the trees, timber, and lumber are cut by authority of the holder of the license, or by any other person, with or without his consent.
>
> (3) The licenses shall entitle the holders thereof to seize in revendication or otherwise, such trees, timber, or lumber where the same are found in the possession of any unauthorized person, and also to institute any action against any wrongful possessor or trespasser, and to prosecute all trespassers and other offenders to punishment, and to recover damages, if any.

Provisions are made for the continuation of the grant to licensees, sec. 5 of the statute being to the effect that "license holders who have complied with all existing regulations shall be entitled to have their licenses renewed on application to the commissioner." A variety of provisions occurs with reference to the obligations of licensees, who are bound, *inter alia*, to keep, and keep open to inspection, such records and books as may be required, and to furnish satisfactory proof of the number of pieces and descriptions of timber, saw-logs, etc. It should be added that, in respect of these rights, the licensee comes under liability to taxation and assessment. With reference to the land itself, the right of the licensee therein is clear and distinct, namely, it is a right to take and keep exclusive possession of the lands described, with, in the second place, a power to cut and remove timber therefrom. As regards the timber, the property therein, when cut, is vested in the licensee, and this vesting takes place whether the operations of cutting are carried out with or without the licensee's consent.

In the present case, Mr. Justice R. M. Meredith, observes:—

> I am still unfortunate enough to be unable to understand why the interest in land of a licensee under the Crown lands timber license is not an interest in land liable to seizure and sale under a writ of execution as well as liable to assessment for the purpose of taxation.

Their Lordships find themselves in the same position. The learned Judges of the Court of Appeal, however, hold that the matter is concluded by authority, and, in particular, by the authority of *Canadian Pacific R. Co.* v. *Rat Portage Lumber Co.*, 10 O.L.R. 273, decided in 1905. This case will be immediately referred to. But it is important to note that the scheme of the Execution Acts of the province of Ontario was plainly meant, and, in their Lordships' opinion, it is fitted, to attach not only

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goods and chattels, but also landed rights. In their Lordships' view, the observation of Lord Davey in *Glenwood Lumber Company, Limited* v. *Phillips*, [1904] A.C. 405 at 408, 70 L.J. P.C. 62, 20 Times L.R. 531, is applicable to the present case. The Act there being construed was a Newfoundland statute of a character similar to that now under construction. It was decided that, in ascertaining what was the nature of the rights under such a statute, the question was not one of words, but of substance.

Lord Davey said:—

> If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself. . . . It is enacted that the lease shall vest in the lessee the right to take and keep exclusive possession of the lands described therein, subject to the conditions in the Act provided or referred to, and the lessee is empowered (amongst other things) to bring any actions or suits against any party unlawfully in possession of any land so leased, and to prosecute all trespassers thereon. The operative part and *habendum* in the license is framed in apt language to carry out the intention so expressed in the Act; and their Lordships have no doubt that the effect of the so-called license was to confer a title to the land itself on the respondent.

All this language is applicable in terms to the statute of Ontario now being dealt with, similar provisions occurring therein. Their Lordships see no reason to doubt the soundness of the view thus expressed by Lord Davey, or its applicability to rights of a similar character in the province of Ontario. In their opinion, a title to the land itself, subject, of course, always to the restrictions, conditions, and limitations laid down in the license, is in the licensee of timber lands. When, accordingly, the Execution Act of Ontario (9 Edw. VII. ch. 47), already referred to, states that a "writ of execution shall bind the goods and lands against which it is issued, from the time of the delivery thereof to the sheriff for execution," it would appear not open to doubt that timber lands and the rights of a licensee therein under a timber license are included under this description.

This view appears to be expressly confirmed by section 32 of the Execution Act, which provides that any estate, right, title, or interest in land shall be liable to seizure and sale in execution in the same manner and on the same conditions as land. But apart from that section the nature of the title of a licensee is a title (it may be limited in character) to the land itself, and in their Lordships' opinion, accordingly, it falls within the scope of the Execution Act. In the Court of Appeal, however, the learned Judges did not apparently feel free, if they entertained this view, to give effect to it, on account of the decision

in the *Rat Portage* case, above referred to: *Canadian Pacific R. Co.* v. *Rat Portage Lumber Co.*, 10 O.L.R. 273.

In the *Rat Portage* case the execution debtor was the holder of a permit to cut and remove railway ties from Crown lands. He entered into partnership with another person, the object of the partnership being to remove the ties in order to fulfil a contract with a railway company. Undoubtedly the object of the partnership was that the ties when cut should be the property of the concern. In the Court of Appeal it rather appeared that the broad question now to be determined was—by reason of a concession made at the bar—not one upon which a judgment was really asked. It was conceded by the counsel for the execution creditor that the writ "was not a lien or charge upon any of the timber embraced in the Crown timber permit until it had been severed from the soil." But the contention was that, once severance of the timber took place, the execution attached, notwithstanding any agreements in respect of the timber made before the severance. The parties do not appear to have entered into actual contest upon the question of the real nature of the right of the timber licensee, in so far as the land itself was concerned, or in so far as affected the comprehensive rights of a licensee in land. In these circumstances their Lordships do not feel that the true issue under the existing Execution Act of Ontario has been fully dealt with.

It is interesting to observe from the dictum of the learned Chief Justice Moss, that "if an agreement is not entered into with a colourable purpose, or with an intent to defeat or defraud creditors, as by a mere pretended partnership, but is entered into with the *bonâ fide* intention of forming a partnership and carrying on a business, it is not open to attack at the instance of creditors." If this dictum points to the impossibility of defeating the execution creditor's rights by the colourable device of partnership or other contract effecting a change of title, so formed as to defeat the execution, their Lordships agree with it. But the right of an execution creditor in no case interferes with the proprietary interests of the execution debtor, except to the effect that, while the execution debtor is free to deal with his property, the property so dealt with remains subject to the rights of the execution creditor therein; these last remain unaffected and unimpaired. The circumstances of the present case in this regard, and the dealings of A. McGuire & Company, with their rights as licensees, while the execution stood, will be presently referred to. But when the learned Chief Justice states that "the interest transferred by the debtor is not one exigible under a writ of execution, and is not affected by any lien or charge arising therefrom; there is nothing to affect the debtor's interest, and by no process

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could he be compelled to use it for the benefit of his creditors," their Lordships find themselves unable to agree with these propositions. In practice they would seem to operate greatly to the diminution of the credit otherwise available to timber licensees, and they would manifestly destroy the security for advances upon timber lands, however valuable, until actual severance of the timber. But this consideration might, of course, be counter-balanced by others, and in any view would have to yield to the fair construction of the words of the Execution Act. These words have been already cited. The subject of execution being land, in the broad sense already referred to, there seems no reason to question the comprehension within that term of timber licenses, in accordance with the principle set forth by Lord Davey in the *Glenwood* case, *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405.

It seems not improbable that a judgment in the above sense would have been pronounced by the learned Canadian Judges had they not felt themselves foreclosed by this authority. In their Lordships' view, however, the construction of the statute is clear. Under the Act the position of the holder of a timber license, is (1) that he is the possessor of an asset of the nature of land; (2) that that asset is, accordingly, subject to execution; (3) that the execution does not interfere with the property of the debtor or his power to assign or transfer, subject only to the security of the execution creditor not being impaired; (4) and when there is cut timber on the land at the date of execution, that timber is, of course, the instant subject of seizure; (5) should the timber be cut subsequent to the date of the execution, it is then instantly attached, and the execution cannot be defeated, because the cutting operations had been made by an assignee or transferee to whom, in the interval between the laying on of the execution and the cutting of the timber, the licensee had transferred his rights, and (6) the only exception to this is the case of a title being acquired by a third party in good faith, and for valuable consideration and without notice of the writ having been delivered to the sheriff and remaining unexecuted.

It seems to their Lordships that if these principles are violated the way is opened up to the defeat of the execution creditor's rights, and, as the circumstances of this case very plainly shew, to transactions of a questionable nature under which debtors would endeavour to avoid their just obligations.

The principles now set forth, are in entire accord with familiar law. That law was expressed thus by Baron Parke in what still stands as the leading case of *Samuel* v. *Duke*, 3 M. & W. 622, 6 D.P.C. 536, 1 H. & H. 127, 7 L.J. Ex. 177:—

> Now it is perfectly clear to me, both upon the decided cases and the reason of the thing, that if a writ of execution has been delivered to

> the sheriff, the defendant may convey his property, but that the sheriff has a right to the execution notwithstanding the transfer . . ; the right . . . speaks from the time of the delivery of the writ upon the receipt of which the sheriff is to levy. But, subject to the execution, the debtor has a right to deal with his property as he pleases, and if he transfers it in market overt, the right of the sheriff ceases altogether.

Under the Execution Act of Ontario the right of the execution creditor is only defeated if the purchaser has acquired a title in good faith and for valuable consideration without notice of the execution, and has paid his purchase-money. The only question, therefore, remaining in this case is whether the Temiskaming Lumber Company, the respondents, so acquired in good faith and for valuable consideration and without notice. It is really unnecessary—the documents and admissions of parties standing as they do—to enter upon this question in detail. So far as the McGuires are concerned, they appear to have deliberately set themselves to defeat the rights of the appellants as judgment creditors, and, in their Lordships' opinion, in this attempt they obtained the active assistance of one Murphy, of the Traders Bank, and of the respondents. The scheme was to make a transfer of the license before any timber was cut, but to make the transfer in such a way that very substantial interests would still remain to McGuire. The scheme was to develop, and has developed, so that, after the transfer was made, the cutting thereof was to be ascribed to the transferees, and when the execution was levied upon the timber so cut, the execution was to be defeated on the plea that the property in the cut timber was by that time in the transferees, who were not the execution debtors. These, namely, McGuire and Company, would thus slip out of liability by the transfer of the license for valuable consideration, and by having divested themselves of the right to cut timber and invested others who could cut and remove it but yet would not be bound by the execution. This operation, which is essentially a transaction of bad faith, so far as the execution debtors were concerned, might, of course, have been possible on the footing that the rights of the licensee were not a title to land and were unattachable by execution. Such a state of the law facilitated an operation by which the execution debtor could evade the rights of his creditors by simply standing aside from the active operations of cutting timber under his license and by assigning his license, with the right to cut timber, to somebody else. What happened in the present case was upon these lines, and, without entering upon the matter at large, their Lordships think that the whole series of transactions was simply a juggle to defeat the rights of the execution creditors of McGuire. Teetzel, J., appears to be well justified in his observation:—

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As respects the company and Murphy, both of whom had notice of the injunction, it is perfectly plain that, while the agreement for sale may not be impeachable as fraudulent as against creditors, the method of carrying it out was primarily adopted for the purpose of enabling McGuire and Company to evade the injunction and to circumvent the plaintiff McPherson in his efforts to realize his judgment out of McGuire and Company's interest in the license and the right to cut timber thereunder, and I must say that upon this record the course pursued by the Traders Bank was such as without which the dishonest purpose of McGuire and Company could not have been so nearly accomplished.

So far as the respondents, the Temiskaming Lumber Company, are concerned, their position does not appear to be one whit better. By the time of the formation of the company in January, 1910, things had reached the stage of legal proceedings against A. McGuire and Company, and an injunction had been obtained against that firm against parting with its property. When, accordingly, the offer to sell to the Temiskaming Company, dated the 11th January, 1910— that is to say, more than a fortnight before even the first meeting of provisional directors—was considered, "it was resolved that said offer be accepted subject to this: that the transfer of said license shall not be made until the pending injunction against A. McGuire and Company, restraining the transfer of the said license, shall have been disposed of, but in the meantime that the company shall go upon the limits and carry on the operation of cutting and removing timber therefrom." The pending injunction was not disposed of *in foro contentioso*, but, as narrated in the appellant's case, "a bond with sufficient sureties was executed by and on behalf of the respondents, and approved by the Court for the sum of $10,000, to secure an approximate amount sufficient for the payment of all the said writs of execution (*i.e.*, both McPherson's and Booth's), and the logs were taken possession of by the respondents."

Their Lordships incline to the opinion that, with reference to the particular matter in issue in this suit, namely, the cutting of the timber and the rights therein, McGuire and Company simply continued as before the formation of the Temiskaming Company, so far as the transaction of transfer was concerned, Annie McGuire took the entire purchase-price in $9,000 of stock allotted to her in the Temiskaming Company. But this ostensible transaction made no real difference to the working of the license. For although the company was constituted in January, 1910, a document is produced, namely, the oath of Cornelius McGuire, furnishing a statement "of the total number of pieces of saw-logs, boom timber, and other timber, got out by or for the said A. McGuire and Company, or otherwise acquired by them, during the past winter." This

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statement was made in terms of the Crown Timber Act, and is dated the 28th May, 1910. It is in these circumstances impossible, in their Lordships' view, for the respondents to set up the plea that they acquired the rights of McGuire and Company in good faith, and are so entitled to defeat the execution laid on at the instance either of McPherson or of Booth. As already mentioned, it was upon the timber so cut that execution was levied, and to relieve the execution upon it and to meet the issue in this action an arrangement as to the setting aside of $10,000 was made. In their Lordships' opinion, the whole circumstances are such as to shew that there has been an attempt to defeat the rights of the execution creditors, and that the respondents were aware of this attempt, and have pursued a course of conduct with a view to its success.

In the result, their Lordships are of opinion that the rights of both of the appellants under the three executions referred to, fail to be satisfied out of the $10,000 secured by the bond, and that the appellants should be found entitled to the costs of this appeal and in the Courts below.

Their Lordships will humbly advise His Majesty that the judgments appealed from should be reversed, that the cause be remitted to the Court of Appeal to dispose of the actions in accordance with this judgment, and that the costs should be dealt with as above stated.

Appeal allowed.

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*Ontario Court of Appeal, *Moss, C.J.O., Garrow, Maclaren, Meredith, and Magee, JJ.A. November 19, 1912.*

1. Adverse possession (§ II—61)—Tenant at will—Prior mortgagee.

A person admitted into possession as tenant at will and remaining in possession without acknowledgment for ten years after the lapse of one year from being placed in possession will not acquire a title by adverse possession against the mortgagee of the lands claiming under a mortgage made prior to the tenancy at will unless a ten year period has elapsed under the statute, 10 Edw. VII. (Ont.) ch. 34, sec. 23, from the last payment of any part of the principal money or interest secured by the mortgage.

[*Noble* v. *Noble*, 1 D.L.R. 516, affirmed in part.]

2. Adverse possession (§ II—61)—Tenant at will—Discharge of prior mortgage—Statutory effect.

Where a mortgage registered under the Ontario Registry Act, 10 Edw. VII. ch. 60, is paid off by the mortgagor, and a discharge thereof is registered in the statutory form, the effect is to discharge the mortgage as against a person claiming title by adverse possession against the mortgagor since the making of the mortgage, and the

*Moss, C.J.O., died before judgment was delivered.

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effect is not to convey or reconvey to the mortgagor his original title in fee with the right to possession as from the date of the repayment.

[*Noble* v. *Noble*, 1 D.L.R. 516, 25 O.L.R. 379, reversed on appeal in part; *Brown* v. *McLean*, 18 O.R. 533, applied; *Henderson* v. *Henderson*, 23 A.R. 577; *Thornton* v. *France*, [1897] 2 Q.B. 143; *Doe d. Baddeley* v. *Massey*, 17 Q.B. 373; *Heath* v. *Pugh*, 6 Q.B.D. 345, 7 A.C. 235; *Ludbrook* v. *Ludbrook*, [1901] 2 K.B. 96; *Cameron* v. *Walker*, 19 O.R. 212, referred to.]

3. LIMITATION OF ACTIONS (§ I D—25)—TENANT AT WILL WITHOUT RENT—STATUTE OF LIMITATIONS (ONT.).

Where a person becomes tenant at will of another's lands without paying rent therefor, the Statute of Limitations, 10 Edw. VII. Ont.) ch. 34, sec. 6, begins to run in his favour as against the owner at the end of one year after being let into possession.

[Sub-sec. 7, sec. 6, Statute of Limitations, 10 Edw. VII. (Ont.) ch. 34, referred to.]

4. STATUTES (§ II B—113)—STATUTES OF LIMITATION.

Statutes of Limitation are to be interpreted as beneficial statutes inasmuch as they are "Acts of peace," and the rule of strict construction does not apply to them. (Dictum *per* GARROW, J.A.).

[See. 16 of the Limitations Act, 10 Edw. VII. (Ont.) ch. 34, referred to.]

Statement

APPEAL by the defendant from the judgment of a Divisional Court, *Noble* v. *Noble*, 1 D.L.R. 516, 25 O.L.R. 379, reversing the judgment of Mulock, C.J.Ex.D., and declaring the plaintiff entitled to recover possession of lands in the city of Brantford, notwithstanding the defence of the Statute of Limitations.

The appeal was allowed, MEREDITH, J.A., dissenting.

Argument

M. K. Cowan, K.C., for the defendant. The son on the 1st April, 1895, became a tenant at will of the plaintiff: *Keffer* v. *Keffer* (1877), 27 C.P. 257. This tenancy at will was never interrupted or changed, and on the 1st April, 1906, the plaintiff became completely barred. The fact that the plaintiff had made payments on the mortgage did not prevent the Statute of Limitations running against him: *Fisher* v. *Spohn* (1883), 4 C.L.T. 446; *Brown* v. *McLean* (1889), 18 O.R. 533. The being assessed as owner or the payment of taxes would not make the plaintiff the owner: *Lynes* v. *Snaith*, [1899] 1 Q.B. 486. The registration of the discharge of mortgage did not give any new right of entry or starting-point under the statute.

W. S. Brewster, K.C., for the plaintiff. The statutory bar was never complete against the plaintiff. There was ample evidence from which a new tenancy at will could be implied from the acts and conduct of the parties. During the whole time of the son's occupation, the property was assessed to the father as freeholder, and to the son as tenant, and the taxes had always been paid by the father, and this had been acquiesced in by the son: *Foster* v. *Emerson* (1854), 5 Gr. 135; *Turner* v. *Doe d. Bennett* (1842), 9 M. & W. 643. The registration of the dis-

charge of mortgage created a new starting-point for the statute, and reconveyed to the plaintiff his original title in fee, with the right to possession as from the date of repayment: *Lawlor* v. *Lawlor* (1882), 10 S.C.R. 194; *Henderson* v. *Henderson* (1896), 23 A.R. 577; *Ludbrook* v. *Ludbrook*, [1901] 2 K.B. 96. The plaintiff, in any event, having paid off the mortgage, is entitled to be subrogated to the rights of the mortgagee, even though the discharge has been executed and registered: *Brown* v. *McLean*, 18 O.R. 533; *Abell* v. *Morrison* (1890), 19 O.R. 669.

Argument

Cowan, in reply.

November 19. GARROW, J.A.:—Appeal by the defendant from the judgment of a Divisional Court reversing the judgment at the trial of Mulock, C.J.

Garrow, J.A.

The action was brought to recover possession of land in the city of Brantford. The defence was the Statute of Limitations. The case is reported in 25 O.L.R. 379.

The case naturally divides into two branches: the first, as to the nature and terms of the occupancy of the land by the defendant and her late husband; and the second, as to the legal effect of the registered discharge of mortgage.

Upon the first branch, Mulock, C.J., held that the occupancy began as a tenancy at will, which was never afterwards interrupted or changed, and that at the end of ten years from the end of the first year of the tenancy the statutory bar against the plaintiff was complete. And, upon the second branch, that the discharge of mortgage and its registration did not have the effect contended for of giving a new right of entry or starting-point under the statute.

I agree with Mulock, C.J., upon both branches.

As to the first, in so far as it depends upon facts concerning which there was conflicting evidence, the finding of the trial Judge should not, upon general principles, have been disturbed.

But, apart from that, I am, with deference, quite unable to see in the evidence as a whole any circumstance which would justify the inference drawn by the Divisional Court that the tenancy at will originally existing was ever put an end to, or a new tenancy of any kind created: see, in addition to the cases referred to by the learned Chancellor, *McCowan* v. *Armstrong* (1902), 3 O.L.R. 100.

The second branch seems to depend largely upon the proper construction of the Registry Act, now 10 Edw. VII. ch. 60, sec. 66*a*, as added by 1 Geo. V. ch. 17, sec. 31, which provides that a certificate of discharge shall, when registered, be (1) a discharge of the mortgage, (2) as valid and effectual in law as a release, and (3) as a conveyance to the mortgagor, his heirs or assigns, of the original estate of the mortgagor.

The plain object intended to be attained is merely by a short

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and simple form to discharge from the title the incumbrance created by the mortgage, which, in equity at least, was never considered as more or other than a charge, the beneficial ownership remaining in the mortgagor.

The section does not say that the certificate is a release or is a conveyance, but that it shall—of course for the purpose intended—have the effect of a release and a conveyance. Such being the clear purpose, it seems to me that the proper construction is that placed upon similar language by Street, J., in *Brown* v. *McLean*, 18 O.R. 533, at p. 535, as "merely replacing the mortgagee's estate in the person best entitled to it, without allowing it to affect the real rights of any person."

Nor can it make any difference in the proper construction that the question arises in such a case as this, where the estate to be benefited is one acquired under the Limitations Act. At the time of the registration of the discharge, the plaintiff's title had, under the provisions of sec. 16 of that Act, now 10 Edw. VII. ch. 34, if I am right as to the first branch, been extinguished for over four years, during which the defendant and those claiming under her late husband had been the statutory owners of the equity of redemption. Statutes of limitation have been called beneficial statutes, inasmuch as they are "Acts of peace," and the rule of strict construction does not apply to them. That does not, of course, mean that the Court should assist an imperfect title set up under the statute, or overlook fraud or dishonesty where they are elements in the statutory title attempted to be made out. Nothing of the kind, however, appears in this case; for I find it impossible to doubt, upon the whole circumstances appearing in evidence, that what the plaintiff now desires to do is to recall, for a reason not avowed, an apparently not unreasonable bounty intended by him for the benefit of his son, now dead. This does not, of course, prevent him from standing upon his legal rights, if any; but, on the other hand, the statutory title, if any, acquired by the defendant is not the proper subject of prejudice because it was so acquired, but should stand upon the same footing as any other title recognised by the law.

In so far as "land" is concerned (interpreted in sec. 2 (*c*)), the whole estate is *primâ facie* affected by an opposing possession—exceptions, however, being made in favour of future estates, disabilities, mortgagees, concealed fraud, etc. But none of the exceptions can, as I read them, be made reasonably to include such a case as this, where the plaintiff's estate had been absolutely extinguished. How it would be if the plaintiff had obtained the discharge before the expiry of the ten years need not now be determined. That was the situation in *Henderson* v. *Henderson*, 23 A.R. 577, in which the question was considered by Maclennan, J.A., who arrived at the conclusion that the registra-

tion of the certificate of discharge gave a new starting-point or right of entry. Burton, J.A., agreed; but the other members of the Court, Hagarty, C.J.O., and Osler, J.A., declined to express an opinion upon the point, which, in the view they took of the facts, was not necessary.

In the following year, a somewhat similar point was considered in the English Court of Appeal, in *Thornton* v. *France*, [1897] 2 Q.B. 143, in which the authority of *Doe d. Baddeley* v. *Massey* (1851), 17 Q.B. 373, the case upon which Maclennan, J.A., mainly relied, was somewhat shaken, and was certainly not followed, but distinguished. In *Doe d. Baddeley* v. *Massey* it is said (p. 382) that the construction there maintained was necessary for the protection of mortgagees. And, if the fact is as stated by Chitty, L.J., in *Thornton* v. *France*, at p. 157, that the mortgagee in *Doe d. Baddeley* v. *Massey* joined in the conveyance, with the mortgagor, for the purpose of recovering the money due on the mortgage, and of conveying the legal estate to the purchaser, the conclusion that the purchaser was, under the circumstances, a person claiming under the mortgage, as well as the mortgagor, was not perhaps unreasonable. In *Thornton* v. *France*, the mortgage, it is worth noting, was after what I may call the adverse possession had commenced, and it was held that time was running against both mortgagor and mortgagee; in other words, that the giving of the mortgage, under such circumstances, did not affect the operation of the statute.

Other illustrative instances in which the purchasers were held entitled to claim under the mortgagee, are: *Heath* v. *Pugh* (1881), 6 Q.B.D. 345, in which the whole subject is very fully considered in the Court of Appeal by Lord Selborne, L.C., afterwards affirmed in the House of Lords: *Pugh* v. *Heath* (1882), 7 App. Cas. 235; *Ludbrook* v. *Ludbrook*, [1901] 2 K.B. 96; and, in our own Courts, *Cameron* v. *Walker* (1890), 19 O.R. 212. In *Ludbrook* v. *Ludbrook*, differing in this respect from *Thornton* v. *France*, the mortgage had been executed before the possession began, which I assume was the position here, although the point is perhaps not very clear. But in that case the plaintiff had not only acquired the reversion, but had purchased and kept on foot the mortgages (see p. 99); and it was, accordingly, held that, under the circumstances, he was justified in taking possession in his capacity of mortgagee.

But all these cases differ widely from the present. When the plaintiff here obtained the discharge, he was a stranger to the estate, and had, therefore, no estate or interest to be enlarged by paying off the mortgage and obtaining a statutory discharge. He might, of course, as in *Ludbrook* v. *Ludbrook*, have taken an assignment of the mortgage, for he was under no obligation to the defendant to pay it, and in that way have fully protected

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himself to the extent of the payment. He may even yet, upon the principle applied in *Brown* v. *McLean*, be able in another action to establish a lien to the extent of the payment. With that, however, we have here nothing to do; for, although leave was sought at the trial to set up such a claim, the application was, quite properly at that stage, disallowed.

Upon the whole, I am of the opinion that the appeal should be allowed with costs and the judgment at the trial restored.

Maclaren, J.A.

MACLAREN, J.A.:—I agree.

Magee, J.A.

MAGEE, J.A.:—The plaintiff claims possession of a house and lot in Brantford occupied by the defendant and her infant daughter, the only child of Frank Noble, her deceased husband, son of the plaintiff.

It is not disputed that the plaintiff purchased the property for $900; and it was conveyed to him by deed dated the 20th February, 1895. On the same day, he mortgaged it to the Royal Loan and Savings Company for $650, repayable $50 annually for four years and the balance in five years with interest yearly. The son was let into possession on the 1st April, 1895, and continued to reside there with his wife until, in April, 1907, he was removed to an Asylum for the Insane, where he remained "just a year," until his death on the 24th April, 1908. The defendant had stayed in the house with her child during his absence, and has since his death occupied it except during about four months in 1908, when it was rented to one Smith, who paid the rent to her. The plaintiff paid instalments of $50 of principal on the mortgage in March, 1896, 1898, and 1899, and continued to pay the interest each year until the 29th February, 1908, when he paid the $500 balance of principal. He then obtained from the mortgagees a discharge of the mortgage in statutory form, certifying that he had "satisfied all moneys owing" upon it, and that it was "therefore discharged." The discharge was registered on the 11th January, 1911, before this action.

The other material facts are sufficiently set forth in the judgments at the trial and in the Divisional Court. There are some misapprehensions of fact in the latter as to uniform payment of taxes by the plaintiff and proof of mode of assessment and supply of material for all repairs, and as to the son working the whole time for the plaintiff; but these are not, in my view, material. What are called the father's "frequent visits to the place," he himself only describes as "calling to see my son and his family." As to the father leasing the place with the defendant's assent, it may be noted that the learned Chief Justice at the trial considered that he did so as the defendant's agent.

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Two questions arise: first, was the plaintiff's title as owner of the equity of redemption extinguished during Frank Noble's lifetime, under sub-sec. 7 of sec. 5 and secs. 4 and 15 of R.S.O. 1897, ch. 133, the Real Property Limitation Act? and,second, did the registration of the discharge of mortgage confer upon the plaintiff a fresh right to possession? On both questions the Divisional Court reversed, in the plaintiff's favour, the judgment at the trial.

On the first question the judgment appealed from proceeds upon grounds thus stated by the learned Chancellor, who delivered the judgment of the Court: "The legal effect of the Statute of Limitations, when one is let into possession of land as in this case, is, that he becomes a tenant at will, and the right of entry to the owner accrues at the expiration of one year thereafter. The continuation of the possession is regarded as a tenancy at sufferance, unless evidence be given that a fresh tenancy has been created. A new tenancy at will is to be implied from acts and conduct of the parties which ought to satisfy a jury (or the Court) that there is such an agreement. . . In the present case, during the whole period . . the lot has been assessed to the plaintiff as freeholder and to the son as tenant, and the taxes have been uniformly paid by the father. This appears to me to present an act *in pais* respecting the property, which manifests the very truth that the father was from year to year recognised as the owner and the son as occupier or tenant; and this with the express assent and acceptance of the son. . . . To give effect to the statute would be to frustrate the clear intention of the owner to hold it in his own hands as the proprietor." And the judgment refers to the leasing of the place by the father to Smith with the defendant's assent as being "inconsistent with her husband being the owner, and reflects light on the real nature of the son's occupation."

With much respect, I venture to think that the case is here treated by the Divisional Court as if the Statute of Limitations actually determined the tenancy at will in one year, and thus rendered the creation of a fresh tenancy at will possible and for the plaintiff necessary. Therein, as I think, lies the whole question; for, if the statute did not determine it, there is not a suggestion of any other act of the parties or fact which would operate as a determination or indicate that the original tenancy at will was ever put an end to before the 1st April, 1906, or thereafter if it continued to be a tenancy at will until the son's death. The plaintiff does not suggest that anything was ever said between him and his son on the subject, and no entry or change of title or act inconsistent with continuance is shewn. The father's calls to see his son and his family certainly could not bear that construction.

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The statute, of course, has no such effect as to terminate the tenancy at the end of the first year, and the Divisional Court did not say that it had, but that Court did proceed to infer that the parties had in fact acted as if such was its effect, and had from year to year created a fresh tenancy as often as the statute ended the previous one, and in effect thus made eleven successive tenancies in theory, where there was only one in fact. The statute, however, contemplates that a tenancy at will created eleven years before action may have continued the whole time, and yet, if the landlord has neither received rent nor obtained a written acknowledgment, his rights will be barred. If there has been a determination in fact of the tenancy, that does not stop the statute running if the tenant continues in possession, but it leaves it open to the jury or Court to find that, after such determination, a new tenancy at will was in fact created by the parties, and so a new starting-point gained by the landlord. But this fresh tenancy presupposes the ending of the previous one in some way; and, if that has not been ended, there is no new one. True, the acceptance of a new tenancy might, in a proper state of facts, imply the surrender of the old one, but that would require very clear evidence, of which there is here an entire absence.

Indeed, the Privy Council in *Day* v. *Day* (1871), L.R. 3 P.C. 751, at p. 763, said: "The language and policy of the statute require that to constitute this new *terminus à quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will;" a pronouncement which Channell, J., hesitates to accept in *Jarman* v. *Hale*, [1899] 1 Q.B. 824, in which case, however, there was an actual determination.

The judgment of the Divisional Court on this point is based upon the case of *Foster* v. *Emerson*, 5 Gr. 135, where the Court did go the length of holding that, if the occupancy was shewn to be within the then period of twenty years that of tenant at will, the statute would not take effect, and this apparently whether the occupancy was under a continuing tenancy twenty-one years old, or under a fresh tenancy within twenty-one years. It is questionable if such a conclusion was necessary in that case. Although Spragge, V.-C., said that no question arose upon actual or presumed determination, yet Esten, V.-C., said (p. 152) that "with regard to Joseph Canniff, the tenancy seems to have been determined by the entry of the testator in 1837;" and there appear to have been various acts of the parties which the Court might well have construed as determining the tenancy. But, whether necessary or not, it was not warranted, I think, by any of the cases quoted as supporting it, and was contrary to

some which the Court cited without disapprobation and to the Act itself. *Doe d. Groves* v. *Groves* (1847), 10 Q.B. 486, was mainly relied on. There Erle, J., expressly mentions the occasional residence of the owner as an answer to the claim of possession, and none of the four Judges, though concluding that the defendant was tenant at will and deciding against him, say whether it was a continuous tenancy or a succession of fresh tenancies. The decision, therefore, does not warrant the conclusion drawn from it in *Foster* v. *Emerson*. But in *Doe d. Bennett* v. *Turner* (1840), 7 M. & W. 226, and *Turner* v. *Doe d. Bennett* (1842), 9 M. & W. 643, both of which were quoted in *Foster* v. *Emerson*, and now in this case by the Divisional Court, the defendant claimed possession from 1817 till 1839; his landlord had, however, in 1827 entered and cut and removed stone from a quarry, which was held to have been a determination of the tenancy at will. The Court said: "If, indeed, the tenancy throughout the whole period had been one continuous tenancy at will . . . the right to bring an action . . . would have been barred:" 7 M. & W. at pp. 233, 234. There was not a continued tenancy at will, for the will was determined in 1827, and the jury on a second trial having found a new tenancy at will, the Court held that the plaintiff was not barred: 9 M. & W. 643. That case did not support *Foster* v. *Emerson* as to a continued tenancy, but was opposed to it.

In *Keffer* v. *Keffer*, 27 C.P. 257, the defendant, son of the plaintiff, claimed by possession from 1859 till 1876. In 1865, the father had, at the son's instance, mortgaged, and the son paid the mortgage, and in 1871 registered a discharge. The Court held that the mortgage was not intended to be and was not a determination of the original tenancy at will, but that the latter had continued throughout; and that, no fresh tenancy having been created, the plaintiff was barred. The cases were reviewed by Gwynne, J., and *Foster* v. *Emerson* was not followed.

But the Privy Council, in *Day* v. *Day*, L.R. 3 C.P. 751, upon the corresponding statute of New South Wales, clearly settled that the statute took effect, although the occupant continued to be tenant at will under a tenancy created more than twenty-one years before action; and their Lordships used the language previously quoted as to the creation of the fresh tenancy.

It is clear, I think, that, if the judgment of the Divisional Court proceeded upon the basis of the statute not taking effect because Frank Noble continued to be in possession up till the 1st April, 1906, as tenant at will under the original tenancy, it is not in accordance with the statute or the authorities; and, if it proceeded upon the basis of an assumed finding of any surrender or determination of the original tenancy and creation of a new tenancy before the 1st April, 1906, and within eleven years, it is not supported by any evidence.

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The plaintiff's title to the equity of redemption became barred and extinguished on the 1st April, 1906. Subsequent admissions, if any, by the defendant or her husband, however valuable as evidence of the nature of the previous tenancy, could not revest the estate in the plaintiff.

What then was the effect of the plaintiff's payment of the mortgage and registration of the discharge? The Registry Act in force at the registration, 10 Edw. VII. ch. 60, sec. 62 (formerly R.S.O. 1897, ch. 136, sec. 76, and see now 1 Geo. V. ch. 17, sec. 31), declares that, "where a registered mortgage has been satisfied," the Registrar, on receiving a certificate of discharge in the statutory form, shall register it, "and the same shall be deemed a discharge of the mortgage, and the certificate so registered shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor." Then sec. 22 of the Real Property Limitation Act, R.S.O. 1897, ch. 133 (now 10 Edw. VII. ch. 34, sec. 23), allows "any person entitled to or claiming under a mortgage of land" to bring action to recover the land within ten years next after the last payment on the mortgage. It is contended for the plaintiff that, even if his equitable estate was barred in 1906, the discharge reconveyed the land to him, and that he thereby became a person entitled to or claiming under a mortgage so as to have ten years from the last payment, the 29th February, 1908, within which to bring his action. The plaintiff must establish both propositions.

The Divisional Court considered that, "had the son acquired a title under the statute as against the father, yet, according to *Henderson* v. *Henderson*, 23 A.R. 577, the execution and registration of the discharge gave a new starting-point for the statute;" and again, "the mortgage in this case being paid off by the mortgagor, the effect is not to discharge the mortgage as against the assumed statutory owner, but to reconvey to the mortgagor his original title in fee, with the right to the possession as from the date of the repayment." And the Court cited *Lawlor* v. *Lawlor*, 10 S.C.R. 194, and referred to *Ludbrook* v. *Ludbrook*, [1901] 2 K.B. 96, where the assignee of mortgages of 1876 and 1882, on which interest had been paid till 1893 and 1888 respectively, was held not barred by possession from 1885 till 1899, although those having the equity of redemption were barred. It is not here questioned that the mortgagee was not barred, so that case does not touch the points involved.

In *Henderson* v. *Henderson*, title by possession was claimed by the son's widow, but the father had registered the discharge of a mortgage before the ten years had run against him; and,

therefore, he was the only person in whose favour the discharge could operate as a reconveyance; so that, upon that point, it does not touch the present case. But Maclennan, J.A. (with whom Burton, J.A., agreed), held that by the discharge the father became a person claiming under a mortgage, and gained a fresh starting-point, and so was not barred, as but for the discharge he would have been, and he considered the case governed by *Doe d. Baddeley* v. *Massey*, 17 Q.B. 373. The Chief Justice and Osler, J.A., disclaimed any expression of opinion on this effect of the discharge; so that we have but the view of the two of the four Judges.

In *Keffer* v. *Keffer*, already referred to, the mortgagor was held barred in 1876, although there also a discharge had been registered in 1871, before being barred by possession from 1859; but the point does not appear to have been raised.

In *Lawlor* v. *Lawlor*, the only question was, whether the discharge obtained by the mortgagor, and registered while he was still owner, restored the estate tail which the mortgage had barred. It, therefore does not help us as to either of the points here raised. But it is to be noted that in that case Strong, J., said (10 S.C.R. at pp. 216, 217): "I think we are called upon to construe the words 'release' and 'conveyance of the original estate of the mortgagor,' as meaning that the whole estate which originally passed to the mortgagee, and of which the equity of redemption remains in the mortgagor, should be deemed to pass by the effect of the registration." And again (p. 218): "The statute clearly enough expresses that the whole estate held as a trustee by the satisfied mortgagee shall pass to his *cestui que trust*, the mortgagor, in as large an estate as that which the latter has in the equity of redemption vested in him at the time the certificate is registered." Referring to the fact that by the statute the discharge is to be valid and effectual as "a release of such mortgage," Strong, J., also said (p. 217): "I do not construe the release here meant as a mere release of the debt, for a release of a debt already paid and declared to be paid and satisfied by the certificate would be useless. I consider this expression as having reference to the legal estate held by the mortgagee." This language bears upon the present case, because here the plaintiff had no estate in the equity of redemption vested in him at registration of the discharge, and here also the mortgage money was certified to be satisfied.

It is, I think, clear that the decision of the Divisional Court is at least not a necessary result of the cases cited. I may here say that, whereas sec. 23 of the Limitations Act was passed for the protection of mortgagees, it does not seem to me at all necessary to that protection so to construe it that a mortgagor, satisfying the mortgage made by himself and getting it discharged,

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should be deemed a person claiming under it so as to prolong the time in his favour. So to prolong it is at least contrary to the policy in sec. 7(3) (1910 Act), which gives no extension where the person entitled to an interest in possession acquires another interest in "remainder, reversion, or otherwise" before the expiry of the ten years, and which declares both interests barred at the end of that time. The applicability of that provision to the case of a mortgagor was raised in *Ludbrook* v. *Ludbrook*, but it was not necessary to decide as to it. See *Carter* v. *Grasett* (1888), 14 A.R. 685, where discharge of a mortgage did not free the owner of the equity of redemption from an easement to which the mortgagee was not subject.

Let us look at the discharge. Originally adapted for cases where the mortgage was paid punctually without default and shewing that the mortgagee's title never became absolute, it was applied by the Legislature to be used in all cases, whether default had been made or not, provided the mortgage was "satisfied" and was to be "discharged." Up till 1865, 29 Viet. ch. 24, the statute declared that it would "have the effect of defeating any title remaining vested in the mortgagee," but should "not have the effect of defeating any other title whatsoever." It then operated as a conveyance to "the mortgagor, his heirs, executors, administrators, or assigns;" but, by 31 Viet. ch. 20, these words were added, "or any person lawfully claiming by, through or under him or them." The form of the discharge prescribed is a certificate "that . . . has satisfied all money due or to grow due on a certain mortgage made by . . . to . . . which mortgage bears date," etc., and "that such mortgage is therefore discharged;" and, as already mentioned, the form is to be used "when a registered mortgage is satisfied."

It is clear, I think, that, no matter whose name appears in it as having satisfied the moneys, the operation of the discharge must be always the same in any particular case. That name, so far as I can see, may be the name of a stranger to the title or of some one having only partial or contingent interest. The discharge certainly does not operate as a conveyance to him merely because he paid the money. See *Lee* v. *Howes* (1870), 30 U.C.R. 292, where purchaser under execution acquired title by discharge stating payment by mortgagor; and see *Carrick* v. *Smith* (1874), 35 U.C.R. 348. If the mortgagor still remains sole owner, it operates as a conveyance to him. If he has conveyed all his interest to A. or to A. and B., it conveys, not to the mortgagor, but to his grantee or grantees or their grantees in turn; and, if there were two grantees, and one alone paid, yet the discharge would convey to both. If the mortgagor had conveyed or devised to A. for life, with remainder to B., the discharge would convey accordingly, and not to the mortgagor.

The essential element is, that the mortgage-debt is satisfied by some one, and the mortgage is to be discharged, and so the legal or equitable estate of the mortgagee is to join the estate of and vest in the persons entitled to the equity of redemption for their proper shares or estates, but cannot, by such a document, vest in any person not entitled to the equity of redemption. Thus, if there were a second mortgagee, the legal estate of the first mortgagee would go to him still subject to redemption. If the mortgagor had conveyed or devised to A. in trust, the legal estate would go to A. likewise in trust, by the discharge.

I say nothing as to the effect a discharge may have as notice of any claim the person paying the money may have, but am speaking of it only as a conveyance. I would agree with the opinion of Street, J., in *Brown* v. *McLean*, 18 O.R. 533, that it should be taken as replacing the mortgagee's estate in the person best entitled to it; but I would add, as I think he meant, of those then having the equity of redemption and in the proportions or interests to which they may be entitled.

If the plaintiff's contention were correct, then, if this defendant had herself paid off the mortgage and registered a discharge of it, she would thereby have replaced the title in the plaintiff, whose right she is contesting, and whose estate had been extinguished. Sir Henry Strong, in *Lawlor* v. *Lawlor*, would appear to have had in mind that the discharge would only reconvey to those having the equity of redemption, when using the words I have already quoted, although they do not necessarily carry so far. In *Lee* v. *Howes*, also, the Court said (30 U.C.R. at p. 298): "The statement in the certificate that the mortgagor had paid the debt would not vest in him the title, if he had then no title on which it could attach."

If I am right that the discharge cannot operate in favour of one not having the equity of redemption, then it follows that it was not a conveyance to the plaintiff himself. He had had the equity of redemption, but that estate was "extinguished" by the Statute of Limitations. He still remained liable, however, on his covenant to the mortgagee for payment; but that did not give him a right to redeem. That was conceded and accepted by Stirling, J., in *Kinnaird* v. *Trollope* (1888), 39 Ch. D. 636. If sued upon the covenant, he could require the mortgagee to reconvey to him upon payment, and in such case the reconveyance would express that it was subject to existing equities: *Pearce* v. *Morris* (1869), L.R. 5 Ch. 227. But even this right to a reconveyance is not strictly a right to redeem, for he has nothing to be redeemed—no pledge which would be restored. It is a right based upon the same principle as that upon which a surety is, upon payment, entitled to the securities held by the creditor. There is no evidence here that there was even a re-

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quest from the mortgagee to pay. A mortgagor having conveyed away his estate is not even a necessary party to a foreclosure suit, though remaining liable upon his covenant. Now here the mortgagor had not conveyed, but he had suffered such a state of circumstances to exist between him and the tenant let into possession by him, that the statute stepped in and extinguished his title. Upon principle he equally lost his right to redeem, that is, to pay the mortgage and obtain a conveyance, unless forced by the mortgagee to pay. If he did not wish the mortgage to be satisfied and discharged, he was not bound to accept a discharge: *McLennan* v. *McLean* (1879), 27 Gr. 54; and he could have obtained a conveyance from the mortgagee by deed to him, or he might have arranged, as no doubt he could, for an assignment of the mortgage to some one for him. If he had a right to redeem, our statute (Mortgages Act, 10 Edw. VII. ch. 51, R.S.O. 1897, ch. 121, sec. 2) would entitle him to require an assignment. He did none of these things, but chose to act as if the owner of the land was to be benefited by his payment, and that owner was then his son. See *Lord Gifford* v. *Lord Fitzhardinge*, [1899] 2 Ch. 32, as to reconveyance declaring mortgaged property absolutely discharged.

But to whom did the discharge convey the legal estate, if not to the plaintiff? The statute says to the mortgagor or his assigns or any person lawfully claiming by, through, or under him. According to *Tichborne* v. *Weir* (1892), 8 Times L.R. 713, the son, Frank Noble, would not be assignee of his father's estate. There the defendant was held not to be assignee of a lease so as to be liable to the lessor on the lessee's covenants to repair, although the defendant had taken an assignment of the lease from one who, however, was really only equitable mortgagee of it by deposit of deed, and although the mortgagor, the lessee, was barred by length of possession. That, of course, came up in a very technical shape. But in *Dawkins* v. *Lord Penrhyn* (1878), 4 App. Cas. 51 (H.L.), Lord Cairns, L.C., said (p. 59): "The Statute of Limitations . . . says that . . . the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession." Lord O'Hagan said (p. 66): "It would operate as a complete transfer of title from one person to another, and as an absolute extinction of a right." And Lord Penzance (p. 64) quoted with approval the words of the Master of the Rolls, that "it is not a bar of the claim, it is a divesting of title, or a transference of title to somebody else." And in *Thornton* v. *France*, [1897] 2 Q.B. 143 (C.A.), Chitty, L.J., at p. 154, spoke of the 34th section (in Ontario 10 Edw. VII. ch.

34, sec. 16), "which transfers the estate which is barred." Other eminent Judges have used similar expressions.

The statute, it is true, only uses the word "extinguished." That does not mean extinguished for all purposes. For instance, if a life tenant's estate is so extinguished, it does not entitle the remainderman to enter. If a mortgagor is barred by possession of a claimant, that does not entitle a mortgagee to hold the property free from any redemption. The new owner in possession has the equity of redemption. That was decided by Lord Brampton (then Hawkins, J.) in *Fletcher* v. *Bird* (1896), reported in Fisher on Mortgages, 6th ed., p. 1025, where the mortgagor was barred by possession from 1869 till 1895, but his two daughters took the precaution of having a mortgage of 1868, on which interest had been kept paid-up, assigned to the plaintiff as their nominee, and the plaintiff was held entitled to possession, but the defendant to have the right to redeem. I agree with that decision. In the instances referred to of a person claiming the estate of a life-tenant or a mortgagor, it cannot be that the statute extinguishes the estate for the sole benefit of the third party. It was passed for the settlement of disputes and the simplification of proofs and rendering unnecessary in many cases the presumption of lost grants which would in truth make the defendant an "assign" of the estate. It would be a singular effect if it ended the dispute by giving the estate to some one else.

The plaintiff, before 1906, had the equitable estate in fee, while the mortgagee had the legal estate in fee. In 1906, the plaintiff lost his estate in fee, and the son acquired an equitable estate in fee. He acquired, by possession and the statute, not merely a right to resist ejectment, but an actual title such as might be forced upon a purchaser in proper circumstances. There cannot be two equitable estates in fee at one and the same time in the same property. The father had one; he no longer has it. The son has acquired one. It can only be the father's, for it was only the father who was barred. Now, whether the son is technically an "assign" of the mortgagor or not, he was by the mortgagor made tenant, and continued as tenant until the statute took effect upon that relationship and extinguished the father's interest in favour of the son. In the present circumstances, Frank Noble was, in my opinion, "a person lawfully claiming by, through, or under" the mortgagor, within the meaning of the Registry Act; and, if the discharge had been registered in his lifetime, it would have conveyed the legal estate to him, the only owner of the equity of redemption.

If, then, the plaintiff took no estate under the discharge, it is really unnecessary to consider the other question, whether he would be a person "claiming under the mortgage." It is more

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difficult to maintain that he is so in this Province, where a discharge is used which implies and declares the complete satisfaction and discharge of the mortgage as if no claim existed under it, than in England, where the conveyance is by deed to a particular person and generally setting out the facts. If this plaintiff had been called upon by the mortgagee to pay pursuant to his covenant, after his own interest in the land was barred, and when the payment would be relieving another's land, and if, on payment, he had taken a reconveyance by deed, shewing his intention to keep the claim alive, I do not see why he should not be looked upon as claiming under the mortgage. But, in the circumstances of *Henderson* v. *Henderson*, it does not seem to me that the mortgagor should be so considered, the land being his own when the mortgage was paid. In *Doe d. Baddeley* v. *Massey*, referred to by Maclennan, J.A., as governing *Henderson* v. *Henderson*, the holders of the mortgage had joined with the mortgagor in a conveyance to one Child, the predecessor in title of the plaintiff's lessor, and it was held that the latter was a person claiming under the mortgage, and it was said that in no other way could the statute be made effectual for the protection of mortgagees. But it would appear from an admission by the plaintiff's counsel, although nowhere else clearly in the report, that the mortgage was paid off before Child acquired the title; and the Court said that, "on payment of the mortgage money, the mortgage ceases to exist as a security for money, but the person to whom the mortgagee conveys his legal interest claims under the mortgage, although his equity of redemption should likewise be conveyed to him." Now that was an action of ejectment at common law, in 1851, when the possession of the legal estate was sufficient, there being no relief at law except such as would be afforded by 7 Geo. II. ch. 20 (C.S.U.C. 1859, ch. 27, secs. 74, 75). But now, if the mortgage had ceased to exist as a security for money, the mortgagee could not obtain possession by virtue of the bare legal estate against the owner of the equity of redemption; and, if he could not, neither could he confer it by a conveyance. It is, I think, manifest that the bare legal estate carried with it in that case the right to possession, and that was all the Court had to deal with.

Now in *Thornton* v. *France*, [1897] 2 Q.B. 143, the Court of Appeal considered that *Doe d. Baddeley* v. *Massey* might be "open to some question as being inconsistent with the judgment of the Court of Appeal in *Heath* v. *Pugh*, 6 Q.B.D. 345, that to be within the Act the mortgage must be a subsisting mortgage," which is practically the same point; and the last-mentioned judgment was affirmed in *Pugh* v. *Heath*, 7 App. Cas. 235. In *Thornton* v. *France*, the holders of a mortgage of 1865

joined in 1875 in a conveyance to a purchaser, who, after mortgaging to one Robinson in 1886, conveyed to the plaintiff in 1890, and the plaintiff in 1892 paid off the 1886 mortgage, but had not obtained a reconveyance. This absence of a reconveyance did not affect the decision, as the Court dealt with the plaintiff's equitable rights, and said that he was in no worse position because the 1886 mortgagee was not added as a plaintiff. The Court said that if *Doe d. Baddeley* v. *Massey* was right "it would . . . apply to the purchase deed of . . . 1875, so that the statute would not have run against (the purchaser) till . . . 1887; but it would not apply to the later title of the plaintiff, who, in no possible sense of the term as used in the statute, could be said to claim under a mortgage until he paid off Robinson's mortgage in 1892, when the statute had already run against the plaintiff. . . . Whether questionable or not, the decision (in *Doe d. Baddeley* v. *Massey*) does not govern the present case. In our opinion, the plaintiff does not claim under a mortgage within the meaning of the Act." From an earlier part of the judgment, I understand the Court to mean that the plaintiff, paying the mortgage made by his grantor, was in no better position than if it had been made by himself, and impliedly that a mortgagor, paying his own mortgage, does not acquire a new right of entry, at least if he himself was already barred. I also take it that, while *Doe d. Baddeley* v. *Massey*, if right, would apply to protect a purchaser taking his conveyance from both mortgagee and mortgagor, it would not apply to protect a mortgagor paying off his own mortgage after he was barred. In a case like the present, where he voluntarily pays it off and declares it to be "satisfied" and "discharged" and "released," I would have no hesitation in holding that, even if he acquired by the discharge the bare legal estate, he would not be a person claiming under the mortgage a right to possession, because under the mortgage no such right in equity existed in the mortgagee, and the Courts are now Courts of both law and equity. On this point, also, I would find for the defendant.

It was also contended for the plaintiff that the defendant was estopped from denying his title because she had obtained possession from Smith, to whom he let the property, and who obtained possession from him—but this is sufficiently answered by the finding of the learned Chief Justice at the trial, that the plaintiff acted as the defendant's agent in the letting, which finding was, I think, warranted by the evidence.

The appeal should, in my opinion, be allowed, and the judgment for the defendant restored, and the costs of both appeals allowed to her.

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MEREDITH, J.A. (dissenting):—The provincial enactments providing for the limitation of actions respecting real property are to be deemed remedial, and to be interpreted accordingly. Their effect is not to be minimised because of the strong expressions which have sometimes been applied to them, nor because, looking at them from one point of view only, there may always be instances in which those who feel their weight may think that such expressions were not misapplied; though in truth when fairly looked at from all points of view, in the interests of the public generally, their usefulness, if not indeed their need, is obvious; and this case comes within them.

The character of the tenure of the plaintiff's son is not in dispute; he became tenant at will of his father; and, under such enactments, the father's right to begin such an action as this first accrued at the expiration of one year after the commencement of that tenancy, and was completely barred if not brought within ten years thereafter.

But that bar, of that right of action, would not of course bar any other right which might afterwards arise; and so if a new tenancy were created, giving a new right of entry, this action may be maintained if that right also has not been in like manner barred.

There is no suggestion of the creation of any new tenure, or of any new right of action, except one of the same character. It is said that from the conduct of the parties, during the son's occupancy, it may be inferred that a new tenancy at will, or new tenancies at will from time to time, were created, which would have given a new right, or several new rights, of entry within ten years before the commencement of this action. But the question is not what may be imagined; it is only what was the actual fact; and it is not justifiable to magnify or minimise the facts in order to prevent the operation of the law.

Upon the whole evidence I can find nothing to warrant the conclusion that there was at any time, from first to last, any change in the tenure under which the son entered upon and held the land. Why should there be? The relationships, in all respects, between father and son continued the same throughout; the reasons for giving the use and occupancy of the house and lot to the son, and for that occupancy continuing during the first year, remained just the same throughout his life.

Four things seem to have been relied upon by the Divisional Court as evidence of a new holding: (1) the father paid wages to the son and allowed him to live rent-free upon the land; but so it was at the beginning and during the first year—if there be anything substantial in these facts; (2) the father paid the taxes upon the property, but so he did, as much as it was done by

him, from the beginning; and might do consistently with ownership in the son; (3) he paid for materials used in the repair of the house and was a frequent visitor there: things which in no way shew any change in the tenure, and indeed are quite consistent, as the other things also are, with ownership in the son; and (4), after the expiration of the period of ten years, the father let the property, with the widow's consent, for her benefit: a thing again giving no evidence of a change of tenure from first to last, and also quite consistent with ownership in the son, acquired by length of possession in his lifetime.

Not only was the creation of a new tenancy within the ten years not proved, but, in my opinion, there was no reasonable evidence of it. The case might not be the same as it is if it were not one of father and son, and indulgent father, and, in some things, improvident son at that.

Upon the other ground, however, the plaintiff is, in my opinion, plainly entitled to succeed in this action. Before the statute began to run in the son's favour, the father mortgaged the lands, and, admittedly, the mortgagee was never barred by length of possession by any one. Then, being seized of the legal estate in the lands, and the mortgage being registered, the mortgagee gave to the mortgagor a certificate of discharge of the mortgage in the manner provided for in the provincial enactment respecting the registration of deeds; and that certificate, being registered, became, under that enactment, "as valid and effectual in law . . . as a conveyance to the mortgagor . . . of the original estate of the mortgagor;" and so the father became entitled to a new right of entry which he can enforce in this action.

It was contended that no greater effect should be given to the registered certificate of discharge than if it were a mere release of the mortgage; but why so? But for the enactment, a reconveyance would be, in this case, necessary, and the discharge is a simple method of evidencing payment of the mortgage and reconveying the land; the enactment expressly and plainly provides that it shall be a conveyance of the land as well as a release of the mortgage. It is immaterial whether the plaintiff could or could not have enforced redemption; he has redeemed, and has a conveyance of the land to him; being out of possession, and having lost his right of re-entry, the registered certificate of discharge could be effectual only as a valid conveyance of the lands to him.

Upon this ground, but upon this ground only, the judgment of the plaintiff's favour should, I think, be affirmed.

In view of the contrary opinion which the other members of the Court have now reached and expressed, upon this point, it may be fitting that I should add a few words to the foregoing

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words—which were written at the close of the argument—indicating why I am unable to agree in their conclusion or reasoning.

Unless my eyes are dimmed by the sight of a needy widow and child, how can I consider that those who are in no sense claiming under, but are claiming against, the mortgagor, are "his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them?" It is only because they, and he through whom they do and can alone claim title—their husband and father—have so long been in possession of the land to the exclusion of the true owner, the mortgagor, that they have any sort of claim upon it. But, if this were not so, or if one could disregard the plain meaning of plain words, another insuperable difficulty would present itself. The obvious purpose of the enactment was, not in any sense to alter the legal rights of the parties concerned, but to provide, in the circumstances covered by it, a simpler and less costly way of obtaining and registering evidence of satisfaction of the mortgage and a reconveyance of the land; in short, a short form of conveyance; nothing more; this is incontrovertible; so a sure test of its effect is found when we find what would have been done if legislation had not provided this easy means of reconveyance; in other words, if we consider for a moment what the short method has replaced; and obviously it has replaced a reconveyance by the mortgagee to the mortgagor upon payment by the mortgagor of the mortgage; I speak of course of this case; in which there can be no kind of contention that the money was not paid and the certificate of discharge obtained by the plaintiff for his own benefit and in his own name; whether or not of his own bounty he might, but for this litigation, eventually have let the widow and child have the property free from the mortgage.

The plaintiff having paid the mortgage moneys and interest for his own benefit, what right have we, what right has any one, for charity's sake, or for any other purpose or reason, to convert that payment into a payment made by or on behalf of the widow and child; to so convert it without the consent and against the will of him who paid the money and whose money it was?

Default having been made in payment at the times and in the manner provided for payment in the mortgage, the legal estate was vested in the mortgagee absolutely; and it was within his power and right to convey that estate to any one, no matter whom; what right, then, to exclude the mortgagor; and he, having paid his money for such a conveyance of it to him, why is he not entitled to the benefit of such a conveyance, at least, whatever might be thought of the effect of a statutory discharge of mortgage? Doubtless the Legislature could extract charity

from the plaintiff for the widow and child, and doubtless it could provide that a payment made by one for his own benefit should not enure to his benefit, but should benefit some other definite or indefinite, certain or uncertain, person or persons, but doubtless it never did and never would; and doubtless, if it ever could and did, no one would part with his money to be so dispensed against his will.

Whether the widow and child have, or either has, a right of redemption from the plaintiff, is not now in question: it will be time enough to deal with it when it arises. All that the plaintiff seeks is possession of the lands, and that he is entitled to, whether or not any right of redemption exists.

No case has been found that decides or says anything contrary to the view of this case which I have expressed; indeed the cases are, distinctly in favour of it. The observation of Street, J., as to what might or would be his preference in an event which did not arise in the case he was dealing with—so much relied upon for her—does not help the defendant in this case. "The person best entitled" is a very indefinite expression; but, in this case, who can be "the person best entitled" to, at least, the legal estate in the land, but he who bought and paid for it with his own money for his own benefit—the plaintiff? However, the question is not what preference any one may have, not what words may have been or may be used elsewhere; we are bound by the plain words of the statute, which, as applied to this case, are: "and the certificate so registered shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor . . . of the original estate of the mortgagor;" whether or not it has any effect upon the equity of redemption which alone was acquired by length of possession.

Of course, if we forget or ignore the fact that, payment having been made *post diem*, the legal estate was absolutely in the mortgagee, and could be got back only by means of a conveyance in some form, the way towards helping the defendant is made easier, but it is none the less an illegal way.

In regard to the suggestion that the plaintiff may not be a person "claiming under a mortgage of land," let me ask what else can he be claiming under? If we do not lose sight of the real position of the parties in the eyes of the law, what ground can there be for any such suggestion? The plaintiff was entitled to an equity of redemption in the land; the mortgagee was entitled to the legal estate and all other interests in it not comprised in that equity, and he had the power to sell and convey that legal estate to whomsoever he pleased, but subject of course to that equity; it was not necessary that he should assign the mortgage: according to the defendant's contention,

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she has acquired by length of possession, and the plaintiff has lost, that equity of redemption; and then the plaintiff for his own benefit paid his own money to the mortgagee for and obtained from him a statutory conveyance, *under the mortgage* to him, of the land; and is now *by virtue of it* the legal owner: his sole right to possession, and therefore to bring this action, is under the mortgage: so that it seems to me to be idle to suggest that he may not be claiming under the mortgage, which is in truth the whole foundation of his right to the land.

It must not be forgotten, in dealing with any of the cases, that we have to consider the effect of the Registry Act, a consideration which does not apply to many of those referred to on the argument of this appeal, and in some of the opinions expressed in this Court. The object of that enactment is to make plain in the registry offices the title to all lands—generally speaking—in this Province; to guard purchasers against rights not registered of which they have not had actual notice. In furtherance of those objects it provides for a short and simple form of conveyance of mortgaged lands to certain persons, so keeping the title plain and clear in the registrar's books; but this Court says that the conveyance, though bought and paid for by one of the persons named in the Act—the mortgagor—and taken, as far as it can be taken, in the short statutory form which the Act provides, in his name and in his name only, passes no right or title to him, but conveys the land to one who, so far as registration goes, has no title to it, nor does her name in any manner or in any way appear in connection with the ownership of or title to the land: a curious method of giving effect to the purposes of the enactment. Can it be doubted that, if the conveyance had been to a stranger, the legal estate would pass to him, whatever the form of the conveyance might be; and is there any good reason why it should be different with the plaintiff? To any one having actual notice of the right acquired by length of possession, that right would remain valid against stranger or plaintiff alike; but a right to redeem only, for that is all that was so acquired.

And in this connection let me add that, if we are to be painfully technical, what evidence is there that the mortgagor's right of entry first accrued ten years before the commencement of this action? Why is the plaintiff obliged to reply upon sec. 22 of the limitation of actions enactment only? What evidence is there that he came within any of the limitation provisions contained in it?

In truth the case seems to me a very simple one, affording little excuse for the many words I have devoted to it, indeed less lines than pages written should make my opinion plain; the defendant, by length of possession of her husband, has ousted

the plaintiff from and has acquired for her husband's heirs the equity of redemption of the land in question; the plaintiff has acquired, under the mortgage, in his own name, with his own money, and for his own benefit, the legal estate in the land, at the least; and so the defendant is entitled only to redeem the land, from him, at the most; and, consequently, the plaintiff is now entitled to possession, the only relief which the judgment in appeal gives him, and all that he sought in the action.

A word should be added regarding the plaintiff's offer to give to the defendant all there is in the land except the sum paid by him to acquire from the mortgagee the title which he now has; surely a reasonable offer if viewed from the standpoint of the legal and equitable rights of the parties and not from that of charity—out of some one else's pocket. By what some Judges have called "legalised robbery," the plaintiff has been deprived of his equity of redemption: I decline to be a party to that which might, with more excuse for the language, be called "judicial robbery" of the money which the plaintiff paid out of his own pocket for his own benefit, and apply it to the benefit of those who were guilty of the legalised robbery, upon the entirely and palpably untrue in fact ground that it was paid for their benefit.

If I am right, there was no need for any amendment of the plaintiff's statement of claim; indeed, if he were in any manner —legal or equitable, as owner of the legal estate or merely as in equity entitled to all the rights of the mortgagee—entitled to possession, why should any amendment be needed?

On the other hand, if an amendment were necessary, it was, in my opinion, the duty of the Court to permit it to be made; the Rules of the Court imperatively required it, and they have the force of statutory enactment; and the interests of all concerned—the parties, the Courts, and public interests—required it; those of the parties imperatively; for what excuse can be offered for putting them to the great expense in money, and all the wear and tear and worry and anxiety of a second trial over a question which could have been just as well, indeed much better, tried and disposed of in this action?

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

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LAURSEN v. McKINNON.

(Decision No. 2.)

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A. January 7, 1913.

1. APPEAL (§ III F—95)—EXTENSION OF TIME—NOTICE TO B.C. COURT OF APPEAL.

The British Columbia Court of Appeal has no power to extend the time within which notice of appeal should be given on an appeal to that court.

2. COURTS (§ V A—297)—RULES OF DECISION—STARE DECISIS.

Interpretations of statutory language which have long been accepted, though their correctness may be open to doubt, will not ordinarily be disturbed particularly where there is not an interference with a positive right.

[*Hamilton* v. *Baker*, "*The Sara*," 58 L.J. Adm. 57, 14 A.C. 209, 221, 222, considered.]

3. STATUTES (§ II C—120)—RE-ENACTED STATUTES—CONSTRUCTION OF—ORIGINAL CONSTRUCTION, EFFECT OF.

Where a statute has been re-enacted, a construction given to the former statute by the courts ought to be adopted or at least it is a circumstance to which weight must be given.

4. JUDGMENT (§ I F—45)—ENTRY—FINAL JUDGMENT PRIOR TO FIXING AMOUNT OF DAMAGES—TIME FOR APPEAL.

Where a final judgment is to be perfected by the insertion of the amount of damages to be ascertained by the registrar, the time to appeal will run from the date of the judgment itself and not from the date when the judgment was finally perfected by inserting the amount of damages.

Statement

APPEAL from judgment of Gregory, J., *Laursen* v. *McKinnon*, 4 D.L.R. 718.

The appeal was quashed, IRVING, J.A., dissenting.

Bodwell, K.C., and *Ritchie*, K.C., for appellant.

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

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The notice of appeal having been given within the statutory period an application was made to us to extend time. The preliminary objection was taken to the jurisdiction of this Court to do so, and the authorities, or supposed authorities, for and against the objection were exhaustively searched and cited to us. Up to the end of 1897, it is quite clear that the Court claimed and exercised the power and jurisdiction to extend the time in cases like the present, where reasonable excuse was offered, but in that year a change was made in the law, which, it is contended on the one side did, and on the other did not take away such jurisdiction. Since that change no case has been found reported or unreported in which the Court has extended the time where the notice of appeal had not been given within the statutory period. Unhappily there is a difference of opinion as to what was decided by the full Court, particularly in the first cases which came before it after the said change,

namely: *Carroll* v. *C.P.R.*, unreported, and *Clabon* v. *Lawry*, 2 M.M.C. 38. These cases were decided fourteen years ago, and were supposed to have decided, *inter alia*, that the Court had no jurisdiction after the change aforesaid to extend the time within which notice of appeal should be given. It is now argued that the subsequent cases, if they do in fact shew that the Court decided the question as above suggested, and were not in fact disposed of on other grounds, were decided under the misapprehension that *Carroll* v. *C.P.R.* (unreported), and *Clabon* v. *Lawry*, 2 M.M.C. 38, settled the question.

Mr. McPhillips referred us to the unreported case of *Martin* v. *Brown*, decided by the full Court in June, 1905. The Court was composed of Irving, Martin, and Duff, JJ. I have had the advantage of seeing the notes of that case of my brothers Irving and Martin, JJ. Irving, J.'s, note is very short, and does not assist me except to this extent that it is not inconsistent with the much fuller note of Martin, J. So far as it relates to the question before us, Martin, J.'s, note is as follows:—

> *McPhillips*, K.C.:—Then I ask for an extension of time to appeal, that this important question should be determined by a full Bench as intimated by this Court. It has never been suggested that the two actions re extending time should be read together.
>
> MARTIN, J.:—Yes, it has. I made that argument myself in *Clabon* v. *Lawry*, 2 M.M.C. 38.
>
> DUFF, J.:—Though there may be doubts in the minds of some of us at least as to the soundness of the original decision, yet it has been so held repeatedly, and after the rulings the Legislature has enacted the same sections, which concludes the matter: it is not now open to argument.
>
> MARTIN, J., reads the extract from *Noble* v. *Blanchard*, 7 B.C.R. 62, as expressing his views.
>
> PER CURIAM:—No leave to appeal can be granted under the circumstances. There is no jurisdiction. Prior decisions on the point should not be opened up.

The sections of the Act above referred to were secs. 11 and 12 of the statutes of 1897, ch. 8. Sec. 11 standing alone would clearly give jurisdiction to the Court to extend time in a case like the present; but sec. 12, so the contention is, was held to modify sec. 11, so as to limit the power of extension to time other than the statutory time within which the notice of appeal must be given. Whether that is the right construction or not it is, I think, now too late to enquire, particularly in view of the decision in *Martin* v. *Brown*, unreported.

I do not think it would be seemly on my part to infer from the absence of reference, in Judge's note-books, to a particular discussion that such a discussion had not in fact taken place before them, and that when subsequently they gave decisions on the assumption that such discussion had taken place, and that

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they had decided the question in issue, they had forgotten that they had not in fact decided what they believed, or were led to believe, they had decided. It was argued that an interpretation of the said sections was not called for in either *Carroll* v. *C.P.R.* (unreported), or *Clabon* v. *Lawry*, 2 M.M.C. 38. As to the former, it was said with truth that notice had been given in time, but for the wrong sittings.

The Court held that the notice had lapsed or must be deemed to have been abandoned. That being so, what was more natural than that counsel for appellant should ask for an extension of time to give a fresh notice, and that the Court should then express its opinion that said sec. 12 precluded it from acceding to the request. It is a question of fact as to whether the Court in the said two cases construed secs. 11 and 12 or not. There is no evidence either way except the negative inference which might be drawn from the absence of reference to it in the note-books of the Judges, and to my mind the much stronger affirmative inference to be drawn from the fact that during a long course of years some of those Judges, and other Judges, have repeatedly acted on the assumption that the question had been so considered and determined.

It was not seriously argued that if it could be stated as a fact that the point had been decided as it was thought to have been fourteen years ago that nevertheless this Court would be justified in re-opening it now and reviewing the correctness of the decision. To say that a Court ought not to perpetuate error is to give voice to a very pleasing and right sounding abstraction. The Court ought not to perpetuate error, but this maxim is controlled by a very salutory rule that constructions which have long been accepted, though their correctness may be open to doubt, should not, save possibly by a higher Court, be disturbed to the confusion of those who are accustomed to rely upon such constructions. There are exceptions to this rule, but this, in my opinion, is not one of them.

The hardship of depriving appellant of his right to appeal was suggested, but I would point out that he deprived himself of that right. The statute gave him the right, and limited the time within which he might exercise it. He lost it by the carelessness of himself or his agent. What he now asks for is an indulgence. The argument of hardship is perhaps weaker in this case than in almost any other, because in most other cases where Courts have been thought to have placed a wrong construction upon a statute a positive right has been interfered with. The case of *Hamilton* v. *Baker*, 58 L.J. Ad. 57, has been called to my attention. There the House of Lords, while reversing the lower Courts, recognized the gravity of interfering with a long-standing construction of a statute, and it was not there

suggested that any of the lower Courts, certainly not those of concurrent jurisdiction, ought to have refused to follow the earlier decision.

It is further to be noticed that since *Martin* v. *Brown* (unreported), and a number of other cases of the same kind were decided, the Court of Appeal Act, 1907, ch. 10, was passed, embodying practically without change the sections above referred to. While I do not attach undue importance to this, yet Courts have ever regarded the re-enactment of a statute which has been judicially construed as an adoption of the construction, or if not that, then a circumstance to be given some weight to. I think, therefore, the Court ought not at this late day to re-open the matter, but should leave it to be dealt with by the Legislature, if it should think a change desirable.

I would, therefore, sustain the preliminary objection.

I may add that the only other point argued which, if decided in appellant's favour, would enable the Court to deal with the appeal on the merits, was that the notice was given in time, having regard to the fact that the final judgment was to be perfected by the insertion of the amount of damages to be ascertained by the registrar. It was argued that time would run from that date and not from the date of the judgment itself. I am of the opinion, which I entertained at the close of the argument, that this contention is not sound.

The appeal should be quashed.

IRVING, J.A. (dissenting):—This case—I speak of the jurisdiction of this Court to extend the time for appealing after the time limited has expired—has been argued before us at great length, and has been fully discussed among ourselves since that argument.

Irving, J.A. (dissenting).

I understand that the other members of the Bench have arrived at the conclusion that we cannot exercise that jurisdiction, or that we are precluded from exercising that jurisdiction. In these circumstances, and in view of the course taken by the Judges of whom I was one in *Martin* v. *Oscar Brown* (unreported), as set out in Mr. Justice Martin's notes, to which notes I have had my attention drawn since the argument of this case, I see little or no advantage in my going through the cases, either to controvert the conclusion at which the other members of the Court have arrived—or to suggest that the point should be reopened. It will be sufficient to say that, with deference, I do not agree with their conclusion on this point.

Then ought we to accede to Mr. Ritchie's alternative argument that the judgment, being a judgment under rule 481, is not perfected until the calculation is ascertained by the officer of the Court appointed for that purpose, and that therefore he is in time? Rule 481 contemplates the drawing up of an order,

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and later on an entering of judgment and otherwise as upon the finding of a jury upon a writ of inquiry. The writ of inquiry was a judicial writ, and it issued after an interlocutory judgment for damages. That interlocutory judgment was final as to the right to recover, and interlocutory only as to the amount: see vol. 6, Enc. of the Laws of England 504, art. "Writ of Inquiry," by Mr. Francis Stringer of the central office. In the forms of judgment, Appendix F. to the English Rules, a form of judgment is given for O. 36, r. 57. The form speaks of the plaintiff having "obtained interlocutory judgment for damages to be assessed," etc., 1912 Yearly Prac., p. 1983; 1912 Annual Prac., p. 97. This rule 481 is an old rule of practice, dating back to the Common Law Procedure Act 1852. The judgment in the leading text-book on Pleading, Stephen, 6th ed., published in 1860, was called (p. 98) an interlocutory judgment. A precise definition of the meaning of "final" and "interlocutory" judgments cannot be given: *Re Lewis, Lewis* v. *Williams*, 31 Ch.D. 627, *per* Chitty, J. A judgment or order may be final within one rule, but not so within another: see *Re Lewis, Lewis* v. *Williams*, 31 Ch.D. 627; *Pheysey* v. *Pheysey*, 12 Ch.D. 305; *Re Crossley*, 34 Ch.D. 664; and see the note to the report, *Croasdell*, [1906] 2 K.B. 570.

For the purpose of giving notice of appeal this order seems to me not to be a final order until the registrar hands it to the person entitled to the damages, and after that entered. That seems to me to be the "perfecting" of the order. It seems plainer if we consider what the actual practice is. Until the registrar completes the calculation entrusted to him, the trial of the action is going on. I think if the registrar in the course of working out the direction of the trial Judge, found that it was not substantially a matter of calculation, and so advised the Judge, the case would still be in the hands of the Judge, and he, in my opinion, would have jurisdiction to set aside the direction he had given and go into the matter himself, or to refer it to a referee under another section. I do not think there can be any doubt of that, notwithstanding the fact that the Judge's direction or order had been passed and entered, if entering is necessary; and I would be disposed to think he could do that even after the fifteen days limited for appealing from an interlocutory order had expired. I am therefore convinced that the trial is still going on. I would hold that the time for appealing did not expire until the judgment was entered upon the registrar's calculation.

Martin, J.A.
Galliher, J.A.

MARTIN and GALLIHER, JJ.A., concurred with the CHIEF JUSTICE.

Appeal quashed, IRVING, J.A., *dissenting.*

ARCHIBALD v. THE HYGIENIC FRESH MILK CO.

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Nova Scotia Supreme Court. Trial before Graham, E.J. January 3, 1913.

1. CORPORATIONS AND COMPANIES (§ II—27)—CONSOLIDATION OR RE-ORGANIZATION—LIABILITY OF TRANSFEREE TO EMPLOYEES.

Where a person is employed by a company for a period of years at a stipulated salary per year, and subsequently during the period of employment the company turns over its undertaking and assets as a going concern to a new company which assumes all liabilities, and the employee is told by the new company that the change would not affect him in his job, and he continues to work for the new company, an implied contract of hiring for one year from the date of the transfer to the new company may be inferred where the circumstances both as to the character of the service with the new company and the method of payment indicate that it was more than a monthly hiring.

2. MASTER AND SERVANT (§ I E—23)—WRONGFUL DISMISSAL—GROUNDS UNDISCLOSED.

In an action by an employee against an employer for damages for wrongful dismissal, the employer may justify the dismissal on grounds never disclosed to the servant, and even on grounds that the master did not know about at the time of the dismissal. (Dictum *per* Graham, E.J.)

Statement

ACTION claiming damages for wrongful dismissal from the employment of the defendant company. The defendant company justified the dismissal on the ground of alleged incompetency and counterclaimed damages alleged to have been sustained by reason of plaintiff's negligence and incompetence.

Judgment was given for the plaintiff.

T. R. Rogers, K.C., for plaintiff.

A. A. Mackay, K.C., for defendant.

Graham, E.J.

GRAHAM, E.J.:—This is an action for alleged wrongful dismissal.

On the 28th April, 1911, the Maritime Fresh Milk Co., Ltd., by its manager, A. Lapierre, offered the plaintiff the position of chief maker for the company's factory at Antigonish for three years at a salary of $1,200 a year. On the 29th, the plaintiff accepted the offer and entered that company's employment. The company had just acquired a patent to use in the Maritime provinces, a process for homogenising and sterilizing new milk and cream, the object being to make it keep for a long period. The plaintiff had a very large experience of milk and cream, in cheese and butter-making, and he was to proceed to a factory at Lacolle in the Province of Quebec to learn this new process and he did so. On his return to Antigonish he had to do with installing the new plant. This continued until October, 1910, when the work of treating milk by this process began.

During the winter and spring of 1911 there is nothing to note about the success of the process. In June, 1911, the Mari-

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time Milk Company, through a broker, one Louis Fuller, turned over its undertaking and assets as a going concern to a new company, the defendants in this case, the latter company assuming the liabilities. The manager and staff remained the same and the plaintiff as well as the other employees were told by the manager that the change would not affect them in their jobs at all, their jobs would be the same.

I have come to a conclusion about the terms of the contract of employment existing between the plaintiff and the new company. I think there is an implied contract of a hiring for one year from the date of the transfer to the defendant company, namely, June 1, 1911.

The payments of salary were made rather irregularly. It could not be inferred that it was a hiring by the month. The character of the service, too, and the contract with the previous company, lead one to infer that it was more than a monthly hiring: *Benton* v. *Collyer*, 4 Bing. 309.

On the 16th of October, 1911, the following letter was addressed to the plaintiff by the president and manager:—

> At a meeting of our Board of Directors it was decided to dispense with your services. Henceforth take notice that your services will not be required after November 15th.

This letter, no doubt, proceeded on the motion that the contract could be terminated by a month's notice.

The plaintiff says:—

> Q. After your dismissal you had an interview with Mr. Lapierre? A. Yes.
>
> Q. Did he give any reason for dispensing with your services? A. Yes, he told me that the company was not making any money; that I had good pay while I was with them, and they thought I could do without it as well as the company could pay me.
>
> And he says that the only complaint that Lapierre ever found with him was on one occasion when a can of cream had not been stuffed before he left the factory in the evening.

Brymer, a director and secretary, says:—

> Q. You were disappointed in the amount of stock the public took up? A. Yes.
>
> Q. And the result is you have been short of capital? A. Yes.
>
> Q. That has been one of your troubles? A. Yes.
>
> Q. And I suppose as book-keeper you don't want to expose your business; as a matter of fact you have been pretty hard up in running this business from the beginning? A. Yes.
>
> Q. You remember the time when this man was dismissed? A. Yes.
>
> Q. You came to the conclusion you ought to be reducing your expenses? A. Yes.
>
> Q. As a matter of fact your own salary was reduced? A. Yes.

Then the plaintiff brought this action and the defendants justify, as the law allows them to do, a dismissal for grounds

never disclosed to the servant, and even for grounds that the master did not know about at the time of the dismissal.

But, of course, in dealing with facts, one does remember that grounds are of that sort. So the defendant's solicitor has, with a view of such a defence, held the plaintiff responsible for all the milk that turned sour in the process during the summer of 1911, and for all of the bad luck attending the process, and puts forward these as the grounds of dismissal.

In respect to any misrepresentation as to the plaintiff's competency, I find that there was no misrepresentation whatever. The officers of the company knew exactly the qualifications of the plaintiff. It was a new process as both he and they knew. They knew exactly how long he had been at Lacolle learning it and they knew of his success from the time that he commenced to use the process at Antigonish, about October, 1910, to the time when the defendant company took him over. Apart from the process I do not see very well how they could have got a more competent man for the position, and better qualified to learn it. After his dismissal there was appointed in his place, Fraser, the man below him, who learned all he knew of the process from him. A brother of Lapierre's had been taken on in the meantime for other work, and so the company went on without the plaintiff.

I find as a fact that the plaintiff was competent.

In order to shew that the plaintiff was at fault, the defendants institute a comparison between the two periods, namely, in the summer months of the plaintiff's incumbency and that during Fraser's incumbency, which is really after action. However, during the month of July, 1911, the percentage of milk complained of as sour by the customers was large. The defendants attributed it to the plaintiff's failure to use an instrument called an acidometer. That would disclose the degree of acidity in the milk. This instrument is not necessarily connected with the new process at all, and I think its use is not mentioned in the directions. When is it to be used? It was suggested, twice: first, when each customer brings the milk in the morning; then when it is turned into the vat. As a fact the factory at Lacolle did not use it for each customer. The milk would be all right in their case at that time, 9 or 10 o'clock, and also when it would be turned into the vat. The difficulty here would be that the milk came in in too great an abundance during the summer season to be treated by this company's plant rapidly enough for the hot weather, and by one o'clock there was danger of the milk being too ripe for the process. It could not then be turned back on the patrons' hands. It is the fact that while the plaintiff used this instrument occasionally, he did not habitually use it but depended on his very large experience in testing and smelling

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to ascertain the fitness of the milk for the process. The plaintiff was as anxious as anyone to discover why the treated milk was going bad, and if such a simple thing as using the acidometer would have been effective he would have welcomed its use. I think that this is a mere afterthought. The plaintiff attributed the souring of the milk, or rather some bottles of it out of a large lot, to another cause, and very early, as Brymer admits, he called his attention to it.

In the first place it is to be noticed that it would be only a few bottles, 3, 6, 8 and so on, out of a large number that had turned bad and would be complained of by the customers. Never a whole trayful or anything like that. Whereas, if there had been too high a degree of acidity in the milk, the whole vatful, or a very large number of bottles, would have shewn bad. The plaintiff was led to the conclusion that the cause of some of the bottles going sour was due to the capsules or crowns of the bottles being defective. In the first place, he says, that with a new business there needs to be a great number of new bottles, and a certain percentage of these new bottles have uneven mouths, which are not capable of being effectively stoppered, and it is only after a time that these get weeded out. Some of the imported bottles, as from Montreal, were particularly bad. The defendants did not use the same capsules as were used at the Quebec factory. There they had a tin capsule, smaller in size, and with a disc of cork inside of the capsule, which covered the mouth of the bottle. The defendants, instead of cork, used a paper disc treated with paraffin wax. There is less elasticity about the paper and the paper in the capsules does not fill up the uneven edge of the bottle's mouth as well as the cork. Besides, the bottle of milk, after it is stoppered, is subjected to a great heat. The milk has to be sterilized at a temperature of 226 Fahrenheit for twenty-two minutes, and the plaintiff says that this heat melts the paraffin wax. Besides, there is great pressure and thin tin may lose its grip.

During the plaintiff's incumbency, the tin used for the capsules was thinner and it did not, in consequence, have such a strong grip on the neck of the bottle. Besides, as I have intimated, the mouth was smaller.

Mr. Trudel, from the factory in Quebec, whose examination was taken by the defendants, says, in cross-examination:—

> We use a different kind of crown in our factory from that used by the defendant company. I have made some experiments with the crowns used by the defendant company. I did not carry the experiments to a very conclusive point. We never use the crowns used by defendant company because we would be afraid to use them. Unless the crown is perfectly air-tight the milk works. The French inventor of the process of homogenising does not specify any particular material for use in the manufacture of the crowns. The manufacturers

of machinery for homogenising milk issue printed directions for carrying on the process of manufacturing such milk. We use a No. 1 crown, which is a small crown. We use a crown with a cork disc inside and is smaller than that used by the defendant company. In the crown we use the tin cap is heavier than that used by defendant company and we use a cork disc instead of paper. The paper in crown used by defendant company is prepared, that is, treated in some way. If this paper were treated with paraffin the sterilizing process might melt it.

Perhaps it is unnecessary to say that the paper disc is cheaper than cork. The defendants used a thicker tin the second season. The plaintiff says:—

Q. Will you explain why the cork disc is, if it is the fact, more likely to keep the air excluded than the others? A. The paper disc is very inferior in elasticity to it, and when pressed on to the bottle it may be tight for the time being but while the milk is sterilizing there is tremendous pressure, the tin gives slightly; the air in the bottle passes out; the paraffin wax becomes soft, and that flows out, and what is left is merely a piece of saturated paper. When the pressure comes off the inside vacuum begins to form. It does not spring back and close up the vacancy as this cork would do. The piece of cork is also more dense. It will not soak up water or milk as the paper.

Q. That is overcome to some extent by the heavier tins now being used? A. To some extent it keeps the cap a little tighter on.

Q. When your bottles are new they are rougher, of course, on the surface around the neck? A. When there is a batch of new bottles used there is bound to be some of them with a little irregularity in the top, not perfectly level, and when one of these bottles is cracked there might be a slight vacancy at one side. The cork stopper would be more apt to fill up that vacancy.

Later he says:—

Q. You have had a large experience in milk testing? A. Yes.

Q. Have you a keen sense of taste and smell? A. Yes.

Q. With the experience you have had, were you able to tell from your sense of taste and smell as to whether milk was in proper state for homogenising or not? A. Yes.

Q. Did you allow any milk to be homogenised in this factory which would not stand the usual tests without the knowledge or concurrence of Lapierre, the manager? A. I did not allow any such to go into the vat the time it was received in the morning but I could not tell how long it was going to take us to put the milk through the process two or three hours afterwards.

Q. If, when you came to put it through the process you found it was not in proper shape you would call Lapierre's attention to it? A. Yes.

Q. If you have had experience you do not require the acidometer? A. No.

The plaintiff gives an instance of the milk souring before it could be put through the process while perfectly fit when it

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came in in the morning, and he called Lapierre's attention to it, and if there was any bad product Lapierre was responsible in that case. Apparently they poured out four or five hundred pounds of it, and tried to reject what had already gone through the process but had the appearance of being curdled, putting the rest on the market. The plaintiff then says:—

Q. Do you remember any other occasion on which you called his attention to the fact that the milk soured? A. Yes, I called attention to the fact that the milk was increasing and the weather was getting warmer and that there would be a repetition of this on a great many days because our machine would not handle it as fast as it came in; although the milk might be fit to sterilize when it came in at nine or ten in the morning nobody could keep it fit by the time we could finish it. Perhaps at one in the afternoon it was standing at a temperature of eighty degrees or more, and he told me we would have to get ready to condense the surplus. So we got ready to condense. I was sent upstairs to do condensing as being the only one who could, and for some time while condensing I did not know what went on down stairs with the sterilizing, as he had charge himself.

Q. Over what period were you condensing, off and on, during that summer, speaking generally? A. I don't remember exactly, but three weeks or more, I know we made over sixty barrels of condensed milk.

Q. At that time you were put in charge of the condensing department and he was managing the homogenising department? A. Yes.

Q. As I understand you, you can use milk not fit for homogenising for making cheese? A. Yes.

Q. The percentage of acid for cheese-making can be as high as twenty? A. Yes, there is always a certain percentage of acid required in making cheese.

Q. Is it fair to say that a good deal of that milk, over-ripe last summer, could have been made into cheese if you had a cheese plant? A. Yes.

It appears that for the second summer the defendant instituted a cheese plant, and, therefore, a comparison fails even in this respect, because the danger of a loss of the surplus which could not be put through this process in time could thus be diminished and the manager would not be so tempted to run any risk.

In my opinion the defendants have not proved that the failure to use the acidometer was the cause of the milk souring or turning bad. I further think that the plaintiff's theory as to the defective capsule is more plausible, and the only person besides him who had any scientific knowledge rather corroborates him in that respect.

Moreover, I think that a comparison between the two seasons, particularly as the last is after action brought, is not a fair comparison.

The defendants have given evidence of another matter. If it is given as tending to shew that it was the cause of the milk going bad I think it utterly fails.

The plaintiff found that there was during cold weather a very large percentage of bottles becoming broken, and he experimented to ascertain the cause. If I understand it, two trays of bottles standing and capsuled are put into the sterilizer, hot water is introduced so as to cover a small part of the bottoms of the bottles in the lower tier. Then the steam is introduced which sterilizes the milk. The plaintiff tried the experiment of introducing hot water sufficient to cover both tiers of bottles and then introducing the steam and found that there was a very much smaller percentage of broken bottles.

In the first place, I think it is to be inferred that Fraser, the plaintiff's successor, continued this plan. In his description of the process he gives it thus: Lapierre was told about the change when it was introduced (January, 1911) and he thought it was a good plan. The plaintiff consulted someone at the Quebec factory about it and he thought "that it was no doubt a good plan."

The plaintiff says that the breaking of bottles did not occur at the Quebec factory because they may have washed them in a different way, tempering them at once.

Moreover, it was the month of July when the milk going bad was complained of; not in cold weather.

I think that the plaintiff had no fault whatever to be found with him in this respect.

There is another ground set up as justifying a dismissal. This is in connection with cream and has no bearing on the other charge.

In respect to cream the patron is paid according to the percentage of butter fat in the cream. For that purpose the cream is tested by a Babcock tester. It was the duty of the plaintiff to use this tester. The cream is taken in by another employee. The identity of the patron's cream, although poured into the company's cask, is maintained until some is taken from it in a tube and placed aside for testing.

Now, the defendants have searched the records and they say that there are tests for some days when there was no cream, and cream for some days when there were no tests.

Apparently the plaintiff did not necessarily make the test the same day the cream came in, but allowed the tubes to accumulate until he had a sufficient number of samples to make a test of all together, and he says, and there is no one to contradict him, that there would not be any difference shewn in the result because of delay.

Then there was a chance of accidents in maintaining the identity by the numbers (each portion has a number) being shifted. There were in one or two instances cases in which there was no test made owing to the plaintiff's being necessarily en-

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gaged at different work, and Lapierre did not know that the tests had not been made before he treated it. Then the customer was paid by an average being taken of his cream about that period. And this was known and approved of by the manager. And there was no complaint from any customer, and it was fair to the customer as is proved in the evidence. I think the defendants have failed to prove negligence in this respect. The plaintiff seems to have had a good deal to do. If perfect records are to be kept I think the book-keeper might well have been employed in entering in a book the figures given by the man who took in the cream and the results of the tests made by the chief maker.

The defendants also complained about the bottle-washing. Now, the bottle-washing was done by a machine with the introduction and use of which the plaintiff had nothing to do. He advised against its introduction. Lapierre understood that part of the work and he or others attended to it and also the bottling and capsuling.

Apparently the bottles had been put through too rapidly and the label was sometimes washed off and inside of the bottle. Lapierre remedied this by running it more slowly.

On one occasion flies were found by Brymer in a bottle or bottles of milk, but Lapierre had a better opportunity of discovering the flies on that occasion in the capsuling machine, or whoever was attending to it, than any one else.

Also Fraser or other persons who put the bottles into the cases to be filled with the milk. The plaintiff would not have any such opportunity.

In my opinion, the defendants' defence fails and no case of incompetence or negligence has been established.

The plaintiff, in my opinion, was wrongfully dismissed. There were six and a half months of the year to run. The plaintiff managed to earn something during that period after his dismissal.

I give judgment for the plaintiff for the sum of four hundred and fifty dollars, and I dismiss the counterclaim, both with costs.

Judgment for plaintiff.

Re OAG and ORDER OF CANADIAN HOME CIRCLES.

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Ontario Supreme Court, Kelly, J., in Chambers. January 18, 1913.

1. Evidence (§ II E 3—156)—Presumption of death—Absentee not heard of in seven years.

If it is proved that for a period of seven years no news of an absentee has been received by those who would naturally hear of him if he were alive, and that such inquiries and searches as the circumstances naturally suggest have been made, a legal presumption arises that he is dead.

[*Hagerman* v. *Strong*, 8 U.C.Q.B. 291, referred to.]

Statement

Application, under sec. 165 of 2 Geo. V. ch. 33, for a declaration as to the presumption of the death of Benjamin Charlton Oag.

W. T. McMullen, for the appellant.

J. E. Jones, for the society.

Kelly, J.

Kelly, J.:—A certificate (No. 14177) for $1,000 in the Order of Canadian Home Circles was issued to Benjamin Charlton Oag. His sister, Margaret Gunn, of Houghton Centre, in Ontario, is the beneficiary named therein. She is the only living member of his family; his step-mother, however, lives in Toronto.

From the time of his father's death in 1889, the insured made his home with his sister, and, from about 1891 until 1904, he was in the habit of taking employment during the summer months sailing on the lakes, but spent every winter, except one, during that time, at his sister's home.

In the spring of 1904, he went as usual to his employment on the water, and in that season was employed on the vessel "Oregon" on the Great Lakes. At the close of navigation in the fall of 1904, he received his discharge from the vessel at Chicago, and for a day or two in December, 1904, he was a guest at the Atlas Hotel in that city. This was the last trace that has been obtained of him, for since that month neither his sister nor her husband nor other friends of his nor those who knew him in his employment, have heard anything of him.

His step-mother says that she has heard nothing of his whereabouts for the past eight years.

In addition to inquiries having been made for him amongst those who might be expected to know something of him, advertisements have been inserted in newspapers in Chicago and in Springfield, Massachusetts, asking information about him; and the Chicago city directories have been consulted; but none of these efforts have brought any results.

In *Hagerman* v. *Strong*, 8 U.C.R. 291, it is said at p. 295: "The principle itself (that is, the principle of law as to the

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presumption of death) is founded upon the necessity of taking some measure of time as a rule in such cases, in order that it may not be forever uncertain at what time an absent person, of whom nothing has been heard, may be concluded to be no longer living. Seven years has been adopted as a reasonable period; the meaning of which I take to be that the law considers it possible that a person who has left his domicile and gone abroad, may be still living, though nothing has been heard of him or from him for seven years; but does not consider it, morally speaking, possible that he should live longer without evidence being in some manner afforded of his existence."

In Halsbury's Laws of England, vol. 13, p. 500, sec. 692, it is laid down that "as to death, on the other hand, there exists an important presumption, for if it is proved that for a period of seven years no news of the person has been received by those who would naturally hear of him if he were alive, and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead."

Reference may be also made to *Willyams* v. *Scottish Widows and Orphans Life Assurance Society*, 4 Times L.R. 489; Phipson on Evidence, 5th ed., p. 644, and cases there cited.

The evidence before me warrants the making of an order declaring the presumption to be that Benjamin Charlton Oag is dead.

Costs of the application will be payable out of the insurance moneys.

Order accordingly.

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NOKES v. KENT CO. Limited.

Ontario Supreme Court (High Court Division). Trial before Middleton, J. January 22, 1913.

1. NEGLIGENCE (§ I B 2—15)—SELLER OF APPARATUS TO BE INSTALLED—PERSONAL INJURY TO BUYER'S EMPLOYEE DURING WORK OF INSTALLATION.

A company installing a refrigerating plant for another, is liable to an employee of the latter who is injured through the negligence of the installing company, which while still in charge of the plant failed to put part of the plant in good order after being given notice of its defective condition, where such failure on their part resulted in injury to the purchaser's employee.

Statement

ACTION for damages for injuries sustained by the plaintiff by reason of the negligence of the defendants, as the plaintiff alleged.

Judgment was given for the plaintiff.

Shirley Denison, K.C., and *H. W. A. Foster*, for the plaintiff.

H. H. Dewart, K.C., and *Harcourt Ferguson*, for the defendants.

MIDDLETON, J.:—At the trial I reserved the question of nonsuit, and allowed the jury to answer questions which, counsel agreed, would raise all the issues necessary for the determination of the action. After the jury had answered these questions, the matter was argued at length; the defendants contending that, upon the answers, the plaintiff was not entitled to judgment.

The action arises out of an accident occurring on the 14th August, 1911, by which a quantity of ammonia escaped from a refrigerating plant upon the premises of the Harry Webb Company Limited at Toronto, through the packing of the joint between the cylinder and cylinder-head of the condenser, forming part of the plant aforesaid.

The plaintiff was an engineer employed by the Harry Webb Company, and was at the time of the accident engaged in operating the machine aforesaid. The effect of the inhalation or attempted inhalation of the ammonia gas, and of the exertion incident to turning off the valves of the engine so as to prevent a further escape and injury to others upon the premises, was most serious, as the plaintiff was sixty-two years of age and in a somewhat enfeebled physical condition, because of the fact that he suffered from chronic bronchitis and arterial sclerosis. Ever since the accident he has been disabled and entirely unable to work, and is now practically a dying man.

The defendant company contracted with the Harry Webb Company to install the refrigerating plant aforesaid. By the contract the property in the plant was not to pass to the purchasers until paid for. At the time of the accident, the plant had been installed and was in operation, but had not proved satisfactory, owing to the fact that it did not give sufficient refrigeration. For this reason, the Webb company had declined to accept it; and some modifications were being made in the refrigerating pipes, to remove the objections raised.

The condenser was not manufactured by the defendant company, but purchased by them from the York Manufacturing Company, of York, Pennsylvania. It constituted but one link in the entire outfit, being supplied by the defendants to the Webb company. It was constructed and assembled by the York company, and was shipped by them in a condition in which it was supposed to be ready for erection and operation. Before leaving the factory, it was tested, and found to be perfect and in running order. It was shipped direct from the factory to the Webb company's premises at Toronto, and was there placed in

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position and connected with the operating dynamo and the pipes constituting the refrigerating plant and condenser system.

At the trial some endeavour was made to shew that the machine was defective in design, owing to the absence of a proper flange to protect the packing constituting the gasket, at the joint between the cylinder and cylinder-head. This contention was entirely displaced by the production of the parts in question, which shewed them to be properly constructed.

To understand the evidence, it is necessary to know in a general way how the plant operated. Essentially it consists of a closed circuit containing ammonia. The ammonia vapour is compressed by the compresser to a pressure of about two hundred pounds; and the effect of this compression is to raise the temperature very considerably. The compressed vapour is then artificially cooled, by bringing the pipes containing it in contact with water. The cool vapour is conducted to the refrigerating pipes and permitted to escape into them, practically at atmospheric pressure. As in the expansion the temperature is reduced precisely to the same extent that it was raised in the compression, and as the starting point of this reduction has been lowered by the cooling of the vapour, a very low temperature is thus produced, which brings about the refrigeration. The ammonia vapour thus expanded is returned again to the compresser, to be started once more through the system.

On the morning in question, the plaintiff was about to put the machine in operation. He started the compresser. He says —and the jury have believed him—that he opened the exit valve of the compresser, but that, nevertheless, the machine would not operate properly; the pressure rose abnormally, and he stopped the machine. He started it again, when almost immediately the pressure become so great that the ammonia was forced through the packing of the cylinder-head, with the result described.

The defendants contended that this was brought about by the failure to open the discharge-pipe from the condenser, and that in no other way could the pressure necessary to bring about the result have been obtained. Plausible as this theory is, the jury have rejected it.

It appears that, some time prior to this, while the machine was in operation, Nokes drew the attention of the defendants' engineers to the fact that the condenser, which was supposed to operate silently, ran with a heavy pounding. Goulet, who was in charge for them, admits that he was told of this. He thought that it did not indicate anything wrong with the machine; and he instructed Nokes to continue its operation.

The jury have, I think, taken the view, and I so read their findings, that this pounding indicated that there was something wrong with the condenser, and that it then became the duty of

the defendants to open it up and ascertain the cause, and that the defendants were negligent in failing to do so. The jury also find, as I understand their answers, that the effect of this pounding was gradually to loosen the packing of the cylinder-head, so that, when it was subjected to a somewhat unusual strain—from whatever cause that was brought about—the loosened packing permitted the ammonia to escape.

After the accident, Goulet was called in. He tightened the bolts on the cylinder-head, thus compressing the packing; and ran the engine without disaster for several days; but he did nothing to remedy the defect that existed in the machine, whatever it was. In the result, about a week thereafter, a somewhat similar accident took place, in which the head was blown off the cylinder, and the discharge valves and other internal mechanism at the cylinder-head were completely wrecked.

I do not think that, under these circumstances, I can nonsuit; in fact, I think the jury were well warranted in taking the view that there was something wrong with this condenser, which would have been discovered had the defendants heeded the warnings given by the unusual noise in its operation. This defect resulted in the escape of the gas on the 14th August, when the cylinder-head was loose enough to yield; and it resulted in the entire wreck of the machine when the cylinder-head was tightened so that it could not yield. It may have been that, owing to the defective condition of the refrigerating portion of the plant, some ammonia was returned to the condenser in a liquid form. This, in a compresser, operating at the speed of the machine in question, would account for its wrecking, and possibly explain the serious effect of the leakage on the 14th August, which more nearly corresponds with the discharge of some fluid ammonia than with the discharge of mere ammonia gas.

Understanding the facts to be as above set out, I do not think there can be any doubt as to the plaintiff's right to recover in law. The defendants were yet in charge of the machine. They owed to the plaintiff a duty which called upon them to see that the machine was put in order when they had, as here found, knowledge of its defective condition.

No good purpose could be served by reviewing the numerous authorities cited upon the argument.

Judgment will, therefore, go, in accordance with the verdict, for $1,000 and costs.

Judgment for plaintiff.

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Jan. 24.

Re QUAY.

Ontario Supreme Court, Kelly, J. January 24, 1913.

1. WILLS (§ III H—170)—LEGACY—PAYMENT IN INSTALMENTS.

Under a clause in a will directing the executors to give to the testator's son "the sum of $25,000 as follows, namely, $6,000 within three months after my decease and $600 every six months thereafter for fifteen years; and should he marry, he shall receive $5,000 of above $25,000, and the balance at the end of fifteen years after my decease," the semi-annual payments will cease on payment of the $5,000 specially payable after the marriage of the beneficiary.

Statement

APPLICATION by Ralph Ira Dwight Quay, a son of William Quay, deceased, for an order, under Con. Rule 938, determining certain questions arising upon the construction of the following clause in the will of the deceased: "I hereby direct my executors to give to my son Ralph Ira Dwight Quay, D.D.S., the sum of $25,000 as follows, namely, $6,000 within three months after my decease and $600 every six months thereafter for fifteen years. Should he marry, he shall receive $5,000 of above $25,000 and the balance at the end of fifteen years after my decease."

The following questions were submitted:—

1. Whether the clause providing for the payment of $5,000 to Ralph Ira Dwight Quay in the event of his marriage was effective and capable of being enforced.

2. Whether, after payment of the $5,000, Ralph Ira Dwight Quay was still entitled to receive from the estate of William Quay the semi-annual payment of $600.

3. Whether, under the clause in question, Ralph Ira Dwight Quay was entitled to receive in all the sum of $25,000 or the sum of $24,400.

H. A. Ward, for the applicant.

J. M. Kilbourn, for the executor and two beneficiaries.

J. D. Montgomery, for Frederick Quay.

Kelly, J.

KELLY, J.:—I answer the questions as follows:—

1. The legatee is entitled on his marriage to receive $5,000, if at that time there be unpaid to him (out of the $25,000) that sum; if, however, the payments made to him before his marriage reduce the unpaid balance of the $25,000 to less than $5,000, he will be entitled on his marriage to receive such balance.

2. After such payment to the legatee on his marriage, the semi-annual payments of $600 each shall cease until the end of fifteen years from the testator's death, when the unpaid balance of the $25,000 shall be payable.

3. The intention of the testator in the paragraph under consideration was to benefit this legatee to the extent of $25,000;

this amount is not cut down by the later words of that paragraph, dealing with the mode of payment.

Subsequent provisions of the will relate to the disposition of this bequest (and bequests to other beneficiaries) on the happening of certain contingencies; the above conclusions are subject to whatever effect these later provisions may have on this bequest, if any of these contingencies arise.

Costs of the application will be payable out of the estate; those of the executor as between solicitor and client.

Judgment accordingly.

CAMPBELL v. C. N. R. CO.

Manitoba King's Bench. Trial before Metcalfe, J. January 28, 1913.

1. RAILWAYS (§ IV 2—91)—CONTRIBUTORY NEGLIGENCE AT CROSSINGS — DUTY TO STOP, LOOK AND LISTEN.

Although a railway company is negligent in leaving cars standing upon a side track at a public crossing in such a way as to obstruct the public view of trains approaching the crossing on the main track, still a person operating an automobile over the crossing is guilty of such contributory negligence as will bar a recovery against the railway company for injuries sustained by reason of a collision with one of its trains if, when approaching the track, knowing that trains, yard engines and hand cars were liable to pass at any moment, and finding his view obstructed by the standing cars and realizing the danger, he fails to reduce the speed of the automobile which he was operating, and fails to exercise care both by looking and listening.

Statement

THE plaintiff claims that while he was crossing the Canadian Northern Railway track at Marion street in St. Boniface, an engine of the defendant was so negligently operated by the defendants' servants that it struck the automobile of the plaintiff R. J. Campbell, throwing out the plaintiffs, causing them both personal injury and damaging the automobile.

The action was dismissed.

H. J. Symington, for plaintiffs.

O. H. Clark, K.C., for defendants.

Metcalfe, J.

METCALFE, J.:—The railway was constructed before the street was opened. On the 28th day of September, 1908, the council of the city of St. Boniface passed a by-law in which it was enacted that "the portion of land coloured pink on the plan hereto annexed . . . being the production of Marion street from Rue de Neuron to Bourget road, is hereby opened as a public street." The plan attached shews Marion street coloured pink up to and beyond the Canadian Northern Railway Company's right-of-way. The right-of-way is not coloured pink.

Thereafter the city of St. Boniface, under sec. 277 of the Railway Act, made an application to the Board of Railway Com-

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missioners for Canada for authority to construct Marion street across the track of the Canadian Northern Railway, as shewn on the plan and profile filed. On the 6th of February, 1911, the said Board made an order as follows:—

> Upon the report of an engineer of the Board approving of the said plan and profile, the railway company not offering any objection.
>
> It is ordered that the applicant be, and it is hereby authorized to construct Marion street, in the city of St. Boniface, across the track of the Canadian Northern Railway Company, as shewn on the plan and profile on file with the Board under the said file No. 16027; in accordance with the general regulations of the Board affecting highway crossings, as amended, May 4, 1910.

The profile is headed, "City of St. Boniface, plan and profile of proposed paving Marion street between De Meuron street and Bourget road." The street was not paved.

The right-of-way had been fenced. This fence was cut and some planks put down for a crossing.

The street shews on the plan as 66 feet wide. The planks at the crossing covered a width of probably 30 feet. It is not shewn whether this planking was done by the city or the railway company.

There is no doubt that thereafter the street was used by the public, who passed to and fro over the railway tracks, using the planks as a crossing, and that such was done with the knowledge and consent of the railway company.

At the place of crossing and extending either way for some distance along the right-of-way are two side tracks, one on each side of the main line of the railway company. Having regard to the interrogatories, I find that these tracks were either owned or operated by the defendant company.

At the time of the accident some cars were standing on these side tracks. The plaintiff R. J. Campbell says that as he approached the crossing he saw these cars and realized that it was a dangerous crossing. Had the cars not been there it would have been the ordinary level crossing, with apparently nothing to obstruct the general view. He says that because of the cars being upon the siding next to him and between him and the main line, he could not see the main line.

Some cars were standing both to the right and left of the planks as he approached. There is some dispute as to just where these cars were standing, but I think that some of them were standing on the strip 66 feet wide shewn on the plan.

The plaintiff says that just before approaching the crossing he had been driving his car at about ten miles or twelve miles an hour, that just before he reached the planks he slowed down to about eight miles an hour. He did not change the gears of the car, but says he reduced his speed by lessening the gasoline supply. When he was just about the main line he saw a

locomotive approaching, that he could not then stop quickly enough to avoid a collision, and that the locomotive ran into his motor car.

He also says that before he attempted to cross he listened and heard no whistle or bell, that he was in a position to hear such if sounded. Purvis, another occupant of the automobile, says likewise. Both swear positively that no whistle or bell was sounded. They both say that they did not see the engine nor its smokestack, nor any smoke or other evidence of its approach until after they had passed the line of vision of the cars standing on the side track, and that it was then too late to stop the automobile.

The locomotive was a yard engine of the defendant company returning from the east yard carrying two cars and some workmen. Some handcars with other workmen had just preceded the yard engine and another car was following. The engine was not going fast. Both handcars were close to the engine. The engineer swears he blew the whistle about a quarter of a mile from the crossing. The fireman also swears that he did so, as do others who were on the engine or upon the tender following. The engineer says that the bell was started ringing at the yard, that it is an automatic bell and when once started continues to ring; that it was ringing all the way from the yard to the crossing, was ringing at the time of the accident, and continued to ring thereafter; that the plaintiff complained at the time of the accident that the engineer had not blown the whistle or rung the bell, that he then told the plaintiff he had blown the whistle and called his attention to the bell still ringing. This the plaintiff flatly denies. The engineer is supported in his evidence, however. I think there can be no doubt that the bell was ringing. Under the circumstances I think I must also find that the whistle was blown.

The plaintiff contends that the defendant is guilty of negligence for having left the cars standing upon the side track. Mr. Clark presents an ingenious argument, contending that this crossing is not a crossing under the Act. While the municipality, without the sanction of the Board, may not open a street across an existing line of railway, I am inclined to the view that the proceedings here taken, and the subsequent acquiescence of the railway, make the crossing in question a crossing under the Act.

But whether this is so or not, I think, altogether irrespective of any statutory penalty, the railway company should not leave cars standing upon a crossing of this nature so as to obstruct the public view, and that if it does so it does not do what is prudent under the circumstances, and that it commits an act of negligence.

Other than this act of negligence, however, I do not find the

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defendant negligent in any respect. Assuming that it was a negligent act on behalf of the railway company to leave these cars thus standing, was the plaintiff R. J. Campbell on his own behalf and on behalf of his infant child whom he had in charge, guilty of negligence? What would a prudent man do under the circumstances? I am forced to the conclusion that a prudent man approaching a track where he knows that trains, yard engines and handcars are liable to pass at any moment to and fro, finding his view obstructed by standing cars, and knowing, as the plaintiff admits, that it was thus made dangerous, would, when approaching the crossing, reduce his speed to the lowest possible speed, and would exercise care both by looking and listening. The plaintiff could have reduced the speed of his car to one or two miles an hour; instead of that he goes over the crossing, as he himself says, at eight miles an hour. There is no doubt that the car going at eight miles an hour cannot be stopped within as short a distance as if it were going at a lesser rate of speed. I fail to understand why, if the plaintiff had exercised the caution which I think under the circumstances he ought to have exercised, he did not hear the bell, or see the moving top of the smoke stack of the engine.

I am forced to the conclusion that he was not paying the attention to his surroundings that, under the circumstances, he should have paid, and that his want of care contributed materially to the accident.

The defendant's engine ran upon two rails and could not swerve to the right nor to the left. I do not think the driver of the engine could have stopped it more quickly. I think he was going at a reasonable rate of speed. The evidence of the plaintiff as to the distance within which the engine was stopped after striking him strongly supports this view. Had the engine been going faster, it is more than probable that the occupants of the motor car would have been killed.

There will be judgment for the defendant with costs.

Action dismissed.

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Jan. 21.

SCARLETT v. CANADIAN PACIFIC R. CO.

Ontario Supreme Court, Lennox, J., in Chambers, January 31, 1913.

1. DEATH (§ II B—17)—DAMAGES FOR CAUSING—APPORTIONMENT OF SUM PAID IN SETTLEMENT.

On an application by a widow of a deceased for apportionment, under secs. 4 and 9 of the Fatal Accidents Act, 1 Geo. V. (Ont.) ch. 33, between her and the mother of the deceased of a sum of money paid over as damages for the death of the deceased, the apportionment should be made in proportion to the damages sustained by each of them and the analogy of the Statute of Distributions does not apply.

[*Sanderson* v. *Sanderson* (1877), 36 L.T.N.S. 847, disapproved; *Bulmer* v. *Bulmer*, 25 Ch.D. 409, and *Burkholder* v. *Grand Trunk R. Co.*, 5 O.L.R. 428, followed.]

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2. DEATH (§ II B—12)—DAMAGES FOR CAUSING—CLAIM OF WIFE LIVING SEPARATE—LIABILITY OF DECEASED FOR WIFE'S MAINTENANCE.

The basis of apportionment, on an application by a widow of a deceased person, under secs. 4 and 9 of the Fatal Accidents Act, 1 Geo. V. (Ont.) ch. 33, for apportionment between her and the mother of the deceased of a sum of money paid over as damages for the death of the deceased, is not affected by the fact that the widow was separated from her husband, inasmuch as he still continued to be liable for her support, and the amount the husband contributed to his mother's support is immaterial, the only question being, on such an application, what the wife and mother would relatively have had a right to expect if the deceased had continued to live.

Statement

APPLICATION by the plaintiff, the widow and administratrix of the estate of George Scarlett, deceased, for apportionment, under secs. 4 and 9 of the Fatal Accidents Act, 1 Geo. V. ch. 33, between her and Jane Scarlett, the mother of the deceased, of the sum of $1,000, the amount paid by the defendants as damages for the death of the deceased.

The widow and mother were the only persons entitled to share. The action was settled out of Court, before being set down for trial; the defendants paying $1,000 for damages and $100 on account of costs.

H. R. Frost, for the plaintiff.

W. A. Henderson, for Jane Scarlett.

Lennox, J.

LENNOX, J.:—There are expenses in connection with obtaining letters of administration and the funeral. I am not informed as to whether the deceased left any estate. For three years or more before her husband's death the plaintiff was living apart from him and supporting herself. The husband, during this time, lived with his mother, Jane Scarlett, and paid her $10 a week. The plaintiff did not release her husband from liability for her support.

The total damages recoverable in the action are to be "proportioned to the injury resulting from the death" to the persons entitled: sec. 4; and the appointment, when it comes to be made, is not to be upon any analogy to the Statute of Distributions, as was done in *Sanderson* v. *Sanderson* (1877), 36 L.T. N.S. 847, but in proportion to the damages sustained by each person entitled to a share: *Bulmer* v. *Bulmer* (1883), 25 Ch. D. 409, at 413; *Burkholder* v. *Grand Trunk R. Co.* (1903), 5 O.L.R. 428.

The fact that the widow was separated from her husband does not appear to prevent recovery or shift the basis of apportionment, according to American cases cited in Sedgwick on Damages, 9th ed., p. 1121; nor would it appear, on principle, to affect the question, so long as he continued liable for her support. And, so long as the wife continued entitled, the husband could contribute to his mother's support only out of the sur-

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plus of his wages or other income after supporting and maintaining his wife. The question is not so much what was being paid to the mother as what the wife and mother would relatively have had a right to expect if the deceased had continued to live. It is not made very clear why the husband and wife were separated. Primâ facie, the wife has the strongest legal claim.

The order will provide that the plaintiff's costs of the action, as between solicitor and client, over and above the $100 received on account of costs, and the costs of both parties of this application, shall be a first charge upon the $1,000; and that, after providing for these sums, the balance of the said $1,000 shall be equally divided between the plaintiff and the said Jane Scarlett.

As at present advised, I do not see that the expenses above referred to affect this fund; but, if the plaintiff has had to bear these expenses personally, I should be spoken to before the order issues.

Order accordingly.

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March 17.

JOHNSON v. FARNEY.

Ontario Supreme Court, Trial before Boyd, C. March 17, 1913.

1. WILLS (§ III G 2—125)—LIFE OR FEE—REDUCING ABSOLUTE GIFT TO LIFE ESTATE—EXPRESSION OF TESTATOR'S WISH.

An absolute gift under a will is not to be cut down to a life interest merely by an expression of the testator's wish that the donee shall, by will or otherwise, dispose of the property in favour of individuals or families indicated by the testator; a wish or desire so expressed is no more than a suggestion to be accepted or not by the donee, and does not amount to a mandate or obligatory trust.

[*Re Hamilton*, [1895] 1 Ch. 373, affirmed [1895] 2 Ch. 370, and *Re Conolly*, [1910] 1 Ch. 219, followed; *Bank of Montreal* v. *Bower*, 18 O.R. 226; *Re Andrews*, 80 L.J. Ch. 370, specially referred to.]

Statement

ACTION for a declaration that the document propounded as the last will and testament of Anna Maria Johnson, deceased, was not such in fact, upon the ground that she was, when she executed it, incompetent to make a will; and, in the alternative, for construction of her husband's will, and a declaration as to the estate taken by her under her husband's will.

The action was dismissed without costs.

J. H. Rodd, for the plaintiffs.

F. A. Hough, for the defendants.

Boyd, C.

BOYD, C.:—At the close of the evidence, I held that the will of the testatrix was well made, and that the probate of it granted could not be disturbed.

Failing the direct attack, the plaintiff next contended that, as to the property coming from her husband, the testatrix had no more than a life estate, or a life estate coupled with a trust

for the ultimate benefit of the plaintiff and others. This involves the proper construction af the husband's will, upon which I withheld judgment till I had examined the cases cited.

The material clauses of the will are these:—

At the introduction it is said: "I leave all my real and personal property to my dear wife." Then, towards the end, it is said: "I also wish if you die soon after me that you will leave all you are possessed of to my people and your people equally divided—that is to say, your mother and my mother's families." Then, in a codicil, he refers to real estate purchased after the date of the will, and says: "Property known as the William McGuire property to go to my wife to do as she sees fit with it. . . . If she my wife die intestate divide what is left of it equally among my brother and sisters and her brothers and sisters. . . ."

The husband died in 1907, leaving about $10,000 worth of property; the wife died in 1912, and her property is about $17,000. They had no children. A year or so after her husband's death, the widow spoke of the provisions in his will being just and fair to both families, and she wanted it carried out.

But, five years after his death, she apparently changed her mind, and thought fit to give all her property among the members of her own family. I think she had the power and the right to do this, and that no trust is imposed upon the property devised to her by the husband. The codicil implies that she had testamentary power over what came from her husband, and his direction was to have force only if she died intestate; and what would have happened had she died intestate need not be discussed. But in the will the expression used is that of a wish, not a direction; and, according to the present lines of decision, the language is sufficient to create an obligation, i.e., a legal obligation enforceable in the Courts.

As said in one of the later cases, the husband may have thought that the influence of an express wish would be sufficient to induce the wife to apply the property in the way suggested, but it was not put upon her as a duty, a mandate, or a legal obligation. He did not mean the second stage of the transfer to be under his will, but to be bestowed under the influence of his expressed wish and by the testamentary act of the wife. His words, taken literally, would cover all the possessions of the wife, however acquired, and this shews that he did not seek to control her free action, but only to give evidence, as he does in so many other parts of the will and codicil, which need not be quoted.

The earlier cases on precatory trusts have been departed from, and a stricter rule now obtains, which may be thus expressed: an absolute gift is not to be cut down to a life interest

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merely by an expression of the testator's wish that the donee shall, by will or otherwise, dispose of the property in favour of individuals or families indicated by the testator.

A wish or desire so expressed is no more than a suggestion, to be accepted or not by the donee, but not amounting to a mandate or an obligatory trust. This is the result of *Re Hamilton*, [1895] 1 Ch. 373, affirmed, [1895] 2 Ch. 370. The modern view as thus expounded is recognised and acted on by Joyce, J., in a recent case, *Re Conolly*, [1910] 1 Ch. 219.

The parting of the ways is marked in our Courts by the case decided by the Chancery Division in 1889, *Bank of Montreal* v. *Bower*, 18 O.R. 226, 230. The whole situation is fully discussed and the cases collected in *Re Atkinson, Atkinson* v. *Atkinson* (1911), 80 L.J. Ch. 370.

I, therefore, declare that there is no trust attaching to the provisions of the husband's will, and that the wife held the property absolutely as her own.

The attack upon the will was ill-advised, in view of evidence so easily procurable; but, as some benefit accrues from the construction of the will, I am disposed to except this case from the general rule as to costs being payable by the one who fails in the attack, and to dismiss the action without costs. I am also influenced by the fact that the wish of the testator was, that his family should be equally benefited with the family of his wife—though he did not take effectual steps to secure that result.

Action dismissed.

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March 22.

QUAIL v. BEATTY.

Alberta Supreme Court, Walsh, J. March 22, 1913.

1. CONTRACTS (§ II D 2—173*a*)—CONSTRUCTION—AS TO QUANTITY OF LAND.

A contract for the sale of "lots 1 to 4" in a land sub-division is to be construed as inclusive of all four of the lots.

[*Haggart* v. *Kernahan*, 17 U.C.Q.B. 341, distinguished; *Re Bronson and Ottawa*, 1 O.R. 415, approved.]

2. VENDOR AND PURCHASER (§ I B—5)—PAYMENT OF PURCHASE MONEY—EXHIBITING TITLE.

Where a contract for the resale of a title held under an agreement of sale from the registered owner stipulates that the sale is subject to approval of title by the vendee's solicitor and that the contracts are to be sent through a specified bank, there is a contractual obligation to exhibit a good title to the purchaser before he can be called upon to pay the balance of the cash payment.

[*Newberry* v. *Langan*, 8 D.L.R. 845, 47 Can. S.C.R. 114, referred to.]

Statement

TRIAL of an issue upon pleadings.

Blanchard, for vendors.

Brokovski, for purchaser.

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Walsh, J.

WALSH, J.:—The vendors applied to me in Chambers at Calgary for an order directing the cancellation of a caveat recorded by the purchaser against lands which they had agreed to sell to him. I directed that an issue should be tried at the Medicine Hat sittings upon pleadings delivered by the parties so that the rights of both parties in these lands under this agreement might be effectually disposed of and that issue has been so tried.

The arrangement between the parties on the agreement for the sale of this property was that it was

subject to approval of title by solicitor of purchaser, contracts to be sent through Bank of Montreal, Saskatoon,

this being the memorandum endorsed upon the cheque given by the purchaser for his deposit which was accepted by the vendors. They acted upon it by attaching to each of the drafts which they passed upon him for the balance of the cash payment all of the requisite evidences of their title. Without considering the rights of the purchaser in this respect under the decision in *Newberry* v. *Langan*, 8 D.L.R. 845, 47 Can. S.C.R. 114, I think the vendors were under a contractual obligation to display to the purchaser a good title before he could be called upon to pay the balance of the cash payment.

The lands under negotiation were described by the parties in all of the papers as lots 1, 2, 3 and 4 in a certain block. The vendors' title to the same is under an agreement of sale entered into with them by the registered owner. In this latter agreement the lands are described as "lots 1 to 4" in this block. The objection, and the only one taken to the vendors' title by the purchaser's solicitor, was, and is, that under this description only lots 1, 2 and 3 pass to the vendors, who therefore have no title to lot 4. His contention, to put it in his own words, is, "this would ordinarily be interpreted as inclusive of 1 and exclusive of 4, giving three lots instead of four." No question was raised under the Statute of Frauds and the title of the vendors in every other respect was and is entirely satisfactory to the purchaser's solicitor, as is also the formal contract executed by the vendors and sent by them for execution by the purchaser with the evidences of their title. In short, if the lands had been described in the agreement under which the vendors claim title as lots 1, 2, 3 and 4 instead of lots 1 to 4 the balance of the cash payment would have been made, the agreement would have been executed long ago, and this dispute would not have arisen.

I do not think that the objection thus taken is tenable. I am of the opinion that, under the description in question, lot 4 is covered as well as lots 1, 2 and 3. Mr. Brokovski referred me to *Dougall* v. *The Sandwich, etc., Co.*, 12 U.C.Q.B. 59, and *City*

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of Montreal v. *C.P.R.*, 33 Can. S.C.R. 396, in support of his contention that under this wording lot 4 is excluded, in addition to which I have found *Haggart* v. *Kernahan*, 17 U.C.Q.B. 341, which is along the same line of decision. In all of these cases it is held that under a description of land as extending from one point to another both of these points are excluded. For instance, in the *Dougall* case it was held that an instrument of incorporation authorizing the construction of a road from Sandwich to Windsor did not give authority to build the road through Windsor or beyond the entrance to Sandwich. In the *Montreal* case the opinion of the Court appears to have been that, if the construction of the agreement, which was for the building of a bridge "along Notre Dame street from Berri street to Lacroix street," had depended simply upon these words it would have limited it to the distance between the two nearest sides of these streets. And in *Haggart* v. *Kernahan*, 17 U.C. Q.B. 341, it was held that the description "from lots 1 to 13" excluded both 1 and 13. These descriptions all differ, however, from the one in hand. They are descriptive of land lying between two certain points the nearest parts of which to the land in question are properly taken as its boundaries. If the description here had been "from lot 1 to lot 4" it might have been successfully contended that neither of these lots, but only the intervening lots 2 and 3 passed, for that form might have been used to describe the land lying between the nearest points to each other of lots 1 and 4. The words here used, however, are descriptive of the lots themselves, and it must be taken, I think, that each of the lots thus mentioned is included in the agreement. Mr. Justice Osler, in *Re Bronson and Ottawa*, 1 O.R. 415, at 417, says:—

> There is no inflexible rule that words "from" and "to" when used in relation to points in space or points of time are always to be taken exclusively,

a statement which is amply supported by the authorities which he there collects. In my opinion, therefore, the objection raised to the vendors' title cannot be given effect to.

I am satisfied, however, that the objection was honestly taken. The purchaser and one of his witnesses through whom he had arranged to finance the matter both swear that he was able, ready and willing to pay the draft for $9,750 on the day upon which the papers were examined by the solicitor and that but for this objection the formal agreement would then have been signed by him and the draft paid. There is no evidence to contradict this and I therefore accept what they say. It is true that there was a much longer delay on the purchaser's part in placing himself in a position to make this payment than was contemplated when the agreement was entered into, but I do

not think that the vendors can complain of that. They recalled their first draft on the 9th of January because of the purchaser's failure to either accept or pay it. They might, perhaps, have taken advantage of this failure and have called the deal off, but, instead of doing so, they, on the 15th of January, passed another draft on him which, with the papers attached, remained in the hands of the bank until the 25th of January, when the solicitor's examination of the papers was made. The long delay between these dates is unexplained, but I think that so long as the vendors were content to leave the draft in the bank for acceptance and payment and the papers for examination and execution by the purchaser he had the right to close the purchase by signing the agreement and paying the draft.

The purchaser, having therefore refused to conclude the agreement under the mistaken but honest belief that the vendors' title is defective and having ever since expressed not only his willingness to complete upon the title being perfected but his intention of holding the purchasers to it, should, I think, be given a reasonable opportunity to close the deal now. The principal of the balance of the cash payment, $9,750, with the bank charges on the draft is before me in the form of a marked cheque now ready for payment into Court to the credit of this matter. I think that, under the circumstances, the purchaser is liable for interest on that sum at 8 per cent., the contract rate, from the 25th of January to the date when this judgment is accepted and acted on by him. I think that he is also liable for the vendors' costs of these proceedings as they have been occasioned entirely by the taking of an untenable objection to the title. If the purchaser, by the 29th of March instant, executes and delivers to the deputy clerk at Medicine Hat the agreement, exhibit 4, and pays into Court the interest computed as above and the vendors' costs of these proceedings, which I fix at $250 and disbursements, the originating summons will be discharged and the agreement declared to be binding upon the parties. In that event all of the money so paid in will be forthwith paid out to the vendors. If he fails to comply with the above terms by the above date there will be a judgment relieving the vendors from the agreement, permitting them to retain the deposit of $250 and removing the caveat. In that event the vendors' costs fixed as above will be paid to them out of the money in Court and the balance will be paid to the purchaser.

Judgment accordingly.

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BELCOURT v. NOEL.

Alberta Supreme Court. Trial before Harvey, C.J. February 19, 1913.

1. JUDGMENT (§ IV B 1—232)—FOREIGN JUDGMENT—ACTION UPON.

An action does not lie in Alberta upon a personal judgment by default recovered in another province of Canada against a defendant served with its process in Alberta, and there resident and domiciled, if he did nothing to submit to the jurisdiction of the court of such other province and did not acquire any domicile in such other province while the proceedings were being carried on.

[*Dakota Lumber Co.* v. *Rinderknecht*, 6 Terr. L.R. 210, applied. See Annotation to this case on Actions upon foreign judgments.]

2. LIMITATION OF ACTIONS (§ I B 1—7)—EFFECT OF FOREIGN JUDGMENT UPON ORIGINAL CLAIM.

An extra-territorial personal judgment is not effective to prevent the operation of the Statute of Limitations in Alberta as regards the original claim upon which the judgment was founded, where the defendant had acquired no domicile in the province in which the judgment was obtained, and had not appeared in the action there brought, nor attorned to the jurisdiction of the court.

Statement

THIS is an action upon a foreign judgment obtained in the High Court of Justice of Ontario.

The action was dismissed.

H. H. Parlee, for plaintiffs.

J. Cormack, for defendant.

Harvey, C.J.

HARVEY, C.J.:—The defendant is and has been since a long time prior to the issue of the writ in the Ontario action a resident of Alberta. He was served with the writ in that action in Alberta and judgment was obtained by default. It appears clear upon the authority of *Dakota Lumber Company* v. *Rinderknecht* (1905), 6 Terr. L.R. 210, 219, and the cases there cited that a judgment obtained under such circumstances is not one which this Court should enforce. No advantage, moreover, would be gained by permitting the plaintiffs to amend so as to set up the original cause of action since the Statute of Limitations is raised in the defence and is an effectual bar to the plaintiffs' claim upon the original cause of action.

The action, therefore, must be dismissed with costs.

Action dismissed.

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"All judgments are foreign judgments which are given by Courts whose jurisdiction does not extend to the territories governed by our laws": *McFarlane* v. *Derbishire*, 8 U.C.Q.B. 12.

It will be noted that the territory of a foreign judgment may or may not be a foreign country in a political sense, but must, of course, be a foreign "law district." In other words, a country, in the political sense, means the whole of the district or territory subject to one sovereign power, such as France, Italy, the United States, or the British Empire;

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a country, in the legal sense, means a district or territory which (whether it constitutes the whole or a part only of the territory subject to one sovereign), is the whole of a territory subject to one system of law, such as England, Scotland, Ireland, or any of the provinces of Canada, or any of the States which collectively make up the United States. Hence the territorial division of a foreign judgment is best put as a "law district."

It could not seriously be contended that a British subject residing in any particular province of Canada is subject to the laws of every province of the Dominion and of all other parts of the empire: *Dakota Lumber Co.* v. *Rinderknecht*, 6 Terr. L.R. 10, 220, 221, 222. A British subject is subject only to the laws affecting the empire as a whole, and those of the particular law district in which he resides, and in a limited sense of those of the law district in which he was born: *Dakota Lumber Co.* v. *Rinderknecht*, 6 Terr. L.R. 222; *Turnbull* v. *Walker* (1892), 67 L.T.N.S. 767; *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155.

Every domestic law district clings to its own privileges and powers in suits on foreign judgments.

The origin of the practice now obtaining in most of the Canadian provinces will be found in the English Common Law Procedure Act, 1852. That statute prescribed the practice to be followed for issuing, serving and proceeding on writs of summons against defendants residing out of the domestic law district in certain given cases; secs. 18 and 19. Those sections were intended simply as procedure, conferring no new jurisdiction, they are the work of able minds, prescribing exact process, as a precautionary basis, for judgments against defendant debtors residing outside of the domestic law district. Their logic is: a defendant debtor, residing out of a given domestic law district, would or might be made to pay on a judgment there recovered (*a*) because he had property there, or (*b*) was there temporarily or (*c*) had funds there in the hands of third parties.

Beyond this, what virtue has a judgment *in personam* against a defendant permanently residing out of a jurisdiction: Can he be sued elsewhere on such judgment? Is it evidence of the debt, or is it valid for other, and if so, what other practical ends?

The methods prescribed by secs. 18 and 19 of the Common Law Procedure Act, 1852 (English) are briefly: (*a*) special service of the writ itself on British subjects out of the law district, (*b*) such service of a prescribed notice of the writ on persons not British subjects out of the law district, (*c*) leave of the Court for the issue and service of such process. In this connection, it will be noted that the English Order XI. of the rules of the Supreme Court, 1883, is in effect a codification of the law as to cases in which absent defendants may be sued, and that this order was passed after and in consequence of remonstrance as to the practice of the English Courts and to bring that practice into accordance with rules of international law, or, at all events, comity: *Field* v. *Bennett*, 56 L.J.Q.B. 89.

The English rules are, in general, the same respecting the enforcement of colonial judgments as are those applicable to the enforcement of all other foreign judgments. In other words, as to the law district

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of England a colonial law district is foreign: *Simpson* v. *Fogo*, 1 H. & M. 195.

The rule of law that every person properly and righteously acquiring a title to property in one country shall hold it all over the globe, is a broad and salutary principle, qualified by special rules applicable to different classes of property, such as lands, ships, etc.: *Simpson* v. *Fogo*, 1 H. & M. 195, 222, 242. The *Simpson* case contains a *dictum* that because foreign judgments of sister provinces within British dominions are appealable to a common Court of appeal, *i.e.*, the Judicial Committee of the Privy Council, such foreign judgments are therefore distinguishable in their nature and effect from other foreign judgments. This, except in a most limited sense, is not supported by the weight of authority; but, on the contrary, each law district with its own law system enforces or declines to enforce foreign judgments as a class, whether they chance to be under the same or under other national flags, upon substantially the same principles and doctrines, excepting, of course, such well-known safeguards as public policy, barbarous laws, and the like: see *Simpson* v. *Fogo*, 1 H. & M. 195.

It appears to be established that if the defendant was not domiciled or resident within the territorial jurisdiction of the foreign Court when the judgment was obtained, and if he did not appear to the action nor submit himself to the jurisdiction of the foreign Court, an action on such judgment cannot be maintained: *Fairchild* v. *McGillivray*, 16 W.L.R. 563; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670; *Emanuel* v. *Symon*, [1908] 1 K.B. 302.

In an action on a foreign judgment it may be said that the English Courts consider the defendant bound: (1) where he is a subject of the foreign law district; (2) where he was when sued, resident in the foreign law district; (3) where the defendant, in the character of plaintiff, himself selected the forum in which he was afterwards sued; (4) where he has voluntarily appeared; (5) where he has contracted to submit himself to the forum in which the judgment was obtained: *Rousillon* v. *Rousillon*, 14 Ch.D. 351; *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155.

There is authority for the doctrine that in an action on the judgment of a foreign tribunal, having jurisdiction over the defendant and the cause, the fact that the judgment proceeded on a mistake as to English law, is no more a defence to the action than a mistake as to the law of some third law district incidentally involved, or as to any other question of fact, and that it could make no difference as to the binding effect of the judgment whether the mistake appears on the face of the proceedings or not: see *Godard* v. *Gray*, 40 L.J. Q.B.N.S. 62, 65, 67; 2 Smith's Leading Cases, 3rd ed. 448; *Castrique* v. *Imrie*, 39 L.J.C.P. (N.S.) 350.

The true principle, on which foreign judgments are enforced in England, is that there is a "duty or obligation" to submit to the decree of a Court of competent jurisdiction, and anything which negatives that duty is a defence to the action: *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155.

A foreign judgment *in personam* may be held not binding elsewhere if it appears on the record: (1) to be manifestly contrary to natural justice; (2) to be based on a class of foreign legislation not recognized

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by other law districts; (3) to be founded on a misapprehension of what is the law of the domestic law district in which enforcement is sought; (4) to be founded on a distinct refusal to recognize the laws of the country under which the title to the subject matter of litigation arose: *Simpson* v. *Fogo*, 1 H. & M. 195.

A foreign judgment is *primâ facie* evidence of a debt, and that everything was done in the Court in which it was obtained that was necessary to support it: *Arnott* v. *Redfern*, 3 Bing. 353; unless the contrary be shewn, the domestic Court will presume that the decision in a foreign judgment is consonant with the justice of the case.

A judgment of a foreign Court, obtained in default of appearance against a defendant cannot be enforced in an English Court, when such defendant, at the time at which the suit was commenced, was not a subject of nor a resident in the country in which the judgment was obtained; for there existed nothing imposing on such defendant any duty to obey the judgment: see *Godard* v. *Gray*, L.R. 6 Q.B. 139, 147; Smith's Leading Cases, p. 2035.

With reference to the provisions of sections 18 and 19 of the Common Law Procedure Act, 1852, conferring on the English Courts a power of summoning foreigners under certain circumstances to appear, and in case of default to give judgment against them; Blackburn, J., considered that, if the principle on which foreign judgments can be enforced, be that which is loosely called "comity," the English Courts can hardly decline to enforce a foreign judgment given in France against a resident in Great Britain, in circumstances hardly, if at all, distinguishable from those under which the English Courts *mutatis mutandis*, might give judgment against a resident in France. But giving full force and effect to the "duty or obligation" doctrine, precluded, in his judgment, the application of the "comity" principle: *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155, 159.

While every tribunal may very properly execute process against property within its jurisdiction, the existence of such property which may be very small (say an umbrella or the like) affords no special ground for imposing on the foreign owner of that property a "duty or obligation" to fulfill the judgment: see *London and North Western R. Co.* v. *Lindsay*, 3 Macq. H.L. 99.

A judgment of a foreign Court, obtained in default of appearance against a defendant, cannot be enforced in an English Court, where the defendant, at the time the suit commenced, was not a subject of, nor resident in the country in which the judgment was obtained: where there existed nothing imposing on the defendant any duty to obey the judgment: *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155.

An English Court will not enforce a foreign judgment, where it is shewn to have been obtained without jurisdiction, or where it was obtained by the plaintiff's own fraud, or where the foreign Court knowingly and perversely disregarded the rights given to an English subject by English law: *per* Blackburn, J., in *Godard* v. *Gray*, L.R. 6 Q.B. 139, 149.

A violation of natural justice, or the application of barbarous laws as

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a foundation for the foreign judgment, constitutes a ground for refusal to enforce: *Liverpool Marine Co.* v. *Hunter*, L.R. 4 Eq. 62.

Extrinsic evidence may be admitted, against a foreign judgment, to shew (*a*) no jurisdiction; (*b*) fraud; (*c*) violation of established principles of justice; (*d*) non-residence; (*e*) non-finality of judgment: see Smith's Leading Cases, p. 2039, referring to the *Schibsby* case; the *Rousillon* case, and *Copin* v. *Adamson*, L.R. 9 Ex. 345, 349, 354.

In a legal jurisdictional sense, a "country" means the whole of a territory subject to one system of law, such as England, Scotland, or Ireland, the different colonies, or such as any one state of the United States; in other words, "country," in this sense, means a "law district": *Dakota Lumber Co.* v. *Rinderknecht*, 6 Terr. L.R. 211, 221.

The Courts are not, in the strictest sense, bound to enforce foreign judgments; they act thereon only *de gratia, ampliare justitiam.*

A cardinal rule, governing Courts called upon to enforce foreign judgments, is that on the spot when and where the foreign judgment itself is obtained is the best time "to learn the truth," which, after all, is the paramount purpose of all Court trials: Smith's Leading Cases, p. 2040.

A foreign judgment, even if regularly obtained according to the procedure of the foreign law district, in order to create that "duty or obligation" to pay which English Courts will import must be within one or the other of the "five cases" mentioned in *Gifford* v. *Calkin*, 45 N.S.R. 277, citing *Emanuel* v. *Symon*, [1908] 1 K.B. 309.

An agreement to submit to the jurisdiction of the Courts of a foreign law district is not to be implied from the making of a promissory note payable in such foreign law district: *Gifford* v. *Calkin*, 45 N.S.R. 277.

A foreign judgment does not in Nova Scotia, by reason of order 35, rule 38 of the Nova Scotia Rules, stand on a different footing from foreign judgments sought to be enforced in England. Rule 38 was merely intended to give to the defendant another defence to an action on a foreign judgment, and was not intended to regulate or alter the law of the country as to when a foreign judgment could be enforced.

The "five cases" (more exactly "five conditions") of the *Emanuel* case are considered in the following decisions: *Fairchild* v. *McGillivray*, 4 Sask. L.R. 237; *British American Investment Co.* v. *Flawse*, 4 Sask. L.R. 372.

If a foreign judgment be invalid against defendants, so that it cannot be enforced in Saskatchewan, it is invalid for all purposes in the province, but, of course, the original claim (certain promissory notes) may be sued upon: *British American Investment Co.* v. *Flawse*, 4 Sask. L.R. 372, following *Dakota Lumber Co.* v. *Rinderknecht*, 6 Terr. L.R. 211.

If a judgment is pronounced by a foreign Court over a person within its jurisdiction, and in a matter with which it is competent to deal, the English Courts will not investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. The jurisdiction, which alone is important in such a matter, is the competence of the Court in an international sense, that is, its territorial competence over the subject-matter and over the defendant: *Pemberton* v. *Hughes*, 68 L.J. Ch. 281. Accordingly, the judgment of such a Court cannot be impeached, in English Courts, for a mere *error of pro-*

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cedure, even by third parties in collateral proceedings, although such error, if it occurred, was such as to make the judgment of the foreign Court *void* by the law of the country where it was pronounced. Such a matter *ought not* to be enquired into by the English Courts: *Pemberton* v. *Hughes*, 68 L.J. Ch. 281.

That foreign judgments will be enforced in actions *in personam* in England is well established, and the circumstances under which such judgments will be enforced in England are concisely stated by Buckley, L.J., in *Emanuel* v. *Symon*, [1908] 1 K.B., at page 309.

In the last-mentioned case it was held that the ownership of real estate in a foreign country, though it bound the owner to submit to the decrees of the Courts of the foreign country so far as they affected the property itself, did not involve a submission to the general jurisdiction of the foreign Courts; and that partnership in a foreign firm did not without an express agreement to that effect constitute a submission to the foreign jurisdiction by a person who was neither resident nor domiciled in the foreign country: *Emanuel* v. *Symon*, [1908] 1 K.B. 302.

A judgment may be obtained regularly in accordance with the law and practice of the foreign law district, yet it must come within some one of the "five cases": *Gifford* v. *Calkin*, 45 N.S.R. 277 and 287.

A judgment *in personam* of a foreign Court of competent jurisdiction may be sued upon in Saskatchewan where the evidence sufficiently establishes the identity of the defendant in the action on the judgment with the defendant in the judgment sued upon, and that the Court which rendered the judgment had jurisdiction over the defendant in respect of the cause of action: *Read* v. *Ferguson*, 8 D.L.R. 737.

In an action in a provincial Court on a judgment *in personam* obtained in one of the United States, evidence that the defendant against whom judgment was rendered was a resident of the state in question when the action was begun, was personally served with the summons which was the first step in the action, and submitted to the jurisdiction of the state Court by entering an appearance in the action by his authorized attorney, is sufficient to establish the jurisdiction of the state Court over the defendant at the time of the rendition of judgment: *Read* v. *Ferguson*, 8 D.L.R. 737.

In an action on a judgment *in personam* obtained in one of the United States, evidence that the defendant against whom the judgment was rendered was a resident of the state in question when the action was begun and was personally served therein with the summons commencing the action is sufficient to shew that he was subject to the jurisdiction of the Court which rendered the judgment: *Read* v. *Ferguson*, 8 D.L.R. 737, citing *Carrick* v. *Hancock*, 12 Times L.R. 59, and *Rousillon* v. *Rousillon*, L.R. 14 Ch.D. 351.

As to any Canadian province, the judgment of a sister province in Canada is a "foreign" judgment: see *British American Investment Co.* v. *Flawse*, 4 Sask. L.R. 372. In that case Scott, J., deals with the exact meaning of "law' district," and cites *Turnbull* v. *Walker* (1892), 67 L.T. N.S. 767, for the doctrine that a British subject is not subject to the laws of any law district, except his own, with certain very restricted qualifications.

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No province can pass laws to operate outside of its own territory, and no tribunal established by a province can extend its process beyond the province, so as to subject persons or property elsewhere to its decisions; and, consequently, a judgment obtained in one province, by service of process out of the jurisdiction, against a domiciled resident of another province, who has not in any way attorned to the jurisdiction, has no extra-territorial validity, even though regularly obtained under the procedure of the former province. *Aliter*, where the judgment of such other province has been obtained upon the non-resident's own initiative: *Deacon* v. *Chadwick*, 1 O.L.R. 352. In that case a judgment recovered in Manitoba against an Ontario defendant was held not enforceable in Ontario. Manitoba and Ontario are independent provinces so far as the power to make laws in respect of the classes and subjects enumerated in sec. 92 of the B.N.A. Act is concerned, among which are "property and civil rights in the province," and "the administration of justice in the province including the constitution, maintenance, and organization of provincial Courts both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts." And to neither is any power given to pass laws having any operation outside its own territory, and no tribunal established by either can extend its process beyond its own territory so as to subject other persons or property to its decisions. "Every exercise of authority of this sort beyond its limit is a mere nullity and incapable of binding such persons or property in any other tribunals": Story on Conflict of Laws, 8th ed., sec. 539. A distinction is to be noted between Canadian and United States laws on this point due to a constitutional provision in the latter country. The constitution of the United States provides that "full faith and credit shall be given in each state to the public Acts, records and judicial proceedings, of *every other state*. And the congress may, by general laws, prescribe the manner in which such Acts, records and proceedings are to be proved and the effect thereof"; and the Act of congress of May 26, 1790, that prescribing the code in which the record and judicial proceedings are to be authenticated, enacts that "the state records and proceedings authenticated as aforesaid shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the state from which the state records are or may be taken." From the foregoing it will be seen that there is a distinction, as to their bases, between the constitutional provisions governing the enforcement of foreign judgments originally sued within the British Empire and the limitations of the constitution of the United States governing the enforcement of foreign judgments originally sued in that country, and in such connection the following cases will be of interest: *Deacon* v. *Chadwick*, 1 O.L.R. 352; *D'Arcy* v. *Ketchum* (1850), 11 How. 165; *Pennoyer* v. *Neff* (1877), 95 U.S. 714, 727; *Rand* v. *Hanson* (1891), 154 Mass. 87; *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155; *Turnbull* v. *Walker*, 67 L.T.N.S. 767; *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote*, [1894] A.C. 670.

It will be seen that the United States enforcement is stronger than ours; yet even there the want of jurisdiction is always in issue: *D'Arcy* v. *Ketchum* (1850), 11 How. 165.

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Process sent to a non-resident out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability: *Deacon* v. *Chadwick*, 1 O.L.R. 352; *Pennoyer* v. *Neff* (1877), 95 U.S. 714, 727; *Rand* v. *Hanson* (1891), 151 Mass. 87.

This rule seems to be equally applicable to the provinces of the Dominion as to the states of the Union, and to be deducible from the decisions in the following cases: *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155; *Turnbull* v. *Walker*, 67 L.T.N.S. 767; *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote*, [1894] A.C. 670.

In *Fowler* v. *Vail* (1870), 4 Ont. A.R. 267, the pleading was held bad in failing to aver that the defendant was not a subject of the foreign country and not amenable to its jurisdiction. The right to the exercise of the power or authority assumed in hearing and determining the cause upon which the foreign judgment is obtained, is the jurisdiction referred to upon the enforcing of such judgments: *Fowler* v. *Vail* (1870), 4 Ont. A.R. 267.

Neither the possession by the defendant of property real or personal, nor the existence of a partnership of which the defendant is a member, in the foreign country, can any longer be considered as giving jurisdiction, in the absence of any other circumstances, to the Courts of that country, so as to make their judgments enforceable in England: *Emanuel* v. *Symon*, [1908] 1 K.B. 309; compare *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670. The decisions in *Douglas* v. *Forrest* (1828), 4 Bing. 686, and *Cowan* v. *Braidwood* (1840), 1 Man. & G. 882, are no longer law on this point, and the doubts expressed in *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155, and *Rousillon* v. *Rousillon* (1880), 14 Ch.D. 351, are justified.

In *Rousillon* v. *Rousillon*, 14 Ch.D. 351, the discussion of the principles on which the Court acts in enforcing or declining to enforce judgments of a foreign Court is apt. In this case the defendant, a Swiss subject, made a contract with the plaintiffs, French subjects, residing in France, when the defendant was in France on a temporary visit, he being then domiciled in Switzerland but residing in England. The plaintiffs afterwards took judgment in a French Court. Defendant was not in France at the commencement of, or during the action, and he had no notice of the proceedings, though plaintiffs knew his address in England, where he was then still residing. The judgment was not enforced nor enforceable by the English Court in the circumstances. The important case of *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155, was there considered.

A foreign divorce obtained by the wife of a British subject domiciled in Canada without service of process on the husband or submission on his part to the jurisdiction of the foreign Court is ineffective to dissolve a marriage performed in Canada, although the wife had some years before applying for the divorce left her husband and taken up her residence in the foreign country: *R.* v. *Brinkley*, 12 Can. Cr. Cas. 454, 14 O.L.R. 434.

In an action brought in Ontario upon a judgment for the recovery of money obtained by the plaintiff in 1908 in the Supreme Court of British Columbia, the defence was that that Court had no jurisdiction in respect of the subject-matter of the action in which the judgment was obtained, as the defendants were not at any time resident or domiciled in

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British Columbia, and they did not appear or consent to jurisdiction; that the cause of action did not arise in British Columbia; and that the action was barred by the Statute of Limitations in force in Ontario, where the defendants resided. The plaintiff first recovered judgment in British Columbia in 1889, and the judgment of 1908 was upon the same cause of action, for money lent. It was held that the plaintiff was in no better position than if the action was upon the judgment recovered in 1889 or upon the original cause of action; the binding effect of the judgment sued upon depended on the rules of international law; and, the defendants not having been domiciled or resident in British Columbia when served with the writ of summons, the judgment must be treated as a nullity: *Brennan* v. *Cameron*, 1 O.W.N. 430 (D.C.).

A judgment of a foreign Court of competent jurisdiction, pronouncing as to the ownership or title of a movable located within its jurisdiction is conclusive against all persons. So a foreign judgment declaring the ownership of certain shares of a company domiciled in the foreign jurisdiction is *primâ facie* of such title, if the validity of such judgment is not attacked and the competency of the Court to pronounce it is not questioned: *Carsley* v. *Humphrey*, 12 Que. P.R. 133.

A default judgment obtained in a foreign jurisdiction (though liable to be set aside) so long as it stands, is "final and conclusive" within the meaning of that expression as applied to foreign judgments, but the defendant is entitled to challenge the validity of the judgment on the ground that it is manifestly erroneous such as being founded on an *ex facie* void contract: *Boyle* v. *Victoria Yukon Trading Co.*, 9 B.C.R. 13.

Judgment had been given against defendant in Ontario in January, 1906, on a claim arising out of a promissory note, signed in that province in 1898. The action was undefended, although defendant was duly served in British Columbia. He left Ontario in 1899 for Winnipeg and afterwards came to British Columbia, where he has since resided. Plaintiff sued in British Columbia on this judgment, and at the trial evidence was given of a payment made after the British Columbia action had been commenced. It was held by the full Court, following *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670, that the defendant had acquired a British Columbia domicile, and was not subject to the Ontario Courts. The Court also held, following *Bateman* v. *Pinder* (1842), 11 L.J.Q.B. 281, that the payment made could not operate to defeat a plea of the Statute of Limitations; and that it was a mere conditional offer of compromise which was declined: *Walsh* v. *Herman*, 13 B.C.R. 314.

In another case the plaintiffs had recovered a judgment in Ontario against W. J. McGrath & Co.—a firm name for one W. J. Magrath. They brought an action in Alberta on this judgment, naming W. J. McGrath & Co. as the defendants. The writ was served on W. J. Magrath, a resident of Alberta, and he entered an appearance. On motion to strike out the appearance and to enter summary judgment, it was held that where a person had carried on business in a firm name elsewhere than in Alberta he may be sued in Alberta in such firm name, and it is no answer that the defendant has long since ceased to use such firm name and had never car-

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ried on business in Alberta under such firm name: *Mills* v. *McGrath*, 1 Alta. L.R. 32.

In *McCullough* v. *Defehr*, 2 S.L.R. 303, the defendants had ordered certain butter-making machines from plaintiff on the representation that with these machines butter could be made from milk fresh from the cow. On receiving the machines they found that they would not make butter as represented and immediately returned them. The representation in question was made by the plaintiff's agent, who did not give evidence, but it did not appear that he had any ground for believing the representations to be true. In fact the plaintiff's own literature shewed the representations to be untrue. The plaintiff recovered judgment in the Supreme Court of Alberta for the price of the goods, the defendants not being residents in Alberta and not appearing and now sued upon the foreign judgment or alternately for goods sold and delivered. The Court held that the representation was untrue and that the agent had no ground for believing it to be true, and the inference was that it was fraudulently made; the defendants were, therefore, entitled to rescind the contract and return the goods. It was further held, following *Gurdyal Singh* v. *Rajah of Faridkote* [1894] A.C. 670, that the defendants not being residents of or domiciled in Alberta and not having appeared in the action there the plaintiff could not now recover upon the foreign judgment recovered by default: *McCullough* v. *Defehr*, 2 S.L.R. 303.

The onus of establishing that a different rule of law on a given subject prevails in a foreign country is upon the party who relies on it. In default of proof of its existence, the provincial law will be applied: *Gogo* v. *Kouri*, 29 Que. S.C. 47 (C.R.).

Special legislation regulates actions upon judgments recovered in Quebec and sought to be enforced in Ontario, and *vice versa*; *Court* v. *Scott*, 32 U.C.C.P. 148, 153. See also Holmested & Langton's Ont. Jud. Act, 3rd ed., 163, 164, 165.

In an action in the province of Quebec to enforce a foreign judgment any defence which was or might have been set up to the original action basing such foreign judgment may be pleaded (*a*) if the foreign judgment was rendered out of Canada; (*b*) if rendered in any other province of Canada, provided the defendant was not personally served within such other province or did not appear, or provided the right to immovables in Quebec or the jurisdiction of the foreign Court concerning such right, is not involved: secs. 210, 211, 212, Code of Civil Procedure (Que.).

In any action brought in Ontario on a Quebec judgment wherein the defendant was personally served, no defence that might have been set up to the original action can be pleaded; but the defence is not so limited where there was neither personal service nor defence in the original action: Ont. Jud. Act, R.S.O. 1897, ch. 51, secs. 117, 118.

Under 22 Vict. ch. 5, sec. 58, consolidated in C.S.L.C. ch. 83, sec. 53, sub-sec. 2, a judgment may be recovered in Quebec, on a personal service in Ontario, in an action in which the cause thereof arose in Quebec, so as to render such judgment conclusive on the merits: *Court* v. *Scott*, 32 U.C. C.P. 148.

In an action in the domestic Court to enforce a foreign judgment, if fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, the whole

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case may be reopened even although this reopening calls upon the domestic Court to go into the very facts which were investigated and which were in issue in the foreign Court; and the technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in the domestic Court the question to be considered is whether the foreign Court has been imposed upon; the fraud practised, or alleged to have been practised, on the foreign Court, being misleading thereof by evidence known by the plaintiff to be false; and in that was the whole fraud: *Abouloff* v. *Oppenheimer*, 10 Q.B.D. 295. While there is a recognized general rule in an action on a foreign judgment against going into the merits, such rule must be read with the rule under which fraud reopens the foreign judgment; and, so combined, the two rules will be applied in the case in which it is impossible to go into the alleged fraud without going into the merits: Piggott on Foreign Judgments, 3rd ed., p. 392.

The following principle is laid down in *Neff* v. *Pennoyer*, Fed. Cas. No. 10,083 (3 Sawyer 2741), affirmed *Pennoyer* v. *Neff* (1877), 95 U.S. 714. A state which has the property of non-residents within its territorial limits, has power to subject such property to the satisfaction of the claims of its citizens against the non-residents, and in doing this the state may adopt any method of procedure which it may deem proper and convenient under the circumstances and may, for such purpose, authorize a judgment to be given against the non-residents prior to the seizure of their property, and with or without notice of the proceedings.

For convenient reference, the doctrines applicable to actions upon foreign judgments may be summarized as follows:—

1. In certain cases foreign judgments may effectively be sued upon in the domestic law district.

2. The competency of a foreign Court, from which come the foreign judgments to be enforced in the domestic law district, is always a condition precedent to the enforcement: *Pemberton* v. *Hughes*, [1899] 1 Ch. 781, C.A.; *Robinson* v. *Bland* (1760), 2 Burr. 1077; *Gage* v. *Bulkeley* (1744), 3 Atk. 214.

3. The competent foreign judgment becomes in the domestic law district a simple contract debt: *Dupleix* v. *DeRoven* (1705), 2 Vern. 540; *Walker* v. *Witter* (1778), 1 Doug. (K.B.) 1; *Grant* v. *Easton* (1883), 13 Q.B.D. 302 (C.A.).

4. The original cause of action is not merged by the foreign judgment: *Hall* v. *Odber* (1809), 11 East. 118; *Smith* v. *Nicholls* (1839), 5 Bing. (N.C.) 208; *Bank of Australasia* v. *Harding* (1850), 9 C.B. 661; *Bank of Australasia* v. *Nias* (1851), 16 Q.B. 717; *Kelsall* v. *Marshall* (1856), 1 C.B. (N.S.) 241; *Thompson* v. *Bell* (1854), 3 E. & B. 236.

5. The foreign judgment to be enforceable, must be a final judgment: *Nouvion* v. *Freeman*, 15 A.C. 1; *Plummer* v. *Woodburne* (1825), 4 B. & C. 625; *Patrick* v. *Shedden* (1853), 2 E. & B. 14; *Frayes* v. *Worms* (1861), 10 C.B. (N.S.) 149.

6. The finality of a foreign judgment applies to the Court rendering it, and, although subject to appeal to a higher Court, it is considered a final judgment: as to original Court, see *Nouvion* v. *Freeman* (1889), 15 A.C. 1; *Patrick* v. *Shedden* (1853), 2 E. & B. 14, and as to appeal-

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ability, see *Alivon* v. *Furnival* (1834), 1 Cr. M. & R. 277; *Scott* v. *Pilkington* (1862), 2 B. & S. 11.

7. A foreign judgment, against the public policy of the domestic law district, will not be enforced, where there can be no "duty or obligation" attached thereto.

8. A foreign judgment, obtained by fraud, will not be enforced, where the domestic law district can attach thereto no "duty or obligation."

9. A foreign judgment, against natural justice, will not be enforced, where the domestic law district can attach thereto no "duty or obligation."

10. A penal foreign judgment will not be enforced, for no domestic law enforces the penal laws of another country: *Huntington* v. *Attrill*, [1893] A.C. 150, reversing as to the application of this doctrine, *Huntington* v. *Attrill*, 17 O.R. 245, 18 Ont. A.R. 136; *Re Selot's Trusts*, [1902] 1 Ch. 488.

11. A foreign law district cannot bind the rest of the world by its laws or procedure: *Buchanan* v. *Rucker* (1808), 9 East. 192, 194.

12. There are five cardinal conditions, some one of which is a condition precedent to the enforceability of a foreign judgment, and these are:—

(*a*) That the defendant, at the time of the foreign action was a subject of the foreign law district, hence owing allegiance, with its inherent "obligation" to comply with its judgment: *Rousillon* v. *Rousillon* (1880), 14 Ch.D. 351; *Emanuel* v. *Symons*, [1908] 1 K.B. 302 (C.A.).

(*b*) That the defendant, when the action for the foreign judgment was begun, was resident in the foreign law district, hence owing a temporary allegiance and its inherent "obligation" to comply with its judgment: *Rousillon* v. *Rousillon* (1880), 14 Ch.D. 351; *Emanuel* v. *Symon*, [1908] 1 K.B. 302 (C.A.); *Schibsby* v. *Westenholz*, 1 L.R. 6 Q.B. 155; *Turnbull* v. *Walker*, 67 L.T.N.S. 767; *Jaffer* v. *Williams* (1908), 25 Times L.R. 12.

(*c*) That the defendant himself, as plaintiff in the foreign action, selected the foreign forum where the action was heard, thus raising an estoppel: *Rousillon* v. *Rousillon* (1880), 14 Ch.D. 351; *Emanuel* v. *Symon*, [1908] 1 K.B. 302 (C.A.); *General Steam Navigation Co.* v. *Guillon* (1843), 11 M. & W. 877, 894; *Schibsby* v. *Westenholz*, 1 L.R. 6 Q.B. 155.

(*d*) That the defendant voluntarily appeared, thus raising an estoppel: *Carrick* v. *Hancock*, 12 Times L.R. 59.

(*e*) That the defendant had clearly contracted to submit to the jurisdiction of the foreign Court: *Rousillon* v. *Rousillon* (1880), 14 Ch.D. 351; *Emanuel* v. *Symon*, [1908] 1 K.B. 302; *Copin* v. *Adamson* (1874), L.R. 9 Ex. 345; *Feyericks* v. *Hubbard* (1902), 71 L.J. (K.B.) 509.

The conditions (*a*) to (*e*) have been so often considered with approval by the domestic Courts that they are universally pronounced the "five cases" (or "conditions"), one of which must support each application to the domestic Court, and that they hold front rank in every text-book, and in the many able decisions of the higher Courts, treating of the nature and effect of foreign judgments.

13. The defendant must have notice of the proceedings: *Buchanan* v. *Buckner* (1807), 1 Camp. 63 (1808), 9 East. 192; *Cavan* v. *Stewart* (1816), 1 Stark. 525.

14. If the defendant had due notice, and did not appear, he is bound by the notice: *Schibsby* v. *Westenholz*, L.R. 6 Q.B. 155; *Turnbull* v. *Walker*, 67 L.T.N.S. 767; see also *Reynolds* v. *Fenton* (1846), 3 C.B. 187, which is overruled.

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March 7.

KINNESTEN v. MACLEAN.

Alberta Supreme Court. Trial before Harvey, C.J. March 7, 1913.

1. CONTRACTS (§ II D 4—188)—EXCAVATION WORK—SUBSIDENCE OF ADJOINING BUILDING OF SAME OWNER.

It is not to be assumed that a contractor authorized by the land owner to make excavations for footings is to protect adjoining buildings belonging to the landowner with whom he contracted from subsidence by reason thereof where it was apparent that the work would interfere with the support of such buildings; the landowner should himself see to such protection and cannot recover from the contractor unless the latter's work was done negligently.

Statement

ACTION for damages for alleged negligent excavation work done by the defendant on plaintiff's land.

The action was dismissed.

C. F. Adams, for the plaintiff.

C. T. Jones, for the defendant.

Harvey, C.J.

HARVEY, C.J. (oral) :—It is quite clear the defendant can only be liable in case of negligence. I think we may dismiss altogether the claim as set up in respect to bricks or bolts or whatever it was, falling from the wall. They appear to have been of a trivial character and there is no evidence to indicate how that came about or whose fault it was or whether it was anyone's fault. That leaves us then to deal only with the question of the excavation. Now it appears to me that the cases which have been cited have no application to this case at all. This was not a case of a man building on his own property and requiring to take proper precautions not to injure his neighbour; it was a case of the defendant being authorized by the owner of the land to make excavation for a particular purpose. It would necessarily follow, and the parties must have known that it would follow, that the making of these excavations would interfere with the buildings on the land, and it was not the defendant's duty—there is nothing in the agreement to which my attention has been called at least—I haven't had a chance to study it very carefully, but glancing over it I find nothing in it which imposes upon the defendant the duty to protect these buildings against these consequences. It must have been clear to all of them that to take away gravel to permit of a three foot six footing on the plaintiff's own land would interfere with the support of the building there and it was clearly the plaintiff's duty to protect his own building and not the defendant's duty, and the duty appears to me on the facts of this case not to be on the defendant at all to make these protections. It was the duty of the plaintiff as between themselves and their tenants to protect their tenants in the premises when they had given the right to have the support taken from below. As far as the gravel is concerned it is quite clear on the evidence and it must

be quite clear to everyone that you cannot excavate under gravel as you can excavate in solid soil, the particles of which will adhere to one another, and the evidence of Mr. Davis especially establishes that it would have been impossible to hold up the gravel, in taking out this excavation, against the wall of the front cellar or the wall of the bake-house; that the gravel would necessarily fall away. The injury that resulted appears to me is chiefly the freezing up which was due to the place being left without any outside protection and allowing the weather to get in. That is, as I have already indicated, what it was plaintiff's duty to provide against and not the defendant's. If the defendant had been negligent in allowing the gravel which separated the wall to get away then he might be liable, but there is not, as I say, any evidence of any negligence on his part, and it was not his duty to support the building. As the only consequence of the work would be to remove these supports I think the case is one where the injury and damage resulted from the natural consequences of the work which plaintiffs authorized defendant to do. There is no evidence of negligence satisfactory to me at all.

There is one other point which is a little different, and that is the claim in respect to gravel. We have some evidence that more gravel was removed than should have been removed. The fact that the gravel slipped down would not justify anyone in taking it away; it could have been returned after the taking of it out but there is no evidence to connect the defendant with the taking away of the gravel. The evidence is that the basement work was done by a contractor and not by defendant, so defendant is not connected in any way with the removal of the gravel.

The action will be dismissed with costs.

Action dismissed.

BOOKER v. O'BRIEN.

Saskatchewan Supreme Court. Trial before Newlands, J. March 25, 1913.

1. BROKERS (§ II B 2—16)—REAL ESTATE BROKERS—DEFAULT OF PRINCIPAL—COMMISSION UNDER OPTION CONTRACT.

A real estate broker who takes an option contract from the land owner with a stipulation for payment out of the purchase price of a fixed sum as "commission" provided sale is made before the expiry date, cannot obtain specific performance of the option of purchase if he did not himself become the purchaser; but he is entitled to judgment for the agreed commission in respect of a sale, made and notified to the owner before the expiry of the option, to a purchaser able and willing to purchase on the terms authorized although the owner declines to carry it out.

[As to real estate agent's commissions generally, see Annotation, 4 D.L.R. 531.]

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BOOKER
v.
O'BRIEN.

Newlands, J.

ACTION for specific performance or in the alternative for commission on the sale of land.

Judgment was given dismissing claim for specific performance and giving judgment for the plaintiff for $1,000.

W. B. Willoughby, for the plaintiff.

NEWLANDS, J.:—The following agreement was entered into by the plaintiff and defendant on the 10th day of January, 1912:—

Moose Jaw, Sask., Jan. 10, 1912.

For and in consideration of the sum of one dollar cash in hand paid, the receipt of which is hereby acknowledged,

I, T. R. O'Brien, owner of lots eleven (11) and twelve (12) in block seventy-two (72), being in the town of Swift Current, Province of Saskatchewan, do by these presents sell, grant and convey unto John T. Booker, of Swift Current, Sask., an option to buy lots above-mentioned at a price of sixteen thousand dollars on following terms, viz.: six thousand dollars cash on execution of contract, five thousand to be paid six months from date of contract, five thousand to be paid twelve months from date of contract, with 8 per cent. interest.

I also agree to pay John T. Booker one thousand dollars to be taken out of second payment as commission provided sale of lots herein mentioned is made not later than Jan. 25, 1912, on which date this option expires at 18 o'clock.

T. R. O'BRIEN.
J. T. BOOKER.

On the 25th of January, 1912, the plaintiff, by his agent, sold the property to T. H. McVicar for the sum of $16,000, payable $6,000 cash, balance six and twelve months. He received in cash $300, and it was agreed that the balance of the first payment would be paid "when papers are executed." A telegram was sent by the plaintiff to the defendant on the 25th, informing him of the sale, to which the defendant replied, "Wire received at one, option expired, property not for sale at present." As a matter of fact the option had not then expired, and did not until 6 p.m. on that day. The defendant refused to carry out the sale, and the plaintiff brought this action for specific performance, or in the alternative, $1,000 for commission on the sale of the same.

As the plaintiff did not buy the lots himself he is not entitled to specific performance. He is, however, entitled to recover the $1,000 commission agreed to be paid by the defendant, because he sold the lots before the expiration of the option to a person able and willing to purchase the same on the terms agreed to by the defendant.

Judgment for the plaintiff for $1,000, with costs.

Judgment for plaintiff.

CLARKE & MONDS, Limited v. PROVINCIAL STEEL CO.

ONT.

S. C.

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March 25.

Ontario Supreme Court, Cartwright, M.C. March 25, 1913.

1. DISCOVERY AND INSPECTION (§ IV—31)—OFFICER OR "SERVANT" OF CORPORATION—SALES AGENT.

The selling agent for a trading company who is held out as the company's "representative" and who assumed the right to sign the company's letters relied upon as constituting the contract in question is a "servant" of the company, examinable as such under Rule 1250 (Ont. C.R. 1897), although paid only by commissions.

[35 Cyc. 1430 referred to.]

MOTION by the plaintiffs for an order requiring one H. B. Holloway to attend for examination for discovery as an officer or servant of the defendant company, under Con. Rule 1250 (439*a*).

Statement

The motion was allowed.

Grayson Smith, for the plaintiffs.

O. H. King, for the defendant company.

THE MASTER:—It is admitted that Holloway is not an officer of the defendant company, though it is evident, from the correspondence and the affidavits filed on the motion, that Holloway was the selling agent in Toronto for the company, which has its head office at Cobourg. He assumed the right to sign the letters leading up to the matter in issue, in the name of the company, on the 23rd and 31st October. And on the 5th November, a letter was sent from the Cobourg office to the plaintiffs' solicitors, in which Holloway is spoken of as "our representative, Mr. Holloway." He was paid by a commission on sales made through him.

Cartwright, M.C.

The real questions between the parties seem to be as to the authority of Holloway to bind the company, as the Statute of Frauds was stated to be the main defence; and whether there was any completed contract.

As all the negotiations were between the plaintiff company, on the one hand, and Holloway, on the other, it is clear that he is the one who can give all information as to what took place. This might allow the application of the judgment in *Smith* v. *Clarke*, 12 P.R. 217. See too *Leitch* v. *Grand Trunk R. Co.*, 13 P.R. at 382. However that may be, it seems that Holloway comes within the definition of "servant." In 35 Cyc. 1430 it is said that the word "servant" means, "especially in law, one employed to render service or assistance in some trade or vocation, but without authority to act as agent in place of the employer"—see quotation in *Ginter* v. *Shelton*, 102 Va. 185, 188, where five different grades or classes of servants are suggested.

Here Holloway certainly rendered service or assistance to the defendant company, whose chief, if not its only, market is in the cities and larger towns. The business could not be suc-

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cessfully carried on without agents or (to use their own word) "representatives" in such places.

The order will go requiring Holloway to attend again at his own expense.

As the exact point is novel, the costs of the motion will be in the cause.

Motion granted.

MAN.

K. B.
1913

March 10.

PULFORD v. LOYAL ORDER OF MOOSE.

Manitoba King's Bench. Trial before Macdonald, J. March 10, 1913.

1. LANDLORD AND TENANT (§ III D—95)—REPUDIATION OF LEASE—LANDLORD'S REMEDY.

An action does not lie by the lessor against the lessee for damages for the latter's repudiation of the lease; his remedy is for the rent as it accrues, whether the lessee continues in possession or not.

Statement

ACTION for damages for the repudiation of a lease.

An application for nonsuit was granted.

W. A. T. Swcatman and *A. G. Kemp*, for the plaintiff.

H. P. Blackwood and *A. Bernier*, for the defendant.

Macdonald, J.

MACDONALD, J.:—Under the form of action as framed, I cannot see how the plaintiff could recover damages, even finding all the facts in his favour.

The plaintiff alleges that the defendants made a lease with him for two years at a rental of one hundred dollars per month, and that they entered into possession on the 9th day of July, 1912, and paid the first month's rent, and that subsequently the defendants repudiated said lease and informed the plaintiff that they did not intend to perform the same.

By reason of this repudiation and refusal the plaintiff claims damages.

I know of no such cause of action. If the plaintiff's contention were fully proved, then the lease exists and the term is vested in the defendants, and their interest in the premises cannot be disposed of or divested by a repudiation. The plaintiff's remedy would be for a breach of any provision of the lease. If non-payment of rent is the plaintiff's cause of complaint, he has his remedy to enforce payment of the rent as it falls due. There is no such measure of damages as is claimed in this action.

If the tenant has entered to take possession as tenant and the terms has commenced, he will be deemed "to hold" during the continuance of the term and until it be legally determined by effluxion of time, whether he continue to occupy by himself of his sub-tenants or not: Woodfall, Law of Landlord and Tenant, 18th ed., 618.

I grant a nonsuit with costs.

Nonsuit granted.

HODDER v. LEE.

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1913

March 5.

Alberta Supreme Court, Walsh, J. March 5, 1913.

1. JURY (§ I B 1—10)—RIGHT TO JURY TRIAL—EQUITABLE CLAIM—SUBSIDIARY MONEY DEMAND.

An action to set aside on the ground of fraud a transfer of land, in which no claim is made for possession, is not an action "for recovery of real property" and the plaintiff is not entitled to a jury trial, although a claim is made therein for a money demand where the latter claim is merely incidental to the main issue.

Statement

APPLICATION by plaintiff for trial of action by a jury. Order made for trial without a jury.

Geo. H. Ross, for plaintiff.

A. H. Clarke, K.C., for defendant.

Walsh, J.

WALSH, J.:—I do not think that the plaintiff is entitled to have this action tried by a jury. The plaintiff seeks to set aside for fraud a transfer of certain land made by her to the defendant and to compel him to pay to her or to the mortgagee the amount received by him under a mortgage placed by him against the same. No claim for possession is made. I do not think that this is an action "for recovery of real property": see *Turner* v. *Van Meter*, 2 W.L.R. 345. The claim to the mortgage money does not in my opinion bring the case within any of the other classes of actions which under rule 170 either party has the right to have tried with a jury. That is a claim for relief which is incidental to the main issue. If the plaintiff succeeds she will be entitled to have the land re-transferred to her free from any encumbrance created on it by the defendant or in the alternative to a personal judgment against him for the amount of any such encumbrance. If she fails on the main issue she can have no claim against the defendant arising out of the encumbering of the land.

The order will therefore be for trial without a jury.

Application refused.

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Saskatchewan Supreme Court, Parker, M.C. March 7, 1913.

1. DISCOVERY AND INSPECTION (§ IV—20)—REFUSAL TO BE SWORN—OBJECTION ON GROUND OF PRIVILEGE FROM ANSWERING.

An objection by defendant to being examined for discovery in an action upon the forfeiture clause in a land contract claiming the cancellation of the contract and forfeiture of the money paid thereunder, is prematurely taken when the defendant refused to be sworn on the ground that the action was one to enforce a penalty or forfeiture; the objection of privilege, if available upon the facts, is to be raised not by refusing to be sworn, but by afterwards taking objection to any particular question put to him and obtaining a ruling thereon as provided by rule 294 of the Saskatchewan Con. Rules 1911.

[*Regina* v. *Fox*, 18 P.R. 343; *Weiser* v. *Heintzman*, 15 P.R. 407, and *Mexborough* (*Earl of*) v. *Whitwood*, [1897] 2 Q.B. 111, referred to.]

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THIS is a motion to strike out the statement of defence of defendant Moretti on the ground that he refused to be sworn and to submit to examination for discovery, or in the alternative for an order compelling the defendant to appear and be examined at his own expense.

P. H. Gordon, for the applicant (plaintiff).

J. E. Lussier, for the defendant.

Parker, M.C.

PARKER, M.C.:—The defendant refused to be sworn, or to be examined on the ground that the action was to enforce a penalty or a forfeiture, and relied on the English decision of *Mexborough (Earl of)* v. *Whitwood*, [1897] 2 Q.B. 111, and also on decisions under the old Ontario Evidence Act, R.S.O., ch. 73, sec. 5. In an action to enforce a penalty or a forfeiture it is no doubt the law in England that the Courts will refuse either an order for discovery of documents or what in our practice is equivalent to an examination for discovery where the forfeiture is the only issue involved: Annual Practice, 1913, p. 479. And the law was undoubtedly the same in Ontario in regard to civil proceedings in that province until R.S.O., ch. 73, was repealed, and a new Evidence Act (1909), ch. 43, substituted therefor. *Weiser* v. *Heintzman* (No. 2), 15 P.R. (Ont.) 407. Sec. 5 of ch. 73 disappears, and is replaced by sec. 7 of ch. 43. This section is substantially the same as the Canada Evidence Act, ch. 145, sec. 5. In the case of *Regina* v. *Fox*, 18 P.R. (Ont.) 343, it was held, *per* Ferguson, J., at p. 347, and *per* Robertson, J., at page 349, that this provision (sec. 5 of the Dominion Evidence Act) entirely displaces and removes the reason for not ordinarily allowing discovery in actions for the recovery of penalties. While the action of *Regina* v. *Fox*, 18 P.R. (Ont.) 343, was brought to recover a penalty under a Dominion Act, I am of the opinion that the decision applies to this province in view of the fact that sec. 27 of the Saskatchewan Evidence Act, R.S.S., ch. 60, is substantially identical with sec. 5 of the Dominion Act.

Assuming therefore the correctness of the defendant's contention that the action in question is to enforce a forfeiture and that the forfeiture is the only issue involved, I am of opinion even in that case that the plaintiff is entitled to discovery. It seems to me, however, that there are other issues involved besides that of forfeiture. The defendant admits making default in payment under the agreement sued on, and the plaintiff sues for payment under the acceleration clause in the agreement of the whole amount payable thereunder, and in default of payment cancellation of the agreement and forfeiture of the moneys paid. The defendant in his statement of defence asks for relief, not only against the forfeiture, but also against the ac-

celeration clause. He also sets up a tender to the plaintiff of the amount in arrears, and denies other material allegations in the statement of claim. I think, therefore, that the defendant was wrong in refusing to be sworn or to be examined at all. He should have submitted to the examination, if there were any particular questions he objected to, he should have proceeded under rule 294. There will be an order that the defendant appear and be examined for discovery at his own expense at such time and place as may be fixed by the local registrar. The costs of the motion will be costs in the cause to the plaintiff in any event.

Order accordingly.

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GRIESE et al. v. WALKER.

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Saskatchewan Supreme Court, Parker, M.C. March 7, 1913.

1. LEVY AND SEIZURE (§ III B—49)—RIGHTS AND LIABILITIES GROWING OUT OF LEVY—PURCHASER AT SHERIFF'S SALE.

In view of the provisions of the Saskatchewan Creditors' Relief Act, R.S.C. 1909, ch. 63, sec. 9, entitling execution creditors to share rateably in the proceeds realized on a sale, where a notice of sale of land by the sheriff under an execution stated that the property was to be sold subject to "existing encumbrances filed thereon as disclosed by the records," and there was at the time of the sale in addition to the execution under which the sale was to be had, a *lis pendens* and two prior executions of record, the words "existing encumbrances" must be taken not to include the prior executions unless an express agreement to the contrary is otherwise shewn, as the seizure and sale under execution is a seizure on behalf of all creditors entitled to share under that statute.

Statement

MOTION for confirmation of a sheriff's sale of land under a writ of execution.

The motion was dismissed.

W. H. McEwen, for the applicant (sheriff).

C. W. Hoffman, for the purchaser.

Parker, M.C.

PARKER, M.C.:—This is a motion to confirm a sale of the north-east quarter of section 32, township 46, range 12, west of the third meridian, made by the sheriff of the judicial district of Battleford, under a writ of execution for $76.55, dated July 12, 1911, and filed in the land titles office for west Saskatchewan, July 14, 1911. All the formalities prior to the sale were complied with and the sale took place on Friday, January 31, 1913. The property was sold to A. M. Panton, the highest bidder, for $500. The notice of sale states that the property was to be sold subject to existing incumbrances filed thereon as disclosed by the records of the land titles office at Battleford. An abstract of title is produced shewing the following incumbrances filed, besides the execution under which the sale was held, all of which are subsequent to that execution: (1) *lis pendens* dated

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October 31, 1911, filed October 31, 1911, by the Imperial Bank of Canada; (2) execution for $209.55, dated March 2, 1912, filed March 4, 1912, by J. T. Simpson; (3) execution for $546.40, dated March 15, 1912, filed March 16, 1912, by the Imperial Bank of Canada. Although the abstract is dated February 13, 1913, I think it is safe to assume that all these incumbrances were on file on the date of the sale. In his affidavit the sheriff swears that he intended to and did sell the land subject to the two subsequent executions and subject to the *lis pendens*. The purchaser on the other hand swears that the sale was subject only to the *lis pendens*. In the absence of an express agreement to the contrary, I am of the opinion that the sale could only have been made subject to the *lis pendens*. The Creditors' Relief Act, R.S.S. ch. 63, sec. 9, provides that

> one seizure by the sheriff of the goods and lands of the debtor shall be deemed a seizure on behalf of all creditors sharing under such seizure as hereinbefore provided.

The words "as hereinbefore provided" refer to those sections of the Act abolishing priority among execution creditors and providing for the rateable distribution amongst all execution creditors whose writs were in the sheriff's hands at the time of the levy or within two months thereafter, of moneys realized by the seizure. In this case, therefore, the three execution creditors, whose writs are shewn on the abstract would be entitled to share rateably in the proceeds of the sale, and under ordinary circumstances the assumption would be that the sheriff sold the land under one execution on behalf of all three. The sheriff, however, alleges an express agreement or understanding to the contrary and also produces the notice of sale which states that the sale was to be subject to existing incumbrances as disclosed by the records of the land titles office at Battleford. It seems to me, however, that the words "existing incumbrances" do not include executions, in view of the provisions of the Creditors' Relief Act above mentioned, and the agreement or understanding to the contrary, being supported only by the sheriff's affidavit and denied by the purchaser, is not sufficiently proven. The motion to confirm the sale will, therefore, be dismissed, but there will be no costs against the sheriff.

Motion dismissed.

CROOME v. LEIR.

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Saskatchewan Supreme Court, Parker, M.C. March 18, 1913.

1. MOTIONS AND ORDERS (§ II—9)—TAKING OUT AND SERVING COPIES OF ORDERS.

Where leave is granted a defendant to enter an appearance and deliver a defence conditioned on payment of certain costs within a stipulated time after taxation, the defendant is in default at the expiry of the stipulated time after the costs have been taxed, although the party entitled to payment of such costs did not issue and serve the order.

[*Faraden* v. *Richter*, 23 Q.B.D. 124; *Hopton* v. *Robertson*, 23 Q.B.D. 126 (*n*); *Script Phonography* v. *Gregg*, 59 L.J. Ch. 406, and *Metcalf* v. *British Tea Association*, 46 L.T. 31, referred to.]

2. JUDGMENT (§ VII C—282)—RELIEF AGAINST DEFAULT JUDGMENT—CONDITIONAL LEAVE TO DEFEND.

A defendant who is in default under the terms of leave to defend granted upon his own application in respect of a default judgment given against him, may still be granted leave to defend if the plaintiff has not been prejudiced, and if the default of the defendant was not wilful but due to a *bonâ fide* misapprehension upon a question of practice in taking out the order; but the court may, in such case, expressly limit his right of defence to the merits excluding any mere technical defence.

Statement

MOTION for final cancellation of an agreement for the sale of lands.

The motion was dismissed on conditions.

P. H. Gordon, for the plaintiff.

F. B. Bagshaw, for the defendant.

Parker, M.C.

PARKER, M.C.:—This is an action for cancellation of an agreement of sale of the north half of lot 13, block 439, Regina, on the ground of the purchaser's default in payment of moneys due thereunder. An order for cancellation was made on November 18th, 1912, giving the defendant two months in which to redeem. On January 17th, 1913, the defendant applied to open up and set aside this order, and for leave to enter an appearance and file a defence. On January 28th, 1913, I gave judgment setting aside the order *nisi* made by myself on November 18th, 1912, and giving leave to the defendant to

file a defence to the action on payment within two weeks after taxation thereof of the plaintiff's costs up to and including the taking out of the order *nisi*.

The plaintiffs appealed from this order, and the appeal was heard by the Honourable Mr. Justice Newlands in Chambers on February 13th. The order made on appeal directed that

upon payment of the plaintiff's costs up to and including the taking out of the order *nisi* by the defendant within two weeks after the taxation thereof, the order *nisi* dated November 18th, 1912, be set aside and leave given to the said defendant to enter an appearance and file a defence to the action.

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This is exactly the order I intended to make myself, so that the order made by myself on January 28th, 1913, has really not been varied. That order was drawn up by the defendant's solicitor, and as it was practically not varied on appeal, he was well aware of the terms of it. By its terms the costs of the action were to be paid within two weeks after the taxation thereof, and the payment of the costs was a condition precedent to the leave given to the defendant to file appearance and defence. The costs were taxed on February 20th, 1913, at $59.35 and the two weeks for payment expired March 6th. The next day the plaintiff applied *ex parte* for an order for final cancellation. I refused this application and directed it to be made by notice of motion. Notice of motion, together with the formal order, made by Mr. Justice Newlands on February 13th, was duly served on the defendant's solicitor on March 8th, returnable March 12th. In the meantime, on the same day (March 8th) and prior to service of the notice of motion, the defendant's solicitor tendered the costs, $59.35 to the plaintiff's solicitor, entered an appearance and served notice of appearance on the plaintiff's solicitor, who, however, refused to admit service thereof or accept payment of the costs. The defendant's solicitor gives as his reason for not paying the costs and entering his appearance within the time limited, a conversation with the solicitor for the plaintiff on February 17th, 1913, in which the said solicitor advised him that he intended to take out and serve the order made on February 13th by the Honourable Mr. Justice Newlands, and that he (the defendant's solicitor) was waiting to be served with this order. There was, however, no legal obligation on the part of the plaintiff's solicitor to take out and serve that order. It was held in the earlier cases that an order has no effect until it is drawn up and served: *Metcalf* v. *British Tea Association*, 46 L.T. 31; *Belcher* v. *Goodered*, 4 C.B. 472; *Kenney* v. *Hutchinson*, 9 L.J. Exch. 60. Subsequent cases, however, have not followed these: *Script Phonography* v. *Gregg*, 59 L.J. Chy. 406; *Farden* v. *Richter*, 23 Q.B.D. 124, and *Hopton* v. *Robertson*, 23 Q.B.D. 126 (*n*). In the case of *Script Phonography* v. *Gregg*, 59 L.J. Ch. 406, it was held that an order dismissing an action operated from the moment it was pronounced, and that the fact that it was not drawn up or served was immaterial. In the case of *Farden* v. *Richter*, 23 Q.B.D. 124, the defendant was ordered on February 5th to file answers to interrogatories within three days or judgment might be signed against him. On February 9th, no answers having been filed, the plaintiff signed judgment under this order. The order was drawn up, and served on February 9th, and the defendant filed his answers on the 11th, as he supposed within the three days named in the order. On application to set aside the

judgment, it was held that the order did not require to be served, that the judgment was therefore regular, and no merits being shewn, it could not be set aside. In *Hopton* v. *Robertson*, 23 Q.B.D. 126 (*n*), it was held that an order giving leave to sign judgment unless a sum was paid before a day named, need not be served upon the defendant before judgment is signed on it. In the case under consideration the order in question was an order opening up a judgment and giving the defendant leave to appear and defend on terms, the terms being the payment of the plaintiff's costs within two weeks after taxation thereof. Such an order, in my opinion, comes within the class of orders referred to in *Farden* v. *Richter*, 23 Q.B.D. 124, and *Hopton* v. *Robertson*, 23 Q.B.D. 126 (*n*), and *Script Phonography* v. *Gregg*, 59 L.J. Ch. 406, and does not require to be taken out and served on the opposite party. It is probable, therefore, that the doctrine of *Metcalf* v. *British Tea Association*, 46 L.T. 31, would now be only applied to cases where service is expressly made a condition precedent to the doing of some act, as for example, orders under Rule 447: see Annual Practice, 1913, page 887. I think, therefore, that the defendant was in default in not paying the taxed costs and entering his appearance within the time limited. As his default, however, was not wilful and was due to a *bonâ fide* misapprehension on his part, and he has made reasonable and prompt efforts to remedy his default, and as the plaintiffs are not prejudiced in any way, he should, I think, be given an opportunity to defend at least for the purpose of asking the Court for relief from the forfeiture of the moneys paid under the agreement, and for reasonable time to redeem. I think, therefore, that the proper order to make is that the defendant should pay the plaintiff's costs of this motion forthwith after taxation thereof, and that he should within three days after taxation be at liberty to file his defence, the appearance already entered being allowed to stand. I think, however, that he should not be allowed to set up any technical defence, but that his defence should be confined solely to the merits of the case. It was urged by counsel for the plaintiff that there is no affidavit of merits filed. I find, however, that such is not the case, as an affidavit of merits was filed on the defendant's motion to open up the order *nisi*.

Order accordingly.

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GONYEA v. CANADIAN NORTHERN R. CO.

Saskatchewan Supreme Court, Newlands, J. March 18, 1913.

1. MASTER AND SERVANT (§ II A 2—49)—LIABILITY OF MASTER—COURSE OF EMPLOYMENT—SASKATCHEWAN WORKMEN'S COMPENSATION ACT.

Where a railway employee is injured while removing personal belongings from the defendants' car with the permission of the defendant company, the accident is one arising out of and in the course of his employment for which he is entitled to compensation under the provisions of the Saskatchewan Workmen's Compensation Act, even though an action brought by him at common law for damages had been dismissed on the ground that at the time of the accident he was on business of his own and was a mere licensee, if the accident occurred during the time he was in defendant's employment.

[*Blovelt* v. *Sawyer*, 89 L.T. 658, and *Morris* v. *Mayor, etc., of Lambeth*, 22 Times L.R. 22, followed.]

Statement

APPLICATION to assess damages under Workmen's Compensation Act.

G. H. Barr, for plaintiff.

J. N. Fish, for defendant.

Newlands, J.

NEWLANDS, J.:—I dismissed the plaintiff's claim for damages at common law for the injuries he sustained while in the employ of the defendants, on the ground that, at the time he received the injuries, he was attending to his own business, and was a mere licensee on that part of the defendants' yard where he was injured, and they therefore owed no duty to him and were not liable to him in damages. The plaintiff then applied to me to assess the damages under sec. 8 of the Workmen's Compensation Act, which provides that if the action is brought within the time limited, and the employer is liable to pay compensation under that Act, though not at common law, the Judge shall proceed to assess such compensation.

Mr. Fish, counsel for the defendants, took the ground that my finding that the plaintiff was about his own business when injured disentitled him to such compensation, as the workman could only get compensation for an accident "arising out of and in the course of his employment."

Though the plaintiff was attending to his own business at the time of the accident, it occurred on the defendants' premises and during the time the plaintiff was in the defendants' employment, and this seems to bring this case within the decisions of the Court of Appeal in *Blovelt* v. *Sawyer*, 89 L.T. 658, and *Morris* v. *Mayor, etc., of Lambeth*, 22 Times L.R. 22. In the first case the plaintiff was injured during his dinner hour while eating his dinner, and in the second during the night while cooking some food. In this case the plaintiff was going for some clothes and bedding belonging to himself which was brought by one of the defendants' trains from his last place of residence, and he did this with the permission of the defen-

dants. I hold, therefore, that the accident arose out of and in the course of his employment, and that he is entitled to compensation under the Act. I fix the compensation at $750, with a set-off of the defendants' costs on the Supreme Court scale as against what they would have been if the action had been brought in the District Court.

Application granted.

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Ontario Supreme Court (High Court Division). Trial before Hodgins, J.A. January 23, 1913.

1. CORPORATIONS AND COMPANIES (§ IV G 2—116*a*)—POWERS OF MANAGER —AGREEMENT BY MANAGER, RATIFICATION ESSENTIAL, WHEN — KNOWLEDGE.

An agreement made by a general manager or the vice-president of a company is only tentative and will not bind the company without ratification, where the fair inference to be drawn from the evidence is that all the parties to the transaction knew that such agreement was subject to being ratified by the board of directors of the company.

[*Skinner* v. *Crown Life Assurance Co.*, 1 O.W.N. 921, 2 O.W.N. 647; *National Malleable Castings Co.* v. *Smith's Falls Malleable Castings Co.*, 14 O.L.R. 22; *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A.C. 174, referred to; see also *Re Dickson and Graham*, 8 D.L.R. 928.]

2. LANDLORD AND TENANT (§ II C—24)—LEASES — HOLDING OVER—LIABILITY—"CONSCIOUS THAT HE HAD NO RIGHT TO RETAIN POSSESSION," EFFECT OF.

In an action to recover possession of premises brought by the owner against an overholding tenant, who believed that he was holding under a valid renewal lease, while, as a matter of fact, there was no renewal lease, but only a tentative agreement for a renewal lease between him and the owner's manager, which agreement had not been ratified by the owner, though the court finds that the owner is entitled to judgment for possession of the premises, it is not obliged to give double rental value of the premises during the time the tenant held over, and will not do so where it does not find that the overholding tenant was "conscious that he had no right to retain possession."

[*Swinfen* v. *Bacon*, 6 H. & N. 846, followed; see also *Re Dickson and Graham*, 8 D.L.R. 928.]

Statement

ACTION to recover possession of the premises known as the Oriental Hotel in the city of Peterborough.

The defendant held the hotel under a lease dated the 31st December, 1906, the term in which began on the 1st February, 1907, and expired on the 30th April, 1912.

The defendant alleged that on the 1st May, 1912, an agreement was made between the plaintiff company and himself, whereby "the plaintiff company demised and relet the premises in question to the defendant for the term of one year commencing on the said 1st day of May, 1912, at the same rental and on the same terms (except those relating to the liquor license) as those contained in a certain lease dated the 31st day of December, 1906, between Richard Hall, trustee, of the first part, the

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Dickson Company of Peterborough Limited, of the second part, and George N. Graham, of the third part, . . . with the further terms, in addition to the provisions in the said lease contained, and in substitution of those relating to the liquor license, that the defendant should execute a power of attorney to the plaintiff company, authorising the said company to execute a license-transfer of the defendant's liquor license on the expiration of the said term, or other sooner determination of said reletting, and that, in case of sale of the realty, the lessors should have the right of purchase of the defendant's license and hotel assets (not including liquor, coal, groceries, and merchandise) for $12,000; the terms of said demise and reletting to be embodied in a formal lease by the plaintiffs' solicitors."

The plaintiffs, on the 10th and 30th May, 1912, served notices to quit on the defendant, and took proceedings, under the overholding tenants sections of the Landlord and Tenant Act, to eject the plaintiff: see *Re Dickson & Co. and Graham*, 8 D.L.R. 928, 4 O.W.N. 100, 27 O.L.R. 239.

This action was begun on the 21st October, 1912, and was tried without a jury at Peterborough on the 30th and 31st December, 1912.

G. H. Watson, K.C., and *E. L. Goodwill*, for the plaintiffs.
D. L. McCarthy, K.C., and *F. D. Kerr*, for the defendant.

Hodgins, J.A.

HODGINS, J.A. (after setting out the facts):—Both the now-expired lease and the one it superseded contained the following clause as to the liquor license: "And that he (the lessee) will, at the expiration or other sooner determination of said term, make, procure, or cause to be made or procured, a proper and sufficient transfer of the license to sell liquors upon the said premises to the person specified by the lessor or the company for that purpose, and that he will lend his assistance to procure the assent of the License Commissioners to such transfer; and, upon the completion of such transfer with the assent of the License Commissioners, the lessee to be entitled to be paid by the assignee thereof, as consideration money, an amount equivalent to the proportionate part of the license fee for the unexpired part of the license term."

What occurred earlier than 5 p.m. on the 1st May between Mr. Shook, the plaintiffs' manager, and Mr. Gordon, the defendant's solicitor, is not, in my judgment, of importance. At all events, Mr. Shook could not have been averse to negotiating for a sale, and the conversation probably led to the interview later in the day—between 5 and 6 p.m.—at which he (Shook), Dickson Davidson, the defendant, and Mr. Gordon, were present. At that time the license for 12 months from the 1st May, 1912, had been granted to the defendant for the sale of liquors in the Oriental Hotel.

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Coming, then, to the agreement which, it is said, was made between the persons named, difficulty is at once experienced because the writing then made, and said to have been initialled, has been lost. Secondary evidence of it is given.

There is nothing in writing which can be said to contain any agreement, conditional, tentative, or otherwise, on which all parties are united. But the defendant contends that there was a parol agreement that would be sufficient for his purpose if it finally established his position as tenant for a year.

I find that there was no common ground arrived at on the 1st May, and that, even if the words used indicated an understanding, the minds of the parties never came together with regard to the subject-matter of the agreement on the point of greatest importance to both parties. The radical difference was this: that the defendant, while giving a power of attorney to transfer the license, intended to and could defeat its operation, if, on his individual application, he obtained the license for the sale of liquor on premises other than the Oriental Hotel.

But there remains the question whether, assuming that the parties then present agreed upon certain terms, it was anything more than a tentative agreement to proposals which had to be ratified by the board of directors before the plaintiff company were to be bound thereby. Shook was general manager. I find nothing to enable me to say that his authority went far enough to agree to the terms proposed on the 1st May.

Notwithstanding the tendency of the Courts to uphold contracts made by a general manager within the general scope of his authority, where the other party has no notice of any limitation—see *Skinner* v. *Crown Life Assurance Co.*, 1 O.W.N. 921, 2 O.W.N. 647; *National Malleable Castings Co.* v. *Smith's Falls Malleable Castings Co.*, 14 O.L.R. 22; *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A.C. 174—I think it is a fair inference to make from the evidence that all parties knew that the action of the general manager was subject to that of the board. . . .

Upon the whole, I have little doubt that there was no concluded agreement, either in terms or in intention, come to on the 1st May, entitling the defendant to a lease for a year, or upon the other matters stated to have been discussed then. If there was, then I find, under the circumstances of this case, no authority in Shook or Dickson Davidson to bind the company, and that all that was done was done subject to the condition that the board should ratify it, which the board did not do. I have not discussed Dickson Davidson's authority as vice-president, because what I have said as to the general manager is applicable to him. His position is not shewn to be of greater practical importance, and is certainly of no greater legal authority.

I do not desire to put my judgment upon the ground that any of the parties are not to be believed. I rest it upon an

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analysis of the evidence, giving such weight to each part of it as I think it deserves, and having regard to the fact that witnesses may often be honestly mistaken, and that the surrounding facts and circumstances accord more nearly with the contention of the plaintiffs than with that of the defendant.

The result is what might be expected. A draft lease was prepared and rejected. If there had been an agreement come to, it might have been necessary to have examined the terms of the draft in order to see if the defendant was justified in refusing to sign it. He, however, relied upon the supposed arrangement; and, as that fails, his objections to the various clauses are unimportant. I think the defendant's conduct relieved the plaintiff company from nominating any one to take a transfer of the license or from tendering any instrument of transfer.

I think the plaintiffs are entitled to judgment for possession and to an order directing the defendant to execute an assignment or transfer of the license of the plaintiff company, or whom they may appoint, the form of which may be settled by the Local Master, and to an injunction restraining the defendant from dealing with the license and from violating his covenant as contained in the lease of the 31st December, 1906, so far as it relates to the license, or doing any act which would be a breach of that covenant. The plaintiffs are also entitled to payment out of Court of the moneys now paid in, and to judgment for occupation rent at the same rate weekly until possession is actually given, and for such proportion of the taxes as may accrue up to the same date. The exact amount of the occupation rent and of taxes and proportion of the license fee to which the defendant is entitled, on the transfer of the license as provided in the lease, may be ascertained by the Local Master, and the latter item should be credited on the amount payable by the defendant. I am not obliged to give double value, and I do not do so, as I cannot hold in this case that the defendant was "conscious that he had no right to retain possession:" *Swinfen v. Bacon*, 6 H. & N. 846; and see the view of the learned County Court Judge on the application before him.

There will be a reference to the Local Master for the purposes I have indicated, if the parties cannot agree on the amount.

The defendant should pay the costs of the action and of his counterclaim.

The defendant can have a stay of 20 days, which stay should (and if I had the power I would so direct), on the defendant filing with the Local Master an undertaking to pay, pending any appeal, the weekly amount fixed in the order of the Divisional Court dated the 3rd day of October, 1912, on the terms stated therein, and so long as he does so pay, include a stay of the injunction granted.

Judgment for plaintiff.

TRAWFORD v. BRITISH COLUMBIA ELECTRIC R. CO.

(Decision No. 2.)

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British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Martin, JJ.A. January 30, 1913.

1. ACTION (§ I B 2—10)—RIGHT OF ACTION—RESTORATION OF BENEFITS—ATTACKING PRIOR RELEASE.

In an action brought under the Families Compensation Act, R.S. B.C. 1911, ch. 82, by the widow and children of a deceased person, for damages for injuries resulting in the death of such person through the negligence of the defendants, where the defendants' statement of defence sets up that the deceased during his lifetime accepted compensation from them in full satisfaction of the injuries and signed an agreement releasing the defendants from all present or future liability to himself or to his heirs, the plaintiffs may, without bringing in the personal representative of the deceased as a party, attack the validity of such release on the ground that it was obtained by fraud.

[*Trawford* v. *B.C. Electric R. Co.*, 8 D.L.R. 1026, reversed.]

2. DAMAGES (§ III I 3—180) — FOR CAUSING DEATH — DEDUCTION OF MONEY PAID BEFORE DEATH.

In an action brought by the widow and children of a decedent under the Families Compensation Act, R.S.B.C. ch. 82, for damages for injuries sustained through the alleged negligence of the defendants resulting in the death of the decedent, where it appears that prior to the death of the deceased the latter received a sum of money for the injuries sustained and executed a release of the cause of action to the defendants, it is not necessary for the plaintiffs to return the sum of money received by the deceased, or to offer to return it, as a condition precedent to their right to have the release set aside on the ground that it was obtained from the deceased by fraud, but such money is to be taken into consideration on the assessment of damages and the amount treated as a payment on account.

[*Trawford* v. *B.C. Electric R. Co.*, 8 D.L.R. 1026, reversed; *Lee* v. *Lancashire*, L.R. 6 Ch. 527, distinguished.]

3. DEATH (§ II B—10)—ACTION FOR CAUSING—RIGHT OF DEPENDANTS.

The widow and children of a deceased person, who, it is alleged, died of injuries caused by the defendants' negligence, bringing an action under the Families Compensation Act, R.S.B.C. 1911, ch. 82, which provides that, where there is no executor or administrator, such action may be brought by the person for whose benefit such action would have been brought by the executor or administrator, are entitled to all the rights and privileges with respect to everything appertaining to the action as would be the executor or administrator.

4. EQUITY (§ I F—37)—CANCELLATION OF INSTRUMENTS—RELEASE.

Where the equitable defence of a release of the cause of action is set up, the court, on finding that the release was fraudulently obtained, may refuse to give effect to the document without decreeing its cancellation or annulment. (*Per* Macdonald, C.J.A.)

5. PLEADING (§ V—347)—REPLY—AVOIDANCE OF FORMAL RELEASE PLEADED IN DEFENCE.

The plaintiff may properly plead in reply that a release, which is set up as a defence in an action for damages for injuries sustained through the alleged negligence of the defendant, was obtained by fraud, since, under the Judicature Act, both legal and equitable questions can be disposed of in the one action; and it is not now necessary, as was the former practice, to file a bill in equity to restrain the defendant from relying on the release as a bar on the ground that it was fraudulently obtained. (*Per* Macdonald, C.J.A.)

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6. RELEASE (§ II—11)—CLAIM FOR PERSONAL INJURIES—EFFECT OF RELEASE—SUBSEQUENT DEATH FROM INJURIES.

The right of action given by the Families Compensation Act, R.S. B.C., ch. 82, to a legal representative or dependant of a deceased person for damages for injuries resulting in the death of such person through the alleged negligence of the defendants, may be barred by a valid instrument of release executed by the deceased. (Dictum *per* Macdonald, C.J.A.)

[*Read* v. *Great Eastern R. Co.*, L.R. 3 Q.B. 555; *Ellen* v. *Great Northern R. Co.*, 17 Times L.R. 453, referred to.]

7. DEATH (§ I—2)—LIMITATION OF LIABILITY FOR CAUSING.

The test of the right of a legal representative or dependant of a deceased person to sue under Lord Campbell's Act is whether an action could have been maintained by the deceased in respect of his injuries. (*Per* Irving, J.A.)

[*Williams* v. *Mersey*, [1905] 1 K.B. 804, cited.]

8. TRIAL (§ II C 6—103)—QUESTION OF ACCORD AND SATISFACTION—SUBMISSION TO JURY.

In an action for damages for injuries sustained through the alleged negligence of defendants where the defence sets up an agreement releasing them from liability, it is a question of fact whether such agreement does or does not amount to an accord and satisfaction, and it can be tried by the jury at the same time as the other issues. (*Per* Irving, J.A.)

Statement

AN appeal by the plaintiff from the judgment of Murphy, J., 8 D.L.R. 1026, taking the case from the jury.

The appeal was allowed.

Hart-McHarg, for the appellant.

L. G. McPhillips, K.C., for the respondents.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The plaintiffs are the widow and children of the late George Trawford, deceased, who, it is alleged, died of injuries caused by defendants' negligence. There is no executor or administrator. The action was, therefore, brought by the widow and children in virtue of the right given by the Families Compensation Act, being ch. 82 of the Revised Statutes of British Columbia, which provides that if there be no executor or administrator of the person deceased, or if there being such, no action shall have been brought within six months of his death by the executor or administrator, then and in every such case such action may be brought by and in the name of the person or persons for whose benefit such action would have been brought if brought by the executor or administrator, and shall be for the benefit of the same person or persons.

In their statement of defence the defendants allege that in his lifetime, the deceased accepted $1,000 from them in full satisfaction of the injuries from which he afterwards died, and signed an agreement releasing the defendants from all present or future liability to himself or to his heirs.

The plaintiffs in their reply allege that the agreement was obtained by wilful misrepresentation. When the action came on for trial, counsel for the defendants took the point that the

defendants could not in the face of the release, the execution of which by the deceased was proved, succeed, because (1) they had no status to attack the release, not being parties to it, and not being the legal personal representatives of the deceased; (2) they had not repaid or tendered the said $1,000; and (3) they had not in terms asked to have the release set aside, but had merely set up in their reply the defendant's fraud in obtaining it.

Mr. McHarg, for the plaintiffs, advanced an argument which, if sound, would meet all of these objections, namely, that the plaintiffs were by the said statute given an independent right of action which the injured man had no power to defeat by any act of his own. This contention, however, is effectually disposed of against the plaintiffs by the decisions in *Read* v. *Great Eastern R. Co.* (1868), L.R. 3 Q.B. 555; *Griffiths* v. *Earl of Dudley* (1882), 9 Q.B.D. 357; and *Ellen* v. *Great Northern R. Co.* (1901), 17 Times L.R. 453. It was argued on the other side that *Pym* v. *Great Northern R. Co.* (1863), 4 B. & S. 396, and *Seward* v. *The "Vera Cruz"* (1884), 10 A.C. 59, were authorities to the contrary, but I do not so read them. Lord Blackburn, in the last mentioned case, does not, as I understand him, in any way modify his views as expressed in the earlier case of *Read* v. *G.E.R.*, L.R. 3 Q.B. 555.

The trial was not allowed to proceed, the only evidence taken being the proof of the deceased's signature to the release. The learned Judge thought the action should be dismissed because the plaintiffs had not repaid the said sum of $1,000. The case, therefore, must be considered as if it were before the Court on demurrer. We must assume that the allegations made in the statement of claim and in the reply are true, and that the release was obtained by the defendants by fraud.

The first objection rests upon this, that the legal personal representative only of the deceased could attack the release. The question resolves itself into two parts. First, are not these plaintiffs in contemplation of the statute the legal personal representatives of the deceased in respect of everything necessary to assert their rights in an action of this kind? And secondly, had they not an interest in the subject matter of the release, inchoate though it may have been, when the release was obtained, yet which independently of representative capacity entitled them to shew that a document set up against them as destructive of that interest was obtained by fraud.

We were not referred to any authorities upon this question, but giving the statute and every provision and enactment thereof "such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act, and of such provision or enactment, according to their

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true intent meaning and spirit," I think the plaintiffs were intended to be put in just as strong a position with respect to everything appertaining to the action as would be an executor or administrator. To hold otherwise would, in some cases at all events, be to defeat the manifest intention of the Act.

The authorities above referred to on another branch of this case make it clear that the deceased could by a valid instrument of release have barred the right of his legal personal representative or dependents, but have not those who, in the absence of fraud, would have been barred, a right independently of any representative capacity to attack a fraudulent instrument set up against them? It occurs to me that this question is not necessarily one of rescission.

Then as to the second part of the question. Is it not sufficient, when the fraudulent nature of the release is admitted or proven to say that defendants shall not be allowed to defeat the plaintiff's right by means of an instrument so obtained? Before the Judicature Act, the practice in such cases as this was to file a bill in equity to restrain the defendant from relying on such an instrument in an action at law. Since that Act like relief can be obtained without multiplicity of action. In *Stewart* v. *G. W. R. Co.* (1865), 2 DeG. J. & S. 319, it was not rescission but an injunction that was granted, and now both the legal and equitable questions can be disposed of in the one action, and if the Court finds fraud it, I think, should refuse to give effect to a plea of release where it is shewn that the release is fraudulent without necessarily rescinding the instrument.

I shall deal with the other objections together. Shortly, they are that the proper course for the plaintiffs to pursue was to ask for the rescission of the fraudulent agreement and to repay or tender to defendants the said sum of $1,000. Perhaps, though I do not say so, the plaintiffs' pleadings may be open to some objection. But no motion was made to strike out any part of them as embarrassing or as shewing no ground for relief. From the several cases to which we were referred it would appear that the course adopted here is that usually followed since the Judicature Act; that, at all events, is the inference which in the absence of full statements of fact and pleadings in said cases, I should draw. In any case, I do not think the proper course at the trial was to dismiss the action because of any defect in the pleadings, nor do I understand that that was the ground upon which the learned Judge did so. It was that the $1,000 had not been repaid. The case principally relied upon by the respondents was *Lee* v. *Lanc. & Yorkshire R. Co.* (1871), 6 Ch. App. 527, where Sir W. M. James, L.J., incidentally mentioned the practice which obtained where rescission was asked for on the ground of mistake. In that case no fraud was alleged.

In *Lagunas Nitrate Co.* v. *Lagunas Synd.*, [1899] 2 Ch. 392, Lindley, M.R., said at 423:—

> A fifth principle is that a voidable contract cannot be rescinded or set aside after the position of the parties has been changed so that they cannot be restored to their former position. Fraud may exclude the application of this principle, but I know of no other exception.

There are many cases in which it has been laid down that in order to obtain rescission of a contract even when obtained by fraud, the party claiming rescission must be in a position to make restitution, for instance, were a purchaser to seek to rescind a contract for the sale of land, or of a chattel after the land had been conveyed or the chattel delivered, he could not have rescission if unable to re-convey the land or to re-deliver the chattel. Here no specific thing has been conveyed or delivered, but a sum of money has been paid. The defendants are entitled to have it taken into consideration on the assessment of the damages. Moreover, the doctrine of restitution is an equitable one, originating in the Court of Chancery, and is based upon the maxim that he who comes into equity must do equity. But its application must depend on the circumstances of the particular case. I think it would be most inequitable to hold in the circumstances of this case that because the plaintiffs did not repay the money paid to the deceased, they should be denied the relief which but for defendants' fraud they could have claimed, and, on the facts as we must assume them, could have obtained. As I have already said the inference I draw from the cases cited in argument is that what is, I think, in this connection inaptly called restitution does not seem to have been insisted upon in cases like the present. In *Stewart* v. *G.W. R. Co.*, 2 DeG. J. & S. 319, the release was, as in the present case, obtained by fraud, and a small sum of money had been paid to the injured man. He afterwards brought an action for damages for his injuries, and the release was set up as a defence. He filed a bill in equity to restrain the defendants from setting up the release, and this was the relief granted. It was not suggested there that he must first repay the £15 which had been paid to him. It appears to have been assumed that the £15 could be treated as a payment on account. It may be said that in that case, the document was no other than a receipt, but the Court granted a relief on the assumption that it was more than that. In *Johnson* v. *Grand Trunk R. Co.* (1894), 21 A.R. (Ont.) 408, the release was got after the statement of claim was delivered, and behind the back of the plaintiff's solicitor. The defendants pleaded the release in their defence and the reply alleged that it was improperly obtained. The learned trial Judge first dealt with the issue respecting the release, and held that it

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could not be set up against the plaintiff. On appeal he was sustained. There is no suggestion in that case that there was any serious objection to the pleadings, which appear to have taken the same form as those in the case at bar. A number of other cases are of the same character. For these reasons, I think the learned trial Judge was wrong in dismissing the action.

There should be a new trial.

IRVING, J.A.:—I would allow this appeal.

The test of the right to sue under Lord Campbell's Act is whether an action could have been maintained by the deceased in respect of his injuries: *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K.B. 804.

The release, if it amounts to an agreement of accord and satisfaction, is a bar to the action; if it does not, then I can see no reason why the plaintiffs should not proceed with their action. A receipt is never conclusive evidence of an agreement, though it is evidence of it.

Whether the agreement does or does not amount to an accord and satisfaction is a question of fact, and can be tried by the jury at the same time that the other issues raised are being tried.

It is admitted, that if the personal representatives were party to this action, it would be open to them to contest the validity of the release. As secs. 3 and 4 shew that another claimant proceeding under Lord Campbell's Act is to have all the rights of the executor, that admission seems to me to be conclusive in the plaintiff's favour.

As to bringing the amount of money paid by the defendants to the deceased as a condition precedent to setting aside the release, in *Re Lee* v. *Lancashire* (1871), L.R. 6 Ch. 527, it was said that if the plaintiff wished to set up the contention that he gave the receipt under mistake he would be compelled to bring into Court the money he had received, In that case fraud was not set up. The only equity set up, was that the plaintiff claimed that he had signed the receipt subject to a stipulation that in a certain event he should not be bound by its terms, and that as that event had happened, resort to equity was necessary. James, L.J., points out that if the plaintiff had set up a different equity, viz., that the document had been given under a mistaken impression as to its effect brought about by the agents representations, then in such a case a return of the money paid to the company would be necessary; but the case set up here is wholly different. The reply set up in this case is undue influence and misrepresentation. Mistake stands on a different footing from fraud. On the footing referred to by James, L.J., there had been no real contract, no meeting of the minds, the

money had therefore never been paid for value, and as the Courts of equity had a general rule that where a person was entitled to money, he was entitled to have that money secured, so that there would be no loss to him, that was just and right in a plea of that kind; but it was not just and right where fraud is set up. In *Stewart* v. *G.W.R.* (1865), 2 DeG. J. & Sm. 319, where fraud was charged, there was not talk about paying into Court.

In this case the plaintiffs have no money in their hands belonging to the defendants. It is quite consistent with the case set up in the reply that the $1,000 or a great part of it would properly belong to the estate of the deceased. Supposing for a moment that the plaintiffs did pay over to the defendants the $1,000 and that the trial went on, if the plaintiffs won, the $1,000 could not be taken into account by the jury in fixing the compensation. The deceased's estate would have $1,000, the defendants would have $1,000, and the successful plaintiff would have their damages, but for the privilege of suing they would have paid $1,000. Or take the other contingency; if the plaintiffs lost the action, the defendants would still retain the $1,000. If the Court is right in directing that the plaintiffs ought to repay the $1,000 as a condition to going to trial on a charge of fraud, it would be absurd to expect that the Court would, after the charges had failed, order the money to be repaid to the plaintiffs.

Irving, J.A.

The plain sense of the matter is that this is a new and independent action to which the defendants are liable and the plaintiffs wish to shew that the bar the defendants would set up is not really and truly a bar.

MARTIN, J.A., concurred in allowing the appeal.

Martin, J.A.

Appeal allowed.

HOUNSOME v. VANCOUVER POWER CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin and Galliher, JJ.A. January 30, 1913.

1. MASTER AND SERVANT (§ III B 2—303)—INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER—INJURIES TO ADJOINING OWNER.

Where contractors for the blasting operations incidental to the preparation of a railway right-of-way caused large quantities of the dislodged rock to be deposited on the land of an adjoining owner, the company owning the right-of-way may be held liable for the damage to the land, if, in letting the contract in which the blasting operations were included, no care was exercised by it to provide against the resultant damage to the adjoining property which damage was such as should reasonably have been anticipated; it is, in such case, the duty of the property owner upon whose property the endangering work is being carried on to see that reasonable skill and care is exercised by the contractor to prevent injury to the adjoining property and the owner of the latter is not restricted to a claim against the contractor.

[*Black* v. *Christchurch Finance Co.*, [1894] A.C. 48; *Hughes* v. *Percival*, 8 A.C. 443; *Dalton* v. *Angus*, 6 A.C. 740, and *Bower* v. *Peate*, 1 Q.B.D. 321, considered.]

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2. RAILWAYS (§ II B—21)—CONSTRUCTION AND OPERATION—FARM CROSSINGS—RELEASE OF SEVERANCE CLAIM BY LANDOWNER.

Where a railway corporation buys a strip of land to be used as a right-of-way for a railway across a farm and takes with the deed of the strip the vendor's release of all claims for severance or depreciation without any reservation to the vendor of any right to cross the railway over such strip, the vendor is not entitled as of right upon the subsequent passing of a statute (B.C. Statutes, 1911, ch. 44, sec. 167) directing the company to make farm crossings for "persons across whose lands the railway is carried" to compel the company to provide a crossing over the strip so conveyed.

[Compare sec. 169 of B.C. Stat. 1911, ch. 44, as to the power of the British Columbia Minister of Railways to order a crossing.]

Statement

APPEAL by the plaintiff from the judgment of Morrison, J. The appeal was allowed in part.

E. N. Brown, for the appellant.

L. G. McPhillips, for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I concur with the judgment of Galliher, J.A.

Irving, J.A.

IRVING, J.A.:—On June 18, 1910, the plaintiff having conveyed to the defendants and executed to them a release, ceased to have any interest in the strip of land which had been conveyed. The statutory right to a crossing was conferred by an Act which came into force on March 1, 1911. That statute in my opinion has no application to the plaintiff's two pieces of property between which the defendants' land lies. This view can be supported on many grounds. Common honesty tells us that where you have executed in 1910 a conveyance and release, such as we have here, you are not entitled to come back in 1911 for a claim for a statutory crossing. The railway is not carried across the plaintiff's lands within sec. 167 of the Railway Act of 1911, it is on defendant's own land.

The other question raised on the argument presents more difficulty. In *Bower* v. *Peate* (1876), 1 Q.B.D. 321, 45 L.J.Q.B. 446, where the defendant stipulated that the contractor should take upon himself the responsibility of shoring up the plaintiff's house and satisfy any claims for compensation the plaintiff might make, the Queen's Bench Division thought that the defendant could not escape liability. The Court thought the defendant was not in the position of a man who simply had authorised and contracted for the execution of a work from which, if executed, with due care, no injury could arise. They then went on to say:—

> The answer to the defendant's contention many, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to

> prevent the mischief, and cannot relieve himself of his responsibility by employing some one else whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

The plaintiff in that case recovered judgment against the principal. *Bower* v. *Peate*, 1 Q.B.D. 321, was approved in *Dalton* v. *Angus* (1881), L.R. 6 A.C. 740, 829, by Lord Selborne, at 791; but in *Hughes* v. *Percival* (1883), L.R. 8 A.C. 443, Lord Blackburn, after setting out the passage I have just read, said:—

> I doubt whether this is not too broadly stated. If taken in the full sense of the words it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers. But the Court of Queen's Bench had no intention, and indeed not being a Court of Error had no power, to alter the law laid down in *Quarman* v. *Burnett*.

He was of opinion that *Bower* v. *Peate*, 1 Q.B.D. 321, was properly decided because the defendants had caused an interference with the plaintiff's right of support, and therefore did not then think it necessary to inquire how far the general language should be qualified.

In his speech, however, he refers to *Quarman* v. *Burnett* (1840), 6 M. & W. 499, as being the leading authority, where at pp. 509, 510 and 511, Parke, B., bases his judgment on the opinion of Lord Tenterden and Mr. Justice Littledale in *Laugher* v. *Pointer* (1826), 5 B. & C. 547. In *Laugher* v. *Pointer*, 5 B. & C. 547, and again in *Rapson* v. *Cubitt* (1842), 9 M. & W. 710, the difference is pointed out between the liability of the owner of a chattel and the owner of real property, and several cases are referred to where occupiers of lands or buildings have been held responsible for acts of others than their servants done upon or near or in respect of their property.

In my opinion the defendants, in blowing out their track, owed a duty to the plaintiff to this extent, that they did not shoot their rock over his land in such a way as to amount to a trespass or a nuisance. The evidence established that their contractors did this, and I think in the circumstances that as the result was something that might easily be expected to occur, it was the defendants' duty to see that reasonable skill and care were exercised to prevent such injury being done. And that in the circumstances they are liable for their contractors' neglect of duty. *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48, seems to me to be in the plaintiff's favour.

This is not a case of collateral negligence. I agree as to amount of damages.

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Martin, J.A.

MARTIN, J.A.:—With respect to the question of damages I am of the opinion that the appeal should be allowed because the evidence brings this case within the principle laid down by *Bower* v. *Peate* (1876), 1 Q.B.D. 321, wherein Cockburn, C.J., says at p. 326:—

> . . . A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted.

And compare also *Longmore* v. *McArthur* (1910), 43 Can. S.C.R. 640. The evidence, practically undisputed, shews that the damage amounts to $500, and therefore there is no obstacle to our directing judgment to be entered for that amount.

Then as to the right of way. Reliance is placed by the defendant on the following release in the conveyance of the right of way executed while the work of construction was in progress:—

> And the said grantor releases to the said grantee all his claims upon the said lands, and further releases the grantee from all claims and demands for severance or depreciation arising out of the expropriation, or taking by the grantee of the said lands, or the construction, maintenance and operation thereon of a line of railway.

The language is very comprehensive and far-reaching, and in my opinion the learned trial Judge was right in taking the view that in the circumstances the defendant as vendor could not, after conveying a right of way which necessarily created a severance of his farm, receiving compensation therefor, and giving a release from the consequences thereof, later turn round and by seeking to invoke a subsequent general statute, compel the purchaser to make a "farm crossing," as the statute calls it, to connect those portions of his farm which were severed by his own act for valuable consideration. I do not doubt that on these facts alone the said release relieves the purchaser from such a liability to his vendor. The case is much stronger in this respect than any of the authorities cited to us, which also establish the further contention that the statute is not to be construed retrospectively.

Gallihe, J.A.

GALLIHER, J.A.—I would allow the appeal in part.

I think there should be judgment for the plaintiff (appellant) for $500, which upon the evidence I fix as the amount of damage sustained by reason of the rocks being shot over on the plaintiff's land.

As to the claim for a crossing such as the plaintiff insists upon, I would dismiss the appeal.

The plaintiff should have the costs of appeal.

Appeal allowed.

LAURSEN v. McKINNON.

(Decision No. 3.)

British Columbia Supreme Court, Gregory, J. February 24, 1913.

Feb. 24.

1. APPEAL (§ III F—95)—EXTENSION OF TIME—NOTICE OF APPEAL.

The Supreme Court of British Columbia has jurisdiction to enlarge the time for giving notice of appeal from that court to the Court of Appeal, although the application is not made until the time for giving such notice has elapsed, its jurisdiction in that respect differing from that of the Court of Appeal itself under secs. 23 and 25 of the Court of Appeal Act, R.S.B.C. 1911, ch. 51, (formerly B.C. Statutes, 1907, ch. 10, secs. 23 and 25.)

[*Laursen* v. *McKinnon* (No. 2), 9 D.L.R. 758, considered.]

Statement

APPLICATION by the defendant to extend the time for giving notice of appeal.

The application was granted.

W. B. A. Ritchie, K.C., for appellant.

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

Gregory, J.

GREGORY, J.:—This is an application by the defendant to extend the time for giving notice of appeal against a judgment of my own, notwithstanding the fact that the time for giving such notice has elapsed, and a similar application to the Court of Appeal has been refused.

It is urged in opposition that I am bound by the decision of the Court of Appeal in *Laursen* v. *McKinnon* (No. 2), 9 D.L.R. 758.

Although it was there only held that the Court of Appeal had no jurisdiction to grant the extension, I would certainly feel bound by it if the reasons given could be applied to the Supreme Court, but it seems to me quite clear that they cannot.

The right of a Judge of the Supreme Court to grant such extension is governed by O. 64, r. 7 of the rules of 1906. At the time of the passing of those rules the Supreme Court Act of 1903-4 was in force, and secs. 94 and 98 of that Act had to be considered in connection with that rule. These sections have been taken out of the Supreme Court Act by the Court of Appeal Act of 1907, and the rule stands alone, and alone governs

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the question; and standing alone there is no room for doubt that the Supreme Court or a Judge thereof has the right to enlarge the time for giving notice of appeal, although the application is not made until the time for giving such notice has elapsed—for the rule expressly and in terms confers this right. The position of the Court of Appeal is different, for sections 94 and 98 of the Supreme Court Act of 1903-4 are still in force so far as it is concerned, for they have in effect been re-enacted in the Court of Appeal Act (ch. 10, 1907) as secs. 23 and 25, and the Court of Appeal based its judgment on the restrictive effect of sec. 23, feeling that it was better to follow the previous decisions of the old Full Court, which had similarly interpreted a similar restriction contained in sec. 12, ch. 8, Statutes 1897.

Shortly, the right of the Supreme Court to extend the time is wholly found in O. 64, r. 7 (which by the way is more explicit, in this respect, than the old rule 743 of the rules of 1890); while the right of the Court of Appeal even if O. 64, r. 7, applies to it, is also affected by secs. 23 and 25 of the Court of Appeal Act.

Having jurisdiction, it seems to me that this case is one in which such jurisdiction should be exercised. The point involved is extremely important to the community at large, affecting as it does the practice in the Crown lands office and of surveyors generally. There has been no doubt from the beginning of the intention of the defendant to appeal, and I do not think he should in these circumstances be prejudiced because his counsel interpreted the rules of Court differently from the majority of the Court of Appeal. It is worthy of comment that the many cases in our own Courts to which I have been referred as shewing he is not entitled, were decided under rule 684 of 1890, and those cases in reality decided that the words "special leave," etc., meant that special circumstances should be shewn. I think they have been shewn here, but in any case those words are not now in our rule, which is the same as the English rule, Order 64, r. 7, and under which the former practice has been materially modified: see *Rumbold* v. *London County Council*, 100 L.T.N.S. 259, and *Baker* v. *Faber*, [1908] W.N. 9.

The time for giving the notice of appeal will be extended until March 11, 1913.

On the hearing the question of costs was not discussed. I should think the defendant should pay them, but if counsel cannot agree they may be spoken to.

Application granted.

MEIGHEN v. COUCH.

MAN.

K. B.

1913

March 10.

Manitoba King's Bench. Trial before Macdonald, J. March 10, 1913.

1. CONTRACTS (§ I E 5—95)—SUFFICIENCY OF WRITING—LETTERS.

A contract for the sale of land contained in correspondence is sufficiently evidenced so as to satisfy the requirements of the Statute of Frauds, where the vendor in reply to the purchaser's letter submitting offer, purported to accept the offer but stated that the terms were to be "cash or its equivalent," and in reply to this the purchaser wrote, "I take this to mean, terms cash, unless we can agree on other terms mutually satisfactory, and this is, of course, all right so far as I am concerned, if we cannot agree I will pay cash"; the agreement was completed by the last-mentioned letter as the payment was to be cash if the equivalent could not be arranged.

2. SPECIFIC PERFORMANCE (§ I E—35)—CONTRACTS FOR REAL PROPERTY—ABSENCE OF TITLE IN VENDOR—INNOCENT MISTAKE.

Specific performance will not be granted, where a widow, in the honest belief that she could deal with the property of her deceased husband, entered into an agreement for the sale of certain lands belonging to the estate of the deceased, of which she was administrator in another province but not in the province where the lands were situate and in which she had upon her husband's intestacy a beneficial interest to the extent of one-third only after the debts of the estate should be paid.

3. SPECIFIC PERFORMANCE (§ II—42)—PARTIAL TITLE—CY-PRES EXECUTION WITH COMPENSATION.

The court will not order specific performance *cy-près* with compensation of a contract made in her individual capacity only by the widow of the deceased owner for the sale of the fee where her interest was in fact only a one-third share after the payment of the debts of the estate.

[Compare *Barnes* v. *Wood*, L.R. 8 Eq. 424; *Hooper* v. *Smart*, L.R. 18 Eq. 683; and see Fry on Specific Performance, 5th ed., 616-622.]

4. VENDOR AND PURCHASER (§ I C—10)—BREACH OF CONTRACT TO CONVEY—INABILITY TO MAKE TITLE—ABSENCE OF FRAUD.

Where upon an agreement for the purchase and sale of land, if the vendor is unable to make title to the land which formed the subject-matter of the contract the purchaser is not entitled to damages for the loss of his bargain.

[*Bain* v. *Fothergill*, L.R. 7 H.L. 158, followed.]

Statement

ACTION for specific performance of an agreement, made by correspondence for the sale of certain lands.

The action was dismissed.

W. J. Cooper, K.C., for the plaintiff.

J. E. Adamson, for the defendant.

Macdonald, J.

MACDONALD, J.:—By an agreement made through correspondence commencing in May, 1910, and ending on 2nd June, 1910, the defendant agreed to sell to the plaintiff the north-east quarter and the east half of the north-west quarter of sec. two in township ten, range eight, west of the first principal meridian in Manitoba.

On the 10th June, 1910, the defendant having between the 2nd and 10th June discovered that the land did not belong to

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her, but to the estate of her deceased husband, wrote the plaintiff advising him of that fact, and that she was told she could not sell it, and stating that she wished to sell for the purpose of clearing up a debt on the estate. She was the administratrix of the estate in Saskatchewan, where she resided, but administration of the estate in Manitoba had not been applied for.

No further correspondence followed between the plaintiff and the defendant excepting through her solicitors in Saskatchewan, and on July 23, 1912, the plaintiff brings action for specific performance of the agreement contained in the correspondence referred to, and in the alternative, damages for breach of the said agreement.

By her statement of defence the defendant (*inter alia*) denies the agreement to sell and sets up the Statute of Frauds as a defence. She also sets up that she is not and never was the owner of the lands, and that she cannot make title, and further that if such a contract was entered into by her, that it was by mistake or error and ignorance as to ownership and authority and power in connection therewith.

The correspondence to my mind forms a complete agreement. It is strongly urged by counsel for the defendant that by the letter of June 10, 1910, the terms were not concluded, but I take it they were. The plaintiff in reply to the acceptance of his offer by the defendant by which she says terms cash or equivalent, says: "I take this to mean terms cash, unless we can agree on other terms mutually satisfactory, and this is, of course, all right so far as I am concerned. If we cannot agree I will pay cash." This then completed the agreement, as the payment was to be cash if the equivalent could not be arranged.

From the facts as above stated specific performance as claimed is not possible as the defendant has no title to convey. Her prompt action in advising the plaintiff of the condition of the title seems to me an answer to any suggestion of improper conduct on her part. The evidence disposes of any question of fraud. The agreement as stated was by correspondence. There was no representation as to the title. The defendant could make no provision for compensation. I believe she was honest in the belief that on the death of her husband she could deal with the property, and upon discovery of her mistake, she immediately advised the plaintiff. As the widow it is urged that she is the owner of one-third interest in the property, and that to the extent of this interest, she should be ordered to convey. It is true she is entitled as the widow to one-third of the estate after payment of debts. She has no ascertained or fixed interest in this land, and it is impossible until the debts of the estate are paid to know what her interest may be. So that the *cy-près* principle cannot be invoked. I doubt if indeed it could

even were she the absolute owner of a one-third interest, such interest being so out of proportion to the entirety.

Now, as to compensation, it is well established that in a case of this kind, following the doctrine laid down in *Bain* v. *Fothergill*, L.R. 7 H.L. 158, a purchaser is not entitled to compensation by way of damages for the loss of his bargain.

The action must be dismissed with costs.

Action dismissed.

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Re LACASSE.

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Ontario Supreme Court, Britton, J. March 22, 1913.

1. WILLS (§ III G 4—138)—CONSTRUCTION—ESTATE UPON CONDITION — GIFT OVER ON WIDOW'S RE-MARRIAGE.

Where there is a provision in a will whereby the entire estate is given to the widow during her natural life but subject to a direction that if she re-marries "everything shall be divided between the children," and this is followed by a residuary clause in favour of the widow alone the effect is that she takes the whole of the property and estate absolutely, subject to her being divested of it should she marry again.

[*Burgess* v. *Burrows*, 21 U.C.C.P. 426, applied.]

Statement

MOTION by the executors of the will of Napoleon Lacasse, deceased, under Con. Rule 938, for an order determining a question arising upon the construction of the will.

J. U. Vincent, for the executors and the widow.

A. C. T. Lewis, for the Official Guardian.

Britton, J.

BRITTON, J.:—Napoleon Lacasse died on the 6th October, 1906. His will was made on the day immediately preceding his death, and is as follows:—

"I revoke all former wills or other testamentary disposition by me at any time heretofore made, and declare this only to be and contain my last will and testament.

"I direct that all my just debts funeral and testamentary expenses be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease.

"I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say:—

"First, my wife Leocadie will have and possess everything that belongs to me during her natural life—if she does not change her name, but if she shall get married everything shall be divided between the children. I give to her the money that is deposited at the post-office of Clarence Creek.

"All the residue of my estate not hereinbefore disposed of I give devise and bequeath to my wife Leocadie."

Then he named his executors.

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On the 1st June, 1907, Mr. Justice Magee made an order for the partial distribution of the estate, but declined then to construe the will. His order was without prejudice to any application by the widow or executors or any child of the testator for its construction.

I am of opinion that, under this will, the widow takes the whole of the property and estate absolutely, subject to her being divested of it should she marry again. I come to this conclusion upon consideration of the whole will; and in no other way can full effect be given to the clause as to residue. Nothing of the testator's estate will descend to his heirs-at-law. It was not the intention of the testator to die intestate as to any part of his estate in case his widow should not marry again. If she does marry again, then, at once thereafter, all the property shall "be divided between the children."

Apart from the residuary devise, the widow would take an estate for life, with power of disposing of the fee should she not marry again; but the estate for life would be subject to the widow being divested of it, should she marry again. The power of disposing of the property can be exercised by her by will.

For all practical purposes and apart from any technical terms in regard to an estate in fee or an estate for life with power of disposing of the fee if the widow should not marry, either construction will give the same result. The case of *Burgess* v. *Burrows*, 21 U.C.C.P. 426, is very like the present. The language of Gwynne, J., at p. 429 of the report is: "The widow took under the will either a fee simple estate in the property in question, or an estate for life with power of disposing of the fee if she should not marry again, but both estates subject to being divested if she should marry again, in either of which cases the heir is excluded." That case fully discusses the whole question in the alternative as above stated. It came before the Court after the death of the widow. In the present case, the widow is living.

Costs of the executors and widow for whom Mr. Vincent appeared and costs of the Official Guardian to be paid out of the estate.

Judgment accordingly.

GERTZBEIN v. BELL.

ONT.

S. C.

1913

Jan. 30.

Ontario Supreme Court. Trial before Meredith, C.J.C.P. January 30, 1913.

1. SPECIFIC PERFORMANCE (§ I E 2—36)—IMPOSITION OF TERMS ON ORDER COMPLETING SALE—JUDICIAL DISCRETION—JUDGMENT IN THE ALTERNATIVE.

In an action for specific performance of an agreement for the sale of land, where it appears that the agreement in question was drawn up by the plaintiff, and prepared in such a manner as to leave room for want of understanding on the part of the defendant of the meaning which the plaintiff asserts it was intended to convey, and where the terms in regard to a purchase money mortgage on the land contained in the agreement are ambiguous, the court may in its discretion order specific performance according to the defendant's interpretation or in the alternative a dismissal of the action.

[*Bullen* v. *Wilkinson*, 2 O.W.N. 1262, 3 O.W.N. 229, 2 D.L.R. 190, 3 O.W.N. 859, referred to.]

Statement

ACTION for specific performance of a contract for the sale and purchase of land.

The action was dismissed.

E. V. O'Sullivan, for the plaintiff.

J. Bicknell, K.C., for the defendant.

Meredith, C.J.

MEREDITH, C.J.C.P.:—The plaintiff may have judgment for specific performance of the writing in question according to the defendant's interpretation of it, that is, price $7,000, $2,000 before deed given, with a mortgage for $5,000, payable as provided in the writing, without costs. Otherwise the action will be dismissed without costs.

I am unable to give any credence to the story that the writing was to be subject to changes to suit the defendant; but, on the other hand, it was prepared by the plaintiff, and prepared in such a manner as to leave room for want of understanding by the defendant and her son of the meaning which the plaintiff asserts it was meant to convey; and is, at least, not expressly definite on the important subject of a first mortgage.

I am quite sure that it was never intended by either party that the first mortgage might be such as the plaintiff might choose and be able to put upon the property; nor, on the other hand, that all that should be at the election of the defendant.

Very plainly, payment of the $2,000 before deed, and payment off of the mortgage now on the land, are provided for; the provisions as to a second mortgage for the rest of the purchase-money—$5,000—and for the right to create a first mortgage, are by no means so clear.

The case is, therefore, one in which the Court may properly refuse to compel specific performance, whatever the very strict rights of the parties under the words of the agreement might be: see *Bullen* v. *Wilkinson*, 2 O.W.N. 1202, 3 O.W.N. 229, 2 D.L.R. 190, 3 O.W.N. 859.

Action dismissed.

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March 8.

WALLER v. TOWN OF SARNIA.

Ontario Supreme Court (Appellate Division), Mulock, C.J.Ex., Clute, Riddell, and Sutherland, JJ. March 8, 1913.

1. MUNICIPAL CORPORATIONS (§ II G—222)—LIABILITY FOR ALLOWING INDEPENDENT CONTRACTOR TO PLACE DANGEROUS IMPLEMENT IN STREET —ATTRACTION TO CHILDREN.

Where a municipal corporation allowed an independent contractor, engaged in repairing a street, to negligently place a cauldron of boiling pitch in a busy street without taking any precautions to protect the public, and where it might be an attraction to children, the municipal corporation is liable in damages for injuries sustained by a child, who, while playing in the street, was splashed with the boiling pitch, by reason of the breaking of the wooden handle of a ladle used by an employee of the independent contractor in handling the pitch.

[*Waller* v. *Corporation of Sarnia*, 8 D.L.R. 629, affirmed.]

2. HIGHWAYS (§ IV D 2—235)—DEFECTS—NOTICE OF INJURY—PERSONAL INJURY FROM REPAIR OPERATIONS.

An action brought against a municipality for personal injuries from negligence in the operations under way for making repairs to its streets, but not due to any defect in the condition of the street itself, is not within the Ontario Municipal Act, 3 Edw. VII. ch. 19, sec. 606, so as to require a preliminary notice of injury.

Statement

APPEAL by the defendants from the judgment of Leitch, J., *Waller* v. *Town of Sarnia* (No. 1), 8 D.L.R. 629, 4 O.W.N. 403. The appeal was dismissed.

T. G. Meredith, K.C., and *J. Cowan*, K.C., for the defendants.

D. L. McCarthy, K.C., for the plaintiffs.

Sutherland, J.

The judgment of the Court was delivered by SUTHERLAND, J.:—The creosote wood block pavement on Front street, in the town of Sarnia, had become out of repair, and the municipal corporation, the defendants herein, called upon those who had laid the pavement and had guaranteed to keep it intact, or in good condition, for a stated period not yet expired, to make it right. The United States Wood Preserving Company thereupon undertook the work, supplying plant and materials and employing the workmen.

While the work was being done, the cauldron in which the asphalt pitch used in connection therewith was melted, was placed on Lochiel street adjacent to the point on Front street where the pavement was being repaired. The melted pitch was dipped out of the cauldron into pails by means of an iron ladle with a piece of pine board nailed on to it to form a handle.

In the course of the work the pitch would adhere to the ladle, and it was found necessary from time to time to clean it off. The course pursued by the workman, under instructions from his employers, was to thrust the ladle into the fire at the base of the furnace so as to burn off the accumulations. This resulted

in the wooden handle catching fire from time to time, being partly consumed, and gradually weakened.

On the 19th April, 1910, the workmen "had put out the second batch of pitch for the day." One man was cutting up more barrels of pitch for the next batch, and the man in charge of the ladle was cleaning it in the manner indicated. He saw its contents burning and drew or jerked the ladle out of the fire, whereupon the handle and ladle separated, the workman stepped aside to avoid injury to himself, the ladle was rolled over a pile of sand kept on hand to dump the pitch on when cleaning it, and its melted and blazing contents thrown in the air. Some of these fell upon the face and clothing of the plaintiff Reginald Waller, a boy of about six years of age, who was a few feet in the rear of the workman, and injured him somewhat severely.

His father brings this action on his own account for expenses incurred by him, and also as next friend for his son for damages in consequence of the injuries sustained by him.

The defendants plead that the injuries were not caused by them or their servants; that no notice in writing of the accident was given, as required by the statute in that behalf; that neither the defendants nor their servants were guilty of any negligence; and that the accident occurred in consequence of the negligence of the plaintiff Reginald Waller in going where he was injured after being ordered and directed to keep away from the work being done.

There was, I think, ample evidence to warrant the findings of the trial Judge.

There was a statutory duty on the part of the defendants to keep the street in repair. The defendants themselves could have undertaken the work of repairing the pavement in question, and, if so, would have been under the obligation of taking such precautions in doing it as not to expose the public to danger of injury. The work of heating the pitch and handling it when heated was necessarily dangerous and required care and precaution. Under such circumstances, a duty was cast upon the defendants, the responsibility for which they could not escape by delegating it to an independent contractor.

Reference to Halsbury's Laws of England, vol. 21, secs. 796 and 797; *Dalton* v. *Angus*, 6 A.C. 740, 829; *Penny* v. *Wimbledon Urban District Council*, [1899] 2 Q.B. 72.

In *Holliday* v. *National Telephone Co.*, [1899] 2 Q.B. 392, Halsbury, L.C., at 398, says:—

> There was here an interference with a public highway, which would have been unlawful, but for the fact that it was authorized by the proper authority. The telephone company, so authorized to interfere with a public highway are, in my opinion, bound, whether they do the work themselves, or by a contractor, to take care that the public lawfully using the highway, are protected against any act of negligence by a person acting for them in the execution of the works.

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Clements v. *County Council of Tyrone*, [1905] 2 Ir. R. 415, 542; held, *per* Palles, C.B.,

that where a body having lawful authority, authorizes an interference with a public road, or authorizes works which, in the natural course of things, will result in such an interference, there is a duty cast upon that body to use due care to prevent danger to the public using the road being caused by the execution of the works authorized; that that duty extends to seeing that the workmen actively engaged are careful; and that such body cannot relieve itself of the obligation by delegating it to another, who fails to perform it.

It was contended on behalf of the defendants that what occurred here was not something in connection with the actual doing of the work, but was of a casual and collateral character. I am unable to agree with this contention. It is perhaps difficult, upon the authorities, to state in any general way just what is meant by casual and collateral. What the man was doing here was something necessary to be done in furtherance of the work of repair. See also *Ballentine* v. *Ontario Pipe Line Co.* (1908), 16 O.L.R. 654, 662; *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335; *Kirk* v. *City of Toronto* (1904), 8 O.L.R. 730; *Valiquette* v. *Fraser* (1907), 39 Can. S.C.R. 1; *Longmore* v. *J. D. McArthur Co.* (1910), 43 Can. S.C.R. 640.

As to any necessity for a notice of action, I do not think the cases cited by the appellants' counsel, referring to actions for damages arising out of the non-repair of streets, apply. This is not an action for damages against the defendant corporation in consequence of its liability to repair highways, but an action for damages in consequence of negligence in the doing of repairs.

The defence of negligence on the part of the plaintiff Reginald Waller was not made out.

I think the appeal must be dismissed with costs.

Appeal dismissed.

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Jan. 27.

REYNOLDS v. FOSTER.

(Decision No. 2.)

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.A. January 27, 1913.

1. CONTRACTS (§ I D—52)—OMISSION OF TERMS OF MORTGAGE FROM CONTRACT—INCOMPLETE CONTRACT.

The omission from a written contract for the sale of lands of the time when the principal is to mature under a mortgage to be given by the purchaser as security for payment of a portion of the purchase price, the contract specifying only the amount and the rate of interest, is of such a material portion of the agreement as to render it incomplete in a particular that could not be supplied by implication, and enforcement of the contract will be refused where no case is made out for a reformation of the document.

[*Reynolds* v. *Foster*, 3 D.L.R. 506, 3 O.W.N. 983, affirmed; *McDonald* v. *Murray*, 11 A.R. 101, referred to.]

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2. MORTGAGE (§ I E—24)—AGREEMENT FOR MORTGAGE—MATURITY DATE NOT SPECIFIED.

A written agreement to give a mortgage back to the vendor on the purchase of real estate is too indefinite to be binding where only the amount of the mortgage money and the rate of interest is specified and it does not appear for how long the mortgage is intended to run; under such circumstances the court will not oblige the proposed mortgagee to accept a mortgage which might be paid off whenever the purchaser chose in his lifetime.

[*Reynolds* v. *Foster*, 3 D.L.R. 506, 3 O.W.N. 983, affirmed.]

3. CONTRACTS (§ II D 2—173*a*)—DESCRIPTION OF LANDS SOLD—INDEFINITENESS.

Where the subject of a written contract of sale is therein referred to as premises "known" by a specified name indicating a building such as an apartment house and as also "known" by the street number also specified in the agreement, it is not to be assumed, in the absence of evidence to prove what property is in fact "known" by such indefinite description, that all lands used in connection with the lands upon which the buildings stood are to be included. (Dictum *per* Meredith, J.A.)

Statement

APPEAL by the plaintiff from the judgment of Teetzel, J., *Reynolds* v. *Foster*, 3 D.L.R. 506, 3 O.W.N. 983, 21 O.W.R. 833, dismissing an action for specific performance of an alleged contract for the sale and purchase of land, or for damages for breach of contract.

The appeal was dismissed.

C. A. Moss, and *T. Moss*, for the plaintiff.

Wallace Nesbitt, K.C., and *E. E. Wallace*, for the defendant.

The judgment of the majority of the Court was delivered by

Meredith, J.A.

MEREDITH, J.A.:—The conclusion of the trial Judge, that there never was any concluded agreement between the parties as to the time for payment of the balance of the purchase-money—$4,000—the payment of which was to be secured by a mortgage upon the land in question, seems to me to be quite in accord with the evidence, and so ought to be accepted as the fact; and, that being so, there never was, expressly at all events, a completed agreement between the parties for the sale and purchase of the property. If one substantial part of an agreement be wanting—one link missing—the contract is incomplete, and there is nothing binding, however well the parties may have been agreed in all other respects; that is, of course, where there is but one contract, and it is incomplete in an essential part.

But it is contended that the law supplies the missing part of this contract. That the law does sometimes make that certain which the words of the parties has not covered, is unquestionable. In many cases of contract, in which no time has been expressed, the law implies a reasonable time. But such an implication could hardly arise in such a case as this, in which the time ought to have been specified and set out in the mortgage; the mortgage would be quite incomplete without it; and, in any

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case, who could say what is a reasonable time in such a case; with what measure is it to be ascertained? But, indeed, this was not contended for in this case upon the argument here. That which was urged was, that, no time having been agreed upon, the mortgagor was at liberty to fix the time or times for payment as he chose—to elect, as it was said.

But I am quite unable to see how there could be any such right in such a case as this; and, if there could, it is quite clear, upon the whole evidence, that the parties never intended that there should, or even thought that there could, be; that it was intended by each to be entirely a matter of agreement between them; as it plainly was a matter upon which they could subsequently easily agree if they still remained of the same mind, one anxious to sell and the other to buy; the difficulty arose entirely from its being an exceptional case, one in which the purchaser rued, and consequently has adopted every means in his power to be rid of, the purchase.

It does, indeed, seem from the case of *McDonald* v. *Murray*, 2 O.R. 573, at 581, and in appeal, 11 A.R. 101, at 122, that Wilson, C.J., and Patterson, J.A., thought that there was such a right, in a case not unlike this in this respect; but that case went off, in each Court, on grounds which made it unnecessary to give effect to that view.

The ancient rule of law that where there be a condition, without a limitation of the time within which it is to be performed, he who has the benefit of it may do it at such time as he pleases, was doubtless the basis of the views of these learned Judges; but is it applicable to such a case as this? Even assuming that, if a mortgage were given, in these days, without any limitation as to the time in which it should be paid off, and without any agreement on the subject, the rule might be applied, that is very far from giving any warrant for considering that in such a case as this any Court would decree specific performance, in which the vendor would be obliged to accept a mortgage which might be paid off whenever the purchaser chose in his lifetime. To do so would be to enforce upon the parties that which they not only never agreed upon, but also something they never would have agreed upon, and something that every business man would consider absurd. In this case no one seems to have ever thought of a longer time than five years; it would seem that the vendor would have made it not more than three years, whilst the purchaser would have been content with five; but it is not proven that either or any other term was actually agreed upon.

The trial Judge was, therefore, I think, right in his ruling upon this point, though it is really a broader one than one merely resting—as he seems to have put it—upon the Statute of

Frauds; it is a question of contract or no contract in fact; and also adding to, by parol, a written formal document; as well as of a violation of the provisions of that statute; and, in my opinion, a judgment in the plaintiff's favour would be contrary to legal right in all these respects.

So, too, I think that, without reformation of the writing, the action fails, on the latter two grounds, in another respect.

The land described in the agreement is not that which was really sold; that is admitted on all hands, and is shewn in the deed which the vendor prepared and intended to deliver. The particular description does not cover the whole of the property; a quite substantial part is not included in it; nor can I think that the general description, "the premises situate on the north side of Bloor street west, known as King George Apartments, known as No. 568 and 570 Bloor street west, plan No. as registered in the registry office of the city of Toronto," is, in the entire absence of evidence as to any such plan, and as to what was known as the "King George Apartments" or as "No. 568 and 570," can be held to supply the omitted part and rights. It would, of course, have been a very different case if the words were, "all the vendor's property known as and used in connection with the King George Apartments," for the omitted parts are a part of and rights used in connection with the land upon which the apartments are built; but there is no evidence to identify them with the apartments, which are the buildings, nor with Nos. 568 and 570, which are only, as far as appears in evidence, the street numbers.

The vendor has resold the property, and so specific performance and equitable rules are out of the question; the parties are upon their strict legal rights in that which is now an action for damages for breach of contract only.

I would dismiss the appeal.

GARROW, and HODGINS, JJ.A., concurred.

Garrow, J.A.
Hodgins, J.A.

Appeal dismissed.

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Jan. 28.

SNELL v. BRICKLES.

Ontario Supreme Court. Trial before Falconbridge, C.J.K.B. January 28, 1913.

1. JUDGMENT (§ I F 2—51)—ENTRY NUNC PRO TUNC AS OF DATE OF ARGUMENT—DEATH OF PARTY IN THE INTERIM.

Where the defendant dies after the argument in a case tried without a jury, no order to continue the proceedings is necessary to enable the court to give judgment, and the judgment may, by virtue of Rule 394 (Ont. C.R. 1897), be pronounced and entered as of the date on which the argument took place.

[See *Gunn* v. *Harper*, 3 O.L.R. 693; *Couture* v. *Bouchard*, 21 Can. S.C.R. 281, and *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554.]

2. VENDOR AND PURCHASER (§ I A—4)—RIGHTS AND LIABILITIES OF PARTIES—TENDER OF DEED.

Although in the absence of a specific provision in an agreement for the sale of land it is incumbent upon the purchaser to prepare the conveyance at his own expense, yet where the agreement recites that part of the purchase price was "to be paid upon the acceptance of title and delivery of deed," with a mortgage to be given to the vendor on the property for the remainder, "said mortgage to be drawn on the vendor's solicitors' usual form," the duty is on the vendor to prepare and tender to the vendee the conveyance especially where the vendor's solicitors wrote to the vendees' solicitors enclosing a draft deed for approval, and on the following day wrote again enclosing a corrected description of the lands to be conveyed.

[*Foster* v. *Anderson*, 15 O.L.R. 362, 371; *Stevenson* v. *Davis*, 23 Can. S.C.R. 629, 633, referred to.]

Statement

AN action for specific performance of a contract for the sale of land by the defendant to the plaintiff.

Judgment was given for the plaintiff.

W. Proudfoot, K.C., for the plaintiff.

J. E. Jones, for the defendant.

Falconbridge, C.J.

FALCONBRIDGE, C.J.:—I am informed that since the argument in this case the defendant has departed this life. I have not yet been notified of probate of will or order of revivor; but it appears that in such a case no order to continue proceedings is necessary to enable the Court to give judgment, and the judgment may be pronounced and entered as of the date on which the argument took place: Con. Rule 394; notes in Holmested and Langton's Jud. Act, 3rd ed. p. 603, and cases there cited.

It is an action for specific performance, the defence being that time was of the essence of the contract, and that the plaintiff neglected to close the transaction on the proper date, whereupon the defendant assumed to rescind the contract.

The transaction was not closed on account of the illness of the plaintiff's solicitor and his consequent absence from his office on the date of closing and the day preceding.

The plaintiff replies that he accepted the title to the lands, and that it was the duty of the defendant, on or prior to the

15th March, to tender to the plaintiff a properly executed conveyance thereof, with a mortgage, drawn on the defendant's solicitors' usual form, or, at any rate, to have supplied such form as required in and by the terms of the said agreement.

The clause of the contract is as follows:—

". . . for the price or sum of seven thousand five hundred dollars	$7,500
"payable as follows: five hundred dollars	500
"paid to G. W. Ormerod as deposit accompanying this offer, to be returned to me if offer not accepted, two thousand dollars	2,000
"to be paid upon the acceptance of title and delivery of deed, and give you back a first mortgage on the property for the remainder, repayable in 5 years from the date of closing	5,000
	$7,500

"with interest from date of closing at 6 per cent. per annum, payable half-yearly, said mortgage to be drawn on the vendor's solicitors' usual form."

The general rule, in the absence of other provision, is, that the purchaser prepares the conveyance at his own expense: *Foster* v. *Anderson* (1907), 15 O.L.R. 362, at 371; *Stevenson* v. *Davis* (1893), 23 Can. S.C.R. 629, 633. But I think that, here, the reading of the whole clause is, that it was the duty of the defendant to prepare and tender to the plaintiff the conveyance. And I think the defendant's solicitors recognised that duty, because on the 21st February they wrote to the plaintiff's solicitors enclosing a draft deed for approval, and on the following day they wrote enclosing a corrected description of the lands to be conveyed.

I am of the opinion, therefore, that the plaintiff is not in default so as to entitle the defendant to invoke against him the clause in question.

The result is, that the usual judgment for specific performance will be directed, with costs of action, and a reference to the Master to settle the conveyance, if the parties cannot agree. There will be three months' stay from the date of the argument (26th November, 1912).

Judgment for plaintiff.

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Jan. 31.

Re BEAIRD.

Ontario Supreme Court, Lennox, J. January 31, 1913.

1. RECEIVERS (§ I A—2)—APPOINTMENT AS TO DECEDENT'S ESTATE—MISCONDUCT OF EXECUTOR.

A receiver of a decedent's estate may be appointed where the executor has been guilty of misconduct or has improperly managed the estate, or has been guilty of a breach of duty.

[*Middleton* v. *Dodswell*, 13 Ves. 266, referred to.]

2. EXECUTORS AND ADMINISTRATORS (§ III A—65)—SUIT TO PROTECT ESTATE—APPOINTING RECEIVER ON EXECUTOR'S DEFAULT.

Where it appears that the executor of a decedent's estate lives out of the jurisdiction and no one is left in charge of the estate and the executor wholly ignores the Surrogate Court when called upon to account, an order appointing a receiver of the moneys and property of the estate will, if the property is in danger, be made on the *ex parte* application of a beneficiary under the will of the deceased.

[*Rawson* v. *Rawson*, 11 L.T. 595, referred to.]

3. INFANTS (§ III—40)—ACTION TO PROTECT INFANT'S PROPERTY—RECEIVERSHIP.

A receiver will be appointed to a decedent's estate where it appears to be necessary in order to protect the interests of an infant.

[Kerr on Receivers, 6th ed., p. 15, referred to.]

Statement

MOTION by Annie Regan, a beneficiary under the will of William Beaird, deceased, for an order appointing the Union Trust Company receiver of the moneys and property of the estate, for the reason that the executor lived out of the jurisdiction and had refused to account.

W. J. Elliott, for the applicant.

Lennox, J.

LENNOX, J.:—I think the beneficiary Annie Regan has made out a case for the appointment of a receiver in this matter.

A receiver will be appointed where the executor has been guilty of misconduct, or has improperly managed the estate, or has been guilty of a breach of duty: *Middleton* v. *Dodswell*, 13 Ves. 266; *Gawthorpe* v. *Gawthorpe*, [1878] W.N. 91; *Evans* v. *Coventry*, 5 DeG. M. & G. 911.

The time which has elapsed without accounting and without information, and the executor's disregard of the proceedings in the Surrogate Court, clearly bring him within these rules and principles.

So, too, a receiver should be appointed where it appears, as it does in this case, to be necessary in order to protect the interests of an infant: Kerr on Receivers, 6th ed., p. 15; and where a sole executor resides beyond the jurisdiction of the Court: *Noad* v. *Backhouse*, 2 Y. & C. Ch. 529; *Westby* v. *Westby*, 2 Coop. Temp. Cott. 210, and particularly if the beneficiaries are unable to get an account from the persons left in charge of the estate: *Dickens* v. *Harris*, [1866] W.N. 93, 14 L.T. 98.

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Here the case is stronger, for there is no one left in charge, and the executor wholly ignores the Surrogate Court when called upon to account.

Generally speaking, however, the order should not be made *ex parte*, but it may be where the property is in danger: *Rawson* v. *Rawson*, 11 L.T. 595; and upon the ground of absence from the jurisdiction and other causes above-stated.

I have not found in the papers filed anything to shew that Albert E. Knox renounced or is dead. Before the order issues, there must be an affidavit filed shewing that John Beaird is, and how he became, sole executor.

The order shall reserve the right to the executor to make application to be reinstated within twenty days after service upon him of the order.

Judgment accordingly.

CAMERON v. HULL.

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Jan. 10.

Ontario Supreme Court. Trial before Boyd, C. January 10, 1913.

1. SPECIFIC PERFORMANCE (§ I E—35)—DOUBTFUL TITLES—DECISION ON VENDOR AND PURCHASER APPLICATION.

A dismissal of a summary application made by a vendor under the Vendors and Purchasers Act (Ont.), is not decisive on the question of title so as to preclude the vendor from bringing an action for specific performance, since the whole case is not exhaustively treated on a vendor and purchaser summons, but the proceedings merely deal with isolated points arising out of or in connection with the contract of sale.

[*Re Walsh*, [1899] 1 Ch. 521, referred to.]

2. JUDGMENT (§ II D 2—118)—SUMMARY APPLICATION UNDER VENDORS AND PURCHASERS ACT (ONT.).

In an action for specific performance of a contract for the sale of land, any point previously decided on a summary application under the Vendors and Purchasers Act (Ont.) relating to that contract cannot be reviewed. (Dictum *per* Boyd, C.)

[*Thompson* v. *Roper*, 44 L.T. 507, referred to.]

3. VENDOR AND PURCHASER (§ I C—10)—DOUBTFUL TITLE—CONSTRUCTION OF WILL—SUMMARY APPLICATION.

Where the vendee of land, under a contract for the sale thereof, raises a question of the doubtfulness of the vendor's title by reason of testamentary language in a will in the vendor's chain of title, the proper practice is for the matter of construction to be brought up on originating summons with all parties before the court, and this may be done pending a summary application under the Vendors and Purchasers Act (Ont.) for an opinion on some point arising out of or connected with the contract.

[*Re Nicholas*, [1910] 1 Ch. 45, referred to.]

Statement

AN action for specific performance of a contract. See *Re Cameron and Hull*, 1 D.L.R. 917, 3 O.W.N. 807.

Judgment was given for the plaintiff.

R. G. N. Weekes, for the plaintiff.

T. G. Meredith, K.C., for the defendant.

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BOYD, C.:—Cameron is vendor and Hull is purchaser of forty acres of land in North Dorchester. The purchaser objected that Samuel James Henderson, under whom the vendor claimed, had not the fee of the land, and required that a release from the heirs of Mary Jane Henderson should be procured. On this point the vendor applied in a summary way under the Vendors and Purchasers Act to have it declared that the objection was not valid, the outcome of which was that the motion was dismissed with costs "leaving the vendor to seek such other remedy, if any, as he may be advised in the matter:" 3 O.W.N. 807, 1 D.L.R. 917.

This action being brought in apparent pursuance of that leave, it is now broadly objected by the defendant (purchaser) that the question of specific performance, as between them, has been definitely and finally settled by the dismissal of the summary application, and that such decision is to be treated as res judicata.

The situation must be examined. The testator disposed of the land in these words: "I give to my mother Mary Jane Henderson and to my brother Samuel James Henderson jointly. . . . the farm on which we live to have and to use or to sell as they may choose; each to be entitled to the benefit of one-half of the product of the farm and chattels. But it is hereby clearly understood and designed that my mother shall have no power to sell or convey any part or portion of the whole of what is hereby given to her by this will; but is only to have a share of the proceeds for her use during her life. And at my mother's death then the whole of my interest in this estate . . . is to go to my brother Samuel James Henderson as above to have and to hold as and for his own or to dispose of as he may wish."

This will was made in August, 1894; the testator died before February, 1896, when the will was registered (no probate has been issued); and the mother has died—no attempt having been made to sell the land during her life.

Pending the summary application, a direction was given by Mr. Justice Clute that the representatives of the deceased mother should be added as parties and be bound by the proceedings and order to be made therein. These representatives are also made parties to this action, but have in no way, earlier or later, intervened actively in the litigation.

Sutherland, J., doubted as to the power to bring in the representatives of the mother; and, as to the will, though he thought the mother took no more than a life estate, still he thought it possible that a different opinion might be held by another. He made no further order, though he may have thought that, as between the parties, the title was too doubtful to be forced on an unwilling purchaser.

The title was not found to be bad; and I think, after the length of time possession was held under the brother, it could fairly be said to be a good holding title, even if the frame of the will was doubtful.

Speaking for myself, I would say that the Judge might well have held that the title was good without any release from the representatives, and I can clearly and unquestionably so declare in the present action, to which the representatives are will was doubtful.

It was with a view of some such proceeding as this that the leave was given by Mr. Justice Sutherland, as I have ascertained from him. Even without that leave, there was no res judicata on the question of title. The summary proceedings under the Act afford a convenient and inexpensive way of getting the opinion of the Court on isolated points arising out of or connected with the contract. The real question here was, whether a release from the heirs of the mother was needful in a proper conveyance of the farm. Sutherland, J., abstained from declaring that the title could not be forced on the purchaser, and rightly so, because, as pointed out by Kekewich, J., in *Re Walsh*, [1899] 1 Ch. 521, the whole case is not exhaustively treated on a vendor and purchaser summons, and to reach such a conclusion is really a matter for decision in an action for specific performance.

Any point expressly decided by a Judge summarily cannot be reviewed in an action for specific performance, and this is all that is meant or decided in the case relied on by Mr. Meredith of *Thompson* v. *Roper*, 44 L.T. 507 (1881).

Apart from the question on the will raised before my brother Sutherland, the purchaser started a claim that the vendor had released him from the contract and had sold to another. This contention is also set up in the pleadings before me (par. 8 of defence), but no evidence was offered to substantiate it. But for this contention the proper practice in cases of doubtful title arising out of testamentary language is for the matter of construction to be brought up on originating summons with all parties before the Court, and this might have been done pending the application under the Vendors and Purchasers Act: see *Re Nicholas*, [1910] 1 Ch. 45.

The claim as to cancellation of the contract called for an action to determine the whole controversy; and, as a consequence of this excessive litigation, much outlay for costs has been incurred. The purchaser obtained his costs under the vendor and purchaser application, and he should pay costs of this action, in which he fails. But the Taxing Officer should not allow for any of the documents copied out in extenso in the statement of claim.

The application was dismissed on the 6th March, 1912, and

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the order was entered on the 23rd March. On the 16th March, the purchaser wrote withdrawing from the contract and refusing to complete. The action for specific performance was begun on the 4th May, 1912. The purchaser might have taken possession had he chosen; and notice was given him that the vendor would, without prejudice, dispose of the hay on the land and look after the weeds pending the result of the action. Evidence was given that the property had become deteriorated to the extent of $300. But that is far beyond the mark; the deterioration will be far more than covered by the $75 to be paid for the hay—a sum which will enure to the benefit of the defendant, Hull. Judgment will be for the balance of the price, $2,800, and in strictness he should also pay interest, some $160 or so. But I will act on the offer of the plaintiff to take $2,800 and the $75 without interest. The land is vested in the defendant, who is to pay $2,800 in a month and costs of action—with a lien on the land till paid; the plaintiff is to collect the $75 from Broughton.

Judgment for plaintiff.

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COX v. CANADIAN BANK OF COMMERCE.

(Decision No. 3.)

Manitoba Court of Appeal, Perdue, Cameron, Haggart, JJ.A. February 24, 1913.

1. COSTS (§ I—2(*d*))—TAXATION—COUNTERCLAIM.

Where the plaintiff fails in his action and the counterclaiming defendants succeed on their counterclaim, the rule is to allow the defendants their general costs in the action and additional costs so far as the costs have been increased by reason of the counterclaim.

[*Cox* v. *Canadian Bank of Commerce*, 8 D.L.R. 30, affirmed; *Saner* v. *Bilton*, 11 Ch.D. 416, and *Atlas Metal Co.* v. *Miller*, [1898] 2 Q.B. 500, applied; *Les Soeurs* v. *Forrest*, 20 Man. L.R. 301, applied.]

Statement

APPEAL from decision of Galt, J., *Cox* v. *Canadian Bank of Commerce*, 8 D.L.R. 30.

The appeal was dismissed.

J. Galloway, for plaintiff.

C. H. Locke, for defendants.

Perdue, J.A.

PERDUE, J.A.:—This is an appeal from an order of Galt, J., *Cox* v. *Canadian Bank of Commerce*, 8 D.L.R. 30, affirming the taxation of the costs allowed to the defendant by the senior taxing officer.

The decision of the Court under which the taxation took place is reported, *Cox* v. *Canadian Bank of Commerce*, 21 Man. L.R. 1, affirmed *Cox* v. *Canadian Bank of Commerce*, 5 D.L.R. 372, 46 Can. S.C.R. 564.

The suit was brought to compel the return of a note made by the Finch Co., Limited, and endorsed by the plaintiffs as sureties, on the ground that the note had been handed to the bank for discount only, that the bank had refused to discount

the note and had improperly retained it. The defendants denied that the note had been left with them for discount and alleged that it was lodged with and held by them as collateral security for past and future advances to the Finch Co. The bank counterclaimed for the full amount of the note. The plaintiffs filed a defence to the counterclaim, denying that the note had been negotiated to the bank or that the bank was the holder in due course. The plaintiffs further claimed that there was not, at the commencement of the suit, any indebtedness owing to the defendants from the Finch Co.

The case was tried before Mathers, C.J., who gave judgment in favour of the plaintiffs and dismissed the defendants' counterclaim with costs both of the main action and of the counterclaim. On appeal to the Court of Appeal this judgment was reversed, the plaintiff's action was dismissed with costs, the counterclaim was allowed with costs and a judgment entered for the Bank against the plaintiffs for the full amount of the note. This judgment was affirmed on appeal to the Supreme Court of Canada.

The objection to the taxing officer's ruling applies wholly to the fees allowed by him in respect of the counterclaim at the trial and in the Court of Appeal. He allowed $60 to senior counsel and $30 to junior counsel at the trial, and $100 in the Court of Appeal, all in respect of the counterclaim.

The plaintiffs' contention is that the costs were not substantially increased by reason of the issues raised by the counterclaim, and that nothing more than a nominal fee should have been allowed at each hearing.

Where there is a claim and a counterclaim, it has already been decided by this Court, that, for the purposes of taxation, the counterclaim is to be regarded as a separate action: *Les Soeurs* v. *Forrest*, 20 Man. L.R. 301.

In taxing the costs of a counterclaim where the defendant has succeeded both in respect of the plaintiff's claim and of the counterclaim, the defendant, in addition to receiving the costs of the plaintiff's action, should receive such additional costs as were incurred by reason of the counterclaim: *Saner* v. *Bilton*, 11 Ch.D. 416; *Atlas Metal Co.* v. *Miller*, [1898] 2 Q.B. 500; *Fox* v. *Central Silkstone Colliers*, [1912] 2 K.B. 597. If the work in respect of which a fee on a counterclaim is claimed related both to the claim and the counterclaim, the fee should be apportioned between the two.

In the present case the plaintiffs denied that there was any sum due to the defendants from the Finch Co. when the suit was commenced, and that, therefore, the principal debt having been paid, the defendants had no claim upon the note in question. They also contended that if the note had been lodged with the bank as collateral security, it was only intended to

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apply to trade discounts and not to apply generally to the indebtedness of the Finch Co. Both of these contentions arose directly under the defendants' counterclaim. Considerable evidence was directed to the elucidation of these two points and a very considerable portion of the argument, at all events, in the Court of Appeal, was directed to these points. It would therefore appear that the counterclaim and the defence thereto raised substantial issues, which were quite separate and distinct from the issues raised by the plaintiffs' statement of claim. I am, therefore, of opinion that the taxing officer was justified in allowing the fees complained of.

While in full accordance with the conclusion at which Galt, J., arrived, I would, with great respect, differ from the view he appears to take that because a successful party loses a large amount on his bill by reason of the statutory limit being applied, the taxing officer might take that into account in dealing with the costs of a counterclaim in the same action. I think the taxing officer must be guided by the principles referred to in the above cases, and allow only such costs in respect of the counterclaim as were incurred by reason of it, and were not incurred by reason of the plaintiffs' claim.

The appeal will be dismissed with costs.

Cameron, J.A. CAMERON, J.A., concurred with judgment of HAGGART, J.A.

Haggart, J.A. HAGGART, J.A.:—The plaintiffs having failed in the original action pay the general costs of the action, and the defendants having succeeded on their counterclaim, should have additional costs so far as they have been increased by reason of that counterclaim. This is the principle laid down in *Saner* v. *Bilton*, 11 Ch.D. 416, by Mr. Justice Fry, after consultation with the taxing masters and which was followed by the Court of Appeal in *Atlas Metal Co.* v. *Miller*, [1898] 2 Q.B. 500.

The plaintiffs contend that the counterclaim involved no matters of law or of fact different from those involved in the claim, that no extra work was entailed, no increased amount of costs was incurred by reason of the counterclaim and that the counterclaim was in effect disposed of by the disposition of the claim.

A perusal of the proceedings does not sustain this contention. It is plain that there were additional issues on the record and additional evidence was necessary and was given. It was for the Master to ascertain what additional costs were incurred and as he proceeded upon the correct principle, I would hesitate before interfering with his finding. I think $190 for the extra costs for the trial and the appeal is not excessive. I would dismiss the appeal against the judgment of Mr. Justice Galt, who affirmed the decision of the taxing master.

Appeal dismissed.

O'REGAN v. CANADIAN PACIFIC R. CO.

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New Brunswick Supreme Court, Barker, C.J., Landry, McLeod, White, and McKeown, JJ. June 21, 1912.

1. MASTER AND SERVANT (§ II B 2—133)—SERVANT'S ASSUMPTION OF RISK —GANGWAY—SHIPPING CASES.

Where a longshoreman is engaged by shipowners to assist in unloading a ship, he must be taken to have assumed the risk of defects in the placing and securing by the ship's officers of the gangway over which he must board the ship to get to his work.

[*Saint John Gas Light Co.* v. *Hatfield*, 23 Can. S.C.R. 164, distinguished; *Coldrick* v. *Partridge, Jones & Co.*, [1910] A.C. 77, referred to.]

2. MASTER AND SERVANT (§ II E 5—245)—FELLOW SERVANTS—COMMON EMPLOYMENT—SELECTION OF WORKMEN BY A TRADE UNION—ASSIGNMENT TO SERVICE.

Where an agreement had been made between shipowners and a society or union of longshoremen whereby the latter undertook to supply to the shipowners the requisite number of men as and when required at a stated rate of wages payable individually to each man employed and for the time only for which he worked, the fact that the selection of the employees was left to the union and that the shipowners had agreed not to discharge any of the men except through the union's foreman employed along with them does not prevent their being employees of the shipowners when they are assigned for duty and enter upon the work, where the foreman himself might have been dismissed by the shipowners and the latter were not only the paymasters but retained the power of controlling the work; and the longshoremen are, therefore, to be considered fellow servants with the officers and men of the ship in a common employment.

[*Sadler* v. *Hemlock*, 4 El. & Bl. 570; *Jones* v. *Scullard*, [1898] 2 Q.B. 565, and *Cameron* v. *Nystrom*, [1898] A.C. 308, referred to.]

3. EVIDENCE (§ III—369)—SECONDARY EVIDENCE—MATTERS IN WRITING.

Where secondary evidence of the contents of a written document has been given without objection, or a statement has been made by counsel and accepted by both sides as a correct version of the document, although there is no evidence of its loss or destruction, the court must construe its meaning in the same manner as if it had been produced.

Statement

MOTION to set aside the verdict for plaintiff in an action to recover damages for negligence causing personal injuries to the plaintiff, while employed in unloading one of defendant company's steamers at St. John, N.B.

The case had been tried before Barry, J., and a jury in the King's Bench Division at the Saint John Circuit, and a verdict entered for the plaintiff for $2,000 upon the answers of the jury to questions as follows:—

Questions by the Court.

1. Q. Were the defendants' employees upon the steamer guilty of negligence in the placing and lashing of the gangway? A. Yes.

2. Q. Did the defendants' agents upon the steamer give reasonable warning to the plaintiff not to ascend the gangway at the time he did? A. No.

3. Q. Did the defendants' agents upon the wharf give reasonable warning to the plaintiff not to ascend the gangway at the time he did? A. No.

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4. Q. Was the plaintiff himself guilty of negligence in going up the gangway at the time he did? A. No.

5. Q. Was the plaintiff forbidden by Detective Welch to go up the saloon gangway, and told to board the vessel by the forward gangway? A. Yes.

6. Q. If the injury was caused by the negligence of the defendants' servants, was the plaintiff a fellow-servant of the company with such servants and engaged with him in a common employment? A. No.

7. Q. At what amount, if any, do you assess the damages? A. $2,000; 2½ years at $400 = $1,000; doctor and drugs, $200; 4 years at $200 = $800. Total $2,000.

Questions by defendants.

1. Q. Was the plaintiff injured by the negligent act or omission of the defendants, or their servant or servants? A. Yes.

2. Q. If "Yes," by whose negligent act or omission was the plaintiff injured? A. By steamer officer.

3. Q. If "Yes," could the plaintiff, by the exercise of ordinary care, have avoided the consequence of such negligence? A. No.

4. Q. If the injury was caused by the negligence of the defendants, or their servant or servants, in what did such negligence consist? A. Of not fastening the gangway.

Argument

F. R. Taylor, for the defendant, moved to set aside a verdict for the plaintiff and to enter a verdict for the defendant, or for reduction of damages or for a new trial. There was misdirection in charging that there was no evidence of contributory negligence on the part of the plaintiff. The evidence was clear that the plaintiff rushed up the gangway without waiting to see if it was secure. The negligence charged was that Latta, one of the officers of the defendant's steamship, did not lash the gangway. The plaintiff was a fellow servant of Latta's and took the risk of his negligence. The grade of employment makes no difference where the two servants are servants of the same master: *Morgan* v. *Vale of Neath R. Co.*, L.R. 1 Q.B. 149; *Tunney* v. *Midland R. Co.*, L.R. 1 C.P. 291; *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326; *Howells* v. *Landore Siemens Steel Co.*, L.R. 10 Q.B. 62; *Hedley* v. *Pinkney Steamship Co.*, [1894] A.C. 222; *Charles* v. *Taylor*, 3 C.P.D. 492; *Swainson* v. *The North-Eastern R. Co.*, 3 Ex. D. 341; *White* v. *Canadian Northern R. Co.*, 20 Man. L.R. 57. We submit there is no evidence of negligence.

Baxter, K.C., for the plaintiff, *contra*:—There is another element in this case besides common employment. The plaintiff was directed to go upon the gangway by the defendant's shore captain. There was no common employment until the plaintiff got on board the ship. The plaintiff was invited to go on board by defendant's agent, who should have known that the gangway was safe. The plaintiff is a ship labourer or longshoreman. These men are supplied by the local society, and the defendant had no choice of them.

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Argument

(Barker, C.J., referred to *Hatfield* v. *The St. John Gas Light Co.*, 32 N.B.R. 100.).

The men here had not arrived at their work. The plaintiff and Latta were not employed in any common scheme. They came into contact in their work; that is all. The plaintiff did not expect to incur risk until he got on board. The question whether there was common employment was a question for the jury and I am entitled to the benefit of their finding because there was evidence to support it: *Union Steamship Co.* v. *Claridge*, [1894] A.C. 185; Beven on Negligence, 1908, 3rd ed. (Can.), p. 672; *Smith* v. *London & St. Katharine Docks Co.*, L.R. 3 C.P. 326.

F. R. Taylor, in reply:—The statement of claim alleges that the plaintiff was in the employ of the defendant so that the plaintiff's employment must have begun.

Barker, C.J.

BARKER, C.J.:—The plaintiff was one of a gang of longshoremen employed to discharge the cargo of the steamer "Empress of Ireland" belonging to the defendants on her arrival at St. John on one of her voyages from Liverpool. He was proceeding to go on board the steamer in company with others of the gang to commence work, by means of a gangway provided by the steamer and which was being secured for that purpose by one of the officers of the ship, when the fastening gave way and the plaintiff was thrown to the steamer's deck, and seriously injured. At the trial before Barry, J., and a jury, a verdict was entered for $2,000, the amount assessed by the jury, who found that the accident took place through the negligence of the defendant's servant, and that there was no contributory negligence on the plaintiff's part. So far there is not any substantial difference between the parties. This being an action at common law, the defendants have set up the defence of common employment and it is to that point I shall direct the few observations I deem it necessary to make in view of the thorough manner the facts have been dealt with by my brother McKeown. Among other questions submitted to the jury was the following:—"If the injury was caused by the negligence of the defendant's servants, was the plaintiff a fellow servant of the company with such servants and engaged with them in a common employment?" This question was answered in the negative and upon that finding in conjunction with the answers to the other questions, the Judge entered the verdict in favour of the plaintiff. It is now contended that notwithstanding that finding, the evidence sustained the defence of common employment, and judgment should be entered for the defendants. There is no objection made to the admission or rejection of evidence, none as to the direction to the jury and none as to the form of the ques-

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tions. The question which I have given is an exact copy of one submitted to the jury in *Hatfield* v. *The Saint John Gas Light Co.*, 32 N.B.R. 100. When that case came before the Supreme Court of Canada the finding of the jury was considered sufficient to sustain the judgment of this Court in favour of the defendant: *Saint John Gas Light Co.* v. *Hatfield*, 23 Can. S.C.R. 164. On my first consideration of this present case I came to the conclusion that it was really disposed of by the case I have just cited, and though I should not myself have reached the same conclusion as the jury did, there seemed to me sufficient evidence to support it. On further consideration, I think that notwithstanding the answer of the jury, the verdict should have been entered for the defendants. There is this distinction between the two cases. *Saint John Gas Light Co.* v. *Hatfield*, 23 Can. S.C.R. 164, depended altogether upon oral testimony from which the jury were to determine whether or not Hatfield was at the time of the accident in the employ of the gas company as their servant and in that way a fellow servant with the company's servant whose negligence caused the accident. In the present case the relation between the plaintiff and the defendants arises from a written contract which it is for the Court to construe; for although this action is not based on the contract, its terms must be looked to and construed in determining whether as a result of its provisions the relation of master and servant regards this special work was created. For some reason which does not appear from the report of the trial, this written agreement was not produced, nor is there any evidence of its contents, except in one or two particulars, given by the witnesses. Mr. Taylor the defendants' counsel made a statement of its contents or perhaps of the effect of its contents and that statement was accepted without objection as a correct version of the agreement, and as such, I feel bound to treat it. In Taylor on Evidence, sec. 36, the following rule is laid down:—

> If a document be lost, and oral evidence be given of its contents, the Judge must construe its meaning in the same manner as if it had been produced, but the jury may, of course, in such a case be called upon to declare whether they believe the oral testimony,

for which the author cites *Berwick* v. *Horsfall*, 4 C.B. (N.S.) 450. This rule is in my opinion applicable to the present case where secondary evidence of the contents has been given without objection or a statement made and accepted by both sides as a correct version of the instrument, although there is no evidence of the loss or destruction of the instrument itself. The statement of Mr. Taylor the defendants' counsel is thus reported, in the official stenographer's report of the trial:—

> An agreement was made between the Canadian Pacific railway and a number of men who signed the agreement and put up a deposit of $1,000

guaranteeing that they would work for the Canadian Pacific railway during a certain period of years, at a certain rate of wages stated in the agreement. This money was deposited with two trustees; and the Canadian Pacific Railway hires those men and agrees to hire them to do their work as long as they work at that rate of wages and do the work in a satisfactory way, and the particular men out of this crowd for any particular vessel are selected by someone who is a member of the Longshoremen's Union, I presume, and he picks such men as have entered into this agreement.

The evidence shews and it is not disputed, that the foreman picks out the men for his gang, that the defendants have no right to discharge the men, but if the foreman won't discharge the man the defendants can discharge the foreman. The defendants also pay the men individually and not through the foreman, and the men are working for the defendants. The evidence also shews that these men take their orders from the defendants' marine superintendent Capt. Elliott or Capt. Walsh, that the men are under their charge and orders and that everything to do with the docking of the ship and discharge of her cargo and baggage is done under the directions of the superintendent. This evidence is not disputed.

It was the duty of the defendants on the arrival of their steamer to discharge their cargo for St. John and deliver on the wharf the baggage of the passengers landing there. To have this done by the steamer's crew is not an up-to-date method of doing such work and in consequence the plaintiff and others in similar lines of work are employed for the purpose. The employment was therefore to do work which the defendants were bound to do and which was therefore their work. In what capacity then was the plaintiff acting? Was he an independent contractor? Clearly not. Was he the servant of the defendants whose work he was to do and by whom he was to be paid, or was he the servant of the union of which he was a member and under whose control he was to some extent acting under the immediate orders and control of the foreman of the gang in which he was working? In other words does the agreement mean that the union or some other officer of it was to do the work for the defendants by men selected from those who were parties to the agreement or does it mean that the union were only to select and furnish the men for the purpose to the defendants who were to work as their servants though under their own foreman. The latter is to my mind the correct conclusion. The union did not as such carry on the business of discharging steamers. They regulated the conditions upon which the members should do that work for others. To hold otherwise would I think be at variance with the ordinary meaning of the language as found in a contract of the kind under discussion. In *Hall and Wife v. Lees et al.*, [1904] 2 K.B. 602, it appeared that the defend-

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ants were a committee of an association called the Oldham Nursing Association whose object was to provide nurses to attend the sick in that neighbourhood. The female plaintiff was compelled to undergo an operation, and for the purpose two nurses were procured on the application of her medical attendant. Through the negligence of one of them she was seriously injured. She and her husband brought this action alleging that the nurse was the servant of the committee for whose negligent acts they were responsible. There were printed rules and regulations subject to which the nurses were employed. The question was whether the nurse was the servant of the committee at the time of the accident, or that of the patient for whom and by whom she was employed. The jury found in answer to a question left to them that the defendants undertook to nurse the plaintiff through the agency of the two nurses as their servants. The question was whether that finding could be supported. Collins, M.R., says (p. 611):—

> Under the circumstances the question seems to me to be, not one of fact for the jury, but really one of law for us—namely, what, upon the construction of the rules and regulations of the association and other documents, there being no dispute of fact involved, was the true nature of the contract entered into by the defendants? It appears to me clear, when the rules and regulations of the association and other documents are examined, that what the association undertook to do was merely to find and supply nurses, in selecting whom they had employed all reasonable care and skill in order to ensure their being competent and efficient.

At page 614 the Master of the Rolls continues:—

> Therefore, when the association sent the nurses, I do not think they were sending them to do in their place that which they had themselves undertaken to do. They never undertook, as it seems to me, to nurse the female plaintiff, but only to supply a competent nurse for that purpose.

There are other elements entering into the question than the mere contractual employment. Who is the paymaster liable to the servant? Who has the control of the work? Who has power to discharge the men? These are all questions pertinent to the main inquiry. In *Sadler* v. *Henlock*, 4 El. & Bl. 570, Crompton, J., says (p. 578):—

> The test is whether the defendant retained the power of controlling the work.

In *Charles* v. *Taylor Walker & Co.*, 3 C.P.D. 492, at page 498, Lord Thesiger relies upon the payment and the power to discharge, and Lord Russell in *Jones* v. *Scullard*, [1898] 2 Q.B. 565, at p. 573, says that the important element to determine whether a person is the servant of one person or the other in relation to a particular business is which of the two had the control of him in the conduct of that business. So in the case

of stevedores who, according to English authorities at all events, are not servants of the owners of the ship, but independent of them with entire control over their men (*Murray* v. *Currie*, L.R. 6 C.P. 24), the Lord Chancellor in *Cameron* v. *Nystrom*, [1898] A.C. 308, at p. 312, says:—

> Reliance was placed upon expressions used in the evidence, with regard to the extent to which the mate and master had the right to direct and control the acts of the stevedore's servants. That does not seem to their Lordships in the least inconsistent with their being the servants of the stevedores and not the servants of the shipowners. There was no express agreement with regard to the extent to which the master and mate should have control over them. That control is only to be implied from the circumstances in which they were employed. The relation of stevedore to shipowner is a well-known relation, involving no doubt the right of the master of the vessel to control the order in which the cargo should be discharged and various other incidents of the discharge but in no way putting the servants of the stevedore so completely under the control and at the disposition of the master as to make them the servants of the shipowner, who neither pays them, nor selects them, nor could discharge them, nor stands in any other relation to them than this, that they are the servants of a contractor employed on behalf of the ship to do a particular work.

There is nothing in the evidence here to shew that the defendants had not complete control over the plaintiff and the work in which he was engaged. It is true that he was subject to the immediate orders of the foreman as all such workmen necessarily are, but the foreman was the defendants' foreman as to that work and subject to dismissal by them. The only objection of any force is that the defendants were by the express terms of the arrangement precluded from discharging any of the men except through the foreman. The evidence is not altogether clear on this point, but assuming the fact to be as I have stated it—and this is the view most favourable to the plaintiff's case—the defendants undoubtedly had the right to dismiss the foreman. So slight a limitation on the defendants' authority to dismiss is unimportant in view of the other facts in evidence.

There is nothing in the point that the work had not commenced when this accident took place. The employment had commenced and the men were at the time on their way to the part of the ship where they were to work and going as they were directed by the defendants' officers: *Coldrick* v. *Partridge, Jones & Co.*, [1910] A.C. 77 at p. 80.

The risk of accident such as that which happened was one known to the plaintiff, who was familiar with the means for boarding the steamers, and he must be taken to have assumed the responsibility of the risk as an implied term of the contract.

I think the judgment should be entered for the defendants.

LANDRY, MCLEOD and WHITE, JJ., concurred.

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MCKEOWN, J.:—The plaintiff is a ship labourer residing at St. John, N.B., and on the 2nd day of January, 1909, started to go on board the defendant company's steamship "Empress of Ireland," then lying at her dock at St. John West, to assist in discharging freight from the vessel's hold. It appears that an arrangement had been made between the defendant company and a number of men, whereby the latter agreed, for a certain time, and at a certain wage, to load and discharge the defendant's vessels at the port of St. John, and the defendant company on its part agreed to give to such men whatever work of that nature it had to do at that port. It is not very specifically stated in the evidence, but I think it is to be gathered, that such men belonged to the Longshoremen's Union, an unincorporated labour organization in the city of St. John, but whether its full membership is party to the agreement or not does not appear. In working out the agreement, the facts seem to be that when a ship, belonging to the defendant company is docked, the union is notified, through its foreman, that a certain number of men will be required to discharge her freight, and men who are party to the above mentioned agreement are selected, presumably by some member of the union, to do the work.

The men thus put to work are paid individually by the defendant company through its officials. They do their work under the direction of gang foremen, who are subject to the instructions of the shore captain of the vessel. I think the learned trial Judge summed up the evidence upon this point fairly and accurately by saying to the jury:—

> The crew, the captain, the first officer, the second officer, the extra second, the third and fourth, and all the men are, no doubt, servants and employees of the defendant company. These stevedores and the foremen, I think—at all events, I so direct you, and you will have to take my statement of the law—were also servants of the railway company.

It seems clear from the evidence that the shore captain has full control of the work of discharging and loading the vessel, and, both through their foremen and directly of himself, has full control over the men who do the work, and where occasion arises exercises his right to directly discharge them. The evidence discloses no controversy upon this point. On the day in question plaintiff was ascending the gangway leading from the wharf to the vessel's deck for the purpose of going to work to discharge the cargo, and unfortunately the fastenings of the gangway gave way, allowing it to fall, whereby the plaintiff was precipitated to the dock and sustained considerable injury, and this suit is brought to recover damages therefor. In answer to a question upon that point, the jury have found that the gangway fell because of the negligence of Robert G. Latta, extra second officer of the steamship, who undertook to make it secure,

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and did partially fasten it; and there is evidence upon which such finding can fairly be based. The jury also found that there was no contributory negligence on plaintiff's part, and assessed damages for his injuries at $2,000, for which amount a verdict was entered for plaintiff, with leave reserved to defendant to move to have a verdict entered for it.

Notwithstanding the findings of the jury to the effect that the injury of which plaintiff complains, was caused by a servant of defendant company, and that such servant was not a fellow servant of plaintiff, I am of opinion that plaintiff is not entitled to hold his verdict for the reason that he and Mr. Latta (the extra second officer through whose negligence in securing the gangway plaintiff's injuries were caused) were in fact both servants of the defendant company, and that the risk of such injury was assumed by plaintiff in the contract of hiring and service between the parties to this suit. In determining the liability of a defendant in a case like this, and where there are no disputed facts as to the relationship of the defendant to the negligent and injured parties, the pronouncement of a jury as to whether the latter are fellow servants or not can be of no assistance to the Court, for the liability in such case must turn upon the answer to the question—"What risk the plaintiff must be taken to have known and assumed when he entered defendant's employ?" In other words, in each individual case, as above, does the contract of hiring and service contain an implied condition that the employee assumes the risk in question? Where the facts are admitted to the extent that they are in the present case, it is then, I take it, a matter for the Court to determine in the construction of the contract whether it was an implied condition thereof that such risk was assumed or not. There are cases in which it may be doubtful whether a plaintiff is, in fact, the servant of a defendant whose employee has caused the injury. See *Hatfield* v. *The Saint John Gas Light Company*, 32 N.B.R. 100, and 23 Can. S.C.R. 164, in which defendant's liability turned upon whether the plaintiff was defendant's employee, or whether he continued to be the employee of one F. W. Wisdom with whom the gaslight company had arranged to do certain work in connection with carrying the gas from the company's main to various buildings and street lamps. If Hatfield in the case referred to had left Mr. Wisdom's service, and had become an employee of the gas company, it seems to have been admitted that he would have no ground of action; while if he remained the servant of Mr. Wisdom (which the jury found was the case) the action was maintainable. Dealing with this question of fact in the above case, the jury found that Hatfield was acting under the direction of defendant as a servant of Mr. Wisdom and under Mr. Wisdom's control, and answered "No" to the following question:—

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and a verdict was entered for the plaintiff. On appeal to the Supreme Court of Canada from the judgment of this Court, dismissing a motion to enter a verdict for the defendant, or for a new trial, Mr. Justice Gwynne remarked (p. 171):—

It is sufficient to say that the question whether the plaintiff was the defendant's servant and under their control, and a co-labourer employed in one common employment with the persons who, being servants of the defendants, negligently caused the plaintiff the injury of which he complains, was a mere question of fact, which it was the office of the jury to determine,

and the verdict was sustained. In cases such as the above, where there is dispute as to whether a plaintiff was in defendant's employ or in that of another party, no doubt it is for the jury to say in whose employ plaintiff really was, and in that way to make a finding as to whether the injured party and the negligent party were fellow servants; but, as in the present case, where the undisputed facts shew that both parties were in the employ of the defendant company, I think the question of defendant's liability cannot be determined by answering a question such as is quoted above, which is word for word the same as question 6 submitted to the jury in this case, and to which they also returned a negative answer; but I think the real question is: "Is there to be implied, in the contract of hiring and service, a condition that plaintiff assumed the risk of negligence on the part of Mr. Latta, the defendant's servant who failed to secure the gangway, thereby occasioning plaintiff's injuries?" No controversy is raised as to Mr. Latta's competency and it seems to me to be a question as to whether, under the contract, plaintiff impliedly assumed the risk in question, and I am of opinion that he did. In the case of *Burr* v. *Theatre Royal*, [1907] 1 K.B. 544, it appeared that the plaintiff was engaged as a chorus girl and as she was leaving the stage at the close of a performance, some object fell and injured her. Scenery was being shifted at the time and there was evidence to shew that her injury was caused by the fall of a piece of the scenery handled by the scene shifters. At the conclusion of plaintiff's case, it was contended that plaintiff could not recover because the evidence disclosed that the scene shifters whose negligence caused the accident were in common employment with plaintiff, and the learned Judge adopted that view and nonsuited the plaintiff. This course was upheld by the Court of Appeal, and in his judgment, Collins, M.R., said as follows (p. 553):—

The basis underlying the doctrine of common employment in all the cases appears to be that, under the circumstances, the injured person

must be taken to have accepted the risks involved by putting himself in juxtaposition with other persons employed by the same employer, whose presence is incidental to the occupation in which he is engaged, and cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself. The principle so stated affords an answer to the argument which has often been introduced in these cases, namely, that the person injured is not in the same grade of employment as the person whose negligence occasioned the mischief. That argument appears to be based upon a misconception of the true principle which governs these cases. There may be such a difference between the relative positions of two persons employed by the same employer as to make it plausible to say that they cannot be considered as fellow labourers. But that consideration does not determine the question really involved, which is whether the possibility of negligence on the part of the person who has occasioned the mischief is not one of the risks which, under the circumstances, must be taken to have been accepted by the person injured as incidental to the employment;

and in the report of the same case published in L.J. Rep. N.S. vol. 76, 459, at page 467, the Master of the Rolls is reported as saying:—

> The doctrine of common employment, in fact, is only a branch of the wider doctrine that a person who voluntarily places himself in juxtaposition with other persons, must be taken to accept the perils which are the ordinary incidents of the relationship into which he has chosen to enter. No one can be heard to complain of that which is a reasonable consequence of the position in which he has deliberately placed himself.

The same principles are discussed in the later case of *Coldrick* v. *Partridge, Jones & Co., Ltd.*, [1909] 1 K.B. 530 and [1910] A.C. 77. The facts were that the defendants, who were colliery proprietors, possessed a railway in connection with their colliery and ran a train thereon for the carriage of their colliers free of charge from the colliery towards their homes after the day's work. One of the colliers while being so carried met his death through an accident occasioned by the negligence of servants of his employers engaged in the repair of a bridge over the railway. The point was taken for plaintiff—as in the case now before us—that even if the relationship of fellow workmen existed between the injured and negligent parties, while at work, it could exist only during the hours of labour, and not while plaintiff was returning from his work after the day's labour ceased. The opinion of the Court was, that such relationship exists while going to and returning from work, as well as during the actual hours of employment, and the liability of an employer with reference to means of access to, and departure from, his scene of labour, and its bearing upon the doctrine of fellow servant, was given thorough consideration. The case was tried before Mr. Justice Bray and a jury, and in answer to questions they found that the accident was caused by the negli-

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gence of a mason and engineer, both in defendant's employ, and they could not agree as to whether plaintiff was guilty of contributory negligence. The defence of common employment being raised it was agreed that no question should be put to the jury on that point, but that, if any facts were disputed, bearing on this defence, the Judge himself should find them. As far as the report discloses there does not seem to have been any disputed facts bearing upon this question. Both the negligent and the injured parties were there, as in the case before us, in the employ of the same master, and the reasoning of the trial Judge, as well as that of the other Judges, seems to me to be applicable to the present case.

In his judgment Mr. Justice Bray says in part as follows (pp. 535, 536, 537):—

> Now the train running on this railway was one of the means provided by the defendants to enable their servants to leave the works. They might use the train or walk along roads or ways running through the works. What is the position of a workman who is walking through his employer's works in order to reach or leave the place where he has to work? I think this is really the question I have to answer, because I cannot think that a workman travelling by one of these trains is in any different position from a man walking through the works. The railway is one of the modes of access provided by the employers just as much as any road or way. The workman chooses which he likes just as much as a man may choose to walk up stairs or go up a lift where one is provided. What is his position then? First, is such a man engaged in the course of his employment? . . . It seems to be impossible that the contract of the employer with his servant should be different during the period when he is passing through his employer's works, to or from his work, from that during the period when he is actually at work. The risk the servant runs is of the same character, namely, the risk of some negligence on the part of his fellow servants with whom he is brought into juxtaposition. Why is it to be implied in the absence of any express contract that the employer has taken upon himself the additional responsibility of being liable for the negligence of those fellow servants? There seems to me to be no reason why he should, or why the servant should, ask that he should . . . I can see no reason why the risk which the servant accepts when he enters on his employment should not include the risk he runs while he is actually on his employer's premises going to or from his work . . . A workman may be engaged at large docks. In the course of his employment he may have to cross a movable bridge or gangway, and he has to cross the same bridge or gangway when he goes to his work or leaves it. If the servant having the control of the bridge or gangway be careless, an accident may happen and the man crossing may fall into the water and be drowned. The employer would not be liable in the first case. Is it reasonable in the absence of any express contract that he should be liable in the second? . . . The master does undertake to use reasonable care in that part of the work which he personally undertakes but does not undertake that fellow servants shall use reasonable care, the risk from negligence of the fellow servants being

one which the servant accepts. I come, therefore, to the conclusion that the defence of common employment is properly raised here and is an answer to the action, and judgment must be entered for the defendants.

In the judgment on appeal Vaughan Williams, L.J., said (p. 542):—

All the decisions on the subject appear to me to proceed on the footing that the doctrine of common employment and the consequent exoneration of the master from liability rest upon the basis of its being an implied term of the contract of employment that the servant undertakes the risk of negligence by his fellow servants . . . It was argued that the implied contract only extends to risks which may arise during the time when the workman is actually at work as the servant of his employer. I do not think that there is any such limitation as suggested. For my part I think that the implied term of the contract of service to which I have referred extends to all cases where there is obviously occasion for the use by the workman of means of access to and departure from his work, which are provided by the master and which will be under the management of his servants, so long as those means of access and departure are so provided.

And Lord Justice Farwell in the same case at page 544 of the report says:—

It is true that the contract of employment is, as a rule, silent as to anything beyond the nature and period of the employment and the remuneration for it; but, as in the case of many other contracts, terms have to be implied and read into it, in order to give effect to what must be presumed to have been the intention of the parties.

After referring, with approval, to the judgment of Shaw, C.J., in the American case of *Farwell* v. *Boston and Worcester Railroad Corporation*, 45 Mass. 49, the learned Lord Justice goes on to say (p. 545):—

Therefore, in my view, the question must depend on the true construction of the contract between employer and employed whether express or implied.

On the case being carried to the House of Lords, the appeal was unanimously dismissed, see [1910] A.C. 77. In delivering his judgment in the House of Lords, the Lord Chancellor said (p. 80):—

The real argument, if the appeal is to prevail, must be that the risk was not really incidental to the service and that, therefore, there was no contract to be implied on the part of the deceased to take the risk of that journey . . . On these facts are we to imply a condition that the deceased took the risk of the negligence of the servant who left the scaffolding too near the line and thereby caused this accident? I think Vaughan Williams, L.J., states the conclusion accurately in his judgment: "The implied contract which arose as between the defendants and the servant was this:—Whenever I avail myself of the means of access which I see provided for myself at this colliery for the men on occasions of access or departure, I will take the risk of the negligence of those ser-

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vants of yours who have the control of the railway, or have the control of—not the running of the carriages—but also the roadway itself and its necessary adjuncts, such as bridges or reparation of the four-foot way or anything else. I take these risks."

Now the plaintiff in this present case has been a longshoreman for some fifty years or thereabouts. He knew that to reach the deck of a vessel it is necessary to go up a gangway which must be attached to the ship to ensure safety. Unfortunately, in the instance before us, it was not securely fastened and for that reason he was injured. But, accepting the finding of the jury that his injury was caused by the negligence of the servant of the defendant company in not fastening the gangway and apart from the guidance afforded by the authorities alluded to, does it not appear conclusive that plaintiff must have known and assumed the risk of such negligence? If not, I would find it difficult to imagine any risk whatsoever which plaintiff could be considered to have taken upon himself. For the reasons given in the decisions above referred to, I think this appeal should be allowed, and that judgment should be entered for the defendant.

Appeal allowed.

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GEORGE v. HUMPHREYS.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and Martin, JJ.A. November 5, 1912.

1. WATERS (§ II J—156)—USE OF WATER FOR IRRIGATION—RIGHTS OF OWNER OF LAND—PRE-EMPTION—POWERS OF PROVINCE—"TERMS OF UNION."

Where by the "terms of union" the Province of British Columbia relinquished to the Dominion its right to administer lands up till then held by the Crown in right of the Province, and these lands were to be ascertained when the route of the Canadian Pacific Railway was fixed, and were subsequently defined and accepted by an Act of the Dominion Parliament, and by the terms of union, the Province agreed not to sell "in any other way than under right of pre-emption requiring actual residence of the pre-emptor on the lands claimed by him"; the granting of water or the right to divert the same for the purpose of irrigating lands already pre-empted was notwithstanding the "terms of union" within the powers of the Province until the lands relinquished to the Dominion were defined and accepted by the Act of the Dominion Parliament.

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Statement

AN appeal by the plaintiff from the judgment of Gregory, J., *George* v. *Michell*, 16 B.C.R. 510, dismissing an action for wrongful obstruction and diversion of water.

The appeal was allowed.

Maclean, K.C., for the appellant.
Craig, for the respondent.

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Macdonald, C.J.A.

MACDONALD, C.J.A.:—This action was brought for an injunction to restrain the defendant from abstracting water for irrigating land from a stream sometimes in the case called Peterson creek and sometimes "Jacko." I shall call it Peterson creek because it appears to me to make no difference in the result by which name the stream or any part of it is called. The plaintiff claims damages resulting from said abstraction in the years from 1906 to 1910 inclusive.

The plaintiff's lands, which are agricultural lands, were pre-empted under the provincial land laws by her predecessors in title, Jones and Mellors, in 1876, with the exception of one lot which was purchased from the Province in 1878. The pre-empted lots are numbered 453 and 454, and the purchased lot 410, all in group 1, Kamloops Division of Yale District. Lot 410 was patented in 1879, and the others on the 20th October, 1884. Authority pursuant to British Columbia Statute, 38 Vict. ch. 5, sec. 48, to divert four hundred inches of water from Peterson creek for purposes of irrigation was recorded by the proper executive officer of the Province in favour of Mellors on the 12th February, 1877, he then being the pre-emptor of said lot 454; 500 inches from the same stream in favour of Jones for farming purposes was recorded on the 27th August, 1877, he then being the pre-emptor of said lot 453; and 500 inches from Jacko Lake, an expansion of Peterson creek, in favour of Jones and Mellors was recorded on the 25th of June, 1883. In the argument before us no attack was made upon the validity of these transactions commonly called water records, save that the stream being within what is now the "railway belt" the Province could not, because of the terms of union (an agreement entered into between the Province and Dominion in 1871) legally make these grants of water. There were other water records made in favour of the plaintiff's predecessors, but they are subsequent to the 19th April, 1884, and for reasons which will hereafter appear I think are invalid, though the status of the defendant to question them, or the ones above mentioned, may be doubted. As to this I express no opinion as the point was not argued.

The question of the validity of the three records mentioned, being exhibits 1, 2 and 4, depends upon the answer to the question, when did the Province cease to have jurisdiction to alienate water to settlers for irrigating purposes within what is now the "railway belt"? Was it when the terms of union were entered into, or was it when the "railway belt" was, by subsequent statute or statutes, transferred to the Dominion.

These terms and statutes have been judicially noticed and

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construed as to some of their consequences in *The Queen* v. *Farwell*, 14 Can. S.C.R. 392, in which the Court appears to have thought that it was not until 19th April, 1884, or at earliest 19th December, 1883, that the Legislature of the Province had put it out of its power to deal with the lands agreed by the terms of union to be conveyed to the Dominion. Ritchie, C.J., p. 420, said:—

> Therefore, so soon as the Act of the Dominion (47 Vict. ch. 6, April 19th, 1884) adopting and confirming the legislation of the Province (47 Vict. ch. 14, 19th December, 1883) was passed, the line of the Canadian Pacific Railway thus selected by the Dominion Government and adopted by British Columbia passed out of the control of the executive Government of British Columbia, and was held by the Crown as represented by the Governor-General of Canada.

And Lord Watson, in *Atty.-Gen. of Brit. Columbia* v. *Atty.-Gen. of Canada*, 14 A.C. 295, 301, speaking with reference to the terms of union and to the said Provincial statute, said:—

> The obligation (by the terms of union) is to "convey" the lands, and the Act (B.C. 19th December, 1883) purports to "grant" them, neither expression being strictly appropriate, though sufficiently intelligible for all practical purposes. The title to the public lands of British Columbia has all along been and still is vested in the Crown; but the right to administer and dispose of those lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province before its admission into the Federal union. Leaving the precious metals out of view for the present, it seems clear that the only "conveyance" contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands and to appropriate their revenues.

I infer from this that until the actual transfer of the railway lands by the statute of 1883, confirmed by the Dominion in 1884, the Province had not by the terms of union parted with its right to manage and settle its public lands, including those which should afterwards be ascertained by the location of the line of railway to be those to be conveyed to the Dominion, but that such right would cease only when the transfer should have taken place and with respect to those lands only. But if I am wrong in supposing that such inference may be drawn from the language above referred to, and right in thinking that no opposite inference may be drawn affecting this case, I am still of the opinion that the Province had not parted with its right to settle its public lands, including those afterwards defined as the "railway belt," until after the transfer effected by the statutes aforesaid. I have not overlooked the Provincial Act, 43 Vict. ch. 11 (1880), but assuming that Act to have been of any effect before its terms were assented to by the Dominion, there is no evidence in this case that the waters in question here are within the belt there defined, which is different, from Kam-

loops easterly, from that finally selected. This statute would, in any event, only affect the record of the 25th of June, 1883.

The respondent's contention, and that apparently adopted by the Court below, was that by the 11th art. of the terms of union, which provides:—

> That until the commencement within two years as aforesaid from the date of the union of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption requiring actual residence of the pre-emptor on the lands claimed by him;

The Province had surrendered its powers of disposition over its lands, including waters, except to alienate by such right of pre-emption, and that while the settler might acquire land by right of pre-emption under Provincial laws, yet the Province could not grant him water privileges under the same laws although without such the lands would be useless for agricultural purposes—the purposes for which it was intended he should acquire them. It was so notorious that I think I may take judicial notice of the fact that a wide belt through which the railway would pass was a dry territory commonly called the "dry belt," which fact must have been known to the parties to the articles of union; and as a settler's right of pre-emption in this territory without the right to obtain water for irrigating the lands pre-empted would be valueless, I cannot think that a construction of the 11th art. which would bring about that result is the correct one. The line to be followed by the railway was not defined. The articles of union would therefore apply alike to all the public lands of the Province, and not to a defined, or even a roughly defined, area. If the water records now under consideration are invalid, so are all water records made in the Province between 1871 and 1884, whether within the limits of what was afterwards defined and transferred to the Dominion or not. I think the intention, made sufficiently manifest by the terms of union, and the course of conduct of the parties afterwards, was that the Province should retain its jurisdiction over its public lands except as expressly limited in the articles, and should be permitted to settle those lands in the honest sense of that term, which could not be done if the settlers were to be deprived of the appurtenances to their holdings which the Land Act authorized them to acquire, and which were essential to a profitable cultivation of the soil. I can find nothing in the language of the articles of union to justify the conclusion that an interregnum in the administration of the public lands was to be created between their date and the final transfer of the railway lands to the Dominion. Until their transfer the Dominion could exercise no jurisdiction over them. That the settlement of the lands should go on, on the part of one or the other party to the

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articles, is plainly indicated in the articles themselves, and in the final terms arrived at at the time of the transfer, and embodied in the Dominion Act of 47 Viet. ch. 6.

It follows that, in my opinion, the three records, exhibits 1, 2 and 4, are valid.

It is unnecessary to say anything about the defendant's records save that they are invalid as they were made by the Province long after the railway belt was transferred to the Dominion: *Burrard Power Co.* v. *The King*, [1911] A.C. 87. The learned trial Judge thought the last mentioned case was authority for holding that the records which I have held to be valid were not so. Their Lordships had not there to consider the status of records made before the transfer of the railway belt, but only those made thereafter, and the language relied upon by the learned Judge I think must be confined to the facts of that case.

On the merits I have come to the conclusion, after reading the evidence, that the plaintiff is entitled only to nominal damages. It is beyond question that the defendant interfered with and diverted water for several years prior to 1910, which plaintiff was entitled, had she insisted on it, to have flow down Peterson creek into Jacko lake, and thence through the continuation of Peterson creek to the plaintiff's lands, but until the year 1910 the parties were not at arm's length. Some protests were made by or on behalf of the plaintiff, but after various discussions between the parties, there was up to the end of 1909 such condonation on plaintiff's part of defendant's trespasses as to estop her from claiming damages. There was, however, no such estoppel in respect of what was done in 1910, but there is no satisfactory evidence of actual damage in that year. The evidence is that that was an exceptionally dry year from the very beginning, and having regard to the lack of convincing proof that defendant's interference in that year with the water in Peterson creek resulted in damage to the plaintiff, and the finding of the learned Judge who, after a view, held that even if the water had not been interfered with by the defendant, it would, owing to the exceptional dryness of the season and consequent scanty flow of water in the creek, have been absorbed by the soil before reaching the plaintiff, I cannot say that a case of actual damage was made out.

I would allow the appeal, direct that judgment be entered for the plaintiff for a perpetual injunction, and one dollar damages, with costs here and below.

Irving, J.A.

IRVING, J.A.:—I would allow this appeal. The plaintiff's property was pre-empted in 1876, and immediately applications to record water were made. In point of time they were the first to record water on the creek.

The defendants, without doubt, used the water, disregarding the rights obtained by the plaintiffs under their records.

The learned trial Judge based his judgment on the decision given by the Judicial Committee in the *Burrard Power Co.* case, [1911] A.C. 987, which in his opinion declares, in effect, that the Provincial Parliament had no authority subsequent to the 21st July, 1871, to legislate with respect to waters and water rights within the railway belt. I do not think there is anything in the report of the Judicial Committee's decision that is inconsistent with what has been generally regarded as the rule, viz., that the 11th article did not come into effect so as to deprive the Province of its right to legislate in respect of water until the 19th December, 1883, or possibly until the Province and the Dominion had agreed upon and defined the lands to be granted, that is, until 19th April, 1884, when the Dominion Parliament passed 47 Viet. ch. 6, ratifying the settlement entered into by the Provincial and Dominion Governments.

In *The Queen* v. *Farwell* (1887), 14 Can. S.C.R. 392, when the title to the site of the present city of Revelstoke was in dispute, it was held that a grant made to Farwell by the Provincial Government in 1885 was of no effect. Strong, J., took the view that the provincial statute, 47 Viet. ch. 14, passed on the 19th December, 1883, was self-executing and operated immediately and conclusively so soon as the event on which it was limited was to take effect, that is, as soon as the line of the railway was finally located. This date, he said, could be fixed by evidence. Ritchie, C.J., who assumed, but without so deciding, that legislation by the Dominion was necessary to transfer the proprietary interests, fixed the 19th April, 1884, as the true date. In *The Queen* v. *Farwell* (1893), 22 Can. S.C.R. 553, King, J., said the railway belt was transferred by the Provincial Act of 1883, 47 Viet. ch. 14, that is, on 19th December, 1883, and in *The Queen* v. *Demers* (1894), 22 Can. S.C.R. 482, Gwynne, J., in whose judgment all the other members of the Court concurred, seems to take the view that it was to the joint action of the two parliaments, and not the 11th article that the title of the Dominion to the railway belt should be attributed. That case would therefore fix the 19th November, 1884. In the *Precious Metals Case, Atty.-Gen. B. C.* v. *Atty.-Gen. Canada*, 14 A.C. 295, at 300, Lord Watson says the lands forming the railway belt were granted by an Act of the Legislature of British Columbia, 47 Viet. ch. 14, sec. 2 (19th December, 1883).

The Act of 1880 was passed to aid the Dominion Government in constructing the Canadian Pacific Railway between Burrard Inlet and Yellowhead Pass, and at the end of the first section are these words:—

> The grant of the land shall be subject otherwise to the conditions of the said 11th section of the terms of union.

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What these words include is difficult to say, because the term of two years within which work was to commence had long since expired, and the term of ten years was fast running out. Possibly it was intended to reserve to the Province—notwithstanding the wide words "and there is hereby granted"—the right to continue to dispose of the lands under the pre-emption laws.

The line from Burrard Inlet to Yellowhead was never proceeded with, and on 12th May, 1883, an Act was passed by the Province in settlement of all claims by the Province against the Dominion in respect of delays in construction of the Canadian Pacific Railway. The Act of 1880 was amended by eliminating all reference to the Yellowhead Pass, and a new grant was made with reference to the line "wherever it may be finally located."

This Act in turn was repealed on the 19th December, 1883, by 47 Vict. ch. 14, which substituted a new agreement, which, however, was not to be binding until ratified by the Dominion Parliament.

In determining the exact date when the administration of the railway belt passed to the Dominion so as to put an end to the power of the Provincial Government to make grants of water therein, regard must be had to the fact that here we are construing "statutory compacts"—to use Lord Watson's expression—between two governments. Until acceptance there was no compact, and having regard to the express provision for ratification by the Dominion Government set out in the preamble to 47 Vict. ch. 14, I would say that the date of the assent to the Dominion statute, 19th April, 1884, was the true date, and that all records obtained by the plaintiff prior to that date were good and valid. At any rate, if that view is not correct, the date referred to by Strong, J., would be the true date of the transfer.

I do not think it is necessary to refer to any of the Land Acts prior to the Land Act, 1875. The Land Act of 1874 had been disallowed in March, 1875, by the Dominion Government on the ground that no reservation had been made in respect of the railway belt or for the Indians. By the Act of 1875, sec. 48, provision was made for the diverting of unrecorded and unappropriated water, on giving one month's notice, a record was made by the proper officer and thereupon the applicant became entitled to divert the stream.

In *Carson* v. *Martley*, 1 B.C.R. pt. 2, 281, *Martley* v. *Carson*, 20 Can. S.C.R. 634, much discussion took place as to the necessity for proving compliance with the terms of the Act, and as to the omission of details in the application and in the records, but the majority of the Supreme Court of Canada held that the provisions as to notices, etc., were merely directory, and that records imperfect in form should be upheld.

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It would appear then that between the pre-emption of the plaintiff's property and the 19th December, 1883, the plaintiff's predecessors in title had obtained some five records covering some 1,900 inches of water from the creek in question, and before the 8th May, 1880, the day of the Royal assent to the first Act of the Province, two records of 200 and 500 inches respectively. With reference to these two records it seems to me the plaintiff's case is absolutely unassailable, and, on those two records alone, that judgment ought to have been entered for the plaintiff.

But the plaintiff, in my opinion, is entitled to more. All of her records obtained prior to 19th April, 1884, are good and valid, and a declaration to that effect should be made, and an injunction granted to restrain the defendants from interfering with her rights. The plaintiff is also entitled to damages; there may be difficulties in the way of proving the amount of damages, but there is abundant proof that she suffered damages year by year by reason of the defendant's interference with her water rights.

I think the questions settled by this lawsuit might very well have been determined by raising the point of law for decision, and then, if necessary, the question of damages could be settled later.

GEORGE v. HUMPHREYS.

APPEAL by the plaintiff from the judgment of Gregory, J., at trial in favour of the defendant.

The appeal was allowed.

H. A. McLean, K.C., for the appellant.

C. W. Craig, for the respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The principal question of law involved in this case is the same as that in *George* v. *Michell* (*ante*), in which I have just handed down my conclusions and the reasons therefor. It is, therefore, only necessary to consider those phases of the case which differ from the one above mentioned. The only water records upon which the plaintiff can rely as being prior to the transfer of the railway belt to the Dominion, are exhibits 3 and 5, recorded the 8th of August, 1882, and 9th of November, 1883, respectively, and they relate to the waters of Jones lake and Anderson creek only, the defendant's records having been obtained long after the transfer of the railway belt to the Dominion cannot in my view of the case avail them. As in the *Michell* case the only objection urged against the plaintiff's said records was that the waters in question being within the said railway belt, the province had no jurisdiction over them after the agreement of the Union in 1871.

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In both cases the question of riparian rights was discussed, but it is clear to my mind that in this case neither party had riparian rights in Jones lake or Anderson creek. The lands of neither party touched these waters, Jones creek, the outlet of Jones lake, was an artificial channel, and the ownership of lands abutting on it as defendant's lands did, gave no riparian rights in respect of it. The defendants, therefore, have no rights, riparian or otherwise, in the waters of Jones lake and Anderson creek, which are the waters in dispute, and which the defendants admit they diverted before they reached Peterson creek through the channel called Jones creek. It follows, therefore, that the plaintiff's rights under her said records have been infringed by defendants, and that she is entitled to a perpetual injunction and damages. In this, unlike the *Michell* case, there is evidence that the plaintiff objected to defendants'' use of the water in 1909 as well as in 1910, and that she suffered injury through defendants' interference in those years. The learned Judge having decided against the validity of her water records, made no finding on the question of damages. I would, therefore, remit the case back to the Court below to have such damage assessed. I would allow the appeal with costs here and below.

Irving, J.A.

IRVING, J.A.:—I would allow this appeal.

In my opinion the provincial government were administering the lands included in the railway belt till the 19th April, 1884. In the case of *George* v. *Michell* (*ante*) I have set out my reasons for fixing that date as the correct date of the transfer of the railway belt to the Dominion. The plaintiff is entitled to a declaration of the validity of her records of water obtained before the 19th April, 1884, an injunction, and an enquiry as to damages.

The learned Judge took a view of the premises and found a number of facts on the strength of his investigations. The conclusions derived from an inspection in the autumn would be of little value as to what the conditions were in June or July, but, with deference to the learned trial Judge, I think the true object of taking a view was forgotten. A view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence: see *London General Omnibus Co.* v. *Lavell*, 83 L.T. 453.

Martin, L.J.

MARTIN, J.A., concurred with MACDONALD, C.J.A.

Both appeals allowed.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

REX v. RYAN.

ONT.

S. C. 1913

Ontario Supreme Court (Appellate Division), Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.A. January 15, 1913.

BRIBERY (§ I—1)—*Counselling and Procuring.*]—Crown case reserved by Latchford, J.

The defendant was charged under the Criminal Code with counselling and procuring another to bribe a peace officer, and was convicted. The question raised was, whether there was evidence to support the conviction.

The judgment of the Court was delivered by MEREDITH, J.A.:—The defendant was convicted of having counselled and procured the bribery of a peace officer; but there was no evidence of the peace officer having been bribed, nor indeed of any attempt to bribe him having been made; so how can the conviction stand?

On the other count there was a verdict of "not guilty;" and no case has been reserved as to it, so nothing further need be said as to it.

I would answer the second question in the negative; and direct that the defendant be discharged: see the Criminal Code, sec. 1018. The disgraceful conduct of the defendant would be no excuse for his conviction, except as the law provides. *J. Haverson*, K.C., for the defendant. *E. Bayly*, K.C., for the Crown.

Prisoner discharged.

WILLIAMS et al. v. KLINGEL et al.

SASK.

S. C. 1913

Saskatchewan Supreme Court, Brown, J. January 20, 1913.

PRINCIPAL AND AGENT (§ II A—8)—*Authority to sell Land.*]—The plaintiff Williams alleges in his statement of claim that Simon Klingel was the owner of the land in question, and that on or about the 18th day of August, 1910, A. S. Klingel agreed to sell on behalf of an undisclosed principal, which undisclosed principal the plaintiff alleges was Simon Klingel, to Ben Matzka.

On January 3, 1911, B. Matzka, who was added as a plain-

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tiff after action commenced, assigned to Williams all his interest in the agreement for sale with A. S. Klingel. Williams then notified A. S. Klingel as the vendor named in the contract of this assignment. The defendants then repudiated the contract and refused to complete the sale.

In the alternative the plaintiff alleges that in 1907, A. S. Klingel purchased the land in question, and paid therefor and on April 18, 1908, caused the same to be conveyed to Simon Klingel, his father, who gave no consideration, and such transfer being voluntary and without consideration Simon Klingel therefore holds the land in trust for A. S. Klingel, and A. S. Klingel being beneficial owner is therefore bound by his agreement with Matzka. The defendants refuse to complete the sale, and plead that A. S. Klingel had no authority from Simon Klingel to sell the land.

The action was dismissed.

Alex. Ross, for plaintiffs.

H. Y. MacDonald, for defendants.

BROWN, J.:—The authority of an agent not expressly authorized to sell real estate to exercise such power is not readily inferred: 31 Cyc. 1361. After carefully going into the evidence, including those portions of the examination for discovery of the defendants which were put in evidence herein, I am of opinion that I would not be justified in finding that A. S. Klingel had authority to enter into the contract in question on behalf of Simon Klingel, or that Simon Klingel had subsequently ratified such contract. Both of the defendants deny such authorization or ratification, and while there are suspicious circumstances connected with their evidence, yet in view of their positive denial, and in the absence of any positive evidence shewing authorization to sell, I am of opinion that the plaintiffs' action must fail. I am not required to consider what remedy the plaintiff may have as against A. S. Klingel, as no such relief is sought for in this action. Judgment will, therefore, be entered up in favour of the defendants, with costs.

Action dismissed.

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CHAPMAN v. McWHINNEY.

Ontario Supreme Court (Appellate Division), Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. January 27, 1913.

[*Chapman v. McWhinney*, 4 O.W.N. 417, varied.]

BROKERS (§ II B—12)—*Sufficiency of Brokers' Services — Evidence.*]—Appeal by the defendant from the judgment of LENNOX, J., *Chapman* v. *McWhinney*, 4 O.W.N. 417.

THE COURT varied the judgment below by reducing the

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amount to be recovered by the plaintiff for commission from $6,675 to $5,675. In other respects judgment below affirmed. No costs of appeal.

Gordon Waldron, for the defendant.

A. F. Lobb, K.C., for the plaintiff.

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ERRIKKILA v. McGOVERN.

Ontario Divisional Court, Falconbridge, C.J.K.B., Britton, and Riddell, JJ. December 24, 1912.

TAXES (§ III F—148*a*)—*Irregular Sale—Validating Act—Setting aside Tax Deed.*]—Appeal by the defendant from the judgment of LENNOX, J., 4 O.W.N. 195, where the facts are stated.

The appeal was allowed.

J. Bicknell, K.C., for the defendant.

Glyn Osler, for the plaintiff.

BRITTON, J.:—I am of opinion that the appeal must be allowed, upon the sole ground that the sale of the land was validated and confirmed by 10 Edw. VII. ch. 124, sec. 4.

That Act recites that the corporation represented that all tax sales and deeds held and given prior to the passing of that Act should be confirmed. The request was for an Act validating tax sales held, and deeds for lands so sold for taxes.

Section 4: "All sales of land in the city of Port Arthur, made prior to the 31st December, 1908, and which purport to be made by the corporation of the said city for arrears of taxes in respect to lands so sold, are hereby validated and confirmed, and all deeds of lands, so sold, executed by the mayor and treasurer of the said city, purporting to convey the said lands so sold, to the purchaser thereof, or his assigns, are hereby validated and confirmed. . . ."

The tax sale at which the land in question was sold was held on the 15th November, 1908, and the sale purported to be made for taxes on said land for the years 1905, 1906, and 1907, and a deed purporting to convey said land to the defendant was executed by the mayor and treasurer of said city on the 19th January, 1910.

In this case, and solely by reason of the statute, the defendant is protected.

The appeal should be allowed with costs and the action dismissed without costs.

FALCONBRIDGE, C.J.K.B., and RIDDELL, J., concurred in the result.

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McCATHERIN v. JAMER.

ROLSTON v. JAMER.

Supreme Court of New Brunswick, Barker, C.J., Landry, McLeod, White, and Barry, JJ. June 21, 1912.

FALSE IMPRISONMENT (§ II B—12)—*Liability of Magistrate —Issuing Warrant Without Sworn Information—The Peddlers Act, C.S.N.B.* 1903, *ch.* 175.]—Appeals by plaintiffs against the nonsuit entered in each case at the trial of actions for false arrest.

T. J. Carter, K.C., for plaintiffs.

W. P. Jones, K.C., for defendant.

The opinion of the majority of the Court (LANDRY, J., dissenting) was delivered by

MCLEOD, J.:—These actions are exactly alike and can be decided together. The defendant is a magistrate of Victoria county, living somewhere near Perth. These actions are brought against him for false arrest. It appears that the warden of Victoria county telephoned the defendant at his home that the plaintiffs were peddling in Victoria county and had no license to do so, and asked him, the defendant, to issue a warrant for their arrest.

The defendant on that, issued a warrant for the arrest of the plaintiffs, no information having been laid before him, and gave it to a constable named Smith for service; and he, Smith, arrested the plaintiffs under the warrant and took them to Perth. The defendant happened to be at Perth and saw the plaintiffs and told Smith to take them before Mr. McQuarrie, a police magistrate, who lived at Andover. Smith did take them to Andover and the defendant went there at the same time or soon afterwards. Mr. McQuarrie read the warrant on which the plaintiffs were arrested, and asked as to the information on which it was issued. The defendant said he had none. The defendant then asked McQuarrie to try the case, but McQuarrie refused. The defendant then refused to go farther and the men were dismissed. There is no question about the facts. As to the arrest, there is no question that the defendant issued the warrant without having information laid; but it is contended on behalf of the defendant that as the constable who arrested the plaintiffs could have done so under the Act without a warrant, the magistrate would be protected. There is no doubt but that there is a provision in the Act (sec. 6, ch. 175, Con. Stat. 1903, "Respecting Peddlers"), that a constable finding people peddling can arrest them without a warrant.

In this case, however, the constable did not do that; he arrested them by virtue of this warrant. On the trial of the case the jury found, in answer to a question, that the arrest was made

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by Constable Smith by virtue of the warrant issued by the defendant. Whatever defence Constable Smith might have had if he had been sued I think it is not open to the magistrate. The magistrate himself had no authority to issue a warrant for such arrest without sworn information being first laid. He did issue the warrant and ordered the arrest without having any information laid. He issued the warrant without jurisdiction and the constable arrested them under that warrant. Therefore he is liable. The case was tried and the facts submitted to the jury; and they assessed the damages in each case at $15. The learned Judge, after having the damages assessed, ordered a nonsuit to be entered reserving leave to enter a verdict in each case for the plaintiff for $15. The rule therefore will be that the nonsuit be set aside and a verdict entered for the plaintiff in each case for $15.

CONNELY v. HAVELOCK SCHOOL TRUSTEES.

Supreme Court of New Brunswick, Barker, C.J., Landry, McLeod, White, Barry, and McKeown, JJ. June 21, 1912.

MECHANICS' LIENS (§ V—35)—*Public School Property.*]—Appeal by defendants from the judgment of the County Court (County of King's) allowing the plaintiffs' lien for work and materials supplied as sub-contractors on the construction of a public school building; upon a claim made under the Mechanics' Lien Act, C.S.N.B. 1903, ch. 147.

G. W. Fowler, K.C., for plaintiffs.

W. H. Harrison, for defendants.

BARKER, C.J.:—The answer set up by the school trustees is that they, as well as their property, are exempt from the operation of the Lien Act, not by express words, but as a legal result of their holding and using the property as trustees for the benefit of the public, without profit to themselves, and as a part of a general public educational system for the province in effect carried on as a department of the Provincial Government. The Lien Act certainly does not bind the Crown. In order to do that the Crown must be specially mentioned. If the contention can be upheld at all it is on the theory that the school buildings and property from their use and nature are within the protection which the Crown, by its prerogative right throws around its own property or property held and used for its purposes. In England the question has undergone much discussion, more especially in reference to the liability of certain descriptions of property held and used for public purposes to be rated for poor rates. The conflicting decisions on the point seem to have been eventually settled by the House of Lords in *Jones* v. *Mersey*

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Docks, 11 H.L.C. 443, to which Mr. Harrison turned our attention. (Reference to *London County Council* v. *Churchwardens*, [1893] A.C. 562, 585; *The Queen* v. *West Derby*, L.R. 10 Q.B. 283; *Durham* v. *Churchwardens*, [1891] 1 Q.B. 330, and *Tuncliffe* v. *Birkdale Overseers*, 20 Q.B.D. 450, as to the application made in these cases of the decision in *Jones* v. *Mersey Docks*, 11 H.L.C. 443; and to *Coomber* v. *Justices of Berks*, 9 A.C. 61, and *Greig* v. *University of Edinburgh*, L.R. 1 H.L. (Sc.) 348.)

The Mechanics' Lien Act was passed in the interest of workmen and contractors so as to afford them some security by way of a lien on the buildings which had been created by their labour. If the principle is worth anything, it is equally as valuable, in the case of a school building paid for by an assessment on the inhabitants of a school district as in the case of an individual taxpayer erecting a building for his private purposes. The Legislature has expressly exempted from taxation the property of the Crown and the property belonging to common school districts (sec. 3, of ch. 170, C.S.N.B. 1903, "Respecting Rates and Taxes"), and if it was the intention of the Legislature to exempt school property from the operation of the Lien Act it is fair to assume that a special provision for the purpose would have been made.

It was also contended that inasmuch as the enforcement of the Lien Act involved a sale of the property in case of the non-payment of the money, it was inapplicable to a case like this where the buildings could not be seized under execution: *Scott* v. *The School Trustees, Burgess, etc.*, 19 U.C.Q.B. 28, was cited as an authority to shew that school buildings could not be seized under execution. Lord Blackburn, in *Coomber* v. *Justices of Berks*, 9 A.C. 61, at 72, disposed of a similar objection in this way. "I do not much doubt that, if the premises were taxable, means would be found for obtaining payment."

I quite agree in thinking that the public school buildings are not liable to seizure under execution. The Legislature has made ample provision in the Municipalities Act (R.S.N.B. 1903, ch. 165, sec. 131), and in the School Act (R.S.N.B. 1903, ch. 30, sec. 82), for the collection of any judgment against a municipality or against the school trustees. In both cases, as is usual in the case of public corporations holding property for public purposes, special provision by way of assessment or otherwise is made for obtaining the money to pay the debt, and in such cases it is obviously the intention of the Legislature that the method so provided should be adopted. No order for the sale of school property need, therefore, be made.

I have not thought it necessary to consider the question as to whether under Lien Act, an owner can be made liable for an

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amount in excess of his contractual liability. The question only arises here as furnishing an argument against a construction of the Act involving such a result or in favour of an implied exemption of the school trustees if that proved to be the true construction. This question has been the subject of much discussion in the Ontario Courts. The cases are all reviewed in *Farrell* v. *Gallagher*, 23 O.L.R. 130, and, so far as that is an authority, the Lien Act of Ontario does not subject the owner to any liability beyond that which he has himself created. It is difficult to suggest any good reason for imposing any greater liability on owners, even for the protection of wage-earners, where the owner has assumed no such obligation, contractual or otherwise. The question must, however, be determined by the provisions of our own Act; and if its language is too plain and positive to avoid such a construction, it bears upon public bodies and private individuals alike, and both must make provision to meet the loss as they would do in the case of any other loss incidental to building operations.

LANDRY, MCLEOD, BARRY, and MCKEOWN, JJ., agreed with BARKER, C.J.

WHITE, J., concurred in the result, and expressed the opinion that school property could not be sold under execution, having regard to the provision of the School Act, whereby owners whose land has been expropriated for school purposes are entitled to get the land back under the terms and conditions of that statute, should the land no longer be required for school purposes.

MOLSONS BANK v. KLOCK.

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Quebec Court of King's Bench (Appeal Side), Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. October 31, 1912.

[*Klock* v. *Molsons Bank*, 2 D.L.R. 445, 41 Que. S.C. 370, affirmed.]

JUDGMENT (§ II A—66)—*Set-off — Res judicata.*]—Appeal by the defendant the Molsons Bank from the judgment in *Klock* v. *The Molsons Bank*, 2 D.L.R. 445, 41 Que. S.C. 370. The appeal was dismissed. *H. J. Hague*, and *Eugene Lafleur*, K.C., for appellant. *Henry Aylen*, K.C., and *Errol M. McDougall*, for respondent.

KAISERHOF HOTEL CO. v. ZUBER.

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Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin and Brodeur, JJ. June 14, 1912.

[*Kaiserhof Hotel Co.* v. *Zuber*, 25 O.L.R. 194, affirmed.]

MORTGAGE (§ VI G 2—105)—*Sale under Power.*]—Appeal from a decision of the Court of Appeal for Ontario *Kaiserhof*

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Hotel Co. v. *Zuber*, 25 O.L.R. 194, affirming the judgment of a Divisional Court, *Kaiserhof Hotel Co.* v. *Zuber*, 23 O.L.R. 481, by which the judgment at the trial in favour of the plaintiffs was reversed and the action dismissed.

The appeal was dismissed.

Secord, K.C., for the appellants.
Watson, K.C., for the respondents.

The defendant Zuber was holder of a second and a third mortgage on hotel property and the plaintiffs owned the equity of redemption. Under powers of sale contained in his mortgages Zuber took proceedings to sell the property and the plaintiffs brought action to restrain the sale, and obtained an interim injunction which was afterwards discharged. The property was then put up for sale at auction. One Boehmer, acting for the appellants, instructed a man named Fish to bid and he ran the price up to $43,500, the respondent Roos having bid $43,000. At request of Zuber's solicitor the auctioneer inquired of Fish if he was prepared to pay the money if the property was knocked down to him and he requested and was given half an hour to satisfy the mortgagee of his ability to do so. He did not return at the expiration of that time and Roos withdrew his last bid. The property was offered for sale again and knocked down to Roos at $39,500, and was conveyed to him a few days later by Zuber.

The appellants then proceeded with their action to restrain the sale, adding Roos as a party, and alleged that it was not conducted in a fair, open and proper manner; that Roos was not the highest bidder; that the conditions of sale were unduly onerous; that there was collusion between Zuber and Roos to enable the latter to obtain the property for less than its value; and that Roos was acting as agent for Zuber and the sale was not *bonâ fide*.

The trial Judge gave judgment for the plaintiffs on the grounds that the conditions of sale did not furnish full information as to the first mortgage and as to existing leases and liens; that the deposit to be made by the purchaser was fixed at twenty per cent.; and that only seven days were given for the purchaser to make objections to the title. This judgment was reversed by a Divisional Court, which held that no one was deterred from bidding by reason of the conditions and that there was no omission or misstatement of any fact material to be known; that the price obtained for the property was a fair one; and that Roos had a right to withdraw his bid when Fish failed to put up the deposit. This judgment was affirmed by the Court of Appeal and the plaintiffs then appealed to the Supreme Court of Canada.

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THE COURT after hearing counsel for both parties reserved judgment, and at a subsequent date dismissed the appeal with costs.

Appeal dismissed with costs.

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WARREN, GZOWSKI & CO. v. FORST & CO.

Ontario Supreme Court. Trial before Middleton, J. February 3, 1913.

[*Warren* v. *Forst*, 8 D.L.R. 640, 46 Can. S.C.R. 642, referred to.]

CONTRACTS (§ IV E—366)—*Breach and its Effects—Shares—Pledge—Tender of Shares—Time.*]—An action by a firm of brokers against another firm of brokers for damages for breach of a contract with respect to 10,000 shares of Temiskaming Mining Company stock, of which the defendants refused to take delivery. The second trial of the action took place before Middleton, J., at Toronto. At the first trial, before Sutherland, J., there was judgment for the plaintiffs (2 O.W.N. 222); but the judgment was set aside and a new trial ordered by a Divisional Court (22 O.L.R. 441, 2 O.W.N. 404); and the order of the Divisional Court was affirmed by the Court of Appeal (24 O.L.R. 282, 2 O.W.N. 1312), and by the Supreme Court of Canada, *Warren* v. *Forst*, 8 D.L.R. 640, 46 Can. S.C.R. 642. There was a conflict of evidence as to the nature of the transactions between the parties and as to what was said and done. The learned Judge (reviewing the evidence) accepts the statements of the plaintiffs and their witnesses, and finds that the stock was tendered by the plaintiffs to the defendants within a reasonable time. Judgment for the plaintiffs for the amount claimed, $2,082, with interest thereon from the 29th June, 1909, to the date of judgment, and costs. No costs of the former trial nor of the appeal to the Divisional Court. *F. Arnoldi*, K.C., and *E. F. B. Johnston*, K.C., for the plaintiffs. *I. F. Hellmuth*, K.C., and *A. McLean Macdonell*, K.C., for the defendants.

Re SOULLIERE and McCRACKEN.

Ontario Supreme Court, Middleton, J., in Chambers. April 9, 1913.

[*Johnson* v. *Farney*, 9 D.L.R. 782, referred to.]

WILLS (§ III A—75)—*Precatory Trust.*]—An application by the vendor, under the Vendors and Purchasers Act, turned by consent into an application for the construction of the will of David Soullière, under Con. Rule 938. The testator gave all his real and personal property to his wife, the vendor, adding this clause: "It is my desire that she takes good care of all my children as much as it is possible to do, and I also desire that

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at her death she will divide the estate that I now give her among our children in the most just manner possible." It was argued that this constituted a precatory trust, and that it operated to cut down the gift to a life estate, with a power of appointment among the children. The learned Judge said that at one time this would probably have been so; but the tendency of the more recent decisions was all the other way. In this will the gift to the wife was absolute, and the clause quoted recognised this and fell far short of what was now regarded as necessary to cut down the absolute estate given. In addition to the cases referred to by the Chancellor in *Johnson* v. *Farney*, 9 D.L.R. 782, the learned Judge referred to *Re Williams*, [1897] 2 Ch. 12, and *Re Oldfield*, [1904] 1 Ch. 549. No costs between the vendor and purchaser. Costs of the Official Guardian to be paid by the vendor. *F. D. Davis*, for the vendor. *Grayson Smith*, for the purchaser. *J. R. Meredith*, for the Official Guardian.

GRAY v. BUCHAN.

(Decision No. 3.)

Ontario Supreme Court (Appellate Division), Falconbridge, C.J.K.B., Britton, and Riddell. February 3, 1913.

[*Gray* v. *Buchan*, 6 D.L.R. 875, affirmed.]

JUDGMENT (§ I G—55)—*Modification—Motion to Vary—Dealing in Company-shares—Brokers—Proof of Actual Sale—Refusal to Give Further Evidence.*]—Motion by the plaintiff to vary the minutes of the judgment of a Divisional Court, 6 D.L.R. 875, 4 O.W.N. 220.

RIDDELL, J., gave the judgment of the Court in these words: We gave leave to the defendants to prove by affidavits an actual sale, which the plaintiff says he disputes; the defendants decline the offer—and, when an opportunity is once more offered them, they again decline. We did not think that, under the circumstances at the trial, more proof was needed. The defendants refuse to give further proof now, and the plaintiff will have full advantage of this refusal upon the appeal. But we cannot change our judgment. No costs. *J. J. Gray*, for the plaintiff. *H. S. White*, for the defendants.

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