Dominion Law Reports

CITED "D.L.R."

COMPRISING EVERY CASE REPORTED IN THE COURTS OF EVERY PROVINCE, AND ALSO ALL THE CASES DECIDED IN THE SUPREME COURT OF CANADA, EXCHEQUER COURT, THE RAILWAY COMMISSION, AND THE CANADIAN CASES APPEALED TO THE PRIVY COUNCIL

ANNOTATED

For Alphabetically Arranged Table of Annotations to be found in Vols. 1-59 D.L.R., See Pages vii-xxii

VOL. 59

EDITED BY

C. E. T. FITZGERALD

C. B. LABATT and

RUSSEL S. SMART

ASSOCIATE EDITOR OF PATENT AND TRADE MARK CASES.

CONSULTING EDITOR

E. DOUGLAS ARMOUR, K.C.

ASSOCIATE EDITOR FOR QUEBEC

S. L. DALE HARRIS, MONTREAL.

TORONTO:

CANADA LAW BOOK CO. LIMITED

84 BAY STREET

1921

CASES REPORTED

IN THIS VOLUME

TABLE OF ANNOTATIONS.

CONCISE BRIEFS OF THE LAW.

APPEARING IN VOLS. 1 TO 59 INCLUSIVE.

BANKRUPTCY ACT AMENDMENT ACT

11-12 George V., Chapter 17, 1921

ANNOTATED

THE AMENDING ACT CONSIDERED SECTION BY SECTION, WITH NOTES ON EACH SECTION AND SUITABLE REFERENCES TO THE ORIGINAL ACT OF 1920

by

J. A. C. CAMERON, M.A., LL.B., K.C.
Master in Chambers, Supreme Court of Ontario
Osgoode Hall, Toronto

THIS ANNOTATION IS SUPPLEMENTARY TO AN ANNOTATION BY THE SAME AUTHOR; 53 *D.L.R.*

An Act to amend The Bankruptcy Act. ANNOTATION

[Assented to 4th June, 1921.]

HIS MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. This Act may be cited as **The Bankruptcy Act Amendment Act, 1921.**

2. The various enactments, repeals and amendments of sections, subsections and paragraphs in this Act mentioned, refer and relate to **The Bankruptcy Act,** chapter thirty-six of the statutes of 1919, as amended by **The Bankruptcy Act Amendment Act, 1920,** chapter thirty-four of the statutes of 1920.

3. Paragraph **(h)** of section two is repealed and the following substituted therefor:—

"**(h)** "available act of bankruptcy" means an act of bankruptcy committed within six months before the date of (1) the presentation of a bankruptcy petition, or (2) the making of an authorized assignment, or (3) the payment, delivery, conveyance, assignment, transfer, contract, dealing or transaction mentioned in section thirty-two of this Act."

In paragraph (q) of the Bankruptcy Act, sec. 2, at p. 13 of the original annotations read "Canada Gazette" for "Ontario Gazette."

It was necessary to read the repealed paragraph (h) with secs.

ANNOTATION 3 and 4 of the original Act. Section 4 provides that if a debtor commits an act of bankruptcy a petition may be presented and sec. 3 states what constitutes an act of bankruptcy. These two sections must still, it is submitted, be read with paragraph (h) as amended.

Section 32 protects payments by the bankrupt to his creditors or payment or delivery to the bankrupt of any conveyances or transfers made by him for adequate valuable consideration. By reason of the amendment any such payment, delivery, conveyance or transfer would now become an available act of bankruptcy to support a petition. The new section is much broader and removes any ambiguity.

In **Re Stewart Mercantile Company, Ltd.** (1921), 59 D.L.R., it was held that a receiving order against a company under the Bankruptcy Act may be based upon a debt owing to the company by reason of its having undertaken, after the Act came into operation, the liabilities incurred by a firm before the Act came into operation.

In **Fisher v. Wilkie Ltd.** (1920), 59 D.L.R., 19 O.W.N. 251, it was held that the provisions of sec. 8 were enacted for the benefit of debtors, but they are provisions which may be waived by debtors. At all events, in the absence of evidence one way or the other, when a petition for a declaration of bankruptcy is unopposed, it should be assumed that the petitioners were rightly in Court and entitled to the relief which they claimed. In this case the material in support of the petition did not disclose when the debt was contracted and it was presumed that the debt on which the declaration of bankruptcy was founded was not contracted before the coming into force of the Act.

4. Paragraph **(w)** of section two is repealed and the following substituted therefor:—

"**(w)** "local newspaper" means a newspaper published in and having a circulation throughout the bankruptcy district or division which includes the locality of the debtor."

The original section defined a local newspaper to be one published in or having a circulation throughout the bankruptcy district wherein the debtor resided. The amended definition is broader.

5. Paragraph **(aa)** of section two is repealed and the following substituted therefor:—

"**(aa)** "person" includes a firm or partnership, an unincorporated association of persons, a corporation as restrictively defined by this section, a body corporate and politic, the successors of such association, partnership, corporation, or body corporate and politic, and the heirs, executors, administrators or other legal representatives of a person, according to the law of that part of Canada to which the context extends."

The amended sec. 5 (aa) was very limited in its definition of the word "person." It included only corporations and partnerships. The amended definition is wider. ANNOTATION

6. Subsection six of section four is amended by striking from the second last line thereof the word "may" and substituting the word "shall."

Under the repealed sub-section it was discretionary with the Court to dismiss the petition or otherwise. The amendment makes it imperative on the Court to dismiss the petition.

Sub-sec. 6 of sec. 4 of the Bankruptcy Act does not apply to a case where the debtor, with the palpable intention of choosing his own trustee, makes an assignment after he is served with the petition in bankruptcy and before the return of the notice of hearing, and a receiving order made on the return of the notice renders such assignment ineffective. **See Croteau v. Clark Co., Ltd.** (1920), 55 D.L.R. 413.

7. Subsection ten of section four is amended by striking out of the second line the word "service" and substituting the word "presentation."

Under the repealed sub-sec. 10 the date the receiving order took effect was on the date of the service of the petition. Under the amendment this is now changed and the date is the date of the presentation of the petition.

8. Section five is amended by adding thereto as subsection two thereof, the following:—

"(2) The said interim receiver may, under the direction of the court, summarily dispose of any perishable goods and carry on the business of the debtor for all conservatory purposes."

Prior to this amendment the interim receiver had no authority to dispose of the bankrupt's estate, even though the goods were of a perishable character.The consent of the inspectors had first to be obtained. **Fisher v. White,** 59 D.L.R., 19 O.W.N. 251.

9. The Act is amended by inserting immediately after section ten, the following:—

"**10a.** (1) Every authorized trustee to whom an assignment is made under section nine of this Act shall within four days of such assignment file, in the court having jurisdiction in the locality of the debtor, the said assignment, and

ANNOTATION

should another authorized trustee be subsequently appointed in his stead such other trustee shall within four days of his appointment give notice thereof to the said court.

"(2) This section, substituting 'forthwith' for 'within four days of such assignment' and for 'within four days of his appointment,' shall apply to all authorized assignments made and to all authorized trustees substituted since the coming into force of this Act."

The effect of this section is to require the authorized trustee to file the assignment with the registrar in the court having bankruptcy jurisdiction within four days from the date of the assignment.

10. Paragraph (b) of subsection one of section eleven is amended by adding at the end thereof the following:— "and except also the rights of a secured creditor under section six of this Act."

Before this amendment was passed the words of the original subsection would seem to indicate (although not intended) that a receiving order or authorized assignment had precedence over the rights of all creditors, even secured creditors. This subsection, however, should be read with sec. 6 of the Act which preserved the rights of secured creditors.

The rights of secured creditors came up for decision in the case of **Rosenzweig** v. **Hart**;. **Ex parte Goldfine** (1920), 56 D.L.R. 101, where Panneton, J., in the Quebec Superior Court held that an unpaid vendor of goods may ask for dissolution of the sale in case of non-payment of the price as provided by the Quebec Civil Code in the case of insolvency the right be exercised within thirty days of delivery. A vendor in such a position is a secured creditor within the meaning of secs. 2 (gg) and 6 (1) of the Bankruptcy Act and he may recover the goods from the trustee. See also annotation to this case in 56 D.L.R. 104. See also **Brenner** v. **American Metal Co.** (1920), 55 D.L.R. 702.

11. Subsection eleven of section eleven is amended by adding at the end thereof the following:—

"In cases where the title to real, or immovable, property, or any lien or charge upon or against that class of property, is affected by any receiving order, or authorized assignment, there shall be added to such affidavit the following words, with the incidentally necessary description and information —'The annexed document affects the title to (or a lien or liens or a charge or charges upon or against, as the case may be) the following described (real or immovable) property: (add such reasonable description of each parcel affected,

stating how it is affected, as may enable the registrar or other officer for the time being in charge of the proper office to identify the affected property and to discover how it is affected).' " ANNOTATION

Previous to this section the receiving order or authorized assignment was registered in the general register or any book kept for that purpose. It was not registered against the particular lands of the bankrupt. This section now provides for the registration of the receiving order or authorized assignment against any particular lands of the bankrupt upon describing the lands to be affected in the affidavit.

It was held in **In re City Garage and Machine Co., Ltd.** (1921), 59 D.L.R., that an assignment under the Bankruptcy Act must be accepted for registration though not accompanied by the affidavit provided for by sec. 7 of the Homesteads Act, 1920, and by sec. 7a of the Assignments Act.

Section 55 of the Bankruptcy Act Amendment Act 1921 provides that the law of the Province shall apply in favour of purchasers for value without notice.

12. Subsection three of section thirteen is repealed and the following substituted therefor:—

"(3) As soon as possible after an authorized trustee has been required to convene a meeting of creditors to consider a proposal of a composition, extension or scheme of arrangement, he shall fix a date for such meeting and send by registered mail to every known creditor **(a)** at least ten days' notice of the time and place of meeting, the day of mailing to count as the first day's notice, **(b)** a condensed statement of the assets and liabilities of the debtor, **(c)** a list of his creditors and **(d)** a copy of his proposal If any meeting of his creditors whereat a statement or list of the debtor's assets, liabilities and creditors was presented has been held before the trustee is so required to convene such meeting to consider such proposal and at the time when the debtor requires the convening of such meeting the condition of the debtor's estate remains substantially the same as at the time of such former meeting, the trustee may omit observance of the provisions identified as **(b)** and **(c)** in this subsection. If at the meeting so convened to consider such proposal or at any subsequent meeting of creditors a majority of all the creditors and holding two-thirds in amount of all the proved debts resolves to accept the proposal, either as

ANNOTATION made or as altered or modified at the request of the meeting, it shall be deemed to be duly accepted by the creditors, and if approved by the court shall be binding on all the creditors."

The repealed section required a copy of the debtor's statement of affairs and of his proposal to be sent to each creditor. The amended section requires a condensed statement of the assets and liabilities of the debtor and also a list of his creditors and a copy of his proposal to be sent to each creditor.

13 Section thirteen of the Act is amended by inserting the following subsections immediately after subsection three:—

"(3a) The provisions of the five immediately next following subsections shall apply only in case the proposal of a composition, extension or scheme of arrangement is made before a receiving order or authorized assignment has been made.

"(3b) At any meeting of creditors to consider a proposal of a composition, extension or scheme of arrangement a like majority of the creditors to that which would be competent to accept the proposal may by resolution appoint a committee of not more than five persons to represent the creditors, and such committee or a majority thereof may, if the court, upon the joint application of the trustee and the debtor, shall confirm the action of the meeting, and subject to any limitations imposed from time to time by formal resolution of like majority of the creditors as aforesaid, proceed by itself, its solicitors or agents, to investigate the affairs of the debtor to the end that through the committee the creditors may be intelligently advised whether to accept or reject the proposal. The court, when it confirms the action of the meeting or subsequently thereto, may, upon the joint application of the trustee and the debtor, authorize the committee, by itself or the debtor or jointly with him, to administer and carry on the estate or business of the debtor in the interest of the creditors generally, pending acceptance or rejection by them of the debtor's proposal, or the further order of the court, and in particular,—

(i) To compromise any debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between

ANNOTATION

the debtor and any person who may have incurred any liability to the debtor, on the receipt of such sums, payable at such times and on such terms as may be agreed;

(ii) To compromise or otherwise arrange, as may be thought expedient, with creditors or persons claiming to be creditors, in respect of any debts provable or claims made against the debtor or his estate;

(iii) To mortgage or pledge any part or parts of the property of the debtor for the purpose of raising money for the payment of his debts or any of them or for the making of payment for goods ordered or to secure money advances made to or obtained by or for the debtor by or with the approval of the committee, for the purpose of carrying on such business;

and all acts of the committee or a majority thereof and of the trustee and of the debtor done under authority of this section and by, or by the direction or with the approval of such committee or a majority thereof, but subject to such limitations as the creditors shall have imposed as aforesaid, shall be binding upon all the creditors, and in particular all debts and liabilities incurred for or by the debtor in respect of moneys borrowed or goods purchased for the purpose of continuing, by or under the direction or with the approval of such committee or a majority thereof, the business of the debtor or for the payment of claims and debts, the payment of which the committee or a majority thereof has directed or approved, shall, with the reasonable costs and expenses of the committee, and of the trustee, and of fair remuneration for the trustee's services, the whole to be fixed by the court, if the debtor shall thereafter be adjudged a bankrupt or shall make an authorized assignment, be payable out of the assets and property of the debtor in priority to the claims of unsecured creditors.

"(3c) The creditors may, by a simple majority of those present at any meeting, revoke the appointment of any member or members of their committee and in such event, or in case of the death, resignation or absence from the province of any of the committee, may appoint another or others to act permanently or temporarily in their stead.

"(3d) If at any meeting of creditors to consider the proposal the chairman shall decide that any creditor has not

ANNOTATION had sufficient time to prove his claim in manner by this Act required, the chairman may accept cable or telegraphic communications as sufficient proof of the debt due to such creditor and sufficient authority to the person named or mentioned therein to vote or act for such creditor at such meeting, whereupon, as respects the proof and action of such creditors, all properly applicable provisions of this Act for the purposes of such meeting shall be deemed fully complied with.

"(3e) When proceedings are taken under the immediately preceding four subsections before the making of any receiving order or authorized assignment all other applicable provisions of this Act shall apply but no document in such proceedings shall be headed "The Bankruptcy Act," nor shall the terms "bankrupt" or "bankruptcy" nor "assignor" or "assignment," be applied either to a person who before any receiving order or authorized assignment has been made makes a proposal for composition, extension or arrangement, nor to such proposal unless and until the provisions of the immediately next following subsection of this Act shall have come into effect All such documents shall be headed "In the matter of a proposal by.....for a Composition," or "In the Matter of a proposal by.....for an Extension of Credit," or "In the Matter of a Proposal by..... .....of a scheme of Arrangement of his Affairs," as the circumstances may require.

"(3f) If as the result of proceedings instituted under the five immediately preceding subsections neither the proposal of the debtor, nor any further proposal by him or by the creditors by way of amendment is accepted, or confirmed by the court, then, notwithstanding anything in this Act, the court, unless good cause for action otherwise shall appear, shall, upon proof of such fact, and without more, upon application of the trustee or of the committee or a majority thereof, adjudge the debtor bankrupt and make a receiving order. The court may consider an offer of the debtor to forthwith execute an authorized assignment as good cause for such action otherwise."

The effect of this amendment is to encourage debtors to make compositions or arrangements before receiving orders or assignments are made, thus eliminating the expense of the administration of the estate and conserving the property of the debtor for his creditors.

Very wide powers are given to the committee. It will be noted that the new subsections only apply to proposals made before a receiving order or authorized assignment is made. Any proposals made after a receiving order or authorized assignment has been made come within the other provisions of sec. 13. It will be noted also that if the proposals contemplated by the amended subsections are not accepted or confirmed the debtor may be adjudged bankrupt and a receiving order made. The section states that the Court, unless good cause otherwise appears, shall, upon proof of any such ineffectual proposal by the debtor and without more, on the application of a trustee or a committee, adjudge the debtor bankrupt and make a receiving order. ANNOTATION

14. The Act is amended by inserting the following section immediately after section thirteen:—

"**13a.** (1) The court, at any time after a debtor has required an authorized trustee to convene a meeting of creditors to consider a proposal of a composition, extension or scheme of arrangement, may, on the **ex parte** application of the trustee and his affidavit disclosing the circumstances and stating his belief that the success of the intended efforts to bring into effect a composition, extension of time for payment, or scheme of arrangement of the debtor's affairs and obligations will be imperilled unless, pending consideration by the creditors of the proposal made or to be made the existing conditions as to litigation of claims against the debtor is preserved, order that any action, execution or other proceeding against the person or property of the debtor pending in any court other than the court having jurisdiction in bankruptcy shall stand stayed until the last mentioned court, upon or before report made of the result of the dealings between the debtor and his creditors, shall otherwise order, whereupon such action, execution or other proceeding shall stand stayed accordingly; and the court in which any such proceedings are pending may likewise, on like application and proof, stay such proceedings until the court having jurisdiction in bankruptcy shall otherwise order.

"(2) On the making of an authorized assignment or an order approving a proposal of a composition, extension or scheme of arrangement every such action, execution or other proceeding for the recovery of a debt provable in authorized assignment or composition, extension or scheme of arrangement, proceedings under this Act shall, subject

ANNOTATION

to the rights of secured creditors to realize or otherwise deal with their securities stand stayed unless and until the court shall, on such terms as it may think just, otherwise order."

The effect of this section is to empower the Court to stay any action, execution or other proceeding, which is being taken against a bankrupt in case the Court is of the opinion that it is necessary to stay such action, execution or other proceeding, in order to prevent an unsuccessful termination of any composition, extension or other arrangement of the debtor's affairs.

Where the application for the approval of a composition agreement is made to the Court, even though made ex parte, the application should not be treated as a mere matter of form, for it involves the exercise of judicial discretion.

Before the agreement is approved, the report of the trustee as to the terms of the agreement and as to the conduct of the debtor and any objections which may be made on behalf of any creditor, have to be considered, and if the terms of the proposal are not reasonable and are not calculated to benefit the general body of creditors, or in any case where circumstances are proved which would require the Court to refuse or suspend a discharge to a bankrupt, the application to sanction the proposal must be refused. See **Re Shaw** (1920), 59 D.L.R., 19 O.W.N. 153.

In **Re Howe** (1920), 59 D.L.R., 20 O.W.N. 244, it was held that where a proposal which was in effect an agreement for a composition to accept 20c. on the dollar less than the assets, if so realised, would pay, that having regard to sec. 13, the trustee may properly seek the sanction and protection of the Court for giving effect to this arrangement so as to bind non-assenting creditors. Such sanction was given.

In **Re Gardner** (1921), 59 D.L.R., 19 O.W.N. 525, it was held that where the terms of the proposal were reasonable and calculated to benefit the general body of creditors and it provided for the immediate payment to all but one of the creditors of more than 50c. on the dollar, that it should be approved, although it afforded an opportunity for one of the creditors financing the scheme to retain his right to payment in full while all the other creditors received only a portion of their claims. It was stated in that case that the Court will scrutinize any scheme of the composition if there is any suggestion of collusion or secret advantage. See decision of Orde, J., in **Re Bluebird Fashion Shops**, to be reported in D.L.R., as to meaning of creditors having claims of $25.00 or over.

15. Subsection eight of section fourteen is repealed and the following substituted therefor:—

"(8) If a majority of the creditors present at any meeting duly called require the trustee to provide further secur-

ity the trustee shall, within thirty days after the making of the receiving order or authorized assignment, or forthwith if first required after the elapse of such period, give security by bond or otherwise to the registrar of the court in the bankruptcy district or division of the debtor's locality in the amount required by the creditors, for the due accounting and payment over and transfer of all property received or to be received by the trustee as such in respect of the estate of the debtor. The expense incident to the furnishing of such security may be charged by the trustee to the estate of the debtor."

ANNOTATION

The repealed section made it obligatory on the trustee to obtain from the creditors a resolution dispensing with further security. If such resolution was not obtained the trustee had to give the security as required by that section. This has now been changed. The effect of the amended section is to make the security required to be put up by the trustee on his appointment sufficient unless a majority of the creditors required him to put up further security.

16. Subsection one of section fifteen is repealed and the following substituted therefor:—

"15. (1) Creditors constituting a majority in number of those who have proved debts of twenty-five dollars or upwards and holding half or more in amount of the proved debts of twenty-five dollars or upwards may, at their discretion, at any meeting of creditors, substitute any other authorized trustee acting for or within the same bankruptcy district or division for the trustee named in the receiving order or to whom an authorized assignment has been made."

Under the original section it was the creditors who constituted a majority of the creditors who held half or more of the proved debts of $25.00 or upwards.. The amended section requires that they not only constitute a majority in number of those who approved such debts, but also that they hold half or more of such proved debts. See judgment of Orde, J., in the case of **Re Bluebird Fashion Shops**, to be reported in D.L.R.

17. Subsection three of section seventeen is repealed and the following substituted therefor:—

"(3) The trustee shall, on the making of a receiving order or an authorized assignment, forthwith insure and

ANNOTATION keep insured in his official name until sold or disposed of, all the insurable property of the debtor, to the fair realizable value thereof or to such other insurable amount as may be approved by the inspectors or by the court, in insurance companies authorized to carry on business in the province wherein the insured property is situate."

Under the original section the trustee was compelled to insure the property to the full insurable value. Under the amended section it is only necessary for him to insure the property to the fair realizable value or to such amount as may be approved by the inspectors or by the Court.

18. Section eighteen is amended by adding thereto as paragraph **(d)** the following:—

"**(d)** An authorized trustee may at any time apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt, an authorized assignor or a debtor who has made a proposal for a composition, extension or scheme of arrangement. The court shall give in writing such directions, if any, as may be proper according to the circumstances and not inconsistent with this Act, which directions shall bind, as well as justify the subsequent consonant action of, the trustee."

Section 18 as originally drawn did not authorize the trustee to apply to the Court in a summary way from time to time for directions as to matters within his trust. In the amended section he may apply to the Court as and when necessary for directions for the administration of the estate.

19. Subsection one of section twenty is amended by adding thereto as paragraph **(k)** thereof the following:—

"**(k)** Elect to retain for the whole or part of its unexpired term, or to assign or disclaim, the whole pursuant to this Act, any lease of, or other temporary interest in any property forming part of the estate of the debtor."

It was held in **Re Auto Experts Ltd.; Ex parte Tanner** (1921), 59 D.L.R., 19 O.W.N. 532, that the liability to pay occupation rent becomes a personal obligation of the trustee, like any other item of expense, for which he is of course entitled to indemnify himself out of the estate. It is not a debt of the insolvent and the landlord is not called upon to prove for it. As sec. 51 is made subject to sec. 52, the

obligation to pay this occupation rent ranks ahead of all the obligations mentioned in sec. 51. This hardship upon the trustee, he might have protected himself against under sec. 15 (5), which provides that no authorized trustee shall be bound to accept an authorized assignment if in his opinion the realizable value of the property of the debtor is not sufficient to provide the necessary disbursements and a reasonable remuneration for the trustee, unless and until he has been paid and tendered a sum sufficient to defray such disbursements and remuneration. The Act has now been amended so as to permit the trustee to either retain or to disclaim any leasehold property. ANNOTATION

20. Subsection two of section twenty is repealed and the following substituted therefor:—

"(2) The permission given for the purposes of this section shall not be a general permission to do all or any of the above mentioned things but shall only be a permission to do the particular thing or things or class of thing or things which the written permission specifies."

The proposed amendment is to prevent a general permission or a blanket authority being given by the inspectors. The permission must set out the particular act or thing authorized and not be general in its character.

21. Section twenty-two is amended by adding thereto as subsection three the following:—

"(3) Where any goods in the charge or possession of a debtor at the time when a receiving order or an authorized assignment is made are alleged to be in his charge or possession subject to the ownership or a special or general property right, or right of possession in another person, and whether or not such goods are held by the debtor under or subject to the terms of any lien, consignment, agreement, hire receipt, or order, or any agreement providing or implying that the ownership of, property in, or right to possession of such goods, or other or like goods in exchange or substitution, shall vest in or pass to the debtor only upon payment of defined or undefined moneys, or upon performance or abstention from performance of any acts or conditions, the person alleged or claiming to own such goods or such special or general property or right of possession therein or thereof shall not, by himself or his agents or servants, nor shall his agents or servants, remove or

ANNOTATION attempt to remove such goods or any thereof out of the charge or possession of the debtor, or of the authorized trustee or any actual custodian thereof, until the elapse of fifteen days after delivering notice in writing to the trustee of intention to so remove. It shall not be implied from these provisions that the rights of others than the trustee have been thereby in any manner extended."

The purpose of this section is to give the authorized trustee 15 days in which to investigate the title of goods in the possession of the debtor. The added section does not destroy the preferred creditor's rights, but simply defers his action with respect to such rights for the time specified.

See sec. 97 as contained in sec. 50 of the Bankruptcy Act Amendment Act 1921, which provides for a penalty for removing, attempting or counselling removal of debtor's goods without such notice.

22. Subsection two of section twenty-four is amended by adding at the end as paragraph (f) thereof the following:

"(f) any order made under subsection eighteen of section thirteen of this Act annulling any adjudication of bankruptcy."

The effect of this amendment is to require any order annulling any adjudication of bankruptcy to be mailed to the Dominion statistician.

23. Section twenty-six is amended by striking from the fifth and fourteenth lines thereof the word "consent" and substituting in each case the word "permission."

The trustee is not required to get the consent of the inspectors. He only requires their permission. In cases of consent he applies to the Court.

24. Section twenty-seven is amended by adding the following paragraphs thereto immediately after paragraph (b) thereof:—

"(c) If the creditors, within ten days after demand by the trustee (made to the inspectors or at any meeting of creditors called by the trustee for the purpose of making such demand) refuse or neglect to repay to the trustee all money advances made by him or obtained in whole or in part upon his credit or responsibility and to secure the trustee to an extent adequate in his

opinion or (if the trustee and the creditors cannot agree) in that of the court, in respect of all liabilities incurred or which may be incurred by the trustee in so carrying on the business of the debtor, the court may, upon application of the trustee, order that the property of the debtor be offered for sale by tender, to be addressed to and opened by the court, at any time to be named by the court, and after such advertisement and opening of any tenders received and subject to the directions and approval of the court, sell the whole or any part of the property of the debtor and apply the proceeds to the payment of the advances, liabilities, expenses and proper costs made and incurred by the trustee in the administration of the estate of the debtor,"

"(d) If the property of a debtor shall be so offered for sale and, within thirty days after the time set for the opening of tenders, no tender or offer of an amount sufficient to repay the advances made and liabilities incurred by the trustee and also his proper costs and expenses shall be received by the court, then the court may, after such notice to the debtor and the creditors as to it may seem proper, permit the trustee in his personal capacity, to bid such a sum as shall be sufficient to repay him his advances, costs, expenses, and the amount of any liabilities incurred by him and reasonable remuneration and (conditional upon no higher bid being received before actual vesting of the property in him in his personal capacity) to purchase the whole or any part of such property at such prices and upon such terms as shall be approved by the court. If the trustee shall so purchase the whole or any part of such property it shall pass to and vest in him in his personal capacity when the court shall so order, whereupon all rights and interests of the debtors and the creditors in or to it shall become determined and ended."

The purpose of this section is to enable the trustee to take summary action to reimburse himself for liabilities incurred in carrying on the business of the debtor.

In **Re Thornton, Davidson and Co.**, a decision of Bruneau, J., of the Superior Court of Montreal, dated September 23rd, 1920, the

ANNOTATION trustee in bankruptcy was authorized by the Court before the appointment of inspectors to sell at market prices some of the stocks and bonds belonging to the bankrupt's estate in order to provide funds for the trustee to pay necessary expenses.

25. Subsection one of section thirty is repealed and the following substituted therefor:—

"30. (1) Where a person engaged in any trade or business makes an assignment of his existing or future book debts or any class or part thereof, and is subsequently adjudicated bankrupt or makes an authorized assignment, the assignment of book debts shall be void against the trustee in the bankruptcy or under the authorized assignment, as regards any book debts which have not been paid at the date of the presentation of the petition in bankruptcy or of the making of the authorized assignment, unless there has been compliance with the provisions of any statute which now is or hereafter may be in force in the province wherein such person resides or is engaged in said trade or business as to registration, notice and publication of such assignments. Provided that nothing in this section shall have effect so as to render void any assignment of book debts, due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made **bona fide** and for value, or in any authorized assignment."

Under the original section it provided that where a person engaged in any trade or business made an assignment to any other person of his existing or future book debts and was subsequently adjudged bankrupt, the assignment of such book debts was void against the trustee in bankruptcy. Under the original section the opinion was given that this section did not preclude banks from obtaining a general assignment of book debts and that an assignment of book debts taken by a bank was perfectly valid against a trustee in bankruptcy. See annotations to sec. 30 of the Act, 53 D.L.R. 168. The word "person" as defined in the Act did not include "bank" and it was generally recognised that banks did not come within the operation of the section. The amending sub-section, however, has omitted the words "to any other person" as appeared in the repealed sub-section, and it is now submitted that the banks are no longer protected by a general assignment and that they are not now in any different position from an individual except to the extent of the exceptions provided in the amended section.

26. Subsection one of section thirty-two is amended by striking from the last line thereof the words "before that time." ANNOTATION

The amendment makes clear that the person to, by, or with whom the payment &c. was made &c. must not have at the time of such payment &c. notice of any available act of bankruptcy.

27. Subsection eleven of section thirty-six is repealed and the following substituted therefor :—

"(11) The court shall, on the application of any contributory, adjust the rights of the contributories among themselves, and, for the purpose of facilitating such adjustment may direct the trustee to intervene, carry the proceedings, employ legal or other assistance and make such investigations, do such acts and furnish such information as to the court may seem necessary or advisable."

This section provides the machinery for the adjustment of the rights of contributories and gives authority to the trustee, with the approval of the Court, to take such action and to employ the necessary assistance, legal or otherwise, that may be necessary.

28. Section thirty-six is amended by adding thereto as subsections twelve and thirteen the following:—

"(12) The court shall allow to the trustee and to any solicitor, advocate or counsel or other assistant employed by him under the provisions of the immediately preceding subsection, as against the contributories or any of them, such remuneration, expenses and costs as the court shall deem just, and such remuneration, expenses and costs shall be paid out of such moneys as shall be collected from contributories under the order or direction of the court for the purposes of the adjustment or out of moneys payable to the contributories by the estate of the debtor, as the court shall order, but such remuneration, expenses and costs shall not be payable in any event out of the general estate of the debtor."

"(13) The court, before proceeding to adjust the rights of contributories among themselves as by subsection eleven of this section provided, may order that the contributory applying shall provide security, in form and amount satisfactory to the court, for the payment of such remuneration,

ANNOTATION expenses and costs as will be incident to such adjustment, and, in default of such security being provided as and when ordered, the court may refuse to proceed with such adjustment"

See annotation to sec. 27, 53 D.L.R. 166. As the adjustment of rights is amongst the contributories themselves, the amended subsections provide for the bearing of the expense of such adjustment by the contributories, the trustee's expenses being borne by the contributories and not by the estate, as it does not affect the estate of the bankrupt generally.

29. Subsection three of section thirty-seven is amended by adding after the word "entitled" at the end of the second line the words "upon proof of such debt."

Subsection 3 of sec. 37 of the original Act did not provide for proof of claim.

30. Subsection six of section thirty-seven is repealed and the following substituted therefor:—

"(6) The trustee may, at any time after the first meeting of creditors, give notice by registered mail prepaid to every person of whose claim to be a creditor with a provable debt the trustee has notice or knowledge, but whose said debt has not been proved, that if such person does not prove his debt within a period limited by the notice and expiring not sooner than thirty days after the mailing of the notice the trustee will proceed to make a dividend or final dividend without regard to such person's claim. If any person so notified does not prove his debt within the time limited or within such further time as the court, upon proof of merits and satisfactory explanation of the delay in making proof, may allow, the claim of such person shall, notwithstanding anything in this Act, be excluded from all share in any dividend."

The original section was somewhat complicated. The amended section provides for a summary way of forcing a creditor with a provable claim debt of which the trustee has notice or knowledge to prove such debt, or in the alternative, having the same barred within 30 days after the mailing of the notice, as provided in that section.

31. Subsection seven of section thirty-seven is repealed and the following substituted therefor:—

"(7) The trustee having (a) gazetted and published as required by section eleven, subsection four, and (b) mailed

as required by section forty-two, subsection two, and **(c)** realized all the property of the bankrupt or authorized assignor or all thereof that can, in the joint opinion of himself and of the inspectors, be realized without needlessly protracting the trusteeship, and **(d)** settled or determined or caused to be settled or determined the claims of all creditors to rank against the estate of the debtor, shall make a final dividend and be at liberty subject to the various provisions of this Act, to divide the property of the debtor among the creditors who have proved their debts without regard to the claims of any other claimants."

ANNOTATION

A final dividend and a division of the debtor's property is not to be made until the trustee has taken the proceedings provided in the amending subsection.

32. Subsection eight of section thirty-seven of the Act as enacted by section ten of chapter thirty-four of the statutes of 1920, is amended by striking out the first fifteen lines thereof and also the sixteenth line to and including the word "thereof."

The original subsection 8 of sec. 37 contained in part some of the provisions now incorporated in sec. 31 of the amending Act.

33. Subsection one of section forty is repealed and the following substituted therefor:—

"(1) The remuneration of the trustee in bankruptcy or in any other proceedings under this Act, for his services, excepting those rendered **(a)** upon the adjustment of the rights of contributories as among themselves, and **(b)** in connection with the application of a bankrupt or authorized assignor for a discharge, shall be such as is voted to the trustee by a majority of creditors present at any general meeting. In the excepted cases the trustee's remuneration shall be fixed by the Court.

In view of secs. 27 and 28 of the Bankruptcy Act Amendment Act 1921, and the inadvisability of charging the estate with the cost of an application by a bankrupt for his discharge, it was necessary to pass the amending section. Under the amending section a majority of the creditors fix the trustee's remuneration except in the adjustment of the rights of contributories as among themselves, and in connection with an application of a bankrupt or authorized assignor for a discharge in which cases they are fixed by the Court.

ANNOTATION

34. Section forty-one is repealed and the following substituted therefor:—

"41. (1) The Court may by its order discharge an authorized trustee from his trusts and from further performance of all or any of his duties and obligations with respect to any estate, upon full administration of the affairs thereof or, for sufficient cause, before full administration. The Court shall require proof of the extent of administration and (where there has not been full administration) of the condition of the estate and of the alleged sufficient cause.

"(2) In particular the trustee shall be entitled to be discharged as aforesaid if, before full administration of the affairs of an estate, another trustee has been substituted for the trustee applying, the latter has accounted to the satisfaction of the inspectors or the court for all property of the estate which came to his hands and a period of three months has elapsed after the date of such substitution without any undisposed of claim or objection having been made by the debtor or any creditor;

"(3) When the trustee's receipts, disbursements and accounts have been approved in writing by the inspectors or the Court, a period of two years has elapsed after payment of the final dividend and proof has been supplied that all objections, applications and appeals made by any creditor or the debtor have in the meantime been settled or satisfactorily disposed of, the affairs of the estate shall be deemed to have been fully administered;

"(4) The discharge of a trustee under the provisions of this section shall operate as a release of the special security provided pursuant to subsection eight of section fourteen of this Act;

"(5) Nothing in or done under authority of this section shall relieve or discharge or be deemed to relieve or discharge a trustee from the results of fraud or any fraudulent breach of trust;

"(6) The trustee shall finally dispose of all books and papers of the estate of the bankrupt or authorized assignor in manner prescribed by general rules."

The amending section sets out with particularity the circumstances under which a trustee can obtain his discharge. The repealed section was limited.

35. Subsection twelve of section forty-two is repealed and the following substituted therefor:— ANNOTATION

"(12) The chairman of the meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court. He may, for the same purpose, notwithstanding anything in this Act, accept telegraphic or cable communication as proof of the debt of a creditor who carries on business out of Canada and likewise as to the authority of any one claiming to represent and vote on behalf of such creditor. If the chairman is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained."

The amending section now empowers the chairman to accept telegraphic or cable communication as proof of a creditor's debt. This was not permitted under the repealed section.

36. Section forty-three is amended by adding at the end as subsection six thereof the following:—

"(6) No inspector shall be capable of, directly or in directly, purchasing or acquiring for himself or for another any of the property of the estate for which he is an inspector, unless with the prior approval of the court."

Subsection 5 of sec. 43 was omitted in the original annotations. It is as follows:—In the event of an equal division of opinion at a meeting of inspectors the opinion of any absent inspector shall be sought in order to resolve the difference, and in the case of a difference which cannot be so resolved, it shall be resolved by the trustee, unless it concerns his personal conduct or interest.

Under sec. 43, before amendment, there was nothing which precluded an inspector from purchasing or acquiring for himself or for any other person any of the trust estate, although this was open to grave objection as the interest of the inspector would conflict with his duty. The amending section now provides that the inspector shall not purchase or acquire any of the trust property.

In **Imperial Bank v. Barber** (1921), 59 D.L.R., 20 O.W.N. 282, Middleton, J., stated that it is most important that it should be understood that the Bankruptcy Act is not intended to be a means by which bankrupts, or the directors or shareholders of a bankrupt company, can absolve themselves from liability and repossess the property at a price which they may dictate to their creditors. He stated that it must also

ANNOTATION be borne in mind that, where inspectors are appointed who represent small claims, great care should be taken to see that the rights of those most largely interested are not sacrificed to the mere weight of numbers.

37. Section forty-six is amended by striking from the end of subsection one the reference "(Eng. Sch. 2 No. 10)" and by striking from subsection two the reference "(Eng. Sch. 2 No. 11)"

This amends a typographical error.

38. Subsection three of section forty-six is repealed and the following substituted therefor:—

"(3) If a secured creditor does not either realize or surrender his security he shall, within thirty days after the date of the receiving order, or of the making of the authorized assignment, or within such further time as may be allowed by the court or the inspectors, file with the trustee a statutory declaration stating therein full particulars of his security or securities, the date when each security was given and the value at which he assesses each thereof. Every creditor shall also, upon demand of the trustee, identify to and for the trustee, within ten days after such demand, any property comprised within the estate of the debtor in, upon or against which he, the creditor, claims to hold any right, interest, lien or security. A creditor shall be entitled to receive a dividend in respect only of the balance due to him after deducting the assessed value of his security, and if any creditor omits or refuses to identify property as in this subsection provided, and within the time so provided (unless it be extended in writing by the trustee or by the court), his right, interest, lien or security in, upon or against such property shall, by force of this Act, and without more, at the expiration of the time limited, become forfeited to the estate of the debtor."

The repealed subsection did not provide for a creditor, on the demand of the trustee, to identify, within 10 days from such demand, any property of the debtor's estate against which he claimed any right, interest, lien or security. Under the amended subsection the creditor must identify such property. If he fails to do so he forfeits any right, interest, lien or security that he may have.

39. Subsection one of section fifty-one is amended by adding at the end thereof:— ANNOTATION

"and all indebtedness of the bankrupt or authorized assignor under any Workmen's Compensation Act."

The amendment is to provide for moneys due under the Workmen's Compensation Act.

40. Subsection four of section fifty-two is repealed and the following substituted therefor:—

"(4) The trustee shall be entitled to continue in occupation of the leased premises for so long as he shall require the premises for the purposes of the trust estate, and any payment to be made to the landlord in respect of accelerated rent shall be credited against the amount payable by the trustee for the period of his occupation. The trustee may surrender possession at any time but if he shall occupy for three months or more beyond the date of the making of the receiving order or authorized assignment the landlord shall be entitled to receive three months' notice in writing of the trustee's intention to surrender possession or three month's rent in lieu thereof. After the trustee surrenders possession such of the landlord's rights as are based upon actual occupation by the trustee shall cease."

Section 19 of the Bankruptcy Act Amendment Act 1921 provides that the trustee may elect to retain for the whole or part of its unexpired term, or to assign or disclaim any leasehold property of the debtor. The repealed subsec. 4 and subsecs. 5, 6 and 7., which have now been repealed by succeeding secs. 41, 42 and 43 of the amending Act, provided that the trustee should by notice elect within one month from the date of the receiving order or authorized assignment to retain the premises for the unexpired term of the lease or to disclaim, and if he failed to give such notice of election he was deemed to have disclaimed the lease. If he elected to retain the premises and the provisions of the lease did not preclude him from assigning the term or subletting the premises, he was empowered to assign or sublet. Under the amending subsections the trustee can continue in occupation of the leased premises as long as he requires them for the purposes of the trust estate. He can surrender possession at any time, but if he occupies the premises for 3 months or more after the date of the receiving order the landlord is entitled to 3 months' notice or 3 months' rent. This was not provided in the original Act.

The trustee is now authorized to assign or sublet any leasehold interest which he has elected to retain notwithstanding that there is

ANNOTATION a provision against assigning or subletting in the original lease, provided that the assignee of the leasehold interest answers the requirments of sec. 41 and gives the security therein required. The liability of the trustee for rent is limited and confined to the payment of rent for the time during which he shall remain in possession for the purposes of the trust estate. See amended sub-sec. 6. Amended sub-sec. 7 provides for the protection of the under-lesse.

As pointed out by Orde, J., in **Re Auto Experts Ltd.**, 59 D.L.R., 19 O.W.N. 532, sec. 52 of the Bankruptcy Act deprives the landlord of his right to distrain, even to the extent of requiring him to relinquish to the trustee goods upon which he has distrained, and also limits his priority to 3 months' accrued rent up to the date of the assignment or receiving order and the costs of distress, if any, if the value of the distrainable assets will so far extend. But it was not intended to do more than this, so far as the question of priority is concerned. Section 51, which deals with the priority of claims, commences, "Subject to the provisions of the next succeeding section as to rent," thereby making the whole of the provisions of sec. 51 subservient to those of sec. 52. This, of course, would not entitle the landlord to any greater priority than that preserved to him by sec. 52—if sec. 52 expressly deprived the landlord of rights which he otherwise would possess. Having regard to the fact that the landlord's rights are intended to be preserved, the Judge could not think that the words in sec. 52 "in priority to all other debts" were intended to give the trustee the right, when the assets are not sufficient, to cast upon the landlord the whole burden of the fees and expenses of the trustee. "Debts" mean all other debts in so far as the landlord is concerned, and must, therefore, include the debts and other expenses involved in the administration of the estate. The definition of "debts" in sec. 2 (n) does not assist, and "debts" as used in sec. 52 (1) must be interpreted according to its natural meaning, having regard to the context. This case was confirmed on appeal (1921), 59 D.L.R., 20 O.W.N. 2.

In **Kerr v. Capital Grocery Ltd.** (1921), 59 D.L.R., it was held that a disclaimer of lease by an assignee for the benefit of creditors under sec. 32b of the Sask. Assignments Act (now repealed; a provision similar to said sec. 32b is now found in sec. 52(5) of the Dominion Bankruptcy Act) was held to operate as a forfeiture, and not as a surrender, and to effect the termination of a sub-lease granted by the assignor.

41. Subsection five of section fifty-two is repealed and the following substituted therefor:—

"(5) Notwithstanding the legal effect of any provision or stipulation in any lease, where a receiving order or authorized assignment has been made, the trustee may at any time while he is in occupation of leased premises for the purposes of the trust estate and before he has given

notice of intention to surrender possession, or disclaimed, elect to retain the leased premises for the whole or any portion of the unexpired term, and he may, upon payment to the landlord of all overdue rent, assign the lease to any person who will covenant to observe and perform its terms and agree to conduct upon the demised premises a trade or business which is not reasonably of a more objectionable or more hazardous nature than that which was thereon conducted by the debtor, and who shall on application of the trustee be approved by the court as a person fit and proper to be put into possession of the leased premises. Provided, however, that before the person to whom the lease shall be assigned shall be permitted to go into occupation he shall deposit with the landlord a sum equal to six months' rent or supply to him a guarantee bond approved by the court in a penal sum equal to six months' rent, as security to the landlord that such person will observe and perform the terms of the lease and the covenants made by him with respect to his occupation of such premises." ANNOTATION

See annotations to sec. 40, 53 D.L.R. 175.

42. Subsection six of section fifty-two is repealed and the following substituted therefor:—

"(6) The trustee shall have the further right, at any time before giving notice of intention to surrender possession, and before becoming under obligation to give such notice in case of intention on his part to surrender possession, to disclaim any such lease, and his entry into possession of the leased premises and their occupation by him while required for the purposes of the trust estate shall not be deemed to be evidence of an intention on his part to elect to retain the premises nor effect his right to disclaim or to surrender possession pursuant to the provisions of this section; and if after occupation of the leased premises he shall elect to retain them and shall thereafter assign the lease to a person approved by the court as by subsection five hereof provided, the liability of the trustee, whether personal or as trustee and whether arising out of privity of contract or of estate and as well all liability of the estate of the debtor shall, subject to the provisions of subsection one hereof, be limited and confined to the payment

ANNOTATION of rent for the period of time during which the trustee shall remain in possession of the leased premises for the purposes of the trust estate"

See annotations to sec. 40, 53 D.L.R. 175.

43. Subsection seven of section fifty-two is repealed and the following substituted therefor:—

"(7) Where the bankrupt or authorized assignor, being a lessee, has, before the making of the receiving order or authorized assignment, demised by way of underlease any premises and the trustee disclaims or elects to assign the lease, the court may, upon the application of such underlessee, make an order vesting in the underlessee an equivalent interest in the property, the subject of the demise to him, to that held by him as underlessee of the debtor, but subject, except as to rental payable, to the same liabilities and obligations as the bankrupt was subject to under the lease at the date of the making of the receiving order or authorized assignment, performance to be secured as and pursuant to the same conditions as provided by subsection five of this section in case of an assignment of lease made by the trustee. The underlessee shall in such event be required to covenant to pay to the landlord a rental not less than that payable by the underlessee to the debtor and if such last mentioned rental was greater than that payable by the debtor to the landlord the underlessee shall be required to covenant to pay to the landlord the like greater rental. The provisions of said subsection five shall be read subject to these provisions so that an underlessee, if he so desires, may have prior opportunity to acquire the right to the possession, for any unexpired term, of the premises occupied or held by him of the debtor, and further, if it shall seem to the court most desirable in the interest of the debtor's estate and notwithstanding the foregoing provisions of this subsection, a prior opportunity to acquire, pursuant to subsection five hereof, an assignment of the head lease."

See annotations to sec. 40, 53 D.L.R. 175.

44. Subsection two of section fifty-six as enacted by section fourteen of chapter thirty-four of the statutes of 1920 is amended by striking out the word "him" after the

word "cause" in the fifth line from the end thereof, and substituting therefor the words "the debtor or other person so in default." ANNOTATION

This amendment was passed to clear up a grammatical ambiguity.

45. Subsection one of section sixty-three is amended by striking out of the second, third and fourth lines thereof the words "within their territorial limits as now established or as these may be hereafter changed."

The section as now amended does not limit the jurisdiction of the Courts territorially.

46. Subsection three of section sixty-three is amended by striking out of paragraph **(a)** the word "Alberta" and by striking out of paragraph **(c)** thereof the words "In the Province of Ontario" and substituting the words "In the Provinces of Ontario and Alberta."

Under the amending subsection the appeals in the Province of Alberta will be to the Appellate Division of the Supreme Court of the Province.

47. Section seventy-two is repealed and the following substituted therefor:—

"72. (1) The court may by warrant direct the seizure or search in behalf of the trustee under a receiving order or authorized assignment, of or for any part of the property of the debtor, whether in possession of the debtor or of any other person, and for that purpose the breaking open of any building or place where the debtor or any part of his property is believed to be.

"(2) Any warrant of a court having jurisdiction in bankruptcy may be enforced in any part of the Dominion of Canada in the manner prescribed or in the same manner and subject to the same privileges in, and subject to which a warrant issued by any justice of the peace under or in pursuance of the **Criminal Code** may be executed against a person for an indictable offence."

The amending sub-section is broader and gives wide powers to the Court for seizure and search.

ANNOTATION

48. Section eighty-five is repealed and the following substituted therefor:—

"85. For all or any of the purposes of this Act, an incorporated company may act by any of its officers or employees authorized in that behalf, a firm may act by any of its members, and a lunatic may act by his committee or curator or by the guardian or curator of his property."

The amending sub-section substitutes an incorporated company for a corporation and it also provides that an incorporated company may act by employees authorized in that behalf. This was not in the repealed sub-section. See sec. 2, sub-sec. (k) of the Act for definition of "corporation."

49. The Act is amended by inserting immediately after section eighty-eight, the following:—

"88a. Where by this Act any body of persons is given power or authority to permit, consent or approve, and the court is given like power or authority alternatively, or otherwise than on appeal, and such body of persons has been constituted or convened, the court shall not act except upon satisfactory proof of prior application to such body of persons and its refusal of such application or its omission to announce its conclusion thereon within what the Court shall deem, according to the circumstances, a reasonable time."

Where inspectors or others are given power or authority concurrently or alternatively with the Court, no application is to be made to the Court until the inspectors or other persons have failed to exercise authority.

50. The Act is amended by inserting the following as section ninety-seven thereof:—

"97. Any person, except the authorized trustee hereinafter mentioned, who, before the elapse of fifteen days after delivery to the authorized trustee of the notice in writing mentioned in section twenty-two, subsection three, of this Act, or in case no such notice has been delivered, shall remove or attempt to remove the goods or any thereof mentioned in such section and subsection out of the charge or possession of the debtor or of the authorized trustee or other actual custodian of such goods, unless with the written permission of the trustee, shall be guilty of an indictable

offence and liable to a fine not exceeding five thousand dollars, or to a term not exceeding two years' imprisonment, or to both such fine and such imprisonment." ANNOTATION

See annotations to sec. 21 of the Bankruptcy Act Amendment Act 1921, ante p. 16.

51. Section ninety-eight is repealed and the following substituted therefor:—

"98. Where any offence against this Act has been committed by an incorporated company every officer, director or agent of the company who directs, authorizes, condones, or participates in the commission of the offence, shall be liable to the like penalties as such company and as if he had committed the like offence personally, and he shall be so liable cumulatively with the company and with such officers, directors or agents of the company as may likewise be liable hereunder."

The effect of this subsection is to make the officers of the corporation personally responsible for the commission of any offences which they have directed, authorized, condoned, or in which they have participated.

52. The French version of The Bankruptcy Act, chapter thirty-six of the statutes of 1919, is hereby amended by striking out the words "tenir maison" in the last line of paragraph (d) of section three thereof, and substituting therefor the words "se renfermer dans sa maison."

53. Section eleven of the French version of the Act, as amended by sections six and seven of chapter thirty-four of the statutes of 1920, is further amended by striking out the words "meubles' wherever in such section as so amended such word occurs and substituting in each case the word "reels."

54. Subsection eight of section four of the Act is repealed and the following substituted therefor:—

"(8) Where proceedings have been stayed or have not been prosecuted with effect the Court may, if by reason of the delay or for any other cause it is deemed just so to do, make a receiving order on the petition of another

ANNOTATION creditor, and shall thereupon dismiss on such terms as it may deem just the petition in the stayed or non-prosecuted proceedings."

See annotations to sec. 4 of the Bankruptcy Act 1920, 53 D.L.R. 150.

55. Section eleven of the Act is amended by adding as subsection seventeen the following:—

"(17) The law of the province in which real, or immovable property is situate as to registration and the effect of non-registration of documents affecting title to or liens upon real, or immovable, property, shall, notwithstanding anything in this Act, apply in favour of purchasers for value without notice, to any lot of real, or immovable, property which has not been identified in manner required by subsection eleven of this section within three months after the making of the receiving order or authorized assignment whereunder any title to or interest in such lot has vested in an authorized trustee, and in cases in which the foregoing provision shall come into operation the trustee's title to or interest in such lot shall be and be deemed divested to the extent necessary to permit such provision to so come into operation."

See annotations to sec. 11 of this Act, 53 D.L.R. 154. The Registry Act and Land Titles Act will protect purchasers for value without notice unless the trustee takes the necessary action to register the receiving order or authorized assignment against particular parcels of land comprising the debtor's estate.

56. Subsection two of section thirty-four of the Act is amended by inserting between the words "bankrupt" and "then" in the second line the words "or has made an authorized assignment," and by inserting between the words "bankruptcy" and "of" in the fifth line the words "or authorized assignment proceedings."

Under the original section the obligation of a banker to take the action required by this section was limited to the case of an undischarged bankrupt. The amendment now extends it to include the case of a person who has made an authorized assignment.

57. Subsection three of section thirty-six is amended by striking out of the fifth and sixth lines thereof the words

"assignment for the general benefit of creditors" and substituting the words "authorized assignment." ANNOTATION

The words "assignment for the general benefit of creditors" under the original Act was a clerical error.

58. Section thirty-seven of the Act is amended by adding thereto as subsection ten the following:—

"(10) Notwithstanding the declaration of a final dividend if any assets reserved for contingent claims, or assets subsequently received, become available for the payment of a further dividend and the necessary expenses of declaring the same, the trustee shall declare and pay such further dividend."

The purpose of the amendment is to provide for the payment of a further dividend after the final dividend, if assets become available.

59. Section sixty-seven of the Act is hereby amended by adding after the word "tariff" in the fourth line from the end of the section the following words:—

"shall also fix the fees to be paid to the officers of the Court and"

This supplies an omission in the original Act.

60. The Act is amended by adding thereto as section ninety-nine the following:—

"99 This Act shall be administered by the Minister of Justice."

There was no Cabinet Minister designated to administer the Act in the original Act.

Alta.

S.C.

COMRIE v. COMRIE

COMRIE v. COMRIE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 28, 1921.

Master and Servant (§I.C—10)—Near Relationship of—Presumption as to Payment—Circumstances to be Considered—Rule of Law.

Relationship or membership in the same household is but one of the various facts and circumstances to be taken into consideration in determining whether a contract to pay for services rendered is to be implied as an inference of fact, and no rule of law can be stated based upon the bare fact of relationship or membership in the same household which is of universal application.

[Redmond v. Redmond (1868), 27 U.C.Q.B. 220; Re Ritchie (1876), 23 Gr. 66; Mooney v. Grout (1903), 6 O.L.R. 521, considered.]

APPEAL by defendant from the judgment of McCarthy, J. in an action by one brother against another for wages. Affirmed with a reduction of the amount.

A. H. Clarke, K.C., for appellant.

J. E. Varley for respondent.

The judgment of the Court was delivered by

Beck, J.:—This is an appeal by the defendant from the decision at the trial of McCarthy J. sitting without a jury.

The action is one by one brother against another for wages, and some other items. As to the wages the defendant urges that the evidence does not disclose an express agreement to pay wages and that as a matter of law "In the case of relatives living together the law does not imply any promise to pay for services; an express promise must be proved" citing Redmond v. Redmond (1868), 27 U.C.Q.B. 220; Iler v. Iler (1885), 9 O.R. 551. There are other decisions upon this point. Re Ritchie; Sewery v. Ritchie (1876), 23 Gr. 66; Mooney v. Grout (1903), 6 O.L.R. 521.

I think the law is put more nearly accurately in the last mentioned case than in Redmond v. Redmond. Meredith, C.J. says at p. 522: "Where services are performed between strangers without any agreement as to compensation, the law implies that a reasonable compensation is to be paid, from the fact of the services having been rendered at the request of the person for whom they have been rendered. But where the parties are in such a relationship to one another as were these two sisters, the law is that no such presumption arises, and the duty rests upon the person who seeks pay for services rendered under those circumstances to prove a contract express or implied."

Redmond v. Redmond would seem to say that once the relationship of child and parent, brother, sister, &c. is established, an express contract to pay must be proved.

But it seems to me that even the less stringent rule asserted by Meredith C.J. ought not to be accepted as a rule of law or as of universal application; but rather that in every case all the facts and circumstances are to be considered and the proper natural inferences to be drawn from them all. Such considerations as the nearness or distance of the relationship, the character of the services, the financial and social positions and the ages of the respective parties; the nature of their former associations, and other considerations must, it seems to me, be taken into account, and the inference drawn, either for or against an implied contract, not at all as a presumption of law, but as a natural inference from all the facts and circumstances; the relationship of the parties being of more or less importance, having regard to the other facts and circumstances proved.

See Street's Foundations of Legal Libiality, vol. iii, pp. 185-186, where it is said that the "Common Courts" for work and labour done, &c., "were devised to enable a plaintiff to recover for a benefit conferred under such circumstances as did not create either a true debt or an actionable assumpsit, but which benefit was nevertheless intended by both parties to be paid for" and see p. 205.

The whole question is discussed well and at great length in Labatt's Master and Servant, 2nd ed. vol. ii, ch. xviii, p. 1651 tit: "Recovery for remuneration for services rendered by relations or members of the same household to one another."

My conclusion is that relationship or membership in the same household is but one of the various facts and circumstances to be taken into consideration in determining whether a contract to pay for services rendered is to be implied as an inference of fact and that no rule of law can be stated based upon the bare fact of relationship or membership in the same household which is of universal application.

In the present case the plaintiff and defendant are brothers. The defendant is 42 years of age and the plaintiff 4 years younger. They both came from Scotland, the defendant 2 years before plaintiff. They both took up homesteads; their lands adjoined each other cornerwise. The plaintiff took up his homestead in 1908 and proved up in 1913. He did not put up a building on his land but the defendant built a shack on his land and they both lived together there. They are both bachelors. The plaintiff did some breaking on his land, how much does not appear. The

Alta.

S.C.

COMRIE v. COMRIE

defendant has 40 acres of breaking on his land. He admits that plaintiff did something towards helping to build the shack, putting up fencing, and ploughing on the defendant's land.

This was all prior to November, 1913, when the plaintiff took a holiday trip to Scotland, remaining till about the end of January, 1914. On the occasion of the plaintiff leaving for Scotland in the fall of 1913, the defendant gave him a cheque for $340. The defendant seems to admit that this was given "for the help he gave me through haying that year." It was probably partly in recognition of the fact that while each had done what was necessary under the Dominion Land Regulations for securing his patent, the defendant had received the greater benefit from the work of both, by reason of there being more improvements put upon the defendant's lands. In this way everything was settled between the brothers up to the end of 1913. The plaintiff, on his return in January, 1914, apparently went as a matter of course to the defendant's shack. There seems to have been no understanding between the brothers on this occasion and in April they had a row and the plaintiff left and went to work with the Bar U Ranch at $40 a month. The plaintiff returned to the defendant in January, 1916, and claims wages from that time to the fall of 1918. He says no rate of wages was fixed but claims on a quantum meruit at the rate of $675 per annum (and board)—a total of $1925. The plaintiff also claims that he paid the defendant on the supposition that a partnership existed between them, several sums of money for which the defendant ought to account and specifies the following: March 16, 1917, $54, by cheque of S. M. Gardner; March 24, 1917, $159.40, by cheque of Dick Bros.; April 8, 1918, $222.45, by cheque of Roderick McLeay; November 25, $155, by cheque of J. D. Hill. The plaintiff also claims rent at $80 a year for the years 1915, 1916, 1917 and 1918 for the plaintiff's homestead, amounting to $340.

The defendant admits his liability for this last—the $340 rent, and while denying his liability in respect of the other claims, pleads a tender before action of $800 and pays that amount into Court.

In view of the evidence the two remaining claims must be considered together.

The plaintiff says that for some length of time previous to his going back to his brother's in January, 1916, he was earning $40 a month (and board); that at that time one

McKinnon was working for his brother, he believed, at $40 a month. The plaintiff's evidence of the agreement for hiring is that when McKinnon was leaving the defendant's place—which was about April 1, 1916—the plaintiff also proposed to go to work on his own account; that the defendant asked him not to go elsewhere but to stay and work with him; that no wages were mentioned; that he agreed to stay.

The plaintiff says that he worked on the place helping with building a new house, feeding cattle, ploughing, harrowing, and doing farm work generally; that in the following years the same sort of farm work—the stock being increased by 22 head in the fall of 1916—was required on the farm; that the hiring ended in October, 1919.

And now comes in the explanation of the advances claimed by the plaintiff. In substance it is, according to the plaintiff, this: that he was the defendant's employee throughout the period from January, 1916, to October, 1919, but at various times at the request, or suggestion of the defendant, he went to work for others in the vicinity, turning over to the defendant the cheques he received as wages from these others. If the plaintiff's claim for wages is sustained, it is obvious that these moneys were the defendant's moneys and this the plaintiff of course admits.

The statement of claim calculates the wages at the rate of $56.25 a month. He says he was getting $50 a month for about 3 months from Dick Bros.; $80 a month from McLeay for his work with the defendant's team; $54 for 12 days' work for Gardner.

McKinnon gave evidence and corroborates the plaintiff's story of a request by the defendant to the plaintiff to stay and work for him, no wages being mentioned, but the evident intention being fair wages. McKinnon says that he was being paid $40 a month; that on his next job he got $45, and wages went up considerably afterwards, sometimes as high as $70 a month.

McRae confirms the plaintiff as to the nature and extent of the plaintiff's work for the defendant.

The defendant in his evidence does not dispute the periods during which the plaintiff says he worked on the defendant's farm or for the several other persons. He denies any understanding that wages should be paid and minimises the work the plaintiff did for him. He admits receiving the Dick cheque and the Gardner cheque, but says that the plaintiff got or must have got the money after the cheques

Alta.

S.C.

COMRIE v. COMRIE

were cashed. He admits getting the McLeay cheque but says: "I received it because I had a claim on the half of this for his board and one half he worked my team—and for work—I fed the cattle which he should do for one month during that period he was at Gardner's."

I have omitted to say that the plaintiff admits he received $20 from one of the cheques for the purpose of buying clothes.

The defendant put in a counterclaim or set-off for taxes paid, to the amount of $27.95, and for payments by cash and cheques made by him to the plaintiff, to approximately a total amount of $400. The fact of the defendant making these payments to the plaintiff would itself seem to be some corroboration of the plaintiff's claim that there was an understanding that wages should be paid. The trial Judge seems to have considered these and other small items and the admitted rent owing by the defendant to the plaintiff as balancing each other and counsel seem to have acquiesced in this.

So that the question of wages is the only one we have to deal with.

It is a case which I think furnishes a good instance in which it is evident that the assertion of a rule of law based merely upon relationship between the parties ought to be rejected. On the whole evidence the trial Judge has believed the plaintiff's story, and I think he was right; but I think he has allowed the plaintiff somewhat too much in respect of wages. The statement of claim puts the claim on the basis of $675 a year, equivalent to $56.25 a month. I think on the evidence—particularly that of McKinnon—$50 a month is about right. Then the statement of claim calculates the amount for 3 full years. The longest period which should be allowed is from April 1, 1916, to October 1, 1919, or 30 months, making $1,500.

I would therefore, reduce the judgment entered for the plaintiff from $1,925 to $1,500, the $800 paid into Court to be as the formal judgment directs, to be paid out to the plaintiff on account. In the result the judgment appealed from is affirmed with that variation. As to the costs of the appeal, I think the defendant appellant is entitled to them.

Appeal dismissed.

OGILVIE v. DAVIE.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. February 1, 1921.

New Trial (§IV.—32)—Surprise—Judgment Based on Contention Raised at Argument—No Opportunity to Disprove.

Where a judgment is based upon a finding that the contract for a commission on the sale of land to the Government was made by reason of the plaintiff's real or supposed influence with the Government and that the sum claimed is for this bartered interest and the contract is consequently null and void and the plaintiffs have been allowed no opportunity of meeting and disproving this contention which was only raised at the argument, a new trial will be ordered.

APPEAL by plaintiff from a judgment of the Court of King's Bench (Que.) affirming a judgment of the Superior Court dismissing an action for commissions and interest on a sale of certain lands to the Government. Reversed, new trial ordered.

E. Lafleur, K.C., and J. W. Cook, K.C., for appellant.

L. S. St. Laurent, K.C., and J. A. E. Gravel, K.C., for respondent.

Idington, J.:—The respondents, as owners in part and as executors or trustees in part, were entitled to compensation for land in Levis expropriated by the Crown for purposes of the Intercolonial Railway on August 12, 1912. It is by no means clear whether it was as the result of ignorance of the fact that the land had been so expropriated or as a means of determining the compensation due to the respondents, that they retained appellants on October 1, 1912, for some purpose and to effectuate same gave, on said date, the following option:

"D. W. Ogilvie, Esq.,
11 St. Sacrament St., Montreal, P.Q.

Dear Sir:

We hereby give you an option to purchase the following described property, such option to be good for four (4) months from present date.

That certain property known as the G. T. Davie & Sons property, situated in the Town of Levis, P.Q., the said property being bounded on the north-west by the River St. Lawrence; on the south-east by the public road known as the Commercial Road; the whole as per plan prepared by A. E. Bourget, P.L.S., of date March 28th, 1912. The whole as it now exists with wharves, buildings, etc., erected thereon.

The property to be accepted subject to existing leases and servitudes. Rents, taxes, insurance, etc., to be adjusted to

Can.
S.C.
OGILVIE
v.
DAVIE

date of passing of deeds. The property to be free and clear of any and all encumbrances. Purchase price to be as per our letter of this date, payable on passing of deeds, which must be passed within thirty (30) days from the date of acceptance of option.

In the event of this option being taken up and the purchase price paid, we agree to pay D. W. Ogilvie & Company, incorporated, a commission of five per cent. (5%) on the purchase price.

Yours very truly,
George T. Davie & Son."

The appellant responded thereto by the following:—

"11 St. Sacrament St.,
Montreal, Oct. 1, 1912.

Messrs. G. T. Davie & Sons,
Levis, P.Q.

Dear Sirs:

In reference to the option given me this day to purchase that certain property owned by you situated in the Town of Levis P.Q. the whole as per plan prepared by A. E. Bourget, P.L.S., of date March 28th, 1912.

It is hereby understood that this option is given for the purpose of my acting as your agent for the sale of the property at the best obtainable figure and on completion of the sale I am to receive a commission of five per cent. on the purchase price.

Yours very truly,
(Sgd.) Douglas W. Ogilvie."

The letter of respondents of October 1, 1912, enclosing the option had referred to the part the Government required as worth, at least, $2 per foot, evidently thereby including injurious affection of so taking, and referred to some other land as possibly required for same purpose as worth $1 a foot.

That option evidently expired by effluxion of time without any results, or extension, or renewal, and all therein, and connected therewith, seems only useful as illuminating to a certain, or rather uncertain, extent, what follows.

The next stage in the relations between the parties hereto appears, by the following letter of appellant of May 7, 1913, and reply of respondent of May 14, 1913, which read as follows:—

"Montreal, May 7th, 1913.

Messrs. George T. Davie & Sons,
Levis, P.Q.

Dear Sirs:—

The Intercolonial Railway of Canada have sent us a blue print of your property situated in Lauzon Ward, Levis, shewing the land they purpose to expropriate lying between the present Intercolonial Railway and the King's Highway; the strip of land having a superficial area, according to the plan as prepared by C. A. Bourget, of 36,900 sq. ft. E.M.

In order to take up this matter with the Intercolonial Railway, will you kindly write us giving us the best cash price you will accept for the 36,900 sq. ft. of land. On receipt of your letter we will communicate with the proper officials and endeavour to make a sale of the property direct to the Intercolonial Railway without expropriation proceedings.

Trusting you will give this matter your early attention, as it is advisable to settle with the Railway before expropriation proceedings are started.

Yours very truly,
(Sgd.) D. W. Ogilvie & Co. Inc.
Per D. W. Ogilvie."

(REPLY).

"Levis, May 14th, 1913.

Messrs. D. W. Ogilvie & Co.,
11 St. Sacrament St., Montreal, Que.

Dear Sirs:—

In answer to your letter of May 7th, we beg to say that we are asking one dollar and twenty-five cents ($1.25) per foot for our property which has been expropriated by the Intercolonial Railway.

Yours very truly,
Geo. T. Davie & Son,
Per J. O. A. V."

That seems to have resulted in some little movement on the part of the appellant, for it is able, on October 13, 1913, to write as follows:—

"Montreal, October 13th, 1913.

F. P. Gutelius, Esq.,
General Manager,
Intercolonial Rly. of Canada,
Moncton, N.B.
Re: Geo. T. Davie & Son's property, Levis, P.Q.

Can.

S.C.

OGILVIE v. DAVIE

Dear Sir:—

We beg to acknowledge receipt of your favour of the 9th instant and note contents.

As per our letter of May 16th, 1913, addressed to Mr. F. T. Brady, we are prepared to sell the G. T. Davie & Sons' property in Lauzon Ward, Levis, P.Q. containing 36,900 sq. ft. for the sum of $64,575. of $1.75 per sq. ft. This price will cover all damages.

We would point out that the question of 'Damage' is a serious one, as Mrs. Davie has to vacate the Davie residence, lying to the south of the land in question; and the office of G. T. Davie & Sons, and the Quebec Salvage Company, has to be vacated owing to the noise, inconvenience, etc., caused by the Intercolonial Railway taking over the strip of land in question.

In addition to this, the question of cartage between the Davie property situated to the south and to the north of the strip of land in question has become a difficult one owing to the several tracks they have to cross, and to the fact that the ground on this strip has been excavated and it makes it difficult to take a heavy load from one property to the other.

Mr. Geo. D. Davie is in Montreal to-day and the contents of this communication has been put before him, and he has expressed his opinion of being anxious to come to an early amicable settlement with the Railway Company.

Yours very truly,

(S) D. W. Ogilvie & Co. Inc.
(S) D. W. Ogilvie."

Something, not clear what, revived the energy of appellant, for we have respondent's letter:

"Montreal, Jan. 30th, 1914.

Messrs. D. W. Ogilvie & Co. Inc.

Dear Sirs:—

Re: Levis Property.

I hereby confirm the verbal extension given you sometime ago of your option for the purchase of the property of the undersigned at Levis, at the modified price of a dollar and seventy-five cents per foot for the portion required by the Government, viz., the portion lying between the highway and the Intercolonial Railway, and containing approximately thirty-six thousand nine hundred square feet, or one dollar and twenty-five cents per foot. if you take the whole of the property; the above option being hereby extended

until, say, the first of April, next.

Yours truly,

(S) George T. Davie & Sons.

(S) per G. D. D."

"Montreal, March 31st, 1914.

The above option is hereby renewed on the same terms and conditions for sixty (60) days from the present date.

(S) George T. Davie & Sons.

(S) per G. D. D."

and reply from appellant's manager, as follows:—

"March 26th, 1914.

George D. Davie, Esq.,
Levis, P.Q.

Dear Mr. Davie:—

In reference to the strip of land containing about 36,900 sq. ft. which the Intercolonial Railway desire to purchase.

Following your verbal instructions, I have again got directly in touch with the officials of the Intercolonial Railway regarding the sale of this property, and have to-day been informed that as Mr. Gutelius is likely to be kept at Ottawa for some days on important business nothing at present can be done.

The official in question, however, informed me that the railway were anxious to come to an amicable settlement for the purchase of the property.

Under the circumstances, in order that there be no misunderstanding, will you be good enough to renew the option of date January 30th, 1914, which expires on April 1st, 1914, for say sixty (60) days.

This will give me an opportunity to meet Mr. Gutelius in Montreal or Moncton during the next couple of weeks and get this property sold at private sale without any of our Quebec friends interfering in same.

With kindest regards,

Yours very truly,

Douglas W. Ogilvie."

Nothing having been accomplished meantime, and the 60 days' extension if given (as may be inferred from the letters of April 22 and 28, 1914) having expired, I again remark that all the foregoing must pass for nothing as contractual basis to be relied upon by appellant, save as illuminating the relations between the parties.

The letters I refer to of April, 1914, are as follows:—

Can.

S.C.

OGILVIE v. DAVIE

"Montreal, April 22nd, 1914.

Geo. D. Davie, Esq.,
Levis, Que.

Dear Sir:——

I understand Mr. Barnard spoke to you in reference to the property of George T. Davie & Sons which I.C.R. wish to acquire.

I can get you one dollar and seventy-five cents ($1.75) per sq. ft. for this piece of land from the railway, but I am also of the opinion that if we hold out, this sum can be increased.

As our option on this property is good until June 1st, I would be obliged if you would give the matter consideration.

I might suggest that the property be sold to myself or some other responsible individual on a small cash payment at $1.75 per sq. ft.; and that any profit over and above $1.75 per sq. ft. secured from the I. C. R. would be divided amongst those interested. This matter we would have to adjust when we next meet.

Trusting you will take the matter up with your brothers and see what can be done.

Yours very truly,

(Sgd.) Douglas W. Ogilvie."

"Levis, Que., 28th April, 1914.

D. W. Ogilvie, Esq.,
11 St. Sacrament St., Montreal.

Dear Sir:—

Your favour of the 22nd instant re the property expropriated at Levis by the I.C.R. was duly read and as requested I have talked the matter over with my brother.

He is agreeable that we dispose of this property either to your self or some other responsible party that you would name at $1.75 per sq. ft. on consideration of a cash payment to be made on same, leaving you to dispose of it to the Government and any difference over the $1.75 to be divided as you see fit.

Yours truly,

George D. Davie."

On June 2, 1914, when that last option extension ended, respondents, apparently tired of the needless and vexatious delays, promptly began to act on their own behalf and wrote directly to the manager of the Intercolonial as follows:—

"Montreal, June 2nd, 1914.

F. P. Gutelius, Esq.,
Manager, Intercolonial Rly., Moncton, N.B.

Dear Sir:—

Since September, 1912, we have been corresponding with various officials of the Intercolonial Railway in reference to a strip of land at Levis, P.Q., which the railway Company has taken possession of and which belonged to Geo. T. Davie & Sons, Levis, P.Q.

The property in question has been acquired by the Davie Shipbuilding and Repairing Co., Limited, and at a meeting of the directors held at Montreal, this morning we were instructed, without prejudice to the proprietors' rights and subject to immediate acceptance and that the deed of sale be signed not later than July 1st, 1914, to make the following proposition:

We will sell you the property containing a superficies of 36,900 sq. ft. E.M. as per survey prepared by C. A. Bourget, P.L.S. for the sum of sixty-nine thousand five hundred and seventy-five dollars ($69,575.00) cash on passing of deed. The purchase price to include damages to the adjoining property as belonging to the Davie Company.

The Davie Shipbuilding and Repairing Co. Limited, is anxious to come to an amicable settlement regarding the purchase of this land, and we trust you will give the matter your immediate consideration.

Y....."

His reply is not in the case.

Surely that must have cut away all hope on the part of appellant ever reaping anything by fair means of any profit beyond the basis of $1.75 per foot for whatever land taken by the Crown for the purposes in question.

In response to letters meantime the appellant's manager wrote as follows:—

"11 St. Sacrament St.
Montreal, Sept. 15th, 1914.

Messrs. George T. Davie & Sons.
Levis, P.Q.

With reference to your letter of the 8th instant, asking what the position is of your claim against the Government for land taken for the I. C. R. cattle sheds at Levis.

I beg to say that the settlement of this matter is progressing, I consider on the whole, very satisfactorily.

We have arranged with the Government to apply for a petition of right to sue the Government for the value of

Can.
S.C.
OGILVIE v. DAVIE

the land but have been asked not to press this matter, as they expect to make a settlement.

In Ottawa last week we were asked to write Mr. Gutelius telling him that if the matter was not settled before the 20th instant, we would apply for the Petition of Right and that the same would be granted.

Of course you know it is very difficult to get the Government to move in any matter outside of war matters just at present; but they are well disposed, and I really think we will be able to settle this matter without suit within a very short time.

Of course when the settlement is effected, it will bear interest from the date of the taking of possession by the Railway Company of the Davie property.

Trusting this explanation is satisfactory, and assuring you that we are doing everything possible in order to obtain a quick settlement in this matter,

Yours very truly,
Douglas W. Ogilvie."

Nothing more appears in the case bearing directly on the measure of appellant's retainer until March 17th, 1915, when respondents write as follows:—

Levis, Que., 17th Mar., 1915.

Messrs. D. W. Ogilvie & Co., Inc.,
11 St. Sacrament St., Montreal.

Dear Sirs:—

In connection with our property at Levis, which the Intercolonial Railway Co. has taken possession of for a siding and which property has been in your hands for sale to the Government, Mr. Barnard states that the Government will be willing to settle for the property on terms that would give us one dollar and seventy-five cents ($1.75) per foot for the property, with interest at 4% from date of sale to be passed as soon as the deeds are got in shape. The purchase price to be payable as soon as the Government is in funds and not later than two years from date.

This would be satisfactory to us and we hereby authorize you to close the matter on such terms.

Yours faithfully,
Geo. T. Davie & Sons."

It is to be observed that this did not expressly renew or pretend to extend to terms of previous letters giving an option and it is to me incredible that in face of the respective letters of appellant of October 13, 1913, and of respondents of June 2, 1914, to Mr. Gutelius, plainly declaring

their terms, that there should exist any hope of profit to be got by fair means.

I, therefore, see no basis upon which appellant can rest any claim for compensation on such a basis, or any other basis than the 5% on price at $1.75 per foot.

Hence if there was in fact any discovery that a larger area than the original 36,900 sq. ft. within that spoken of and defined by the plan of expropriation, that larger area was respondents' property and the price they named of $1.75 per sq. foot over and over again, sometimes expressed as 36,900 sq. ft., and at others as that more or less, was theirs within the literal terms declared in the foregoing letters.

The only thing quite apparent is that for years the respondents having allowed the appellants the opportunities I have outlined above, then ceased to do so and claimed payment on basis of $1.75 a foot upon which appellant would be entitled to its commission. That had been paid before the appellant sued herein on the basis of 36,900 sq. ft. being the correct measurement as assumed throughout till execution of deed; unless in regard to an incident connected with the work of one Addie, a surveyor, who was not called, and whose computation of the area in question may have been the foundation for claims alleged to have been made by the Government that it contained only 34,312 sq. ft.

The deed to the Crown which resulted, after a year or more of delay, and is dated June 2, 1915, professes to convey 38,723 feet.

I am unable to identify the two descriptions; that is the one given in expropriation and that given in the deed, as being identical, though I see nothing to demonstrate that the area in the original description had been for any reason increased and yet why a new description was resorted to is neither explained nor explicable on the evidence before us. Either they are the same or the contract under which appellant worked has been departed from in a way that would not help it herein.

If they are, as is quite possible, within the same boundaries, only differently expressed, then the appellant has nothing to complain of herein unless by reason of an error of computation of that area that he has not got his commission upon the price of $1.75 per square foot.

The apparent difference in area would be 1,823 feet, which, at $1.75 per foot, would be $3,190.25, and appellant's commission thereon would be, as I make it, $159.51 due him, if this later computation of area is correct.

Can.

S.C.

OGILVIE v. DAVIE

On my construction of the appellant's contract with respondents, as evidenced by the above quoted letters and the attendant circumstances interpreting same, this would be the ultimate result for appellant.

I can see no ground for the extension of the implications of profit after the time limit therefor had expired and the respondents had declared by their letter of June 2, 1914, to Mr. Gutelius, the terms upon which they were willing to accept as compensation for their land expropriated, whether it be 36,900 feet or 38,723 feet.

It would have been highly improper for those serving the Crown to have given more, if more given, it must be attributed to mistake, or something worse, which I hope did not exist, and, in any event, could not benefit appellant.

In this view of the contract between the parties hereto there never was any foundation for the pretension of appellant to any share in the interest to be paid by the Crown for the detention of payment.

The claim set up by appellant of about 20 to 25% profit, under all the circumstances is most repulsive and suggestive of much suspicion of its having been founded upon hopes and expectations offensive against the provisions of the public policy enunciated in sec. 158 of the Criminal Code, R.S.C. 1906, ch. 146.

Unless we are to assume, what is inherently improbable, that the respondents were so ignorant and incapable as to be quite unfitted for taking care of their own affairs, and much less of discharging their duties as trustees, the result seems inexplicable upon any other theory than that the Crown was made to pay 25% more than respondents were willing to accept.

Which alternative should be adopted; That the Crown was not well advised, or that it was imposed upon? And again, that such imposition was designedly brought about, or merely that the feeble folk serving the Crown were overcome by those serving the respondents?

And again, was it the result of a clear recognition on the part of the respondents that it was only by engaging an equipment adequate to surmount the lethargic resistance of such feeble folk, that the respondents could get a just consideration of their rights which led them to offer such a price for the service?

In the evidence there is a good deal that is very suggestive of some willingness to do some manoeuvring.

In justice to the Minister of the Department there is not

the slightest ground of suspicion attaching to him or to others directly serving the Crown.

We must, however, I submit, aid them in removing the tendency of suspicion on the part of those believing otherwise that such things can be done, by always scrutinising closely the conduct of those dealing with their subordinates.

There is much to arouse suspicion in some features of the actions of the parties hereto and their respective agents, and if the suspicious discovery of increase in area is unfounded the Crown may recover from the respondents, but that would not or should not help appellant.

There is, in my view of the facts, no need to consider the ground taken in the Courts below.

If the result had been to increase the price to the extent claimed by appellant of 20 or perhaps 25% beyond the price which the respondents had offered, then, I suspect, there would be much in the case to suggest an examination of the law and facts which the said Courts have proceeded upon.

I would dismiss this appeal with costs, but without prejudice to the appellant's right to recover in another action the small item of $159 it may be entitled to if in fact there was actually an increase of area beyond that originally contemplated, conveyed to the Crown.

Whether or not there was an error of computation in the area upon the basis of which the price per foot desired by respondents was such as to entitle appellant to the item I have named as possible based thereon, has not been the foundation of this appellant's action or tried out.

It is quite possible that the respondents have been paid too much, and that such overpayment is recoverable by the Crown, and hence I do not deal with the payments made by respondents to the subordinate agent of the appellant.

Duff J.:—I regret to say that I have been unable to concur in Mr. Lafleur's contention that the decision of the trial Judge affirmed by the Court of Appeal to the effect that the plaintiff's claim arises out of the transactions juridically sterile because partaking of the nature of trafficking with influence is entirely without foundation in the evidence.

On the other hand it is quite clear to me that the odious accusation which by the conclusion of the Courts below is held to be established was never really put to the witnesses principally concerned in such a way as to give them a fair opportunity of meeting it and clearing themselves; and the point to which I have given my attention is whether, there being some evidence pointing in the direction of the con-

Can.

S.C.

OGILVIE v. DAVIE

clusion at which the Courts below have arrived, it is of sufficient weight to support the judgments or of so little weight as to require a reversal of those judgments on this point. On the whole I think the more satisfactory course is to order a new trial reserving all the costs including all the costs of the appeal to this Court to abide the result of that trial. This being my conclusion, it would be improper to discuss the evidence in detail.

I am satisfied that as regards the other issue raised by the pleadings the appellants have fully established their right to recover the amount claimed; and the retrial should therefore be limited strictly to the issue whether or not the contract upon which the claim is based is a contract the enforcement of which the law regards as incompatible with those paramount interests of the community which are compendriously indicated by the phrases "public policy" and "public order."

Anglin J.:—Appealing from a judgment of the Court of King's Bench affirming the dismissal of their action by the Superior Court the plaintiffs seek judgment for the amount of their claim or, alternatively, a new trial on the ground that they were not given an opportunity of meeting a charge of illegality, not pleaded and first preferred in the course of the argument before the trial Judge, on which the judgments against them solely rest.

The claim as formulated in the declaration consists of three items: (a) Balance of commission at five per cent. on the price which the defendants agreed to accept for their land, $159.51; (b) Price paid in excess of what the vendors agreed to take, exclusive of interest, $1,809.75; (c) Interest on the price paid between the date of taking possession and the date of closing the transaction ("date of sale"), $10,598.59; Total, $12,567.85.

Besides particular defences peculiar to each item, two general defences are pleaded—that the action is premature and that the plaintiffs' claim has been satisfied by payments made by the defendants to Barnard. Consideration of these pleas may be advantageously deferred. The discussion of the several items will, therefore, proceed subject to them and to the defence of illegality.

(a) and (b). A contract to pay a commission of 5% on a price of $1.75 per square foot, which the defendants had agreed to accept, is admitted. A supplementary contract that any sum in excess of this figure which the plaintiffs could induce the Government to pay would belong to them

as additional remuneration is contested. But in view of the admissions in the examination of A. C. Davie, the correspondence in evidence, and the acknowledgment of this supplementary contract by the payment of $5,000 on account of it by the defendants to Mr. Barnard, there seems to me to be no reason to doubt that it is established. Whether the plaintiffs are entitled to the balance of the commission asked and only to the $1809.75 claimed as excess price, or whether the demand for a balance of commission is unfounded and the whole $5,000 and interest thereon should have been claimed as "extra price" depends on the true area of the property conveyed to the Crown.

If the area conveyed was in fact that named in the deeds, 38,723 sq. ft., the claim as formulated is correct as to both items. If it was 36,900 sq. ft., which was the basis of the negotiations and of the actual settlement with the Government of the price paid ($64,575 for 36,900 sq. ft. at $1.75, plus $5,000, a lump sum agreed to as a compromise), the claim for a balance of commission is ill founded and, if not debarred by the principle limiting the adjudication to the sum demanded (art. 113 C.C.P.), the plaintiffs would be clearly entitled to the sum of $5,000 and interest thereon instead of $1809.75, in respect of item (b) of their claim. In the factum, however, while apparently recognising that a mistake was made in this respect to their detriment, they adhere to their claim as formulated in the declaration.

The notice of expropriation gave the area of the property to be taken as .79 acres, or 34,412 sq. ft. According to a survey made by Bourget, P.L.S., the actual area of the land expropriated was 36,900 sq. ft., and the defendants appear to have based their claim throughout on that being the correct quantity. They still adhere to that position. Another survey made for them by Addie is stated in a letter from the Deputy Minister of Railways to Barnard to have shewn an area of 38,671.3 sq. ft. The Deputy Minister points out that Addie probably included land which was already the property of the Crown. The defendants asked that the Government should send a qualified surveyor to check over Addie's survey on the ground and arrive at a definite result with him. If that was done, the record does not shew the result. Whether anything was done or not, and whatever its result if anything was done, it is abundantly clear that the transaction was closed between Barnard and the Department on the basis of the actual area being 36,900 sq. ft., which it was agreed should be conveyed at a price of $1.75 per foot

Can.
S.C.
OGILVIE
v.
DAVIE

($64,575) plus $5,000 additional. This latter sum was agreed upon, Barnard tells us, by way of compromise between the figure of $1.75 per sq. ft. stated by the plaintiffs in their letter of October 13, 1913, to the general manager of the I.C.R., and confirmed by the defendants' letter of January 30, 1914, as what they were willing to accept on a basis of 36,900 sq. ft., and $2.00 per sq. ft., the price finally demanded from the Department by Barnard, who represented the plaintiffs. Barnard's evidence and his letters put that beyond doubt.

The deeds transferring the land to the Crown, in which the area is stated to be 38,723 sq. ft., were not seen either by the plaintiffs or by Barnard before execution, although they had asked to be notified of the closing of the matter and had stated (letter of March 14, 1916) that they wished to be present. Barnard tells us that on the date of closing (June 2, 1916) Dupre, who acted for the Government in investigating the title and in giving instructions for the preparation of the deeds and had arranged to notify Barnard so that he and Ogilvie might attend on the closing, telephoned him from Quebec that "the matter was all ready and that the Davies' insisted on its being closed that afternoon." Of course Ogilvie and Barnard were unable to be present.

Barnard says that there were three different surveyors' reports and that that meant quite a few interviews between himself and Dupre. On February 2, 1916, the plaintiffs wrote to the defendants: "The situation is simply this: The Government have several plans showing different areas of the property, and it is necessary that Mr. Addie prepare a plan of the property as per the Expropriation Notice. If the area as shown on this plan appears satisfactory to the Government the matter will be closed at once. The Department of Railways and Canals informs us that their Engineer at Moncton has instructions to go into the matter with Mr. Addie. And we are to-day again taking up the matter with the Department, enquiring as to the delay."

To this the defendants replied on the following day: "Plans have already been prepared by Mr. Addie of the property and are now in possession of the Government. What is required is that an Engineer be appointed to go over the ground with Mr. Addie (as Mr. Brown, Chief Engineer at Moncton wrote Mr. Addie he had no orders to that effect) and which Mr. Barnard promised he would attend to at Ottawa. It is urgent that this be done and that a Government Engineer go over the ground with Mr. Addie so that

we can get the matter closed up and a settlement effected without further delay."

On March 13 the papers were sent by the Department of Justice to Dupre & Gagnon with instructions to get the matter closed without delay. It must have been after this date that Barnard had the frequent interviews with Dupre of which he speaks. Some delay was occasioned by difficulties of title and in having the Order in Council for payment put through. There is no further reference in the record, however, to the question of area. Neither Dupre nor the notary Couillard, who prepared the deed, nor any of the surveyors or railway officials concerned is called to explain how the area came to be fixed at the figure named in the deeds. Barnard in a letter of May 22, 1917, to the late Stuart, K.C., who was then acting for the defendants, refers to the change of area as a "manoeuvre .... with a view to covering up the $5,000." O'Neill, the defendants' accountant and confidential clerk and a witness on their behalf, also suggests that 38,723 sq. ft. was inserted in the deed "because there was something to cover" in "the making of the $5,000." But if that had been the purpose the area would almost certainly have been increased by 2857.14 sq. ft. (which at $1.75 per sq. ft. would amount to $5,000) and made 39,757.14 sq. ft.

While A. C. Davie could not explain the statement in the deeds that the area was 38,723 sq. ft. and refused to characterise it as "false," he swore positively that he knew the area of the property to be 36,900 sq. ft.

Whether there is anything due in respect to item (a) and what should have been the plaintiffs' claim on item (b) depend entirely upon the true area of the property conveyed. In my opinion that cannot be ascertained on the evidence now before us. This question should therefore form one of the issues for determination on the new trial which must be had for other reasons presently to be stated. The plaintiffs' rights in respect to items (a) and (b) should be determined as above indicated when such area is ascertained. To permit of complete justice being done if the true area proves to be less than 38,723 sq. ft. leave should be reserved to the plaintiffs to present an incidental demand under art. 215 (1) C.C.P. for the whole or any part of the balance of the sum of $5,000 (and interest thereon) not covered by the conclusions of their present declaration. Should such a demand be held not to lie the right to bring action for any such balance not recoverable in this action should, if

Can.
S.C.
OGILVIE
v.
DAVIE

the defence of illegality is not successful, be reserved to them.

(c) The claim for interest, $10,598.59, between the date of taking possession (August 12, 1912) and the date of conveyance (June 2, 1916) is preferred on two grounds—as profit secured from the Government over and above $1.75 per ft., and as covered by a contractual stipulation. The sum claimed includes $762.40, interest paid on the $5,000 and recoverable, if at all, under item (b).

If the plaintiffs' claim to the interest on the $64,575 rested solely on a stipulation that they should receive so much of the purchase price as exceeded $1.75 per sq. ft., the view suggested by Lamothe that as an accessory of the principal it would belong to the defendants (res accessoria sequitur rem principalem) might occasion difficulty. The principle of the law of mandate adverted to by my brother Mignault might also prove an obstacle to recovery by the plaintiffs. But the special contract invoked by them, if established, overcome both these difficulties.

While the matter was still in the stage of negotiation the plaintiffs informed the defendants by letter (September 15, 1914) that "of course when the settlement is effected it will bear interest from the date of the taking possession by the Railway Company of the Davie property." Allison Davie admits that from this letter the defendants learned that the Government would pay interest from the date of expropriation. When negotiations between Barnard and the Department had so far progressed that he was able to state the terms of settlement, we find this passage in a letter from the defendants to D. W. Ogilvie of March 17, 1915: "Mr. Barnard states that the Government will be willing to settle for the property on terms that would give us one dollar and seventy-five cents ($1.75) per square foot for the property with interest at four per cent. from the date of sale to be passed as soon as the deeds are got in shape. The purchase price to be payable as soon as the Government is in funds and not later than two years from date. This would be satisfactory to us and we hereby authorize you to close the matter on such terms."

The important words in this letter are "from the date of sale." Although the witness O'Neill says he understood them to mean "from date of expropriation" (testimony probably inadmissible), A. C. Davie offers no such explanation and G. D. Davie, with whom all the negotiations were carried on by Ogilvie, is not called as a witness. Barnard

says that it was distinctly understood that the interest up to the date of actual conveyance was to be given the plaintiffs and himself as additional remuneration. He certainly made a claim on that basis at an intereview with A. C. Davie and O'Neill in January, 1916, when he met them in Quebec to make certain, he says, that they understood the terms of the settlement and precisely what disposition was to be made of the monies to be paid by the Government. Davie and O'Neill both admit that interview. Barnard says he understood the claim he then made was assented to: Davie and O'Neill that it was to be referred to G. D. Davie. The failure to call the latter as a witness is, therefore, most significant. Barnard himself was a witness for the defendants and their counsel had him verify and then put in evidence a letter of May 22, 1917, from himself to the late G. G. Stuart, who was then acting for the Davies. In that letter Barnard says: " . . . Ogilvie's agreement provided that he would get anything over and above $1.75 a foot. We tried first to get $2.50 a foot and then $2.00, and finally got the Government to offer $1.75. The matter was at a deadlock for some time when, after numerous interviews with the Minister, I arranged that instead of getting $2.00 a foot we should get $1.75 plus $5,000 and interest on the whole amount at 4% from the date of taking possession, the $5,000 and interest from taking of possession being a compromise between our demand at $2.00 and the Government's price of $1.75. I considered that Ogilvie, under his agreement, would be clearly entitled to the $5,000 and the interest from the date of taking of possession, but in order to avoid all possible misunderstanding, prepared a special letter which I sent to Ogilvie with instructions to have same signed by the Davies, in which I mentioned that I had arranged with the Government for the sale of the property on terms that would give them $1.75 per foot 'with interest at 4% from date of the sale to be passed as soon as Deeds are got in shape,' and I thought by reciting 'from date of sale to be passed as soon as Deeds are got in shape' that I made it quite clear that they would only get interest from the date of the Deed of Sale.

I further explained the matter in a letter to Mr. George Davie and also verbally to Mr. O'Neill and when I found that the cash payment would not be sufficient to pay off Ogilvie, took the trouble to go to Quebec and meet Mr. Allison Davie and Mr. O'Neill at Chinic's Hardware Store

Can.

S.C.

OGILVIE v. DAVIE

where we went into the figures and worked out exactly how much the Davie Estate would have to add to the cash payment in order to settle with Ogilvie, and how Mr. Allison Davie and Mr. O'Neill can now pretend that the Estate is entitled to the interest from date of taking possession is frankly beyond me.

. . . .

P. S. In figuring the amount of interest that Ogilvie is entitled to, I have in the above letter calculated interest up to the 2nd of June, the date of the passing of the Deed of Sale. To give you the whole story I should mention that when I met Mr. Allison Davie and Mr. O'Neill in Quebec at Chinic's, and we figured the amount of interest coming to Ogilvie they raised the point that if interest until the execution of the Deed of Sale was to be paid to Ogilvie the settlement might drag on for a long time to the prejudice of the Davie Estate. I agreed that this would not be fair as the expectation was, when the Davies agreed to take $1.75 a foot, that they would get payment within a reasonable time, and after some discussion it was agreed that Ogilvie's right to the interest would stop on the 1st of March."

Barnard's statement as to the objection raised by Davie and O'Neill is corroborated by their testimony. The dedendants also called D. W. Ogilvie as a witness on their behalf and had him pledge his oath to the truth of all the facts within his knowledge stated in Barnard's letter to Stuart.

Finally, the defendants paid Barnard $10,763 on June 5, 1916. A. C. Davie says on examination for discovery by counsel for the plaintiffs that this payment was made in fulfilment of a legal obligation—he is quite sure of it. On examination by counsel for the defendants he at first repeats this statement, but under adroit questioning he eventually says that, while the first $5,000 was so paid, the second $5,000 was paid "out of goodwill," after a conference of the family. Once again G. D .Davie is not called to verify this statement. The witness O'Neill was not asked as to it. To me it is simply incredible. Five thousand dollars (with $763 interest on it) was admittedly paid to Barnard as principal secured in excess of $1.75 a foot. Barnard had in January also demanded the interest from August, 1912, to the date of closing on the $64,575 to be received by the Davies for themselves. The Davies held Barnard's note for $10,000 principal and $1,500 interest in connection with

another transaction. They seem to have assumed that because of the relations between Barnard and Ogilvie's company any payment which they might make to the former would operate pro tanto as a discharge of their obligations to the latter. They probably conceived that it would be a good stroke of business to obtain payment of Barnard's note by setting it off against what they apparently believed might safely be credited to him in discharge of their obligation to the plaintiffs. Perhaps to avoid any admission that might prove embarrassing in the event of Ogilvie insisting on his claim for the interest, while they describe the first $5,000 of the $10,000 of principal paid to Barnard as "difference on sale of Davie property to I.C.R.," they designated the second $5,000 as "allowance for services rendered" in the statement sent to Barnard and as "bonus for trouble" in a statement certified by O'Neill and filed at the trial. Comment on all this seems unnecessary. I would merely add that the testimony of A. C. Davie is most unsatisfactory. It gives an impression of shiftiness and unreliability.

Taking into account all the evidence before us bearing upon it, if obliged now to determine the question, I should incline to the view that the Davies did agree with Ogilvie that his firm should have as part of their remuneration the interest on the $64,575 between the date of taking possession and the date of sale, by which I am disposed to think was meant the date of execution of the deeds. But as a new trial must be had on other grounds, it will probably be more satisfactory that this item should be dealt with by a Judge who will have the advantage of seeing the witnesses and possibly also of evidence not now before us, such as the testimony of G. Davie and the explanatory letter to him mentioned in Barnard's letter to Stuart. We have not the benefit of the views either of the trial Judge or of a majority of the Judges of the Court of King's Bench on the merits of the plaintiffs' claim apart from the defence of illegality. The Chief Justice would treat the interest as an accessory and holds the claim for $159.51 unfounded. Martin, J., would disallow the plea of compensation based on the payments to Barnard and the defence that the action was premature. He finds the claim for interest unfounded and also that for a balance of commission. Pelletier, J., proceeds solely on the ground of illegality. Greenshields, J., dissents and there is no opinion delivered by Carroll, J. The formal judgment merely dismisses the appeal "considering that there is no error in the judgment appealed from."

Can.

S.C.

OGILVIE v. DAVIE

The general defences still remain to be considered.

I know of no legal ground on which the defendants can set up payment to Barnard as an answer to the plaintiffs' claim. Neither as a partner nor otherwise was he entitled to receive moneys payable to them. He was merely their employee or sub-agent and had apprised the defendants of that fact by sending them a copy of his letter of March 24, 1916, written to D. W. Ogilvie. Nevertheless they chose to pay Barnard instead of the plaintiffs moneys due, if at all, to the latter.

The defence that the action is premature has occasioned me some difficulty. The answer to it suggested by Martin, J., the only Judge below who alludes to it, seems open to the objection that the delay in payment was negotiated by Barnard himself and assented to by Ogilvie. The defendants, however, would seem to have recognised by their payments to Ogilvie of commission on $64,575 and to Barnard of $10,763 in June, 1916, that they were then under obligation to pay whatever remuneratian had been earned in respect of the entire sale, notwithstanding that they had not yet received $60,000 of the purchase money and the interest thereon. With some doubt I accept the view of my brother Mignault that this defence should not prevail.

I do so the more readily because it does not afford an answer to a part of the claim proportionate to the part of the purchase money paid before action and does not preclude a declaratory judgment as to the balance. Moreover by an incidental demand under art. 215 (2) C.C.P., all the purchase money having since been paid, the plaintiffs could have put themselves in a position to recover such balance, if not otherwise disentitled to it. The fact that the defence was not given effect to in the Courts below affords a strong indication that in their opinion it should not be maintained.

The illegality charged by the defendants at the close of the trial was a violation of art. 158 (f) of the Criminal Code. They in effect then alleged that what they agreed to pay the plaintiffs for was an exercise of improper influence with the Government or some Minister or official thereof. They refer to the following features of the evidence as warranting an inference that that was, in part at least, the nature of the consideration which they were to receive for the remuneration to be paid.

Ogilvie says that the Davies "appreciated" that he was "in a better position to negotiate than they were"; that was also his own impression, "the Davies felt that (he) could get a better price . . . . from the Government than they

could;" and that "Mr. Barnard was probably in a more favourable position than (himself) to negotiate with the Government and its officials."

Any price in excess of $1.75 per sq. ft. which they could obtain from the Government was to be divided between the plaintiffs and Barnard.

Although the Davies were always willing to accept $1.75 per sq. ft. for their property and on April 22, 1914, Ogilvie had written them "I can get you one dollar and seventy-five cents ($1.75) per square foot for this piece of land from the railway, but I am also of the opinion that if we hold out this sum can be increased," the completion of the transaction was delayed until June, 1916, so far as appears solely to enable Ogilvie and Barnard to secure additional monies for themselves from the Government. The Government actually paid $5,000 more than the Davies had asked and were willing to take. In addition they paid $10,598.59 of interest which the plaintiffs assert the Davies had agreed to hand over to them.

For 2 years the plaintiffs tried unsuccessfully to induce Gutelius, the general manager of the I. C. R., to agree to pay the defendants' price of $1.75 per foot. Then Barnard was brought in to break the impasse by negotiating with the Minister over Gutelius' head. The price demanded for the land was immediately raised. Gutelius was over-ruled and $5,000 additional in principal and $10,598.59 interest—the latter apparently not expected by the Davies for themselves—was eventually paid by the Government.

Barnard says he was brought into the transaction when it was found that nothing could be done with Gutelius—and that after he was brought in the negotiations were left entirely in his hands, adding, however, "I had Mr. Ogilvie to help me. I had Mr. Ogilvie use his influence up at Ottawa and with the railway people," and that he (Barnard) "was to use his influence . . . to try and persuade Ottawa that the price was reasonable."

In a letter of June 11, 1915, written to G. D. Davie, when matters were dragging, Barnard says "I expect to go to Ottawa this week and take the matter up with my friends."

Thomas O'Neill, the defendants' accountant, says Ogilvie told him "I have handed the whole thing over to Barnard. I do not want to mix with the politicians in Ottawa and he has friends up there."

Then there is the suggestion thrown out in the examination for discovery of D. W. Ogilvie that Barnard was closely

Can.

S.C.

OGILVIE v. DAVIE

connected by marriage with a member of the Government, and finally the increase of the area from the 36,900 sq. ft. claimed by the Davies to be the true area, to the 38,723 sq. ft. mentioned in the deeds, coupled with Barnard's and O'Neill's surmise that it was made to cover up the additional $5,000.

In addition to all this, apparently before Barnard's services were enlisted, there was a reference to the Government valuators, with whom the plaintiffs advised the defendants to "keep in touch"—a mysterious intervention of a Mr. Lockwell, whose status and connection with the matter are not explained—an interview between Lockwell and Ogilvie at the latter's residence in Montreal and eventually a valuation by these valuators at the absurdly high figures of $3 a sq. ft. on which the Department refused to act.

The cumulative effect of all these things is relied upon to warrant the inference that the plaintiffs demanded compensation or reward, by reason of, or under the pretence of possessing influence with the Government, or with some minister or official thereof (directly or through Barnard as their sub-agent), for procuring from the Government payment of the defendants' claim for compensation for their expropriated property. The trial Judge considered this inference warranted and that the contract sued upon was therefore illegal as a barter of improper influence. His judgment was pronounced on appeal to be free from error. Two of the appellate Judges (Lamothe, C.J., and Martin, J.), added, however, that in the case of a sale to the Government a contract by the vendor to pay an agent, engaged by him to procure the highest possible price, all that such agent could obtain over a figure fixed by the vendor as the minimum net price that he would accept, is in itself illegal as contrary to public policy and involving deception of the Department interested and a fraud upon the Government. Martin, J., speaking of the subject of the present action says "It was a demand for compensation under a pretence of possessing influence with the Government; it was an agreement intended to mislead and had the effect of misleading the Government as to the price the respondents were willing to take for their property. The manner in which it was made afforded an opportunity for appellant to exploit the Government . . . "

This aspect of the case has been dealt with by my brother Mignault. I agree with his views upon it and cannot usefully add to them. I am unable to appreciate the ground of the

distinction drawn by the two appellate Judges between the Government and a corporation, firm or individual as a purchaser as affecting the legality of a contract for the remuneration of the vendor's agent based on the quantum of his interest in an increased price.

But the ground of the judgment of the Superior Court requires further consideration. The first observation I would make upon it is that if the four principal facts relied upon—the over-ruling of Gutelius, the long delay after the letter of April 22, 1914, the payment of a large sum over and above the price the vendors were prepared to accept and the increase in the area from 36,900 sq. ft. to 38,723 sq. ft. —have any probative force in support of the defendants' case they tend to establish rather an actual and successful use of improper influence with the Government, or some minister or official thereof, than a mere demand for compensation based on the existence of such influence real or pretended. Yet Martin, J., says "there is no evidence or suggestion that any official of the Government was corrupted in any manner" and Lamothe, C. J., makes the same statement and adds (translated): "It is not alleged nor is it proved that the decision of the authorities was influenced by any undue means. Neither is it alleged or proved that the expropriated lot of land was worth less than the amount actually paid by the Intercolonial. As between the Government on the one hand and Davie and Co. on the other, the contract is not attacked, nor does it appear susceptible of attack." But for the four facts which I have specified, the other matters relied upon in support of this branch of this case—equivocal expressions in evidence and correspondence and sinister suggestions of advantage taken of friendships and family connection carried no further—would not be deserving of notice. Their significance depends wholly upon their connection with the salient facts above stated. Taken with those facts they no doubt give rise to a situation "fraught with suspicion." But, with respect, if the matter were to rest where it now is the inevitable result in my opinion would be a verdict of "not proven."

The appellants quite reasonably do not desire such a Pyrrhic victory. They wish to remove the stigma necessarily left by an accusation such as that under consideration if it be not completely refuted. Unfortunately they did not ask for a postponement of the trial to afford them an opportunity to meet that charge when it was preferred in argument before the trial Judge. Had they done so and

Can.

S.C.

OGILVIE v. DAVIE

been refused, even if the evidence were vastly stronger than it is—if it clearly established a prima facie case against them—having regard to the manner in which the charge was sprung, they would, in my opinion, have been entitled to a new trial to afford them the opportunity denied—not as a matter of grace, but as of right. Not having taken that course, however, they are now obliged to ask indulgence. Yet, as Halsbury, L. C., delivering the judgment of the Judicial Committee, said, in Connolly et al v. Consumers Cordage Co. (1903), 89 L.T. 347, at p. 349, where similar illegality, not suggested in the Courts below, had been found by this Court, "It is impossible to resist the cogency of the argument of counsel that he has not had an opportunity of meeting the allegations that are suggested against his client. As already stated, the circumstances are fraught with suspicion, but suspicious as they are, they may, nevertheless, be susceptible of explanation, and, if so, the opportunity for explanation and defence ought to have been given. That has not been done, and whatever may be the suspicions that their Lordships, in common with the learned judges below, may entertain upon the subject, mere suspicion without judicial proof, is not sufficient for a court of justice to act upon."

My only doubt has been whether the proper course in the present case would not be entirely to reject the defence of illegality as unsupported by proof. I defer, however, to what is probably the better judgment of my colleagues that there is sufficient of suspicion in the circumstances already before us to warrant sending the case back for a new trial in order that this defence may be fairly and fully investigated and the appellants' guilt established, if they be guilty, or if not their character cleared of what any right-thinking man must regard as an imputation under which they should not remain if it can be removed.

On the new trial the issues to be contested should be restricted to the question of the area of the property conveyed by the defendants to the Crown, the existence of a contract with regard to the payment of the interest to the plaintiffs and the defence of illegality. The question on this defence should be whether the plaintiffs by reason of or under the pretence that they or their agent Barnard possessed influence with the Government or with any Minister or official thereof demanded or exacted from the defendants or induced the latter to pay, offer or promise any compensation fee or reward for procuring from the Government the pay-

ment of the defendants' claim or any portion thereof for the taking by the Government of the defendants' property at Levis.

Under all the circumstances there should be no costs of this appeal to either party.

Brodeur, J.:—The plaintiff appellant claims payment of a commission in connection with land owned by defendants and expropriated by the Crown.

On the issues as joined, plaintiff would probably have been awarded a substantial part of the amount claimed. The superior Court, confirmed in appeal, held that the option and agreements set up by the plaintiff had reference only to its approaching the federal authorities and using its influence to procure more advantageous conditions and a higher price for the land expropriated. These agreements were held to be contrary to public order, and therefore illegal.

This question as to the legality of the transaction had not been raised in the plea, and plaintiff claims it suffers prejudice thereby, on the ground that certain suspicious circumstances now appear in the record, which, if explained by further evidence that plaintiff declares itself ready to make, would establish that it acted throughout in a perfectly honest and legal manner.

An explanation of the appointment of the valuators would indeed be important, and also the presence about or among them of persons of doubtful character, the letter wherein defendants say that they are well acquainted with these valuators, "We think our Mr. George can keep in touch with them" (letter, Dec. 19th, 1913), and the valuators' report, giving a higher value to the expropriated land than that which defendants were ready to accept.

It would be well to know what were defendants' reasons for selecting as their agents persons in a distant city with little or no knowledge of the expropriated lands. This fact is rendered all the more mysterious by Ogilvie's letter of March 26, 1914, in which he hopes to complete the transaction by private sale "without any of our Quebec friends interfering in same," and by Barnard's letter of January 15, 1915, in which he says that he will go to Ottawa in a few days to "take up the matter with my friends when I am there."

Gutelius, general manager of the Intercolonial, for the use of which the land was expropriated, evidently did not wish to pay the price asked by Davie and Ogilvie, and Bar-

Can.

S.C.

OGILVIE v. DAVIE

nard's services were then used to negotiate with the Minister and take the matter over Gutelius' head. It appears that Ogilvie said to one of the witnesses heard in the case "I have handed the whole matter over to Barnard. I do not want to mix with the politicians in Ottawa, and he has friends up there."

It would be equally important to know why the deed of sale specifies a greater extent of land than plaintiffs claim to have ceded. Barnard can find no explanation for this change and suggests that "the area was changed with a view to covering up the $5,000 for which manoeuvre there was no reason whatever."

There are still more circumstances in the case which make it probable that the transaction was illegal. But in view of the fact that plaintiff believes that it is in a position to explain all these circumstances and was not allowed an opportunity of doing so, I do not think we should confirm the judgment of the lower Courts, but rather follow the decision of the Privy Council in the case of Connolly et al v. Consumers Cordage Co., 89 L.T. 347, and send back the record to the Superior Court for completion of the proof. The Courts would then be in a better position to pronounce on the issue raised by the parties as to the legality of the contract.

One of the most important items of plaintiff's claim bears on the question of interest,—as to whether the interest from expropriation to the passing of deed belongs to defendants or to plaintiff.

There is perhaps a little ambiguity in defendants' letter on this subject, but after the explanations of Barnard, who drafted this letter, I would have been inclined to accept his evidence. As he is explicitly contradicted on one point by other witnesses, however, and as we have not the benefit of the trial Judge's opinion as to the credibility of the witnesses heard before him, it is better not to prejudice the issue.

Defendants have pleaded that the action was premature and that Barnard was authorized to receive money from them for and in the name of the plaintiff.

Neither of these two defences is well grounded.

Nothing in the agreements between plaintiff and defendants shews that the commission or the price of sale in excess of $1.75 per foot was to be paid only when defendants themselves were paid by the Government. Their conduct furnishes ample proof that no delay was granted. When the deed fixing the indemnity was passed, they had only re-

ceived $11,034.58, and yet they immediately paid over $13,000 to plaintiff and to Barnard.

It cannot be pretended that the payment to Barnard must be set up against the plaintiff. It is true that plaintiff employed Barnard to help in having the Government settle defendants' claim, but it never authorised him to receive monies for it, and he had no power to do so.

For these reasons the appeal should be maintained, but without costs, seeing that the appellant was at fault in not asking in the Superior Court to be allowed to make the proof it now seeks to place in the record.

The cross-appeal, in view of the judgment on the appeal, becomes useless and should be dismissed without costs.

The record should be sent back to the Superior Court for proof as to the legality of the contract.

For this purpose the parties will be entitled to amend their pleadings. Should the contract be considered legal, plaintiff will be entitled to made an incidental demand, with the permission of the Superior Court, or in the alternative will be granted reserve of its right to bring a new action for an additional amount if the land sold did not contain 38,723 feet, but a lesser area.

Mignault, J.:—The appellant, a body corporate, which is owned and controlled by Douglas W. Ogilvie of Montreal, claims from the respondents $12,567.85 made up, as stated in its factum, of the following items: 1. For balance of commission on the sale by the respondents to the Canadian Government for the Intercolonial Railway of a parcel of land at Levis, Que., $159.51; 2. For difference between purchase price of 38,723 sq. ft. at $1.75 per foot, being $67,765.25, and the price actually obtained for the property, $69,575.00: $1,809.75; interest on $9,575.00 for 3 years and 295 days at 4 %, $1,459.59; interest on $60,000 for 3 years and 295 days, $9,139.00; total: $12,567.85.

To explain this claim I must say that on June 2, 1916, the respondents sold the property in question to the Government for a block price of $69,575, with interest from "the date of taking" (which the parties admit was August 12, 1912, date of the registration by the Government of the expropriation notice). The deed described the property as containing 38,723 sq. ft., and the appellant alleges that this was its area, and the Government, on the date of sale, paid to the respondent on account of the price, $9,575, with interest at 4% from the date of taking, said interest amounting to $1,459.59, so that the total cash payment was $11,-

Can.
S.C.
OGILVIE
v.
DAVIE

034.58. The balance of the purchase price, $60,000, the Government was to pay in 2 years from the date of sale, June 2, 1916, with interest at 4% from the date of taking. The final payment, amounting with interest to $69,575, was made to the respondent on or about October 20, 1918, a year and a half after the bringing of the appellant's action.

As briefly as can be stated, the appellant's claim is that it is entitled to a commission of 5% on a price giving to the respondent $1.75 per sq. ft. and it calculates this commission on a price of $67,765.25, representing $1.75 per sq. ft. on a total area of 38,723 sq. ft. The appellant was paid $3,228.75 as 5% commission on $64,575, which, at the price of $1.75 per foot, represents an area of 36,900 ft., and it demands an additional amount of $159.51 being 5% on $3,190.35, the difference between $64,575 and $67,765.25.

Then the appellant claims that it is entitled, over and above this commission, to anything received by the respondents in excess of $1.75 per ft., and the sale price being $69,575, this excess amounts to $1,809.75.

Finally, treating the interest payable to the respondents as being something to which it, the appellant, is entitled as being over and above the price of $1.75 per foot, it demands, as representing this interest, the sum of $10,598.59, the greater part of which was paid to the respondents long after the action was brought.

Among other matters, the respondents plead that the action, in so far as it is based on any amount paid to them after June 2, 1916, is premature. They also object that the real area of the property was 36,900 ft., and not 38,723 ft. as alleged by the appellant and stated in the deed of sale to the Government. They also claim the benefit of payments exceeding $10,000 made by them to Barnard, who was associated with the appellant in the negotiations concerning the sale of the property. I will dispose at once of this last defence by saying that, in my opinion, the respondents cannot, as against the appellant, offset any payments made by them to Barnard.

Before taking up the different items of the appellant's claim, I must refer to the question of the area of the property which was discussed at considerable length at the hearing. No evidence of this area was given at the trial. The appellant alleges that it was 38,723 ft. and the deed of sale, and a subsequent deed between the Government and the respondents correcting it, expressly give this figure as the area sold. On the other hand, both Ogilvie, who owns the

appellant company, and the respondents acted throughout on the assumption that the expropriated property contained 36,900 sq. ft., which was stated to be shewn by a plan prepared by Bourget, land surveyor, which plan however is not in the record. The respondents had measurements made by Addie, land surveyor, and it is mentioned in a letter written to Barnard by the Deputy Minister of Railways and Canals that Addie reported an area of 38,671.3 ft. The expropriation notice gives the area as being 79/100 of an acre, or 34,412 ft. Barnard, in one of his letters, qualifies as a "manoeuvre" the statement in the deeds of an area of 38,723 ft., and some of the Judges of the Court of King's Bench looked on it as being a very suspicious circumstance. The position however is this: The appellant founds its action on a sale of 38,723 ft., and no evidence, outside of the deeds, was made of the real area. This seems clearly to be the basis of the appellant's action as it was conceived by the appellant itself.

First item. Claim of $159.51, additional commission. This claim is based on the agreement, which is not disputed by the respondents, to pay 5% on the sale of the property at $1.75 per sq. ft., and the question whether the respondents have paid all the commission owed by them or not depends on the area of the land sold. This, I have said, the appellant alleges was 38,723 ft. The respondents deny this allegation, and aver that the total area was 36,900 ft. The appellant had therefore the onus of establishing its averment, but, as regards the respondents, the statement in the deed of sale from the respondents to the Government as well as in the subsequent deed of correction, in both of which the area is declared to be 38,723 ft., might probably be considered conclusive evidence, as being at least an extra-judicial admission by the respondents of this area; and moreover while A. Davie swore, when examined on discovery, that the area was 36,900 ft., he added however the qualification "that is the plan we followed then," and he did not undertake to say that the statement in the deeds was false. The matter could have been cleared up by producing a copy of the plan annexed to the deed of sale, and possibly by a survey on the ground of the area shewn on this plan, but as that was not done, I would have been disposed to hold the respondents bound by their admission in the deeds. However, out of deference to the desire expressed by my brothers Anglin and Brodeur, I am willing, inasmuch as the case must be sent back for retrial on the question of

Can.

S.C.

OGILVIE v. DAVIE

the legality of the contract, that new evidence be taken to establish the real area of the property taken by the Crown. When this evidence is made, it will be possible to determine whether the appellant's claim for $159.51 is justified, assuming that its action remains in the form in which it was brought.

Third item. Claim of the appellant for $10,598.59, interest on the purchase price of $69,575. In my study of this case I dealt with this item before considering the second item of $1,809.75, which is the one in connection with which the greatest difficulty arises in view of the judgments of the Courts below. I had formed an opinion on the merits of this claim for interest, but inasmuch as I now defer to the desire of by brothers Anglin and Brodeur that this question be among those directed to be retried, with the view that some evidence which was not given be made, I deem it my duty, so as not to embarrass the new trial, to express no opinion as to this item of the appellant's claim.

Second item. Claim of the appellant for $1,809.75, being the difference in price between $67,765.25, representing 38,723 ft., at $1.75 per ft., and $69,575, the total purchase price paid by the Government.

This sum of $1,809.75 is clearly something paid by the Government over and above the purchase price of $1.75 per ft., and the appellant is entitled thereto if the ground on which its action was dismissed in the Courts below can not be sustained.

The trial Judge dismissed the action of the appellant without costs for the following reason: (translated)

"Considering that the only object of the said option and the subsequent agreements alleged and proved to form part thereof was to provide for plaintiffs' acting as intermediaries between the Government of Canada and the authorities at the head of the Intercolonial Railway on the one hand and the defendants on the other, for the purpose of procuring to the latter, by means of their influence and position, more advantageous terms and a higher price for the land then so expropriated, and that the consideration stipulated was the price paid for this intervention: that any such agreement is contrary to public order, and that any consideration stipulated to give effect thereto is illegal and null and cannot be the object of a judicial demand."

The Court of King's Bench affirmed this judgment, Greenshields, J., dissenting, but in their reasons for judgment some of the Judges considered that an agreement the

object of which was to obtain from the Government for this land something in excess of the price for which the respondents were willing to sell it, was an illegal contract, contrary to public order, and that the appellant could not recover any compensation for its services under this agreement. In the words of Lamothe, C. J., "Davie & Co. and the appellant company agreed together to try to obtain an additional $5,000 from the Intercolonial, a sum for which Davie was not making any claim. In other words they came to an understanding for the purpose of abstracting from the public treasury an additional amount which was neither claimed nor due. The motive and the avowed object of the contracting parties were clearly illicit. They were trying to deceive the Department of Railways as to the intentions of Davie & Co. to conceal or to place well in the background the real price asked. The Department was led to believe that Davie & Co. really claimed $5,000 more, and this was done solely for the benefit of the appellant company. This was a matter in which public funds were concerned. The Government is not in the position of an individual; it cannot make any gift without the consent of Parliament. I agree with the opinion of the trial Judge. The contract between Ogilvie & Co. and Davie & Co. had for its motive and base a consideration illegal, illicit and contrary to public order. The Courts cannot enforce it."

In consequence, the Court of King's Bench dismissed without costs the appeal from the judgment of the Superior Court.

It should be observed that the grounds on which both judgments below dismissed the appellant's action, were not taken in the respondents' plea, but the contention was raised at the hearing in the first Court, and I would, with deference, think that the parties and particularly the appellant should have been afforded the opportunity of bringing fresh evidence on the issue thus raised. In saying that I do not for a moment dispute that the Court can proprio motu dismiss an action when it comes to the conclusion that it is founded on an unlawful and illicit contract, but even then I think it is better to reopen the case so that the parties may, if they can, clear themselves of the imputation of having made an unlawful or illicit agreement.

The words of Lamothe, C. J., which I have quoted, may I say so with respect, somewhat overstate the facts of this case as I conceive them. What happened was that the respondents were willing to accept $1.75 per ft. for their

Can.
S.C.
OGILVIE
v.
DAVIE

property and to pay a commission of 5% on this price to the appellant who was their agent, and who was in no wise connected with the Government or under fiduciary relations with it. The respondents agreed also to abandon to the appellant any thing in excess of the stated price which the appellant might obtain. There was no suggestion whatever of deceiving the Government, and there was surely no duty incumbent on the appellant to disclose to the Government the price which the respondents would accept. It was the case of an agent bargaining with a third party for the best obtainable price, even a price in excess of that which his principal would accept, and the fact that the agent had stipulated with his principal that the excess price would belong to him does not make the contract illegal. The Judges of the Court of King's Bench recognise that such a contract can be made when the purchaser is a private individual (see also Guillouard, Societe, No. 16, who discusses the nature, thereby admitting the legality, of such a contract), but why can it not be made when the purchaser is the Government, provided no misrepresentations, no corruption of public officials nor improper methods are resorted to, and provided that the vendor and his agent are under no fiduciary relations with the Government imposing on them the duty of disclosure? Here the Chief Justice says: (translated)

"It is not alleged nor is it proved that any public officer was corrupted. It is not alleged nor is it proved that the decision of the authorities was influenced by any undue means. Neither is it alleged or proved that the expropriated lot of land was worth less than the amount actually paid by the Intercolonial. As between the Government on the one hand and Davie & Co. on the other, the contract is not attacked, nor does it appear susceptible of attack."

That being the case, even though this property was to be paid with public monies, how can it be said that the agreement between the parties was illegal and contrary to public order? The words "public order" may be words to conjure with, but their meaning is very vague, and although undoubtedly a contract contrary to public order is void (arts. 989 & 990 C.C. (Que.)) still where a contract is not prohibited by law it should be very obvious that it is contrary to good morals or public order before it be set aside. With respect, I cannot agree with the Chief Justice when he comes to the conclusion that this contract, which would not be contrary to public order if the purchaser were a private

citizen, is against public order because the lands were bought by the Government, it being remembered that the agents who dealt with the Government were under no fiduciary relations towards it, and resorted to no corruption, misrepresentation or undue influence.

The trial Judge puts the case on somewhat different grounds when he finds that there was a contract whereby Ogilvie and Barnard undertook, through their position and influence with the Government, to obtain a higher price for the property than that which the respondents were willing to accept, the additional sum so obtained to be divided between them. This, in my opinion, is a very much stronger ground.

It is useless to deny that the facts in evidence lend some support to the theory on which the Superior Court's judgment is based. The respondents contracted with Ogilvie and I have said that, in my opinion, their contract was not per se an illegal one. But Ogilvie found Gutelius, the superintendent or general manager of the Intercolonial Railway, obdurate. He refused to pay even $1.75 per ft. for the property, and then Ogilvie secured the co-operation of Barnard, presumably and even admittedly because he possessed, or was supposed to possess, influence with the Government. Barnard asked $2.25 per ft. from Gutelius who had declined to pay even $1.75, and this was naturally refused. Barnard then negotiated with the Minister of Railways and Canals, the head of the Department, and finally Gutelius was over-ruled and the sale was agreed to at a price of $64,575, representing $1.75 a foot for an area of 36,900 ft., which the parties then understood was the area of the land, plus $5,000 which the Government agreed to pay over and above this price. Barnard says, in his letter of May 22, 1917, to Stuart, K. C., that this was a compromise between his demand first of $2.50, then $2, and the Government's price of $1.75. There is no doubt that in all he did, Barnard acted with the approval of Ogilvie and also, I think, of the respondents, and but for his intervention and influence it is possible the opposition of Gutelius would not have been overcome. It is needless to add that the $5,000 so obtained was to be divided between Ogilvie and Barnard.

Under these circumstances the two Courts have found that the contract giving to Ogilvie and "those interested" the surplus or profit which he might obtain over and above the selling price of $1.75 per ft. was a contract made with them by reason of their real or supposed influence with the

Can.

S.C.

OGILVIE v. DAVIE

Government, in other words was a purchase of their influence with the Government, and consequently null and void.

The appellant complained before us that it had not been afforded an opportunity to meet, and disprove if it could, the contention that it had bartered its influence with the Government, which contention was raised only at the argument in the first Court. I have already said that I think that it should have been afforded that opportunity and as a matter of justice, and because were I to dispose of the contention on the evidence in the record, I would have great difficulty in determining whether there has been really here a barter of influence with the Government, or an ordinary contract with an experienced broker looking towards the securing from the Government of the best obtainable terms, I have come to the conclusion that the record should be sent back to the Superior Court with directions to reopen the case on this question whether there was, as found by the Superior Court, an agreement by Ogilvie or Barnard, through the influence which they possessed or pretended to possess with the Government or with any Minister or official thereof, to obtain for the respondents the price of $1.75 per foot for the expropriated property, any sum obtained in addition to the said price to be divided between Ogilvie and Barnard.

I have not referred to the defence that this action is premature. The reason for which this defence was disregarded, to wit that Ogilvie's right to claim commission could not be affected by a delay granted by the respondents for the payment of the purchase price, is in my opinion unsound inasmuch as the respondents sold on terms made for them by Ogilvie or by his agent, Barnard. But, in view of the conduct of the respondents themselves, I do not think that this defence should be maintained. They paid to the appellant, immediately after the signing of the deeds, and although they had received only $9,575 on account of capital, the full commission on the purchase price of $64,575, the $5,000 added thereto being treated by them as something due to Barnard, thereby recognising that the appellant did not have to wait until the payment of the balance of the purchase price to claim its commission on the balance. They thus put their own construction on their contract with the appellant, and I do not think they should now be allowed to contend that the right of the appellant, whatever it was, was postponed until the

monies were actually paid over to the respondents.

I therefore agree that there should be a retrial as stated in the memorandum which will be included in the formal judgment of the Court.

It may well be, if the area of the expropriated property be shewn to be 36,900 sq. ft. that the appellant has misconceived what are its rights against the respondents, assuming that the contract sued on is a lawful one. For the surplus price paid to the respondents over and above the price of $1.75 per ft. would then be $5,000, and not $1,809.75 as alleged in the declaration. Whether the appellant, in view of the trial, would be entitled to amend its declaration, or to take an incidental demand, is a question on which I do not deem it expedient to express in advance any opinion, but I am willing that any opportunity to move to amend or to take an incidental demand be afforded the appellant on the retrial now ordered. It seems to me that if the appellant is entitled to any portion of the price paid the respondents as being over and above the sum of $1.75 per foot, it should get a proportionate part of the interest paid to the respondents on the purchase price of the property.

I would grant no costs to either party of this appeal nor of the cross-appeal which, in my opinion, should be dismissed.

Memorandum for formal judgment.

1. The appeal is allowed without costs.

2. The Court declares that the defendants' contentions that the action was prematurely instituted and that Barnard was the plaintiff's partner and that Barnard had authority and power to receive money for the plaintiff company are unfounded.

3. The record will be sent back to the Superior Court to further inquire into and determine (a) whether the plaintiffs by reason of or under the pretence that they or their agent Barnard possessed influence with the Government or with any Minister or official thereof demanded or exacted from the defendants or induced the latter to pay, offer or promise any compensation fee or reward for procuring from the Government the payment of the defendants' claim or any portion thereof for the taking by the Government of the defendants' property at Levis; (b) the area of the property conveyed by the defendants to the Crown; and (c) whether the defendants contracted to pay the plaintiffs as part of their remuneration the interest paid by the

Sask.

K.B.

KOSTIUK v. BALL

Crown on the purchase money between the date of its taking possession of the property and the date of the execution of the deeds conveying it.

4. The Court orders that both parties shall have liberty to amend relevantly to the new enquete above directed so far as Quebec procedure permits and that, without in any way determining that it would be maintainable, leave shall be reserved to the plaintiffs, should the area of the property be found to be less than the 38,723 sq. ft. mentioned in the deeds, to prefer, if so advised, an incidental demand for an increased allowance in respect of excess price over $1.75 a sq. ft. for the number of sq. ft. by which the property shall be found to fall short of 38,723.

The Court declares that if the illegality of the contract is not established the plaintiff company is entitled to a commission at the rate of 5 per cent. on so much of the purchase money paid as represents the price of the land actually conveyed at $1.75 a sq. ft. less the sum of $3,228.75 already paid to it and also the sum of $1,809.75 claimed in the declaration in respect of excess price with interest thereon and in addition thereto to any sum for which they may successfully maintain the incidental demand above mentioned.

Should such incidental demand not be preferred or be held not to lie and the defence of illegality fail, leave will be reserved to the plaintiffs to bring such action as they may be advised for any balance (over $1,809.75) of the sum of $5,000 paid as excess price which they may see fit to claim.

If it is not established that the contract alleged by the plaintiffs is illegal, adjudication on the defendants' liability in respect of the sum of $10,598.59 claimed for interest is reserved to be disposed of by the Superior Court.

KOSTIUK v. BALL.

Saskatchewan King's Bench, McKay, J. May 11, 1921.

Contracts (§I.E—95)—Sale of Traction Engine—Requirements of Farm Implements Act (Sask.)—Non-compliance—Invalidity.

A contract for the sale of a traction engine sold for ploughing is invalid if it does not contain the express warranty required by Form A of the Farm Implements Act, Sask. Stats. 1917, 2nd sess. ch. 56.

ACTION by plaintiff for the return of the purchase money paid by him for a Cleveland traction engine, on account of breach of warranties.

Sask.

K.B.

KOSTIUK v. BALL

Arthur Frame, for defendant.

McKay, J.:—This is an action by plaintiff for the return of the purchase money paid by plaintiff to the defendant for a Cleveland tractor on account of breach of warranties, and in the alternative that the contract between plaintiff and defendant for the purchase of said tractor is invalid in that it does not comply with the provisions of the Farm Implements Act, ch. 56 of the Statutes of Saskatchewan, 1917, 2nd session.

I will first deal with the latter objection.

The Cleveland tractor referred to is a large implement and is an engine, and the form of contract used is Form A in the Schedule to said Act. The engine was sold for ploughing, and in the said form appears the following:—

"(If the engine is sold for ploughing, the following additional warranty shall be given):

That the engine will, if properly operated, pull upon the following land (here insert description of land) inch plows in breaking at a depth of inches, or inch plows in stubble at a depth of inches. That the vendor will send a competent man to start said engine and instruct the purchaser in its operation."

In the contract this warranty has not the blanks filled in, and, in my opinion, this is fatal to the validity of the contract. The Act requires that an express warranty shall be given in the contract as above set forth, and this was not done; therefore, in my opinion, the contract is invalid for the want of this express warranty in writing. True it is that a verbal warranty was given that the engine could pull on defendant's land, in breaking, two 14-inch plows, and, in stubble, three 14-inch plows, 4 inches deep, but that does not cure the defect in the statutory contract, when the objection is taken by the plaintiff.

The Act also in my opinion requires that the machinery should be described in the contract so as to avoid any dispute as to what was being sold. This is not done in this case. The contract put in as Ex. A simply refers to "machinery." The nearest to a description given is where the contract has these words: "The said machinery is intended to perform the following work, namely: Breaking with 2 14" plows, stubble ploughing with 3 14" plows." This to my mind is not a sufficient description. One could not tell what kind of an engine was being sold by this description, as there are several different kinds of engines.

Furthermore, the defendant never signed the contract as

Alta.

S.C.

FORDEN v. MORRIS

vendor. Although his signature appears on the contract which was entered into on February 27, 1919, he put it there on March 15, 1919, as a receipt for the $1,450 then paid, and no copy of the contract appears to have been delivered to plaintiff as required by sec. 19 of the Act.

As the contract does not comply with the said Act, and is therefore invalid, the plaintiff is entitled to a return of the purchase money. Frost v. La Compagnie des Jardins, [1919] 2 W.W.R. 457.

From the view I have taken of this alternative plea, I do not think it is necessary for me to deal at length with the question of breach of warranties, further than to say I am satisfied from the evidence that the engine could not perform the work it was warranted to perform, namely, pull on defendant's land in breaking two 14-inch plows, and in stubble three 14-inch plows, 4 inches deep.

The plaintiff will be entitled to judgment for the purchase money paid, namely $1,650, with interest at the rate of 5% per annum on $200 from February 27, 1919, and on $1,450 from March 15, 1919, with costs.

The defendant's counsel urged that, if plaintiff succeeded on the amendment made at the trial, defendant should be entitled to costs up to trial. Although I base my judgment chiefly on said amendment, the plaintiff in my opinion is also entitled to succeed on the question of breach of warranty. But apart from this, I think plaintiff would be entitled to his costs, even if he succeeded on the amendment only, as the defendant, after the amendment, fought the action on all the issues raised. See Etter v. City of Saskatoon (annotated) (1917), 39 D.L.R. 1, 10 S.L.R. 415.

The defendant will be entitled to the engine.

Judgment accordingly.

FORDEN et al v. MORRIS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. February 4, 1921.

Damages (§III.A—83)—Sale of Goods—Breach of Warranty—Right to Withhold Part of purchase-money — Counterclaim for Amount Withheld—Inferences of Fact.

A purchaser of goods who has a claim for damages arising out of the sale is justified in withholding from the purchase-price what he estimates to be a reasonable amount for such damages, and setting this up by way of counterclaim in an action by the seller for the balance due on the purchase-price, and the Court may draw inferences of fact from the reasonableness and fairness of his actions.

APPEAL by defendant from judgment of Scott, J., in an

action due on a lien note, the defendant counterclaimed for damages for breach of warranty and appeals from the amount allowed by the trial Judge. Reversed.

J. F. Lymburn, for appellant.

H. H. Hyndman, for respondent.

The judgment of the Court was delivered by

Beck, J.:—This is an appeal from the judgment of Scott, J., at trial.

The plaintiffs sued for the balance accruing upon a "lien note" given for a number of cows. The note is dated October 27, 1913. The principal sum was $1,390. The defendant made a number of payments on account, the last being $100 on May 25, 1915. The balance, principal and interest, claimed by the plaintiffs in their statement of claim filed on May 1, 1919, is $1,293.52.

The defendant put in a defence and counterclaim setting up breach of a warranty whereby the plaintiffs warranted that the cows were first-class dairy cows; that they would each give from 40 to 80 pounds of milk per day; that they were sound and in calf and due to calf not later than Christmas, 1913. The defendant claimed $1,800 damages.

Making an estimate based upon the evidence, his counsel claims that the damages in reality amounted to $2,458.12; admitting, however, that a considerable reduction must be made to represent the saving of the expense handling the additional quantity of milk, the higher price of milk received during some periods of time owing to the warranty not having been fulfilled, and some other items.

The trial Judge allowed the defendant $275 as damages. He, however, it seems, misinterpreted a letter of the defendants which he took to be an admission that the defendant did not expect to receive more than 25 pounds a day per cow during the first year.

Furthermore, I think he was wrong in the view that he expressed and gave effect to that the defendant would gain at the end of the season what he had lost at the beginning of the season owing to the cows not calving within the time expressed in the warranty. It seems to me that this is fallacious and that the loss, whatever it was, was a permanent one, though, on a careful calculation, having regard to the changing price of milk, depending partly on the season of the year, the loss might not turn out to be as great as at first would appear.

Again, as the damages sustained by the defendant accrued soon after the date of the note, upon which interest is calcu-

Alta.

S.C.

FORDEN v. MORRIS

lated at 8% per annum, either the amount of damages should have been deducted at an early date from the principal of the note and interest calculated only on the balance, or interest at the same rate should have been added to the amount of the damages.

It is clear that the defendant is entitled to damages in a much larger sum than that fixed by the trial Judge. If we were forced to make an estimate of damages, we would find it difficult to ascertain them; but I think we are relieved from making a detailed calculation by reason of the conduct of the defendant. He seems to have acted with a good sense of justice and fairness throughout. The note was for some time in the hands of a bank. The bank manager wrote him on May 5, 1914, asking for payment. In that letter there is reference to a letter of complaint written by the defendant to one of the plaintiffs. The letter is not produced. On June 5, 1914, the defendant answers the former letter saying that he is disappointed that no response has been made to his letter to the plaintiff and saying that "in any subsequent proceedings on the note I hereby reserve all my rights and claims." Up to this time he had paid three sums of $25 on account.

On April 8, 1914, he made a payment of $100, having up to that time made payments amounting in all to $340. He writes on April 14, 1914, saying that he had remitted the $100; that he expected to remit again shortly, but in the meantime he would be obliged if the manager would let him know how much the plaintiffs would deduct from the note in view of his several complaints of breaches of the warranty. In May, 1915, the defendant made a further additional payment of $100. This is the last payment he made. There was some further correspondence. On September 17, 1915, he writes expressing his disappointment that no notice had been taken of his complaints; and setting forth his complaints anew and enclosing a detailed statement estimating his damages at $1,814.

A buyer of goods who has a claim for damages arising out of the sale has undoubtedly a right to pay the purchase price in full and then sue the seller for the damages instead of waiting for the seller to sue for the purchase price or the balance of it and then setting up his damages by way of set-off or counterclaim; but from the course which he in fact takes, coupled with additional circumstances, the Court may rightly draw inferences of fact.

Here it seems a fair inference that the defendant paid until he felt that he had left the balance owing on the note equivalent or perhaps a little less than what he thought his damages would be likely to be estimated, taking everything into consideration, by a Court of law; and that he would never have placed his claim at a higher figure with the view of asking plaintiffs to pay it, had the plaintiffs themselves not commenced proceedings. I do not put it as a case of estoppel against the defendant, but as a fair inference from his actions and his inaction, having in mind myself, as in all probability I think he himself had, that deductions of uncertain amounts and difficult to ascertain must undoubtedly be made from his own figures.

I find the damages suffered by the defendant quite reach the balance claimed by the plaintiffs. Taking the inference which I have drawn from the defendant's conduct and its circumstances, and in view of the great difficulty in calculating the exact amount of his damages, I would fix them at a sum equal to the amount owing upon the note. He set up his case both by way of defence and counterclaim as I think under our practice he was at liberty to do. The counterclaim under our practice is in substance a defence. He succeeds in meeting the plaintiffs' claim.

It seems to be a matter of indifference whether the judgment is one dismissing the plaintiffs' claim and disregarding the form of counterclaim or one giving judgment for each party for an equal amount. I think it better to adopt the former aspect. In any case the whole contest was over the defendant's claim for damages, and as he succeeds he should have the costs of the action, including the counterclaim, and the costs of the appeal, which is allowed.

Appeal allowed.

BRITISH WHIG PUBLISHING CO. LTD. v. E. B. EDDY CO. LTD.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 11, 1921.

Contracts (§II.D—145)—Sale of Paper for Newsprint—150 tons Approximately—Whole of Purchasers' Requirements — Construction.

An agreement for the sale and purchase of paper contained the following clause "the company agree to sell and the purchasers to purchase during the period commencing on the 1st day of January, 1916 and ending on the 31st day of December, 1918 for use in the publication of the British Whig newspaper published in the city of Kingston, one hundred and fifty tons approximately of paper per year (being the whole of the purchasers' requirements)." The Court held that on the proper construction of this clause, that the contract was for the sale

Can.

S.C.

BRITISH WHIG PUBLISHING CO. LTD. v. E. B. EDDY CO. LTD.

of 150 tons of paper per year, the word "approximately" was only to provide against incidental variations arising from slight and unimportant excesses or deficiencies and that each year must stand by itself, the contract not being for 450 tons during a three year period, the words "(being the whole of the purchasers' requirements,)" did not form any controlling part of the contract, and were merely an intimation as to the purchasers' requirements.

[Bourne v. Seymour (1855), 16 C.B. 337, 139 E.R. 788 followed; British Whig Publishing Co. v. E. B. Eddy Co. (1920), 19 O. W. N. 279 affirmed.]

APPEAL by plaintiff from a judgment of the Supreme Court of Ontario Appellate Division (1920), 19 O.W.N. 279, dismissing by an equally divided Court a judgment of Middleton, J., in an action for damages for breach of contract. Affirmed.

C. C. Robinson, for appellant.

G. F. Henderson, K.C., and M. G. Powell, for respondent.

Davies, C.J.:—At the conclusion of the argument in this case I entertained no reasonable doubt that the appeal failed and should be dismissed.

A careful perusal of the agreement in question and further consideration of the facts as proved satisfies me that the reasons for judgment of the trial Judge, Middleton, J. (1920), 18 O.W.N. 255, and of Mulock, C.J.Ex., and Riddell, J., of the Appellate Division (1920), 19 O.W.N. 279, were sound, and that their construction of the contract in question was the correct one.

I have had the advantage of reading the reasons for judgment prepared by my brother Anglin, and as these reasons embody my own views fully, I do not deem it necessary to add anything to them, and I would, therefore, for the reasons stated by him, dismiss the main appeal as well as the defendant's cross-appeal, both with costs, reducing the amount awarded plaintiff, on Mr. Robinson's admission, by the sum of $249.42.

Idington, J. (dissenting):—The appellant is a newspaper publisher, and the respondent a manufacturer of paper. They entered into a contract, of which the most important clause is as follows:—

"The company agree to sell and the purchasers to purchase during the period commencing on the 1st day of January, 1916, and ending on the 31st day of December, 1918, for use in the publication of The British Whig newspaper, published in the city of Kingston, one hundred and fifty tons approximately of paper per year (being the whole of the purchasers' requirements) on the following terms and conditions."

The questions raised relate to the interpretation and construction of this clause.

Middleton, J., held that the words, "one hundred and fifty tons approximately of paper per year," were the essential dominating part of the clause and contract, and consequently, that the damages for breach thereof by failure on the part of respondent in the third year of the term to deliver the quantity thus called for, must be assessed on the basis of 165 tons, less the quantity delivered in that year.

Why 165 tons instead of 135 tons should be taken as such basis would be puzzling but for the fact that the parties concerned had some discussion in a friendly way in anticipation of the breach, and the respondent then proposed to add 10% to the approximate amount named in the contract.

Even so, I submit with great respect, such an estimate of the approximate amount might as well have been put at 10% below as 10% above that.

However, in my view of what the parties were contending for, which I am about to state, this new suggestion of mine is only to illustrate how far apart it was possible for the parties to have been in making such an elastic contract.

It seems to me quite clear that the approximate amount of 150 tons a year was, in the minds of those concerned, nothing but an estimate of the possibilities, and that the actual goods the appellant was contracting to buy and the respondent contracting to supply, was the paper required for use, in the publication of the newspaper published by appellant in Kingston, during each year of the currency of the contract, and that was intended by both parties to be the whole of the appellant purchasers' requirements for said purposes.

The actual requirements for the purpose so specified doubtless would be found in the result reduced to an absolute certainty, yet must in the course of business events necessarily be given some flexible meaning to which business common sense would have to be applied to avoid quarrelling over details in the last year of the currency of the contract.

No one on either side of such a contract would expect a definite stock-taking at the beginning or ending of such a term as contracted for. Hence they had to make reasonable allowances in estimates of requirements in giving and supplying the last order under the contract.

And in approaching the making of such a contract to the

Can.

S.C.

BRITISH WHIG PUBLISHING CO. LTD. v. E. B. EDDY CO. LTD.

due execution of which reasonable conduct and fair dealing must be applied, it was quite natural they should begin by a guess of what was the possible or probable quantity to be needed.

I can easily see how such a form of a long contract such as before us grew, and bit by bit was amended in accordance with past experience not only in relation to appellant's business but that of very many others carrying on the business of newspaper publishing.

In doing so the important clause now in question seems to have become rather ambiguous. Yet I have no manner of doubt that if the appellant had improperly undertaken a re-selling of the goods so supplied, to the detriment of the respondent, the latter could have had the doing so restrained; or that if the appellant had improperly bought any part of its requirements elsewhere than from respondent, the latter could, and no doubt would have claimed damages for such a breach, and that the basis for the measure thereof must necessarily in such case have been the quantity of the requirements of appellant having due regard to what I have adverted to above as to reasonable allowance in the possibly final orders for the year.

In such an action for damages the Court or jury trying it would be bound to consider, if having any regard to the intention of the parties, what was the probable amount of the paper necessary to supply the requirements of the appellant in its specified business.

The jury in such a case would be asked to consider what was within the reasonable contemplation of the parties.

And the true basis therefor would not, I submit, be the estimate or guess of what was presented as the approximate quantity when coupled up with something much more specific as herein, but that which would, in a business way, as result of experience, be quite capable of being demonstrated to be a substantially larger or lesser quantity than the original guess.

I submit this test of the realities in order to get away from what seems to me rather an illusory way of selecting arbitrarily some words of a contract and discarding others, and forgetting to realise what the parties actually were trying to do by means of the contract they were framing. In other words, the subject matter of the contract was not the estimated, but the actual requirements of a specified business.

The contract certainly is ambiguous and in all such cases the acts, conduct and course of dealing of the parties before and at the time they entered into it, may be looked at in order to ascertain what they had in contemplation and what they did immediately after in pursuance thereof.

It is clear that the experience of the three years' contract which preceded this one demonstrated that 150 tons was far below the probable requirements yet the parties acted in dealing with each other on the basis I suggest and for the first 2 years of this contract, acted on the same basis.

The appellant's business seemed to be growing and that was mutually advantageous until an unfortunate condition of affairs arose in the third year of the contract which rendered it otherwise for respondent.

Neither was to blame for the unexpected condition in question, nor could it excuse the breach of contract.

I am of the opinion that the appeal should be allowed; the judgments of the Courts below reversed with costs here and in the Court of Appeal, and the damages be assessed on the basis of the quantity required for the appellant's business specified in the contract, and that alone.

If the parties cannot agree of course a reference must determine the amount.

I suspect it can be determined between themselves as matter of business better than any referee can do it.

Duff, J.:—I concur in the view expressed by Ferguson, J. A., with which Masten, J., agreed. 19 O. W. N. 279, at p. 280.

My reasons for this conclusion are quite sufficiently stated in the judgment of Ferguson, J.A., and consequently it is unnecessary to do more than summarise them in a sentence or two.

The phrase "being the whole of the purchasers' requirements" and the word "approximately" must be construed by reference to one another and by reference to the fact explicitly stated in the contract that the purchase is a purchase of paper for a particular use. I think the more reasonable construction is that which treats the first mentioned phrase as the governing one and the quantity named as an estimate only.

I think also that the contract being one which is susceptible of more than one necessarily exclusive meaning, the course of dealing between the parties prior to the con-

Can.

S.C.

BRITISH WHIG PUBLISHING CO. LTD. v. E. B. EDDY CO. LTD.

tract as well as the course of dealing under the contract itself are relevant facts for the purpose of deciding what is the right construction. I concur with Ferguson, J. A., in the opinion that the fact proved by the invoices that shipments were made and expressed to be made under this very contract in the years 1916 and 1917 in excess of 150 tons, is an important and weighty fact pointing to the conclusion to which the Judge arrived.

Anglin, J.:—I am of the opinion that the plaintiff's appeal should be dismissed for the reasons stated by Middleton, J., 18 O. W. N. 255, and by Mulock, C. J. Ex., and Riddell, J., 19 O.W.N. 279.

The contract to be construed expressly provides that it "is to be read and interpreted as made at . . . the City of Hull, Quebec." But, as was determined in McConnel v. Murphy (1873), L.R. 5 P.C. 203 at p. 219, cited by Mr. Robinson, the governing principle in Quebec as in the Provinces where the English common law prevails "must be to ascertain the intention of the parties through the words they have used. This principle is one of universal application."

Their Lordships proceed to point out that there is no technical or artificial rule in the law of Quebec which bears upon the construction of a mercantile contract such as that before us. "The question really is the meaning of language and must be the same everywhere."

See, however, art. 1019 C.C. (Que.)

The contract was in my opinion absolute for the sale of "one hundred and fifty tons (150 tons) approximately of paper per year." I read "approximately" as the equivalent of "about" and regard it as having been inserted "only for providing against incidental variations arising from slight and unimportant excesses or deficiencies." Brawley v. United States (1877), 96 U. S. Sup. Ct. Rep. 168, 172.

This qualifying word is not "supplemented by other stipulations or conditions which (might) give it a broader scope or more exclusive significancy" as the words "more or less" were in Brawley's contract.

The words immediately succeeding—" or at that proportionate rate for any shorter broken period covered by this contract"—further indicate that a quantitative definition of the subject matter was uppermost in the minds of the parties. What that subject matter was to be having been thus defined, it seems to me that proper and adequate effect is given to the words "(being the whole of the pur-

chasers' requirements)" by treating them as a statement of expectation. The converse case was thus dealt with by Atkin, J., in In re An Arbitration between Harrison and Micks, Lambert & Co., [1917] 1 K.B. 755, at p. 761, approved by the Court of Appeal in Tebbitts Brothers v. Smith, (1917), 33 T. L. R. 508. No case has been cited—no doubt because none can be found—where a contractual provision for the sale of a defined quantity of goods has been held to be overridden by a subsequent ex facie parenthetical clause such as that now under consideration. The words "(being the whole of the purchasers' requirements)", as Mulock, C.J. Ex., says (19 O.W.N. 279), "do not form any controlling part of the contract but are merely an intimation as to the purchasers' expected requirements."

The English authorities relied on by the appellant, which with others are collected in 25 Hals. Laws of England, p. 214, note (f) to para. 366, and the 1920 Supplement at p. 1365, are all cases in which the statement as to quantity was obviously introduced merely as an estimate, the contracts having provided for the sale of a particular lot of goods specified by description or otherwise designated. Bourne v. Seymour (1855), 16 C.B. 337, 139 E.R. 788, cited by Riddell, J., is certainly more closely in point than any of them and is about as helpful as a decision on the construction of one contract can well be on that of another not drawn in identical terms.

The problem is purely one of construction—to ascertain what are the governing words in the document before us which determine the subject matter of the contract. Those words, in my opinion, are "one hundred and fifty tons (150 tons) approximately of paper per year."

The construction for which the appellant contends, on the other hand, gives no effect to this specification of the quantity of the subject matter.

The ambiguity or uncertainty necessary to justify resort to evidence of conduct to assist in ascertaining the intention of the parties, in my opinion is not found in this contract.

I agree with the trial Judge and the Appellate Divisional Court that "each year stands by itself"—that the contract is not for 450 tons to be delivered during a 3 year period but for 150 tons a year.

Mr. Robinson's assent to the contention that the basis for computing the damages should be an obligation to supply 150 tons instead of 165 tons for the year 1918 involves

Can.

S.C.

BRITISH WHIG PUBLISHING CO. LTD. v. E. B. EDDY CO. LTD.

a reduction of the amount awarded by the sum of $249.42 as I make the computation. I would dismiss the defendants' cross-appeal as well as the main appeal—both with costs.

Brodeur, J.:—The question in this case is whether the defendant company agreed to supply all the paper required for the publication of the two newspapers of the appellant company or simply the approximate quantity of 150 tons a year.

It seems to me that if the parties intended that all the requirements of the newspapers should be provided for by the respondent company the contract would have been drafted in a different way.

Instead of stipulating that the Eddy company would sell approximately 150 tons of paper and then add within parenthesis (being the whole of the purchasers' requirements) the parties would have put the latter words at first and would have stated that the Eddy company would supply the whole quantity of paper required for the publication of the newspapers in question and the addition after that of the words "about 150 tons" would not have altered the exact meaning of the agreement and of the extent of the obligation. It would have meant that the supply of all the paper required for the publication of these two papers should be made by the vendor.

It should not be forgotten also that this contract is on a printed form. The words in parenthesis which the appellant seeks to be the ruling words of the agreement are printed and the words "150 tons" are typewritten.

Where there are formal and general words which are the usual terms used in a contract and there are other special and peculiar words, and the question is which are to have most weight, the terms that a man has thought of for himself and written into the contract, if they conflict and cannot be reconciled with the printed words, ought to have most weight. Desrosiers v. Lamb (1888), M.L.R. 4 Q.B. 45.

Besides, I cannot read this contract as meaning by its own expressions a right on the part of the purchasers to get from their vendor all the paper they required for their newspapers because they simply stipulated that 150 tons was all the purchasers' requirements, remaining free to purchase elsewhere if they wanted a larger quantity at a better price.

As to the cross-appeal, I would dismiss it. The defendant company has no right under the contract to apply to the last year the surplus quantity which it delivered in the

previous year. Each year stood by itself.

The appeal and the cross-appeal should be dismissed with costs.

Mignault, J.:—This case should be dealt with on no higher basis than as involving the construction of quite a usual form of contract. It is noticeable that the contract says: "This contract is to be read and interpreted as made at the Head Office of the Company at the City of Hull." Therefore the question of its construction falls to be determined in this case according to Quebec law, of which, although it was not proved as a fact before the Courts below, this Court is bound to take judicial notice: Logan v. Lee (1907), 39 Can. S.C.R. 311; Hankin v. John Morrow Screw & Nut Co. (1918), 45 D. L. R. 685, 58 Can. S. C. R. 74.

The portion of the contract in respect of which the dispute has arisen is the following:—

"1. The company agree to sell, and the purchasers to purchase, during the period commencing on the 1st day of January, 1916, and ending on the 31st day of December, 1918, for use in the publication of 'The British Whig' newspaper or newspapers published in the City of Kingston, one hundred and fifty (150) tons approximately of paper per year, or at that proportionate rate for any shorter broken period covered by this contract, (being the whole of the purchasers' requirements), on the following terms and conditions:—"

Does this mean that the purchaser is entitled to a quantity of paper sufficient in each year to satisfy its requirements irrespective of the quantity mentioned, or does it signify that this quantity alone, whether or not it satisfies these requirements, is to be delivered under the contract?

This is the whole question to be decided, and in order to solve it the parties have made a diligent search in the books for similar cases and perhaps naturally, because the case was brought before the Ontario Courts, they refer us to English or Canadian decisions exclusively. I think, however, that in a matter of this kind, where the only inquiry is as to the meaning of a contract, decided cases, unless they interpret an absolutely identical clause, are of very little assistance. In all such cases, the paramount rule is to give effect to the intention of the parties and as to this intention the language of the contract, and if it be ambiguous the course of dealing of the parties, are the best guides.

Can.

S.C.

BRITISH WHIG PUBLISHING CO. LTD. v. E. B. EDDY CO. LTD.

The Quebec Civil Code (arts. 1013 et seq.) has laid down, for the interpretation of contracts, certain general rules which it will be useful to follow in this case.

Thus when a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none (art. 1014.)

"All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act." Art. 1018 C.C. (Que.)

"In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation." Art. 1019 C.C. (Que).

"However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract." Art. 1020 C.C. (Que.).

Applying these rules, the obligation to sell paper was contracted by the respondent, so the clause in question, if it be of doubtful meaning, should be construed in favour of the respondent. Care must be taken however to so interpret the contract that effect may be given to all its terms.

Such evidence as there is here is not of much assistance. The contract is on a printed form furnished by the respondent. The blanks were filled in by means of a typewriter. Thus the words "one hundred and fifty (150)" are typed. The remainder of Clause 1 is printed, including, of course, the parenthetical phrase. Before this contract the parties had entered into other similar contracts specifying also 150 tons, but notwithstanding this specification, the respondent, without objection, furnished quantities in excess of 150 tons per year. Similarly, during 1916 and 1917, the respondent, without objection, supplied paper as ordered and in excess of 150 tons. It is true that, in this action, it seeks to have this excess credited to 1918, but as to that it is clearly wrong. The whole difficulty comes from the fact that the price of paper rose sharply in 1918 and the respondent claimed that if it were bound to furnish up to the requirements of the appellant in that year it could only do so at a loss.

Prima facie I would say that the sale here is of a specified quantity of paper, to wit 150 tons "approximately," the latter word having the meaning of "more or less." The difficulty, however, is to give some effect to the words "being

the whole of the purchasers' requirements." To say that the respondent contracted to sell paper to the extent of the appellant's requirements, whatever they might be, would deprive of any useful effect the specification of 150 tons. A more natural meaning can be given to the parenthetical phrase, without rendering this specification meaningless, by saying that it was a representation by the appellant that the whole of its requirements would be 150 tons approximately, and that is the way the contract reads. The respondent may conceivably have had good reasons for insisting that the specification of a quantity should be accompanied by a representation that the quantity specified was the whole of the purchasers' requirements. At all events, while we cannot disregard these words, if they can be given a natural meaning by taking them as a representation or estimate of the purchasers' requirements, I would not hesitate to do so, the more so that if I adopt the appellant's construction, I would deprive of any useful effect the specification of the quantity.

The course of dealing of the parties may of course be taken in consideration, if a contract be ambiguous, but it can be here explained by the fact that the price of paper had not appreciably varied at the time when the excess deliveries were made.

On the whole I have come to the conclusion not to disturb the judgment below and this involves dismissing both the main and the cross-appeal.

Appeal and cross-appeal dismissed.

B. C. FRUIT MARKET LTD. v. THE NATIONAL FRUIT CO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 10, 1921.

Damages (§III.P—340)—Purchase of Goods—To be Shipped "by Heated Car"—Failure of Seller to Carry out Instructions—Goods Frozen—Liability of Purchaser—Liability of Vendor.

A purchaser of goods ordered to be shipped "by heated car" has a right to have such instructions carried out by the seller within the proper meaning of the term so that the goods will be protected from frost during transit, and if the seller fails to do so and the goods are so badly frozen on arrival as to be valueless the purchaser is entitled to damages to the value of such goods.

APPEAL by defendant from the judgment of a District Court Judge in an action to recover the purchase price of goods. The defendant counter-claimed for damages,

Alta.

S.C.

B.C. FRUIT MARKET LTD. v. THE NATIONAL FRUIT CO.

claiming that the goods were ordered shipped "by heated car" and on arrival were so badly frozen as to be valueless.

Reversed.

The facts of the case are fully set out in the judgments delivered.

C. M. Blackstock, for appellant.

C. E. Cameron, for respondent.

Harvey, C. J. (dissenting):—This is an appeal by the defendants from Jackson, Co. Ct. J.

The plaintiffs' claim is for the price of 75 sacks of cabbage and the freight thereon from Lethbridge to Medicine Hat.

The goods were ordered to be shipped in a heated car. They were shipped without any express instructions in this respect but were in fact shipped in a heated car and the extra freight rates therefor were charged to and paid by the plaintiffs. The goods were shipped on December 6, 1919, and the bill of lading was received by the defendants on the 8th, or 9th, without any objection being taken to it. The car containing the cabbages arrived in Medicine Hat on January 8, when the temperature was 30 degrees below zero and the railway company's official states that the defendants thought it was too cold to haul them from the car to the warehouse and it was agreed to leave them in the meantime. Additional heat was added by the railway company and on the 12th, or 13th, delivery was taken and the cabbages were then found to be completely frozen so as to be valueless.

The car from which the delivery was taken was known by the defendants to be a heated car, though they suggest that the cabbages may have been transferred to it, but I find nothing in the evidence to justify any such inference. It is clear that they were in a heated car when they arrived in Medicine Hat and also that the defendants believed that to be the fact for otherwise there would have been no reason for delaying the delivery. On receiving delivery of the cabbages the defendants wrote the plaintiffs as follows:

"Medicine Hat, Alta., Dec. 13, 1919.

"A. Lindlay, Esq.,
c-o B. C. Fruit Market,
Lethbridge, Alberta.

Dear Sir:—

Enclosed you will find the original Bill of Lading cover-

ing the seventy five sacks of cabbages which you shipped on December 5th.

The car containing the cabbage was switched over to our warehouse to-day and on examination, the shipment proved to be entirely frozen.

We immediately dug up the enclosed Bill of Lading for the purpose of filing a claim and found to our surprise that the goods were not billed by Heated Car. In addition to this, the Bill of Lading carried a stamped notation 'Forwarded by shippers instructions. Owners risk of weather.'

On the strength of this Bill of Lading the Railway Company would have forwarded these goods in any type of car, and have been absolutely free from responsibility or loss.

We cannot possibly collect a claim unless you can arrange with the Agents at Lethbridge to have a notation "Heated Car" placed on the both No. 1 and No. 2 Bills of Lading.

We had refused this shipment on account of its condition, but since there is some doubt as to the responsibility of the Railway Company, we are accepting same and will do the very best we can with it.

Yours very truly,

National Fruit Company Limited

(Sgd.) A. Brown, Mgr."

Enc. 1.

Registered,

To which the defendants replied:—

B.C. Fruit Market,
Lindley & Reid, Prop's.,
401 2nd Ave. S., Lethbridge Alberta,
December 15th, 1919.

"Messrs. National Fruit Co. Ltd.,
Medicine Hat, Alta.

Dear Sirs:—

Your letter and No. 1 Bill of Lading for 75 sacks of cabbage shipped you on December 5th to hand.

We beg to advise you that the C. P. R. in this City for sometime past have refused to accept perishable stuff only to be shipped by heated car and that all such perishable stuff to be shipped at owners risk or weather, unless 25 per cent. extra was paid in freight. This we were not advised to do by you.

Enclosed you will find the B. O. L. again also No. 1 way bill 33841, which proves conclusively that the cabbage was

Alta.

S.C.

B.C. FRUIT MARKET LTD. v. THE NATIONAL FRUIT CO.

shipped per heated car service.

By freight 37.80, Heating 3.78, Cartage 4.90, total 46.80.

In view of the fact that the cabbage was in the Hat on the 7th inst., and not delivered until the 13th is clear proof that the C. P. R. or yourselves neglected seeing to same.

Under the circumstances we are absolved from all blame and it is now up to you and the C. P. R. at the Hat.

The stamped notation on the freight bill is put on all B. O. L. unless 25 per cent. more freight is paid and box car is erased because said perishable stuff has to go by heated car.

Hoping you will be able to collect the claim we remain.

Yours resp.,

B.C. Fruit Market,

(Sgd.) A. Lindley, Manager."

The stamped notation referred to in defendant's letter was in fact "Forwarded in box car by shipper's instructions. Owners risk of weather," with the words "box car" struck out by a line through them.

It appears that there were two different rates for heated cars, one as shewn in the bill of charges of a 10 per cent. addition to the ordinary freight charges, under which the railway company did not assume full responsibility; and the other involving an addition of 25 per cent. under which it did accept responsibility.

The railway company official who took the shipment states that the words "box car" were struck out because the cabbages were not shipped in a box car but in a heated car. The freight shed foreman states that instructions were sent to shippers that the freight on all perishable goods must be prepaid and he believes that the instructions also were that they would be put in heated cars and the plaintiffs' manager, in his examination for discovery says: "The C. P. R. instructed us they would not accept any perishable goods unless shipped by heated car" thus confirming the statement in his letter of December 15.

On the foregoing evidence there is no room for doubt that the cabbages were shipped in a heated car and it seems almost equally clear that the plaintiffs were justified in believing that they would be so shipped without special instructions to that effect. I feel no doubt also that the railway company contracted to ship in a heated car and was subject to all the liability attaching to a contract to ship in a heated car. The defendants, however, contend

that the bill of lading is the only proper evidence of the contract and it does not expressly specify that the shipment is by heated car, and that their order to have the goods shipped in a heated car imposed an obligation on the plaintiffs to obtain a contract of shipment in a heated car. They say that in the absence of a bill of lading in the terms of their order the goods did not pass and they would have no claim against the railway company.

It is true that the bill of lading is not unambiguously a contract for shipment in a heated car but with the ambiguity explained and removed it is, in my opinion, such a contract. It appears that under sec. 20, Rule V and subsec. (2) of the Sale of Goods Ordinance C.O. N.W.T. 1898, ch. 39, upon the shipment in a heated car as directed by the defendants the property in the goods passed to them and they thereby under the bill of lading by virtue of sec. 2 of the Bills of Lading Act, R.S.C. 1906, ch. 118, became vested with all rights of action against the railway company in respect of the goods.*

I do not wish to suggest that a bill of lading in ambiguous terms such as this would be good for all purposes and it may be that upon receipt of a bill of lading by which it did not appear clearly that their direction had been complied with the defendants might have refused to accept the goods and take them from the carrier and the cases cited insofar as they are applicable seem directed to this aspect which, however, is not presented here inasmuch as the defendants did accept and take the goods.

If, I say, the defendants had refused to accept the goods it is possible that other considerations might apply though their arranging for the holding of the goods for several days after they had the bill of lading in their possession, would even then require to be taken into consideration.

The defence raised by the pleadings is that the plaintiffs in breach of their duty billed the goods by straight freight and on receipt of the bill of lading the defendants repudiated the contract and refused to accept delivery and that if they did accept delivery it was on behalf of the plaintiffs on the understanding that the defendants would sell the cabbages for the benefit of the plaintiffs.

This does not raise any question of the form of the contract as evidenced by the bill of lading nor does the evi-

* See annotation, Sale of Goods, 58 D.L.R. 188.

Alta.

S.C.

B.C. FRUIT MARKET LTD. v. THE NATIONAL FRUIT CO.

dence indicate that the defendants were in any way prejudiced by the form. The goods were not shipped by straight freight but were shipped by heated car. The contract was not repudiated on receipt of the bill of lading, nor, in my opinion, was it repudiated at all, but the goods were accepted with a claim of right for damages.

The defendants' suggestion in the latter was that if the bills had a notation put on them shewing shipment by heated car they would be satisfied. In my opinion the bill of charges receipted by the railway company shewing charges for a heated car gave them as definite evidence of the shipment by heated car as if the words had been on the bill of lading itself.

The trial Judge found on evidence which justified it that the goods were shipped in good condition and in accordance with the instructions and that the plaintiffs were entitled to recover.

It may be observed that even if there was any default in observing instructions in not giving specific instructions for shipment in a heated car, no damages resulted therefrom and the defence is in reality a claim for damages to the amount of the plaintiffs' claim.

I would dismiss the appeal with costs.

Stuart, J.:—This case has presented some serious difficulties. These are due, I think, to three questions which are undoubtedly troublesome. The first is: what contract did the defendants request the plaintiffs to make with the carriers? The second: what contract did the plaintiffs in fact make? And the third: did the actions of the defendants in allowing the car to stand in the yards at Medicine Hat for 4 days before inspecting the goods prevent them from having recourse against the plaintiffs assuming that otherwise they could have such recourse?

With much respect I do not think that the mere fact that the defendants took delivery of the goods precludes them from all remedy. Section 31 (2) of the Sale of Goods Ordinance enacts:—"Unless otherwise authorized by the buyer the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do and the goods are lost or damaged in course of transit the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages."

The terms of the concluding clause shew that the buyer may take delivery and still claim damages against the seller for not making a proper contract. As it is put in 25 Halsbury p. 222 at p. 223 (note g); "The buyer's alternative seems to be to treat the delivery (i.e. to the carrier) as invalid, or as valid; in the latter case the seller being held responsible in an action of tort for negligence or conversion."

Here the defendants not only defended the action for the price of the goods but counter-claimed for damages for breach of the obligation to make the proper contract with the carriers. No doubt the measure of such damages would be the amount of damages which the defendants might have recovered from the carriers if the proper contract had been made with them. And as the goods were totally spoiled by the frost the price paid for them and the freight charges would naturally be the proper amount. So that it would appear that the result would be the same even if the defendants could succeed only on their counterclaim but not on their defence on account of having treated the delivery to the carriers as valid, i.e., as giving them the property in the goods.

This, of course, is all aside from the delay from December 8 to 12 in opening the car and examining the goods. That is the third question to which I referred in the beginning. Dealing with that question first, it is to be observed that the evidence shews that Sharland, freight shed foreman for the railway company at Medicine Hat, entirely approved of the course adopted. He said, "As far as I remember the National Fruit Company decided it was too cold. Between me and the National Fruit Company we decided it was too cold and we decided we would leave it in the heated car and we added two heaters to that car. It would not be reasonable to ask a man to move his stuff at thirty below, at least we could not compel him to."

Owing to this circumstance it occurred to me that it might be that the railway company had ceased to be carriers and had become merely gratuitous warehousemen but it appears that at least until the goods are placed in the carrier's sheds and a reasonable time for taking delivery has elapsed the carrier continues to be a carrier. See Hutchinson on Carriers, 3rd ed., vol. 1, paras. 141, 142, pp. 149-151. The evidence seems to show that the goods were not intended to be placed in the railway freight sheds for delivery

Alta.

S.C.

B.C. FRUIT MARKET LTD. v. THE NATIONAL FRUIT CO.

but to be delivered from the car to the defendants' warehouse and that some switching had to be done for that purpose. Until this was done it seems to me to be clear that the railway company still held the goods under the contract of carriage and as carriers. The company agreed, partly for purposes of its own, for there were other perishable goods in the same car, to postpone the final part of the transit to the intended point of actual delivery until the weather moderated and the car could be safely opened without danger to either the cabbages or the other goods in the car from the severity of the frost. It therefore appears plain to me that the contract of carriage was still in effect and controlled the liability of the parties to it. That this is so is shewn also, I think, by the action of the carriers in adding two heaters to the car.

I am unable, therefore, to see clearly why the delay from the 8th to the 12th can affect the question in one way or the other. The plaintiffs are not charged with liability for defects in the goods. They are charged with liability for defects in a contract which it is alleged they did not secure on the defendants' behalf in such terms as they should have secured. The fact that the period of transit was extended was of itself of no consequence so far as the nature of the carriage contract is concerned except upon one possible ground, viz.,:—that the defendants made this arrangement for extension of the period of transit after they had received the bill of lading and knew or might have known what the nature of the contract was. But even this does not, I think, prejudice their position because they were entitled to assume without examining it closely that the bill of lading had been made to conform to their instructions particularly when they knew, as they quite clearly did from Sharland, that the goods were in fact in what was generally known as a "heated car."

On the ground, therefore, that the defendants are claiming damages not for defects in the quality of the goods as not conforming to the description but for defects in the nature of the contract entered into on their behalf I think that the arranged delay at Medicine Hat cannot be a defence to the defendants' counterclaim for damages.

There was not written evidence put in of the nature of the instructions for shipping which accompanied the order. It was simply admitted by the plaintiffs that they had been instructed to ship the cabbage "by heated car." Had there

been no instructions given at all I think under the provisions of sec. 31 (2) of the Ordinance above quoted the plaintiffs would have been obliged to make a contract with the carriers whereby the latter would be bound to protect the cabbages from frost while in transit because that would clearly be the only contract which would be "reasonable having regard to the nature of the goods and the other circumstances of the case," the goods being cabbages and the temperature 20 or 30 degrees below zero. And I have very grave doubt whether the actual instructions given to ship "by heated car" should be considered as authorising the plaintiffs to do anything less than that and indeed whether those instructions should not be interpreted as meaning substantially the same thing.

There is room, it seems to me, for two interpretations of the meaning of the instructions to "ship by heated car." By the first of these it would have been agreed that the cabbages should be shipped in a type of car known to and contemplated by the parties as being commonly used by the carriers and with respect to which the carriers understood certain obligations which might be more or less limited, but which car upon the proper interpretations of the terms used in describing it would have to fulfill certain requirements, that is, that here the term "heated car" would be interpreted as meaning a car continuously and sufficiently heated to prevent damage from frost. By the second interpretation the parties would have agreed directly that the plaintiffs should secure a contract from the carriers to carry the cabbages in a car so properly and continuously heated that the frost would not injure the goods during the period of transit. The final result of the two interpretations might be the same but in the latter that result is reached more directly.

A perusal of the evidence convinces me that it was in the first sense that the parties understood the instructions. Brown, the defendants' manager, spoke of his long experience in having perishable goods shipped "per heated car" and in having the bill of lading invariably so endorsed. Reagh, the freight shed foreman at Lethbridge, as well as Giles, the checker, testified to the existence and use by the railway company of a certain type of car which was a refrigerator car in summer and a heated car in winter. There is, therefore, no doubt that the parties understood each other perfectly when the instructions were given, and

Alta.

S.C.

B.C. FRUIT MARKET LTD. v. THE NATIONAL FRUIT CO.

that it was their intention that the cabbages should be shipped in that type of a car. But in my opinion it does not follow from this that the parties had agreed that a shipment in fact in that type of car would relieve the plaintiffs from all obligation under sec. 31 (2) of the Sale of Goods Ordinance to secure a contract from the carriers to have the car in which the cabbages were shipped really conform to the well understood requirements or qualities of a "heated car." I should have no hesitation in interpreting such a notation as "per heated car" stamped on a bill of lading as a contract that the car would be continuously and sufficiently heated to prevent frost.

Now it is admitted that the bill of lading contained no reference to an obligation to furnish proper heat. And if there were nothing more it would be plain, it seems to me, that the plaintiffs would not have fulfilled their obligation. For the fact of putting the cabbages in a car which was supposed to be of the type intended would be quite irrelevant because it would be left open to the carriers to deny any obligation to furnish proper heat. And the fact that the cabbages were frozen shews that they did not in fact do so, that is, that although the car was of the type called "heated car," it was not in fact heated properly, and so did not fulfill the requirements or possess the qualities of the type referred to.

Then was there anything else to shew that a contract had been made which bound the carriers to furnish sufficient heat to prevent frost? This is the crucial point of the case.

Reference was made to a circular sent out by the carriers to shippers. But Reagh's evidence is merely that this circular informed shippers that the freight on all perishable goods must be prepaid. But as to instructions that they must be put in heated cars he could only say, "I am not absolutely certain. I believe there was." And at another point he said, "We sent out a circular in the fall of the year saying that it must be prepaid. Q. To go by heated car? A. I would not say that." No copy of this circular was produced, and the admissibility of oral testimony as to its contents is doubtful, to say the least.

There is no evidence of any verbal conversation between the shippers or their employees or agents and any servant of the carriers. Indeed the evidence shews that the plaintiffs actually delivered the cabbages to a cartage or transfer company and left it to these people to do the shipping to

the defendants. There is no suggestion that the plaintiffs passed on their instructions from the defendants to the transfer company or that the employees of the transfer company said a word of any kind to the carriers' employees as to the method of shipment.

We have, indeed, nothing but an account for freight charges made out by the carriers and dated December 5, the date of actual shipment, in which there appears the charge, "Htg. (i.e., presumably, heating), $3.78." This account was not paid until December 15 by the plaintiffs, 3 days after the cabbages were discovered to be frozen in Medicine Hat. Can this be said to constitute a contract by the railway company to ship "by heated car"? In my opinion it can not. Where there is absolutely no other evidence whatever of a contract having been made, it seems rather strange to me to say, because a man does something (i.e., assuming that he does it, which is here very doubtful, for the cabbages were frozen) and charges you for it, that this can be treated as evidence that he had bound himself to do that something.

Indeed, I gather from the evidence of the railway employees that they put the cabbages in the car rather for their own purposes and protection than owing to any obligation or promise or request to do so.

Furthermore, if the plaintiffs had called a person in authority from among the railway's employees and had had him testify that the company had bound itself to carry the cabbages "by heated car," there might be something in that in the way of an admission at least which the plaintiffs might have suggested that the defendants could rely upon. But so far from this being the case, what have we before us in evidence but testimony from the chief employee of the railway, who was called by the plaintiffs, actually denying that his company had contracted to ship in a heated car! These questions and answers occur in Reagh's evidence: "Q. The bill of lading is the contract between the parties? A. Yes. Q. This expense bill is not a contract? A. No. Q. You also had a contract in addition to that to ship by heated car? A. No. . . . . Q. This bill of lading does not contain all the contract? A. It contains the contract."

In face of this testimony from the plaintiffs' own witness, the carriers' employee, it seems rather peculiar that the plaintiffs should assert that they had made the contract

Alta.

S.C.

B.C. FRUIT MARKET LTD. v. NATIONAL FRUIT CO.

to ship "by heated car" or that they had fulfilled their duty to their purchasers and had got the carriers bound, and so say that their purchasers were quite able to rely upon a contract and proceed against the carriers.

In Benjamin on Sales, 5th ed., p. 739, it is said that the provision of section 32 (2) is declaratory of the common law. There are not many cases cited in Benjamin and Chalmers, nor discoverable in the digests. There are these cases. Buckman v. Levi (1813), 3 Camp. 414, in which Lord Ellenborough said at pp. 415, 416: "A delivery of goods to a carrier or wharfinger with due care and diligence is sufficient to charge the purchaser; but he has a right to require that in making this delivery due care and diligence shall be exercised by the seller. Before the defendant can be charged in the present instance he must be put into a situation to resort to the wharfinger for his indemnity." Then there is Cothay v. Tute (1811), 3 Camp. 129, and Clarkey v. Hutchins (1811), 14 East 475, 104 E.R. 683, in the former of which Lord Ellenborough held that the vendor was not bound to enter and insure the goods as being over a certain value (for the purpose of holding the carrier), and in the latter the same Judge, delivering the judgment of the Court, held the contrary, saying at p. 476: "The plaintiff cannot be said to have deposited the goods in the usual and ordinary way for the purpose of forwarding them to the defendant unless he took the usual and ordinary precaution which the notoriety of the carriers' general undertaking required with respect to goods of this value to insure them a safe conveyance. . . . . He had an implied authority, and it was his duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods and to put them into such a course of conveyance as that in case of a loss the defendant might have his indemnity against the carriers."

No other cases seem to be cited in Halsbury.

I do not think the plaintiffs used due care and diligence. If they had been shipping these cabbages to a branch house of their own and on their own account, I feel certain they would have exhibited more carefulness and particularity in dealing with the carriers.

I think they had no right, acting as agent of their purchasers, to leave them to have recourse to so precarious and uncertain an obligation as that furnished by the freight account, especially in view of what the freight foreman of

the carriers, Reagh, said about the nature of the contract.

My view, for these reasons, is that the plaintiffs are liable to the defendants in damages on their counterclaim for their failure to make either the required or a reasonable contract with the carriers. If such a contract had been made, it would undoubtedly have covered the whole period of transit, including the 4 days' delay, with respect to which I need not repeat the observations which I have already made.

The real measure of damages is, I take it, the value to the defendants of the obligation of the carriers if the bill of lading had been endorsed "per heated car." It is, of course, to some extent, but I think only to a slight extent, a matter of some doubt as to what damages the defendants could have recovered from the railway company under such a bill of lading; but as between the present parties and in the circumstances I do not think it unjust to the plaintiffs to say that the defendants could have recovered the full value of the cabbages and the freight. At least it does not lie in the mouth of the plaintiffs to say that they could not have done so.

I would therefore allow the appeal with costs and give judgment for the defendants on their counterclaim to the same amount as the judgment for the plaintiffs for the price of the goods and freight, and I would give the defendants their costs of the action.

This is, of course, tantamount to a dismissal of the action, as my brother Beck decides, and the formal judgment might as well be in that form.

Beck, J.:—It may, I think, be of some assistance in deciding this case to know the respective rights of the parties—the plaintiff consignor and the defendant consignee—against the railway company in the event of there being a claim against the railway based on the assertion that it was through the negligence and breach of contract of the railway company that the goods in question here were found to be so badly frozen upon the actual receipt of them by the consignee that they were valueless.

Where a carrier has been given goods for carriage and the contract for carriage is embodied in a bill of lading, (See Ency. of the Laws of Eng. 2nd ed. vol. 111, tit: Bills of Lading pp. 228, 229) the consignor, having made the contract with the carrier, may sue on the contract, even though the goods really belong to the consignee. Dunlop

Alta.

S.C.

B.C. FRUIT MARKET LTD. v. THE NATIONAL FRUIT CO.

v. Lambert (1839), 6 Cl. & Fin. 600, 7 E.R. 824; and this would be so even though the freight is payable by the consignee. If no bill of lading is entered into, then the person on whom the property in the goods was at the time of shipment or who was to bear the risk of transit, is the proper party to sue. Fragano v. Long (1825), 4 B. & C. 219, 107 E.R. 1040.

The consignee may also sue where a bill of lading has been given. Tronson v. Dent (1853), 8 Moo. P.C. 419, 14 E.R. 159. The Bills of Lading Act, R.S.C. 1906, ch. 118; 10 Corp. Jur. tit Carriers, secs. 510 et seq., pp. 347 et seq.; Williston's Sales of Goods, sec. 426, p. 733.

From the evidence in this case no one can be satisfied whether the goods—cabbages—were frozen when shipped, during transit, or after arrival at their destination—Medicine Hat—and before actual delivery.

On the part of the plaintiff, the shipper, it is asserted that the cabbages were kept in the basement of their premises where it is said nothing ever froze; that they were examined a couple of weeks before shipment and were then all right; the shipment was made on December 5; the cabbages were taken by dray from the plaintiff's premises to a car—said to be a heated car—on the railway; the day was cold—"a little frosty in the morning but by noon all right"—they were "shipped" about 1 p.m.

By employees of the railway company it is asserted, but the witnesses seem to have insufficient personal knowledge—that the car in which the goods were shipped was kept sufficiently heated; but when they arrived in Medicine Hat on Monday, December 8, the temperature was 30 degrees below zero. The railway company's agent at Medicine Hat says that "It would not be reasonable to ask a man to move his stuff at 30 below, at least we could not compel him to." The goods were not actually delivered till Friday, the 12th, doubtless for that reason. The agent says the goods were not transferred from one car to another.

On the part of the defendant it is asserted that the cabbages were when actually received, frozen to the heart and consequently valueless. The defendant's manager says: "We had another shipment come in the same date and it arrived there the same day and had entirely the same handling and it was not damaged."

Naturally the evidence as to whose fault it was that the

cabbages were frozen was meagre because that question was not in issue.

The position taken by the defendant was in substance that: "The defendant ordered from the plaintiff 75 sacks of cabbages under an implied agreement that the plaintiff would make a suitable and proper contract with the carrier for transit to the defendant; that in breach of that implied agreement the plaintiff did not make a contract with the railway company for carriage of the goods by heated car and consequently upon receipt of the bill of lading the defendant repudiated the contract of purchase and refused acceptance of the goods." The law supports such a defence. It is summarised in 25 Hals. tit: Sale of Goods, secs. 382, 383, p. 222, as follows: "The seller must duly follow any instructions of the buyer as to the mode of transmission of the goods consistent with the terms of the contract. If he fails to do so the goods are at his risk during the transit. Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages."

The foregoing is in substance a quotation of sec. 32 of the English Sale of Goods Act 56-57 Vict. 1893, (Imp.) ch. 71; Sale of Goods Ordinance, C.O. N.W.T. 1898, ch. 39, sec. 31.

I think on the evidence the defendant has established his defence. The contract represented by the bill of lading was not in its terms the contract which it was the duty of the seller to make. In my opinion a buyer has a right to have a complete and perfect contract comprised in the bill of lading and the seller cannot relieve himself from this obligation by shewing, as the plaintiff attempted to do, that the real contract which he made was the contract that he was bound to make and thus throw upon the buyer the burden of accumulating evidence in addition to the bill of lading to satisfy the carrier of the defendant's right to sue him.

So far as the evidence was directed to the question of negligence resulting in the cabbages being damaged, suspicion points rather to the railway company. The plaintiff

Sask.

C.A.

KLEIN v. SCHILE

has a right to sue the company and I think must be left to that remedy.

I would, therefore, allow the appeal with costs and dismiss the action with costs.

Appeal allowed.

KLEIN v. SCHILE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. April 25, 1921.

Judgment (§VIII.A-270)—Judgment by Default—Application to Set Aside—Delay in Making—Affidavit—Necessity of Shewing Good Defence on Merits—Misconception on Part of Persons Making Application—New Application on Proper Material—Stay of Proceedings.

An application to set aside a judgment regularly signed should be made as soon as possible after the judgment comes to the knowledge of the defendant, but mere delay will not bar the application unless an irreparable injury will be done to the plaintiff or the delay has been wilful. The application should be supported by an affidavit setting out the circumstances and shewing the nature of the defence and set forth facts which will enable the Court or Judge to decide whether or not there is matter which will afford a defence to the action. If the application is not made immediately, the affidavit should also explain the delay. The defendant having failed to establish a good defence on the merits when the application was brought after great delay, the Court refused the application, but the failure being the result of a misconception on the part of those who prepared the material, rather than the absence of a good defence, leave was given to renew the application on proper material, and a stay of proceedings granted.

APPEAL from the order of a Judge in Chambers setting aside a judgment entered by the plaintiff and allowing the defendant to defend the action. Reversed, but defendant given leave to make a new application on proper material, and proceedings on the judgment stayed for sixty days.

P. H. Gordon, for appellant.

C. W. Hoffman, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—This is an appeal from the order of a Judge in Chambers setting aside the judgment entered by the plaintiff and allowing the defendant to defend the action. On November 16, 1918, the plaintiff obtained a judgment for $6,222.24 against the defendant upon a promissory note in default of appearance, and issued execution thereon. The execution not being satisfied, the plaintiff, on December 10, 1918, brought action against the defendant and his two sons to set aside certain bills of sale executed by the defendant in favour of his sons as being in fraud of creditors, the

plaintiff being an execution creditor by virtue of the judgment and execution above referred to. On February 3, 1919, an appearance in that action was entered on behalf of the defendant, and on February 25 his defence was delivered by his solicitors. That action was set down for hearing at Swift Current at the sittings of May 25, 1920. On May 20, five days before trial, the defendant launched a motion to set aside the default judgment. The motion was refused by the local master, but on appeal to a Judge in Chambers the order was reversed and the application granted. The plaintiff now appeals to this Court.

The circumstances under which a Court will exercise its discretion to set aside a judgment regularly signed are pretty well settled. The application should be made as soon as possible after the judgment comes to the knowledge of the defendant, but mere delay will not bar the application, unless an irreparable injury will be done to the plaintiff or the delay has been wilful. Tomlinson v. Kiddo (1914), 20 D.L.R. 182, 7 S.L.R. 132; Mills v. Harris (1915), 21 D.L.R. 230, 8 S.L.R. 113. The application should be supported by an affidavit setting out the circumstances under which the default arose and disclosing a defence on the merits. Chitty's Forms, 13th ed., p. 83.

It is not sufficient to merely state that the defendant has a good defence upon the merits. The affidavits must shew the nature of the defence and set forth facts which will enable the Court or Judge to decide whether or not there was matter which would afford a defence to the action. Stewart v. McMahon (1908), 1 S.L.R. 209.

If the application is not made immediately after the defendant has become aware that judgment has been signed against him, the affidavits should also explain the delay in making the application; and, if that delay be of long standing, the defence on the merits must be clearly established. Sandhoff v. Metzer (1906), 4 W.L.R. 18.

The only material filed on the application was an affidavit made by the defendant and his examination thereon, and an affidavit filed on behalf of the plaintiff proving that the defendant had entered an appearance and filed a defence to the action brought by the plaintiff to set aside the bills of sale. The plaintiff admits being served with a writ of summons about October 26, 1918, and admits that the sheriff told him at the time that the plaintiff was suing him on the note. His only explanation as to why he allowed judgment

Sask.

C.A.

KLEIN v. SCHILE

to go by default is that "he was of opinion that, as the plaintiff had given no consideration for the said note, he would not be able to obtain judgment." In my opinion this is not satisfactory.

In Sandhoff v. Metzer, supra, the defendants attempted to account for their delay by saying that they were foreigners and could not read English. In giving judgment, Wetmore, J., at p. 20, said: "Reasons of this sort cannot be encouraged. I think that even a foreigner ought to understand that sheriff's officers do not travel long distances to serve them with papers just for amusement, and the fact of the service of the papers should put them on the alert."

In view of the ignorance of legal matters displayed by the defendant on his examination, I am satisfied that the explanation which he gave in his affidavit was only a form of words, the significance of which he did not understand. Had he been sufficiently versed in legal matters to know the meaning of "want of consideration," and that it would afford a good defence, he would have known that he must enter an appearance to a writ. The reason for the defendant's delay in entering an appearance, and thereby permitting judgment to go by default, may not be very material unless the delay was wilful, but the real reason, whatever it may be, should be given.

He accounts for his delay in making the application to set aside the judgment—a delay extending from November 16, 1918, to May 20, 1920—as follows: "On account of crop failures since the time the said judgment was signed, I did not have money to employ solicitors to act for me in opening up the judgment."

In view of the fact set out in the affidavit filed on behalf of the plaintiff that, within 3 months from the signing of the judgment, the defendant had solicitors who entered an appearance and filed a defence for him in the action to set aside the bills of sale, this explanation cannot, in my opinion, be accepted as sufficient. It may be, as suggested by his counsel on the argument, that the defendant did not retain the solicitors in the actions to set aside the bills of sale, but that they were retained by his sons, who were also defendants in those actions. If this suggested explanation is in accordance with the fact, it should have been embodied in the material so as to answer the affidavit filed on behalf of the plaintiff, and which could only have been filed to

shew that the explanation given by the defendant as to the cause of his delay in making the application was not tenable.

As to the merits. He says that, at the time the note was given—August, 1917—he was the owner of 960 acres in North Dakota, heavily encumbered; that the plaintiff was the owner of certain lands in Michigan—either 820 or 840 acres, he does not know which—also encumbered; that they agreed to trade lands; that it was found that the plaintiff's equity in the Michigan lands was $5,835 more than the defendant's equity in the North Dakota lands, and that he gave the plaintiff the note in question for that amount, the plaintiff representing that he had to pay that amount to some land company so as to be able to make title to the Michigan lands. He says that the plaintiff told him at the time he gave the note that it would not have to be paid if the plaintiff did not make title to the Michigan lands. The defendant also says that he gave the plaintiff a transfer of the North Dakota lands, but that the plaintiff did not give him a transfer of the Michigan lands. On his examination he admitted that the plaintiff never registered the transfer he received, for the reason that, in 1918, the defendant's North Dakota lands were all sold under proceedings taken by the encumbrancers. He also admitted that he never asked the plaintiff for a transfer of the Michigan lands or took possession thereof, and also that, under the agreement, he owed the plaintiff more money than that represented by the note and for that reason he was not entitled to a transfer of the Michigan lands. He could not produce his copy of the agreement, because, he says, he thought there was no use keeping it. He could not remember the terms of the agreement, or what he was to pay for the Michigan lands, or the number of years over which those payments were spread, nor had he any recollection of the amount of the encumbrances thereon. He says he cannot read English, but admits that all his children can. His knowledge of the transaction from beginning to end, as disclosed by his examination, is so nebulous, that I find it difficult to believe that he was quite frank. The only point upon which he is definite is, that the plaintiff told him when the note was given that it would not have to be paid unless the plaintiff could make title to the Michigan lands. The plaintiff does not controvert this testimony in any way.

Taking the facts to be as stated by the defendant, that the note in question represents part of the purchase money

Que.

K.B.

THE KING v. GREFFARD

of the Michigan lands, and that the plaintiff told him he would not have to pay it unless he could make title thereto, do they constitute a good defence to the action on the note?

To constitute a good defence, the defendant, in my opinion, must go further, and set up that the plaintiff is unable to make a good title to the said lands. Nowhere does he do this. The defendant has established that he would not be entitled to a transfer of the lands upon payment of the note, as he would still have further payments to make. On the material before us, the only defence open to the defendant is, that the plaintiff cannot make title. If he can make title, the defence of want of consideration fails.

I am therefore of opinion that the defendant has failed to establish a good defence on the merits with that clearness which is necessary where an application is brought after so great a delay. The application, therefore, must be refused. As, however, the defendant's failure in this regard seems to have resulted from a misconception on the part of those who prepared his material as to the necessity of setting forth the facts upon which the defence rested, rather than the absence of a good defence, and as it would be a great injustice if he were compelled to pay the note and then subsequently ascertain that the plaintiff could not make title to the lands for which the note was given, I would, even at this late date, give the defendant leave to renew the application on proper material, which would, however, have to include the establishing of the plaintiff's inability to make title. For that purpose I think a stay of proceedings on the judgment for, say, 60 days, should be granted.

The appeal itself should be allowed with costs, the order of the Judge in Chambers set aside, and the order of the master restored.

Judgment accordingly.

THE KING v. GREFFARD.

Quebec King's Bench, Lamothe, C.J., Carroll, Pelletier, Martin and Greenshields, JJ. June 29, 1920.

Theft (§I.—1)—Sale of Farm—Agreement by Purchaser to Keep Equipment Free from Seizures or Liens—Sale of Equipment by Purchaser—Prosecution for Theft—Special Interest in Property—Criminal Code, sec. 347.

A clause in a farm purchase agreement by which the purchaser binds himself to keep farm equipment of a certain value free from all seizures or other liens until he shall have paid one-half the purchase price, does not give the vendor such an inter-

Que.

K.B.

THE KING v. GREFFARD

est in the farm implements as to entitle him to prosecute the purchaser for theft for selling such implements, contrary to the agreement.

APPEAL by way of stated case from a conviction of theft. The facts are fully stated in the judgments rendered. Conviction quashed.

A. Lachance, K.C. and A. Fitzpatrick, K.C. for the Crown, Armand Lavergne, K.C. for appellant.

Martin, J.:—This is an appeal by way of stated case from a judgment rendered by the late Langelier, J., Judge of the Sessions of the Peace at Quebec, who found the accused guilty on a charge of theft, after a speedy trial held on August 8 last, and, on motion by counsel for the accused, reserved certain questions of law. The Judge postponed sentence until the questions reserved had been decided by this Court.

Before the statement of case was prepared, the magistrate before whom the trial was had, died and counsel for the accused, upon notice to the Crown, applied to this Court to state a case upon the questions of law reserved by the magistrate.

Upon that motion before the Court, the parties were directed to agree upon a stated case and they have done so in the following terms:

The accused bought a farm for $4,000 in cash and a balance secured by mortgage. Amongst other clauses in the deed of sale appears the following agreement:—"It is expressly agreed by these presents that the purchaser binds himself to keep farm equipment of a value of not less than $2,000, free from all seizures or other liens whatsoever, until he shall have paid to the vendor one half of the price of sale."

The accused sold practically the whole of the farm equipment, in spite of the protests of the vendor, and contrary to the above agreement. The vendor took civil proceedings against the accused, who confessed judgment in the hypothecary action directed against him.

Was the Judge in error in finding the accused guilty of the theft of the said farm equipment, and does the sale of the said farm equipment constitute an offence in law?

There is no controversy of the facts. They are briefly as follows: The accused Greffard purchased from a Mrs. Lirette, of Jeune-Lorette, a farm for the sum of $13,000, on which amount $4,000 was paid cash by the accused, the balance of the purchase price being secured by a mortgage

Que.

K.B.

THE KING v. GREFFARD

and in this mortgage deed is to be found the clause above recited.

Sometime after the above sale was effected, the accused sold practically all the equipment on the farm purchased under the above deed, which was to be held by him until one-half of the purchase price of the said farm had been paid. This equipment was sold by the accused notwithstanding the protests of the vendor.

Can this conviction be sustained in law? Section 347, Crim. Code, R.S.C. 1906, ch. 146, says:

"Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent,—(a) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely, of such thing or of such property or interest."

Did Mrs. Lirette have any special property or interest in this farm equipment? The accused expressly agreed to keep, free from all seizure or other lien, farm equipment of a value of at least $2,000 until he should have paid Mrs. Lirette half of the price of sale of the farm. There is no doubt if the accused had lived up to this agreement the position of Mrs. Lirette would be better than if he did not do so, but I fail to see how it can be successfully contended that Mrs. Lirette had any special property or interest in this farm equipment either temporarily or absolutely. She had no more interest than that of any other creditor whose debtor's goods are the common gage of his creditors. If the farm equipment had been seized and sold at the suit of Mrs. Lirette or any other creditor of the accused, could she or would she have been collocated and paid the proceeds of such sale by preference over the other creditors? She had no such preference. The farm equipment was absolute property of the accused.

The question submitted for our consideration is: Was the Judge in error in finding the accused guilty of the said farm equipment, and does the sale of the said farm equipment constitute an offence in law?

The first part should be answered in the affirmative and the second part in the negative; and we are of opinion that the conviction of the accused was erroneous and that he ought to have been acquitted, and we order and direct that he be discharged.

Greenshields, J.:—It is true that a person may steal property belonging to himself providing he has given to another proprietary rights or rights of property in or over the thing belonging to him, and which he steals, and the result of his act is to destroy a special right of property vested by him in another.

In this case, the most that can be said is, that the goods sold by the accused were the common gage of all his creditors for the payment of debts due to them.

I fail to find in the special clause of the agreement anything that confers upon the seller any special right of property which can be destroyed by the sale of the goods.

Whatever offence the accused may have committed, he certainly did not commit the offence of theft, according to my judgment and opinion, and I should quash the conviction and liberate the accused.

Judgment. Considering that by sec. 347 of the Crim. Code, any person, complainant in a charge of theft, must have some special property or interest in the thing stolen, and it is not made to appear that the complainant had any such property or interest in the things alleged to have been stolen; that the case stated for the opinion of this Court in the following terms: "Was the Judge in error in finding the accused guilty of the said farm equipment, and does the sale of the said farm equipment constitute an offence in law?" should be answered, the first part in the affirmative, and the second in the negative, which is the answer of this Court to the said question, and that the conviction of the accused is erroneous and that he ought to have been acquitted;

It is by the Court of our Sovereign the King now here considered, adjudged and finally determined and directed that the appeal of the accused be and the same is maintained, and his conviction quashed and annulled, and that he be acquitted and discharged from the said accusation, and it is ordered that an entry hereof be made of record in the Court of the Sessions of the Peace at Quebec.

Conviction quashed.

REX v. DIAMOND.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 29, 1921.

Intoxicating Liquors (§III.A—55)— Sale — Evidence of — Alberta Liquor Act (1916), 6 Geo. V., ch. 4, secs. 54, 57.

The prosecution having succeeded completely in proving that a pre-

Alta.

S.C.

REX
v.
DIAMOND

tended sale of liquor to a person in another Province was a mere pretence, this being necessary because if an actual sale had taken place it would not have been an offence under the Alberta Liquor Act, the accused cannot be convicted of a sale to that person, and although the magistrate disbelieves the person representing himself as a common carrier and in whose custody the liquor was when seized, when he swears that he did not purchase the liquor, the magistrate is not justified in finding without other evidence that a sale to him had in fact been made. Before sec. 54 of the Alberta Liquor Act can be applied there must be some prima facie evidence that the defendants had the liquor in their possession, charge or control. Mere inferences which may be made as a matter of imagination or suspicion are not enough to justify the application of the words of the section.

APPEAL by defendants Diamond, from a judgment of Ives, J. (1921), 57 D.L.R. 705, confirming convictions against them under the Alberta Liquor Act. Reversed.

A. A. McGillivray, for appellants;

H. W. Lunney, for the Crown.

Harvey, C.J.:—With much regret I have come to the conclusion that the conviction of selling liquor against these two defendants cannot be sustained and I concur in the judgment of my brother Stuart. I say regret because this act is as barefaced an attempt to defeat the spirit of the Liquor Act, 6 Geo. V. 1916 (Alta.), ch. 4, as could well be conceived, but for all that I cannot find the evidence to warrant a finding that there was a sale.

My brother Stuart has pointed out the insuperable difficulties to be overcome.

But though they escape the imposition of the fine they do not come off scathless, if, as seems probable, the liquor was still the property of the Diamond Liquor Co., in which they are personally interested. That liquor was taken possession of by the police and is no doubt held by them or by the Attorney-General. Gottschalk claimed no interest in it and, of course, it could not be returned to him. These defendants have not sought to establish any claim to it and in the meantime, therefore, it will be kept by the Crown authorities and one can see great obstacles in the way of the defendants or the company they represent establishing any legal right to it.

Stuart, J.:—These are two cases in which the two defendants, the Diamonds, were convicted of selling liquor contrary to the Liquor Act by Mr. Sanders, Police Magistrate for the City of Calgary. Motions to quash on certiorari were dismissed by Ives, J. (1921) , 57 D.L.R. 705, and the defendants have appealed.

The two defendants are officials of The Diamond Liquor Co., Ltd., which in January, 1921, was engaged in the liquor export business and had a warehouse in a certain street in Calgary.

On the morning of January 22, at about 6.30 o'clock, police officers observed that sacks or boxes were being carried out of the rear door of the warehouse and placed in a sleigh, that sacks of grain were placed over these sacks or cases, that a man came and hitched a team to the sleigh and that another team was being led behind by a second man on the sleigh as it drove off. Within a few blocks a constable stopped the sleigh and spoke to the driver, one Gottschalk, who, at first, pretended to express wonder that the constable should stop a load of grain but when the latter insisted that it was liquor Gottschalk then stated that he was getting $3 a case for delivering it. He produced an envelope containing two documents, one a typewritten letter, on the letter paper of The Diamond Liquor Co., Ltd., addressed to Mr. Hiram Miller, Lloydminster, Saskatchewan, and dated January 21, 1921, which began thus: "Bill of Goods consigned with E. Gottschalk and Company as public carrier License No. 11. This goods should be delivered and handed over to you in first class conditions as follows: Invoice No. 1220, Folio 26."

Here follows a list of the cases of liquor and then the document proceeded to say: "Kindly have carter sign this bill check over merchandise; not responsible for any breakage or missing bottles unless notified within 24 hours of time of delivery. Paid by accepted cheque January 18, 1921."

The other document was a form of a consignment order which had evidently been obtained from The Dominion Express Co. It was called "Fruit Form 6." The words "The Dominion Express Company" had been struck out and over them were written the words "E. Gottschalk & Co." and below them the words "Diamond Liquor Co., Calgary, Alta." It had as a date "Jan. 1, 1921," but this may have been an error for Jan. 21. It read "Please forward the property hereinafter described, subject to the terms and conditions of the Company's regular form of receipt printed on back of duplicate leaf." Then followed a description of the 33 or 36 "sacks" of liquor and H. Miller, Lloydminster, Saskatchewan, was named consignee. The document was signed "E. Gottschalk" but not by anyone as consignor.

Alta.

S.C.

REX
v.
DIAMOND

Gottschalk, the other man, whose name was Tabor and the two Diamonds were at once summoned by the police. Gottschalk and Tabor were charged with having liquor illegally in their possession and the Diamonds with illegal selling. The liquor was seized. The informations were laid on January 22. The hearing of the evidence took place on February 1. On January 24 the defendant Joseph Diamond appeared at Lloydminster, Saskatchewan, and sought out one Hiram Miller there. He endeavoured to get this man to sign an order for the liquor which he had written out and had dated January 8, 1921. On the back of this document Diamond had also written what was apparently intended as a draft telegram or letter in these words: "Y (for why) don't you ship out goods that I ordered on Jan. 8th, or refund money—H. Miller." This document was left with Miller who had refused to sign or to do anything about it. Miller was asked by Diamond to come down to Calgary but he refused. He was brought by the Crown, however, as a witness and gave the foregoing testimony. He also stated that he had never had any dealings whatever with the Diamonds or their company and had never ordered or agreed to buy or pay for any liquor from them.

It also appeared in evidence that on January 21 Gottschalk and one of the Diamonds appeared at the city license inspector's office and Gottschalk obtained there and paid for a license "to carry on the trade occupation calling or business of keeping two horses on the following premises 642 1st Avenue N.E. within the limits of the City of Calgary." As Gottschalk and Diamond left the office the latter remarked that this made him a "common carrier."

Gottschalk was called as a witness for the defence in the Diamond cases and stated in his evidence in chief simply that neither of the Diamonds had sold any liquor to him. On cross-examination he said that he was a farmer living near Drumheller, that some two months before one of the Diamonds had offered him work in a lumber camp up at Lake Louise and at about January 20 he had, without further communication with Diamond, come from his farm with his sleigh and two teams into Calgary and asked for the work, that he was told that he was too late but that he could take a load of liquor to Lloydminster, that at Diamond's suggestion they went together to the license office to get the license so that he would be a "common carrier." He stated also that he had left his sleigh at the back of the warehouse and that when he got there with

his team it was already loaded and that the agreement was that he was to convey it to one H. Miller, Lloydminster, in accordance with the documents given him and he was to be paid $3 a case for conveying them.

The liquor seems to have been put in sacks and not in wooden cases, and Gottschalk explained this as being "a better load in the box and would not be so apt to slip off." The grain was also in sacks.

Neither of the Diamonds was called as a witness on his own behalf.

The question is whether upon this evidence the Diamonds were properly convicted of unlawfully selling liquor.

I do not know that a better example than this case could be found to shew how different a case is apt to appear in a Court of Appeal from the way it must have appeared at the trial. There is no doubt that any reader of the story just recounted must have little sense of humor if he refrains from laughter when the obvious purport of it all dawns upon him. It would, I think, be rather difficult to conceive a more bare-faced attempt at a "camouflage" which might deceive the police than we have presented to us in this story.

But nevertheless what is the problem which is presented to us upon this appeal? It is whether there was any evidence upon which the Diamonds could properly be convicted, not of having broken the law, or of having attempted to do so, in some vague uncertain way (which beyond all doubt is true upon the evidence) but of having actually sold that liquor illegally.

Now undoubtedly the Diamonds manufactured a pretence of having sold the liquor to Hiram Miller. But it was, strangely enough, incumbent on the prosecution to shew that this was really a pretence because, if it had been true, it would have been a sale to a person beyond the Province and so within the law. Yet having succeeded completely in proving that the liquor had not been sold to Miller the prosecution was still bound to convince the magistrate that there had nevertheless been a sale.

The appellant's counsel pressed upon us very strenuously the questions: To whom, then, was this liquor sold? Where is there any evidence that it was ever sold at all if it was not sold to Miller?

The police magistrate and the Judge below, having, the one made the conviction and the other confirmed it, have apparently left all the trouble to this Court of Appeal of

Alta.

S.C.

REX v. DIAMOND

finding a satisfactory answer to these rather embarrassing questions. I do not remember that even counsel for the Crown made any serious attempt to give an answer. And yet if we cannot act upon our own initiative and exercise our ingenuity sufficiently to find an answer and as a consequence must quash the conviction, I suppose it may be suggested that the Appellate Division is interfering unduly and throwing obstacles in the way of enforcing the Liquor Act.

There is nothing, of course, in the suggestion that there might have been some other H. Miller in Saskatchewan. The defendants went to the one man who was called by the prosecution and by their conduct, I think, precluded themselves from suggesting the existence of any other person as their real purchaser.

Then Gottschalk swore that he had not bought the liquor. His general story was disbelieved, and of course quite properly so, by the magistrate. The magistrate was entirely justified in disbelieving anything he said. But it is one thing to disbelieve him when he said he had not bought the liquor and it is quite another thing to find, without any other evidence, the contrary affirmative. It simply means that his oath was of no value in proof of an assertion that he had not bought it. And the matter is left where it was before he made the statement at all. What then was the situation? As it appears to me it is simply, or perhaps intricately, this. Either the liquor had been sold to Gottschalk or it had been sold to persons unknown or it had not been sold at all.

There are really only two lines of reasoning by which the conviction can be upheld. First, it may be suggested that taking into consideration all the strange and suspicious and deceitful actions of the defendants, together with the fact that the liquor was being taken away from the warehouse obviously for the purpose of delivering it somewhere, the magistrate was entitled to infer that they had really sold it to someone because sending it out for delivery is not a thing that they would be at all likely to do without having sold it.

Secondly, it may be suggested that as Gottschalk said he had not bought it and as there was no actual evidence of a sale to anyone else, Gottschalk must be held to have been a mere bailee for the defendants and that thus the liquor was in the defendant's possession not in their authorised warehouse and the presumption provided for in sec. 54 of The Liquor Act may be applied and as the Diamonds did not prove by their own evidence that they had not sold it, there-

fore, they might be legally convicted.

Taking the last suggestion first, it will be observed that sec. 54 reads as follows: "If on the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or having or purchasing or receiving of liquor prima facie proof is given that such person had in his possession or charge or control any liquor in respect of or concerning which he is being prosecuted such person shall be obliged to prove that he did not commit the offence with which he is so charged."

Now suppose we assume that Gottschalk was a bailee only, surely it can only be assumed that he was a bailee for the Diamond Liquor Co. Ltd., and not for the individual defendants the Diamonds. It was common ground that that company had been the owner of the liquor. In that case no doubt this liquor was in the possession or control of The Diamond Liquor Co., Ltd., and being out on the street it was at a place where that company had no right to have it and as against that company the presumption of sec. 54 could possibly be applied. But I am unable to see how it could be applied against the individual defendants. Certainly sec. 58, referring to incorporated companies cannot help because what is there to shew that the premises of the company were "the particular premises upon which the offence was committed." It is going far enough to imagine or presume a sale but what is there to justify an additional imagination or presumption as to where the sale took place? Similarly sec. 57 read with 54, cannot help because there is absolutely no prima facie evidence in the words of 54 that the individual defendants had this liquor in their possession, charge or control. I think that before we attempted to apply these words as against the defendants some question should have been made upon the evidence and it should have been shewn prima facie that they had such charge or control and I think that mere inferences which one may make as a matter of imagination or suspicion are not enough to justify the application of the words of sec. 54.

Then returning to the first line of reasoning before suggested, it seems to me that the very discussion which I have just made of the possibility of applying sec. 54 in some way furnishes a serious objection to inferring from all the general circumstances that there had been a sale to some one. The situation is too clearly open to the explanation that the Diamond Liquor Co. Ltd. were sending the liquor out with

Alta.

S.C.

REX v. GOTTSCHALK

Gottschalk to be peddled and sold up the country. That is the position which I have imagined and dealt with already.

Concisely stated, the only method of upholding the conviction is to say this. The evidence shews that either the liquor had been sold to Gottschalk or was being transported for sale. In the former case the company was guilty of a sale, in the latter it was illegally in their possession and under sec. 54 they may be convicted upon presumption and this also is going a long way by means of the imagination - it was of course, either one of the two defendants who, as agents for the company, had sold to Gottschalk and the other no doubt took part in it; or it was these two agents of the company who are shewn by prima facie proof to have had the liquor under their charge or control. And taking it either way the defendants could be convicted of selling.

For myself I do not conceive this to be a proper method of upholding a conviction for an offence. There is altogether too much alternative theorising and imagining in it to make me satisfied with it as a proper course.

I have done my best as counsel for the prosecution to uphold these convictions. But I doubt very much whether it was my duty to go into this eager search for a ground of legal liability when we heard not a word of all these arguments either from the Judges below or from counsel for the prosecution.

I would, therefore, allow these appeals but without costs and order the convictions to be quashed, but without costs below.

Beck, J., concurs with Stuart, J.

Appeal allowed.

REX v. GOTTSCHALK.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 5, 1921.

APPEAL from the judgment of Ives, J. (1921), 57 D.L.R. 705, confirming a conviction under the Alberta Liquor Act. The facts of the case are fully set out in the judgment appealed from and in Rex v. Diamond, ante page 109.

F. C. Moyer, for appellant.

H. W. Lunney, for respondent.

Harvey, C.J., concurs with Stuart, J.

Stuart, J.:—In this case the facts are the same as those set forth in the two cases of Rex v. Diamond, ante page 109, and it is not necessary to repeat them. Here the defendant

was charged with having liquor unlawfully in his possession. The only state of facts in which he could have had the liquor lawfully in his possession would have been that suggested in his defence, namely, that he was a common carrier transporting the liquor lawfully to an actual purchaser outside the Province. Not only was this disproven, but the evidence was quite sufficient to justify the finding that he was himself acquainted with the nature of the pretence that was being arranged. His coming without previous enquiry 50 miles to Calgary with two teams on the mere chance of getting work in the woods was too absurd a story to be accepted. And when first accosted by the police he attempted to keep up the pretence by asserting that he only had grain.

The appeal should be dismissed with costs.

Beck, J. (dissenting):—As my brother Stuart says in his reasons for judgment in the allied cases of Rex v. Diamond, ante p. 110, there are great grounds for suspicion that a breach of the Liquor Act, 6 Geo. V., 1916 (Alta.), ch. 4, was planned. For myself, I find no grounds for suspicion against Gottschalk, and in the face of his explanation given under oath, I am of opinion that, following Rex v. Covert (1916), 34 D.L.R. 662, 28 Can. Crim. Cas. 25, 10 Alta. L.R. 349, the conviction ought to be quashed, the case made by the Crown being wholly based on a statutory presumption, and the defendant's account of his connection with the affair fulfilling the conditions exacted by the decision in Rex v. Covert. I would, therefore, quash the conviction with costs in this Court.

As to the forfeiture of the liquor, Ives, J., quashed the order of forfeiture rightly, I think, but he declined to make any order for restoration.

As Gottschalk claimed no interest in the liquor, I think he was not entitled to an order of restoration. Anyone who may be entitled to the liquor, it would seem, is not without remedy if it is in the hands of the police authorities. See Doodeward v. Spence (1908), 6 Commonwealth L.R. 406, cited and noted in Minor v. C.P.R. Co. (1911), 3 Alta. L.R. 408; 15 W.L.R. 161.

Appeal dismissed.

Sask.

K.B.

THE YORKTON DISTRIBUTING CO. v. MORTIMER

THE YORKTON DISTRIBUTING CO. v. MORTIMER.

Saskatchewan King's Bench, McKay, J. April 21, 1921.

Intoxicating Liquors (§III.D—72) — Authorised Exporter — Agreement with Another Authorised Exporter to Sell on Commission.

A company authorised to keep and sell liquors for export in Saskatchewan may legally arrange with another authorised liquor export company in the same Province to sell its goods for it on a commission basis to bona fide purchasers outside of the Province, and a delivery of liquor under such an agreement, to be kept and sold for the first-named company on commission, is not a sale within the meaning of the Saskatchewan Temperance Act.

APPEAL from a conviction made by A. J. C. MacEchen, a Police Magistrate for the Province of Saskatchewan, on December 14, 1920, for that The Yorkton Distributing Co., Ltd., on or about October 28, 1920, at Bienfait in the said Province, did unlawfully sell liquor contrary to the provisions of the Saskatchewan Temperance Act, R.S.S. 1920, ch. 194, and adjudged the said appellant for its said offence to forfeit and pay the sum of $750 to be paid and applied according to law, and if the said sum of $750 was not paid forthwith, ordered that the same be levied by distress and sale of the goods and chattels of the appellant.

W. B. O'Regan, for appellant.

H. F. Thomson, for respondent.

The facts are shortly as follows:—

McKay, J.:—The appellant is a partnership business consisting of three brothers, engaged in the keeping of and selling liquors for export, with its chief place of business at Yorkton, Saskatchewan. It also has other places of business in Saskatchewan, at Montreal in Quebec, and in Alberta.

The Bienfait Export Liquor Co., Ltd., to whom the alleged unlawful sale is said to have been made, is an incorporated company under The Companies Act, R.S.S. 1920, ch. 76, of the Province of Saskatchewan, and is hereinafter referred to as the Beinfait company. The powers of the said company are set out in its memorandum of association dated August 5, 1920, as follows: "(3) The objects for which the company is established are to carry on an export mail liquor business to ship to points outside the Province of Saskatchewan."

The Bienfait Co. had paid the exporters' tax for 1920 required by The Liquor Exporters Taxations Act, 7 Geo. V., 1917 (Sask.), ch. 24, and the appellant at any rate for its place of business at Yorkton.

About September 27, 1920, the appellant and the Bien-

fait Co. entered into a written agreement providing, among other things, that the Bienfait Co. should warehouse at Bienfait, Sask., liquors of the appellant, and send them out to purchasers outside the Province of Saskatchewan, and collect the price from the purchasers, and deposit these monies in the Union Bank at Estevan in the name of "The Bienfait Export Liquor Company, Limited, in trust for the Yorkton Distributing Company, Limited."

The appellant had the right to draw out the money from the said trust account, less 7½% commission on the amount of invoices issued for reshipment of the liquors. The Bienfait Co. was to draw out said 7½% commission, which was its remuneration for handling the appellant's liquors.

The appellant was to pay all charges for freight or express on the liquors, and if at any time the Bienfait Co. paid the same they were to be charged to the appellant.

The appellant from time to time sent liquors to the Bienfait Co. under above agreement, said liquors being consigned to the appellant at Bienfait.

With regard to the consignment, the subject matter of this appeal, the appellant at Yorkton ordered these liquors from its Montreal house for itself to be shipped direct to the Bienfait Co. at Bienfait, and at the same time ordered other liquors for its Yorkton house from the Montreal house. All these liquors were shipped in a car from Montreal to Yorkton to appellant. The liquors ordered for Bienfait were labelled for Bienfait, and the appellant had them forwarded by express to the Bienfait Co. The police, believing this a sale on the part of the appellant, seized the liquors and laid the information upon which appellant was convicted. The appellant now appeals from this conviction. The defence is that it was not a sale.

I am satisfied that the appellant did not intend to sell the liquor in question to the Bienfait Co., but it desired to make some arrangement whereby the Bienfait Co. could legally handle its liquors.

According to Rosebaume, the manager of the Bienfait Co., this company had not sufficient capital to carry on its business, and Bronfman, the managing partner of the appellant, knew this, and he says he desired to make use of this company which already had paid the tax for 1920 to sell for export, or, as he puts it, had a license to sell for export. He says if the appellant desired to sell in its own name at Bienfait it would have had to pay $1,000 and hire

Sask.

K.B.

THE YORKTON DISTRIBUTING CO. v. MORTIMER

help and rent premises.

I find from the evidence that the liquor in question was sent by the appellant to the Bienfait Co. under the above arrangement to be kept and sold for the appellant on commission. It was not a sale to the Bienfait Co. by the appellant. It was always the appellant's liquor until it was sold to purchasers.

The appellant and the Bienfait Co. could at this time both legally keep and sell liquors for export, and I do not see any reason why the latter company could not sell the appellant's liquor on the consent of the appellant.

The fact that the Bienfait Co. had no power under its Memorandum of Association to warehouse liquor for another person or company does not in my opinion affect this case. That would be a question that might arise in another way. For instance, when settling up time between appellant and the Bienfait Co. arrived, if the appellant refused to pay the Bienfait Co the commission agreed on, the Bienfait Co. might not be able to enforce the payment of the commission, as its Memorandum of Association does not authorise it to do a warehouse business of the kind set out in the agreement filed.

Objection was made that the agreement was not under the corporate seal of the Bienfait Co., and was therefore not a valid agreement. I do not think this affects the case. This also is a matter that might be raised between the appellant and the Bienfait Co. Of course, it might be a circumstance to take into consideration, when considering the evidence, as to whether there was a bona fide agreement as to warehousing, etc., and not a sale.

In my opinion, therefore, the conviction should be quashed.

As the circumstances of this case looked very suspicious until the evidence was gone into, and due to the fault of the appellant, for instance, in consigning the liquors to the Bienfait Liquor Co. instead of to itself as it had been hitherto doing, the conviction is therefore quashed without costs.

Conviction quashed.

CLARK v. THE KING.

Can.

S.C.

CLARK v. THE KING

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 11, 1921.

Evidence (§XII.L—988)—Criminal Code, sec. 19 (3)—Sanity of Accused—Establishing to Satisfaction of Jury—Burden of Proof—Weight and Sufficiency of Evidence.

There is nothing in sec. 19, sub-sec. 3, of the Criminal Code by which "every one is presumed to be sane at the time of doing or omitting to do any act until the contrary is proved" to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden of proof had been discharged; that balancing the probabilities upon the whole case there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality, or if he did know it, did not know that he was doing what was wrong.
[Review of Authorities.]

New Trial (§II.—8)—Criminal Law—Murder—Defence of Insanity—Judge's Instructions to Jury—Erroneous—Misleading to Jury.

On the trial of an accused person for murder where the defence of insanity was set up, the trial Judge told the jury that they ought to convict the prisoner unless the defence of insanity was established by the prisoner beyond a reasonable doubt, and added "if you entertain any reasonable doubts as to the sanity of the prisoner at the time he committed the act, why then it is your duty to convict." The Court held that this direction was erroneous and calculated to mislead the jury, and ordered a new trial.

APPEAL from a conviction for murder. New trial ordered.

W. P. Jones, K.C., for appellant.

W. B. Wallace, K.C., for respondent.

Idington, J. (dissenting):—The appellant was indicted for murder and convicted thereof. The defence set up was insanity. The facts bearing upon his actual commission of the crime charged seem to have been of such a conclusive character as to leave no room for doubt of his guilt unless he could be excused on the ground of insanity, or rather a doubt of his sanity, which is sought to serve the same purpose.

Stripped of undue verbiage confusing or tending to confuse the mind, the issue raised is whether or not if there might have been or ought to have been created by the evidence adduced a doubt as to his sanity in the minds of the jurors who tried him, then he should have been acquitted.

The law in Canada ever since the enactment of the Criminal Code of 1892, 55-56 Vict. (Can.), ch. 29, is that declared by sec. 11 thereof, continued in sec 19 of the Criminal Code,

Can.

S.C.

CLARK
v.
THE KING

R.S.C. 1906, ch. 146, as follows:—

"19. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.

"2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

"3. Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved."

In submitting the question of appellant's sanity to the jury, the trial Judge told them that the burden was placed upon the accused to make out his insanity at the time of the commission of the offence, beyond a reasonable doubt.

Inasmuch as that precise form of direction had been then recently, unanimously, approved by the Court of Appeal for New Brunswick in the case of The King v. Keirstead (1918), 42 D.L.R. 193, 30 Can. Cr. Cas. 175, 45 N.B.R. 553, the trial Judge refused to reserve a case for said Court, founded upon the objection that there was error in so charging the jury. That Court upon appeal thereto decided to abide by its ruling in said case, and refused to interfere.

The Court of Appeal for Alberta in a similar case of Rex v. Anderson (1914), 16 D.L.R. 203, 22 Can. Cr. Cas. 455, 7 Alta. L.R. 102, having by a bare majority decided that a charge using similar language to that now in question was erroneous and granted a new trial, the appellant obtained from my brother Anglin leave to appeal to this Court, under and by virtue of ch. 43, sec. 16, of the Dominion Statutes of 1920, which provides as follows:—

"16. The following section is inserted immediately after section one thousand and twenty-four of the said Act:—

"1024a. Either the Attorney-General of the Province or any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside or affirming a conviction of an indictable offence, if the judgment appealed from conflicts with the judgment of any other court of appeal in a

like case, * * * *"

and continues to provide for a Judge of this Court giving in such case leave to appeal.

It has been argued before us not only that there is a substantial conflict between the judgment in question and that in the Anderson case, but also that the ruling of the Supreme Court of the United States in Davis v. United States (1895), 160 U.S. Rep. 469, is the correct view to adopt.

The head note to that report is as follows:—

"If it appears on the trial of a person accused of committing the crime of murder, that the deceased was killed by the accused under circumstances which—nothing else appearing — made a case of murder, the jury cannot properly return a verdict of guilty of the offence charged if, upon the whole evidence, from whichever side it comes, they have a reasonable doubt whether, at the time of killing, the accused was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing.

"No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

Such is the result of an argument in which about a hundred authorities were cited, and many of them are referred to in the judgment of the Court.

Such is, as it seems to me, the drift and probable result of accepting the law as laid down in the Anderson case, in preference to that by the New Brunswick Court of Appeal.

The grave consequences of our so deciding would be almost tantamount to repealing the above quoted enactment of our Code, obviously designed to put an end to what was presumably an undesirable state of our law as administered, and place it upon clear and, but for what has happened, I should have supposed, unmistakable grounds.

In the Anderson case, 16 D.L.R. 203 at pp. 211, 212, Stuart, J., was, I respectfully submit, apparently unable to define the difference between a defence to the "satisfaction of the jury" or "clearly proven" and one "beyond reasonable doubt."

And, with great respect, I cannot see how, for a moment, the protection thrown around a prisoner is, as he suggests,

Can.

S.C.

CLARK
v.
THE KING

necessarily interfered with by the due limitation of the defence set up.

Beck, J., at p. 213, cited therein as authority Cyc's definition which tends in same direction as ultimately decided in the Davis case I refer to above.

None of the other authorities which he cites, to my mind, I respectfully submit, when closely examined and considered, really touch the kernel of what is involved herein.

On the other hand, such decisions as Harvey, C.J. (16 D.L.R. at pp. 209, 210) relies upon, aptly present the identical view he took of the Anderson case, as that which had been presented by eminent Judges in England, using the phrase "beyond reasonable doubt" in the same sense in relation to the proof of insanity as did the trial Judge in that case.

He cited Bellingham's case, May 15, 16, The Times, decided in 1812; Reg. v. Stokes, 3 Car. & Kir. 185, decided in 1848, only 5 years after M'Naghten's case (1843), 10 Cl. & Fin. 200, 8 E.R. 718, by Baron Rolfe, who had been appointed to the Exchequer Chamber in 1839, and hence possibly one of the Judges called to answer the question in the M'Naghten case, and (though best known as a leader of the Chancery Bar) had had considerable experience in Criminal trials as recorder of Bury St. Edmunds, and in presiding at the trial of many notable criminal cases; and the case of R. v. Jefferson (1908), 72 J.P. 467, 24 T.L.R. 877, where Bigham, J., as late as 1908, charged the jury in the same terms as now objected to.

And although that case went to appeal, no one ever thought of raising such a ground as now taken herein. Why so unless clearly untenable?

The truth would seem to be that the law as laid down in the M'Naghten case, supra, that in order to establish the defence, on the ground of insanity, it must be "clearly proven" and that "to the satisfaction of the jury" has always been, for at least 100 years, the law in England; and that it has been so presented to juries concerned in the language now complained of without challenge.

Mr. Tremeear, in the second edition of his work on our Code, in his notes upon the section thereof now in question, says that it was in the draft code prepared by the Imperial Commission, but never adopted by Parliament.

Law seemingly was found to be more stabilized, as it were, in England, without a code, than in some other

countries with one.

That, however, is no reason for our departing from our Criminal Code, which seems to me in its terms to be more imperatively adverse to appellant's contention in its terms than the logical result of the judicially made law of England.

The word "satisfaction" has given to it, in Murray's Dictionary, as one of its many means, the following:—

"6. Release from suspense, uncertainty or uneasiness" (J.); information that answers a person's demands or needs; removal of doubt, conviction.

"Phrase, to (a person's) satisfaction."

I am unable to find the thing proved, as our Code so expressly requires; unless it is so beyond reasonable doubt. I should dislike very much to hold any man proved insane, either in a civil or criminal proceeding, unless I could do so beyond reasonable doubt.

And I venture to think that the safety and protection of society is just as important as is the protection of a member thereof, when that member is placed upon trial. On the one hand he or she has been most justly protected for ages by the use of a judicial formula, as it were, lest passion and prejudice should prevail and injustice be done.

And in relation to the defence of insanity, those who have given thought to the matter at all must realise how easy it has been and still is to abuse the defence by suggestions, for example, of temporary insanity, and mislead those moved by pity or passion, to the deterioration of the due administration of justice.

I respectfully submit that society as a whole is quite as much entitled to be protected as a single member thereof. Such illustrations as proof of an alibi, which forms part of the evidence of the actual facts, pro and con, bearing upon the issue raised relative to the actual perpetration of the offence in question, are quite beside the collateral substantive issue of mental and moral responsibility.

That is only permitted to be raised as a defence in law to the actual commission of the offence when rebutting the presumption of sanity declared by said section until the insanity is proved.

The charge against an accused person should in regard to the acceptance of and weight to be given the evidence of fact for or against him or her so far as bearing upon the actual offence charged, be kept clearly and distinctly sever-

Can.

S.C.

CLARK v. THE KING

able from the defence of insanity, and each of the issues thus raised be given its own proper place in the presentation thereof, made by the Judge's charge, or otherwise.

It must be determined first whether or not upon the evidence bearing upon the actual perpetration of the offence, the accused can be found "beyond reasonable doubt" guilty, and then due consideration be given to the alternative of whether or not at the time in question the accused was of sound mind within the meaning of the statute, and that finding must be subject to the like limitations of proof "beyond reasonable doubt."

The appeal, in my opinion, should be dismissed.

Duff, J.:—On the trial of an accused person indicted for murder where the defence of insanity is set up, it is incumbent upon the accused in order to negative his responsibility for an act otherwise criminal to prove to the satisfaction of the jury that he was insane at the time he committed the act. M'Naghten's case, 10 Cl. & Fin. 200 and Crim. Code, sec. 19, sub-sec. 3. The trial Judge told the jury that they ought to convict the prisoner unless the defence of insanity was established by the prisoner beyond a reasonable doubt, and he added: "If you entertain any reasonable doubts as to the sanity of the prisoner at the time he committed the act, why then it is your duty to convict." This direction was, in my opinion, an erroneous one and calculated to mislead the jury.

Broadly speaking, in civil proceedings the burden of proof being upon a party to establish a given allegation of fact, the party on whom the burden lies is not called upon to establish his allegation in a fashion so rigorous as to leave no room for doubt in the mind of the tribunal with whom the decision rests. It is, generally speaking, sufficient if he has produced such a preponderance of evidence as to shew that the conclusion he seeks to establish is substantially the most probable of the possible views of the facts. This proposition is referred to by Willes, J., in Cooper v. Slade (1858), 6 H.L. Cas. 746 at p. 772, 10 E.R. 1488, in these words: "The elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict."

The distinction in this respect between civil and criminal cases is fully explained in a judgment of Patteson, J., speaking for the Judicial Committee in the case of Doe d. Devine

v. Wilson (1855), 10 Moo. P.C. 502 at pp. 531, 532, 14 E.R. 581. The whole passage is so instructive and so apt that it is worth while reproducing it in full:—

"Now, there is a great distinction between a civil and a criminal case, when a question of forgery arises. In a civil case the onus of proving the genuineness of a deed is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that it is genuine. The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities. In a criminal case the onus of proving the forgery is cast on the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted.

"Now, the charge of the learned Judge appears to their Lordships to have in effect shifted the onus from the defendants, who assert the deed, to the plaintiff, who denies it, for in substance he tells the jury that whatever be the balance of the probabilities, yet, if they have a reasonable doubt, the defendants are to have the benefit of that doubt, and the deed is to be established even against the probabilities in favour of the doubt. Certainly, it has been the practice so to direct the jury in a criminal case; whether on motives of public policy or from tenderness to life and liberty or from any other reason, it may not be material to inquire, but none of those reasons apply to a civil case. If, indeed, by the pleadings in a civil case, a direct issue of forgery or not be raised, the onus would lie on the party asserting the forgery, and this would be more like a criminal proceeding, but even then the reasons for suffering a doubt to prevail against the probabilities would not, in their Lordships' opinion, apply."

This exposition of the distinction between the two classes of cases brings out the point that the rule in criminal cases is a rule based upon policy.

The distinction may be illustrated by a reference to another class of proceedings in which a similar rule applies, namely, proceedings to establish illegitimacy and proceedings in which the validity of a de facto marriage is called in question. Where a child is born of a married mother,

Can.
S.C.
CLARK
v.
THE KING

and husband and wife have had access during the relevant period, the presumption of legitimacy is of such a character that it can only be overcome by evidence producing in the mind of the tribunal a moral certainty. And this moral certainty is contrasted by Lord Lyndhurst in a celebrated passage in Morris v. Davies (1837), 5 Cl. & Fin. 163, 7 E.R. 365, with a conclusion reached by weighing the probabilities and resting upon a mere balance of probabilities. The like rule prevails where a marriage having been solemnised, there have been cohabitation and issue, and a question arises as to whether the marriage ceremony was formally sufficient. In such a case it is incumbent upon those who impeach the validity of the marriage to demonstrate the existence of the defect.

All this is sometimes expressed by saying that the law presumes innocence and legitimacy, but in truth the fact that in given circumstances there is a rebuttable presumption of law in favour of a certain conclusion does not necessarily afford any guide as to the weight or strength of the evidence required to rebut the presumption. The law presumes for example that a promissory note is given for a valuable consideration; a presumption which has only the effect of establishing a prima facie case. The law presumes innocence, but it prescribes also a supplementary rule, namely, that in criminal proceedings, at all events, the presumption of innocence is not rebutted unless the evidence offered for that purpose demonstrates guilt in the sense of excluding to a moral certainty all hypotheses (not in themselves improbable) inconsistent with guilt.

The precise question to be determined is whether the same rule governs where the presumption to be overcome is a presumption of sanity. Where the question arises on a criminal prosecution the practice has been to treat the presumption as a presumption of law, and this practice seems to be sanctioned both by the answers given by the Judges in M'Naghten's case and by the provisions of the Crim. Code of Canada above referred to; but as I have just pointed out, the circumstance that the presumption is a presumption of law tells us nothing as to the weight of the proof required to overcome it. Is there a special rule as to this?

I am unable to think of any principle or any reason of policy comparable in importance to those upon which rest the rules touching the presumptions of innocence and legiti-

macy for holding that a similar rule should be applied as touching the character of the proof to be exacted where the presumption to be overcome is the presumption of sanity; or why the general principle should not be adhered to that in judicial proceedings conclusions of fact may legitimately be founded upon a substantial preponderance of evidence.

I have, moreover, no doubt that the expressions which have now for generations been used by judges in instructing juries in criminal proceedings as to the degree of certainty justifying a conviction (as "the prisoner must be given the benefit of the doubt," "guilt must be established to the exclusion of reasonable doubt"), are expressions which have passed into common speech; and that a Canadian jury receiving instructions couched in similar terms as to the probative weight of the evidence necessary to justify a given conclusion would in the great majority of cases attach to these expressions the significance which they ordinarily bear and are intended to bear when used in relation to the presumption of innocence. A jury being instructed that a finding of insanity would only be proper if they should be satisfied to the exclusion of all reasonable doubt upon that point, would not, I am quite sure, understand that an affirmative conclusion would be justified by proof consisting only of a substantial preponderance in the weight of evidence.

It will be necessary to refer very briefly to some authorities that have been mentioned. And first of the charge of Mansfield, C.J., in Bellingham's case, which is said to have been approved by Lord Lyndhurst, C.B., in Offord's case (1831), 5 C. & P. 168. The report of Sir James Mansfield's charge seems to be a newspaper report only, and Lord Lyndhurst's words of approval seem to be rather directed to the Chief Justice's definition of insanity than to his remarks upon the burden of proof. Lord Lyndhurst, indeed, in Offord's case contents himself with stating that the jury must be satisfied that the prisoner was insane before they can properly acquit him. Bellingham's case was a very painful case ,and I do not think it can be regarded as a satisfactory authority upon this point. See Reg. v. Oxford (1840), 4 St. Tr. (N.S.) 497 at pp. 550, 551; Reg. v. M'Naughton (1843), 4 St. Tr. (N.S.) 847, and especially the speech of Mr. Cockburn. In Oxford's case, just referred to, Denman, L.C.J., who with Alderson, B., and Patteson, J., presided, limited himself to remarking as regards the bur-

Can.

S.C.

CLARK
v.
THE KING

den of proof that all persons "prima facie must be taken to be responsible for his acts until the contrary is proved." In similar terms the jury was charged in The Queen v. Vaughan (1844), 1 Cox C.C. 80; Reg. v. Higginson (1843), 1 Car. & Kir. 129; Reg. v. Davies (1858), 1 F. & F. 69; Reg. v. Barton (1848), 3 Cox C.C. 275; Reg. v. Townley (1863), 3 F. & F. 839; Reg. v. Layton (1849), 4 Cox C.C. 149.

It is quite true that in Reg. v. Stokes (1848), 3 Car. & Kir. 185, Rolfe, B., is reported to have said that if the jury were left in doubt it would be their duty to convict, and similar language is attributed to Bigham, J., in R. v. Jefferson, 72 J.P. 467. When the remarks of these learned Judges are read as a whole, however, the fair interpretation of them seems to be that the jury must be satisfied with the evidence of insanity. They were not, I think, intended to convey to the jury the impression that they must arrive at that degree of moral certainty which is necessary to justify a conviction upon a charge of crime. As against these observations may be put the language of Tindal ,C.J., in addressing the jury in M'Naughton's case, 4 St. Tr. (N.S.) 847, where he presided with Williams ,J., and Coleridge, J. The Chief Justice used these words at p. 925:—

"If on balancing the evidence in your minds you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes. If not so, and if in your judgment the subject should appear involved in very great difficulty, then you will probably not take upon yourselves to find the prisoner guilty. If that is your opinion, then you will acquit the prisoner."

It seems clear that there has been no uniform practice of directing the jury on the issue of insanity in the manner adopted by the trial Judge in this case, and as it appears, as I have said, to be more consistent with principle that the jury should be told that insanity must be clearly proved to their satisfaction, but that they are at liberty to find the issue in the affirmative if satisfied that there is a substantial, that is to say, a clear preponderance of evidence, I am constrained to the conclusion that there was substantial error in the conduct of the trial, and that a new trial should be directed.

Anglin, J.:—Is it misdirection to instruct a jury that to

justify a verdict of acquittal on that ground (sec. 966, Crim. Code) in a prosecution for murder the defence of insanity must be established beyond a reasonable doubt? The Supreme Court of Alberta en banc (Harvey, C.J., dissenting) held that it was in Rex v. Anderson, 16 D.L.R. 203, 22 Can. Crim. Cas. 455. The Appeal Division of the Supreme Court of New Brunswick, following its own previous judgment in The King v. Keirstead, 42 D.L.R. 193, 30 Can. Cr. Cas. 175, has unanimously held in this case that it is not. Hence this appeal—the first brought to this Court under sec. 1024(a) of the Criminal Code, enacted by 10 Geo. V., 1920 (Can.), ch. 43, sec. 16.

If this question were entirely open, I should be disposed to accept as more logical and humane than that approved in English law (however defensible the latter may be on grounds of policy) the view which has prevailed in the Supreme Court of the United States and in many States of the Union (Lawson on Law of Presumptive Evidence, p. 537); that, while the presumption of sanity relieves the prosecutor in the first instance from proving that fact, if, upon the whole evidence, a reasonable doubt remains in the mind of the jury whether at the time of the killing the accused was mentally competent to distinguish between right and wrong or to understand the nature of his act, it cannot properly render a verdict of guilty. Davis v. United States, 160 U.S. Rep. 469; German v. United States (1903), 120 Fed. Rep. 666. The reasoning of Harlan, J., delivering the judgment of the Court in the Davis case, seems to me unanswerable. How can a man rightly be adjudged guilty of a crime "if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime?" (p. 484) * * *

"How upon principle or consistently with humanity, can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?" (p. 488).

Where, as in murder, intent is an essential element in the crime, if the evidence as a whole so far rebuts the presumption of intent that it is left doubtful whether the accused was capable of forming the necessary intent—could have had mens rea—how can it be held that all the constituent elements of criminality are established beyond reasonable doubt? Professor Thayer in his excellent Treat-

Can.
S.C.
CLARK
v.
THE KING

ise on Evidence at the Common Law (1st ed., pp. 381-4) discusses this question with his customary lucidity.

The defence of insanity, which goes to negative an essential ingredient of the crime—criminal intent—just as does the defence of inevitable accident—and as the defence of an alibi goes to negative another essential element, the identity of the accused—is thus put on the same footing as other defences. Evidence in support of them which creates in the minds of the jury a doubt whether some essential element of the crime has been established—a doubt which on the whole evidence is not removed—entitles the accused to an acquittal, since the burden of satisfying the jury of his guilt beyond reasonable doubt, which always rests on the prosecutor and never changes, has not been discharged. R. v. Schama (1914), 24 Cox C.C. 591, p. 594, 11 Cr. App. R. 45; R. v. Stoddart (1909), 2 Cr. App. R. 217, at pp. 243-4; The King v. Myshrall (1901), 8 Can. Cr. Cas. 474.

But, this is not the law of England with regard to the defence of insanity as is stated by the Judges in their answers to questions propounded to them by the House of Lords in M'Naghten's Case, 10 Cl. & Fin. 200, at pp. 209-212, which, notwithstanding criticism by eminent Judges and writers, have ever since been generally accepted in English courts as authoritative. It does not suffice in English law that a defendant pleading insanity should create a doubt as to his sanity in the minds of the jury. He must prove his irresponsibility "to their satisfaction"—it must be "clearly proved." So said Tindal, C.J., speaking for himself and his fellow Judges.

As Harvey, C.J., says (16 D. L. R. 203 at p. 209), the authority of M'Naghten's case not having been accepted in the United States. "a reference to American text-writers and cases can furnish no aid in determining the law in Canada on this subject."

On the other hand our Parliament has seen fit in s.19 (3) of the Crim. Code to define the law which is to govern Canadian Courts in these terms. "Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved."

It is noteworthy that, although the codifiers undoubtedly had the language of M'Naghten's case before them, our legislators have not said that, in order to overcome the presumption of sanity, mental irresponsibility must be "clearly proved" or even that it must be "established to the satisfaction of the jury"—but merely that it must be

"proved." Another point of difference between our statutory law and that of England, perhaps not devoid of significance, is that whereas here on insanity being "proved" the verdict is to be "not guilty" (the jury being required to find the insanity specially and, if that be the case, to state that the acquittal is on account of it, sec. 966), thus indicating that insanity with us goes to the question of guilt or innocence. In England since 1883, 46-7 Vic. (Imp.) ch. 38, in like circumstances the verdict must be guilty of the act or omission charged but insane at the time when he did the act or made the omission, thus indicating that insanity is there not an absolute defence but rather matter available in arrest of judgment. This would seem to be a logical outcome of the view that, notwithstanding reasonable doubt as to sanity raised by the evidence, criminality involving intent may exist beyond reasonable doubt.

No doubt, however, "proved" in sub-sec. 3 of sec. 19 of our Code must mean "proved to the satisfaction of the jury," which, in turn, means to its reasonable satisfaction. Braunstein v. The Accidental Death Ins. Co. (1861), 1 B. & S. 782, at p. 797, 121 E. R. 904. It may possibly have been meant to cover the phrase "clearly proved" used in M'Naghten's case. "Clear and positive proof," however, was held in an Indian case cited in Stroud's Jud. Dict. (2 ed.), 323 (the report is not available here) to mean "such evidence as leaves no reasonable doubt." If the adverb "clearly" adds to the force of the participle "proved" its use, in my opinion, is not warranted under our Code. Still less is it justifiable to add to the "proved" of the Code such a distinctly qualifying phrase as "beyond all reasonable doubt," if a higher degree of certainty is thereby required than the word "proved" itself imports.

"Proved is not a word of art." Aaron's Reefs v. Twiss [1896] A. C. 273, at p. 282. It may have different shades of meaning varying according to the subject matter in connection with, and the context in which, it is used. "Tested" or "made good" or "established" are its ordinary equivalents. Murray's Dictionary; Crampton v. Swete and Main (1888), 58 L.T. 516. It may require only evidence of the factum probandum sufficient to be left to a jury. Tatam v. Haslar (1889), 23 Q.B.D., 345, 348, 349; see, too, The People v. Winters (1899), 125 Cal., 325. Here I find nothing to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden

Can.

S.C.

CLARK
v.
THE KING

of proof had been discharged—that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality, or if he did know it, did not know that he was doing what was wrong. That I believe to be the law of Canada, as it appears to be that of most of the States of the American Union. Underhill on Criminal Evidence, sec. 158.

The latter clause of the ancient maxim, stabitur praesumption donec probetur in contrarium, does not import that any special amount or degree of evidence is required to rebut the presumption. Its whole office is to shift to him against whom it operates the burden of adducing such evidence as will satisfy the tribunal that the presumption should not prevail (Best on Evidence, 11th ed., p. 314) such proof as may render the view which he supports reasonably probable. To require that a particular presumption must be negatived beyond reasonable doubt is to superadd to the force of the presumption a rule of substantive law—and that has been done in the case of the presumption of innocence. Thayer on Evidence at the Common Law, 1st ed., pp. 336 and 384. The history of this presumption of law and the distinction between it and the doctrine of reasonable doubt is dealt with by White, J. (now C.J.) in Coffin v. United States (1895), 156 U.S. Rep. 432, at pp. 452-60.

I quite appreciate the difficulty experienced by Harvey C.J., (16 D.L.R. 208-210) and by White, J. (42 D.L.R. at pp. 197-198) in formulating the distinction between proof to the satisfaction of the jury and proof beyond reasonable doubt. How can I be satisfied of a fact if I have reasonable doubt that it is so? But, with Beck, J., at p. 215 (16 D. L. R.) I am convinced that the expression "proved beyond reasonable doubt" has become consecrated by long judicial usage as pointing to an amount or degree of proof greater than is imported by the word "proved" standing alone or by the expression "established to the satisfaction of the jury," or even by "clearly proved"—certainly greater than is required to discharge the burden of proof in civil matters.

That Judge quotes, at pp. 214-216, an extract from the judgment delivered by Sir John Patteson in Doe d. Devine v. Wilson, 10 Moo. P. C. 502, at p. 531, and a passage from

Taylor on Evidence, 11th ed. Vol. I., para. 112, at pp. 115-116, as illustrating this difference. But the actuality of the distinction in law between an instruction that the existence of a fact or condition must be proved and that it must be proved beyond a reasonable doubt is perhaps best tested by the inquiry whether an accused would not have ground for complaint if the trial Judge having charged that the jury must be satisfied of his guilt—that it is clearly proven—should refuse to direct them that they must be so satisfied beyond reasonable doubt. I put that question to counsel for the Crown during the argument. It was not answered. I find it was anticipated by Stuart, J., in Anderson's case (p. 212). With that Judge "I think the rule is well established that an accused person is entitled to have such a direction given," accompanied by an explanation of what is reasonable doubt. R. v. Stoddart, 2 Cr. App. R., 217, R. v. Schama, 24 Cox C. C. 591 at p. 594; Reg. v. White (1865), 4 F. & F. 383, are instances of the recognition of this right in English law. In R. v. Sterne (1843), cited in Best on Evidence, 11th ed. at p. 84, Baron Parke instructed that there should be "such moral certainty as convinces the mind of the tribunal as reasonable men, beyond all reasonable doubt."

I also agree with Stuart, J. (16 D. L. R. at p. 212) that "If the expression (beyond reasonable doubt) was not improper in the present case, then it inevitably follows that it is not necessary in the ordinary case," i.e., in directing the jury as to the burden of the prosecution.

The case of Reg. v. Layton (1849), 4 Cox C. C., 149, at p. 156, in which the trial took place shortly after M'Naghten's case, where the direction given by Rolfe, B. was: "The question therefore for the jury would be, not whether the prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind, may perhaps be referred to as an instance of a correct appreciation of the effect of the M'Naghten case. Lord Lyndhurst, C.B., had delivered a similar charge in R. v. Offord, 5 C. & P. 168. The charge of Bingham, J. in R. v. Jefferson, 72 J. P. 467, at pp. 469-470, that the prisoner has to make out the charge of insanity "to your satisfaction without any reasonable doubt. If you have reasonable doubt as to whether he knew he was doing wrong or not you must find him guilty," though similar to that in Bellingham's case, and to that in Reg. v. Stokes, 3 Car. & Kir. 185, was, I venture to think, a misapprehension of the effect of the answer of the Judges

Can.
S.C.
CLARK
v.
THE KING

in the House of Lords. Such a charge would, in my opinion, be clearly wrong in Canada. These Nisi Prius reports, however, are really of little value.

On appeal in Jefferson's case Lawrance, J., delivering the opinion of the Court setting aside the verdict on another ground, was careful to state that no question had been raised as to the direction of the trial Judge (p. 470), probably to make it clear that approval of it was not to be inferred.

I am, for these reasons, of the opinion that there was misdirection at the trial of the appellant and that it is not possible to say that substantial wrong did not result therefrom. The application of the appellant for leave to appeal should, therefore, be granted and his conviction set aside and a new trial directed.

Brodeur, J.:— I concur with my brother Duff.

Mignault, J.:—A presumption being, by definition, a deduction from a known or ascertained fact, or, as the old writers expressed it, ex eo quod plerumque fit, it is clear that the presumption of sanity of mind, entailing civil and criminal responsibility, would be fully recognised even if it had not been made the subject of a statutory declaration. So para. 3 of sec. 19 of the Criminal Code, which states that "every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved," merely gives an unnecessary, I do not say a useless, legislative sanction to a universally recognised presumption of fact, entitling us to consider it as a presumption of law—although that does not add to its evidential force which will stand as proof of the basic element of criminal responsibility, until it is rebutted or, to use the words of the Code, "until the contrary is proved."

This shews that although we have an express declaration by the Legislature, the Code really adds nothing to the common law; in fact the presumption of sanity of mind, involving criminal responsibility, is recognised in England as well as in all countries, and our inquiries need not carry us further, which are subject to the common law.

We may therefore take the rule stated by the Judges in M'Naghten's case, 10 Cl. & Fin. 199, that the jurors should be told that every man is presumed to be sane, until the contrary is proved to their satisfaction (I do not here refer to the further statement of the Judges, speaking by Tindal, C.J., that insanity must be "clearly proved") as being in

effect the rule of our Crim. Code, for although the words "to the satisfaction of the jury" are not contained in para. 3 of sec. 15, inasmuch as the contrary of the presumption must be proved, and the proof must be passed on by the jury, this proof must be sufficient to satisfy the jury that the presumption has been rebutted.

I do not think that it is necessary to consider cases that have been decided in the United States, although I have read with interest and with some measure of sympathetic consideration the able opinion of the late Harlan, J., in Davis v. United States, 160 U.S. Rep. 469, to the effect that if on the whole evidence any reasonable doubt exists as to the sanity of the accused, the jury should acquit. This manifestly would transgress the rule of our Code, for instead of proving his insanity, it would be sufficient for the accused to create in the minds of the jury a reasonable doubt whether he was sane when he committed the crime, which would, in my judgment, deprive the legal presumption of its legitimate effect.

Here the trial Judge in charging the jury emphasised that it was their duty to convict the accused unless in their opinion he had proved his insanity beyond a reasonable doubt. Is this misdirection in law? The Supreme Court of New Brunswick, whose judgment in the case of The King v. Kierstead, 42 D. L. R. 193, 30 Can. Cr. Cas. 175, the trial Judge followed, has unanimously held that it was not. Inasmuch, however, as the Appellate Division of Alberta, in Rex v. Anderson, 16 D. L. R. 203, 22 Can. Cr. Cas. 455, had decided that such a direction was wrong, the appellant was enabled to appeal to this Court by reason of a recent amendment of the Crim. Code (10-11 Geo. V., 1920 (Can.) ch. 43, sec. 16).

My first impression at the hearing was that if the jury entertained a reasonable doubt whether the plea of insanity was proved, the legal presumption was not rebutted. Further reflection has, however, led me to think that it is sufficient that the jury be satisfied on all the evidence that the plea of insanity has been established, and for that reason I fear that the direction which was given in this case may have been, to say the least, misleading. It is moreover open to the objection that something is added to the law, which is content with requiring that the contrary be proved, without specifying the degree of proof to be adduced. It is unquestionable that guilt must be proved beyond a reasonable

Alta.

S.C.

NICHOLSON v. WILLISCROFT

doubt, so that the presumption of innocence is stronger, and rightly so, than the presumption of sanity. Proof in ordinary matters does not suppose that the evidence removes all doubt; it is the result of a preponderance of evidence, or of the acceptance on reasonable grounds of one probability in preference to another, and, in the case of insanity, the evidence generally is largely a matter of expert opinion. To say that insanity must be proved to the satisfaction of the jury does not weaken the legal presumption, but it places the plea of insanity on the same footing as all other defences which must be established so as to satisfy the jury. I would certainly not say that if the jury be in doubt whether the accused was sane or insane they should acquit him, because if they accept his plea of insanity, they must expressly find that he was insane and return a verdict of not guilty because of insanity (sec. 966 Crim. Code). But while unquestionably all the onus here is on the accused, still the jury may accept his evidence as having greater weight than that of the Crown, although they might not feel that all reasonable doubt has been removed. Such a doubt might be caused by the testimony of one reputable expert against the opinion of other experts, and, in such a case, it is certainly within the province of the jury to accept the views of the latter in preference to those of the former. I would therefore think that a proper direction would be to call the attention of the jury to the legal presumption of sanity and to inform them, the onus being on the accused, that insanity must be proved by him to their satisfaction. Further than that I would not go.

A serious wrong or miscarriage may have resulted from the direction given by the trial Judge, so on full consideration I concur in the judgment allowing the appeal and ordering a new trial.

Appeal allowed. New trial ordered.

NICHOLSON v. WILLISCROFT.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 27, 1921.

Contracts (§I.C—25)—Oral Contract by Agent—Agent Not Authorised to Make Contract—Obligation of Principal to Continue —New Written Contract—Consideration—Specific Performance.

The plaintiff's agent had authority to engage the defendant as captain of a vessel going on a prospecting trip, provided that at the same time he secured his staking rights for petroleum and natural gas, the condition being that no man was to be engaged as a member of the party whose staking rights could not be

Alta.

S.C.

NICHOLSON v. WILLISCROFT

obtained. Some time after the expedition had started, the plaintiff, on learning that no document had been signed, had the defendant sign a hiring agreement to this effect. The defendant during the expedition staked a claim which he subsequently located and on which he paid the fee. The Court held that as the agent had no authority to make the contract which the defendant alleged was made, i.e., an oral contract for his services, for a definite period without any agreement that he should stake and assign a claim, therefore the plaintiff was under no obligation to continue the employment on these terms, and the hiring contract which the defendant signed putting him under the obligation to stake and assign, had sufficient consideration, to support an action for specific performance.

APPEAL by plaintiff from the trial judgment dismissing an action for specific performance on the ground that there was no consideration for the contract made. Reversed.

F. Ford, K.C., and C. F. Newell, K.C., for appellant.

J. R. Lavell and J. A. Ross, for respondent.

The judgment of the Court was delivered by

Stuart, J.:—In the early part of 1920 the plaintiff was arranging to go into the far north country on a prospecting expedition and to take with him a number of employees and assistants. He apparently was obliged to make some financial or other arrangements in Montreal, and while he was there the preparations for the expedition were left by him in the hands of one George. The plaintiff had purchased a gasoline boat of some 12 or 14 tons burden lying at Fort McMurray, the head of navigation on the Athabasca. George was engaged in securing a crew and other assistants and made a bargain with the defendant, who was a ship captain or skipper of considerable experience, particularly on the Mediterranean, during the war, but who was residing at McMurray, to act as captain or skipper of the boat. It was apparently the plaintiff's intention that George should secure written contracts from all the employees engaged, one of the terms of which would be that they should locate oil or mineral claims and assign them to the plaintiff. George had promised the defendant the sum of $1000 for his services from April 1., to October 1. This bargain had been made orally. George was not called as a witness and the only account of it on the record is that given by the defendant, who stated that he had been asked but had refused to agree to stake and assign a claim.

The expedition started north in two sections, one part going on the boat from McMurray, the other part, which included the plaintiff, going down the Peace from Peace River

Alta.

S.C.

NICHOLSON v. WILLISCROFT

Landing. They met at Fort Fitzgerald on the Slave River and after passing the portage to Fort Smith, they all went together down the Slave River into Great Slave Lake and across that lake to a headland called Windy Point, where there were indications of oil. After staying there a few days they were preparing to divide again, a few men to remain and the others, including the plaintiff and the greater part of the men, to go on in the boat down the MacKenzie River to Fort Norman. It was just as the boat was about to leave that the plaintiff learned that George had never got a written contract from the defendant. The plaintiff at once interviewed the captain, the defendant, and after some conversation, the exact purport of which is somewhat in dispute, the defendant signed the following document.

"Hiring Agreement

This Agreement made in duplicate this first day of April, A. D. 1920, Between: William Nicholson of the City of Edmonton, in the Province of Alberta, hereinafter called the party of the first part and Capt. John Edwin Williscroft of Fort McMurray Province of Alberta, hereinafter called the party of the second part:

1. The party of the first part hereby agrees to take the party of the second part into his services as an assistant in a prospecting party, now proceeding to prospect for petroleum and natural gas and mineral claims and locations in the vicinity of Great Slave Lake, in the North West Territories of Canada, at a wage of $1,000 from April 1st till October first, payable upon the completion of the said work of the said prospecting party and upon the registration and recording in the office of the Agent or Sub-agent of Dominion Lands or the Mine Recorder, as the case may require, at Edmonton or Fort Smith, of all claims staked out, located or obtained by the said party of the second part while on the said trip, and upon the execution and delivery by the said party of the second part to one William Nicholson, of the Town of Banff, in the said Province, of proper transfers and assignments of all the said claims and locations.

2. The party of the second part declares that he understands and is competent to perform the duties of such a situation and hereby agrees to serve the party of the first part honestly, soberly and faithfully, at all times and in all respects during the said service, and will conform to all orders and rules of the party of the first part, and will prospect for, locate and stake petroleum and natural gas and mineral

claims, and will transfer, set over and assign, and doth hereby transfer, set over and assign all such claims and locations, and register or cause to be registered such transfers and assignments of all such claims and locations, in the office of the agent of Dominion Lands at Fort Smith or Edmonton, and will not absent himself from such service at any time without leave.

In witness whereof the said parties have hereunto set their hands and seals on the day and year first above written.

Signed sealed and delivered (Wm. Nicholson (Seal).
In the presence of (J. E. Williscroft (Seal).
(Sgd) R. E. McArthur."

Neither the plaintiff, nor any one on his behalf, asked the defendant to do any staking on Great Slave Lake. The party reached Fort Norman on July 6., and during a succeeding period of about 2 weeks the boat ran up and down the river to various places. The plaintiff, and apparently most of the party, went ashore at different times, but the defendant attended principally to the boat.

The defendant and another member of the party one Shaw, went off one day, being July 14., on one of the ship's canoes or boats and each staked an oil claim. This was not only without any request from the plaintiff but without his knowledge. From some source it afterwards came to the plaintiff's knowledge that they had done this and on July 20, plaintiff went to defendant and enquired about it. Defendant alleges that the question was "What about the claim you staked?" while plaintiff alleges that, having heard the rumor as to what had been done, he went to defendant and asked him to go and stake a claim to which the defendant demurred owing to the fly pest, and said that as a matter of fact he had already staked a claim. The accounts given by the two parties of what was then said differ somewhat but at the end of the conversation plaintiff gave defendant a cheque for $300. This he stopped payment of as soon as he could communicate because of a remark which he alleges the defendant made after receiving it.

The whole party returned south and no reference was made on the return journey to staking any claim at Windy Point.

The defendant came to Edmonton, located the claim and paid the fee, some $900 or $1000.

This action was brought for specific performance to compel the defendant to assign the claim to the plaintiff and for

Alta.

S.C.

NICHOLSON v. WILLISCROFT

damages. The defendant counterclaimed for a balance of his wages.

The trial Judge dismissed the plaintiff's claim on the single ground that the plaintiff's agent, George, had already agreed to pay defendant $1000 for his services as captain for the 6 months and that there was no consideration for the additional obligation, entered into by the defendant in the written contract, to locate and assign an oil or mineral claim.

I am bound to say that if the case clearly were this, that the defendant had concluded through the plaintiff's agent, George, a contract binding on the plaintiff that he would navigate the boat and perform merely the duties of a ship's captain for 6 months for the sum of $1000 there would appear to be some difficulty in avoiding the result arrived at by the trial Judge. In 7 Hals. p. 385, it is said, that a promise to perform something which the promisee is legally bound to perform independently of his promise or is already under a legal obligation to the promisor to perform is no consideration; and several cases are cited in a note where it was decided that a promise by a master to pay seamen increased wages in consideration of their continuing to serve or doing more than the ordinary share of work, when they are under a legal obligation to do so, is nadum pactum. There are also quite a number of American cases cited in 6Am. &Eng. Encyc. of Law pp. 729, 730 et seq., which seem, at least some of them, to insist very strictly upon this principle.

Now if the plaintiff had been already under a legal obligation to pay the defendant $1,000 for his services simply as ship's captain for the 6 months, it would appear to me to be rather difficult to say that there was any consideration at all for the defendant's promise to locate and assign the claim. The only ground upon which such an obligation on his part could be held to rest would be that by signing the document he practically assented to its contents being treated as the true original contract from the beginning. This view would be strengthened by his own evidence that George had requested him to agree to locate and assign, that he had refused and that finally he had told George that he would navigate the ship on the terms originally mentioned by George, that is, $1,000 for the 6 months. These words in his evidence are somewhat ambiguous and while in one interpretation they no doubt can be held to mean that he only agreed to navigate the ship and do nothing else for the sum stated, yet it would not be straining them, I think, very unduly to

interpret the word "terms" as including the obligations originally suggested for both parties.

If there were, however, nothing more than this I should for myself hesitate to disturb the decision of the trial Judge. But, there is another piece of evidence which is extremely important and puts another aspect on the matter entirely. The plaintiff stated in his evidence this, referring to his agent George, "He had authority to engage him as captain to go north, provided at the same time he secured his staking rights for petroleum and natural gas and the condition was that no man was to be engaged as a member of the party whose staking rights could not be obtained."

And he stated further that "I first learned that the defendant had not signed the document on the morning of the 1st., or 2nd., of July while the boat was riding at anchor in the vicinity of Slavey Point."

The agent George was not called to contradict this evidence and unless we are to disbelieve Nicholson as untruthful it must be taken to be correct. We cannot in this appeal reject Nicholson's evidence when there is nothing to contradict it, nothing to justify us in declaring him a perjurer and no doubt cast upon his testimony by the trial Judge.

The situation, therefore, is that George had no authority to make the contract with the defendant, which the defendant says was made and so the plaintiff was under no obligation to continue the employment until October 1, and pay the $1,000. When he secured the defendant's signature to the document he came under that obligation and this would constitute the requisite consideration.

With respect to the contention that the defendant agreed only to stake "in the vicinity of Great Slave Lake" and not some 600 miles away at Fort Norman, I think it is sufficient to point out that "the vicinity of Great Slave Lake" is referred to only in the recital in the document obviously as indicating only in a general way the general direction of the proposed expedition. Whether or not the defendant knew from the beginning that it was also proposed to go down the MacKenzie River seems to me to be immaterial, although I think from his answer made on discovery it is extremely probable that he did. When he without objection continued to navigate the boat down the MacKenzie as part of his contractual duties I think he undoubtedly agreed, at least impliedly, that all his other obligations under the contract would also continue while so engaged.

A very earnest attempt was made to shew that some of the provisions of The Canada Shipping Act, R. S. C. 1906

Que.

K.B.

MENARD v. THE KING

ch. 113 with regard to seamen's contracts, were applicable and that these had not been complied with but I think that the attempt, to shew that applicability was unsuccessful and also that no good purpose would be served by examining that statute in detail.

I would, therefore, allow the appeal with costs and order the judgment below to be set aside and judgment to be entered for the plaintiff for specific performance of the agreement to assign and for costs. This, of course, will be on condition of the plaintiff repaying to the defendant the location fee and any other expenses, which the latter has properly paid.

We were not asked to deal with the counterclaim and the disposition of the matter by the trial Judge will stand unless either party applies to him to vary it. As formal judgment was never entered on the counterclaim this would appear to be still possible.

Appeal allowed.

MENARD v. THE KING.

Quebec King's Bench, Lamothe, C.J., Lavergne, Carroll, Pelletier and Martin, JJ. June 26, 1919.

Depositions (§IV.—15)—Royal Commission—Public Inquiry—Evidence—Use of on Subsequent Criminal Prosecution.

Depositions received in the course of a public inquiry before a Royal Commission is inadmissible as proof in a subsequent prosecution for theft.

APPEAL by way of reserved case from a conviction for theft. Conviction quashed.

J. A. Prud'homme, K.C., for appellant;

A. Germain, K.C., for respondent.

The facts of the case are set out in the judgment below.

Lamothe, C.J.:—This cause is taken to appeal on a reserved case. The accused was found guilty of theft. Before pronouncing sentence, Bazin, J., of the Court of Sessions, submitted the following question to the Court of Appeal:

"Prior to the trial of the accused before me, and even before a complaint had been laid against them, an inquiry was conducted by Panneton, J., one of the Judges of the Superior Court for the District of Montreal, at the request of the City of Montreal.

"The two accused were heard as witnesses at this inquiry; their evidence was taken by means of stenography, and then transcribed by the officiating stenographer.

At the trial the representative of the Crown demanded

and obtained permission to produce the evidence of the accused thus transcribed, to form part of the evidence taken before me. The defence objected to the production of these depositions taken before Panneton, J., and the objection was noted and reserved.

"Was I right in allowing the production of these depositions of the accused to form part of the evidence adduced by the Crown in the present case?"

In my opinion, the Court of Appeal should answer this question in the negative. The inquiry conducted by Panneton, J., was not a trial in the sense of art. 999 of the Crim. Code, nor was it a judicial proceeding. The presiding magistrate at this inquiry did not act as a Court, but as a Royal Commissioner. There was no accused; there were no parties to the case. Further, the depositions produce "to form part of the evidence" of the Crown, as Bazin, J., says in his notes, were not authentic, as required by law.

The Court of Appeal, on motion of the accused, added the following question to the reserved case: "Was there any evidence upon which the said Gordien Menard, Jr., could be convicted of the theft of which he has been convicted?"

I would answer this additional question in the negative. The Judge of Sessions had before him two charges relating to earth and stone excavated from the city streets—the charge of having conspired to defraud the City of Montreal by fraudulently removing this earth and stone, and the charge of having stolen the same earth and stone personally and individually. The first charge, of conspiracy, was declared unfounded by the Judge of Sessions. All or nearly all the evidence related to this charge of conspiracy. Against Gordien Menard, Jr., personally and individually, there is no evidence of theft. There are indices and circumstances that might raise suspicions, but suspicions do not make proof.

In my opinion the verdict of guilty should be quashed.

Pelletier, J.:—Gordien Menard, Sr., and Gordien Menard, Jr., were tried before Bazin, J., on three charges, that of having conspired together to defraud the City of Montreal, that of having stolen earth and stone belonging to the City of Montreal, and that of having under false pretences and with intention to defraud obtained payment of a sum of $100.

On the first and third charges the accused were declared not guilty, but they were found guilty of the charge of

Que.

K.B.

MENARD
v.
THE KING

having stolen earth and stone, the property of the City of Montreal.

At the trial before Bazin, J., the prosecution produced the depositions or the supposed depositions of the two accused, which would appear to have been taken in the course of an inquiry before a Royal Commission, of which the chairman was Panneton, J., of the Superior Court. After finding the accused guilty of the theft of earth and stone, Bazin, J., reserved for the decision of this Court the question as to whether he had allowed illegal evidence to be made when he permitted the production before him of the depositions taken before Panneton, J. Not content with this reserve, Gordien Menard, Jr., made a motion before us in which he claimed that as there existed no evidence of guilt against him, he ought not to have been convicted. We allowed the addition of a further question, and it is these two questions which we must now answer.

This case brings to light so strange and extraordinary a state of affairs, as revealed in the mass of evidence before us, that one cannot help asking how such things can be. Indeed the record establishes beyond all doubt that the earth and stone of the City of Montreal are distributed to all comers, to the knowledge of the city engineer and the foreman, and the thing is not done in a corner, but without the slightest attempt at concealment. I shall incidentally comment on these facts in the course of the discussion of the case submitted to us.

1. The first question reserved by Bazin, J., deals with the depositions of the two accused taken in the course of an inquiry before a Royal Commission. Could these be produced to form part of the record in the course of the trial of the accused on a criminal charge, and there make evidence against them?

We have Bazin, J.'s notes, and they shew that in convicting the accused he based himself principally on these prior depositions taken before Panneton, J. Bazin, J., says in his reserved case that the representative of the Crown demanded and obtained permission to produce these prior depositions, that the accused objected to their production, but that he dismissed this objection and admitted the depositions "to form part of the evidence adduced by the Crown in the present case." These depositions thus taken before Panneton, J., are now before me. I note that they amount to 250 pages, and that these 250 pages contain the supposed evidence of Gordien Menard, Sr., and of Gordien

Menard, Jr., intermingled and interrupted the one by the other. They even contain the attorneys' arguments and the beginning and the end of other depositions—of slight importance, however. In any event the 250 pages in question do not form a complete whole. Gordien Menard, Jr., appeared five or six times. At the end of each of these depositions or supposed depositions, I find no certificate. But there is a much more serious objection. These depositions would appear to have been taken by Marcel Gabard, stenographer, and at the end of the bound volume which contains them and which was filed by the prosecution, I find the following certificate:

"I, the undersigned stenographer, certify under the oath administered to me in this matter, that the foregoing depositions numbered 1 to 2072 are an exact transcription of my shorthand notes, as taken in the course of the inquiry, the whole according to law.

Marcel Gabard, stenographer."

Stenographer; but not an official stenographer, only the "undersigned" stenographer.

This stenographer says that he speaks under the oath administered to him. What was this oath, and when and by whom was it administered? If Gabard was not a witness before Bazin, J., then when was he sworn? Was it before Panneton, J.? We do not know. We have only his declaration that he was sworn. He adds that the shorthand notes of which he speaks were taken in the course of the inquiry. What inquiry? Exhibit 15 begins with these words: "Gordien Menard, Jr., being duly sworn." It does not shew before what Court, Judge, or Royal Commission this was done. There is another fact still more serious. Mr. Gabard says in his certificate that the depositions which he certifies are numbered 1 to 2072. Now there are not 2,072 pages, but only 250.

I consulted on this subject Mr. Charles Langelier, our Judge of the Sessions of the Peace at Quebec, and he told me that at a preliminary enquiry he would not have looked at the matter so closely, but that in a case in which the magistrate sits as Judge and jury, there is no doubt that the evidence is inadmissible, and he would not have hesitated in rejecting it. These are the documents submitted and accepted in a trial in which the freedom, the honour and the good name of the accused are at stake.

In their factum the appellants raise the issue as to whet-

Que.

K.B.

MENARD v. THE KING

her evidence taken elsewhere than before the jury or before the magistrate sitting as Judge and jury can be produced. Relying on precedents and on the Crim. Code, particularly sec. 999, they reach the conclusion that the depositions in question are not among the number of those which can be legally produced in the course of the trial of an accused.

I think that the legal proposition submitted by the appellants is well founded. The authors and the jurisprudence are unanimous in requiring that before such a deposition be produced, it must at least be signed by the Judge before whom it was taken. It was for a long time an open question whether in the case of several depositions they must each be signed by the Judge. The final conclusion reached was that the Judge's signature on the last page of several depositions bound or attached together was sufficient, but that the Judge's signature must appear at least once. Here it does not appear at all.

This second ground would suffice to render the proceedings illegal. Perhaps it might deserve more careful study on my part, if the question now before us had not been settled finally by the highest Court of this country in a case creating a precedent absolutely applicable to this one, Pacaud v. The Queen (1899), 29 Can. S.C.R. 637, in which the following was the unanimous holding of the Court: "Evidence received before a Royal Commission was filed of record, by consent 'to avail as evidence' on the trial. Held, that, notwithstanding the consent, such evidence could not be accepted as proof in the cause."

The words "by consent" in this holding must be noted. Indeed it appears that a formal written consent had been signed to this purpose. The Supreme Court nevertheless was unanimous in rejecting these depositions, proprio motu and in spite of the consent of the parties, as not forming part of the record. In the present case, not only was there no consent, but objection was taken and the objection was dismissed.

If such was the decision of the Supreme Court in a civil action, what are we to think of the judgment which ignores or sets aside this principle in a criminal trial?

Let me add that in the case cited, the depositions were admittedly authentic (they were produced by consent), while in this case objection was taken and there is no evidence that the depositions were ever given.

In both cases the depositions were taken before one or more Royal Commissioners, and on this point a complete

similarity exists between them. The only reason given by Mr. Geoffrion in support of the admissibility of these depositions is that the admissions of an accused may be proved at his trial. There is no doubt of that, but it is not suggested that these admissions can be proved otherwise than in open Court by the witness who heard them, who must first be sworn before the Court, and who may be cross-examined, etc. Surely a letter or a document signed by an absent person purporting to repeat these admissions would not be accepted as evidence, and Ex. 15 is nothing more.

I therefore have no difficulty in reaching the conclusion that the first point is well taken, and I now pass on to the second.

II. Is there any other evidence against the appellant?

Before answering this question we must first have a clear general idea of the whole matter. Excavations were proceeding in connection with the construction of sewers, and the earth and stone thus excavated, which as I have said above were freely distributed, served to construct two wharves, one belonging to Menard, Sr., who is not before us, and the other either to the appellant or to his brother Pierre Menard. The appellant took no actual part in this matter, for it was Menard, Sr., alone who had the earth and stone delivered to the two wharves. In order to find the appellant guilty, there must first be guilt on the part of his father and secondly it must be shewn that the second wharf belongs to him. The factum of the Crown, prepared by Mr. Geoffrion, proceeds on this, the only possible basis.

Bazin, J., in departing from this basis is in my opinion clearly in error, and Mr. Geoffrion's admission is enough to shew it. As the accused did not take the earth and stone, as he did not have it carried and unloaded at the wharves, he is not and cannot be guilty of theft unless the wharf belongs to him. The owner of the second wharf would in reality be guilty of receiving stolen goods, but even if this constitutes "theft," which I do not believe, the thief is the owner of the second wharf.

The accused was his brother's creditor for the price of sale of the second property, and from this fact Bazin, J., presumes that he had an interest in the construction of the wharf as adding to the value of the land. Even if this presumption were well founded in law, which it is not, it could only give rise to a charge of conspiracy. I therefore examine this case from the point of view, the only one possible, taken by Mr. Geoffrion. The attorney for the prosecution

Que.

K.B.

MENARD v. THE KING

expresses himself as follows:

"The second ground (the first was as to the admission of the evidence taken before Panneton, J.) is that there is no evidence in the record of the guilt of the accused Gordien Menard, Jr. That involves us in the question of the guilt of Gordien Menard, Sr., for the son cannot be guilty, if the father is not guilty."

The factum then goes on for 6 printed pages with the discussion as to the guilt of Gordien Menard, Sr., and then adds the following words:

"If the defendant Menard, Sr., in taking the city's materials and in using the labour of its employees for the two wharves, committed the crime of which he is accused, it remains to be seen if Gordien Menard, Jr., the alderman, took part in these actions, for he would in that case be equally guilty, and there would be in addition to the individual offences the crime of conspiracy."

The last part of this quotation is, in my opinion, absolutely correct. In fact, Gordien Menard, Jr., cannot be guilty unless his father is guilty, and in that case it follows that they are both guilty of conspiracy. The Judge acquitted him of the charge of conspiracy.

The factum of the prosecution then proceeds to a lengthy three-page discussion of the question which it sets forth as follows: "At the outset of this discussion we must consider the question of the ownership of the second wharf."

And at the close of the discussion there is a half page which, according to the prosecution, would complete the evidence against Gordien Menard, Jr.

The evidence taken before Bazin, J., as to the ownership of the second wharf is not sufficient to decide the point. But Mr. Geoffrion does not stop there. His factum is on this point based almost exclusively on Ex. 15, that is to say on the depositions supposed to have been taken before Panneton, J.

The question of the ownership of this wharf is the main point at issue in this case. It must be decided first of all against Gordien Menard, Jr., otherwise the case falls to the ground. In fact it is definitely established that it was not he who took the stone or who had it carried, and he can only be found guilty of conspiracy or of receiving stolen goods if he knowingly derived any benefit from these transactions. Now from the documents produced, if we look only at their face or rather at their contents, it is Pierre Menard who is the owner of the second wharf. In order to

ascertain if the titles establishing Pierre Menard's ownership are fictitious or fabricated, recourse must be had to the whole of the external circumstances resulting from the Panneton inquiry, and to the supposed contradictions of the accused at this inquiry. This is the procedure followed by Mr. Geoffrion. It follows that if the depositions taken before Panneton, J., are disregarded as constituting inadmissible evidence, the whole of Mr. Geoffrion's argument is left without any foundation. What evidence then remains against the appellant? Some vague declarations, proved by dismissed and disgruntled workmen who may even be to some slight extent guilty themselves, and the fact that the earth was sometimes deposited on the second wharf in the presence of the appellant, etc.

In any case the reading of these depositions should not have satisfied twelve jurymen. They would never have brought in a verdict of guilty on such evidence. If I had been the Judge, sitting in a criminal Court, I would on motion have declared that there was no evidence and I would have withdrawn the case from the jury.

There is another question which would deserve serious consideration if it were necessary, but in view of the decision reached on other points, I shall content myself with a passing mention. The record furnishes complete proof that the earth and stone were the product of excavations. As I have said above, they were freely distributed to all comers, and Bazin, J., himself says that this was done openly and in the public view. In short the matter was one of common knowledge, and further, was authorised by the city engineer, the foremen, etc. It is only since this case that instructions have apparently been given to the contrary. Where then is the "mens rea" or the "animus furendi?" I shall not, however, decide that point.

We refer the parties to a decision of the Supreme Court, Godson v. City of Toronto and McDougall (1890), 18 Can. S.C.R. 36. This bears an analogy to the present case from the point of view of the character of the inquiry conducted before Panneton, J. The proceedings had been conducted under a statute exactly similar to the one under which the inquiry before Panneton, J., was carried on, and the Supreme Court declared (at p. 40) that in such a case the Judge "was in no way acting judicially; he was in no sense a court."

On the whole we have decided to allow the appeal.

Judgment. Considering that the evidence taken before

Sask.

C.A.

ANGLO-CANADIAN MORTGAGE INVESTMENT CORP'N v. SHAW.

Panneton, J., could not be produced before Bazin, J., under the circumstances under which it was produced, to form part of the evidence for the prosecution; that in consequence the answer of the Court to the question reserved by Bazin, J., is that this evidence should not have been admitted; that without going into the merits of the evidence taken before Panneton, J., there is no evidence whatsoever against the accused Gordien Menard, Jr.

The verdict rendered against Gordien Menard, Sr., is null, and as to him he must undergo a new trial. As to the accused, Gordien Menard, Jr., the verdict against him is annulled for all legal purposes, he is declared not guilty and is freed from the said charge.

Appeal allowed.

ANGLO-CANADIAN MORTGAGE INVESTMENT CORPORATION v. SHAW.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. April 25, 1921.

Judgment (§II.A—60)—Effect and Conclusiveness—Res Judicata.

If under the terms of an agreement for the purchase of land, a demand for payment is necessary before commencing action, and if prior to launching a first action the plaintiff has in fact made a demand for payment but at the trial of that action has failed to prove the demand and the action is dismissed, a subsequent action will not lie for the same cause, but if in fact no demand has been made, the dismissal of the first action is no bar to recovery in a second action, after demand has been made, because until a demand is made no cause of action exists and any action brought before demand is made is premature.

[Palmer v. Temple (1839), 9 Ad. & El. 508, 112 E.R. 1304 followed.]

APPEAL by plaintiff from the trial judgment, dismissing an action to recover purchase money in default under an agreement for sale. Reversed.

H. J. Schull, for appellant; J. F. Hare, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—The question involved in this appeal is, whether or not the plaintiff is estopped from recovering by reason of a judgment rendered in a former action.

The facts, briefly, are: In 1913 the defendant agreed in writing to sell to C. M. Pickett lots 26 and 27 in block 2, Hillcrest Addition, Moose Jaw, for $1,650, and one D. H. Pickett guaranteed the payment of the purchase money to the defendant. In October, 1913, the defendant assigned to the plaintiff his agreement of sale and all moneys due or payable thereunder, and by said assignment covenanted that, in case of default by the said purchaser in payment of any

sum or sums which should become due or owing under said agreement, he would forthwith on demand well and truly cause to be paid to the assignees any sum or sums so in default. The purchaser made default in payment, and on November 4, 1919, the plaintiffs brought an action against C. M. Pickett, D. H. Pickett and the present defendant for the purchase money in default. The ground of liability against the present defendant was that he covenanted to pay on demand in case of default by the purchaser. The action came on for hearing on March 10, 1920, and the plaintiffs closed the case against the defendant without proving a demand upon him for payment. They proved that they had instructed their solicitors to demand payment and that the solicitors had reported that they had done so. This, however, was not evidence that the solicitors had in fact made the demand. The plaintiffs had also put in evidence a portion of the examination for discovery of the defendant Shaw, in which he admitted that in the preceding June he had received a letter from the plaintiffs' solicitors but he did not remember what that letter contained. After the plaintiffs closed their case, counsel for the defendant Shaw moved to dismiss the action as against him on the ground that no demand for payment had been proved, and that such demand was a condition precedent to recovery. Counsel for the plaintiffs then asked to be allowed to put in a copy of the letter referred to in the defendant's examination for discovery. This the trial Judge refused, giving as a reason therefor that the plaintiffs' case was closed. He held that there was not proof of a demand having been made prior to the action, and consequently dismissed the action as against Shaw. On March 15, 1920, the plaintiff made a formal demand upon Shaw for payment, and, not receiving payment, brought this action on May 7. The defendant set up the plea of res judicata. At the trial of that action the plaintiffs proved the covenant, the default of the purchaser and the demand of March 15, and that the defendant had not paid. The only evidence put in by the defendant was a copy of the record and proceedings in the first trial. No other evidence was given of a demand having been made prior to March 15, 1920. In his judgment, the trial Judge said: "It is an unfortunate state of affairs for the plaintiff, but I consider that it would have been proper to have attempted to get leave to appeal. But it seems to me on the record here, reading the evidence which was tendered to prove the demand in the former

Sask.

C.A.

ANGLO-CANADIAN MORTGAGE INVESTMENT CORP'N v. SHAW

action, and reading the statements of counsel, and reading the remarks of the learned trial Judge, it must be taken on the record that at the time the former decision was given there had been a demand made, and that counsel had relied upon it and thought he had proved it, but he had not proved it, and that being the case I think the plaintiff's action here should be dismissed with costs."

From that judgment the plaintiff now appeals.

I agree with the trial Judge that if, prior to the launching of the first action, the plaintiff had, in fact, made a demand on Shaw for payment, but at the trial of that action had failed to prove its demand and the action was consequently dismissed, a subsequent action would not lie for the same cause. If, however, no demand had, in fact, been made, the dismissal of the first action would be no bar to recovery in the second, because, until a demand was made, no cause of action existed, and therefore, any action brought before demand was made was brought prematurely.

In Palmer v. Temple (1839), 9 Ad. & El. 508 at p. 521, 112 E.R. 1304, Denman, C.J., says:—"And, in fact, the plaintiff had sued the defendant for this very deposit and the verdict had passed against him. But the evidence showed the ground of that verdict to be that the action was prematurely brought, viz., before the contract was rescinded and before the defendant had disabled himself from completing it. The former judgment forms no obstacle to the recovery now that that event has taken place. It is like an action brought for the price of goods before the credit had expired, which would not prevent a recovery of the same goods after that period."

The question is, has it been established in the present case that a demand was made on the defendant prior to the bringing of the first action. If a transcript of the proceedings in the first action shews that a demand was, in fact, made before the bringing of that action, it would follow that the judgment in that action dismissing the claim against the defendant Shaw was wrong, and therefore the plaintiff's remedy was by way of appeal and not by a new action. Had an appeal been taken, I venture the opinion that it would have been held that the trial Judge was wrong in refusing to receive the letter even after the plaintiff's case was closed, for, under our modern practice, the rights of the parties cannot be made to depend upon a momentary forgetfulness of counsel. See Rule 354. But that is not the question. The question is, could the Appellate Court have

held that the evidence established the making of a demand prior to bringing the first action. With deference I am of opinion that it could not. No one testified to a demand having been made. Had the letter been admitted, it might have been conclusive that a demand had been made. On the other hand, it might have been equally conclusive that the language used did not amount to a demand. Even to-day we do not know what it would have disclosed, for it has not been put in evidence in this case. The onus was upon the defendant in the second action to establish that the plaintiff's claim was res judicata. In my opinion he failed to establish it. The appeal should, therefore, be allowed with costs, the judgment below set aside and judgment entered for the plaintiffs for the amount of their claim and costs.

Appeal allowed.

*** JEAN K. GIT ET AL v. FORBES.**

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 11, 1921.

Contracts (§II.D—188) — Construction — Irreconcilable Clauses — Effect to be Given to First Clause.

In construing a contract it is the duty of the Court to read together all the clauses and give to each the meaning derived from the whole instrument, but where two clauses are irreconcilable, so as to be destructive the one of the other, the rule is to give effect to the first clause and reject the other.

APPEAL by defendants from a decision of the Appellate Division of the Supreme Court of Ontario. The appeal involved the construction of a contract for altering a building so that it could be used as a restaurant. The material portions of the contract are set out in full in the judgments given. The County Court Judge, by whom the action was tried, held that the causes were repugnant and gave effect to the earlier one; this decision was reversed by the Appellate Division which decision is now reversed and the decision of the trial Judge restored.

S. F. Washington, K. C., and E. E. Gallagher, for appellants.

J. L. Counsell, for respondent.

Davies, C.J., dissenting:—I concur with **Duff, J.**

Idington J.:—The respondent brought an action upon a contract dated March 5, 1919, made between him and the appellants whereby he agreed in consideration of the sum of $3,000 that he would furnish materials and perform the services thereinafter set forth.

*Special leave to appeal to Privy Council granted.

Can.

S.C.

JEAN K. GIT v. FORBES

The work thereinafter set forth consisted of carpenter work, plumbing, electric wiring, plastering, stairs, painting and decorating, as specified.

The respondent's statement of claim is somewhat ambiguous and may be read as if discarding said contract and relying upon an alternative contract in said agreement, presently to be referred to.

And the manner of presenting the evidence in support of his claim indicates a possible reliance upon such alternative contract as I tentatively express it.

But in the course of the trial counsel for respondent when challenged as to this, boldly took the following position:—

Mr. Counsell: "Mr. Washington admits that we were entitled to claim for extras. There is not a thing in the original contract that there is to-day. Mr. Washington overlooks entirely the fact that this bill of Mr. Forbes rendered is a bill for the whole work and not anything to do with the contract. He goes on the third clause in that contract, that is to say, that Mr. Git was to pay him for his time and material supplied. Both of them disregarded that contract."

That was so persisted in as to render the trial rather confusing.

The respondent claimed and claims he was to be paid for all the costs of work and material, plus 12½% to be added thereto.

It seems rather a startling proposition in face of such an elaborate contract and specifications and the absolute covenant of the respondent with which the agreement set out binding him expressly to do the work and supply the materials for which he is to be paid the sum of $3,000 as follows:—

"Now this agreement witnesseth that in consideration of the sum of three thousand dollars ($3,000.00) to be paid as follows: one thousand dollars ($1,000.00) on the signing of this agreement, further sum of one thousand dollars ($1,000.00) when it appears to the satisfaction of all the parties hereto that materials have been furnished and services performed to the extent of twenty-five hundred dollars ($2,500.00) and the balance or sum of one thousand dollars ($1,000.00) thirty days after the completion of this agreement, the party of the second part covenants, promises and agrees to and with the parties of the first part that he will furnish the materials hereinafter mentioned and will perform the services as hereinafter set forth."

Immediately after that follows the entire contract regarding what has to be done by respondent for said consideration.

Then follows a provision in the agreement that if on examination of the building as disclosed by part of the work thus to be done it would not be consistent with the safety of the building to proceed, the work was to be abandoned and respondent entitled to compensation out of said $1,000 cash payment, and he to return balance thereof. Nothing arose out of this and its only possible use is as shewing what the nature of the contract was.

Next after that comes the following:—

"The parties of the first covenant with the party of the second part that in the event of the materials to be supplied and the labour performed amounting in value to more than three thousand ($3,000.00) then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than three thousand ($3,000.00) then the final payment will be the actual amount expended by the party of the second part over two thousand ($2,000.00) plus twelve and one-half per cent. instead of one thousand as above stated. In estimating the value of the materials to be supplied and the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials and shall be entitled to the amount ascertained as paid by him for labour and materials plus twelve and one half per cent."

The trial Judge held this inconsistent with the express contract to do all the said work and supply all materials necessary therefore for the fixed sum of $3,000.

He proceeded on that basis of the incompatibility of the above quoted covenant in the contract and that which followed, and determined accordingly that the work done under the terms of that part of the contract covered by the said covenant could not exceed the sum named, and found as a fact that it fell below the sum named, and then allowed for extras on that basis.

On appeal the Second Appellate Division directed a variation in his formal judgment of which the following is what directly concerns us now in appeal therefrom.

It reads as follows:—

"2. This Court doth order that the said appeal be and the same is hereby allowed and that the said judgment dated the 19th day of February, 1920, be varied and as varied be

Can.
S.C.
JEAN K. GIT
v.
FORBES

as follows: (1) This Court doth declare that according to the true construction of the agreement between the parties, dated the 5th day of March, A. D. 1919, the covenant contained in paragraph one of the said agreement and the subsequent covenant providing for the case of materials and labour amounting in value to more or less than three thousand dollars ($3,000.00) are to be read together and effect to be given to the later covenant."

I am, with great respect, unable, in light of the authorities I am about to cite, to accept the foregoing as the true construction in law of said agreement.

It seems impossible for me to read the first covenant to do the work and supply the materials, which I have set out above, for three thousand dollars, and the later agreement together, as the trial judge is directed to do. The latter, if adhered to, abrogates the first contrary to the general rule in such cases that the first must be observed and the latter discarded.

Counsel for appellant relied on the decision in the case of Furnivall v. Coombes (1843), 5 Man. & G. 736, 134 E. R.756, and a number of later decisions and text books adopting that decision as law. I prefer to anything else I have seen the interpretation of same decision and text which appears in the case of Williams v. Hathaway (1877), 6 Ch. D. 544, at pp. 549 et seq., and applied with due discrimination in Watling v. Lewis, [1911] 1 Ch. 414, as safe guides.

The former is a decision of Jessel, M. R., who in his opinion judgment seems, as usual with him, to go directly to the root of the matter and briefly, in terse language, to distinguish between a subsidiary provision which does not destroy the covenant and one which does. He says (6 Ch. D. 544 at p. 549).

"The first question is one of law. It is said that if you find a personal covenant, followed by a proviso that the covenantor shall not be personally liable under the covenant, the proviso is repugnant and void. I agree that that is the law; but that by no means applies to a case where the proviso limits the personal liability under the covenant without destroying it, thus leaving a portion of the original covenant remaining; in that case the proviso is perfectly valid."

If the covenant to do the specified work and supply the necessary material herein for $3,000 is not destroyed by the substituted bargain, then I fail to know how it could be destroyed.

The entire basis of a complicated contract and one of

which the range might ultimately be difficult to determine is by a stroke of the pen obliterated, as it were, and another so simple in its character that it needed nothing more than the verbal expression— go ahead, do as I tell you and I will pay your expenditure and 12½% for your care and supervision.

Surely these are irreconcilable contracts in every way. Even in applying the test which the Master of the Rolls gives, lawyers and Judges may differ, as these cases illustrate.

But the test nevertheless, seems a good one and if it can be said not to destroy the covenant herein I fail to see what could.

So convinced was able counsel for respondent that he felt driven to assert his client's position in the language quoted above. I agree with him that if you can substitute in one and the same contract an alternative and harmonise them as one, he may be right.

I do not dispute that parties may in the same agreement provide for alternatives if the purview thereof makes it clear that such is their purpose.

That, however, is not this case, but one of an absolute covenant not anticipating by a line or word thereof departure therefrom followed by another and distinctively alternative contract in substitution of the former, although using one element thereof as an alternative basis of the latter.

It is, I repeat, impossible for the Court to do as directed by this judgment of the Appellate Division.

The judgment thereof should therefore be set aside and that of the trial Judge restored with costs.

Duff, J., (dissenting):—This appeal raises questions turning upon the construction of a deed the material clauses of which are as follows:—

"Now this agreement witnesseth that in consideration of the sum of three thousand dollars ($3,000.00), to be paid as follows: One thousand dollars ($1,000.00), on the signing of this agreement, further sum of one thousand dollars ($1,000.00), when it appears to the satisfaction of all the parties hereto that materials have been furnished and services performed to the extent of twenty-five hundred dollars ($2,500.00), and the balance or sum of one thousand dollars ($1,000.00) thirty days after the completion of this agreement, the party of the second part covenants, promises and agrees to and with the parties of the first part that he will furnish the materials hereinafter mentioned and will per-

Can.

S.C.

JEAN K. GIT v. FORBES

form services as hereinafter set forth.

****

"The parties of the first part covenant with the party of the second part that in the event of the materials to be supplied and the labour performed amounting in value to more than three thousand ($3,000.00) then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than three thousand ($3,000.00) then the final payment will be the actual amount expended by the party of the second part over two thousand ($2,000.00) plus twelve and one half per cent. instead of one thousand as above stated. In estimating the value of the materials to be supplied, and the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials and shall be entitled to the amount ascertained as paid by him for labour and materials plus twelve and one half per cent."

The County Court Judge at Hamilton, by whom the action was tried, held that the second paragraph being repugnant to the first must be rejected. The Appellate Division has held that the two paragraphs must be read together and effect given to the later covenant as a modification of the earlier one. The question to be decided is whether the Appellate Division was right in reversing the decision of the trial Judge. The case, in my opinion, is governed by two rules of construction. The first is laid down in Shelley's case (1581), 1 Co. Rep. 93b, at p. 95b, 76 E.R. 206:—

"Such construction is always to be made of a deed that all the words (if possible) agreeable to reason and conformable to law may take effect according to the intention of the parties without rejecting of any, or by any construction to make them void."

The second is the rule laid down in Grey v. Pearson (1857), 6 H.L. Cas. 61, at p. 106, 10 E.R. 1216, by Lord Wensleydale, namely, that the grammatical and ordinary sense of the words is not to be adhered to if that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument; and that in such case the grammatical and ordinary sense of the words is to be modified so as to avoid that absurdity or inconsistency. I confess I see no difficulty in reading these two paragraphs together in precisely the way in which the

Appellate Division has done. In the event of the cost being less than $3,000 or exceeding $3,000 then the remuneration is to be upon "a cost plus percentage basis." True, since the chances of the cost being precisely $3,000 are very remote, the practical effect of reading the two clauses together, in this way, is to treat that sum as an estimate; and that is precisely what I think the parties intended, and considering, as we are bound to do, the necessary uncertainty both as to the extent and as to the cost of the changes which might be required to carry into effect the object of the contract, it is precisely the meaning, in my judgment, which the tribunal called upon to construe the deed is entitled to ascribe to it and must ascribe to it.

As against this way of construing the deed there is brought into play an ancient maxim which is given in Sheppard's Touchstone, vol. 1 at p. 88, in these words:—

"If there be two clauses or parts of the deed repugnant the one to the other the first part shall be received and the latter rejected except there be some special reason to the contrary."

It is to be observed that this rule of construction is given in the chapter on the Exposition of Deeds, and that on the preceding page there are two rules laid down which are virtually the two to which I have already referred. 1st, that the construction must be upon the entire deed, and that "one part of it doth help to expound another"; and 2nd, that where the deed cannot take effect according to the letter it must, if possible, be so expounded as to take effect according to the intention to be collected from the whole deed.

The rule as to repugnancy, therefore, is obviously a rule to be applied only in the last resort and when there is no reasonable way of reconciling the two passages and bringing them into harmony with some intention to be collected from the deed as a whole.

This, as might have been expected, has more than once been decided. Bush v. Watkins (1851), 14 Beav. 425,-51 E.R. 350. The rule has indeed been put into operation where by giving effect to the second of two inconsistent clauses the intention, as disclosed by the deed as a whole would be defeated or where the rejected clause was repugnant to the very nature of the transaction the parties were engaged in. But in Walker v. Giles (1848), 6 C.B. 662 at p 702, 136 E.R. 1407, it was laid down that where there are

Can.

S.C.

JEAN K. GIT v. FORBES

inconsistent parts, that part, without regard to their order, which is calculated to carry into effect the real intention of the parties as collected from the instrument should be given effect to. Indeed it would appear that the disclosure of the general intention of the deed when read alone, or when read in light of the circumstances where the circumstances can, as in the present case, properly be resorted to, may constitute a "special reason" within the meaning of the very words of the rule itself as given in Sheppard's Touchstone for refusing to reject the later clause.

The cases relied on present no real difficulty. In Furnivall v. Coombes, 5 Man. & G. 736, the effect of the proviso, if effect was to be given it at all, was of necessity to relieve the covenantors from any sort of personal obligation, a result held to be obviously inconsistent with the intention of the transaction. In Solly v. Forbes (1820), 2 Brod. & Bing. 38, 129 E.R. 871, a deed professing to be a release but reserving rights against the sureties, was given effect to by treating the words of release as amounting to a covenant not to sue and the Court of King's Bench cited and applied the language of Lord Hobart in Clanrickard's case (1616), Hob. 273, at p. 277, 80 E.R. 418:

"I do exceedingly commend the Judges that are curious and almost subtil . . . . to invent reasons and means to make Acts, according to the just intent of the parties."

Again, Sir George Jessel, who afterwards in In re Bywater v. Clarke (1881), 18 Ch. D. 17, at pp. 19, 20, described the converse rule governing the construction of wills as a mere rule of thumb, laid down in Williams v. Hathaway, 6 Ch. D. 544, at p. 549, that the rule now under consideration "by no means applies" where the proviso limits the liability under the covenant without destroying it, thus leaving some portion of the original covenant remaining. Again in Watling v. Lewis, [1911] 1 Ch. 414, a proviso was rejected because it was held that the only effect that could be given to it would be to destroy the original covenant; and in In re Tewkesbury Gas Co., [1911] 2 Ch. 279, at p. 285, Parker, J., considered that when there was an unqualified covenant to pay with a proviso that it should only be enforced at the "option of the covenantor" the proviso must be rejected as obviously destructive of the object of the instrument.

In all these cases the clause rejected was one incapable of reconciliation with the general intention of the instrument;

and indeed the operation of the rule seems to be limited to those cases in which there are two clauses so inconsistent that effect cannot be given to the second without annihilating the first, and that neither the nature of the transaction nor the terms of the instrument sufficiently discloses an overriding intention affording a guide to the tribunal. The tribunal being thus left to the alternative of holding that the mutually repugnant clauses or the whole instrument must be inoperative for uncertainty or, on the other hand, rejecting one of the clauses rejects the later clause.

It may be doubted whether it would not have been more consistent with sound sense to have adopted the former alternative; but the rule, although of limited application, seems to be a settled one and can only be altered by statute.

I repeat that I can entertain no doubt that it has no application to the instrument before us.

The appeal should be dismissed with costs.

Anglin, J.:—By the first clause of a contract under seal the plaintiff "covenanted, promised and agreed" to do certain specified work in the nature of alterations to a building for the sum of $3,000 payable in three instalments of $1,000 each. The document set out the specifications in detail and made provision for an abandonment of the work should it be found on removal or attempted removal of partitions that it would entail "serious damage" to the structure, and for payment in that event of the cost of labour expended. This clause followed:—

"The parties of the first part covenant with the party of the second part that in the event of the materials to be supplied and the labour performed amounting in value to more than three thousand ($3,000) then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than three thousand ($3,000) then the final payment will be the actual amount expended by the party of the second part over two thousand ($2,000) plus twelve and one-half per cent. instead of one thousand as above stated. In estimating the value of the materials to be supplied and the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials, and shall be entitled to the amount ascertained as paid by

Can.

S.C.

JEAN K. GIT v. FORBES

him for labour and materials plus twelve and one-half per cent."

The plaintiff claims to recover $7,010.36 as the cost of the materials furnished and labour expended plus 12½% thereon, less $3,180 already paid. The County Court Judge at Hamilton, by whom the action was tried under the provisions of the Mechanics Lien Act, R.S.O. 1914, ch. 140, held that the clause above quoted should be rejected as repugnant to the absolute agreement to do the work for $3,000, and gave judgment for the latter sum plus $1,040.50 to which he held the plaintiff entitled for extras arising out of a number of changes in and departures from the specifications sanctioned by the defendants, less the $3,180 already paid.

The Appellate Division, after declaring that the covenant to furnish materials and do the work for $3,000 and the subsequent covenant providing for payment of the value of such materials and labour if amounting to more or less than $3,000 must "be read together and effect given to the latter covenant," referred the matter to the local Master to ascertain the amount due to the plaintiff in accordance with this declaration. The defendants appeal and ask the restoration of the judgment of the trial Judge.

The question presented is whether the later covenant in the contract, if given effect to, destroys the earlier one, or merely limits or qualifies its operation. In the latter case the cardinal rule of construction, that you must give effect to every part of a document if you can, must undoubtedly prevail; Elderslie SS. Co. v. Borthwick, [1905] A.C. 93; Williams v. Hathaway, 6 Ch. D. 544; in the former the rule stated in Sheppard's Touchstone, vol. 1, at p. 88 (No. 7), "that if there be two clauses or parts of the deed repugnant, the one to the other, the first part shall be preferred and the latter rejected, except there be some special reason to the contrary," appears to be so clearly established that, as the later clause, the covenant providing for payment of cost plus percentage must be rejected. Watling v. Lewis, [1911] 1 Ch. 414; Cheshire Lines Committee v. Lewis & Co. (1880), 50 L.J. (Q.B.) 121, 44 L.T. 293; Furnivall v. Coombes, 5 Man. & G. 736—authorities cited by the appellants—are in point.

If the later covenant in the contract now before us were given effect to, the only possible operation of the first covenant would be in the event of the cost of the materials

supplied and the labour expended, plus 12½% thereon, amounting to precisely $3,000. In other words the contract would impose on the defendants a simple and unrestricted obligation to pay the cost of materials and labour plus 12½%, the minimum being $2,000. That which was an absolute covenant to do the work for $3,000 thus becomes, if effect be given to the later covenant, conditional upon the cost plus 12½% amounting to exactly that sum. That in my opinion is not merely an alteration or qualification of the covenant to furnish the materials and do the work specified for $3,000. It is wholly inconsistent with and repugnant to that covenant and destroys it.

There is no ground for interference with the disallowance by the Judge of a portion of the amounts which the plaintiff in the alternative claimed to be due to him for extras. He obviously accepted and acted on the evidence of Evans and McNeill, two experts employed by the defendants to report on the items preferred by the plaintiff as extras, and there is no ground for rejecting his appreciation of their testimony.

I would allow the appeal and restore the findings of the County Court Judge. The judgment directed by the Divisional Court should be varied accordingly. The appellants are entitled to their costs in this Court and in the Appellate Division.

Brodeur, J.:—The appellants are Chinese restaurateurs, and the respondent is a contractor.

At the beginning of the year 1919 the appellants, who were already running a restaurant in the city of Hamilton, leased from the defendant Mills a property situate on King street in that city for the purpose of establishing another restaurant in the same city. Alterations and repairs were needed since the property as laid down was not suitable for a restaurant. Partitions had to be removed; hardwood flooring had to be put in; private dining rooms, pantry, kitchen, a small sleeping room, and an archway at the entrance were needed. A contract was made on March 5, 1919, between the appellants and the respondent for making the alterations and repairs therein specified for the sum of $3,000 payable in instalments, viz., $1,000 cash, $1,000 when the value of the work would have reached $2,500, and the remaining $1,000 thirty days after the completion of the work. This contract ends with the following clause, which is the cause of the whole trouble and which can hardly be

Can.

S.C.

JEAN K. GIT v. FORBES

reconciled with the fixed sum of $3,000 above mentioned:—

"The parties of the first part (Jean Git, Jean B. Hong and Jean S. Wing) covenant with the party of the second part (Sidney S. Forbes) that in the event of the materials to be supplied and the labour performed amounting in value to more than three thousand ($3,000) then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than three thousand ($3,000) then the final payment will be the actual amount expended by the party of the second part over two thousand ($2,000) plus twelve and one-half per cent. instead of one thousand as above stated. In estimating the value of the materials to be supplied and the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials and shall be entitled to the amount ascertained as paid by him for labour and materials plus twelve and one-half per cent."

In the first part of the contract we have then a formal agreement that the work was to be done for a fixed sum, $3,000, and then in the latter clause we have a stipulation that if the work done is worth less than $3,000 a certain reduction would be made, or, in other words, the owner would not pay the $3,000 specifically stipulated. On the other hand, if the work was worth more than $3,000, then the owners would have to pay the amount actually expended by the builder plus 12½%, which would be his profit on the job.

The repairs were made and, as is usual in cases of that kind, extras were put in by the contractor, and, for most, if not all, of these extras, agreements were made as to their price. In the course of the progress of the work the contractor said at one time that those extras would not amount to more than $500, then later on, on May 15, when all the work was finished, Git made the last payment due under the contract, and he asked Forbes to bring in the bill for the extras, and he asked him how much the extras would cost, and Forbes said in a jocular way, about $1,000. Git expressed his surprise at that, but he was still more surprised when Forbes came with a total bill not only of $4,000, including the contract price and $1,000 for extras, but he presented a bill totalling $7,010.36, or more than double the contract price. The contractor claimed that he was entitled

Can.

S.C.

JEAN K. GIT v. FORBES

to all that under the clause in the contract above quoted.

The appellants, defendants, were very willing to pay $500 for extras, but refused to pay the rest. The present action was instituted claiming $3,830.36 after having deducted $3,180, which had already been paid. The action was based upon the contract, though the plaintiff did not specifically rely upon the later clause. The action also claimed that in addition to the contract the plaintiff was requested to furnish other materials and to perform services not stated in the written contract.

The defendant pleaded that the agreement was for $3,000, and that they were willing to pay $500 for the extras.

The trial Judge came to the conclusion that the clauses of the contract providing the first for a fixed sum and the later for a sliding scale were repugnant and gave effect to the first clause, and in addition to that he found that there were extras to the extent of $1,632.05. But he found that on the contract proper work to the extent of $591.55 had not been performed. He gave judgment therefore in favour of the plaintiff for $1,040.50.

The Appellate Division reversed this decision, and came to the conclusion that the two clauses of the contract should be read together and that effect should be given to the later clause. Reference was ordered to determine the amount due under such a construction of the contract.

The case comes now before us.

It seems to me that these two clauses of the contract cannot be reconciled and that they are absolutely repugnant. In one case it is stated that the work is to be done for a fixed price, viz., $3,000, and later on we find a clause that this price will be increased or decreased according to the value of the work done. If we give effect to the later clause the first one means nothing, and I cannot see how we can read them together as ordered by the Appellate Division. Unfortunately we have no notes of the Appellate Division which could guide us. The parties evidently intended that the work would be done for $3,000. The proviso as to a sliding scale was inconsistent with this covenant, and it becomes void and should be rejected. Furnivall v. Coombes, 5 Man. & G. 736; 7 Hals. pp. 517, 518; Cheshire Lines Committee v. Lewis, 50 L.J. (Q.B.) 121.

The conduct of the parties later on shews that this second covenant was not intended to be carried out. Payments

Can.

S.C.

JEAN K. GIT v. FORBES

were made on a basis of the $3,000 contract. Extras were ordered, and the contractor was asked how much in excess of the $3,000 these extras would amount to, and he said about $500. This answer puts on the contract a construction which should not be departed from. Later on he seemed to be almost ashamed of himself when he suggested these extras could amount to $1,000. But now when he comes to claim $3,830.36 his action could not be reasonably maintained for such a large amount. The judgment of the trial Judge has done full justice to the plaintiff's claim. The judgment a quo should be reversed with costs of this Court and of the Court below, and the Judge's decision should be restored.

Mignault, J.:—The two Courts below arrived at different results mainly because they differed as to the rule of construction which should be applied to the contract between the parties.

The first Court considered absolutely irreconcilable the clause in the contract that the respondent would for the sum of $3,000 perform the work and furnish the materials specified, and the subsequent clause that if the work and materials would cost more than $3,000, the appellants would pay the excess, with 12½%, and if less, that they would pay the actual amount expended by the respondent, over and above $2,000, plus 12½%. And the trial Judge applied the rule of construction which in such a case rejects the second of two clauses which are so repugnant that they cannot stand together (Corpus Juris, vol. 13, p. 536).

The Appellate Division, on the contrary, held that the two clauses should be read together, and that effect should be given to the later covenant.

It appears to me absolutely impossible to give effect to the two clauses. For on the one hand the work specified is to be done for a lump sum of $3,000, and on the other, if it costs more than $3,000, the respondent is to have the excess cost, with 12½%, and if less, the appellants are to pay him a minimum of $2,000, plus the actual amount expended over that amount with 12½% added thereto. In other words, the work, by the first clause, is to be performed for a fixed price, while, by the second, it is to be paid for on the basis of a quantum meruit, with a minimum of $2,000, and a percentage on actual cost of 12½%.

I fully recognise that when it is at all possible, it is the duty of the Court to read together all the clauses of a con-

tract, giving to each the meaning derived from the whole instrument. But where two clauses are irreconcilable, so as to be destructive the one of the other, one of these clauses must necessarily be disregarded, unless the whole contract is treated as void for uncertainty, and the rule appears to be to give effect to the first clause and to reject the other. Thus a proviso destroying a previously assumed personal liability, being repugnant to the covenant to pay and indemnify, was declared void of effect. Watling v. Lewis, [1911] 1 Ch. 414. Applying this rule I must find that there is absolute repugnancy between these two clauses, and therefore I must disregard the second clause.

I therefore think that the basis of the judgment of the trial Judge was the correct one, and that being the case, I would not interfere with his decision with regard to the amount which is payable to the respondent for extra work not comprised in the contract, for which the respondent was granted a substantial sum.

I would therefore allow the appeal with costs here and in the Appellate Division, and restore the judgment of the trial Judge.

Appeal allowed.

KRUSE v. FALLOWS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 6, 1921.

Tender (§I.—12)—Of Cheque—Deposit to Creditor's Account—Willingness of Bank to Pay—Acceptance of in Payment—Not Paid through Fault of Creditor's Agents—Action Limited to Remedy on Cheque—Defence of Tender and Payment into Court—Sufficiency of.

If a cheque is tendered in payment of a debt, and the creditor deposits it to his credit in his bank and the debtor's banker is ready and willing to pay it, it is then too late for the creditor to say that the cheque was not accepted in payment and he is obliged to rely on his remedy on the cheque, and where it is not paid owing to the fault of the creditor's own agents, the defendant's plea of tender and payment into Court is a good defence.

[See Annotation, Tender—Requisites, 1 D.L.R. 666.]

APPEAL from a judgment of McCarthy, J., dismissing an action to recover the balance of purchase-money due under an agreement for sale of land; a sale to realise the amount and personal judgment for any shortage and alternatively in the event of non-payment, rescission. Affirmed.

W. J. Millican, for appellant.

A. deB. Winter, for respondent.

Alta.

S.C.

KRUSE v. FALLOWS

The judgment of the Court was delivered by

Beck, J.:—The agreement in question is dated July 2, 1919. It described Kruse as "of near Baintree, Alberta, farmer"; and Fallows "of Baintree, Alberta, farmer."

The land in question lies close to Baintree. Baintree is a small town or village on a line of the C.N.R., about 8 miles nearer Calgary than Rockyford, on the same line about 60 miles from Calgary. At Rockyford there is a branch of the Canadian Bank of Commerce; there is no bank at Baintree. Rockyford is the nearest banking town.

The agreement, which was originally an option, was made in consideration of the defendant's promissory note for $1,000, with interest at 7% per annum, falling due on November 1, 1919. It was dated at Calgary and made payable at the Canadian Bank of Commerce at Rockyford; and was paid by a cheque of the defendant's, dated October 31, 1919, on the Canadian Bank of Commerce at Rockyford, for $1,020.90, deposited to the credit of the plaintiff in that branch of the bank.

The total purchase price of the land was $27,076.87. The agreement provided that if the defendant should exercise the option he should upon payment of the note be entitled to a credit of $1,000 on the purchase price.

There is a provision for accepting the option "by letter delivered to the plaintiff or mailed, postage prepaid and registered, addressed to the plaintiff at Baintree."

There is another provision in case of default by the defendant for notice by the plaintiff addressed to the defendant at the post office at Baintree.

The next payment called for by the agreement was $2,500, with interest on the $26,076.87 at the rate of 7% per annum on January 1, 1920, and according to the terms of the agreement the interest was to be calculated from July 15.

There is also in the agreement a provision that the plaintiff should break and prepare for seed "some 35 or 40 acres," and, if the option was taken up, the defendant should pay the plaintiff at the rate of $5 an acre for breaking and $2.50 for discing, payable on January 1, 1920.

The amount owing by the defendant to the plaintiff for the breaking and discing was agreed upon as $271.15, and it also was agreed that there was a shortage of $2.40 in the cheque given for payment of the $1,000 note.

So that on January 1, 1920, there would be owing by the

defendant to the plaintiff: Shortage on note, $2.40; breaking and discing, $271.25; instalment of principal, $2,500; interest at 7% per annum on $26,076.87 from July 15, 1919, to January 1, 1920, $850.15; total, $3,623.80.

The defendant, however, made up the amount on the basis that the interest payable was not on the whole unpaid balance, but only on the instalment, and this calculates the amount as $2,853.75, which is approximately correct on that basis.

For this amount he drew a cheque, which he enclosed in a letter reading as follows:—"1523 11th Ave. West, Calgary, Dec. 29, 1919. H. Kruse. Dear Sir: Please find enclosed cheque and exchange for $2,853.75, two thousand eight hundred and fifty-three dollars seventy-five cents, being amount owing for Jan. 1st, 1920, as follows: $2,500 with interest $80.20, July 15-Jan. 1, 1920; $271.15, 35 acres cultivated @ $7.75 per acre; $2.40, amount owing from option, and oblige, Yours truly, S. A. Fallows."

The cheque enclosed read:—"Rockyford, Alberta, Dec 29th, 1919. The Canadian Bank of Commerce, Rockyford Branch. Pay Hans Kruse or order two thousand eight hundred and fifty-three 75/100 dollars with exchange (the words "with exchange" are struck out with light diagonal strokes of the pen). $2,853.75. S. A. Fallows."

Although no place of address appears on the letter, it was in fact addressed to the plaintiff at Baintree and received by him there on December 30. Having said this, the plaintiff adds: "I at once noticed that that was not the right amount, so on the following day I was in Calgary, and I went to my solicitor and shewed him this cheque and informed him that that was not the full amount."

The result was that the plaintiff's solicitor saw the defendant's solicitors and the latter wrote the plaintiff, addressing him at Baintree, the following letter (enclosing the defendant's cheque on the Canadian Bank of Commerce at Rockyford for $761.62):—"Hans Kruse, Esq., Baintree, Alta. Dear Sir: Re Fallows. Pursuant to instructions of Mr. Fallows, we enclose herewith his cheque for $761.62, being the balance which you state to be due you under the contract for the sale of your property to him, including also allowance for 35 acres of cultivation at $7.75 per acre. The account is calculated as follows: Instalment of principal due 1st January, 1920, $2,500.00; interest on $2,076.87 to same date, $841.72; shortage of interest on 1st payment of

Alta.

S.C.

KRUSE v. FALLOWS

$1,000·00, $2.40; 35 acres of cultivation at $7.75 per acre, $271.25—$3,615.37. Cheque previously remitted to you 29th Dec., 1919, $2,853.75. Balance due for which cheque is enclosed herewith, $761.62. Mr. Fallows has asked us to say that he regrets very much the fact that his former remittance to you was short, but, as explained to your solicitors, he calculated interest merely on the instalment now due instead of upon the whole principal now outstanding. Yours faithfully, Clarke, Carson, Macleod & Co."

The cheque enclosed was as follows:—"Rockyford, Alberta, Dec. 31st, 1919. The Canadian Bank of Commerce. Pay H. Kruse or Order, Seven Hundred and Sixty-one, 62-100 Dollars. x761.62. S. A. Fallows. Endorsement on back of cheque, "H. Kruse."

The plaintiff received this cheque for $761.62 at Baintree and endorsed and cashed it or placed it to his credit at the bank at Rockyford on January 9

Notwithstanding that a member of the firm of solicitors for the defendant evidently miscalculated the interest as $841.72 instead of $850.15, the plaintiff seems to have taken no exception to the amount and doubtless at the time intended to accept it in satisfaction of the arrears.

The trouble, and the cause of this litigation arose in this way. The plaintiff had deposited the cheque for $2853.75 to his credit in the Standard Bank at Calgary on December 31. On January 10 he was informed by letter from the Standard Bank at Calgary, addressed to him at Baintree, that the cheque for $2853.75 had been returned unpaid. He thereupon came up to Calgary, arriving on the morning of Monday, January 12. He saw none else than the manager of the Standard Bank and then went to his solicitor and instructed him to commence this action, the statement of claim in which was signed the same day.

This is the explanation of the cheque being returned unpaid. Roberts, the manager of the Canadian Bank of Commerce at Rockyford, says in substance that:—On the 5th January the teller brought the cheque to his attention and pointed out that the words "and exchange" had been scored out and that nevertheless the clearing house had added $7.15 for exchange, making $2860.90. He says that there is absolutely no doubt that when the cheque came to the bank at Rockyford the words "and exchange" had already been scored through. Shortly afterwards—apparently the same day—the defendant happened to come into the bank and Roberts shewed him the cheque and asked

how it was that he had scored out the words "and exchange"—if he intended to pay the exchange and that then Mr. Fallows stated—Then the witness was stopped.

The cheque was then returned to the Canadian Bank of Commerce at Calgary and through the clearing house to the Standard Bank, Calgary. When returning the cheque it was marked in pencil on the back with these words: "Not drawn with the exchange; will pay $2853.75"—an intimation, Roberts says, that the exchange had been incorrectly added and that the cheque would be paid for the amount for which it had actually been drawn.

Short, the teller, was called as a witness and confirmed Roberts' evidence that the words "and exchange" were scored through when the cheque reached the bank at Rockyford.

The plaintiff and Bull, teller of the Standard Bank at Calgary, are explicit that the question of exchange on the cheque was referred to at the time of the deposit of the cheque and that then the words "and exchange" had not been struck out.

The defendant's explanation in his evidence and in a letter he wrote quite shortly after the occurrence are to the effect that having drawn the cheque and written the letter in each of which the words "and exchange" were written, he decided that there was no need of adding exchange as the cheque would naturally be deposited at Rockyford and he accordingly struck them out of the cheque, but by an oversight not out of the letter.

There is a direct conflict of testimony. The scoring out of the words in the cheque is done with very fine strokes of the pen and probably the plaintiff had with him the letter in which the cheque was stated to be drawn with exchange.

I think the weight of evidence is with the defendant and that Bull, the Standard Bank teller, and the plaintiff are mistaken or were mistaken at the time of the deposit.

At the commencement of the action the plaintiff still retained the cheque for $2853.75 and the defendant with his statement of defence alleges that he tendered to the plaintiff the said sum of $2853.75 by delivering to him the said cheque for that amount; that the plaintiff accepted the same as payment and that the defendant's bank upon which it was drawn has always been ready and willing to pay the same at Rockyford at par; that the plaintiff retained and still retains the said cheque; that the said

Alta.

S.C.

KRUSE v. FALLOWS

sum of $2853.75 has always been available for payment of the said cheque and the defendant pays into Court the said sum in satisfaction of the plaintiff's claim.

It is quite well recognized that prima facie payment by cheque is a conditional payment; but what is the condition? It seems to me that the condition is that upon presentment in due course there are funds to meet it and—to meet the point of the present case—the banker is ready to pay it. It may perhaps be that one who accepts a cheque may change his mind and return it and say that he wants the cash; but if he goes so far as to present the cheque and the banker is ready and willing to pay it, it seems to me that it would then be too late for the creditor to say that the cheque was not accepted in payment; that he would be obliged to rely on his remedy on the cheque, which in the case supposed, would be met by a plea of tender and a payment into Court. Here, I think, the proper conclusion on the evidence is that was the fault, though perhaps an innocent fault, of the agents of the plaintiff that the cheque was not paid, and in my opinion, therefore, the defendant's plea of tender and payment into Court is a good defence to the claim based upon the alleged default in payment of the instalment of principal and interest.

I think it must be held that, under the circumstances which existed, the defendant was not entitled to demand the amount of the exchange. The plaintiff and the defendant both resided at Baintree, the nearest banking town was Rockyford, the parties had dealt together on the understanding that payment by cheque on the bank at Rockyford was payment at a proper place.

Doubtless the plaintiff might have stood upon his strict legal rights and have refused to accept a cheque or anything else than legal tender (though in the circumstance he might have been made to suffer in costs) but had he done so I think he as creditor could not have compelled the defendant as his debtor to pay him in Calgary. I think the law in this respect as it should be adopted and applied in this country in view of our business customs is correctly stated in the American work, Hunt on Tender, sec. 312, at pp. 341-343, where he states, "At common law, with respect to the payment of money, where the time, but no place of payment is specified, the rule is stated generally to be that the debtor must seek his creditor, if within the 'four seas' and make tender to him. Without

qualification it would seem that [at common law] the tender must be made to the obligee in person and failing this the obliger would be in default. . . . But the strict rule, if it ever obtained without qualification, has been modified, and it is now sufficient if the debtor seek his creditor at his place of residence [or I submit his place of business] if within the realm [the State or Province] and there make a tender. In the United States the debtor is not bound to go out of the State in which the contract was made."

The foregoing is directed to the question of a tender in the strict sense to fulfil strict legal requirements such as to prevent a forfeiture, to perfect an acceptance of an option, &c.; and the strict rules as to tender at common law were in many instances at least not insisted upon when the creditor's relief had to be sought in equity.

So that, in my opinion, the defendant, had the plaintiff insisted upon his strict legal rights, might have tendered payment at the plaintiff's residence at Baintree. Such an offer of payment, coupled with payment into Court, would at least have been sufficient to answer completely the plaintiff's claim for specific performance. See as to payments of debts otherwise than by cash, 7 Hals. p. 449, sec. 916.

As to the difference in the interest, that is the difference between $850.15 and $841.72, that is $8.43, that was evidently a mistake, a bona fide mistake, of a member of the firm of the defendant's solicitors. The plaintiff either did not observe it or observing it abandoned it entirely or at least as a requirement as a part of the payment in question. To recover it now, if he can, it will be necessary for him to set up a mistake and appeal to the equitable jurisdiction of the Court. To do so solely in respect of so small a sum would probably be ineffectual on the ground that it was beneath the dignity of the Court; de minimis non curat lex. At all events the present action is not substantially founded on such a claim.

In the foregoing view the plaintiff had no right of action and his action should be dismissed with costs. In this view there is no question of relieving the defendant from forfeiture.

There are one or two other items in question.

At the opening of the trial the plaintiff's counsel asked to amend by claiming $54.25 in respect of water rentals which by the terms of the agreement the defendant was to pay. No demand had been made upon the defendant by the railway company or the plaintiff although the plain-

Alta.

S.C.

KRUSE v. FALLOWS

tiff had received a notice from the company respecting these rentals, which he did not communicate to the defendant. The defendant paid these rentals to the company on the day the trial began after the matter was brought to his attention by the application of the plaintiff to amend so as to make a claim in respect of them. It is clear no order should be made respecting them.

The defendant counterclaimed for $50.

It seems unnecessary to discuss the plaintiff's liability for it, inasmuch as the plaintiff in reply to a letter from the defendant of January 7 sent to the defendant by letter of January 12 (the day on which the action was commenced) a cheque for $50 in payment of the claim. The action having already been commenced the defendant on January 14 returned the cheque declining to accept it, as he had a strict right to do.

The $50, being admittedly owing by the plaintiff to the defendant the trial Judge deducted from it the following three sums:—The exchange, $7.15; interest on $2853.75 from the due date to the date of payment into Court, $13.40; the difference in the interest which he put at $8.26: $28.81, and gave the defendant judgment on his counterclaim for the balance, $21.19: Total $50.

For the reasons indicated I think the second item ought not to have been deducted. The last item was perhaps properly deducted.

I think the item for exchange may also be allowed on the same principle; the plaintiff having in all probability been misled by the defendant's letter stating that the cheque was made with exchange; the words "and exchange" in the letter not being erased as they were in the cheque, and the bank having charged him with the exchange.

In the result I think the defendant was entitled to recover $34.42, without additional costs.

In the final result, in my opinion, the plaintiff's appeal should be dismissed with costs and the judgment in favour of the defendant be increased from $21.19 to $34.42.

Appeal dismissed.

TARASOFF v. ZIELINSKY.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ. A. April 25, 1921.

Appeal (§VII.E—323)— Death — Circumstantial Evidence — Probabilities—Finding of Trial Judge—Right to Review Evidence on Appeal—Dangerous Animal—Knowledge of Owner—Duty to Secure—Liability.

The body of the plaintiff's wife was found lying badly mangled in a field to which the defendant's bull had access and where unmistakable evidence of the presence of cattle was found. The injuries were such that it was very improbable they could have been inflicted by human agency. The bull was known to be vicious and ferocious, and had previously attacked other persons.There was no question as to the veracity of the witnesses and no conflict of evidence. The Court held that the evidence was properly reviewable on appeal, that the trial Judge had properly found on the evidence that the deceased was killed by the bull which was known to the defendant to be dangerous and which he was bound to keep secure at his peril, and that under the circumstances neither the defence of contributory negligence nor that of volenti non fit injuria applied.

Dominion Trust Co. v. New York Life, 44 D.L.R. 12, [1919] A.C. 254; Montgomerie & Co. v. Wallace-James, [1904] A.C. 73; Richard Evans & Co. v. Astley, [1911] A.C. 674; Baker v. Snell, [1908] 2 K.B. 825, applied; Canada Paint Co. v. Trainor (1898), 28 Can. S.C.R. 352, distinguished.

APPEAL by defendant from the trial judgment awarding plaintiff $6000 for the death of his wife whose death was caused by defendant's bull. Affirmed.

The facts of the case are fully set out in the judgment of Turgeon, J.A., in which the other members of the Court concurred.

J. F. Frame, K.C., for appellant.

P. G. Makaroff, for respondent.

The judgment of the Court was delivered by

Turgeon, J. A.—In this case the plaintiff was the husband, during her lifetime, of Marie Tarasoff, deceased, and is now the administrator of her estate. He brings this action on behalf of and for the benefit of himself and the three infant children of the deceased. Marie Tarasoff met her death on October 6, 1919, in a field upon the farm upon which she lived with her husband and family. The plaintiff's contention is that the deceased was killed by a hornless bull owned by the defendant (the husband's landlord) and kept by him upon the same property; that this bull was of a ferocious nature, to the defendant's knowledge; and that at the time of the fatal accident he was running at large upon the farm as a result of the failure of the defendant to keep him safe. The trial Judge found that the

Sask.

C.A.

TARASOFF v. ZIELINSKY

woman's death was caused by the defendant's bull, and he gave judgment for the plaintiff in the sum of $6000, to be apportioned among the parties entitled thereto in the manner in which it would have been divided had the deceased died leaving this sum as her total estate. From this judgment the defendant appeals.

Several grounds of appeal have to be considered in this case.

Mrs. Tarasoff was last seen alive about 9.30 a. m. on the morning of her death. At that time she left the defendant's house to go in the direction of the village, some distance south and west. At about 12.30 noon, her husband found her dead body lying in a small ravine about 220 yards from the house. There was every evidence of a violent struggle having taken place. Most of her clothing was torn from the lower part of her body and was scattered about over a considerable area, some of the pieces being found 20 yards away from the body. The medical evidence shewed that death was caused by a powerful blow or blows delivered on the chest, of sufficient violence and extent to cause all the ribs on either side to spread out and break. The breast bones also were broken. According to the evidence such a condition of the body might have been caused by a man jumping repeatedly with both feet upon the woman's chest, but hardly otherwise by human agency. The theory of the plaintiff is that the assault was the act of the hornless bull. This bull had a short time before exhibited evidence of ferocity by attacking a hired man, Zynkoff, who saved himself only with difficulty. As a result of this attack on Zynkoff, Zynkoff himself, the plaintiff, the deceased, and a neighbour named Halliwell all complained to the defendant about the danger incurred by allowing this bull to run loose. As a result of these complaints the defendant bought a ring which he had inserted in the bull's nose, but beyond this he took no precautions whatever to keep the bull safe. On the morning of the woman's death, the bull was not seen in the immediate vicinity of the spot where the body was found, but it was at large upon the farm with the rest of the cattle and had access to the spot in question. The ground about the spot where the body lay and the woman's clothes were examined the morning after her death by the police when unmistakable evidence of the presence of cattle was found, both upon the ground and the clothing; such as manure, foot-marks and hair similar to the hair on the nose of the bull in

question. There is an entire absence of any evidence pointing to any human being as being the likely or even the possible cause of the woman's death.

It is asserted in the first place that the trial Judge ought not to have come to the conclusion, to which he did come, that the deceased was killed by the defendant's bull. In considering this important feature of the case, it was strongly urged upon us by counsel for the defendant that the case is one of those in which the appellate tribunal is in quite as good a position to arrive at a conclusion upon the evidence as was the Judge at the trial. I agree with this statement, and have considered the evidence set out in the appeal book in the light of the principle laid down in Dominion Trust Co. v. New York Life Ins. Co., 44 D.L.R. 12, [1919] A.C. 254, and Montgomerie & Co. v. Wallace-James, [1904] A. C. 73. That principle is, I think, correctly summarised as follows, in the headnote to the first of these cases, ([1919] A.C. 254):—"In considering the weight to be attached by an appellate Court to a finding of fact, a distinction should be drawn between cases in which the issue depends upon the veracity of the witnesses, and those in which it depends upon the proper inferences to be drawn from truthful evidence. In the latter class of cases the original tribunal is in no better position than the judges of the appellate Court."

In this case, all the witnesses, including the parties themselves, appear to have given their evidence with the utmost candour; there is no conflict at all in any of the essential matters, and the facts, such as they are, are practically undisputed. This applies not only to the circumstances immediately surrounding the woman's death, but to all the other circumstances of the case. There is no doubt, therefore, that the above principle does apply in this case.

Approaching a study of the evidence, as I do, with this principle in mind, I cannot help but come to the conclusion that the deceased was killed by the defendant's bull. The time and the manner of her death, the medical evidence as to the nature of her wounds, the condition of her clothing, and the fact that this ferocious animal was at large upon the farm at the time; all lead to the great preponderance of probability that her death was so occasioned. In this case direct and positive evidence is, of course, unavailable, as none of the witnesses were present at the death. But this must not deter us from forming conclus-

Sask.

C.A.

TARASOFF v. ZIELINSKY

ions when those conclusions can reasonably be formed from the evidence which is available. In this regard I would refer to the statement of Earl Loreburn, L.C., in Richard Evans & Co. v. Astley, [1911] A.C. 674, at p. 678:—"It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities."

In this case the plaintiff contends that the woman was killed by the defendant's bull, and not only, in my opinion, is there abundant evidence pointing to that conclusion, but the evidence is such that any other conclusion seems extremely improbable. The theory suggested by the defence was that the woman's death might have been caused by human aggression, I can find nothing in the evidence to support any such theory. No person is suggested as the possible aggressor, and the violence and strength of the assault, as revealed by the condition of the body and explained by the medical testimony, were such that it is very unlikely that it could have been the act of a man.

Among the authorities cited by the defendant's counsel regarding the weight to be attached to circumstantial evidence in civil cases, is that of The Canada Paint Co. v Trainor (1898), 28 Can. S.C.R. 352. In that case the plaintiff, an employee of the defendant, injured her foot while engaged in her work under circumstances which made it very difficult to arrive at a positive conclusion as to whether the accident occurred through some defect in the workmanship or in the position of the employers' machinery or through the employee's own imprudence and recklessness. In rendering the judgment of the Supreme Court, Gwynne, J., said at p. 357; "The only evidence upon the point which was offered upon the part of the plaintiff was her own evidence and that of Mr. Guyon, and at the close of the plaintiff's case it was a matter wholly of speculation and conjecture of which no intelligent explanation has been offered as to how the accident did in fact occur, or what was its cause."

The foregoing description of an inadequate case does not at all, in my opinion, fit the plaintiff's case in the matter now before us.

Further on, Gwynne, J., adds at p. 360; "The utmost that the evidence warrants is that the cause of the accident still is, as it was at the close of the plaintiff's case, a matter merely speculative and conjectural, and that there appears more probability in the theory suggested by the defendants than in that propounded on behalf of the plaintiff."

If this language is applicable to this case at all, it is applicable rather to the theory of human aggression advanced by the defence than to the theory of the plaintiff that the unfortunate woman was done to death by the bull.

It was also argued that the bull was as much in charge of the plaintiff (the deceased's husband) as of the defendant, he being in occupation of the premises under lease. If anything should depend on this contention, I think the following facts as disclosed in the evidence dispose of it unfavourably to the defendant. While a lease was executed between the parties, it is clear that the intention always was that the defendant, the lessor, should continue to occupy the premises as well as the plaintiff, the latter looking after the cultivation of the land. The lease itself provides for a small dwelling house to be erected upon the premises by the lessor to be occupied by the lessee during its term. This building was erected and occupied by the plaintiff and his family, and the defendant continued to occupy the farm-house and buildings. The lease makes no mention of the cattle and does not purport to convey them, temporarily or otherwise, to the plaintiff. During the winter of 1919-20 the plaintiff looked after the cattle, on the leased premises for the defendant, and was paid $60 for his services in the spring, after which time, the animals, including the bull, were allowed to roam over the farm, excepting on the standing grain. All complaints concerning the bull's ferocity, including the complaint of the deceased and her husband, were made to the defendant, and he acquiesced by his conduct, in the responsibility thus suggested to him. The evidence does not, in my opinion, support the contention that at the time of the accident the bull was in charge of the deceased or of her husband or that either of them were responsible for keeping it safe.

Sask.

C.A.

TARASOFF v. ZIELINSKY

Nor can the defence of contributory negligence be entertained, in my opinion. It cannot be contended, surely, that the duty of the plaintiff and his wife was to remain indoors and to refrain from their necessary outside work so long as the defendant allowed his bull to stray over the farm, under penalty of having to suffer with out recourse, any damage which the bull might cause them. The defence of contributory negligence cannot be supported by the evidence in this case, unless we are prepared to accept the proposition that a person having a knowledge of possible danger cannot go about his business without exonerating the tort feasor from liability if the danger that might have been apprehended should happen to him.

The defence of "volenti non fit injuria" was also raised. Upon this point I agree with what is stated by the trial Judge in his judgment. This is a case where I think it is well to point out the distinction emphasized by Bowen, J., in Thomas v Quartermaine (1887), 18 Q.B.D. 685, between volenti and scienti at p. 696; "It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not "scienti non fit injuria," but "volenti." It is plain that mere knowledge may not be a conclusive defence."

In this case, after the bull first exhibited symptoms of ferocity by attacking the hired boy Zynkoff, both the plaintiff and the deceased complained to the defendant and asked him to keep the bull secure.

I therefore find on the evidence that the deceased was killed by the defendant's bull; that this bull was dangerous to the knowledge of the defendant, and that neither the defence of contributory negligence nor that of volenti non fit injuria are available to the defendant.

The responsibility of the owner of a dangerous animal is set out by Cozens-Hardy, M.R., in the case of Baker v. Snell, [1908] 2 K.B. 825 at p. 828, as follows: "If a man keeps an animal whose nature is ferocious, or an animal of a class not generally ferocious, but which is known to the owner to be dangerous, is the owner of that animal liable only if he neglects his duty of keeping it safe or is negligent in the discharge of that duty, or is he bound to keep it secure at his peril? In my opinion the latter

is the correct proposition of law, and I think that it is not open to the Court to decide the other way."

In this case, in any event, the defendant knew his bull was dangerous and neglected to keep it safe. In my opinion there can be no question of his liability.

Objection is also taken in the matter of damages, both as to the principle upon which damages should be awarded under The Fatal Accidents Act, 9-10 Vict. (1846) (Imp.) ch. 93 and the amount of damages allowed by the trial Judge. Authorities are cited in the appellant's factum purporting to shew that loss of service cannot be taken into account in assessing damages under the Act, and if this were so the effect would be serious, because in this case the damage incurred by the plaintiff is due to the loss of his wife's services. Mayne on Damages is cited, and at p. 512 in the 9th ed. of this work I find the statement that damages for loss of service cannot be recovered under Lord Campbell's Act, upon which our Act is modeled. As authority for this statement the author cites the two cases of Osborn v. Gillett (1873), L.R. 8 Ex. 88, and Clark v. London General Omnibus Co., [1906] 2 K.B. 648. An examination of those two cases shews that they do not support the author's statement. Both these cases were dealt with and explained in the later case of Berry v. Humm & Co., [1915] 1 K.B. 627, where it was pointed out that they do not decide that a plaintiff under Lord Campbell's Act cannot recover damages for loss of service incurred through the death of a relative.

In the case before us, I think it is our duty to give effect to the considerations laid down in the case of St. Lawrence & Ottawa Rly. Co. v. Lett (1885), 11 Can. S.C.R. 422. There the Supreme Court had to deal with a case from the Province of Ontario brought under a statute similar to ours. The action was brought on behalf of the husband and five children, aged respectively 11, 14, 16, 19 and 21 years, of a woman who was killed at the age of 53. The evidence shewed that the deceased managed the whole business of the house where the husband and five children lived, attended to purchases and repairs, milked the cow and did a great deal of housework, though with the help of a servant. She was also described as a good and careful mother towards her children. The jury at the trial awarded damages in the sum of $5800, of which $1,500 was apportioned to the husband and the

N.B.

S.C.

BARRETT v. PRUDENTIAL TRUST CO.

balance divided among the five children. Both the Court of Appeal of Ontario (1884), 11 A.R. (Ont.) 1 and the Supreme Court, upheld this verdict, and the principle upon which the Supreme Court acted is aptly summarised in the head-note to the report, 11 Can. S.C.R. 422, as follows: "Although, on the death of a wife caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother."

I think the facts of the case before us amply support the judgment of the trial Judge, and that the damages should be allowed to remain at the figure assessed by him.

I would dismiss the appeal with costs.

Appeal dismissed.

BARRETT ET AL v. PRUDENTIAL TRUST CO. ET AL.

New Brunswick Supreme Court, Appeal Division, Hazen, C.J., McKeown, C.J., K.B.D., and Crocket, J. April 22, 1921.

Judgment (§VII.C-280)—Application to Set Aside—Delay—Jurisdiction of Court—O. 70, R. 2, and O. 12, R. 1, New Brunswick—Mistake——Irregularity.

The provisions of O. 70, R. 2, New Brunswick, apply only to applications to set aside proceedings for irregularity, and do not in any way curtail the inherent power of the Court to prevent an abuse of its process, whenever such an abuse is drawn to its attention; a judgment may therefore be set aside, although there has been delay in making the application if the judgment is not only wrong but irregular as well, for the reason that there was no proper service of the notice of motion for judgment.

APPEAL from a judgment of Grimmer, J. dismissing an application of the appellant to set aside, as against him, a judgment recovered against him and some twenty odd other defendants for $124,513.13 in an action in the Chancery Division, and executions issued against the appellant upon the said judgment and subsequent proceedings thereon. Reversed.

W. B. Wallace, K.C., for M. B. Innes, supports appeal.

M. G. Teed, K.C., contra.

The judgment of the Court was delivered by

Crocket, J.:—The action arose out of an agreement for the sale of certain lands in the Province of Saskatchewan,

which was entered into on Feb. 20, 1913, between the respondents and a co-partnership firm consisting of Jacob W. Kierstead, Charles J. Mersereau and the appellant. The purchase price of the lands was $136,000, of which $20,000 was to be paid in cash and the balance in instalments with interest at 7%. Upon payment of the said purchase price and interest the respondents agreed to convey the said lands to the purchasers. The transfer or deed was to be prepared by the respondents' solicitor at the expense of the purchasers, and it was agreed that in case of default of payment the respondents could on notice rescind the agreement and retain all money paid as liquidated damages. On the same day, Kierstead, Mersereau and Innis entered into an agreement with Scott D. Guptill, Samuel H. Flewelling and E. Allan Turner to sell them the said lands for $216,000 as trusteees of a syndicate, which had been formed under the name of the Westmount Realty Syndicate of Regina for the purpose of purchasing the property and re-selling it at a profit. This syndicate agreement was also executed by the other defendants, other than the personal representatives of certain deceased persons, as subscribers and members of the syndicate. The appellant was a subscriber to and member of this syndicate, having subscribed for 6¼ shares of the value of $2,000 each. On May 10, 1913, the partnership between Kierstead, Mersereau and Innis was dissolved. The appellant retired from the firm, Kierstead and Mersereau paying him $6,000 for his interest therein, and the appellant assigning to them all his interest in the partnership, including all his rights and interest in the agreement of purchase entered into with the respondents as well as in the agreement of sale entered into with the syndicate trustees. Kierstead and Mersereau at the same time agreed to indemnify Innis against all claims under and by virtue of the agreement of purchase and sale entered into with the respondents. Four days later the appellant, in pursuance of the terms of the syndicate agreement and in consequence of the caveat, as he says, which he and his former partners had filed against the property, joined with Kierstead and Mersereau in the execution of an agreement of sale of the Westmount property, so called, to the syndicate trustees for the sum of $216,000, which price was afterwards reduced to $186,000. Before the dissolution of the partnership Kierstead, Mersereau and Innis had paid to the respondents $20,000, the amount of the first

N.B.

S.C.

BARRETT v. PRUDENTIAL TRUST CO.

payment under the agreement of sale. Subsequently during the year 1913 Kierstead and Merscreau made a further payment of $14,000 and interest and in the year 1914 another payment of $16,000 and interest. Kierstead died in the autumn of 1914, and some of the instalments and interest being in arrears the respondents began to press Mersereau, the surviving partner, for payment and on June 23, 1915, obtained from him as such surviving partner, as security for the money owing to them under their agreement of sale, an assignment of all monies payable under the syndicate agreement and of all rights of action or claims which the said Mersereau as such surviving partner then had or might thereafter have against any and all persons, being members or composing or interested in the Westmount Syndicate of Regina. The assignment provided that it should not prejudice or affect any rights which the respondents then had or were entitled to against the estate of Kierstead or against Mersereau or the appellant or against the lands agreed to be sold under and by virtue of the original agreement of Feb. 20, 1913, and expressly reserved such rights, including any right of foreclosure, to the respondents. The respondents, having failed to collect under this assignment the monies payable under the syndicate agreement, commenced action in the Chancery Division by a writ of summons, issued Dec. 15, 1915, against the administrators of the estate of Jacob W. Kierstead deceased, Mersereau, Innis, the three trustees under the syndicate agreement, and eight subscribers to and members of the Westmount syndicate. The writ claimed a declaration of the rights of the parties, payment by the defendants to the plaintiffs of the balance due and unpaid on the original contract of sale or in the alternative specific performance of the said contract and also an account. The appellant accepted service of the writ on Dec. 29, 1915. This statement of claim was filed on May. 13, 1916, claiming payment of the stated sum of $102,620.03 as the balance unpaid on Dec. 15, 1915, the date of the issue of the writ. The appellant entered an appearance in person on Oct. 3, 1916, and was served with a copy of the order for directions and the statement of claim, but did not deliver a defence. So far as appears from the papers no further proceedings were taken in the action until the month of December, when an application was made on behalf of the plaintiffs to amend the title

of the cause by adding the names of nineteen defendants, who had become subscribers to and members of the Westmount Syndicate, as well as the names of three executors of a deceased subscriber and member. This application was made in pursuance of an agreement under seal, which was entered into on Dec. 10, 1917, between the plaintiffs and Mersereau and the syndicate trustees.

This agreement, which was entitled in the Court and cause, stated that it was mutually agreed by the parties to the suit and by the members of the syndicate, so far as they were represented therein, that the defendants should severally withdraw their defences and consent to a decree or judgment against them by default, but that if they had paid or so soon as they should pay the moneys severally unpaid by them respectively on their syndicate shares, the plaintiffs covenanted not to enforce the said judgment or decree or to proceed thereon in any way as against such defendants respectively, expressly reserving, however, to the plaintiffs all rights against any of the defendants who should not have paid or might not pay, as well as against any other member or members of the syndicate agreement; that the monies which had then been paid to the syndicate trustees should be at once paid over by them to the plaintiffs and that the sums pledged or promised should be got in by the trustees and paid over to the plaintiffs as soon as possible; that the title of the lands described in the syndicate agreement and in the statement of claim were to be discharged from all caveats or other clouds or liens thereon created by Kierstead, Mersereau, Innis and the trustees at the cost and expense of the syndicate and such discharges or releases delivered in escrow at once to Mr. H. A. Porter who was to hold the same until the lands were ready to be conveyed to the new company as thereinafter mentioned and then to be delivered over to the plaintiffs; that on payment of the monies then on hand the plaintiffs were to forthwith, at their own expense, cause to be incorporated under Dominion Charter a joint stock company with a capital stock of $100,000 for the purpose of taking over the said real estate mentioned in the statement of claim and managing and handling and disposing of the same; and that so soon as the sum of $30,000 should be paid to the plaintiffs and the said lands freed from all caveats or other clouds thereon created by Kierstead, Mersereau, Innis, and the said trustees, the

N.B.

S.C.

BARRETT v. PRUDENTIAL TRUST CO.

plaintiffs would cause said company to be organised and the title of the said lands to be vested in such company freed from encumbrances, subject, however, to the right of any member or members of the syndicate who might demand lands instead of stock to have his portion conveyed to him either before the formation of the said company or by the said company thereafter. The agreement further provided for the organisation of the company, and that on such organisation the total amount that should then have been paid to the plaintiffs by the trustees and any other member or members of the syndicate should be ascertained and the amount of stock equivalent thereto at par should be set aside and that from and out of the same the plaintiffs should be at liberty to retain to themselves such number of shares as might be necessary at par to pay the plaintiff's costs of action and incidental thereto as between party and parties, and that the balance of such stock so ascertained should be issued or transferred to the trustees to be by them held for or allotted and transferred to members of the syndicate; and that all the balance of the $100,000 of stock of the said company should be issued to and held by the plaintiffs or their nominees subject to the condition that the plaintiffs should out of such balance cause to be transferred to and held in trust by said Porter a reasonable quantity of stock estimated to be sufficient to provide stock pro rata for any member of the syndicate who might thereafter pay to the plaintiffs money on account of their unpaid subscriptions and that on such payment such stock should be transferred to them by Porter, but that if such members should not pay within one year from the organisation of the company said stock or so much thereof as should remain undistributed should be by Porter transferred back to the plaintiffs. The agreement also provided that so soon as they could do so without prejudicing their rights against any other defendant or member of the syndicate they would release the present defendants and any member of the syndicate, who might have fully paid up their subscriptions, from all claims; that the trustees should proceed under the terms of the syndicate agreement to forfeit any rights of any member or subscriber who had not paid up or from whom it might be expected by Porter that no collection or payment could reasonably be expected; and that if the sum of $30,000 should not be paid over to the

plaintiffs the latter would protect the syndicate members through the trustees to the amount that might be paid either by stock in the proposed company or by land.

According to the affidavit of C. Robinson, who had replaced Turner as a syndicate trustee, the agreement just recited was executed by the trustees in pursuance of a resolution passed at a meeting of the members of the syndicate and the sum of $30,501.78 which the trustees had collected from different subscribers, was paid by Robinson to Whimeray, who, notwithstanding the respondents' agreement of sale with Kierstead, Mersereau and Innis, still held the title to the Westmount property as security for monies due him by the respondents on the purchase thereof, and these monies were paid to Whimeray for the purpose of preserving the property from loss, "said Whimeray having threatened to foreclose on said property." $20,000 of this amount had been paid before the judgment, and $10,501.78 was paid subsequently. In pursuance of the agreement referred to the Westmount Realty Co., of Regina, was incorporated by Dominion Letters Patent on April 23, 1919, and organised in June of that year, with one of the respondents as president, and Robinson vice-president, but, though the appellant alleged in his affidavit of December 2, 1920, that Robinson had informed him a few days previously that the land had been transferred to the company and the respondents had received the stock as provided by the agreement, Robinson in his affidavit in answer of December 17 alleged that the land had not yet been transferred and would not be until the claims against the rights of all parties were adjusted, either by agreement of by decree of the Court. The appellant filed an affidavit in reply to Robinson's affidavit in which he alleged that he was not notified of the meeting at which the resolution authorising the above agreement was passed and that he was not present at the meeting.

This agreement having been entered into, and 22 defendants added, the cause was not noticed for hearing until December, 1918, 3 years after the issue of the writ of summons, and then the hearing was adjourned by White, J., at the request of the plaintiff's solicitor, after proof by affidavit of the service of the notice of motion upon the different defendants who were not present or represented. The cause finally came on for hearing before Grimmer, J., on March 6, 1919, when, no one appearing for anyone of the thirty-five defendants, a decree was made against twelve of the defendants for want of appearance and against 5 defendants,

N.B.

S.C.

BARRETT v. PRUDENTIAL TRUST CO.

including the present appellant, as well as against three executors of the last will and testament of a deceased member of the syndicate, for want of a defence, and against the administrators of the estate of Jacob W. Kierstead deceased, and 7 other defendants, upon hearing the pleadings and proofs taken.

The decree declared that there was due and owing to the plaintiffs under the agreement of sale made between the plaintiffs and Kierstead, Mersereau and Innis, $124,513.13; that the syndicate agreement constituted a binding agreement of co-partnership between the defendants other than the administrators of the estate of Jacob W. Kierstead deceased and the executors of the last will and testament of Edward Johnson deceased, and that the said Kierstead and Johnson were in their life time members of the said syndicate and partnership and that their estates were liable for the payment of the moneys therein mentioned; that under and by virtue of the assignment made to the plaintiffs by Mersereau, the surviving partner of the firm of Kierstead and Mersereau, dated June 23, 1915, Mersereau, Innis and 21 other defendants were jointly and severally liable to the plaintiffs and ordered that the plaintiffs recover judgment against these 23 defendants, including the appellant, jointly and severally for the sum of $124,513.13.

Upon this decree final judgment was signed against the appellant on March 10, 1919, for $124,513.13 and $1,589.48 costs. Two writs of fieri facia, each endorsed for the whole amount of the judgment, were issued—one to the sheriff of St. John and the other to the sheriff of Kings—on March 12, 1919.

It was this judgment and these executions which the appellant sought by his application before Grimmer, J., to have set aside. The application was made on the following grounds, as stated in the summons granted by His Honor on December 7, 1920:—

1. That no notice of motion for judgment was ever served upon the defendant, Miles B. Innis. 2. That no notice was served by the plaintiffs of their intention to proceed under O. 64, R.13. 3. That judgment was given for more than was due.

4. That the plaintiffs have so dealt with the property mentioned in the statement of claim as to materially affect the interest of the defendant Miles B. Innis, and thereby extinguish their claim against him.

Two affidavits of the appellant and one of his counsel, Mr.

W. B. Wallace, K.C., were read on the application for the summons. One of the appellant's affidavits was sworn to on September 24, 1920. In this affidavit after setting forth the service upon him of the writ of summons, his appearance thereto and the service of the statement of claim, the dissolution of the partnership with Kierstead and Mersereau, and the subsequent death of Kierstead and that Mersereau had since the commencement of the action made an assignment for the benefit of his creditors, he alleged that, not having any direct interest in the matters in question and having been informed that negotiations were pending for settlement with the plaintiffs he did not put in any defence and that he was not served with any notice of the plaintiff's intention to proceed further against him in the action; that in the month of May or June, 1919, he was notified by the sheriff of St. John that he had an execution against him for about $124,000; that no notice of motion for judgment was ever served upon him; and that shortly after receiving notice of the execution from the sheriff as aforesaid he had an interview with Mr.J. F. H. Teed, one of the solicitors for the plaintiffs, and ascertained from him that an agreement had been entered into in writing between the plaintiffs and some of the defendants for the settlement and taking judgment in the suit and then learned for the first time what the conditions of the settlement were and without prejudice to his rights asked Mr. Teed if a settlement could also be effected with him and that Mr. Teed informed him he thought it could and that after carrying on some negotiations with Mr. Teed, which were understood to be without prejudice, he retained Mr. Wallace to look into and advise him in the matter. He further stated that he entered into these negotiations for settlement because he was not financially able to meet the claim of the plaintiffs and because he had ascertained that a settlement had been made with the plaintiffs with the other defendants and because after retaining Mr. Wallace, though the latter advised him that in his opinion an application could be successfully made to set aside the judgment, he was desirous, if possible, to avoid the incurring of any costs in the matter, and that he was informed by his counsel and believed that he had a good defence to the action on the merits. This affidavit of the appellant also sets out para. 15 of the affidavit of J. F. H. Teed, which was used when the action first came on for hearing before White, J., on December 17, 1918, for the proof of the service of the notice of motion for judgment

N.B.

S.C.

BARRETT v. PRUDENTIAL TRUST CO.

against him. Mr. Teed alleged in this paragraph of his affidavit that he did on December 9, 1918, personally serve Miles B. Innis with the notice of motion by delivering a true copy thereof at his office, No. 50 Princess St., being the place specified by him in his appearance as his address for service and placing the same upon the desk of Miles B. Innis in his said office, he being at the time of said service temporarily absent therefrom, and there being no person there on whom service might be made and he (Teed) having made not less than 4 previous efforts to effect service on him at his office. The appellant alleged that no further affidavit was produced before White, J., or Grimmer, J., as to the service on him of the said notice of motion, and that after discussing Mr. Teed's affidavit as to the service of the notice upon him, with his counsel he made search in his office and found a notice of motion under some papers on his desk. The appellant's second affidavit, which was sworn on December 2, dealt entirely with facts going to the merits of the plaintiff's action against him, and recited at length his understanding of the terms of the plaintiff's agreement of December, 1917, with the other defendants.

Mr. Wallace, in his affidavit, states that after he was retained by the appellant in the matter of the judgment, and after consulting the plaintiffs' solicitors, and having several conversations with Porter to see if a settlement could not be effected, he advised him to make an application to set the judgment aside, and that he prepared an application to Grimmer, J., for that purpose, but found that the latter had been called away from home and was not expected to return until the latter part of August or first of September.

Three affidavits in answer were read in behalf of the plaintiffs on the return of the summons, those of J. F. H. Teed, G. T. Barrett, and C. Robinson, and three affidavits of the appellant in reply to these.

The only material facts appearing from these affidavits not already mentioned are that since the decree was made on March 6, 1919, the plaintiffs had not sought to recover from Innis more than the amount owing on his subscription in the syndicate and that Mr. Teed had instructed the sheriffs holding the executions to levy and realise the sum of $10,000 only, which the plaintiffs had advised him they were at all times willing to accept; that the negotiations which Innis opened with Mr. Teed after learning of the executions in May or June, 1919, ceased the first part of July,

but that Innis again opened negotiations in November, 1919, which terminated after a few weeks when the plaintiffs refused to accept any of his propositions; that in February, 1920, Mr. G. H. V. Belyea, K. C., acting for Innis, again opened negotiations with the plaintiffs direct, which were continued until March 25, when Innis entered into and accepted an agreement of settlement without prejudice contingently on his being able to raise certain monies in two weeks' time, and which fell through on June 7, 1920, when Mr. Teed wrote Innis that all offers of settlement were withdrawn and that he was instructing the sheriffs to proceed under the executions; that under a new execution which had been issued to the sheriff of Westmoreland two lots of land in Moncton were sold and purchased by the plaintiffs for $175; that relying on the decree of March 6, 1919, as a final determination of the rights of the parties, an action was commenced in the Court of Chancery of Prince Edward Island against certain subscribers to the syndicate residing in that Province; and the claim of the plaintiffs that if the judgment should be set aside the consequences to them would be most serious. Among the consequences, alleged to be attributable to the appellants great delay and neglect in making the application, were the expense of incorporating the Westmount Realty Co., of Regina, the acceptance by the plaintiffs of payment from a large number of syndicate subscribers on the basis of Innis being one of those liable to themselves; and the advertising and sale of the appellant's property in Moncton. They also claimed they had been delayed for months in bringing action on for trial against Innis, more than 18 Courts having passed.

Grimmer, J., in his judgment dismissing the appellant's application considered only the first ground. With respect to this he held that Innis by his action subsequently to the judgment waived the right he might have had to apply to set the judgment aside because of the want of service of notice of motion. As I read the Judge's judgment, the principal reason for his decision was that the appellant had not made the application within a reasonable time as required by O. 70, R. 1, though he comments also upon the appellant's indifference to the action before judgment and his repeated efforts after he became aware of the judgment to negotiate a settlement.

I should have been disposed in view of all the facts to

N.B.

S.C.

BARRETT v. PRUDENTIAL TRUST CO.

attribute his indifference to the action before judgment to the impression, which he said he had, that he was out of it and but nominally interested, and in the circumstances to regard the negotiations, which were carried on without prejudice after he learned of the judgment, as an explanation of his delay in applying to set the judgment aside. The real ground, however, of the Judge's decision, as I take it, was that the application was not made within a reasonable time after the appellant had learned of the judgment, and, having arrived at the conclusion that the application was too late, he dismissed it without entering upon a consideration of any of the other grounds stated in the summons.

In the view I take of the case as it was presented on appeal, I am of opinion that the appellant was and is entitled to have the judgment against him set aside notwithstanding the lateness of his application.

The application was made under O. 27, R. 15, not only upon the ground that the appellant had not been served with the notice of motion, but upon two other grounds which went to the merits of the judgment against the appellant. The affidavits used on the application not only disclosed that the appellant had substantial grounds of defence, but shewed that the decree was obtained by default in the terms above stated against all the other defendants represented therein by the syndicate trustees as the result of an agreement under seal, entered into with them by the plaintiffs, whereby the plaintiffs covenanted that it should not be enforced against any of them who should pay to the plaintiffs the amounts due on their subscriptions to the syndicate, and further covenanted upon the receipt of $30,000 and the discharge of certain caveats and liens upon the property, to transfer the lands, which they had contracted to sell to the appellant and his partners, to a joint stock company to be incorporated at their instance, and to provide for the allotment of stock in such company to such defendants as should have paid their syndicate subscriptions. Surely the plaintiffs, who never, either before action brought or afterwards, tendered a conveyance of the lands to any of the purchasers under their original agreement of sale, and who, by their agreement of December 10, 1917, had covenanted to transfer the lands to others, cannot be allowed to hold the lands under such an agreement and at the same time a judgment

against one of the original purchasers for the full amount of the unpaid purchase price. The plaintiffs by their new agreement with Mersereau and the syndicate trustees clearly extinguished their right to recover the balance of the original purchase price from the appellant. The only possible right, it seems to me, which the plaintiffs could have against the appellant would be the right to recover the amount of the appellant's subscription as a member of the syndicate under Mersereau's assignment to them, and the decree was clearly wrong in my opinion, irrespective of the question of whether the debtors had received notice of the assignment or not, in declaring, as it did, that by virtue of that assignment all the subscribers were jointly and severally liable to, and that judgment should be recovered against them, jointly and severally, for the amount of the unpaid balance of the original purchasers' purchase price.

The provisions of O. 70, R. 2, apply only to applications to set aside proceedings for irregularity, and do not in any way curtail the inherent power of the Court to prevent an abuse of its process, whenever such an abuse is called to its attention. A judgment may therefore be set aside though the application is out of time, if the circumstances warrant it. See Beale v. Macgregor (1886), 2 T.L.R. 311; Atwood v. Chichester (1878), 3 Q.B.D. 722; Davis v. Ballenden (1882), 46 L.T. 797; and Muir v. Jenks, [1913] 2 K.B. 412. In Atwood v. Chichester, where a judgment was set aside by the Appeal Court on an application made after the lapse of a year, Bramwell, L.J., held that when a judgment was wrong and no irreparable mischief would be done by acceding to a tardy application, the objection of lateness ought not to be allowed to prevail. Davis v. Ballenden was a case where the application was made nearly two years after the judgment. In Muir v. Jenks, where the application, which was made in March, 1913, to set aside a judgment signed in May, 1912, was dismissed by the Master on the ground of the defendant's delay, and the Master's decision was upheld by Bucknill, J., the defendant appealed to the Court of Appeal on the ground that the judgment was signed for too much, and the Court of Appeal held, notwithstanding the delay, that the judgment, having been signed for a sum in excess of that which was due, was wrong, and that the defendant had a right

N.B.

S.C.

BARRETT v. PRUDENTIAL TRUST CO.

to have it set aside, the plaintiff not having applied to amend it by reducing it to the proper amount.

In the present case the judgment against the appellant was not only wrong for the reasons above stated, but was irregular as well, for the reason that there was no proper service upon him of the notice of motion for judgment. The provision of O. 12, R. 1, relied upon by the respondents, that a defendant appearing in person shall state in his memorandum of appearance an address at which all pleadings and other proceedings not requiring personal service "may be left for him," must be read with O. 67, R. 2, which requires that they be left with some "person resident at or belonging to such place."

With regard to the respondents' claim that they will suffer serious injury in connection with the action they instituted in Prince Edward Island, if the decree and judgment are set aside, I cannot see, in view of the terms of the agreement between the plaintiffs and the syndicate trustees, under which the decree was taken by default, and of the incorporation and organisation of the joint stock company in pursuance of the terms of that agreement, how any injury to the plaintiffs which may follow the setting aside of the decree against the appellant can well be attributed to the appellant's delay in applying for the setting aside of the decree. If any injury or loss does result to them in consequence of the setting aside of a decree, which is wrong, it will be an injury or loss for which they, and not the appellant, are to blame, whether in connection with the incorporation and organisation of the joint stock company, the Prince Edward Island action or the sale of the appellant's property under the executions issued upon the judgment against him.

In my opinion, this appeal should be allowed with costs, and the decree and judgment against the appellant and the executions issued thereupon and all subsequent proceedings had and taken under the executions should be set aside with costs of the application before Grimmer, J.

Appeal allowed.

McKENZIE v. THE BIGGAR COCHERY RURAL TELEPHONE CO., LTD.

Saskatchewan's King's Bench, McKay, J. April 6, 1921.

Accounts (§I.—1)—Stated—Implied Promise to Pay—Action for Amount—Necessity of Proving Correctness of—Opening Up—Surcharging and Falsifying—Pleadings.

Where a company has called a meeting for the express purpose of finding out what is owing on an account and of making a settlement for the amount found to be owing, and after going into the accounts, pays the creditor a certain sum and gives an order for an additional amount, "being balance due to him on contract," an account stated arises, and the law implies a promise to pay, on which the creditor may sue without being put to the proof of the correctness of the account.

A party endeavoring to set aside or to open a stated account so as to have liberty to surcharge and falsify, must especially charge at least one definite and important error and support that charge with evidence confirming it as it is laid.

ACTION for the sum of $1,116.23 on an account stated, and for the sum of $197.49 for goods sold and delivered and interest thereon at the rate of 8% per annum and for the sum of $45 for money advanced. Judgment for plaintiff.

H. M. Allan, for plaintiff;

Donald Maclean, K. C., for defendant.

McKay, J.:—The defendant denies that there was an account stated, or that any goods were sold and delivered to it by plaintiff, or that plaintiff advanced any money to said Wilbur for the defendant at its request or at all; and in the alternative, if any accounts were stated, and if any sums were found to be due from the defendant to the plaintiff, said sums were arrived at on a verbal report made by the plaintiff, which report was incorrect and misleading to the knowledge of the plaintiff; and further, that by contract dated March 10, 1917, the plaintiff covenanted to construct for the defendant a telephone line as more fully set out in certain specifications and details of construction, and defendant covenanted to pay plaintiff therefor the sum of $19,392 subject to certain adjustments for extras and alterations and work cancelled according to definite unit prices, and that the plaintiff neglected and refused to deliver to the defendant a true and correct statement or any statement of the extras and alterations and work cancelled for which adjustments should be made, and that the plaintiff has been fully paid for all work done and materials supplied in the construction of the said telephone line.

1. I will first deal with the account stated.

The facts are shortly as follows:—The plaintiff, a telephone contractor of some years' experience, saw the plans

Sask.

K.B.

McKENZIE v. THE BIGGAR COCHERY RURAL TELEPHONE CO.

and details of construction of the defendant's proposed telephone line at the office of the Department of Telephones at Regina, shortly before March 10, 1917. While plaintiff was at or near Kelfield, his foreman, Ward, telephoned to him, and he (the plaintiff) came to Biggar, where the plaintiff met Lickfold, the defendant's secretary, and its directors on March 10, 1917, at a meeting of said directors. The contract for building the defendant's proposed telephone line was awarded to the plaintiff for $19,392 and the contract was that day signed by plaintiff and defendant.

At this meeting the defendant produced a plan shewing the proposed telephone line, of which plan Ex. E at the trial is a copy. This plan shews that the said proposed line ends at the north-east corner of sect. 36, tp. 35, range 15, west of the 3rd Meridian, whereas the town of Biggar, to which the defendant's proposed line was leading, is some distance to the east of this point.

After the plaintiff began building the said telephone line, and towards the end of May, 1917, he discovered that from the north-east corner of 36-35-15, W.3, to the central part of the town of Biggar, there was a considerable gap, and that in his opinion Class A lead was necessary to fill this gap, and no Class A lead was provided for in the contract. Plaintiff discussed the matter with Lickfold, the secretary, and Mathews, the president of the defendant. They said the defendant wanted its line to come into and connect with the town of Biggar. The plaintiff informed them that more material would be required, and they would have to get instructions from the Goverment Rural Telephone Department through the Engineering Department at Regina, etc. They instructed plaintiff to see the different Departments.

The plaintiff, complying with their request, saw the Departments, and he was instructed to continue the line from the north-east corner of 36 as a Class A lead. The plaintiff gave this information to the defendant's secretary and president, and explained to them how the line would come in and end near the Biggar Hotel, and also gave them an estimate of the cost.

On May 30, 1917, the letter put in as Ex. A at the trial was signed by the president and secretary of the defendant authorising the plaintiff to build Class A lead into Biggar from the S. E. corner of 1-36-15, which is across the road allowance from N. E. corner 36-35-15, for $806.45, estimating the mileage as ¾ of a mile, the difference, if any, in the

actual mileage to be adjusted in accordance with this price. Other minor changes from the original contract were authorised by this Ex. A.

The plaintiff began the construction of said Class A lead between May 30, 1917, and June 30, 1917.

On June 18, 1917, the secretary of the defendant wrote Ex. F, which is as follows:

Biggar, Sask. June 18, 1917.

"Dept. of Telephones,
Regina, Sask.

Gentlemen:

Owing to the fact our Co. hasn't made provision to complete the system to the central office, and that the contract only reads to S. E. 1-36-15 W.3, we hereby ask permission to issue an additional debenture of $1000.00 to complete same.

The contractor has told us that upon instructions from your engineering dept. a 30 ft. pole lead should be built from the S. E. corner of 1-36-15 W.3, across the G. T. P. tracks in a N. E. direction until it intersects R. R. Avenue, and thence, continue this lead S. E. on R. R. Avenue to the lane in block 5 of the town site, where your Dept. will connect it up with the cable in this lane.

Kindly let us hear from you at the earliest convenience as we have the rural work already started.

Yours truly,
N. W. Lickfold, Sec.
Biggar Cochery R. T. Co. Ltd."

On June 30, 1917, the directors of the defendant held a meeting at which the following resolution was passed: "Mr. Matthews, 2nd by Mr. Squirrel, that the Pres. & Sec. arrange for debenture to carry line into Biggar from 1-36-15."

On July 17, 1917, Naismith, the Superintendent of rural telephones, wrote to the secretary of the Defendant in connection with the deviation around a lake on sect. 34-35-14, apparently meaning 3-36-16 W.3, mentioning that this deviation would add about a mile to defendant's telephone system, and also that a short piece of Class A lead appeared to be necessary to connect defendant's telephone system with the town of Biggar, which has not been included in the Department's estimate.

Later the plaintiff, considering that he had completed his contract, requested the Government to inspect it, and sent to Lickfold, the then secretary of the defendant, statements of and charges for the work he did, which statements Lick-

Sask.

K.B.

McKENZIE v. THE BIGGAR COCHERY RURAL TELEPHONE CO.

fold received some time prior to the meeting of October 3, 1917. These statements or copies thereof were produced from the custody of the defendant at the examination for discovery of the secretary, D. A. Robertson, who succeeded Lickfold, and was put in at the trial as Exs. 6, 7, 8 and 9 with portions of his examination. These exhibits are also referred to as invoices Nos. 379, 408, 410 and 412. Invoice No. 412 is apparently a copy of the original except the last three items of date, October 6.

The Goverment Inspector completed the inspection of the defendant's telephone line on October 3, 1917, and he on that date gave a statement to Lickfold stating he had inspected the line and found it all right. Lickfold, the then secretary of the defendant, representing the defendant, accompanied the inspector when making the said inspection.

During the tour of inspection, Lickfold notified the directors of the defendant that there would be a meeting of the directors on the evening of October 3, 1917, to settle with the plaintiff for his work.

On the evening of October 3, 1917, the directors held a meeting at which the plaintiff was present. It started about 9 p.m. and lasted until after 12 o'clock that night.

The invoices above referred to, Nos. 399, 408, 410 and 412, or copies thereof, were produced at that meeting and the different items gone into.

The invoice No. 412 shewed the following items claimed by plaintiff for work done and material supplied.

To amount of contract	$19392.00
Supplementary work as per invoice No. 379	722.69
Supplementary work as per invoice No. 410	1064.00
Poles, as per invoice . . . . . No. 408	140.00
Desk set to Dr. Geriky	10.00
	$21328.69

And gives credit for the following items:

Total for various credits for drafts, &c., as appears in items on said invoice	19575.71
Omissions from contract	189.00
And the following three items apparently added to this meeting:-	
Orders to pay	247.75
J. A. McKenzie	200.00
Balance order	1116.23
	$ 21328.69

At this meeting of Oct 3. 1917, the following resolution was passed by the defendant's directors: "Moved by Mr. Matthews, 2nd by Mr. Padgham, that we pay Mr. McKenzie a cheque for $200, and pay the following accounts for Mr. McKenzie, Mr. Irvine $212.00, Mr. Matthews $20.00, Mr. Benn $7.00, Mr. Padgham $5.60, Mr. Larlham $3.15, and to also give Mr. McKenzie an order on McKinnon & Co "for $1116.23 in payment of construction contract in full."

The last three items in invoice 412 are the items referred to in the foregoing resolution.

The defendant at this meeting paid plaintiff $200 and gave him an order for $1116.23 on McKinnon & Co., who had the selling of its debenture.

The defendant subsequently stopped payment of this order, and when sued pleads the defence above set forth.

As to the first plea, that there was no account stated:

In 7 Hals, p. 489, the author states as follows:- "Where parties mutually agree that a certain sum is due from one to the other an 'account stated' is said to arise, and the law implies a promise on the part of the one from whom such sum had been agreed to be due to pay the same, on which the other party may sue without being put to proof of the correctness of the account."

And Parke, B., in Wray v. Milestone (1839), 5 M. & W. 21, at p. 24, 151 E. R. 10, says: "As to the necessity of an express promise, if there be any case which lays it down that an express promise is necessary after an account stated, which was meant to be a final account, I dissent from that doctrine. In many cases, the very nature of the transaction will explain with what view the account was stated; and if it be stated so as to shew a final balance then to be paid, the party will be liable."

In the case at Bar, the nature of the transaction clearly shews why the account was stated. The evidence clearly establishes that the meeting was called and the accounts gone into for the very purpose of making a settlement with the plaintiff that night, and after going into the accounts the defendant paid him $200 in cash and gave him the order for $1116.23, "being balance due to him on contract."

"Wherever there is an admission by one party, against whom another has money claims, that there is a balance due from him to the other, there arises from such admission a contract, which affords a distinct cause of action, to pay the balance on request, 'as upon account stated.'" Chitty on Contracts, 16th Ed. sec 4. p. 77.

Sask.

K.B.

McKENZIE v. THE BIGGAR COCHERY RURAL TELEPHONE CO.

From the foregoing citations, and according to the evidence, it is quite clear there was an account stated between plaintiff and defendant, and the amount found due to plaintiff was $1,116.23.

This brings me to the alternative pleas. And it seems to me the first question I have to consider is: the plaintiff and defendant having gone into the accounts and found a balance of $1,116.23 due the plaintiff, should I disregard this account stated and go into the accounts again?

Although not pleaded in the defence during the trial, there was an attempt on the part of some of the defendant witnesses to attach a condition to the giving of the order in question, to the effect that plaintiff was to furnish a further statement of the work done, but the evidence does not satisfy me that such was the case. Apparently there was something said by some of the directors at the meeting of October 3, 1917, about the plaintiff giving a further statement, but it was not made a condition by the Board of Directors as to the giving of the order or the payment of the same. The resolution authorising the giving of the order imposes no condition, and it is only the resolution that can be taken as the act of the defendant.

I find then from the evidence that no condition was attached to the giving of the order or the payment of the same. It was an absolute and unconditional order to pay the $1,116.23 to plaintiff.

In Coleman v. Mellersh (1850), 2 Mac. & G. 309, 42 E.R. 119, the accounting party was a firm of solicitors, and the evidence shewed "misstatement and false representation designedly made," and an open accounting was ordered. An appeal was taken to Lord Chancellor Cottenham, and at p. 314 he lays down the principles upon which stated accounts may be opened up as follows:—"The only question is whether the case proved justified the decree as pronounced, or whether it ought to have been limited to a direction that the Plaintiff should be at liberty to surcharge and falsify the accounts relied upon by the Defendants as settled accounts.

"There is a material difference in the principle on which the Court deals with settled accounts with reference to those two kinds of decrees, as there undoubtedly is in the effect in working them out. A settled account, otherwise unimpeachable, in which an error is proved to exist, may be subjected to a decree to surcharge and falsify, upon the

supposition that one error having been proved, others may be expected upon investigation to be discovered; but if the relative situation of the parties, or the manner in which the settlement took place, or the nature of the error proved, shew that the alleged settlement ought not to be considered as an act binding upon the party signing, and that it would be inequitable for the accounting party to take advantage of it, the Court is not content with enabling the party to surcharge and falsify an account which never ought have been so settled, but directs the taking of an open account."

And in Vernon v. Vawdry (1740), 2 Atk. 119, 26 E.R. 474, the following is laid down:—"If there are only mistakes and omissions in a stated account, the party objecting shall be allowed no more than to surcharge and falsify; but if it is apparent to the Court that there has been fraud and imposition, the decree must be, that the whole shall be opened," etc.

There is no evidence of any misstatement, false representation, fraud or imposition on the part of the plaintiff in the case at Bar.

The defendant had in its possession for some time prior to the meeting of October 3, and also at the meeting, statements in writing shewing what the plaintiff was claiming, and all this was fully explained to the directors at the meeting.

In my opinion the defendant is not entitled to an open accounting.

But should it be entitled to surcharge and falsify the stated account?

In Parkinson v. Hanbury (1867), L.R. 2 H.L. 1, at p. 19, Lord Westbury in his judgment stated as follows:—"Nothing is more requisite than to abide by the old rule, clearly enunciated by Lord Hardwicke, and constantly followed, that if you desire to set aside, or to open, a stated and settled account, so as to have liberty to surcharge and falsify, you must, in your bill, specially charge some, at least one, definite and important error, and support that charge with evidence confirming it as it is laid. Having regard to the manner in which evidence is taken in Courts of equity, there would be no protection to a Defendant if he had not, by proper averment in the bill, distinct notice of the allegation that he had to meet, more especially when the whole of the relief turns entirely on the power of the

Sask.

K.B.

McKENZIE v. THE BIGGAR COCHERY RURAL TELEPHONE CO.

Plaintiff to aver, and to prove satisfactorily, some particular error in his account."

The defendant in its defence alleges that the report was "incorrect and misleading," and in its particulars delivered states in what respects it was incorrect and misleading. But these particulars, except clause (a), of which there was no satisfactory evidence, go to the construction of the contract, a question of law, rather than a question of fact. Clause (b) refers to Class A lead, and says that the items therein mentioned were required to be supplied by the contract, whereas the plaintiff charged them as extras.

I do not think the original contract provides for any of these items. At the time plaintiff and defendant signed the contract they were of the opinion that the defendant's proposed telephone system ended, as Plan E shewed, at the north-east corner of 36-35-15, W.3. And later, when it was discovered that no provision had been made for bringing the system into the town of Biggar, Ex. A was signed by Lickfold and Matthews authorising plaintiff to build Class A lead, and the defendant's Board of Directors authorised the issue of another debenture to pay for this extra work, and took this work into consideration when they settled with plaintiff on October 3, 1917, that the balance due him was $1,116.23.

Clause (c) refers to an alleged shortage in Class D. The evidence does not satisfy me that there was a shortage. "Where there is a question of surcharging and falsifying accounts, the case alleged must be clearly proved by the person impeaching them, and if there is any doubt, it will be determined against him." Gething v. Keighley (1878), 9 Ch. D. 547, at p. 552. And in any event the mileage of Class D in the details of construction was only an estimate, whereas the contract of March 10, 1917, was an entire contract for the system and not divisible. Clause (d) refers to the deviation around a slough.

The defendant tried to establish a new contract with the foreman Ward as to this item. But in my opinion Ward, the foreman, would have no power to make such contract; and in any event, as this contract was not pleaded, I cannot consider the evidence concerning it.

Furthermore, defendant must have known all along that the plaintiff claimed this deviation as an extra. The defendant's attention was drawn to it in Mr. Naismith's letter of July 18, 1917, the plaintiff gave itemised charges for it

in Invoice 379, delivered to defendant long before the meeting of October 3, 1917, and it was discussed and gone into at the said meeting. In my opinion, then, the stated account between plaintiff and defendant settled on October 3, 1917, finding a balance of $1,116.23 due to the plaintiff, should not be opened up, and defendant is liable therefore.

2. With regard to the item of $197.49 for goods sold and delivered:

The goods making up this item are enumerated in Invoice 444 for $49.55, and Invoice 458 for $147.94, and these goods were delivered after the settlement of October 3, 1917, and were not taken into consideration at that settlement. Robertson, in his examination for discovery, submitted the receipt of these goods by the defendant, and that the defendant agreed to pay for them. There is also ample evidence that the defendant agreed to pay interest at the rate of 8% per annum on the $49.55 from November 1, 1917, and on $147.94 from December 1, 1917.

I allow this item of $197.49 to plaintiff with interest at the rate of 8% per annum on $49.55 from November 1, 1917, and on $147.94 from December 1, 1917.

3. As to the $45 for money advanced to W. Wilbur:

Wilbur did work for defendant, and when defendant was settling with Wilbur, defendant, not having sufficient money to pay him, he gave an order to plaintiff on the defendant for $45 to repay the plaintiff for money advanced to him by plaintiff. After this order was given to plaintiff, and knowing this, defendant paid to one Goodman, who had worked for Wilbur, the sum of $33.50, and defendant seeks to charge this to plaintiff. I cannot allow this. Wilbur had been working for defendant, and he had already assigned the $45 to plaintiff, and defendant knew it, and there is no evidence that plaintiff owed Goodman anything.

The plaintiff, however, admitted the following items:—Barker $2, Talbot $2.80, Heather $4.20, Ferguson $4.20, amounting to $13.20. This amount will be deducted from the $45, leaving $31.80 due to plaintiff.

The plaintiff will be entitled to judgment against defendant for $1,345.52, with interest at the rate of 8% per annum on $49.55 from November 1, 1917, and on $147.84 from December 1, 1917, with costs.

Judgment accordingly.

Can.

S.C.

McCARTHY v. THE KING

McCARTHY v. THE KING.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 11, 1921.

Automobiles (§III.B—205)—Driver of—Duty to Use Reasonable Care—Negligence—Liability—Manslaughter.

A person driving an automobile on a public street is under a legal duty to use reasonable care and diligence to avoid endangering human life. If he fails to perform that duty without lawful excuse he is criminally responsible for the consequences. Section 247 of the Criminal Code has done away with the fine distinction between negligence and gross negligence in such cases.

[See Annotation, Automobiles and Motor Vehicles, 39 D.L.R. 4.]

APPEAL from the judgment of the Saskatchewan Court of Appeal (1921), 57 D.L.R. 93, 14 S.L.R. 145, affirming a conviction for manslaughter in failing to use reasonable care and diligence in driving a motor car, and killing a telephone workman working in a man-hole on the street. Affirmed.

G. F. Henderson, K.C., for appellant.

H. Fisher, for respondent.

Idington, J.:—The appellant whilst in charge of and driving an automobile in one of the streets of Regina, ran it over an obstacle described as follows by the trial Judge:-

"The tarpaulin was thrown over a form extending about five or six feet from north to south, and looking at it from the north or from the south it was in the shape of an inverted V. The top of this V would be somewhere between four and five feet high. Possibly nearer four than five feet. The width of the bottom of the V would be between three and four feet. The measurements were not given at the trial, but a witness erected a tarpaulin at the trial, in the presence of the court and jury to represent its position at the time of the accident."

The structure so described covered a man-hole in the street where three men were working for the Provincial Telephone Department, and one of them was killed as the result of this adventure on the part of the appellant.

For so killing that man appellant was indicted for manslaughter and found guilty thereof.

The street in question was a wide one on which there was ample room for appellant to have driven the car in question over the unobstructed part of the street and passed the said structure in safety.

The trial Judge submitted, after said conviction, a reserved case containing the following questions:-

"1.—Did I properly instruct the jury as to the negligence which, under the circumstances of the case, would render

the accused guilty of manslaughter? 2.—In view of the fact that there was no evidence that the accused saw the deceased nor knew that the deceased was under the tarpaulin referred to in the evidence, could the accused be found guilty of manslaughter?"

The Judges of the Court of Appeal (1921), 57 D. L. R. 93, 14 S.L.R. 145, with the exception of Newlands, J.A., answered these questions in the affirmative and sustained the conviction.

The opinion of the majority was written by Lamont, J.A., who reviewed at length many decisions which support the judgment now appealed from, if any needed beyond the relevant section of the Criminal Code which I am about to quote.

Newlands, J.A., held (57 D.L.R. 93 at p. 94) that in the light of some expressions in decisions of long ago that "there must be gross negligence before there is criminal liability," and that "the want of ordinary reasonable care which an ordinary prudent man would have observed although sufficient to render the accused liable in a civil action, is not sufficient in a criminal case."

Several of the cases he cites were mere nisi prius expressions which are not at the present day of much value, even if, as I submit, possibly relevant to the then state of the law.

The law applicable to this case is to be found in sec. 247 of the Crim. Code, cited by Lamont, J.A., at p. 99, which reads as follows:—

"247.— Everyone who has in his charge or under his control anything whatever animate or inaminate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."

This was first enacted in the Criminal Code of 1892, sec. 213. It leaves no room for the refined distinctions between negligence and gross negligence. It imposes an absolute duty on the part of him having charge of that which in its use may endanger human life in the absence of precaution or care. It should not, I respectfully submit, be frittered away by any refinement on the part of the Judges.

The trial Judge's charge throughout was absolutely correct until he momentarily, on objection, interjected the

Can.

S.C.

McCarthy v. The King

remark that there was a possible distinction between that which would render a man liable for civil damages for negligence, and that which would render him liable criminally.

Even if the distinction had been maintainable as I hold it is not in the application of this section, he seems to have covered the ground.

I should have preferred the charge before so amended.

Section 1019 of the Crim. Code, which reads as follows:— "1019.— 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: Provided that if the court of appeal is of the opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted," might, if need be for which in my view there is none, be relied upon. If Newlands, J.A.'s view is correct it should be applied.

The negligence here in question which led to appellant's motor car running over such an obstacle on the street as the above description presents when ample space to pass it without doing so, was so palpably gross that there was not much to be found in the way of palliation even if the old saws about gross negligence could be invoked and relied upon.

There was, in my opinion, no miscarriage of justice.

The appeal should, I think be dismissed.

Duff J.:— Section 258 of the Criminal Code does not I think substantially change the common law. In this I agree with the opinion of Sedgewick J., delivered on behalf of the Court in The Union Colliery case (1900), 31 Can. S.C.R. 81, at p. 87. There may, I think, be cases in which the Judge ought to tell the jury that the conduct of the accused in order to incriminate him under this section must be such as to imply a certain indifference to consequences, but such cases, I think, must be rare and this assuredly is not one of them. Where the accused, having brought into operation a dangerous agency which he has under his control, (that is to say dangerous in the sense that it is calculated to endanger human life), fails to take those precautions which a man of ordinary humanity and reasonably competent understanding would take in the given circumstances for the purpose of avoiding or neutralising the risk, his conduct in itself implies a degree of recklessness justifying the description "gross negligence." The facts of course may disclose

an explanation or excuse bringing the accused's conduct within the category of "reasonable" conduct. But as Vaughan, J., said long ago in Bushel's case (1670), Vaugh. 135, 124 E.R. 1006, 6 How. St. Tr. 999, the Judge does not charge the jury with matters of law in the abstract but only upon the law as growing out of some supposition of fact; and it is much better in such a case as the present, (where, in the absence of explanation, the conduct of the accused—driving a motor through a frequented street at the rate of 12 miles an hour without seeing the road clearly before him—plainly inculpates him) that the trial Judge should seek, as Lamont, J.A., 57 D.L.R. 93, at pp. 95 et seq., did, to bring the jury to concentrate their attention upon the various matters alleged in explanation and excuse.

Anglin, J.:—I would dismiss this appeal. There was dissent in the Court of Appeal, 57 D.L.R. 93, only upon the first question of the reserved case. To that question sec. 247 of the Crim. Code precludes any but an affirmative answer. Failure to take reasonable precautions against, and to use reasonable care to avoid, danger to human life is thereby declared to entail criminal responsibility for the consequences. There is nothing in sec. 16, referred to by Mr. Henderson, to qualify this explicit declaration; and sec. 258 has no bearing, in my opinion, on a case of manslaughter. It would be most unfortunate if anything should be said or done in this Court to countenance the idea that a motor car may be driven with immunity from criminal responsibility if reasonable precautions be not taken against, and reasonable care be not used to avoid, danger to human life. As Bigham, J., said on the trial of a chauffeur for manslaughter by running over a woman in a London street: "There is a greater responsibility on persons engineering a dangerous machine like a large motor car about the streets than on a man driving a one-horse brougham." Rex v. Davis, [1909] 43 L.J. (Newsp.) p. 38.

What are reasonable precautions and what is reasonable care depends in every case upon the circumstances. Carelessness which ought to have been recognised as not unlikely to imperil human life cannot, in my opinion, be regarded as aught else than culpable negligence.

Brodeur, J.:—This appeal arises out of a conviction for manslaughter in the case of a man driving negligently an automobile.

It is contended by the accused that there must be gross negligence to incur criminal liability, and that the degree of

Can.

S.C.

McCarthy v. The King

negligence must be higher in criminal cases than in civil cases.

A large number of cases have been quoted to us on this point, and they might appear somewhat conflicting, though I think that they could be reconciled by a careful examination of the facts in each case. But the language itself of the Criminal Code disposes of this issue. It says in sec. 247:—"Everyone who has in his charge or under his control anything whatever, whether animate or inanimate . . . which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to perform such duty."

Nobody will dispute the fact that an automobile negligently driven is a dangerous thing. Then the driver of his automobile on the street is bound to take reasonable precaution and use reasonable care to avoid any danger.

If our legislators intended to state that there would be criminal liability only in the case of reckless or gross negligence, they would certainly have so declared their intent. But they simply incorporated in our criminal statutes these expressions so well known and so fully construed in the cases of civil negligence.

The absence of reasonable care in driving an automobile may then create a criminal liability. The following cases may be quoted in support of this contention: Reg. v. Murray (1852), 5 Cox C.C. 509; Rex v. Grout (1834), 6 C. & P. 629; The Queen v. Dalloway (1847), 2 Cox C.C. 273.

Even if we construe the Judge's charge as the appellant contends, I consider it legal and sufficient.

The appeal should be dismissed.

Mignault, J.:—The appellant was tried on an indictment for manslaughter for having, when driving a motor car in a public street of Regina, caused the death of one Percy Young. The trial Judge, in charging the jury, directed them as to the law governing the case as follows:—

"It has been decided, and I am going to tell you that the law is, that every person who drives a motor car has a duty to drive it with such care and caution as to prevent, so far as is in his power, any accident or injury to any other person; that is, he has got to use all reasonable precaution to see that no person is injured through his want of caution or precaution."

After the charge, counsel for the accused complained that the Judge should have told the jury that a greater degree of negligence was required in a criminal case than in a civil one, and the Judge recalled the jury and gave them this further direction:—

'I am also asked to direct your attention to the fact that in a criminal case the degree of negligence which renders a man culpably negligent is greater than in a civil case. I think that is quite so, and I am going to charge you to that effect—that while in a civil case a man may be liable to an action for damages, in a criminal case it would take a greater degree of negligence to render him liable. That is so. But in this case it is for you to say whether or not the accused, driving a vehicle of that sort along the streets of the city, took that care which it was the duty of an ordinary prudent man to take in order to avoid doing damage to some person else on the street. If you come to the conclusion that he did not take that care, and that it was in consequence of that want of care that the death of Young took place, then he is guilty; if he did take that care, he is not guilty."

Notwithstanding Mr. Henderson's able argument, I cannot come to the conclusion that the jury was misdirected. Section 247 of the Crim. Code states the law as follows—[See judgment of Idington, J., ante p. 207]

I think the charge is fully supported by this section. It was the duty of the accused to take reasonable precautions to avoid endangering human life, and the jury was told so. It was then for the jury to determine whether the accused had taken these precautions.

Naturally, in the offence of manslaughter, there may be a greater or less degree of guilt according to the circumstances of each case. I see no reason to doubt that the degree of guilt in this case will be duly considered when sentence is pronounced on the jury's verdict.

Appeal dismissed.

OLIVER v. THE KING.

Exchequer Court of Canada, Audette, J. June 2, 1921.

Constitutional Law (§II.B—365)—Exchequer Court Act—Provincial Laws Affecting Limitation of Actions—Jurisdiction.

HELD: That O., having invoked legislation on her behalf, cannot escape from any obligation upon her arising out of such legislation or amendments thereto.

Can.

Ex. C.

OLIVER
v.
THE KING

2. That under sec. 33 of the Exchequer Court Act (R.S.C. 1906, ch. 140) the provisions of the Real Property Limitation Act of the Province of Manitoba (R.S.M. 1913, ch. 116) would apply in respect to the limitation of actions to recover land situate in the said Province.

The fact that the land patents had been signed in Ottawa would not make the law of prescription or limitation of Ontario applicable.

QUAERE: Where suppliant, who alleged a claim to certain lands in Manitoba under the Manitoba Act, 33 Vict. (1870), Ch. 3, sec. 32, by reason of possession and occupancy of a predecessor in title in 1870, took no steps to assert her claim until some 49 years had elapsed after the last-mentioned date, although in the meanwhile, namely, in 1908, the Dominion Government had issued letters-patent for portions of the said lands to other parties, must she not be held by her laches to have acquiesced in the title given by the patents issued in 1908?

PETITION of right seeking to have certain land patents, granted by the Crown, set aside by reason of being issued in error and inadvertently, and to have suppliant's estate converted into freehold by the Crown, and also petition of right seeking to recover $100,200 damages by reason of an alleged breach of contract between suppliants and the Crown.

The facts are stated in the reasons for judgment.

Eugene Lafleur, K.C., T. Rinfret, K.C., and G. Barclay, for suppliants.

F. H. Chrysler, K.C., and P. H. Chrysler, for the Crown.

Audette, J.:—The suppliant, by her petition of right, seeks to set aside and have declared void five land patents, with respect to Lots 47, 48 and 49 in the parish of St. Peter, in the Province of Manitoba, alleged to have been issued, by the Crown, inadvertently and in error and improvidently; for a declaration that she is the owner in fee simple of these lands, and further that she is entitled to have her title confirmed by a grant from the Crown, or to have her estate in the said lands converted into an estate or freehold by grant from the Crown.

I may state, in limine, that owing to the total absence of proof of occupancy, etc., with respect to Lot 47, the suppliant fails to establish any claim to relief in respect of that lot; and add that all which is hereafter said applies to Lots 48 and 49 only.

This claim is based upon an alleged occupation of the lands in question by the suppliant's predecessor in title, now over 50 years ago, and rests mainly upon sec. 32 of The Manitoba Act, 33 Vict. 1870 (Can.) ch. 3.

With respect to documentary title, the suppliant has failed to establish the same, and were it satisfactory in some respects, the chain of title is not brought up to her. This view has been amply acquiesced in, although not actually admitted at Bar, and the action undoubtedly now rests upon occupancy and possession.

Under 33 Vict. ch. 3, sec. 32, sub-sec. 3, of the Manitoba Act: "All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid [1869], of land in that part of the Province in which the Indian title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown."

Now, the utmost that the vague, meagre and unsatisfactory evidence on record—evidence that I may call inferential rather than positive—could establish is that Sinclair was in possession of or occupying some land, which might be ascribed to Lots 48 and 49 in question herein at the time the soldiers came up the Red River on the occasion of the North-West Rebellion. However, there is no date mentioned in evidence except such as might be derived from such a general allegation. One counsel at Bar stated that would be around August 24, 1870. At any rate it would be in the summer of 1870.

Therefore, upon that point it clearly results that the suppliant fails to establish any such occupancy "up to 8th March, 1869" as required by the above recited section.

However, failing to succeed upon that section, suppliant relies upon the Acts of 1874 or 1875. The section of the Act of 1874, in respect to the section in question, was repealed in 1875 and replaced by 38 Vict. 1875 (Can.), ch. 52, sec. 1, which purports to be an amendment of the section above recited (33 Vict. ch. 3, sec. 32, sub-sec. 3), and reads as follows:—

"3. Whereas it is expedient . . . . to afford further facilities to parties claiming land under the third and fourth sub-sections of the thirty-second section of the Act, thirty-third Victoria, chapter three, to obtain Letters Patent for the same: Sec. 3. Be it enacted, that persons satisfactorily establishing undisturbed occupancy of any land within the Province prior to, or those through whom they claim, in actual peaceable possession thereof, on the fifteenth day of July, one thousand eight hundred and seventy, shall be entitled to receive Letters Patent therefor, granting the same

Can.

Ex. C.

OLIVER
v.
THE KING

absolutely to them respectively in fee simple."

This amendment deals with parties claiming under the 3rd section first above referred to, which section enacts that the occupancy alleged must be one "with the sanction and under the license and authority of the Hudson's Bay Company." If such sanction, license and authority be necessary, there is not a tittle of evidence establishing the same.

It is true this Act of 1875 requires the occupancy only prior to July 15, 1870, instead of March 8, 1869, as provided by the original section, but it is claimed that all legislation by the Parliament of Canada in respect of the Act constituting the Province of Manitoba, subsequent to the Manitoba Act (33 Vict. ch. 33) and the Imperial Act confirming the same (34-35 Vict. (1871) ch. 28), is untra vires of the Parliament of Canada and illegal. It is so contended in view of the enactment, under the Manitoba Supplementary Provisions Act, R.S.C. 1906, ch. 99, sec. 22, whereby the suppliant's claim would "be barred as fully and effectually as if it had not been made, if the claimant in respect thereof did not establish his claim before the 1st November, one thousand eight hundred and eighty-six, etc." If that Act has force of law the claim is obviously prescribed and barred by this limitation.

If the suppliant accepts the legislation subsequent to the Manitoba Act extending the occupancy prior to July 15, 1870, she must also accept the legislation, by the same power, in respect to this limitation, which is legislation dealing only with procedure, and under both views she is out of Court.

Moreover, the evidence adduced, unsatisfactory as it may be, could not be regarded as establishing occupation before July 15, 1870—the most it could establish would be occupation somewhat around August 24, 1870, if it at all does establish that fact. The case has not been proved.

This action, although in respect of a claim relying upon possession and occupancy in 1870, has only been instituted in December, 1919—that is 49 years after. Would not such great laches, such delay in asserting such claim shut the door to an applicant who was content to thus sleep upon her imaginary rights, until it is discovered the property has increased in value? Should a Court assist under such circumstances and is not the suppliant estopped by such laches to set up such a claim? Has the suppliant by her

delay not acquiesced in the title given by the Lands Patent in 1908?

Furthermore, the lands in question are situated in Manitoba and the laws with respect to the statute of limitation, under sec. 33 of the Exchequer Court Act, R. S. C. 1906, ch. 140, must be the laws in force in Manitoba. The fact, as contended, that the patents were signed in Ottawa, would not make the laws of Ontario applicable when the lands are situate in Manitoba.

Under the Real Property Limitation Act of the Province of Manitoba, R.S.M. 1913, ch. 116, secs. 4, 5, & 17, an action to recover land is limited to 10 years. The evidence in respect of the possession, adverse to the suppliant in the last 10 years is not as satisfactory as might be desired, yet with the explanation given, the absence of the real owner serving in France during the war, it should under the circumstances of the case, coupled with the patent, be accepted as sufficient on behalf of innocent third parties purchasers for value.

There were several other interesting and important questions raised at Bar, and much might be spread upon record in respect of the same; but, in the view I take of the case, it becomes unnecessary to consider them here. The action must be dismissed for want of evidence. The case has not been proven and therefore fails.

There will be judgment ordering and adjudging that the suppliant is not entitled to any portion of the relief sought by her petition of right.

Action dismissed.

PAGE v. CAMPBELL.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 11, 1921.

Parties (§I.A—1) — Vendor of Land — Restrictive Covenants — Breach of Covenant—Plaintiff Having No Interest in Land for Benefit of Which Restriction Made—Right to Bring Action.

A person who with others has formed a syndicate and purchased farm land which has then been subdivided and sold as building lots, subject to certain building restrictions, is not entitled to succeed in an action against subsequent purchasers of a portion of the property for breach of the building restrictions, if at the time he commences the action, he has sold all his interest in the subdivision and does not retain any land for the benefit of which the restrictive covenant was entered into.

[London County Council v. Allen, [1914] 3 K.B. 642; Formby v. Barker, [1903] 2 Ch. 539, followed.]

APPEAL by the plaintiff from the judgment of the

Can.

S.C.

PAGE v. CAMPBELL.

Supreme Court of Ontario, Appellate Division, (1920), 18 O.W.N. 333, in an action for a mandatory injunction for the removal of a church built in breach of certain restrictive covenants to which the land was subject. Affirmed.

F. D. Davis, for appellant.

E. S. Wigle, K.C., for respondents.

Davies, C.J.:—I am of the opinion that this appeal should be dismissed with costs for the reasons stated by Meredith, C. J. O., in delivering the unanimous judgment of the Appellate Division. The grounds on which the Chief Justice based his opinion are succinctly and clearly stated in the following paragraph of his reasons for judgment:— (See (1920), 18 O. W. N. 333 at p. 334.) "In my opinion the respondent is not entitled to the relief awarded to him. He has no interest in the question raised, and does not represent anyone who has an interest. If the owners of the other lots have rights, the dismissal of the action will not affect them. The extraordinary remedy sought ought not to be awarded even if the respondent had a technical right to enforce the covenant, especially in the circumstances to which I have referred, and he has not been damnified by what the appellants have done."

I concur in these conclusions alike of law and fact and have nothing useful to add to them.

Idington J.:— The appellant and others were owners of some farm lands, of which, by and through him, as their trustee, they made a subdivision for residential purposes.

All of said subdivision except two lots had been sold before this action, and those two at the begining of the action were sold.

Hence at the trial he had no interest in the maintenance of such an action as this, which is brought against the respondents, as trustees and owners of some lots in said subdivision upon which a church was being built, to restrain their building there because doing so is alleged to be in violation of a restrictive covenant given appellant by some of his grantees from whom respondents acquired their title.

The substance of the said covenant is thus set forth in the appellant's factum:— "The grantees, for themselves, their heirs and assigns, hereby covenant and agree with the grantor, his heirs and assigns, that no buildings shall be erected upon the said lands except for residences and their necessary outhouses, such residences to be erected as single residences or double tenements only, and all such residences, if they be single residences, are to be erected at a

cost of not less than $1,500, and if they be double tenements are to be erected at a cost of not less than $2,500, and no buildings are to be erected on the said lands at a distance of less than twelve feet from the street line of the said Moy Avenue."

The decision in the case of London County Council v. Allen [1914] 3 K.B. 642, seems conclusively to restrict the right recognised in Tulk v. Moxhay, (1848), 2 Ph. 774, 41 E.R. 1143, and asserted by appellant herein to enforce such a covenant to one who owns part of the land in question.

Surely all that was within the contemplation of him and the parties giving such like covenants was to protect the area of the subdivision of which each so covenanting was buying a part. Appellant pretends herein that he holds under the trust deed from his fellow adventurers other lands not subdivided and hence owns part of the land in question and therefore comes within the terms of the judgment in the said London County Council case.

The trust deed to him and under which he acted imposes no such restrictive scheme as part of his trust.

It would seem as if the restrictive covenant scheme was a development of his own and was limited to the area of the subdivision in question, and though presumably his cestuis que trustent assented to the use thereof so far as that area was in question, it by no means follows that they would assent to it in regard to other subdivisions and he certainly, in execution of his trust, could not impose it, without their consent, in relation to other subdivisions. That might in one section of the property be advantageous to the sellers but in another quite the reverse.

Again it is urged that he is a trustee for those who bought other lots than those immediately in question in same subdivision.

I fail to find the trust anywhere expressed. Indeed the appellant seems to have carefully avoided creating such a trust, or having it imposed upon him.

Though the covenant is made with the appellant "his heirs and assigns" there is no evidence of his having assigned it, or of ever having given the purchasers of other lots the benefit thereof in any deed.

I fail to find therefore how any of those he pretends to be taking a paternal interest in, could set up any such claim.

Hence in light of the above cited cases appellant has no

Can.
S.C.
PAGE
v.
CAMPBELL.

interest in equity to assert such right as he does and cannot properly pretend he is acting as trustee for such others as suggested in argument.

In conclusion the acquiescence and delay from at least some time in November until January 24, whilst the church was being built, should debar him seeking any injunction when the building was almost completed.

The purpose of so building was evident in October and if an injunction was to be the remedy, it should have been applied for promptly.

The covenant does not run with the land and hence the only possible remedy was in equity which does not countenance such a course of conduct.

The appeal should be dismissed with costs.

Duff, J.:—This appeal should be dismissed with costs.

Anglin, J.:—That as owners deriving title under the covenantor the defendants are not bound to the plaintiff covenantee if he does not retain any land for the benefit of which the restrictive covenant sued upon was entered into is clearly established by London County Council v. Allen, [1914] 3 K.B. 642, and Formby v. Barker, [1903] 2 Ch. 539—decisions of the English Court of Appeal. Buckley, L.J., says, [1914] 3 K.B. 642 at p. 660:—"The doctrine in Tulk v. Moxhay, 2 Ph. 774, does not extend to the case in which the covenantee has no land capable of enjoying as against the land of the covenantor the benefit of the restrictive covenant. * * * Where the covenantee has no land, the derivative owner claiming under the covenantor is bound neither in contract nor by the equitable doctrine which attaches in the case where there is land capable of enjoying the restrictive covenant."

The plaintiff and certain co-adventurers formed a syndicate to purchase the Davis farm, a property in the City of Windsor, for the purpose of subdividing and disposing of it in building lots. The title was vested in the plaintiff as trustee for sale on behalf of himself and the other members of the syndicate. Three plans of subdivision of parts of the farm were prepared and registered in the following order as Nos. 579, 591 and 648 respectively. It does not appear whether any lot on Plan 579 was disposed of before the registration of Plan 648. The lots owned by the defendants they acquired from the original purchasers from the plaintiff, and on them they built the church which the plaintiff seeks to have removed. These lots are within subdivision 579 and front on Moy Ave.

When the action was begun the plaintiff had some interest in a lot in this street and in another in Hall Ave., both within subdivision 579, but he has since parted with both these lots and neither he nor his co-adventurers have any interest now in any lot fronting either on Moy Ave. or Hall Ave. within subdivision 579. Personally he owns no land whatever within the subdivision.

He and his co-adventurers some time since divided amongst themselves all the unsold lands shewn on Plan 579 and his trust as to that subdivision thereupon terminated. He still owns lot No. 605 in Moy Ave., within subdivision 648.

The purpose of the covenant sued upon would seem to have been to require the owners of lots 138 and 139, Moy Ave., on which the offending church is built, to conform to the building scheme of the syndicate whereby Hall Ave. and Moy Ave., within the subdivision covered by Plan 579 were to remain exclusively residential streets. It would appear to have been the lands abutting on these two streets within this subdivision and no others that were intended to be benefited thereby. While this is not explicitly stated in the record the following extract from the examination-in-chief of the plaintiff makes it tolerably clear that the trial proceeded on that footing.

"Q. Which of these sub-divisions are the lands in question in? A. 579. Q. The lots are included in registered sub-division 579? A. Yes. Q. There were restrictions included in your conveyance of the lots? A. Yes. Q. Tell us how that happened? A. Certain streets, Moy and Hall, were restricted to residential property only. His Lordship: Is that not a matter of written record? Mr. Davis: I wish to show the general scheme. We say it was restricted property. His Lordship: The deeds put in, I take it, contain the restrictions on which you rely? Mr. Davis: Yes, my lord. Q. Were all the lots sold under restrictions? A. All of it except the one large block that with a restriction of some kind on it.

His Lordship: It might be helpful to know over what land or lands the restrictions now in issue extended. Witness: I can shew it from the plan. Mr. Davis: Q. What portion of the lands covered by these plans was subject to restrictions?

Mr. Wigle: Confine yourself to 579. That is the only one in question. Mr. Davis: What portion of 579 was subject to restrictions? A. All of it except the one large block that

Can.

S.C.

PAGE v. CAMPBELL.

was sold for a large home—everything excepting that.

His Lordship: Subject to what restrictions? Mr. Davis: Q. What restrictions were there? A. Moy and Hall avenues were restricted to residential streets."

The plaintiff therefore appears to have no status to maintain this action.

Moreover he represented to the church authorities through the defendant Allworth, before the church was erected, that personally he had no objection to its being built-that his opposition was solely because as trustee of the farm he deemed it his duty to protect customers to whom he had sold. In his evidence he says that it is in their interest that this action, although not purporting to be brought by him as a trustee or in any other representative capacity, is maintained. In view of the subsequent change in the defendants' position by the erection of the church, even if he still held land within the benefit of the covenant, it would seem not improbable that suing as an individual he would be confronted by an awkward estoppel.

He never was trustee for his vendees and has no status to assert any rights they may have. His trust for the syndicate, if still subsisting, would not seem to help his position, since the syndicate retains no land for the benefit of which the covenant was obtained. That trust, however, has come to an end.

Finally the fact that this action was brought only when the defendants' building was nearing completion would probably afford a defence on the ground of laches to the claim for the extraordinary remedy of a mandatory injunction for its removal.

The appeal fails and must be dismissed with costs.

Brodeur, J. (dissenting):—The appellant's action is for an injunction restraining the defendants from erecting on the corner of Moy and Niagara streets, in the City of Windsor, a church, contrary to the building restrictions which were stipulated in the deed of sale which the appellant made of the lots of land on which this church was to be built.

The appellant was the owner with some others of a farm which is within the boundaries of Windsor and they decided to subdivide it into building lots and the appellant was appointed trustee for his co-owners to make the sale of these lots; and a conveyance to that effect was made to him on the express covenant that building restrictions should be placed upon the lots fronting Moy Ave. This covenant was fully carried out by the appellant in all the grants which he

made.

In 1913, a sale was made of the lots in question in this case to the Turners, with the usual building restrictions; and that sale was duly registered; and the defendants purchased these lots from the Turners with notice of those building restrictions. They tried to obtain the consent of several of their neighbours to the construction of the church because such an edifice would be a violation of those building restrictions. They failed to obtain the consent of a larger number of interested parties who petitioned the appellant to institute proceedings to restrain the trustees from constructing the church. Hence the present action, which was maintained by the trial Judge but whose decision was reversed by the first Appellate Division on the ground that the plaintiff has no interest in the question raised since he has no lots on Moy Ave.

The evidence shews that the plaintiff, after his co-owners gave him the sale of the farm in question, had four subdivision plans prepared. The first one was made by McKay on April 24, 1911, and was registered under No. 579. It covered the front part of the farm to Erie St., and contained lots which were numbered 1 to 445. It contained on Moy Ave. the lots 138 and 139 in dispute in this case. At the time of the institution of the action, the plaintiff was personally the owner of lots 228 and 229 which were shewn on this survey plan No. 579, but he had sold them before the trial took place.

On March 22, 1912, the plaintiff went on with the survey of the farm from Erie St. The same land surveyor, McKay, prepared a plan which was registered as Plan 591. The lots described on this new plan were known as Nos. 450 to 562. Moy Ave. was continued on this plan as a prolongation of the one shewn on Plan 579. There was on this latter plan a block of land called "Block A." which was then left without being subdivided; but on November 16, 1912, the subdivision of this Block A was made and registered. The lots covered by this subdivision of Block A were numbered 566 to 591 inclusively.

On January 30, 1913, plaintiff had the work of the subdivision of the farm continued from above Erie St. to Ottawa St. and a plan giving a description of the lots 592 to 707 was prepared, under the number 648, by the same surveyor. On this survey is shewn the lot 605 which was situate on Moy Ave., and which was purchased by the plaintiff on December 17, 1915, and which was at the time of the institution of

Can.
S.C.
PAGE
v.
CAMPBELL.

the action and of the trial, and which is still, his property.

Those three surveys covered a great part of the farm which the plaintiff and his associates had purchased in 1911.

When the plaintiff sold to the Turners on August 5, 1913, the lots 138 and 139 situate on Moy Ave., the three subdivision plans had been registered and the purchasers covenanted that they would not erect buildings upon these lots 138 and 139, except for residences.

When the plaintiff acquired lot 605, it was on a restrictive agreement of about the same nature as the one stipulated in the Turner contract.

The respondents acquired lots 138 and 139 from the Turners in September, 1917, and got notice of the restrictive clauses affecting these lots, though no formal covenant was stipulated in their deed of acquisition. They tried to obtain the consent of their neighbours to their erecting a church on these lots. Some of them acquiesced and waived their rights. Some others, amongst whom is the plaintiff, refused to give the necessary consent. It is possible that if the church authorities had been willing to erect a stone or brick building all the objections would have vanished. It is not very clear in the evidence, but it may be surmised that a large construction of inflammable materials would be of such a dangerous character that these neighbours would not feel disposed to waive their rights under the building scheme which had been devised as to the nature of the construction on Moy Ave.

I cannot see how the Appellate Division has made the mistake of stating that the respondent had no interest in any lot on Moy Ave. There has been perhaps a confusion as to some lots, viz., 228 and 229, which appear on Plan 579 which the plaintiff possessed at the institution of the action but which he sold before the trial. He is asked the following:—"Q. Do you own any lands now in the subdivision where the lots in question are? A. At the present time, no sir."

The witness evidently refers as we may see by the context to the subdivision Plan 579. But at p. 17 of his evidence, he makes it very clear that he is still the owner of a lot, No. 605, on Moy Ave.

This lot, No. 605, appears on the subdivision Plan No. 648, of January 30, 1913, which was the continuation of the two previous Plans 579 and 591, made, respectively, in 1911 and 1912. These three plans had been registered long be-

fore the Turners purchased in 1913, and long, also, before the respondent purchased in 1917.

This Moy Ave. was running in a straight line from Sandwich St. to Ottawa St., and all the lots sold on this street, including No. 605, were sold with building restrictions.

This is a case in which we should refuse to apply the principles laid down in the cases of Formby v. Barker, [1903] 2 Ch. 539; London County Council v. Allen, [1914] 3 K.B. p. 642; Millbourn v. Lyons, [1914] 2 Ch. 231, relied upon by the respondent, because in those cases the plaintiff had no interest in any land situate near the one in dispute.

In the present case the appellant is still the owner of a lot situate on Moy Ave. He is himself under restrictive obligations. He is then entitled to rely on Tulk v. Moxhay, 2 Ph. 774, 41 E.R. 1143, and to ask that the respondents the subsequent purchasers of the lots 138 and 139 on Moy Ave., be ordered to demolish the building which they have erected contrary to the covenant contained in their vendor's title.

The respondents contended also that the plaintiff should not succeed because when the church was constructed he stood by and allowed the respondents to complete their building. The work began in December and the plaintiff almost immediately saw the respondents and made his objections to the building being erected. Correspondence was exchanged between the parties until January and, not being able to agree, the present action was instituted on January 16. It cannot be contended in those circumstances, that the respondents may effectively say that the plaintiff stood by.

The judgment a quo should be reversed and the decision of the trial Judge restored with costs of this Court and of the Appellate Division.

Mignault, J.:—On the ground that the appellant at the time of the trial owned no lots in the subdivision where the church erected by the respondents is situated, and therefore had no interest in the restrictions imposed when the lots were first sold by him, I think the appeal fails and should be dismissed.

He clearly says that he owns no land in this subdivision: "Q. Do you own any lands now in the sub-division where the lots in question are? A. At the present time, no, sir. His Lordship: In 579? A. I did when this action was started, but they have since been sold.

Mr. Davis: Have you no lands at all in the subdivision?

B.C.

S.C.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA.

A. No, sir, not at the present time. They have been sold since this action was started."

The restrictions preventing the erection of buildings not of a residential character had been imposed by the appellant on the predecessors in title of the respondents. The latter purchased the property with knowledge of these restrictions but without having, by their deed of purchase, covenanted to observe them. There is therefore no privity of contract between the appellant and the respondents.

On the authority, however, of Tulk v. Moxhay, 2 Ph. 774, 41 E.R. 1143, the appellant contends that he is entitled in equity to enforce this covenant against the respondents who purchased with notice of the building restrictions.

The answer is that having disposed of all land in the subdivision, he is without interest to enforce the covenant, and that therefore the doctrine of Tulk v. Moxhay does not apply; London County Council v. Allen, [1914] 3 K.B. 642; Millbourn v. Lyons [1914] 2 Ch. 231.

The appellant when asked what interest he had in the enforcement of the covenant, answered that, as trustee of the farm, it was his duty to protect the customers to whom he sold lots. It seems to me that these customers, if they are aggrieved by the erection of the respondents' church, should assert their own rights. I am clear, however, that the appellant, having no longer any interest in the land to be benefited by the covenant, cannot now enforce the restrictions.

Appeal dismissed.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA.

British Columbia Supreme Court, Macdonald, J. December 10, 1920.

Companies (§VI.A—313) — Winding-up — Status of Liquidator — Securities Given by Company—Power of Company to Borrow —Attacking—Onus of Proof—Winding-up Act, R.S.C. 1906, ch. 144—Companies Act, R.S.C. 1906, ch. 79—Evidence—Absence of Intention by Depositee.

A liquidator of a company which is being wound up under the Winding-up Act, R.S.C. 1906, ch. 144, has a right under sec. 98 to attack a depositee of securities of the insolvent company, and contest its right to retain such securities on the ground that the company never became entitled to commence business, and had therefore no right to transfer any property or securities, and that they cannot be retained against the liquidator.

The Companies Act R.S.C. 1906, ch. 79, sec. 175 goes no further nor was intended to go any further, than to develop the principle that the books of a partnership are evidence, as between the partners, but it gives no support to a contention that they can be used for such purpose against strangers, and in the absence of a statute the rule is that corporation books are not

admissible in matters of a private nature to establish or support a right or claim of the corporation or its members against a stranger except as memoranda in connection with the evidence of a witness who has testified from personal knowledge.

Where power has been conferred upon a company to borrow money under certain restrictions a bank whose local manage takes the precaution of having letters from the company's solicitors indicating that all the requirements as to borrowing have been complied with, and who receives copies of the by-laws and resolutions properly certified, authorising the borrowing of moneys and transacting the usual and necessary banking business, is justified in concluding that the borrowing powers had been properly exercised, and has a right to assume that all matters of internal management have been duly complied with.

[Royal British Bank v. Turquand (1885), 5 El. & Bl. 248, 119 E.R. 474; (1856), 6 El. & Bl. 327, 119 E.R. 886, followed.]

Section 98 (1) of the Winding-up Act is ineffectual to support a recovery of all or a portion of the securities given by a company unless the person taking such securities had knowledge that the condition of the affairs of the company was such as to border on insolvency at the time of obtaining the advances for which the security was given. The presumption in sec. 98 (2) that such securities were deposited in contemplation of insolvency is rebuttable, the burden of proof being cast upon the party receiving such securities of shewing that he had no intention of so receiving such securities or of defrauding the creditors.

[Hammond v. Bank of Ottawa (1910), 22 O.L.R. 73, followed; Adams & Burns v. Bank of Montreal (1889), 8 B.C.R. 314; (1901), 32 Can. S.C.R. 719, referred to.]

ACTION for an account of securities deposited or pledged by the plaintiff with the defendant, and for an order directing a return of such securities and repayment of any moneys received in respect thereof. Action dismissed.

C. Wilson, K. C., and A. Whealler, for plaintiff.

H. Tupper, K. C., and A. Bull, for defendant.

Macdonald, J.:— Plaintiffs seek to have an account taken of all securities deposited, or pledged, by the plaintiff company with the defendant, and for an order, directing a return of such securities, and repayment by the defendant of any moneys it may have received in regard thereof. The action, as originally commenced, was based upon the effect of sec. 98 of the Winding-up Act, R. S. C., 1906, ch. 144, but it was subsequently extended, so as to include an averment, that the company never became entitled to commence business. It was submitted, that, in that event, it had no right, to transfer to the defendant any property, or securities, that it may have received, while thus illegally carrying on business and that the defendant could not retain them as against the liquidator.

As an initial ground, defendant contended, that the liq-

B.C.

S.C.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA.

uidator could not attack this position and that he was not in any better one than if the company were seeking a return of its securities.

Some support is afforded to such a contention by the judgment of Riddell, J., in Re Canadian Shipbuilding Co. (1912), 6 D. L. R. 174. 26 O. L. R. 564, but in that case the rights of the liquidator were asserted under a particular statute and such decision was followed in Security Trust Co. Ltd. v. Stewart, (1918), 39 D.L.R. 518, 12 Alta. L.R. 420, at p. 423. The rights of a liquidator are succinctly indicated by Street, J. in Re Canadian Camera & Optical Company, (1901), 2 O. L. R. 677, at p 679, as follows:—

"It is necessary to bear in mind the position in which a liquidator stands in a compulsory winding-up, viz., that, while in no sense an assignee for value of the company, yet he stands for the creditors of the company, and is entitled to enforce their rights, because their right to prosecute actions themselves against the company and to recover their claims directly out of the property of the company is taken away by the Winding-up Act."

Teetzel, J. followed this judgment in National Trust Co. v. Trust & Guarantee Co. (1912), 5 D.L.R. 459, 26 O.L.R. 279. Then Lord Davey in Kent v. La Communaute des Soeurs de Charite de la Providence, [1903] A.C. 220, at 226, 72 L. J. (P. C.) 61, refers to the duties and powers of the liquidator as follows:—

"The office of the liquidator has in fact a double aspect. On the one hand he wields the powers of the company, and on the other hand he is the representative for some purposes of the creditors and contributories. There are therefore many cases in which he may sue in his own name, as e.g., to impeach some act or deed of the company before winding-up which is made voidable in the interest of the creditors and contributories."

I do not think this contention of the defendant is tenable. I am confirmed in this conclusion by the fact that no objection of this nature was raised in a similar action of Blackburn Bldg. Society v. Cunliffe, etc., Co. (1882), 22 Ch. D 61, 31 W.R. 98, in that case, it was alleged, that an overdraft of the building society had been illegally obtained and an action was brought by the official liquidators, seeking practically the same remedies as the plaintiffs herein.

The liquidator, having thus, in my opinion a status to attack the defendant and contest its right to retain such secur-

ities, I next consider the terms and conditions affecting the incorporation of the plaintiff company and their fulfilment or otherwise.

It appears from the preamble to the Dominion Act of incorporation that the Dominion Trust Co. Ltd., hereafter called the "Old Company," had been incorporated by letters patent of this Province, and that such incorporation was subsequently confirmed and extended by 8 Edw. VII. 1908, (B. C.), Ch. 59. Such old company in 1912, obtained Dominion incorporation of the "Dominion Trust Company" (2 Geo. V., 1912, (Can.), Ch. 89), hereafter called the "New Company," and certain directors of the old company were named as provisional directors of the new company. The company thus formed by Dominion legislation was a separate entity from that of the company, which applied for its incorporation and could not be termed its successor. It was given power to acquire the stock and business of the old company, conditional upon the assumption of its debts, obligations and liabilities. The capital stock of the new company was declared to be $5,000,000, divided into 50,000 shares of $100 each. While the new company, by virtue of such Act, became a corporation, still, there were certain conditions imposed before it became entitled to do business. It was provided by sec. 5 that:—

"The Company shall not commence business until at least two hundred and fifty thousand dollars of stock have been bona fide subscribed and one hundred thousand dollars paid thereon in cash into the funds of the Company, to be appropriated only for the purposes of the Company under this Act."

The plaintiffs take the ground, that these provisions operate as conditions precedent to the right of the new company to do business and that it failed to comply with such conditions, with the result that all its transactions were illegal and capable of being attacked. It was also submitted, that such failure brought into play another section of the Act of incorporation and constituted a forfeiture of the charter, through the operations of the company not having been legally commenced within two years from the passage of the Act. These provisions, as to forfeiture, are as follows:-

"17. The powers granted by this Act shall expire, and this Act shall cease to be in force, for all purposes except for the winding up of the Company, at the end of two years from the passing thereof unless the Company goes into

B.C.

S.C.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA.

actual operation within such two years."

This contention, as to the new company illegally carrying on business, was not advanced until about 2 years after the commencement of the action. It was, at the trial, featured as a very strong point in their favour by the plaintiffs, though it was admitted that up to the time it was thus raised, no one had questioned the right of the new company to do business. There is no doubt, that, as a fact, whether legally entitled to do so or not, the new company virtually stepped into the shoes of the old company. It operated through the same officials, used the same office and adopted the same books with slight exceptions. It exercised the powers granted by its Act of incorporation and its existence, as a corporation, was recognised by Dominion legislation, 3-4 Geo. V., 1913, ch. 107, containing provisions dealing with shares and share warrants and giving the important and additional power to the company of borrowing, under certain conditions. Then when application was made to wind up the company, in October, 1914, it was not on the ground that it had no right to do business, but because its business was in such a state as to require the intervention of the statute, primarily in the interest of the creditors. The right of the company to do business was conceded, and the liquidator was authorised in the winding-up to utilise all the powers vested in the new company by its Act of incorporation. Under these circumstances, thus shortly outlined, an argument is presented by the defendant, that it is not open to the plaintiffs to now allege that the new company did not lawfully commence business. The determination of such objection would involve a decision, as to whether non-compliance with the conditions precedent, as to commencing business, is an irregularity or an illegality, affecting the company. It only, however, becomes necessary for me to arrive at such a decision in the event of it being proven as a fact that such non-fulfilment took place on the part of the new company.

I should first reach a conclusion on this important point, that the onus of shewing fulfilment of such conditions rests upon the defendant. This position is not consistent with that assumed during the trial and is at variance with the pleadings. I think, considering the form of the action, that the plaintiffs properly undertook the task of proving that the new company did not comply with the requisite conditions, prior to their commencing business.

Have the plaintiffs satisfied such burden and afforded proper proof on this branch of their case? The nature of the evidence tendered, for this purpose, came under consideration early in the trial. The liquidator, while giving his evidence, in referring to the necessity for $250,000 of stock being bona fide subscribed and $100,000 paid thereon in cash into the funds of the company, stated that neither of these events had occurred. It was quite apparent that these statements were not based on his own knowledge, but on information derived from the books, papers and documents of the new company, which had come into his possession. It was contended that, under these circumstances, no weight should be attached to such statements.

I thought the proper course to adopt was to allow evidence of this kind to be given provisionally by the liquidator, as well as by Carmichael, an accountant, called as a witness by the plaintiffs. I also permitted various books of the company to be filed as exhibits. I made it quite clear, however, that I was not accepting such statements or books as evidence, and that ,in giving my judgment, I might discard them altogether. In pursuing this course, I referred to the case of Jacker v. International Cable Co. (1888), 5 T.L.R. 13, where Lord Esher, M.R., indicates, that even where there is no objection made to evidence, which has been wrongly admitted, "it was the duty of the Judge to reject it when he came to give his judgment * * * *; or if it were objected to and admitted, this Court was bound to reject it."

Fry, L.J., and Lopes, L.J., agreed, as to the duty of the Court, where such evidence had been improperly admitted, and as to the necessity of a case being decided upon legal evidence.

Was such evidence offered by plaintiffs legal and should it be relied upon to prove that the plaintiff company commenced its business illegally? It is almost needless to say, that I should, in coming to a conclusion on this important issue, not be satisfied with merely forming an opinion in the matter, but should feel certain that my finding was supported by proper legal evidence. I do not think that the oral evidence on the point can be treated as more than hearsay, and so the source, or basis, for such evidence must be considered, and its admissibility determined.

There was no direct proof as to the genuineness of the cash book, share register, and other books of the plaintiff company tendered in evidence; but assuming that they were

B.C.

S.C.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA.

as represented, can they be adduced by the plaintiff as evidence against the defendant? It was sought by their production and perusal, assisted by explanatory oral evidence, to prove that the requisite shares had not been subscribed, nor the stipulated amount paid into the funds of the plaintiff company. Ordinarily, a plaintiff undertaking, by the form of his action and pleading, to prove the existence or non-existence of an essential act, is required to do so, by primary evidence, if available. If this is to be accomplished, through witnesses, then, they should speak from their own knowledge. He is not allowed to establish the truth of such fact by a self-made unsworn statement, such as his own cash books. There may be circumstances which will permit the introduction of secondary evidence. In this case, it is not suggested that the evidence tendered comes within the latter category. It must then, if receivable, be an exception to the general rules of evidence and sanctioned by some statutory provision, giving such a privilege to a corporation, as distinguished from a private individual. A number of authorities have been cited, as tending to support the plaintiffs in their contention that such evidence should be accepted, but practically all of them were either actions for calls or litigation amongst the members of a company. The decision in The Queen v. Nash (1852), 2 Den. 493, 21 L.J. (M.C.) 147, gives some assistance to the plaintiffs, but the statute there considered (8-9 Vict., ch. 16), allowing the share register to be used as evidence, does not correspond in this respect with provisions for a like purpose in the Dominion Companies Act. A comparison of the two sections, dealing with such evidence, shows the distinction, and that the Imperial Act is much broader in its terms. 8-9 Vict., 1845 (Imp.), ch. 16, sec. 28, is as follows:—

"The production of the register of shareholders shall be prima facie evidence of such defendant being a shareholder and of the number and amount of his shares."

Whereas in the Companies Act, R.S.C., 1906, ch. 79, the section is as follows:—

"175. All books required by this Part to be kept by the secretary or by any other officer of the company charged with that duty shall, in any suit or proceeding against the company or against any shareholder, be prima facie evidence of all facts purporting to be therein stated."

The necessity for placing a strict construction upon legislation of this nature was referred to by Lord Brougham in

Bain v. Whitehaven & Furness Jct. R. Co., (1850) 3 H.L. Cas. 1, at p. 22, 10 E.R. 1. He was there discussing the effect of a section in the Companies' Clauses Consolidation Act, 8-9 Vict. 1845 (Imp.), ch. 17, similar to the section referred to in The Queen v. Nash, supra, and stated as follows:—

"A great privilege is bestowed by the Act upon the company, neither more nor less than that of making evidence for itself. The books of the company are made evidence for the company, and, unless rebutted by counter-evidence, will be sufficient to warrant a verdict in each case. It must be admitted that this is a very great privilege, and an exception to the ordinary rules of evidence. By those rules, and the rules of common sense and justice, what a man writes is evidence against him, but not evidence in his favour; but here the proposition is reversed. So that the company, by writing in the books that "A.B. holds" a certain number of shares, can go into Court and make A.B. answerable for them, and can produce the entry as evidence against him. This is a great privilege, and in order to justify the exercise of it, the conditions on which it is given, namely, the provisions of the statute as to the making of these entries, must be strictly complied with; and I hold that it is much safer to consider each of those provisions as a condition precedent, as a provision imperative, and not merely directory, on account of the great importance of the privilege itself, and on account of its being an exception to all ordinary rules of evidence. If, therefore, I had not found a distinct compliance with the requisitions of the 9th section, I should not have considered that the 29th section was of any avail to the applicant in making these books evidence for him, and against his adversary."

I do not think, that the Dominion legislation goes further, nor was intended to go further, than to develop the principle that the books of a partnership are evidence, as between the partners, but it gives no support to a contention that they can be used for such purpose against strangers. In that event, the situation is thus, shortly outlined, in 22 Corp. Jur., pp. 898, 899:—

"In the absence of a statute, the rule generally prevailing is, that corporation books are not admissible in matters of a private nature, to establish or support a right or claim of the corporation or its members against a stranger * * * except as memoranda in connection with the evidence of a

B.C.

S.C.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA.

witness who has testified from personal knowledge."

Amongst the numerous authorities there cited, in support of this proposition of the law, the judgment of the majority of the Court in Chesapeake & O. R. Co. v. Deep Water R. Co. (1905), 50 S.E. Rep. 890, is well worthy of consideration. In that case, after referring to a portion of Thompson's work on "Corporations," as to whether the books and records of a corporation are evidence as against strangers, and pointing out that it is, in a measure, so stated in one paragraph and the contrary, in effect, outlined in another, the judgment then quotes, with approval, two further extracts from such work as follows, at p. 909:—

"But where it is sought to use the records of a private corporation as evidence of the facts which they recite, for the purpose of concluding, or even influencing, the rights of third parties, who are strangers to the record, then such records are not admissible, on the same principle which operates to exclude the records of legal judgments, when offered for a similar purpose, on the principle that they are res inter alios acta. The sound rule, then, is that the records of a private corporation cannot be used in evidence, for the purpose of sustaining a claim of the corporation against persons who are not members of it, or to defeat a claim of such a person against the corporation, or to affect strangers anyway."

The judgment then deals with the inconsistency of the author, as follows, at pp. 909, 910:—

"There is, at least, an apparent contradiction in the language quoted, but this may be due to mere inaccuracy of expression. If it be shown by competent evidence that a resolution was passed that a meeting was held and that an organisation was effected, then the record made of the resolution, the by-law, or the organisation would undoubtedly be at least admissible evidence to show what by-law was passed, what resolution was adopted, and the character of the organisation affected; but this is a very different matter from admitting these records to show that they were made. Proof of the creation of a thing differs widely from proof of the identity or character of a thing, after it has been made."

An excerpt from Wigmore on Evidence, vol. 3, sec. 1661, is then discussed, but, it is stated, that there were no cases cited, illustrating what is meant by the citation. Another view of the author, as to the weight to be attached to the

records of the proceedings and acts of an ordinary private corporation, is referred to as follows, "According to the other theory, they are merely entries of the oral doings, and are thus analogous to any ordinary person's co-temporary entries of his doings."

Considered in that light, they can be taken as part of the oral testimony of the party who made them, but not as proof that the statements therein contained are true or "were made at the time, in the manner and by the authority recited therein."

In London v. Lynn, (1789), 1 H. Bl. 206, 126 E.R. 119, an effort was made to use the books of the corporation as evidence of their contents. They were refused for that purpose, as appears by the footnote at p. 214. "The defendants were not permitted to give in evidence their corporation books to prove their own rights."

Here, the plaintiff sought to take a similar course, as to the non- performance of the conditions, giving the new company the right to commence business. The failure, to adequately subscribe for shares, or make the necessary payment, was, as I have mentioned, sought to be proven, not by witnesses, conversant with the facts, but by those who did not even make the entries in the books, and who based their belief on these points, simply upon statements therein contained. I fully appreciate the importance that attaches to an exclusion of such evidence, and how seriously it affects the position of the plaintiffs. In my opinion, however, under the circumstances, the books of the company should not be received, as proper legal evidence, and any statements they contain, or deductions to be derived therefrom by witnesses, as to such requisite payment or subscription, should be ignored.

There is thus no evidence, which I should consider, as satisfying the burden of proof which I think the plaintiffs properly undertook, that the new company illegally commenced and carried on its business. I have thus no evidence before me, which I should consider as preventing the new company from commencing business.

It is, however, contended, that the officials of the defendant should have made inquiries which would have resulted in showing that the plaintiff company was not entitled to do business. This contention involves the question, as to which party should bear the onus of proof, which has already been discussed. It is in any event of no avail in the light of my

B.C.

S.C.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA.

finding that there is no evidence as to illegality existing and, consequently, that any such inquiry would have brought the suggested result.

It was then submitted that the plaintiff company had no power to borrow money from the defendant, or if it had such power, that it had not been properly exercised. There is no doubt that the first advances by the defendant to the new company, were made at a time when it had no power to borrow. These moneys, however, were repaid and do not form a portion of the moneys loaned upon by defendant to plaintiff company upon which defendant bases its right to receive and retain the securities. In August and September, 1914, a substantial amount was loaned during the great stress at the commencement of the war. At this time, power had been acquired by the plaintiff company to borrow under certain restrictions. Such power was conferred in 1913 by 3-4 Geo. V., (Can). ch. 107, through an amendment to the Act of incorporation of the plaintiff company and is as follows:—

"19. For the purposes of carrying out the objects of the Company as authorized by chapter 89 of the statutes of 1912, and for no other purpose, the directors of the Company may, if authorized by by-law, sanctioned by a vote of not less than two-thirds in value of the subscribed stock of the Company, represented at a general meeting duly called for that purpose,— (a) borrow money upon the credit of the Company; (b) limit or increase the amount to be borrowed; (c) hypothecate, mortgage or pledge the real or personal property of the Company, or both, to secure any money borrowed for the purposes of the Company."

The exercise of such borrowing powers was questioned by the plaintiffs. It was not contended, that the borrowing was not within the general powers thus granted, as not being properly "incident to the course and conduct of the business" of the company. See on this point, Blackburn Bldg. Society v. Cunliffe, etc., Co. 22 Ch D. 61, and Re Farmer's Loan & Savings Co. (1898) 30 O. R. 337. The manner of borrowing was, in this connection, the sole subject of attack. In view of the facts, I do not think this position is tenable. The defendant, through its local manager, took the precaution of having letters from the solicitors, indicating that all the requirements as to borrowing had been complied with. He also received copies of the by-laws and resolutions, properly certified authorising the borrowing of

moneys and transacting the usual and necessary banking business. He had no reason to doubt the genuiness of these documents and was justified in concluding that the borrowing powers had been properly exercised.

The defendant bank, in dealing with the plaintiff company, had a right to assume as against the company, "that all matters of internal management had been duly complied with." Royal British Bank v. Turquand, (1855), 5 El. & Bl. 248, 119 E. R. 474, 24 L. J. (Q. B.) 327; (1856) 6 El. & Bl. 327, at p. 332, 119 E.R. 886, 25 L.J. (Q.B.) 317, Jervis, C. J. says:—

"And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done."

Plaintiffs contend that, in any event, the provisions of sec. 98 of the Winding-up Act are effectual to support a recovery of all or a portion of the securities held by the defendant. Such section reads as follows:—

"If any sale, deposit, pledge, or transfer is made of any property, real or personal, by a company in contemplation of insolvency under this Act, by way of security for payment to any creditor, or if any property real or personal, movable, or immovable goods, effects or valuable security, are given by way of payment by such company to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer or payment shall be null and void; and the subject thereof may be recovered back for the benefit of the estate by the liquidator, in any court of competent jurisdiction.

"2. If such sale, deposit, pledge or transfer is made within thirty days next before the commencement of the winding-up under this Act, or at any time afterwards, it shall be presumed to have been so made in contemplation of insolvency."

The first sub-section is inapplicable upon the facts, as there is no evidence, to shew that the securities were deposited with the defendant bank by the company "in contemplation of insolvency under the Act." The managing director of the company doubtless was aware of the true financial position of his company at the time of obtaining the ad-

B.C.
S.C.
DOMINION TRUST CO. v. ROYAL BANK OF CANADA.

vances in question. Unless the defendant had knowledge that the condition of affairs of the company was such as to border on insolvency, it could not be affected by the pledging of the securities under such first sub-section. There might be circumstances, where there is such neglect to inquire, that it would amount to constructive notice, but I do not think this condition of affairs existed, when I bear in mind the period, when the defendant assisted the plaintiff company. At the beginning of the war, a situation had arisen which necessitated co-operation amongst financial institutions to avoid disaster. The managing director of the plaintiff company, then applying for a loan must have excited suspicion, if not actual knowledge, on the part of the officials of the defendant bank, that trust funds which should be available, had been diverted for some other purpose than was originally intended. Reasons were given for making advances and thus protecting depositors of plaintiff company, which, in normal times, I am satisfied, would not have influenced any bank. So whatever knowledge may have been possessed by the managing director of plaintiff company, as to the insolvency of his company, it was not imparted to the defendant when the securities were deposited.

Plaintiffs then invoke the provisions of the second sub-section of sec. 98, as to certain of the securities, and contend that the presumption, as to their deposit, or pledge, in contemplation of insolvency has not been destroyed. They further submit, that such presumption is irrebuttable. A number of authorities were cited, but I do not think they support this latter contention. The presumptions created are capable of being controverted. This involves the burden being cast upon the defendant of proving that, as to securities deposited, or pledged, within 30 days of the commencement of the winding-up, they were not so deposited or pledged in contemplation of insolvency. With respect to the presumptions, arising under sections of the Winding-up Act, and in supporting my conclusion, as to the effect of the second sub-section of sec. 98, I need only to refer to Hammond v. Bank of Ottawa (1910), 22 O. L. R. 73, where it was held that the presumption, under sec. 94 of the Act, was rebuttable. See Moss, C. J. O., at p. 81:—

"The mortgage having been made within three months next preceding the commencement of the winding-up, there is a presumption that it was made with intent to defraud the company's creditors. But the presumption is not

B.C.

S.C.

DOMINION TRUST CO. v. ROYAL BANK OF CANADA.

a conclusive or irrebuttable presumption. It places upon persons, whether creditors or not, to whom a mortgage is given within the prescribed limit of time the onus of shewing the absence of intent to defraud the creditors of the company."

Has the defendant, then, satisfied the onus it must assume in connection with such deposit or pledge of securities? It only requires to shew that, in so obtaining securities, it had not such contemplation in mind. It seeks to overcome the presumption, by shewing the circumstances and that the securities were received by "pressure," exercised upon the plaintiff company. The remarks of Martin, J. in Adams & Burns v. Bank of Montreal, etc (1899), 8 B .C. R. 314, at p. 319, are appropriate, viz:— "Transactions of this nature must, I think, be viewed and judged as a whole, and a circumstance here and there in the chain of events, which standing by itself might be of much weight, should not be singled out and magnified into undue importance."

As to what took place at the time of the advances, and subsequently, the local manager of the defendant bank was examined de bene esse, but was not cross-examined, as the ground was taken that the examination was irregular. The order, for this examination was, however, on appeal, sustained. He stated that, after the advances had been made, his head office required further security to be given. He, in turn, made a demand for such securities and a number were deposited with the bank within the 30 days before the commencement of the winding-up. He then outlined the circumstances, and the extent of the pressure. Were they sufficient to destroy the presumption? The doctrine, as to pressure, was discussed in Adams and Burns v. Bank of Montreal, 8 B. C. R. 314; 32 Can. S. C. R. 719. I accept the statements of the bank manager, as to what took place with respect to the securities. I think such evidence establishes that this demand, by the defendant, for, and receipt of the securities, within the 30 days, was not in contemplation of insolvency and the presumption, to that effect, is destroyed. While the "pressure" exerted to obtain the securities was slight and received a ready response, still it would appear to come within the authorities.

Plaintiffs also rely upon the provisions of sec. 94 of the Winding-up Act. The evidence necessary to support its application was considered in Hammond v. Bank of Ottawa, supra. Suffice for me to say that the plaintiffs have failed

Sask.

K.B.

RE HOULDING.

to adduce any evidence to sustain its position on this point.

The result is, that, in my opinion, while the plaintiffs might be entitled to call for accounting in the future, they have failed to shew any right to recover the securities deposited, or pledged, with the defendant, or to interfere with the defendant in realising upon them.

The action is dismissed with costs.

Action dismissed.

RE HOULDING.

Saskatchewan King's Bench, in Bankruptcy, McKay, J. May 16, 1921.

Bankruptcy (§III.—25)—Bankruptcy Act—Rights of Trustee—"Property Belonging to the Debtor"—Meaning of.

The trustee under the Bankruptcy Act, 9-10 Geo. V. 1919 (Can.), ch. 36, is in a similar position as a liquidator under the Winding-up Act, R.S.C. 1906, ch. 144, and has a right to attack a creditor and contest its right to retain certain securities given to it by the company being wound up.

The words "property belonging to the debtor" in sec. 56 (8) of the Act have practically the same meaning as "property of the debtor" and include property of the debtor which has been dealt with by him by transfer to a creditor.

[Dominion Trust Co. v. Royal Bank (1920), 59 D.L.R. 224, followed. See Annotation, Bankruptcy Law in Canada, 53 D.L.R. 135.]

APPLICATION under sec. 20 (c) and 56 (8) of the Bankruptcy Act, 9-10 Geo. V. 1919 (Can.) ch. 36 and Bankruptcy Rule 120, for an order for the delivery of a McLaughlin touring car to the trustee. Issue directed under R. 120.

H. Ward for authorised trustee;

J. S. Rankin, for Mrs. Houlding.

McKay, J.:—This is an application for an order

1. That Anna Alice Houlding do deliver to the Trustee one McLaughlin Touring Car, Model H.49, No. 32171 now in the possession of the said Alice Houlding. 2. And in the alternative, for an order setting aside a certain agreement, and a Bill of Sale made between the said Charles E. Houlding and Anna Alice Houlding, or that an issue be directed for trial respecting the question of the ownership of the said automobile, and for that purpose that such directions be given and order made as shall seem just, and 3. That an injunction be granted restraining the said Anna Alice Houlding from disposing of or encumbering the said automobile pending the trial of such issue.

The application is made under sec. 20 (c) and 56 (8) of the Bankruptcy Act 9-10 Geo. V. 1919 (Can). ch. 36, and Bankruptcy Rule 120.

Sask.

K.B.

RE HOULDING.

Counsel for Mrs. Houlding raises three objections which question my right to hear this application.

1. First he contends that as there was no resolution of the creditors or written request of the inspectors of the estate to have the examinations herein held, as required by sec. 56 (1) (4) and (5) I should not hear the application.

The examinations have been held and I do not think these objections are now valid on this application. See also In re Branson, [1914] 2 K.B. 701.

2. He also contends that the trustee has no right to attack Mrs. Houlding's title or ownership to the said car, as the trustee takes the place of the assignor Charles E. Houlding, and not the creditors.

In my opinion he has. The trustee is in a similar position as a liquidator under the Winding-Up Act, R.S.C. 1906, ch. 144, and in Dominion Trust Co. v. Royal Bank (1920), 59 D.L.R. 224, it was held that the liquidator had the right to attack the defendant and contest its right to attain certain securities given to it by the company being wound up. And see also sec. 31 of the Bankruptcy Act which provides that certain conveyances or transfers of property shall be deemed fraudulent and void as against the trustee under the authorised assignment, and in such cases the trustee would be the person to take the necessary proceedings to have the conveyance or transfer declared void.

3. The third objection is that as Mrs. Houlding does not admit the car in question belongs to the debtor Houlding this application cannot be brought under sec. 56 (8) and R. 120.

I do not think this contention is correct. In my opinion the words "property belonging to the debtor" in this sec. 56 (8) have practically the same meaning as "property of the debtor" used in the beginning of sec. 25 of the Act. In the English Act of 1914, 4-5 Geo. V., Ch. 59, the corresponding section is 38, which is practically the same as sec. 44 of the English Act of 1883, 46-47 Vict., ch. 52. And, in my opinion, these words include property of the debtor which has been dealt with by himself by transfer to a creditor. This is the interpretation put upon sec. 44 of the English Act of 1883, by the author in Baldwin on Bankruptcy 9th ed., pp. 261 and 385.

Under the English Act of 1914 and English Rule 6, however, similar applications as the present are brought in open Court, but our R. 120 expressly provides for bringing these

Man.

C.A.

BRUNSTERMAN v. WINNIPEG ELECTRIC R. Co.

applications in Chambers.

This R. 120 gives me power to direct an issue to be tried, and I think in this case it will be more satisfactory to all parties that I should do so.

As Mrs. Houlding's claim arises out of a transaction between husband and wife, and the Courts look upon such transactions with suspicion (Koop v. Smith (1915), 25 D.L.R. 355, 51 Can. S.C.R. 554), Mrs. Houlding will be the plaintiff and the trustee defendant in the issue, and the issue to be tried will be:—Whether the McLaughlin Touring Car, Model H. 49, No. 32171, now in the possession of the said Anna Alice Houlding is her property as against the said authorised trustees.

The said issue will be set down for and tried at the next Civil sittings of the Court of King's Bench at Saskatoon in the Province of Saskatchewan, beginning on June 21, 1921, and will be tried without a jury.

There will be an injunction order restraining the said Anna Alice Houlding from disposing of or encumbering the said automobile until the trial of said issue.

The costs of this application will be reserved for the Judge trying the issue.

Judgment accordingly.

BRUNSTERMAN v. WINNIPEG ELECTRIC R. CO.

Manitoba Court of Appeal, Perdue, C.J.M., Fullerton and Dennistoun, JJ.A. April 4, 1921.

Street Railways (§III.B—25)—Failure of Motorman to See Small Stone on Highway—Passenger Alighting Injured by Stepping on—Negligence.

It is not negligence on the part of a street car motorman that he fails to notice a small stone on the boulevard, and stops his car so that a passenger in alighting steps on the stone and is injured, the boulevard being under the control of the Public Parks Board, and the stopping place being otherwise a safe and proper place for passengers to alight.

[Bell v. The Winnipeg Electric Street R. Co. (1905), 15 Man. L.R. 338; Blakeley v. Montreal Tramways Co. (1914), 20 D.L.R. 643; Fraser v. Pictou County Electric Co. (1916), 28 D.L.R. 251, 20 Can. Ry. Cas. 400, 50 N.S.R. 30; Williams v. Toronto & York Radial R. Co. (1919), 48 D.L.R. 346, 25 Can. Ry. Cas. 203, referred to.]

APPEAL by plaintiff from the judgment at the trial 1920), 53 D.L.R. 668, dismissing an action for damages for injuries received when alighting from a street car. Affirmed.

C. P. Wilson, K.C., and E. D. Honeyman, for appellant

R. D. Guy, for respondent

Man.

C.A.

BRUNSTERMAN v. WINNIPEG ELECTRIC R. Co.

Perdue, C.J.M., concurs.

Fullerton, J.A.:—The plaintiff was injured when alighting from a street car at the south-east corner of Broadway and Edmonton streets. At the trial (1920), 53 D. L. R. 668, it was agreed that the question of the liability of the defendant alone should be considered and the question of the amount of damages disposed of by a reference.

Macdonald, J., the trial Judge, held the defendant not liable and this appeal is from his judgment.

Broadway runs east and west. The street car tracks are practically in the centre of the street with boulevards on each side, the travelled way being to the north and south of the boulevards.

On the day of the accident the plaintiff was riding in an east bound car. As the car approached the intersection of Broadway and Edmonton streets she gave the usual signal to stop. The car, however, passed the intersection some feet. Plaintiff thinks it stopped about 15 ft. from the crossing, while the motorman says it was only 2 feet. It makes little matter, however, as in either case she had to alight on the boulevard. She stepped down on a stone which rolled under her foot and caused her to fall.

The plaintiff alleges that the place on which she was invited to alight was dangerous and unsafe to the knowledge of the defendant and further that if such alighting place was not known to the defendant to be dangerous and unsafe "the defendant was guilty of negligence in failing, before inviting the plaintiff to alight, to inspect the said landing or alighting place being a landing or alighting place other than the usual and proper landing or alighting place provided."

In the first place the evidence is clear that the defendant had no knowledge of the presence of the stone which caused the injury so that the whole case hangs on the last allegation. Council for the plaintiff argues that the east sidewalk crossing Broadway was the proper alighting place and that having carried the plaintiff beyond that the defendant owed a special duty to see that the place where defendant invited the plaintiff to alight was safe.

The Rule book for the guidance of the defendant's employees was put in evidence. Rule 55 reads: Motormen must not stop a car so as to block cross streets or cross walks."

Young, the motorman on the car, states in his evidence that he usually attempts to stop opposite the cross walk, and that three-quarters of the time the passengers are able

Man.

C.A.

BRUNSTERMAN v. WINNIPEG ELECTRIC R. Co.

to step out on the walk. He further says that it is impossible to stop at any fixed point, so much depends on the condition of the brakes, the state of the rail &c. If the rule be complied with the passenger must necessarily step off on the boulevard as otherwise the car would be blocking the cross walk. The evidence shews that the grass on the boulevards is worn out at all the intersections along Broadway where the passengers alight from the cars.

At the corner where the plaintiff alighted the worn spot extended from 12 to 15 ft. east of the cross walk gradually tapering as it went farther away from the walk.

I think it is impossible on the evidence to say that the walk itself was either the usual or proper place for alighting. In the case of open cars it would be impossible to land passengers on the walk and if the boulevard had to be abandoned as a landing place it would be necessary in the case of open cars to stop the car on the cross street, thus entirely blocking traffic across the street.

Council for the plaintiff contends that the defendant had no legal right to allow passengers to alight on the boulevard and if it does so must take all reasonable precautions to select a safe place. He refers to the Public Parks Act, R. S. M. 1913, chap. 163, which places all boulevards under the general management, regulation and control of the Public Parks Board.

G. Champion, the General Superintendent of the Public Parks Board was called by the plaintiff. He stated that during the 13 years he had occupied the position of Superintendant passengers had been alighting from the street cars upon these boulevards and no objection had ever been taken to this practice by the Board. In fact the Board from time to time has placed crushed gravel at the points on the boulevards where the grass had been worn by the feet of passengers, and at certain points the City of Winnipeg has put down safety platforms. The boulevards, so far as landing passengers, is concerned, may be regarded as a part of Broadway and in fact a safer place to land passengers than any point on the paved street as a passenger landing on the boulevard takes no risks from street traffic until he has crossed the boulevard and reached the travelled portion of the street.

It is contended, however, that the space between the tracks and for 18 inches outside of each track along the boulevard was ballasted with gravel, that this gravel some-

times contained stones of considerable size, and that these stones frequently got upon the boulevard either through having been thrown there by the sweepers or by small boys, and that in consequence it was the duty of the defendant to take very great precautions.

The stone produced at the trial, which is the one upon which the plaintiff is supposed to have stepped, is too large to have been thrown upon the boulevard by the sweeper and in any event the boulevards were thoroughly cleaned on April 27, 1917.

The boulevards are carefully looked after by men in the employ of the Parks Board, all debris being removed and the grass cut once a week to ordinary lawn grass length. Moreover it is the duty of the foreman in charge of these men to inspect the boulevards daily.

Council for the plaintiff did not contend that the defendant should have established some special method of inspection, but urged that the motorman was negligent in failing to see the stone.

Now a motorman approaching an intersection has a number of duties to attend to. He must be on the lookout on both sides for pedestrian and vehicular traffic crossing the street and also must have his eyes on the track ahead. He says that he was keeping a sharp lookout on the day in question but did not observe the stone. The stone produced is much the same colour as the earth and could not easily be detected. I fail to see how it can be said that the motorman was guilty of negligence in failing to see the stone.

The defendant company carry, I understand, upwards of 60,000,000 passengers each year and so far as I know an accident of this nature has never occurred in connection with its operations.

As Whitehouse, J. puts it in Conway v. Lewiston & etc. (1897), 38 Atl. Rep. 110 at p. 112, "Her injury was not the ordinary or probable result of stopping at that particular point, but was due to an unexpected event, which could not reasonably have been anticipated. The negligence imputed to the conductor was not the real or proximate cause of the injury. It simply presented an opportunity for the operation of the true cause,—the movement of a rolling stone upon which the plaintiff unfortunately stepped. It only afforded the occasion for a purely accidental occurrence causing damage without legal fault on the part of anyone."

In Foley v. Brunswick Traction Co. (1901), 50 Atl. Rep.

Man.

C.A.

BRUNSTERMAN v. WINNIPEG ELECTRIC R. Co.

340, the plaintiff met with a similar accident.

The jury was instructed that the plaintiff could recover if the place selected by the defendant for her to leave its car was not a safe place for that purpose.

On appeal from a verdict in favour of the plaintiff, Garrison, J. said, at p. 341 "The gravaman of the plaintiff's action was the failure of defendant to use reasonable care for her safety as a passenger; hence the correct instruction should have been that the defendant was liable for the plaintiff's injuries if it failed to take reasonable precautions to see that the place provided by it for her discharge was a safe one for the purpose. . Whatever be the form of words employed, the idea expressed should be that the guilt of the defendant is to be measured by the degree of care it has put forth for the plaintiff's safety, and not by the degree of success attendant upon its efforts * * * Owing to the nature of the casualty, and the indeterminate size, character and location of the object that caused it, the point of the case was whether such an object as that which caused the plaintiff's fall would, in the exercise of reasonable care by the defendant, have been discovered, and if discovered, have been removed."

Macdonald, J., the trial Judge, says in his judgment, 53 D. L. R. at p. 671, "The stone causing the injury is not a large one; its colour is not such as to attract attention, it is much the colour of the ground and if lying in the grass it would require more than ordinary watchfulness to detect it. I fail to see where there has been any negligence on the part of the motorman."

I entirely agree with the view thus expressed by the trial Judge and would therefore dismiss the appeal with costs.

Dennistoun, J. A.:— This is an appeal from the judgment of the Court of King's Bench 53 D. L. R. 668 dismissing the plaintiff's action for damages. With respect I desire to express my concurrence with the reasons for judgment of Macdonald, J. who tried the case, and limit my remarks to that phase of the case which concerns the negligence of the motorman.

The plaintiff was a passenger upon a street car of the defendant company in the city of Winnipeg. As carriers of passengers it was the duty of the company to carry safely using reasonable care for that purpose, and it was their further duty both under the common law applicable to such

carriers, and as an implied term of the contract with the passenger, to provide a reasonably safe place at which to alight.

The defendants do not own or control the portions of the highway upon which they discharge passengers.

The title to the highway is in the Crown and the right of possession is, as a general rule, in the City, but at the point where the plaintiff alighted on the occasion in question it was in the Parks Board a statutory corporation having charge of boulevards.

Obviously the defendants must discharge their passengers upon the highway, and by acquiescence amounting to license they had been accustomed to overrun the intersection of the cross street by a few feet and permit their passengers to alight upon the boulevard which runs down the centre of Broadway with a travelled road for vehicles on each side and the tracks of the railway company in the centre.

There is no suggestion in the evidence that the point at which the plaintiff was impliedly invited to alight was in any way unsuited to the purpose. It was a level bit of ground, bare for the most part, and partly grassed at the point of exit from the car. It may have been an inch or two lower than the cement crossing, but that in no way altered its character as a reasonably safe place to alight.

When a street railway company does not own or control the landing places which it must use, it can do no more than avoid known or obvious danger and unless there was something at the point in question which was obviously likely to injure a passenger when alighting, and the company knew it, or ought to have known it, or ought to have seen it and avoided it, and was negligent in not doing so, then in my opinion, the plaintiff's action fails.

On the occasion in question, about 4 P. M. on April 30, 1917, the plaintiff when alighting from a car on Broadway stepped upon a rounded stone described as about the "size of two fists", her ankle turned and she was seriously injured.

It was at an hour of the day and a time of year when there was plenty of light. The plaintiff did not see the stone before stepping upon it, but the trial judge imputes no negligence to her for not observing it. This has, however, some bearing upon the visibility of the stone at the time. It is a dark earthen coloured stone apparently stained with oil or something of the kind, and unquestionably inconspicuous in

Man.

C.A.

BRUNSTERMAN v. WINNIPEG ELECTRIC R. CO.

certain positions. What its position was when trodden upon no one knows - whether it was partly buried in the earth, or hidden in the grass, or lying in the open cannot be determined. It rolled away when the plaintiff stepped upon it and was discovered some time after the accident lying a few feet away, being easily found when searched for.

Upon the argument of this appeal the negligence without which liability cannot be imposed upon the defendants was narrowed down to the duty of the motorman to have observed the stone when his car was approaching the stopping place, and to have halted his car so as to enable passengers to alight clear of it. Or, it was urged, the motorman ought to have observed the stone through the reflecting mirror after the car had stopped and to have taken precautions to prevent a passenger from coming into contact with it.

There is no evidence that the stone was at the landing place for any space of time before the accident occurred, and therefore no evidence of negligence in permitting it to be there at that time. It may have been thrown or deposited upon the right of way or the boulevard but a moment before. The plaintiff was in the habit of alighting at this point daily, and while stones of a similar character are spoken of as having been found at other points after the accident, there is no evidence of any being seen at any time at the landing place at the corner of Broadway and Edmonton streets. It is admitted that the conductor of a street car has no opportunity of detecting objects lying beside the right of way, and that the only person who could have seen and appreciated the danger was the motorman.

That official has important duties to perform in controlling the speed of his car, in starting and stopping it, in avoiding traffic at cross streets and obstacles on the right of way. He must act with despatch. He must run to a time schedule and it is his duty to observe and avoid obvious dangers at landing places.

Street cars of the defendant company are of different types. Some, like the car in question, discharge passengers at the rear end only, others have exit doors at both front and rear ends, while others, known as open cars, discharge passengers along the whole length of the car. The evidence does not in my opinion justify a finding that a motorman who halts a car at a recognised and usual stopping place or anywhere else, is bound to use such keenness of vision, and such accuracy of control, that no single passenger shall run

the risk of stepping upon a casual object of the appearance and dimension of the stone which has been filed as an exhibit in this case.

Moreover the motorman did not see the stone. He says he was on the lookout and that there was no stone that he could see. How can it be said that it was actionable negligence that he failed to see it? If he had observed the stone and deliberately or carelessly disregarded it the plaintiff's case would have been stronger. In the absence of any evidence or reasonable inference that he ought to have seen it, and without any information as to where it was lying or how it was concealed it is impossible to say that he was at fault in not detecting its presence as his car approached the halting place.

Mr. Wilson urged strongly that the motorman should have seen the stone through his mirror after the car had stopped, and that he admitted he did not look for anything of the kind. Assuming that he had seen the stone, it does not appear that he could have done anything to prevent the plaintiff from stepping upon it. He could not re-start his car without signal from the conductor and the exigencies of the service and the necessity for despatch in traffic of this kind in a large city make it impossible to guard against every possibility of accident by giving individual warnings to passengers who are alighting in broad daylight, in the full possession of mental and physical faculties. Moreover it is necessary to assume that the motorman would have seen the stone and appreciated the danger had he looked, and there is no evidence upon which such an assumption can be based.

The trial Judge, (53 D. L. R. 668) finds as a fact that there was no negligence on the part of the motorman. He was sitting without a jury and exercising its functions and in my humble judgment he has drawn the correct inferences from the evidence and his finding should be concurred in.

I have perused carefully the numerous authorities quoted by counsel and refer particularly to Nellis on Street Railways, 2nd ed. vol. 1. at pp. 308, 309; Maverick v. The Eighth Ave. R. Co. (1867) 36 N. Y. 378; Foley v. Brunswick Traction Co., 50 Atl. Rep. 340; Bell v. The Winnipeg Electric Street R. Co. (1905), 15 Man. L.R. 338 at p. 345, 10 Corp. Jur. pp. 913-915; Blakeley v. Montreal Tramways Co. (1914), 20 D.L.R. 643; Fraser v. Pictou County Electric Co. (1916), 28 D. L. R. 251, 20 Can. Ry. Cas. 400, 50 N. S. R. 30; Williams v. Toronto & York Radial R. Co. (1919), 48

Alta.

S.C.

WINFREY v. WINFREY AND CLUTE.

D.L.R. 346, 25 Can. Ry. Cas. 203, 45 O.L.R. 387; Mobile Light & R. Co. v. Walsh, (1906), 40 So. Rep. 559.

I would dismiss the appeal and express the hope that the respondents will not ask for costs.

Appeal dismissed.

WINFREY v. WINFREY and CLUTE.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 20, 1921.

Husband and Wife (§III.A-144).—Action for Divorce Commenced—Adultery Condoned and Action Discontinued as Against Wife—Right of Husband to Continue Action Against Co-respondent on Proper Amendment of Statement of Claim.

A plaintiff having commenced an action against his wife for divorce on the ground of adultery and for damages against the co-respondent, and having after the commencement of the action condoned the alleged adultery by returning to cohabitation with his wife, the action against her being thereupon discontinued, may still proceed against the co-respondent for criminal conversation or for enticing and alienating affections. It is not necessary for the plaintiff to commence a new action, but suitable amendments should be made in the statement of claim.

[Bernstein v. Bernstein, [1893] P.D. 294, distinguished.]

APPEAL by co-respondent from a judgment of Scott, J. (1921), 57 D.L.R. 706, in an action originally for divorce and for damages against the co-respondent, but in which the plaintiff after the commencement of the action condoned the adultery by resuming cohabitation with the wife, the action for divorce being discontinued. Affirmed, but more specific directions given as to the amendment of the statement of claim

N. D. Maclean, for appellant.

G. W. Massie, for respondent.

The judgment of the Court was delivered by

Stuart, J.:—This action began as an action for divorce by the husband against the wife, with a claim, by special leave under the rule, for damages against the co-respondent.

After the commencement of the action the plaintiff condoned the alleged adultery, by returning to cohabitation with his wife, and the action was thereupon discontinued as against her.

The defendant Clute then made a motion in Chambers to dismiss the action. The Master on February 18 in his reasons for judgment stated that the action would be dismissed as against the wife, although in fact it had been discontinued by notice on February 3. He then said, "The plaintiff, however, desired to proceed with his action against

the defendant Clute for damages for alienating affections and enticing away. This, I think, he has a right to do, and I will allow him to amend his statement of claim, if he so amends his statement of claim within 15 days from this date and enters the action for trial within two months from this date or within such other time as may be ordered. Costs to the defendant Clute in the cause."

No order was taken out in pursuance of this judgment, but the defendant Clute appealed to a Judge in Chambers, and the appeal was heard by Scott, J. (1921), 57 D.L.R. 706, who dismissed the appeal with costs. In his reasons for judgment, Scott, J., at p. 707, said that the plaintiff had elected not to amend under the order (of the Master), and that by consent of the solicitors for the parties that part of the Master's order relating to such amendment was abandoned.

The defendant Clute has now appealed from the order of Scott, J., and relies principally upon the case of Bernstein v. Bernstein, [1893] P.D. 294. In that case there had been a condonation which defeated the plaintiff's claim for divorce, and the Court of Appeal held that the petition must be dismissed entirely as against the co-respondent as well as against the respondent.

But the situation in England is different from the situation here. There the Matrimonial Causes Act, 20-21 Vict. 1857, ch. 85, which established the Court for Divorce and Matrimonial Causes, abolished entirely the action for criminal conversation as a separate cause of action, and such a claim can there be entertained by the Court only in a petition for divorce and not otherwise. But with us sec. 18 of the Supreme Court Act, 7 Edw. VII., 1907 (Alta.), ch. 3, enacts: "The court shall have jurisdiction to entertain an action for criminal conversation. The law applicable to such actions shall be as the same was in England prior to the abolition of such action in England, and the practice shall be the same as in other actions in the court so far as it is applicable."

It will therefore be seen that the ratio decidendi of Bernstein v. Bernstein does not really apply in this case. By statute we still have the ordinary action for criminal conversation, and, as I apprehend, by common law we still have the action for enticing and alienating affections.

The matter is therefore reduced largely to one of form and convenience. The plaintiff could undoubtedly begin a separ-

Alta.

S.C.

WINFREY v. WINFREY AND CLUTE.

ate action against Clute for criminal conversation and for enticing and alienating. The case of Bernstein v. Bernstein, where the matter was fully discussed, shews that the condonation does not defeat these claims entirely, but only goes in mitigation of damages. The choice lies therefore between three possible courses, i.e., whether (1) to dismiss the action entirely, leaving the plaintiff to begin a new action against the defendant Clute alone, or (2) to allow the action with its present style of cause and with the statement of claim in its present form to proceed as against Clute only, or (3) to allow the action to proceed upon the condition of amendment, as was apparently the view of the Master in Chambers.

It is obviously desirable that the practice in such a matter should be settled. Inasmuch as we do not now begin actions by writ, but merely by the issue of a statement of claim, it is apparent that the difference between issuing a new statement of claim and amending the present one, where no statute of limitations is involved, is largely a matter of costs. But in any case I think it is not desirable that the action for criminal conversation and enticing and alienating affections should proceed with the wife named in the style of cause as a defendant and with a clause in the statement of claim, as there is, relating to the existence and custody of children, and with a claim, now abandoned, against the wife for divorce. Such references would clearly have been struck out if they had been inserted in an action begun in the first instance for criminal conversation and enticing and alienating affections. And now that the petition for divorce is dropped, it seems to me that the matter should be dealt with in exactly the same way. As between directing these amendments and forcing the plaintiff to begin a new action, there is, as I say, nothing involved but costs.

I think therefore that the Master was right in the view he took, but that more specific directions as to amendment should be made. The statement of claim should be amended by striking out the name of the wife as a party defendant, by striking out all reference to the wife in para. 1 of the claim, by substituting for the words "the defendant" in the first line of para. 2 the words "his wife," by substituting for the words "the defendant Erma Jane Winfrey committed adultery with the defendant Arthur H. Clute" at the end of para. 4 the words "the defendant Arthur H. Clute committed adultery with the said Erma Jane Winfrey," by

striking out the word "defendant" before the words "Erma Jane Winfrey" where the latter first occur in para. 5 and substituting therefor the word "said," by striking out para. 8 entirely, and by striking out claims numbered (1) and (2) in the prayer for relief.

The Master's direction as to the costs of the application before him should stand, but in view of the apparent arrangement between the parties referred to by Scott, J., 57 D.L.R. 706, I think the costs of the hearing before him and of this appeal should be simply costs in the cause.

Judgment accordingly.

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. CO.

WINNIPEG v. WINNIPEG ELECTRIC R. CO.

Manitoba Court of Appeal, Perdue, C.J.M., Fullerton and Dennistoun, JJ.A. April 4, 1921.

Public Utilities Commission (§I.—1)—Powers and Duties—Winnipeg Electric R. Co.—Increase in Fares — Company brought under the Act by Order in Council.

Under the provisions of the Public Utilities Act R.S.M. 1913, ch. 166, the Public Utilities Commission has power to increase the fares for the carriage of passengs by the Winnipeg Electric Railway Company having acquired exclusive jurisdiction over fares when the railway company was brought under the Act by a by-law passed on May 20, 1912, requesting the Lieutenant-Governor in Council to bring under the operation of the Act all public utilities owned and operated within the city, including those owned and operated by the city, in accordance with which request an Order in Council was passed on May 28, 1912.

[Review of Legislation: Canadian Northern Pacific R. Co. v. City of New Westminster, 36 D.L.R. 505, [1917] A.C. 602; Winnipeg Electric R. Co. v. City of Winnipeg (1916), 30 D.L.R. 159, 26 Man. L.R. 584; City of Edmonton v. Northern Alberta Natural Gas Co. (1919), 50 D.L.R. 506, 15 Alta. L.R. 416; Ottawa Electric R. Co. v. Township of Nepean (1920), 54 D.L.R. 468, 60 Can. S.C.R. 216, referred to.]

APPEAL by the City of Winnipeg from an order of the Public Utilities Commission authorising and empowering the Winnipeg Electric R. Co. to charge and collect fares in excess of those fixed by the contract between the company and the city. Affirmed.

H. J. Symington, K.C., J. Preud'homme, and J. F. Bond, for the city.

J. Pitblado, K.C., for certain shareholders.

E. Anderson, K.C., D. H. Laird, K.C., and F. M. Burbidge, K.C., for respondents.

Perdue C.J.M.:—This is an appeal by the City of Winnipeg from an order made by the Public Utility Commissioner increasing the fares for the carriage of passengers by the Winnipeg Electric R. Co. [See (1920), 54 D.L.R. 445].

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

The order was made on the application of the company. Leave of appeal to this Court was given under sec. 70 of the Public Utilities Act, R.S.M. 1913, ch. 166. The leave to appeal was confined to the question: "Had the Public Utility Commissioner power or authority to make the said order in so far as it affects the City of Winnipeg?"

The company was incorporated in the year 1892 by ch. 56 of the statutes of the Manitoba Legislature passed in that year, under the name of the Winnipeg Electric Street Railway Company which was afterwards changed to its present name.

The main contention of the appellant, the City of Winnipeg, is, that the Public Utility Commissioner (hereinafter called the commissioner) had no power or authority to make the order complained of, because, as it is claimed it was made in contravention of the express terms and conditions of By-law 543 of the City of Winnipeg and of the special Act of the Legislature of the Province of Manitoba, being the above-mentioned ch. 56 and of an agreement made in pursuance of the said by-law and special Act, dated June 4th, 1892.

Much turns upon the provisions of the above Act and by-law and it is necessary to examine them carefully. The Act in question 55 Vict. 1892, (Man.) ch. 56 is entitled, an Act to incorporate The Winnipeg Electric Street Railway Company and to confirm By-law No. 543 of the City of Winnipeg." The recital is to the effect that certain persons have by their petition prayed that they may be incorporated under the title of "The Winnipeg Electric Street Railway," for the purpose of constructing and operating street railways in the city of Winnipeg, the town of St. Boniface and certain parishes mentioned, with power to make extensions along streets and roads in the said city, town and parishes with all the powers necessary in connection therewith and for other powers. The first section of the Act declares that William Cornelius Vanhorne, James Ross, William McKenzie and the other persons mentioned are constituted a body corporate and politic under the above name.

Section 9 of the Act gives the company power to construct, maintain and operate a double or single track railway with the necessary side tracks, switches &c. upon or along any streets or highways in the city of Winnipeg and other places named, to take, transport and carry passengers upon the same by such motive power as may be authorized

by the council of the said city, town or municipalities, by by-law, and with the consent of such council to carry freight and to use and construct all necessary works &c.; "and in addition to the powers by this Act given to exercise all the powers set forth in By-law No. 543 of the City of Winnipeg and the contract thereunder."

The company is authorised to carry on the business of producing and selling electric light, heat or power (sec. 10) and to acquire street railway, gas and electric light franchises by lease or purchase (sec. 20). The directors are given power to make, amend, repeal and re-enact all such by-laws, rules, resolutions and regulations as shall appear proper and necessary for the well ordering of the company and for various purposes mentioned, one of them being, "the fares to be received from persons transported over the railway or any part thereof" (sec. 13). A number of sections deal with the issue and sale of stock, paid up shares, bonds, debentures and borrowing powers generally which do not affect the questions in issue in this appeal.

Section 32 incorporates in the Act the several clauses of the Manitoba Railway Act 44 Vict. 1881 (Man) ch. 27 which shall be deemed to be a part of this Act and shall apply to the company and the railway to be constructed by them as far as applicable to the undertaking except in so far as the same may be inconsistent with the express enactments of this Act. It declares that the expression "this Act" when used in the incorporating Act shall be understood to include the clauses of the Railway Act, except in so far as they are inconsistent with or varied by any of the provisions of the incorporating Act.

Section 34 is as follows:

"By-law number 543 of the City of Winnipeg entitled 'A By-law of the City of Winnipeg respecting Electric Street Railways' a copy of which by-law is Schedule "A" hereto, is hereby validated and confirmed in all respects as if the said by-law had been enacted by the Legislature of this Province, and the said Company shall be entitled to all the franchises, powers, rights and privileges thereunder."

By-law 543, which is made a schedule to the company's Act of Incorporation, recites that James Ross and William McKenzie, contractors, have applied to the City of Winnipeg for the right of constructing, equipping, maintaining and operating street railway lines in the city of Winnipeg, subject to the rights of the Winnipeg Street Railway Company.

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

The last mentioned company was then operating a horse tramway on certain streets under an agreement with the city. It is further recited that the applicants have applied for the authority to build, equip &c. a double or single line track railway with all necessary side tracks &c. poles, wires, conduits and appliances for running cars, carriages and other vehicles on over and along the streets or highways of the city of Winnipeg; that whereas it has been deemed advisable to grant the request of the applicants, subject to the rights &c. of the Winnipeg Street Railway aforesaid and on the terms, conditions and provisoes contained in the by-law, and on the distinct agreement that the fulfilment of said terms &c. in so far as they are prior in point of time to construction and operation of such railway lines shall be conditions precedent to the construction and operation thereof, and in so far as the terms &c. relate to the operation, conduct and management of said railway lines, the same and the fulfilment of same shall in all cases be conditions precedent to the continued enjoyment of the rights and privileges of the applicants under the by-law.

The by-law then proceeds to give, subject to the legal rights of the Winnipeg Street R. Co., the exclusive right to construct, maintain and operate double and single track railways with the necessary side tracks, switches, poles, conduits, appliances &c., over the streets or highways of the city of Winnipeg. Provisions are made for obtaining permission from the city before proceeding with the work. Plans of construction are to be submitted to and approved by the city engineer. The overhead or trolley system of electricity is to be adopted. The placing and character of the poles are to be approved by the city engineer. Numerous provisions are inserted in the by-law relating to the construction of the lines, the quality of the cars, the use of sleighs or busses, the right of way on the streets and the operation of the cars, and other matters which do not affect the questions under consideration on this appeal.

Section 5 of the by-law deals with tickets and fares and is of much importance. That section declares that cash fares are not to be more than 5 cents each. Fares on night cars are not to be more than double the ordinary maximum fare rates. A class of tickets must be sold at not less than 25 for $1 and another class at not less than 6 for 25 cents. Cheap tickets for workmen must be sold at the rate of 8 for 25 cents, to be used only at stated

hours. Cheap tickets are also to be sold for the use of school children.

Section 33 is as follows:

"33. All rights and privileges under this by-law may be transferred to and become vested in a Company to be formed and organized by the applicants and their associates and on such transfer all benefits and obligations arising under this by-law shall be transferred to the said Company which shall thereupon become and be liable in the place of the applicants for the proper carrying out and fulfilment of this by-law.

"Provided that this clause shall only have effect upon such Company executing a contract with the City embodying the terms of this by-law so far as the same have not been performed."

Section 35 provides that a contract embodying the provisions of the by-law and a covenant on the part of the applicants to conform to and fulfil all the matters and provisions required of them shall be drawn and shall be executed by the city and the applicants within 12 weeks from the passing of the by-law.

The by-law was passed on February 1, 1892, and the Act of Incorporation was assented to on April 20, 1892. The applicants Ross and McKenzie assigned to the Winnipeg Electric Street R. Co., all their rights, franchises, powers and privileges under the said by-law. A contract, dated June 4, 1892, embodying the provisions of the by-law and a covenant to conform to and fulfil them, as required by the above sec. 35, was executed by the company and the city. This contract is found as Schedule "B" to an Act of the Legislature of Manitoba, 1895, ch. 54. This Act confirms the purchase of the franchises, rights, assets &c. of the Winnipeg Street Railway Company by the Winnipeg Electric Street Railway Company. The Act also validates and confirms the contracts of June 4, 1892, a copy of which is made Schedule "B" to the Act.

The Winnipeg Electric Street R. Co., now The Winnipeg Electric R. Co., acquired by purchase or amalgamation The Manitoba Electric and Gas Light Co., The North West Electric Co., Ltd., and The Winnipeg General Power Co. There were also several subsidiary street railway companies in neighbouring municipalities with the railways of which the Winnipeg street railway system was connected. By an Act of the Legislature of Manitoba 3 & 4 Ed. VII. 1904 Ch. 87, sec. 1, it was declared that the Winnipeg Electric

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

Street R. Co., might amalgamate with any other company or purchase the assets, rights, property and franchises of any other company or body corporate having the right to build or operate street railways or dealing in or disposing of lighting or power. Under this and a similar provision in the Act incorporating the Winnipeg General Power Co., the two companies by agreement in 1904 amalgamated as one company under the name of the Winnipeg Electric R. Co. (See City of Winnipeg v. Winnipeg Electric Railway Co. (1910), 20 Man. L.R. 337, at p. 400, 401).

In the year 1918, The Winnipeg Electric R. Co., which I shall hereafter call the company, found itself in financial difficulties. As alleged in their petition, the operating costs including labour and material had largely increased since the outbreak of the war; it was urged that such costs were increasing and, it was believed, would continue to increase; that the prices, rates and fares fixed prior to the war were no longer fair, just or reasonable, and that such costs were increasing so rapidly that, unless the company were afforded relief and permitted to increase its revenue derived from transportation, it would be forced into bankruptcy. It was further alleged that by the awards of Boards of Conciliation which had recently been sitting to hear applications for increased wages to employees, the company's pay-roll would be increased by the additional sum of $361,952.42 annually. Increases which the company had to give to its employees in other departments and greater cost of material would, it was alleged, increase the operating cost of the railway by the sum of $600,000 annually.

A financial statement annexed to the petition shewed that between January 1, 1918 and September 1, 1918 a deficit of $21,207.59 was suffered in the company's street railway department. It was also shewn that if the increases granted by the Boards of Conciliation and the other increases in uncontrollable expenditure were in effect for the whole year, there would be a deficit of over $631,000. The petition asked that the company be allowed to charge a 6 cent fare per passenger, to charge 25 cents for 7 school children's tickets, and that other fares be abolished.

Previously to presenting this petition to the Public Utilities Commission, the company had petitioned the council of the City of Winnipeg in similar terms to be allowed to make the above increases in its fares. The matter was considered by the council in committee of the whole. Sever-

al members of the council were of the opinion that the company should make application to the Public Utilities Commission. A motion was carried appointing an advisory committee in connection with the company's petition. This committee made its report shewing that after conferences with the representatives of the company a form of order was agreed upon between the parties, and counsel for the city was instructed to appear before the commissioner and consent to the order "as a temporary expedient." This order is dated October 31, 1918, and contains a recital "reserving all the city's rights both under legislation and contract with the company." The order empowers the company to charge a cash fare of 5c or 5 tickets for 25c; 6 workmen's tickets for 25c; 7 school children's tickets for 25c; the present right to transfers to continue. It was declared that the order was made for temporary relief only and pending a full investigation by the commission. The company was ordered to file with the commission a statement giving the total amount of wages and salaries paid in the railway department, also a complete comparative statement for the current and preceding years of its street railway operations shewing revenue and revenue deductions properly classified.

The company presented a further petition, dated November 14, 1918, to the Public Utilities Commission requesting a further increase of fares on the lines within the city of Winnipeg and also on the lines operated by the company outside the city. After hearing council for the company, for the City of Winnipeg and the City of St. Boniface, the Commissioner made an order allowing a temporary increase of fares for the carriage of passengers in the city of Winnipeg. The following fares were allowed: A cash fare of 6c or 5 tickets for 30c; 5 workmen's tickets for 25c good during certain hours; 7 school children's tickets for 25c.

The commissioner gave his reasons for allowing the increase. He found that the company's then financial position justified the increase and that "relief was necessary to protect the investment from serious loss."

On August 23, 1920, the Public Utility Commissioner made his final order in respect of fares. The investigation to obtain the necessary data extended over a period of 18 months and entailed great expense upon the company. The following fares were allowed for the carriage of passengers within the cities of Winnipeg and St. Boniface: A cash

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

fare of 7c per passenger; 4 tickets for 25c; 7 school children's tickets for 25c.

Increases in fares were also allowed upon the suburban lines outside the two cities.

The City of Winnipeg disputes the jurisdiction of the Public Utility Commissioner to make the above order on several grounds.

The first ground is that the commissioner had not power under a general Act to alter rates fixed by a prior special Act, invoking the maxim, generalia specialibus non-derogant. In support of this contention counsel for the city argues that an agreement set up in a schedule to a statute has the same effect as if it were a clause in the statute. To support this contention it must appear that By-law 543 of the City of Winnipeg forms an integral part of the company's Act of incorporation. Section 34 of the Act declares that the by-law, a copy of which is Schedule "A" thereto, "is hereby validated and confirmed in all respects as if the said by-law had been enacted by the Legislature of this Province." But these words do not make the by-law a part of the Act. They still leave it a by-law and a by-law only, although it is validated and confirmed. The words: "as if it had been enacted by the Legislature of this Province" have only the effect of emphasising the validation and confirmation. The effect of this clause is that the by-law is rendered legal and binding on the city, so that no question can be raised as to the legality or regularity of the passing of the by-law, or as to the power of the city to enact it. The words used are very different in effect from those used in the statute to ratify the agreement in question in the case of the Canadian Northern Pacific R. Co. v. City of New Westminster 36 D.L.R. 505, [1917] A. C. 602. The agreement in that case was set out in a schedule to the Act which declared the provisions of the agreement were to be "taken as if they had been expressly enacted hereby and formed an integral part of this Act."

By-law 543 is not an agreement. The company was not in existence when it was passed. The by-law gave to the applicants Ross and McKenzie the right and privilege to build a street railway in the city on certain terms and conditions. The rights and privileges given under the by-law might be transferred to a company to be formed, but this provision should only have effect upon the company executing a contract with the city embodying the terms of the by-law so far as the same had not been performed (clause

33 of by-law). This contract between the company and the city was afterwards drawn up and executed. It is the contract of June 4, 1892, which was "confirmed and validated to all intents and purposes as therein expressed" by the Act of 58-59 Vict. 1895 (Man.), ch. 54, sec. 2. It is this contract, and not the by-law, that binds the company. It cannot be contended that this contract is a statute. It is only an agreement made in pursuance of the by-law and validated as a contract 3 years afterwards.

Even if it were found that the by-law was incorporated in the Act so as to be an integral part of the Act, I think it was the intention of the Legislature that the provisions of the Public Utilities Act would in case of conflict with those of the special Act prevail over the latter.

Section 84 of the original Public Utilities Act, 2 Geo. V., 1912 (Man.), ch. 66, is as follows: "All Acts and parts of Acts inconsistent with this Act are hereby repealed." This section was not carried into the Revised Statutes of 1913, but even if it were considered as repealed, the repeal would not revive the inconsistent Acts or parts of Acts: Manitoba Interpretation Act, R.S.M. 1913, ch. 105, sec. 29.

It is further contended by the appellants that the Public Utilities Act did not give the Commissioner power to interfere with rates fixed by contract. The sections of the Act, R.S.M. 1913, ch. 166, relied upon by the respondents as giving jurisdiction and power are the following:

"20. The commission shall have jurisdiction—

"(a) in all questions relating to the transportation of goods or passengers on the lines of any tramway company or street railway company or steam railway company under the jurisdiction of the Legislature of Manitoba as herein defined or on any parts thereof; and for such purpose it may authorise or require any such company to carry goods or passengers on its lines or any part thereof for any period of time and at such prices as it may fix;

"(b) whenever it is made to appear to the commission, upon the complaint of any public utility, or of any person or persons having an interest, present or contingent, in the matter respecting which the complaint is made, that there is reason to believe that the tolls demanded by any public utility exceed what is just and reasonable, having regard to the nature and quality of the service rendered or of the commodity supplied, and in such case it may proceed to hold such investigation as it sees fit into all matters relating to

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

the nature and quality of the service or the commodity in question, or to the performance of such service and the tolls or charges demanded therefor, and may make such order respecting the improvement of the commodities or services and as to the tolls or charges demanded, as seems to it to be just and reasonable and may disallow or change as it thinks reasonable, any such tolls or charges as, in its opinion, are excessive, unjust or unreasonable or unjustly discriminate between different persons or different municipalities; the whole, however, subject to such of the provisions of any contract, existing between such public utility and a municipality at the time such complaint is made as the commissioner shall consider fair and reasonable.

"23. The commission shall have power—

"(a) to investigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility as herein defined;

"(b) from time to time to appraise and value the property of any public utility as herein defined, whenever in the judgment of the said commissioner it shall be necessary so to do, for the purpose of carrying out any of the provisions of this Act, and in making such valuation the commissioner may have access to and use any books, documents or records in the possession of any department or board of the Province or any municipality thereof;

"(c) after hearing, upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates which shall be imposed, observed and followed thereafter by any public utility as herein defined, whenever the commissioner shall determine any existing individual rate, joint rate, toll, charge or schedule thereof or commutation, mileage or other special rate to be unjust, unreasonable, in sufficient or unjustly discriminatory or preferential.

"32. No change in any existing individual rates, joint rates, tolls, charges or schedules thereof or any commutation, mileage or other special rates shall be made by any public utility, nor shall any new schedule of any such rates, tolls or charges be established until such changed rates or new rates are approved by the commission, when they shall come into force on a date to be fixed by the commission, and the commission shall have power, either upon written complaint or upon its own initiative, to hear and determine

whether the proposed increases, changes or alterations are just and reasonable. The burden of proof to show that any such increases, changes or alterations are just and reasonable shall be upon the public utility seeking to make the same."

Section 20, sub-section (a) gives the commission general jurisdiction in all questions relating to the transportation of passengers on the lines of any street railway company under the jurisdiction of the Legislature of Manitoba * * * at such prices as it may fix. This sub-section gives the commission a general power to fix rates on street railways.

Sub-section (b) of the same section authorises the commission, on the complaint of a public utility or of any person having an interest in the matter, that the tolls demanded by a public utility exceed what is just and reasonable, having regard to the nature and quality of the service, to make an investigation into all matters relating to the nature and quality of the service, and it may make such order respecting the improvement of the services and as to the tolls demanded as seems just and reasonable, and it may disallow or change, as it thinks reasonable, any tolls or charges as, in its opinion, are excessive, unjust or unreasonable; "the whole, however, subject to such of the provisions of any contract existing between such public utility and a municipality at the time such complaint is made as the commissioner shall consider fair and reasonable."

Taking (a) and (b) together and putting a liberal construction, as the Court should do, upon this remedial statute, I think power is given to the commission, not only to reduce, but also to increase tolls and charges, so as to make them just and reasonable. This view in strengthened by the provisions of sec. 32 which empower the commission to hear and determine whether the proposed increases, changes or alterations in rates are just and reasonable. The last four lines of sub-sec. (b) provide a qualification that the commission should take into account the provisions of any contract existing between the public utility and a municipality as the commissioner shall consider fair and reasonable. Jurisdiction is conferred on the commission, and a judicial discretion is conferred on the commissioner to decide whether the provisions of the contract are fair and reasonable.. This is to be done after making the investigation as to the nature and quality of the service, as directed in the earlier part of the sub-section.

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

I do not think that sub-sec. (g) of sec. 20 has any application to the question of fares. It gives jurisdiction to the commission, subject to the terms of any contract, to define or prescribe the terms upon which a public utility may use a bridge or subway or a highway where special terms should be prescribed; as, for instance, an approach to a bridge or a subway as well as the bridge or subway itself. It would specially apply where the bridge or subway connected two municipalities. This subsection was added by 3 Geo. V. 1913, ch. 54. sec. 3.

Section 20 deals with the jurisdiction of the commission and incidentally with certain of its powers. Section 23 deals further with its powers. Subsection (c) of sec. 23 empowers the commission, after hearing upon notice, by order in writing to fix just and reasonable individual rates, joint rates, tolls, charges &c. which shall be imposed, observed and followed thereafter, "by any public utility as herein defined, whenever the commissioner shall determine any existing individual rate, toll, charge, ...to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential. This clearly shews that the commission has power to increase existing rates where they are found by the commissioner to be insufficient.

In considering the question whether the commission has power to increase the fares fixed by contract between the railway company and the municipality, sec. 21 of the Public Utilities Act is important. That declares that the commission shall have a general supervision over all public utilities subject to the legislative authority of the Province, and "may make such orders regarding equipment, appliances, safety devices, extension of works or systems, reporting and other matters, as are necessary for the safety and convenience of the public or for the proper carrying out of any contract, charter, or franchise involving the use of public property or rights." This provision clearly contemplates interference by the commission even where there is a contract between the utility and the municipality. Orders made under sec. 21 might involve the expenditure by the utility of great sums of money, an expenditure not contemplated by the parties when the contract was made and not covered by it. In what is known as the Electrolysis case Winnipeg Electric R. Co. v. City of Winnipeg; Re Public Utilities Act. (1916), 30 D.L.R. 159, 26 Man. L.R. 584, the commissioner made an order involving the expenditure of

a great sum of money to prevent leakage of electric current in the operation of the trolley system of running cars, although the contract contained no provision to that effect.

On the other hand, the commissioner has made many orders directing the doing of things by the railway company without following the procedure provided by By-law 543 and the contract. These relate to the location and placing of tracks, rails, poles, the placing and removing of poles, wires and other appliances &c. By the contract these were matters which were subject to the plans and approval of the city engineer. See By-law 543, secs. 2 (a), 3, 3 (a), (a.2), 4. The city engineer was to decide all questions which should arise between the city and the applicants and his decision should be final, subject to an appeal to the city council or to arbitration, (secs. 19 and 22.) In case of non-compliance with the provisions of the contract by the applicants or with the provisions of any by-law or regulations thereafter made by the council concerning speed of cars, frequency of trips and hours of operation, the city engineer should decide as to the length of time the applicants were in default and the city might collect the amount by suit at law (sec. 19 (a).) After the railway company was brought under the operation of the Public Utilities Act, these matters seem to have been dealt with exclusively by the commissioner.

In exercising the powers conferred by sec. 21 of the Public Utilities Act the commission may make orders as to extensions, appliances and equipment, not contemplated when the contract was made, involving a great expenditure of money by the utility which could not be met by the fares mentioned in the contract with the municipality. A rectification of the fares would then be necessary. They would be insufficient and the commission should under sec. 23 (c) fix just and reasonable rates, tolls and charges to meet the increased expenditure.

Counsel for the appellant relied upon the decision of the Appellate Division of the Supreme Court of Alberta in In re Public Utilities Act, City of Edmonton v. Northern Alberta Natural Gas Development Co. (1919), 50 D. L. R. 506, 15 Alta. L. R. 416. In that case it was held that the Board of Public Utility Commissioners constituted by the Public Utilities Act of Alberta had no jurisdiction to increase the rates chargeable by a gas company to consumers within the municipality beyond the maximum contractually fixed as a term upon which the municipality granted the

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

franchise to the company. There was an Act of the Legislature of Alberta purporting to validate and confirm the by-law of the municipality and the agreement between it and the company. Three of the four Judges who heard the appeal were of the opinion that the validating Act did not have the effect of giving to the agreement the force and effect of a statute. The Alberta Public Utilities Act 5 Geo. V. (1915), ch. 6 is almost identical with the Manitoba statute, but it contains no provision corresponding to sec. 84 of the Manitoba Act of 1912, (R. S. M. 1913, ch. 166.) The utility in question in the case was a gas company and therefore sec. 20 (a) did not apply. An appeal from the decision of the Alberta Court was dismissed by the Supreme Court of Canada (1920), 56 D. L. R. 388, 61 Can. S. C. R. 213, upon the grounds that the company had never gone into operation, that there was no "existing rate" under sec. 23 (c) and that therefore the Public Utilities Commission had no jurisdiction to make the order.

The appellant also relied upon Ottawa Electric R. Co. v. Township of Nepean, (1920), 54 D. L. R. 468, 60 Can. S. C. R. 216. The Ottawa Electric Railway had been declared by Dominion enactment to be a work for the general advantage of Canada, and consequently came under the operation of the general railway legislation of the Dominion. The appeal was from an order of the Board of Railway Commissioners. The provisions of the Railway Act (D) and the circumstances of the case are so different from the legislation and the facts involved in the case at Bar that it affords little if any, assistance in arriving at a decision in this appeal.

For the reasons I have given I think By-law 543 of the City of Winnipeg, after the legislation confirming it, still remained a by-law, and that the contract executed in pursuance of it by the city and the company remained a contract after its confirmation by the Act of 1895, ch. 54. This contract might with the consent of the parties be varied by a subsequent contract. The city might require an equipment and service not contemplated when the original contract was made. The company might be willing to comply with the requirements of the city upon getting just and reasonable concessions in the way of increased fares. This would be a matter for negotiation between the parties in order to arrive at an agreement. The city would stand on the terms of the by-law and the agreement as to the amount

of the fares to be charged and the company could claim that it should not be called upon to do more than it was required to do by the contract unless it was permitted to charge increased fares. This was the position of the parties when the Public Utilities Act was passed. Section 4 of the Act excluded from its operation any public utility owned or operated by any company or corporation existing previously to the session of the Legislature held in the year 1912. The Winnipeg Electric R. Co. did not therefore come under the operation of the Act when the Act came into force. There was one way, and one way only, by which the company could be brought under the Act. That is provided by sec. 3. The company might be brought under the Act by an order of the Lieutenant-Governor in Council, which might be made "upon and after the due passing of a by-law by the council of any municipality in which the operations of such public utility are carried on, requesting that all public utilities operated within the municipality, in so far as such operation is within the municipality, be made subject to the Act." On May 20, 1912, soon after the passing of the Act, the City of Winnipeg passed a by-law requesting the Lieutenant-Governor in Council to bring under the operation of the Act all public utilities owned and operated within the city, including those owned and operated by the city. In accordance with this request an order of the Lieutenant-Governor in Council was passed on May 28, 1912, bringing under the Act all the public utilities referred to in the by-law, making the Act and every part thereof applicable to such utilities and in full force and effect from the date of the Order in Council. In this way the company was brought under the Act.

By sec. 69 of the Public Utilities Act R. S. M. (1913), ch. 166, the decision of the commission upon any question of fact or law within its jurisdiction shall be binding and conclusive upon all companies and persons and municipal corporations and in all Courts. By sub-sec. (2) of the same section, "the commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act, and save as herein otherwise provided, no order, decision or proceeding of the commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any court, even when the question of its jurisdiction is raised." For the purpose of enforcing

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

its orders it is given the powers of the Court of King's Bench (sec. 52). By sec. 64: "The decision of the commission upon any question of fact or law within its jurisdiction, shall be final, and be res judicata."

When the Winnipeg Electric R. Co. was brought under the Act, the commission acquired exclusive jurisdiction over fares. The railway company and the city were no longer free to bargain with each other over the question of fares or other matters concerning the utility. Such questions could only be dealt with by the commission or subject to its approval. It was the duty of the commission to make orders as to extensions, equipment and service to be furnished by the company. It was also the duty of the commission to protect the public utility by permitting it to charge increased fares to meet the additional burdens imposed upon it.

From the time the company was brought under the operation of the Act, frequent applications were made by the City of Winnipeg to the commission for orders directing the company to furnish extensions, additional service, changes in or removals of existing tracks, switches &c., protection against stray electrical currents &c., and orders were made on these applications. The first order made by the Commission directed the company to construct a double street car track on Main St. North, the removal of certain tracks and switches, the operation of a car service to the north city limits, and to do other things. This order was made on the application of the City of Winnipeg. During the next 4 or 5 years many orders were made by the commission on the application of the city requiring the performance by the company of various matters entailing a great expenditure of money by the company. There has been a great increase in the wages of employees and the cost of material, while from various causes there has been a great depreciation in the revenue of the utility. The commissioner's finding of facts upon the application are important. This finding is binding on the parties (sec. 64). He says: "It is a fact that no dividends have been earned for the last five years, and that the company's finances are so depleted that efficient service cannot be furnished without additional revenue. Therefore, it must be evident that unless further revenues are provided the service must deteriorate and the riding public will suffer." He adds that it is the duty of the

Commission to protect the service and ensure its continuance.

The petition of the company alleges that unless it is afforded some relief and is permitted to increase its revenue derived from transportation, it will be forced into bankruptcy. This allegation was supported by evidence. The commissioner has shewn that additional revenue is necessary. The utility is of extreme importance to the citizens of Winnipeg and the surrounding territory. Its bankruptcy, or a serious impairment of its efficiency, would be a public disaster. Persons in this community reside, as a general rule, a considerable distance away from their place of employment. They rely upon the street railway for transportation. A stoppage of its operation for even a single day would cause great inconvenience and loss. To argue that the commission could not save the situation by such simple means as a reasonable increase in the fares chargeable by the company, is to put a very narrow construction upon the provisions of the Act.

A motion was made during the argument to quash the appeal on the ground that the City of Winnipeg, the appellants, had consented to the reference of the question of fares to the commission and that the commissioner had thereby become an arbitrator between the parties. In the view that I take of the Act I think the motion should be refused.

I would dismiss the appeal with costs to be paid by the City of Winnipeg, such costs to be full taxable costs and not subject to the limitation contained in sec. 23 of the Court of Appeal Act, R. S. M. 1913, ch. 43.

Fullerton, J.A.:—This is an appeal from an order of the Public Utilities Commission made on November 1, 1920, authorising and empowering the Winnipeg Electric R. Co. to charge and collect on and after September 1, 1920, fares for the carriage of passengers, in excess of the fares fixed by the contract between the company and the city.

Section 70 of The Public Utilities Act, 1913, ch. 166, provides as follows:— "70. An appeal shall lie to the Court of Appeal, in conformity with the rules governing appeals to that court from the court of King's Bench or a judge thereof, from any final decision of the commission upon any question involving the jurisdiction of the commission, but such appeal can be taken only by permission of a judge of the Court of Appeal given upon a petition presented to him within fifteen days from the rendering of the decision. . ."

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

Upon petition of the city under the above section Perdue, C.J.M., on October 1, 1920, made an order "that the said the City of Winnipeg be at liberty, and is hereby given permission to appeal from the said order of the Public Utility Commissioner to the Court of Appeal upon the following question, namely,— Had the Public Utility Commissioner power or authority to make the said order in so far as it affects the City of Winnipeg. Provided, nevertheless, that on the said appeal no question shall be raised or argued as to the constitutional validity of the said Public Utilities Act, or as to the validity of the appointment of the said Commissioner to his office."

While many questions were discussed on the argument, the main contention relied on by the appellant was that fares were fixed by the special statute incorporating the respondent company and that as the Public Utilities Act was a general statute the maxim generalia specialibus non derogant applied and the special Act was not affected by its provisions.

In order that this and the other contentions raised may be understood, it is necessary at the outset to refer to the by-law, contracts and statutes from which the respective rights and liabilities of the city and the company are to be determined.

On February 1, 1892, the council of the City of Winnipeg passed By-law No. 543. This by-law, after reciting that James Ross and Wm. McKenzie had applied to the city for the right of constructing and operating street railway lines in the city of Winnipeg, enacts that subject to certain terms and conditions, the applicants are given the rights applied for. These terms and conditions are set out in the by-law: but for the present purpose it is only necessary to refer to the following:—

Sections 5 and 6 fix the fares to be charged.

Section 27 makes the obligations and penalties imposed on the applicants conditional upon the by-law being ratified and confirmed by the Legislature at its next session and a charter granted to the applicants and their associates.

Section 33 authorises the transfer of all rights and privileges under the by-law to a company to be formed and organised by the applicants "and on such transfer all benefits and obligations arising under this by-law shall be transferred to the said Company, which shall thereupon become and be liable in the place of the applicants for the

proper carrying out and fulfilment of this by-law, provided that this clause shall only have effect upon such Company executing a contract with the City embodying the terms of this by-law so far as the same have not been performed."

Section 35 provides that a contract embodying the provisions of the by-law and a covenant to conform to and fulfil all the said provisions should be drawn and executed by the city and the applicants.

In persuance of the last-mentioned provision a contract was drawn and executed between the city and the applicants Ross and McKenzie.

By ch. 56 of the statutes of Manitoba 1892, assented to on April 20, 1892, the respondent company was incorporated.

Section 9, after giving the company power to construct and operate lines of railway, concludes as follows: "And in addition to the powers by this Act given, to exercise all the powers set forth in By-law No. 543 of the City of Winnipeg and the contract thereunder."

Section 18 authorises the city and the company "to make and to enter into any agreement or covenant relating to" among other things "the amount of fares to be paid by passengers."

Section 34 "By-Law number 543 of the City of Winnipeg entitled 'A By-law of the City of Winnipeg respecting Electric Street Railways a copy of which by-law is schedule 'A' hereto, is hereby validated and confirmed in all respects as if the said by-law had been enacted by the Legislature of this Province and the said Company shall be entitled to all the franchises, powers, rights and privileges thereunder."

In compliance with the proviso contained in sec. 33 of the by-law above quoted, on June 4, 1892, the company executed a contract with the city embodying the terms of this by-law so far as the same had not been performed.

This agreement contains the following among other recitals: "And whereas by Indenture of Assignment, bearing date the third day of June, 1892, the said James Ross and William McKenzie did pursuant to the powers contained in said By-law and contract, grant, assign, transfer, and set over unto the said Company all the rights, franchises, powers and privileges of them the said James Ross and William McKenzie under and by virtue of the said By-law No. 543 and said contract, with full power to exercise all

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

such rights, powers, franchises and privileges for the term in said By-law and contract mentioned.

And whereas by said By-law and contract, it is provided that the said Company should enter into this contract with the City."

The agreement then proceeds in the exact language of the by-law with slight necessary variations in sec. 17, 27, 33 and 35, and the addition to sec. 35 of the following: "The Company hereby undertake, promise and agree to conform to, fulfil, observe and keep all the matters, provisions and conditions set forth in or required of them or the said James Ross and William McKenzie by said By-law number 543 of the City of Winnipeg, and of the contract thereunder."

The last-mentioned agreement is set out in Schedule "B" to ch. 54 of the statutes of Manitoba 1895 and is confirmed by sec. 2 of that Act in the following language:—

"2. The purchase by the Winnipeg Electric Street Railway Company from James Ross and William McKenzie of the rights of the said James Ross and William McKenzie under by-law number 543 of the City of Winnipeg, and the transfer of the said rights to the Winnipeg Electric Street Railway Company on the terms and for the consideration of paid-up stock of said Company for which same was made, shall be and are confirmed and declared binding to all intents and purposes: and the contract between the City of Winnipeg and the said The Winnipeg Electric Street Railway Company, bearing date the fourth day of June, 1892, a copy of which is set forth as Schedule "B" to this Act, is hereby confirmed and validated to all intents and purposes as therein expressed."

The contention of the appellant is that sec. 34 of the Act incorporating the respondent company quoted above not only validates and confirms By-law 543 but gives to each section of that by-law the effect of a statute and as sec. 5 of the by-law fixes the fares to be charged the Public Utilities Act, being a general statute, cannot override sec. 5.

The first question then to be determined is whether the effect of the incorporating Act is to make the provisions of the by-law statutory law.

Section 34 of the Act validates and confirms the by-law and enacts that "the said Company shall be entitled to all the franchises, powers and privileges thereunder."

Clearly, however, this means that the company shall ex-

ercise such powers subject to all the terms and conditions of the by-law.

Now sec. 33 of the by-law requires that the company, as a condition of acquiring these powers, must enter into a contract with the city.

Until that has been done the by-law, as far as the company is concerned, was ineffective.

This, it appears to me, in a complete answer to the contention that the words of sec. 34 of the Act "is hereby validated and confirmed in all respects as if the said by-law had been enacted by the Legislature of the Province" have the effect of making the several sections of the by-law a part of the Act itself.

I am of the opinion that the effect of the Act is simply to validate and confirm the by-law.

Section 18 of the Act seems to point to the same conclusion because it gives express power to the council and the company to enter into any agreement or covenant relating to, among other things, "the amount of fares to be paid by passengers."

I think the rights and liabilities of the parties are solely governed by the contract subsequently entered into between them on June 4, 1892 which was "confirmed and validated to all intents and purposes as therein expressed" by 58 Vict. 1895 (Man.) ch. 54, sec. 2.

Mr. Symington, counsel for the appellant, laid down as a proposition of law that an agreement set up in a schedule to a statute has the same effect as if it were a clause of the statute itself. While his argument was directed to the Act of incorporation and the by-law scheduled to that Act which he treated as an agreement, it is of course, if correct, applicable to the agreement of June 4, 1892.

The authorities cited do not, in my opinion, support such a proposition.

In Canadian Northern Pacific R. Co. v. City of New Westminster, 36 D.L.R. 505, [1917] A.C. 602, the real question decided was that certain land was not exempted from taxation by the provisions of an agreement between his Majesty the King, in the right of British Columbia, and the Canadian Northern Pacific R. Co. ratified by an Act of the Legislature of British Columbia. The Act said that the provisions of the agreement were to be "taken as if they had been expressly enacted hereby and formed an in-

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

tegral part of this Act." Sir Arthur Channel, at p. 507, said "On the argument some question was raised by the respondent's counsel as to the operation of this provision," (the one in the agreement dealing with exemptions) "but the board are clearly of opinion that it operates as if it were a clause in an Act of the provincial legislature, and is binding on the City of Westminster with the force of such an Act."

Davis v. The Taff Vale R. Co. [1895] A. C. 542. In this case the facts were that the Barry Dock and Railways Co. promoted a Bill in Parliament to give them running powers over portions of the Taff Vale's system. In the result a clause was inserted in the Barry company's Act enacting that the Taff company should forward traffic destined for or coming from the Barry lines at rates per mile not greater than the lowest rate which should for the time being be charged by the Taff company for like traffic between certain places. The Taff company forwarded coal for Davis & Sons destined for the Barry company's line, charging rates in excess of the limits imposed by that clause and sued Davis & Sons for the amount.

Day, J. held that the Act relied upon by the consignors was only intended to give legislative sanction to a contract between the two companies, and that, therefore, they could not rely upon the provisions.

The Privy Council allowed the appeal, [1895] A. C. 542.

Here the clause in question was a part of the Act itself and the case is not therefore in point.

At pp. 552, 553 Lord Watson, after pointing out that the provisions of a Railway Act differ from private stipulations in the essential respect that they derive their existence and their force, not from the agreement of the parties, but from the will of the Legislature, says "These observations are not meant to apply to any case where a private contract made between two companies is scheduled to and confirmed by the Act, because in such a case the form of the enactment might be held to indicate that it is to operate as a contract and not otherwise."

In the Grand Trunk Railway Company, etc. v. City of Toronto (1909), 42 Can. S. C. R. 613, the question involved was the jurisdiction of the Railway Board.

Sec. 2 (28) of the Railway Act, R. S. C. 1906, ch. 37 defines "Special Act" as follows:—'Special Act' means any

Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway" .....

Section 3: "This Act shall, subject to the provisions thereof, be construed as incorporate with the Special Act, and, unless otherwise expressly provided in this Act, where the provisions of this Act, and of any special Act passed by the Parliament of Canada, relate to the same subject-matter, the provisions of the Special Act shall, in so far as it is necessary to give effect to such Special Act, be taken to overrule the provisions of this Act".

The Act invoked as ousting the jurisdiction of the Board was ch. 48 of 56 Vict. 1893 (Can.) entitled "An Act to give effect to an agreement between the Grand Trunk Railway Company of Canada, the Canadian Pacific Railway Company, and the Corporation of the City of Toronto."

Section 1, of this Act declares that "all works done or to be done in order to give effect to the agreement hereinafter mentioned, as well as those affected by it, are hereby declared to be works for the general advantage of Canada."

Section 2. The agreement "is hereby declared to be in force and binding on the parties thereto."

Section 3. "Each of the said parties may do whatever is on its part necessary in connection with any of the said works in order to carry out and give effect to its undertaking as embodied in the said agreement."

The Court held, Girouard and Duff, JJ. dissenting, that the Board had jurisdiction. The judgment was placed on the ground that ch. 48 was not a "special Act" within the meaning of the Railway Act.

On appeal, reported in [1911] A. C. 461. under the title of Canadian Pacific Railway Co. v. Corporation of City of Toronto and Grand Trunk R. Co. of Canada, the Privy Council held that although the Act in question was a special Act within the meaning of the Railway Act, it did not relate to the same subject-matter within the meaning of sec. 3 of the Railway Act and that in consequence the Board had jurisdiction.

Lord Atkinson, who delivered the reasons for judgment, says at pp. 478, 479 - - - "The agreement could not of itself confer on the companies power to carry out the many works and make the many alterations contemplated by it. It was necessary to obtain parliamentary powers for that

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

purpose. And accordingly this Act of the Dominion Parliament, 56 Vict. ch. 48, was obtained, ratifying and validating the agreement, enacting that all the works done, or to be done under it, as well as those affected by it, were works for the general advantage of Canada, and further enacting that each of the parties to the agreement "might do whatever is on its part necessary in connection with any of said works in order to carry out and give effect to its undertaking as embodied in said agreement. It was by this statute that power and authority were conferred upon the company to carry out the works specified in, and operate their lines in the manner contemplated by, the tripartite agreement. Their Lordships are therefore clearly of the opinion that this Act was a special Act within the meaning of sec. 2. sub-sec. 28 of the Act of 1906."

Mr. Symington placed great reliance on the case of The Ottawa Electric R. Co. v. Township of Nepean, 54 D.L.R. 468, 60 Can. S.C.R. 216.

This was an appeal from a decision of the Board of Railway Commissioners of Canada on questions of law.

The Ottawa company had applied to the Board for an increase of fares on its Brittania extension.

It appeared that on their lines within the City of Ottawa and on the Brittania extension taken as a whole the company had a revenue of at least 15%. On the Brittania extension taken by itself there was a deficit. The Board refused to make an order on the ground that as the system as a whole was profitable additional revenue was not required. Three questions were submitted. Question 3 was as follows:— (3) Has the Board the right to treat the company's operations as a whole and continue the existing tariff - - -"

The Court heard counsel and ordered a re-argument on three other questions, number (1) being: "Has the Board of Railway Commissioners authority to reduce the company's charge for passenger services within the city of Ottawa below the fare of 5 cents now charged for any such service?"

The majority of the Court considered that in order to answer question 3 it was first necessary to answer this last quoted question.

Prior to 1894 two street railways had been operating in the City of Ottawa. By an agreement between the two companies made in 1894 the assets of one were sold to the

other. An agreement was also made between the City of Ottawa and the two companies whereby the city gave the amalgamated companies power to "maintain and operate street railways during the term of 30 years in the manner and on the terms and subject to the conditions, restrictions and provisos hereinafter contained &c."

Paragraph 46: "No higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said line and branches thereof within the present City limits - - "

By ch. 86, 57-58 Vict. 1894, (Can) sec. 2. "The agreement between the said companies and the Corporation of the City of Ottawa, bearing date the 28th day of June. A. D. 1893, and set out in schedule "B" to this Act, is hereby ratified and confirmed."

3. "The franchises, powers and privileges heretofore or hereby granted to or conferred upon the said companies, or either of them and which are hereby authorised to be transferred to the said united company, shall be exercised and enjoyed by the said united company, subject to the terms, provisos and conditions contained in the said agreement with the Corporation of the City of Ottawa."

7. "The lines of street railway constructed by the said Companies or either of them are hereby declared to be works for the general advantage of Canada and the said "The Ottawa Electric Railway Company" is hereby declared to be a body corporate subject to the legislative authority of the Parliament of Canada."

Duff, J. (p. 481) answered the third question in the negative. His judgment is based mainly on the ground that the Act of 1894 was a "special Act" which the Railway Act could not override.

Anglin, J. holds that the power conferred on the company by earlier provincial legislation to fix its rates of fare was continued by the Dominion Acts of 1892 and thus became the subject of a "special Act" excluding the application of inconsistent provisions of the Railway Act, and he therefore found it unnecessary to deal with the effect of the confirmation by the statute of clause 46 of the agreement as creating a statutory right in favour of the company, (p. 488).

Brodeur, J. specifically holds that the Act of 1894 was a "special Act" within the meaning of the Railway Act and his judgment is based on that holding, (p. 494).

Mignault, J. at p. 499, takes the view that the contract

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

binds both the city and the company "with the consequence that the power of interference of the Railway Board - which can be exercised only on the ground that the tolls charged are unfair and unreasonable - is excluded by the recognition by the city and by Parliament that up to the maximum stipulated by clauses 46 and following of the contract, any tolls charged by the company while the contract is in force are fair and reasonable." He further states at p. 499. "In coming to this conclusion, I also rely on sec. 3 of the Railway Act (R. S. C. 1906, ch. 37) the statute of 1894 being a special Act overriding the provisions of the Railway Act in so far as is necessary to give effect to such special Act."

Davies, C. J. who dissented from the judgment of the Court, at p. 474 expressed the view that while the Board could not allow a higher tariff than 5 cents it had jurisdiction to determine whether the rate of 5 cents or even a lower rate was not a "fair and reasonable rate."

Idington, J. who was also a dissenting Judge, while he does not definitely decide the point, appears to hold the view that the Board had jurisdiction. (See p. 481).

Re City of Toronto and Toronto and York Radial R. Co. and County of York, (1918), 43 D.L.R. 49, 42 O.L.R. 545, 23 Can. Ry. Cas. 218.

Chapter 93, of the statutes of Ontario, 60 Vict. 1897, sec. 15:- "And whereas by certain agreements between the municipal corporation of the county of York and the company, dated respectively the 6th day of April 1894, and the 7th day of February, 1896, which are set forth in Schedules A and B to this Act, certain privileges and franchises were granted to the company upon its complying with the conditions therein set forth and with which the company has fully complied. It is therefore enacted that the said agreements and the privileges and franchises thereby created are hereby confirmed and declared to be existent and valid and binding upon the parties to the said agreements to the same extent and in the same manner as if the several clauses of such agreements were set out and enacted as part of this Act."

Riddell, J. at p. 59, says with reference to this section: "I may say at once that, in my opinion, council for the appellant placed the rights of his client quite too low. This agreement is not simply validated by a statute, but is itself a statute. - - - Whatever difficulties might have been en-

countered had the agreement been simply validated, there can be none when we remember that the privileges and franchises are given by statute."

Now, it appears to me clear beyond all question that none of the above authorities support the broad proposition laid down by Mr. Symington. In the last cited case Riddell, J., and in the case of Canadian Northern Pacific R. Co. v. City of New Westminster, 36 D. L. R. 505, [1917] A. C. 602, the Privy Council were of the opinion that the peculiar words in the statutes in question had the effect of making the scheduled agreements part of the statutes. Davis v. Taff is clearly not in point. In both Grand Trunk Ry. Co. v. City of Toronto and the Nepean case the question was whether the Acts there in question were "special Acts" within the meaning of the Railway Act, which is quite a different question.

The result of the cases cited which are in point appears to be that in order to make an agreement scheduled to an Act a part of the Act itself, it is not sufficient to find words in the statute merely confirming and validating the agreement: you must find words from which the intention can be inferred.

In my judgment, therefore, the Act confirming and validating the contract of June 4, 1892, had not the effect of making its provisions statutory law.

By ch. 66 of the Statutes of Manitoba 1912, (R.S.M. 1913, ch. 166), entitled "The Public Utilities Act" the Legislature of Manitoba established a Public Utilities Commission with very wide jurisdiction and power over public utilities.

Prior to the passing of the Act the appellant and respondent had been in almost continuous litigation over their respective legal rights; a number of appeals had been taken to the Privy Council, and needless to say, large amounts of money had been expanded in connection with same. Questions were every day arising which could only be settled by the Courts on the strict interpretation of the letter of the franchise and then only after the great delay involved in the hearing of the various appeals, which the parties were at liberty to take.

Principally, I have no doubt, to meet this situation, the Legislature decided to create a new Court to determine all matters in dispute in a summary way and with an appeal

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

limited to the question of jurisdiction only and the Public Utilities Act was passed.

It is contended that this Act does not give the Public Utilities Commissioner power to override the terms of a contract fixing the amount of fares to be charged for the conveyance of passengers on a street railway.

A considerable part of the argument was taken up by a discussion of the canons applicable to the construction of statutes. These are no doubt useful guides when the intention of the Legislature is obscure, but can be of little assistance when the words of the statute are clear, as I think they are in this case.

Section 20 (a) under the heading "Jurisdiction and Power of Commission" reads as follows:- [see ante p. 259]

Section 23 (c): [See ante p. 260]

Section 32. [See ante p. 260]

It will be observed that sec. 20 (a) has exclusive reference to transportation utilities while the other sections referred to relate to public utilities generally.

Again, while 20 (a) gives the commission jurisdiction over all questions relating to the transportation of goods and passengers, it especially confers jurisdiction over fares.

Counsel for the appellant refers to the sanctity of contracts and argues that the Court will not presume an intention in the Legislature to disregard contracts unless such an intention appears from clear words or necessary implication.

The Public Utilities Act does not, however, purport to interfere with contracts existing between public utilities and municipalities. It simply creates a new Court with sweeping jurisdiction over municipalities and public utilities that may thereafter be brought under its jurisdiction.

Section 4 of the Public Utilities Act says that it "shall not apply to any public utility owned or operated by any company or corporation existing previously to the said session, - - - unless and until the same is brought under this Act by an order of the Lieutenant Governor-in-Council, which may be made upon and after the due passing of a by-law by the council of any municipality in which the operations of such public utility are carried on requesting that all public utilities operated within the municipality - - be made subject to this Act."

The appellant passed such a by-law and by an Order-in-Council the Act was made applicable to both appellant and respondent.

Having by its own Act voluntarily submitted itself to the jurisdiction of the Public Utilities Commissioner with full knowledge of the wide extent of his jurisdiction, the appellant can gain little from any argument regarding the sanctity of contracts.

The words of 20 (a) are clear and unambiguous and unless their meaning is cut down by other parts of the Act they gave the commissioner jurisdiction to make the order in question in this appeal.

Now is there anything in the other sections of the Act to cut down the plain and obvious meaning of the words used in 20 (a)?

We were referred to 20 (b) and 20 (g) as shewing that the Court was not intended to have jurisdiction over contracts.

20 (b) applies to public utilities generally and deals with an application to reduce tolls on the special ground that they "exceed what is just and reasonable having regard to the nature and quality of the service rendered or of the commodity supplied." In such a case the commission has jurisdiction to make orders (1) respecting the improvement of the commodities or services: (2) as to the tolls. In the case of an order made on such an application the commissioner is required to give effect to such of the provisions of any contract existing between such public utility and a municipality as the commissioner shall consider fair and reasonable. While this, to the extent stated, limits the general jurisdiction of the commissioner on the peculiar application therein provided for, it does not otherwise affect his general jurisdiction.

20 (g) deals with an application by a public utility to use any highway or any bridge or subway constructed or to be constructed by the municipality, or two or more municipalities, and provides that any order prescribing the terms of such user must be subject to the terms of any contract between the public utility and the municipality.

The general use of the streets and highways is essential to the operation of a street railway company and is always provided for specifically in the franchise of such a company.

This section must, I think, be intended to cover the case of highways, bridges or subways constructed after the granting of the franchise and not provided for in it. It cannot refer to a general application to use highways which the

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

company already has the right to use under its contract with the municipality.

For example, the section would apply to the Maryland Bridge now under construction. This section would give the commissioner jurisdiction to define the terms and conditions upon which the respondent should be at liberty to operate cars over said bridge, subject to any existing agreement.

If the contention that the commission has no jurisdiction to override contracts is correct then the words "Subject to the terms of any contract between any public utility and any municipality, and of the franchise or rights of the public utility" at the beginning of this section are unnecessary.

For the reasons which I have given, I think the Public Utilities Commission had jurisdiction to make the order appealed from, and I would therefore dismiss the appeal with costs.

Dennistoun, J. A.:— The Public Utilities Commission acting under the provisions of the Public Utilities Act, R. S. M., (1913), ch. 166, issued an order dated August 20, 1920, fixing fares to be charged by the Winnipeg Electric R. Co., for the transportation of passengers over its street railway system in the city of Winnipeg. This order increases the fares to be paid by the public using the street cars, and abolishes privileges previously enjoyed by specified classes of passengers under a contract between the city and the company made in the year 1892.

The City of Winnipeg has appealed from this order upon the ground that the Commission had no jurisdiction to make it.

The Act provides as follows:—

"69. The decision of the commission upon any question of fact or law within its jurisdiction, and as to whether any company, municipality or person is or is not a party interested within the meaning of this Act shall be binding and conclusive upon all companies and persons and municipal corporations and in all courts.

"(2) The commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act, or by any other Act, and save as herein otherwise provided, no order, decision or proceeding of the commission shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or

any other process or proceeding in any court, even when the question of its jurisdiction is raised.

"70. An appeal shall lie to the Court of Appeal. . . . from any final decision of the commission upon any question involving the jurisdiction of the commission but such appeal can be taken only by permission of a judge of the Court of Appeal . . ."

The Corporation of the City of Winnipeg on October 1, 1920, obtained leave to appeal to this Court from the order of the commission referred to, the question propounded for decision being,-"Had the Public Utility Commissioner power or authority to make the said order in so far as it affects the City of Winnipeg ? Provided nevertheless that on the said appeal no question shall be raised or argued as to the constitutional validity of the said Public Utilities Act or as to the validity of the appointment of the said Commissioner to his office."

The question to be decided is limited by the statute and the order granting leave to appeal, to a determination of the statutory powers of the commission to make the order appealed from. This Court has no jurisdiction to review the order on its merits. If the commission had power to make it, the order is "binding and conclusive in all courts."

During the course of the argument counsel for the railway company sought to shew that the commission had acquired jurisdiction by consent of parties, to act as arbitrator, or quasiarbitrator, and that the order appealed from was made under statutory powers plus powers acquired by consent, and being made by persona designata was unappealable.

The Court ruled that the appeal authorised by the Act, and the order giving leave to appeal, did not permit any question of jurisdiction to be raised except such as arose by virtue of the statute, and the argument was thereafter confined to the statutory jurisdiction of the commission.

To my mind this jurisdiction can be determined from a perusal of the Public Utilities Act giving to its provisions the ordinary grammatical meaning of its words and phrases, without reading into it the numerous reservations and legislative exceptions urged by council at great length, and involving a minute and complicated review of a very considerable number of public and private statutes, passed by the Legislature of Manitoba during the last 30 years.

It must be borne in mind that up to the year 1912, when

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

the Public Utilities Act was passed, the whole trend of the legislation in respect to public utilities was based upon contract and agreement between the parties concerned, and their rights were strictly construed by the courts, as fixed by the letter of those contracts and the legislation which validated or confirmed them.

As a result there was continuous and acrimonious litigation between the public, represented by the municipalities, and the investors, represented by the incorporated utilities. There were contests between rival utilities, and frequently there was no final method of adjusting these disputes but by application to the Legislature itself, a body which does not possess the technical qualifications for the satisfactory solution of problems relating to individuals.

Litigation involved prolonged delays, many of the cases going to the Judicial Committee of the Privy Council and the expenses involved, which ultimately fell either upon the public or the utility, were considerable.

Such a state of affairs was not peculiar to the Province of Manitoba. It existed in most of the Provinces of the Dominion and mutatis mutandis in the United States. Legislatures everywhere began to take action with a view to putting an end to this unsatisfactory state of things, and to combine public control with private ownership in the hands of commissions with large exclusive judicial and discretionary powers. The motives of the utilities were largely financial in the pecuniary interests of their shareholders, on the other hand the motives of the municipalities were in the interest of the public service without much regard for private rights.

The public utility commission was therefore evolved and adopted successively by Massachusetts in 1885; New York in 1905; Wisconsin in 1907; New Jersey 1910, followed by a large number of States, and by the Provinces of Canada, so that there is at the present time a widely diffused effort to make this new idea effective and beneficial.

The intention of the Legislature in passing this Act should be declared with caution, to observe the canon of construction laid down by Lord Haldane in Vacher & Sons Ltd. v. London Society of Compositors, [1913] A. C. 107, at p. 113, keeping in mind what the state of the law was at the time the Act was passed and reading the Act as a whole. I am of the opinion that the intention was to substitute for the Courts a new tribunal with large jurisdiction and pow-

ers, whose decisions would be unappealable, speedy, and enforceable by summary and unusual process. That the commission should have absolute jurisdiction within the limits assigned to it, assisted by a body of trained experts whose services would at all times be available for the purpose of investigating and adjusting the conflicting rights and liabilities that are constantly arising between opposing parties involved in furnishing and using a public utility service. The members of such a commission are specially trained for such service, and able to give their whole time and attention to it, and at comparatively small expense able to supply necessary technical data for the investigation and determination of any question which comes before them.

The Act is a remedial Act. It is intended primarily to safeguard the rights of the public, and to provide efficient public service at fair and reasonable cost. It does not seek to oust the owner, or shareholder, but to control his exactions, and compel him to be satisfied with a fair and reasonable return for the service rendered.

The commission is all-powerful within the scope of its jurisdiction and it is the duty of the Court on this appeal to determine what that jurisdiction is in respect to fares for passenger traffic upon the railway.

The Public Utilities Act was passed in 1912, and was amended and consolidated as it appears in the Revised Statutes of Manitoba, which were passed in 1913.

First, note sec. 84 of the Act of 1912, which has disappeared from the consolidation having served its purpose. "84. All Acts and parts of Acts inconsistent with this Act are hereby repealed."

These definite, specific, wide, sweeping words, have an important bearing upon the arguments which were addressed to this Court, with respect to rights acquired by the city and the railway under previous general and special Acts.

That the general Acts are gone in so far as they are inconsistent with this Act, there can be no doubt, and the special Acts are gone also, where they deal with the identical powers conferred by the general Act, notwithstanding the maxim generalia specialibus non derogant, which must be read and applied subject to a number of exceptions which will be dealt with later.

The definition of a "public utility" in sec. 2 (b) is quite inconsistent with the use of the words in the following sections of the Act. The definition declares it to be a corpora-

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

tion, a firm, a person, and so forth, while in the following sections it is a business that is referred to as a public utility and not the owner of the business.

The Act has been amended and in part remodelled since 1912, but it has not yet in all probability, attained the exact form which will satisfy its authors.

Sections 3 and 4 set forth the public utilities to which the Act applies and in my humble judgment disposes of the main question raised on this appeal.

By section 3 all public utilities owned or operated by the Government of the Province, all public utilities under the control of any company or corporation created or incorporated, at or after the session of the Legislature held during the year 1912, and all railways and street railways except railways owned and operated by any municipality which has not passed a by-law under sec. 4, are declared to be within the applicability of the Act.

Section 3 did not bring the Winnipeg Electric R. Co. under the Act. It had been incorporated long previously to the year 1912, and had secured franchise rights, subject to terms and conditions as to user of the streets, maintenance of the service, and fares to be charged by contract with the city made with all due solemnities and ratified and confirmed by the Legislature.

Had the city been content to rest upon its contractual rights it was free to do so, and the Public Utilities Commission would have had no jurisdiction whatsoever over the parties now before this Court.

The Legislature realising that a city such as Winnipeg governed by special charter, and including within its boundaries many public utilities such as water-works, gas-works, street railways, electric power plants, and so forth might prefer to control and contract under the legal system which prevailed at the time the Act was passed, and might be unwilling to surrender to the Public Utilities Commission the large powers which the Act confers, passed sec. 4, for the purpose of enabling such a city to bring its utilities under the commission, or to remain outside its jurisdiction as the city saw fit.

That section reads as follows:—

"4. This Act shall not apply to any public utility owned or operated by any company or corporation existing previously to said session, or which is continued in the name of another company, unless and until the same is brought un-

der this Act by an order of the Lieutenant-Governor-in-Council, which may be made upon and after the due passing of a by-law by the council of any municipality in which the operations of such public utility are carried on, requesting that all public utilities operated within the municipality, insofar as such operation is within the municipality, including those owned or operated by the municipality itself, be made subject to this Act."

The public utility has no option under this section. It is the city which has the option, and when the city and Lieutenant-Governor-in-Council combine to force the utility under the Act the utility must submit to the jurisdiction of the commission whether it will or not. The only protection which is afforded to an unwilling utility lies in the opposition which it may be able to bring against the passing of the Order-in-Council. If unable to prevent its passage the Act automatically becomes operative, and the commission may exercise all the jurisdiction and powers which it possesses.

The Public Utilities Act of 1912 was assented to on April 6, 1912, and on May 20, 1912, the City of Winnipeg passed the following by-law:

"By-law No. 7288.

"A by-law of the City of Winnipeg to place its Utilities under the Public Utilities Act.

"Whereas the Legislature of the Province of Manitoba enacted The Public Utilities Act, being chapter 66 of 2 George V. providing among other things, for the creation of a Public Utilities Commission for the Province of Manitoba;

"And whereas it is deemed desirable to make the utilities owned and operated by the City of Winnipeg subject to the said Act, and to have all the public utilities within the City of Winnipeg brought under the said Act;

"Now therefore the Municipal Council of the City of Winnipeg, in Council assembled, enacts as follows:—

"1. The City of Winnipeg hereby requests the Lieutenant-Governor-in-Council to bring under the operation of the said Public Utilities Act all public utilities owned and operated within the City of Winnipeg, in so far as such operation is within the said City, including those owned and operated by the City of Winnipeg itself.

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

"Done and passed in Council assembled this 20th day of May, A. D. 1912.

C. J. Brown, City Clerk. R. D. Waugh, Mayor."

On May 28, 1912, an Order-in-Council was passed by the Lieutenant-Governor in Council of which the following are the operative words, omitting the recitals:

"On the recommendation of the Honourable the Minister Committee advise:—

"That pursuant to the provisions of the said The Public Utilities Act all public utilities at present owned or being operated by any existing company, or that may be hereafter continued in the name of another company, or by the municipal council of the City of Winnipeg as a corporation, within the limits and extent of the said City, insofar as such operation is within said limits, be brought under the said Act, and that the same and every part thereof be applicable thereto, and be in full force and effect from the day of the date hereof."

Certified M. McLean.

Clerk Executive Council."

Forthwith upon promulgation of this Order in Council the Winnipeg Electric R. Co. became subject to the jurisdiction of the Public Utilities Commission with all the obligations and benefits, imposed or conferred, by the Public Utilities Act whatsoever they may be.

But, say counsel for the city, we have a contract with the railway company which settles the terms upon which the company may use our streets, the character of the service which they shall give, and the fares they may charge for the carriage of passengers. The Public Utilities Commission has no authority to override the terms of that contract or to change or alter the fares fixed thereby.

In my opinion the Public Utilities Commission does not by the terms of the order in question override the contract.

It is the Legislature of the Province of Manitoba which has done so, and the power of the Legislature under section 92 (13) of the B.N.A. Act to override contract is unquestioned.

So soon as the commission acquired jurisdiction under the statute and Order in Council, the contract became nothing more than a record of agreements reached by the parties which will continue to govern their future relations until the commission acting within the scope of its specific powers sees fit to change them.

There may be many matters covered by the contract which do not fall within the powers of the commission; in respect to such matters the contract remains in full force and virtue; There may be other matters in respect to which the commission has jurisdiction but does not see fit to exercise it, and the contract will continue to govern; but where the statute expressly gives the commission jurisdiction to change or alter terms and conditions without any reservation of contractual rights, the commission may change or alter them.

To give any other meaning to the express provisions of the Act would be to rob it of its distinctive character, and to emasculate it to the point of futility.

I now propose to examine the Act to ascertain, firstly, if it gives the commission jurisdiction to raise fares on the application of a street railway company against the will of a municipality; and secondly, to ascertain if there is anything in the statute law of the Province, which excepts from the jurisdiction of the commission the raising of fares for the carriage of passengers, on the Winnipeg Electric Railway, by reason of the contract regulating fares which has been referred to.

Section 20 (a) of the Act is in these words: [See ante, p. 259]

Read in connection with this sec. 23 (c): [See ante, p. 260]

Next consider.—

"26. In considering and acting upon any application or matter before the commission involving the question of rates to be charged for service by any public utility, the commissioner shall not make any ruling or direction to raise rates for any such service beyond what the owners of any such public utility may desire to impose."

Lastly, read sec 32, which deals with new schedules of rates submitted for approval by a public utility. [See ante p. 260]

Sec. 20 (a) is a railway clause which does not refer to any other form of public utility, and is expressly declaratory of "jurisdiction" as contrasted with "power" in 23 (c). It was strongly urged that the Legislature intended to draw a sharp distinction between "jurisdiction" and "power". That the latter was exercisable only within the scope of the former, and that unless what were called the jurisdictional sections of the Act, 20 to 22 inclusive, clearly give authority to raise railway fares, the commission can acquire none

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. CO.

from the powers contained in 23 (c), which deals with utilities generally.

This imposes too narrow a limitation upon the meaning of these words which are frequently interchangeable, and the argument only obtains force by reason of Mr. Symington's contention, that 20 (a) does not refer to fares at all, and that the commission takes its sole jurisdiction over fares from 20 (b), which gives no authority to make increases. His argument is that 20 (a) deals with "prices" and not with "rates, tolls, or charges", and that it refers to a railway which, in course of construction, or for some other reason, is not ready to file a tariff of tolls, in which case the commission may determine and fix "prices at which goods or passengers may be carried until the railway is ready to commence operation and file its regular schedules of tolls. Further that 20 (a) as it now appears was originally 19 (b) in the Act of 1912 and that it is one of the clauses which were designed for the purpose of vesting in the commission powers which had formerly been possessed by the railway commissioner under the Railway Act, and that there must be read into it the limitations which were formerly imposed upon the railway commissioner by the Railway Act.

I cannot accept this argument. A clause in a general statute must be read in accordance with the plain meaning of the words and phrases which it contains, there can be no hidden limitations or restrictions because, in some former Act from which such words are taken, there clearly appeared such limitations or restrictions. I must assume that the general words are taken, and the restrictions have been abandoned. I think the words of 20 (a) when read with 23 (c), and sec. 32, as set forth above, abundantly shew that the commission have power and jurisdiction to fix prices for the transportation of goods and passengers, to fix just and reasonable rates, tolls and charges, when existing rates are found to be unjust, unreasonable or insufficient, and to approve increases of rates, tolls, and charges when a utility applies for same and discharges the onus of proving that such increases are just and reasonable.

Having reached this conclusion, it is necessary to examine the argument presented on behalf of the city, that by the Public Utilities Act rights secured by previous contract are reserved, and placed beyond the jurisdiction of the commission.

The first section to which reference is made is 20 (b).

This section is general in its character and applies to all Public Utilities, differing in this respect from 20 (a) which refers to railways only.

It authorises the commission to reduce tolls upon complaint being made that the tolls demanded exceed what is just and reasonable, having regard to the nature and quality of the service rendered, and provides inter alia, that the commission may disallow or change as it thinks reasonable, any such tolls or charges as in its opinion are excessive, unjust, or unreasonable, the whole however subject to such of the provisions of any contract existing between such public utility and a municipality at the time such complaint is made, as the commission may consider fair and reasonable.

This section deals with the reduction of tolls on complaint, and is not applicable to the present appeal, but it is urged that the reference made to contract shews an intention on the part of the Legislature to consider the contract as existing and binding for all purposes, and that it was necessary to give the commission specific authority as is here done, to interfere with its provisions under the special circumstances set forth in this section.

In my judgment this is not the meaning of the section.

The commission has been given general jurisdiction over tolls and fares, but those tolls and fares are to be considered under this section with respect to "the nature and quality of the service rendered," and in order to determine the justness and reasonableness of the fares charged, the commission should examine the contract in order to ascertain what is the nature and quality of the service originally contracted for, and then, having regard to such of the provisions of that contract as the commission considers fair and reasonable, fix the tolls.

As previously stated the contract is not abrogated by the Legislature in so far as it deals with matters which are not under the jurisdiction of the commission, and there is nothing inconsistent in giving the commission jurisdiction over tolls and fares, and at the same time directing a reference to the contract for the purpose of determining what the nature and quality of the service ought to be.

By this same section the commission is authorised to make such order respecting the improvement of the service as seems to it to be just and reasonable, and should be

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

guided by a consideration of the provisions of the contract which appear to be fair or reasonable. In any event the commission has jurisdiction under this section to reduce the fares and to improve the service if it considers it just and reasonable to do so, taking the contract which fixes existing rates and quality of service as the basis of the enquiry.

The next section in which contract is referred to is 20 (g), which reads:—

"20. The commission shall have jurisdiction:—

"(g) subject to the terms of any contract between any public utility and any municipality, and of the franchise or rights of the public utility, to define or prescribe the terms and conditions upon which a public utility shall or may use for any of its purposes as a public utility, any highway or any public bridge or subway constructed or to be constructed by the municipality, or two or more municipalities, and to enforce compliance with such terms and conditions."

This is a new sub-section. It was not in the Act of 1912, but was passed in the year 1913.

It does not mention tolls, and to read it as limiting the commission in its jurisdiction over tolls given by 20 (a), 20 (b), 23 (c) and 32 by the terms of any contract or "franchise" would be contrary to the express words of those sections and contrary to the general spirit of the Act read as a whole.

This section appears to relate solely to the user of a highway, public bridge, or subway. Bridges and subways are frequently designed and built for the combined use of the municipality for highway purposes, and of the utility for traffic purposes, the design, the method of user, and the proportions of the cost to be borne, are frequently a matter of bargain and agreement between the parties which desire to use the highway, bridge, or subway in common.

Notwithstanding the able argument of Mr. Symington, I have come to the conclusion that this section does not refer in any way to tolls or charges, but only to the obligations and restrictions which the parties to the contract or franchise have imposed upon one another in respect to joint user of a specified municipal undertaking. It is a particular highway, bridge or subway which has been made the subject of a special agreement that is here referred to; the subsection is designed to meet special cases and is not of

general application, and it gives to the commission jurisdiction to enforce against the utility compliance with such terms and conditions.

The Appellate Division of the Supreme Court of Alberta appear to have taken a somewhat different view of this sub-section in City of Edmonton v. Northern Alberta Natural Gas Development Co., 50 D.L.R. 506, but it is respectfully pointed out that the Court did not take into consideration section 20 (a) which was not applicable to a gas company and which, if correctly interpreted as dealing with rates and fares upon a railway, controls and modifies the meaning to be given to 20 (g), insofar as railway utilities are concerned.

When 20 (g) was added to the Act in 1913 another clause was added at the same time which provides:—

"27. The commission shall have power, after hearing, upon notice, by order in writing, to require every public utility as herein defined:—(a) to comply with the laws of this Province and any municipal ordinance or by-law affecting the public utility, and to conform to the duties imposed upon it thereby or by the provisions of its own charter or by any agreement with any municipality or other public utility."

This provision does no more than bear out the idea previously expressed, that the agreements referred to are to be enforceable so long as they remain untouched. The commission when it acquires jurisdiction over a utility takes the contracts, franchises, and agreements, which are existing as the foundation upon which it is to work.

In so far as they are within the jurisdiction of the commission they have lost their contractual status and have become the equivalent of orders made by the commission which may be altered or amended from time to time as may appear just and reasonable.

For eight years the City of Winnipeg and the Winnipeg Electric R. Co., have invoked the jurisdiction of the commission, and a large number of orders have been made and complied with. Many of these orders have been obtained upon the application of the city and the terms of the contract now claimed to be inviolable have been altered and enlarged.

It is urged that the city surrendered none of its contractual rights when it brought the railway under the Act, that the contract may be changed and altered as against

Man.

C.A.

WINNIPEG v. WINNIPEG ELECTRIC R. Co.

the railway company, but that no jot or tittle may be charged or altered against the will of the city.

Having previously expressed the view that it is the jurisdiction which the commission acquired under the statute, and not that acquired by consent, which is to be determined upon this appeal, it may be that the position of the city has been in no way prejudiced by its course of conduct before the commission during the past 8 years.

Counsel for the city appear at all times to have carefully objected to the jurisdiction of the commissioner, and counsel for the railway company have done the same. Both parties have made use of the commission when it suited their purpose to do so, and ex abundanti cautela, as pointed out by the judgment of the commission, when they opposed the making of an order, denied the jurisdiction of the tribunal to make it.

For this additional reason, I think it advisable to confine the reasons for judgment on this appeal to the statutory rights of the parties without regard to their equivocal conduct before the commission.

I have made frequent reference to the "contract" between the city and the company. The contention of the city is, that it is more than a contract, that it is a statutory enactment which fixes the fares to be charged during the term of the franchise, and that such fares can only be altered by express statutory enactment.

I agree with the view of the Chief Justice and my brother Fullerton, that this contract has never become a statute in that sense. Toronto Railway Co. v. The King, 38 D.L.R. 537, [1917] A.C. 630, 29 Can. Cr. Cas. 29, 23 Can. Ry. Cas. 183. In any event the general repeal of "All Acts and parts of Acts inconsistent with this Act," must not be overlooked. This section does not appear in the Alberta Act under which the decision in the Northern Alberta Gas Co. case referred to was decided. If it were necessary to do so, I would hold that all previous legislation in respect to fares upon a street railway, which are inconsistent with the provisions of the Public Utilities Act, in respect to fares upon such railways when brought under the operation of the Public Utilities Act, has been repealed.

The case of Ottawa Electric R. Co. v. Township of Nepean, 54 D.L.R. 468, was much relied on by counsel for the city. That case appears to have turned largely upon secs. 3 and 6 of the Railway Act of Canada, R.S.C. 1906, ch. 37, by

which it is provided that "where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject matter, the provisions of the Special Act shall, in so far as is necessary to give effect to such Special Act, be taken to override the provisions of this Act."

In the case at Bar not only is there no such clause, but there is an express and specific clause repealing "all Acts and parts of Acts inconsistent with this Act."

The maxim generalia specialibus non derogant, so urgently pressed upon us, is of general application when an attempt is being made to ascertain the intention of the Legislature, and, when that intent can only be inferred from a comparison of the general words with the special words the latter will prevail. But where the intention of the Legislature may be inferred from words in the general Act which shew that there was a clear intention to override the special Act, the former will prevail.

Here the intention is clearly expressed that the commissioner shall have jurisdiction over fares, in respect to all utilities which may be brought under the operation of the general Act, and all Acts and parts of Acts inconsistent with that intention are repealed.

The golden rule of construction so often quoted, that the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the statute, may well be applied.

"Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences; for in that case the words of the statute speak the intention of the Legislature." Warburton v. Loveland (1831), 2 Dow & Cl., 480 at p. 489, 6 E.R. 806.

Maxwell on Statutes, 5th ed., discussing the rule "generalia specialibus non derogant," says at p. 286, that the Legislature is presumed not to have intended to alter a special provision by a subsequent general enactment unless that intention is manifested in explicit language, or there be something which shews that the intention of the Legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one; or something in the nature of the general one making it unlikely that an exception was intended as regards the special Act.

Ont.

S.C.

RE AUTO EXPERTS LTD.; EX PARTE TANNER.

These words may be aptly applied to the present appeal, and shew that the case at Bar does not fall within the scope of the general words of the maxim, which are only to be used as a guide, when more certain tests are wanting; The Great Central Gas Consumers Co. v. Clarke (1863), 13 C.B. (N.S.) 838, 143 E.R. 331.

References were made during the argument to Provincial Statutes and to the Winnipeg Charter 1918, which expressly mention the rights acquired by the parties under the provisions of By-law No. 543, and the contract based upon it, and it was argued that this indicates that the contract has been maintained inviolable, and unaltered. It is sufficient to repeat that the contract does remain for many purposes as originally drawn and will continue to do so. There has been some uncertainty as to the continuance of the Public Utilities Act, which is to some extent an experiment in a new field, and it has been considered prudent to make provision for many things in the Winnipeg Charter 1918 which may be found necessary at some future time but which are not to be involved so long as the Public Utilities Act remains operative by the deliberate action of the city.

For the reasons given and concurring with the views expressed by the other members of the Court, I am of opinion that this appeal should be dismissed and that the respondents' motion to quash the appeal should also be dismissed.

Appeal dismissed.

RE AUTO EXPERTS LTD.; EX PARTE TANNER.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. March, 1921.

Bankruptcy (§IV.—40)—Landlord's Claim for Rent Accrued Due at Time of Assignment—Priority Over All Other Claims—Liability of Trustee for Occupation Rent—Right of Reimbursement from Estate—Necessity of Landlord Proving Debt for Occupation Rent.

Under the Bankruptcy Act 1919, Can. ch. 36, the landlord's claim for the arrears of rent which has accrued to the date of the assignment, together with his costs of distress, has priority over all claims, including the fees and disbursements of the trustee. The liability to pay occupation rent becomes a personal obligation of the trustee like any other item of expense, for which he is of course entitled to indemnify himself out of the estate. It is not a debt of the insolvent, and the landlord is not called upon to prove it. As sec. 51 is made subject to sec. 52, the obligation to pay this occupation rent ranks ahead of all the obligations mentioned in sec. 51.

[See Annotations, Bankruptcy Act of Canada, 53 D.L.R. 135, 59 D.L.R. 1.]

APPEAL by the authorised trustee from the judgment of Orde, J., varying an order of the Registrar, as to the right of a landlord under the Bankruptcy Act, who has distrained for rent, and who has been obliged under the Act to give up possession of the goods to the trustee. Affirmed.

The judgment appealed from is as follows:—

Orde, J.:—On October 19, 1920, Auto Experts Ltd. made an assignment under the Bankruptcy Act 1919, Can. ch. 36, to N. L. Martin, an authorised trustee. The statement of affairs presented at the meeting of creditors, held on October 26, 1920, gave the value of the debtor's assets at $5,295.91, composed of cash on hand $7.80, stock in trade, service truck and office fixtures valued at $2,735.15, and accounts receivable $2,552.96. The liabilities were $6,762.47, of which $323 was for rent, $291.05 for wages, and the remaining $6,148.42 for unsecured creditors. Prior to the assignment, the landlord, Tanner, had distrained for $300 rent due and had incurred $23, for bailiff's charges. Under sec. 52 (1) of the Act, upon the assignment being made, he was obliged to give up possession of the goods to the trustee.

At the meeting of creditors on October 26, 1920, the landlord was present, and after some discussion as to the disposal of the goods, the meeting resolved that the trustee should remain in occupation of the demised premises "pending negotiations for the sale of the assets to a prospective tenant." There was some question as to the landlord having waived his right to occupation rent at this meeting, and the Registrar, upon the strength of a letter written by the landlord's solicitor to the trustees on November 6, disallowed the claim for occupation rent between the date of the assignment and the date of the letter. Upon the hearing before me additional evidence was given both viva voce and by affidavit. From this evidence it is quite clear that the landlord did not waive his right to occupation rent. He says that he told the meeting that he had no objection to the trustee's remaining in possession provided he was paid his rent. The trustee will not deny that the landlord said this, and admits that if the assets had ultimately realised a sufficient sum, occupation rent would have been paid. But he says that it was understood that his remaining in possession was for the benefit of all parties, the landlord included, and that by keeping the place open the landlord's chances of getting a new tenant were improved. The evidence is clear, however, that the landlord, through his solicitor, was re-

Ont.

S.C.

RE AUTO EXPERTS LTD.; EX PARTE TANNER.

peatedly requesting the trustee to disclaim the lease and vacate the premises without waiting for the expiry of the month given him by sec. 52(5). My finding upon the evidence is therefore that there was no waiver or abandonment by the landlord of his right to occupation rent during such time as the trustee should see fit to retain the premises after the assignment. When the goods were ultimately sold by the trustee, they realised only $642.40, and the book accounts only $39.43, which, with sundry cash items, made a total of $690.12 available for distribution. If the landlord's claim for rent has priority over the trustee's fee and expenses, and the trustee has also to pay occupation rent, there will not only be nothing left for the preferred claims for wages, but the trustee will be out of pocket. His expenses, exclusive of his own remuneration and his solicitor's fees, amount to more than $400.

Upon the matter coming before the Registrar in Bankruptcy, he held that the landlord's claim for rent accrued at the date of the assignment was not entitled to priority over the trustee's fee and expenses, and as already stated, he also disallowed part of the claim for occupation rent subsequent to the assignment. From that order the landlord now appeals.

The trustee contends that the priority which is given by sec. 52 (1) to the landlord for his rent and the costs of distress is subject to the payment of the fees and expenses of the trustee. He argues that the intention of the Act is to make the landlord subject to its provisions like any other creditor, and that the trustee in administering the estate of the debtor is doing so for the benefit of the landlord as well as for the other creditors, so that it would be inequitable and unfair that the landlord should reap the fruits of the trustee's work without bearing his share of the expenses of administration. He says that this intention is evident from the provision that the priority preserved to the landlord is payment "in priority to all other debts" and that the word "debts" as here used means the debts of the debtor and does not include those incurred by the trustee in the administration of the estate.

The landlord's right to distrain for his rent is so generally recognised that in legislation of this sort it is either not interfered with at all or it is almost wholly preserved. In England the landlord's right is not disturbed by the bankruptcy at all, and he may proceed to distrain in spite of it.

Section 52 of our Bankruptcy Act deprives the landlord of his right to distrain even to the extent of requiring him to relinquish goods upon which he has distrained to the trustee, and also limits his priority to three months' accrued rent up to the date of the assignment or receiving order and the costs of distress, if any, if the value of the distrainable assets will so far extend. But it was not intended in my judgment to do more than this, so far as the question of priority is concerned. Section 51, which deals with the priority of claims, commences with these words, "Subject to the provisions of the next succeeding section as to rent," thereby making the whole of the provisions of sec. 51 subservient to those of sec. 52. This, of course, would not entitle the landlord to any greater priority than that preserved to him by sec. 52, if sec. 52 expressly deprived the landlord of rights which he would otherwise possess. Section 52 expressly deprives him of his priority for any rent which accrued earlier than three months before the receiving order or the assignment, and it likewise limits his right to accelerated rent to a period of 3 months and deprives him of any priority for such accelerated rent, but does it go further than that? Having regard to the fact that the landlord's rights are intended to be preserved, I cannot think that the words, "in priority to all other debts," were intended to give the trustee the right, when the assets are not sufficient, to cast upon the landlord the whole burden of the fees and expenses of the trustee, for that will be the result if the trustee's contention is upheld. I think the word "debts" as used here means all other debts in so far as the landlord is concerned, and must therefore include the debts and other expenses involved in the administration of the estate. The landlord is declared expressly to be entitled to "an amount not exceeding the value of the distrainable assets" if necessary in order to pay him his arrears of three months' accrued rent and his costs of distress. If the expenses of administration are to be first deducted from that sum then the landlord is deprived of the security which the Act expressly retains for him. Had it been intended that in working out the question of the respective priorities of the landlord's claim for rent, the expense of administration, the costs of execution creditors, and the claims for wages, the landlord should rank after the expense of administration, one would have supposed that sec. 51 would have been framed to make that quite clear. If "the fees and expenses of the trustee" were to have ranked

Ont.

S.C.

RE AUTO EXPERTS LTD.; EX PARTE TANNER.

above everything, then it would have been a simple matter for sec. 51 to have commenced by so providing and then to have proceeded to declare that "subject to the provisions of the next succeeding section as to rent" the priorities should be as follows. Counsel for the trustee argues that the word "debts" must mean "debts provable in bankruptcy" in accordance with the definition in sec. 2 (n). But it is not the word "debts" that is defined here, but a specially coined term, namely, "debts proven in bankruptcy," indicating that there are debts outside the limited scope of that term. Sections 44 et seq. furnish examples of debts of the insolvent debtor which are not provable in bankruptcy. The definition does not assist us at all, and the word "debts" as used in sec. 52 (1) must simply be interpreted according to its natural meaning having regard to the context.

Counsel for the landlord suggested that the word "debts" as used in sec. 51 was wide enough to include the costs of administration. But while one may interpret it as being wide enough to cover all the payments covered by sub-sec. (1) of this section, the phrase "subject to the retention of such sums as may be necessary for the costs of administration or otherwise" in sub-sec. (2) might be held to indicate that the word "debts" as there used only applied to those paragraphs of sub-sec. (1) which commence with the words "Secondly" and "Thirdly." It is quite clear, however, that the words "foregoing debts" in sub-sec. (5) include more than the same words in sub-sec. (2). I do not think that the word "debts" as used in sec. 51 affords much assistance one way or the other, except as indicating that the word is not intended to have any specially defined or restricted meaning, but must be construed according to the context. The provisions of sec. 52 are intended to be paramount to those of sec. 51, and the lien which the landlord has upon the distrainable assets is evidently preserved for him. It cannot have been intended that in a case like this, where the whole property of the debtor is so small as to be barely sufficient to pay the landlord, the tenant by making an assignment can destroy the landlord's lien by what, in the result, proves to be a useless expenditure in the administration of the estate.

It was, of course, argued that by giving the landlord priority over the trustee's expenses, the trustee may be placed in the uncomfortable position of having to bear those expenses himself, but that is a contingency which it is his

duty to guard against before taking, or continuing the burden of, the trusteeship. Section 15 (5) and sec. 27 (b) provide means whereby he can protect himself in just such cases as this. To allow any argument as to the consequences of my decision to affect my judgment would be simply an example of "hard case making bad law."

I must hold, therefore, that the landlord's claim for the arrears of rent which had accrued to the date of assignment, amounting to $300, together with the sum of $23, his costs of the distress, has priority over all other claims, including the fees and expenses of the trustee.

The question as to the occupation rent now remains to be decided. Having disposed of the issue as to whether or not the landlord has acquiesced in any modification of his rights in this respect, is the landlord's claim for occupation rent to be postponed to the other fees and expenses of the trustees? Clearly not. The liability to pay occupation rent becomes a personal obligation of the trustee like any other item of expense, for which he is, of course, entitled to indemnify himself out of the estate. It is not a debt of the insolvent, and the landlord is not called upon to prove for it. If he is entitled to accelerated rent any dividend in respect thereof is credited to the occupation of the trustee. But the trustee can no more escape the obligation of paying rent for the period during which he occupies the premises than he can escape the payment of his accounts for advertising or the wages of a man in possession. As sec. 51 is made subject to sec. 52, the obligation to pay this occupation rent ranks ahead of all the obligations mentioned in sec. 51. This again may prove a hardship to the trustee in the present case, but he might have protected himself under sec. 15 (5) and 27 (b) had he seen fit to do so.

The landlord will, therefore, be entitled to be paid in priority to all other claims, including the trustee's fees and expenses, the sum of $323 for the arrears of rent and costs of distress above mentioned, and also to recover from the trustee the further sum of $300 for occupation rent for the period of one month during which the trustee remained in occupation after the assignment. As to the costs, while the point may have been doubtful, I see no reason why the landlord should not also be entitled to his costs upon this appeal, which I fix at the sum of $25, in addition to those allowed by the Registrar upon the motion before him. Rule 118, which provides that a "trustee shall in no case be personally

Alta.

S.C.

REX. v. HOMEBERG

liable for costs in relation to an appeal from his decision rejecting or disallowing any proof wholly or in part," does not in my judgment apply to a case where the trustee is resisting payment of a liability incurred by him subsequent to the assignment.

L. M. Keachie, for Tanner.

J. H. Cooke, for Martin, trustee.

March, 1921. The Court, after hearing read the evidence adduced before Orde, J., and the "Order" aforesaid and upon hearing what was alleged by counsel, dismissed the appeal with costs.

Appeal dismissed.

REX v. HOMEBERG.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 1, 1921.

Physicians and Surgeons (§II.—42)—Chiropractor—Treatment of Disease—Death—Lack of Skill—Crim. Code, sec. 246—Lawful Acts—Omissions—Manslaughter—Liability.

A chiropractor does not undertake the practice of medicine nor the practice of surgery, nor does he undertake to do some lawful act the doing of which would endanger life within the meaning of section 246 of the Criminal Code where his treatment consists of omissions rather than acts. It is also necessary to support a verdict of manslaughter under the above section to establish the fact that the accused did cause the death, not that he might have done so.

[Rex v. Beer (1895), 32 C.L.J. 416, followed.]

Case stated by the trial Judge on a conviction against a chiropractor for manslaughter. Conviction quashed.

C. V. Bennett for the Crown.

A. A. McGillivray, K. C. for the accused.

Harvey, C. J.:—The view I entertained on the argument when judgment was given quashing the conviction was that upon the evidence in this case the accused was not "undertaking to administer surgical or medical treatment" within the meaning of sec. 246 of the Crim. Code, R.S.C. 1906, ch. 146. I see no reason for departing from that view. The use of both terms "medical" and "surgical" shews that neither is to be taken as comprising the whole of healing treatment as either might possibly be in certain contexts and the section also shews that it is the doing of an act and not the omission which imposes liability. Both the chiropractors and the medical men gave evidence that chiropractic is neither the practice of medicine nor the practice of surgery.

As this disposes of the whole case I see no reason to consider the other questions reserved.

Stuart, J.:—I agreed at the hearing in this case that there must at least be a new trial on the ground of misdirection. I did not think that the trial Judge had made it clear to the jury that, if they disbelieved the assertion of the accused in his evidence, which they very well might, that he knew the deceased was suffering from appendicitis, they must at least decide whether he failed to exercise reasonable skill in diagnosis. The trial Judge I think assumed that it must be taken as a fact that the accused knew the nature of the disease. But the mother's evidence indicated that during his so-called treatment he did not know the real fact and his assertion at the trial that he did might have been properly considered by the jury as an attempt to establish his skill and knowledge after the fact was known.

My hesitation as to quashing the conviction entirely and discharging the accused was due to a doubt as to the proper interpretation of the words of sec. 246 of the Crim. Code to which my brother Beck has referred. I was inclined then to the view that the words which follow the expression "any other lawful act", viz., "the doing of which may be dangerous to human life" should be read as applying only to the immediately preceding expression "any other lawful act" and that they did not refer to the antecedent expression "to administer surgical or medical treatment". That is to say I thought that perhaps this latter phrase should be taken simpliciter so that the sense would be that any one who undertakes to administer medical treatment is under a legal duty to have and to use reasonable knowledge, skill and care. And I was also inclined to think that the term "medical treatment" should be interpreted, as it evidently was by the trial Judge, as having a wide general meaning as including any treatment which purported to remedy disease and not as confined to the administration of drugs. If this were the proper view a new trial only should have been directed.

But after consultation and reading the opinion of my brother Beck I am now disposed to assent, though still with some hesitation, to the view which he has expressed.

Beck, J.:—This case was tried before Walsh, J. with a jury. The charge was that the accused at etc. between, etc., "did slay and kill one Bonita E. Bergman and did thereby commit manslaughter." The jury found the accused

Alta.

S.C.

REX. v. HOMEBERG

guilty. He was sentenced to one month's imprisonment and a fine of $500.

The trial Judge reserved a case on the following points of law;-(1) Was there any evidence to support the verdict? (2) Was I right in allowing the Crown to prove that the defendant (a chiropractor) was not registered and not licensed to practise as a chiropractor in the Province of Alberta, and if so did I correctly and sufficiently instruct the jury as to the legal effect of such evidence? (3) Did I correctly and sufficiently instruct the jury as to the law applicable to the charge of manslaughter? (4) Did I correctly instruct the jury as to the legal effect and meaning of sec. 246 of the Criminal Code? (5) Should I have instructed the jury that the defendant could not be found guilty of manslaughter under sec. 246 of the Criminal Code? (6) Did I sufficiently instruct the jury that to justify a verdict of guilty they must find that the defendant caused the death? (7). Should I have told the jury that to justify a verdict of guilty they must also find that death resulted from gross negligence or gross ignorance, or both, on the part of the defendant? (8) Was I right in holding that the question of intent or mens rea need not be considered in this case? (9) Should I have instructed the jury to the effect that the defendant need only have had and used the knowledge, skill and care that any duly qualified chiropractor should have and should use in such a case to escape criminal responsibility? (10) Having regard to all or any of the foregoing questions should the conviction herein be quashed or should the conviction be set aside and a new trial ordered?

The girl Bergman aged about 15 years who lived with her father and mother at Erskine, Alberta, became ill in the early morning of Friday June 11, and died at The Royal Alexandra Hospital, Edmonton on that day week, Friday June 18. The mother called on the accused on the evening of Saturday the 12th. The accused is a chiropractor having an office at Stettler, 9 miles from Erskine and was apparently in the habit of visiting Erskine. Describing the treatment given by the accused to the girl, the mother says; He asked her some questions; then he adjusted her back. he made some notes; he took his hand and went over the back; following the spine, and as he found certain parts he made a note of it; he was just finding out parts and he was adjusting them; he was using two hands; the time he occupied was about 5 minutes; he said, in answer to the mother's question that there were two kinds of colic; that the girl

had one kind - colic of the left kidney and liver; it was not appendicitis; snapping his fingers he said it wouldn't be that for him to cure it, if it was appendicitis; he said an appendicitis operation destroyed the main oil cups of the system and that the average life of a patient who had such an operation was 15 years; he gave no directions as to treatment or diet or medicines; he saw the girl again about noon on the 13th; he treated her on Sunday the 13th March [June?] as he had done on the previous day; he saw her again on the evening of Monday the 14th; he then gave her another adjustment, said she was getting on nicely and in reply to a question said there need be no restrictions on her diet. He saw her again on the evening of Tuesday the 15th, treated her in the same way and said she might get up: for the 2 preceding days she had been drinking quantities of water with grape juice in it and had not cared to eat; on Wednesday the 16th she got up, dressed, came down stairs, played the piano, didn't seem very well and went back to bed; she had got up because the doctor had said it would be better to do so; she had got up about noon and was returning to bed about two o'clock when owing to a wind a window fell and gave her a shock and she said: "Oh, that hurt me". She began to get worse; the mother tried to get a doctor; failing to do so she got the accused who came in the evening; two women,-Mrs. Houghton and Mrs. Parcher - were there when he came; the accused adjusted the girl in the presence of the two women, he said she was a very sick girl - her stomach was all churned up but that he didn't think it was serious; the mother told him she had got a nurse and was trying to get a doctor; he did not approve; he returned the same evening; he asked: "What kind of draughts have you had here?;" the girl had a pain between the shoulders and the lungs and he said that looked as if there had been a draught through the room; he said he was afraid the girl had double pneumonia, that the other pain had all been adjusted — taken care of; the mother suggested his staying all night but he said it was not necessary, that he could be got by telephone to Stettler at any time; he called at the house again that evening but did not see the girl; the mother describes the girl's condition:—"she had complained of the pain in her stomach from the time the window fell down; she had a severe pain up till half past six; she had a very horrid pain and I was putting on hot applications with turpentine water and that seemed to relieve her at the time; the pain was in the abdomen, after that she took a pain through the should-

Alta.

S.C.

REX. v. HOMEBERG

ers; that made her breath short; that was the pain the accused thought was double pneumonia". The nurse, Miss Elsie, had now arrived and the mother left it to her to look after the girl.

About 2:30 on the morning of Thursday the 17th Dr. Frankum, a medical practitioner arrived; the doctor and the mother took the girl by train to the Royal Alexandra Hospital, Edmonton, arriving about 3:30 in the afternoon.

The mother herself had been treated by the accused some months before; she thought his treatment had done her good; it was by request of the girl herself that the accused was called in; while the girl was sick she did not want a medical man but wanted a chiropractor - the accused.

The foregoing is substantially all the evidence that was given on the part of the Crown as to what the accused undertook to do and the manner in which the accused treated the girl, and as to his professions of skill. None of the rest of the evidence appears to be of consequence in the view which I take of the law applicable to the case, except that the accused, who gave evidence on his own behalf, said that he knew that the girl was suffering from appendicitis and asserted his competency to treat her: and except the evidence given by other chiropractors and medical practitioners as to the proper treatment and what would have resulted from it.

The sections of the Criminal Code treating of homicide begin with sec. 250.

Section 252 defines "culpable homicide," so far as material to the present case, as follows: "Homicide is culpable when it consists in the killing or 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 x x x"

The trial proceeded on the assumption, a correct one as I think, that the charge of manslaughter could be sustained only if the defendant could be brought within the terms of sec. 246, one of the earlier sections of the Code appearing under the caption: "Duties tending to the preservation of life"; secs. 241-249.

Section 246 reads as follows:

"246. Everyone who undertakes, except in cases of necessity, to administer surgical or medical treatment, or to do any other lawful act, the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill and care in doing such act, and is criminally responsible for omitting without lawful excuse, to discharge that duty if death is caused by such omission."

Section 244 provides for a punishment in case death is not caused, that is "unless the offence amounts to culpable homicide"; the punishment for which is provided by sec. 268.

Section 246 is directed against a person who undertakes to do a lawful act; administering surgical or medical aid is an instance of a lawful act; the section covers other lawful acts; but, first the section is directed against acts, not omissions and secondly, the act contemplated is restricted to an act "the doing of which is or may be dangerous to life".

The purposes of the other sections comprised under the caption: "Duties tending to the preservation of life" are as follows:—

Section 241, duty of person in charge of another to provide necessaries of life. Section 242, duty of head of family to provide "necessaries" — this has been held to include surgical and medical treatment. Section 242A, duty to provide necessaries for wife, child or ward. Section 243, duty of masters to provide food, clothing or lodging to servant, if they have contracted to do so. Section 245, abandoning children under two years of age. Section 246, the section under consideration. Section 247, duty of persons in charge of dangerous things. Section 248, duty of person not to omit an act he has undertaken to do if the omission is dangerous. Section 249, master causing bodily harm to apprentices or servants.

I have referred to the sections of which sec. 246 is one, because it may be thought that they may be of some assistance in the interpretation of that section. The interpretation of that section, as I have in effect suggested, is correctly, in my opinion, expressed by Falconbridge, C.J. in Reg. v. Beer (1895), 32 C. L. J., 416. That was a case of a charge of manslaughter against a Christian Science practitioner. Falconbridge C. J., said at p. 418, "Mrs. Beer did not undertake to administer medical or surgical assistance nor did she undertake to do some lawful act, the doing of which would endanger life. No one can say that sitting silent by the bed side of a person suffering from sore throat would be dangerous to life. I therefore hold under all circumstances in evidence here, that the section does not apply."

It seems clear that the section is not intended to differentiate between duly licensed practitioners and others; (See R. v. Webb (1834), 1 Moo. & R. 405, R. v. Lewis, (1903), 7 Can. Cr. Cas. 261 at p. 270), in other words that it is not intended to throw any heavier burden upon an unlicensed practitioner than upon a licensed practitioner except that

Alta.

S.C.

REX. v. HOMEBERG

when the evidence touches the question of "reasonable knowledge, skill and care" that will in practice doubtless be more easily proved in the case of the latter than in the case of the former; and in this connection it may be well to point out that the classes of persons licensed to practice methods of cure are larger in some of the provinces than in others; osteopaths, for instance, being licensed in Alberta, British Columbia and Saskatchewan, and that the general Criminal Law of Canada is intended to be identical in all the Provinces.

There is also an element essential to the charge which is thus dealt with by the trial Judge in his address to the jury: "The trend of the medical evidence is that had the appendicitis which resulted in the ruptured appendix been properly treated in the first place, the girl's life might have been saved". This, I think, is as far as the evidence goes in this respect. This touches one of the grounds of the reserved case or rather two — the 1st and the 6th. There was not only in my opinion insufficient instruction to the jury that they must, in order to justify a verdict of guilty, find that the defendant caused the death; but the evidence did not in fact establish the fact that he did cause the death, in other words that it was reasonably certain that the girl would have survived or survived longer if operated on promptly after the defendant began his attendance on her.

In Reg. v. Spencer (1867), 10 Cox C. C. 525, at p. 526, Willes, J. (speaking however of the alleged negligence of the defendant) said: "That might have been so, but it was not sufficient that it might have been so, the prosecution were bound to show that it must have been so". Possibly these words would be too strong to apply to the proof of the consequences of a wrongful act. Reasonable certainty of the result would probably be sufficient, but as I have said I think that was lacking here.

The Court quashed the conviction at the conclusion of the argument and counsel were informed that reasons would be given later. I have expressed substantially but at length the opinion I held at the conclusion of the argument. I think it is unnecessary to answer the several questions formally.

Conviction quashed.

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE CO. v. PARROTT.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 11, 1921.

Estoppel (§III.E—70)—By Conduct—Accident Insurance—Defending Action Against Insured—Knowledge of Breach of Covenant Freeing from Liability—Action by Insured to Recover Amount of Judgment—Waiver of Condition—Election.

Where an accident insurance company defends an action for damages against the insured with knowledge of a breach of a covenant in the policy which would free it from liability and persists in its defence down to trial, it is deemed to have elected to defend the action and to have waived the conditions, and is estopped from setting it up in answer to an action by the insured upon the policy.

APPEAL by an accident insurance company from the judgment of the Saskatchewan Court of Appeal (1920), 53 D. L. R. 533, 13 S. L. R. 405, in an action against it to recover the amount of damages recovered against the insured for injuries received in a laundry. Affirmed.

P. E. Mackenzie, K.C., for appellant.

G. H. Yule, for respondent.

Idington J.:—The appellant insured respondent against loss from the liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered, while the policy was in force, by an employee while within the factory and in and during the operation of the trade or business described in a specified schedule.

There appear as usual, numerous conditions limiting appellant's liability, and endorsed on the policy was the following:—

"Endorsement to be attached to and forming part of Manufacturers' Liability Policy No. M. 165, Modern Laundry.

Notwithstanding anything herein contained to the contrary, it is hereby understood and agreed that all mangling machines owned and operated by the assured shall be provided with fixed guards or safety feed tables, adjusted at the point of contact of the rolls so as to prevent the fingers of hands of the employees from being drawn into the rolls, and that such guards shall be maintained during the term of this policy. Any failure on the part of the assured to provide and maintain such guards shall relieve this company from liability on account of personal injuries due to such neglect, and this policy is accepted by the assured accordingly.

Dated at Winnipeg, Man. this 6th day of February, 1914.

The Western Canada Accident & Guarantee Insurance Company.

(Sgd.) A. F. W. Severin, Manager & Secretary."

Can.

S.C.

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE CO. v. PARROTT.

The main questions raised herein are whether or not the said provision can be waived or the appellant estopped from setting it up against respondent in answer to this suit upon said policy, and whether or not, in either such case, the facts relied upon establish in law either waiver or estoppel.

A young woman working at a mangle in respondents' laundry was injured by her fingers being drawn into the rolls.

The contention set up by appellant was and is that the mangle in question was not guarded in the manner specified and hence no action can lie.

The factum for the respondent claims that there is no evidence from which it can be inferred that the absence of a guard was the immediate cause of the accident.

I confess I am unable to find in the evidence any necessary connection between absence of the guard and the accident. But the parties concerned seem to have assumed there was. The case seems to have been argued out on that assumption.

I may be permitted to point out the difference between the language of the above quoted condition and the terms of the local statutes R. S. S. 1909, ch. 17. [R. S. S. 1920, ch.176] which provide for the protection of employees thus:— "17. [20.] No person shall keep a factory so that the safety of any person employed therein is endangered or so that the health of any person employed therein is likely to be permanently injured. .....

"19. [22]. In every factory:— (a) All dangerous parts of mill gearing, machinery ....shall be, so far as practicable, securely guarded."

The words of this sec. 19 only require that "machinery shall be, so far as practicable, securely guarded."

The condition indorsed on the policy and herein relied upon is in form absolutely imperative by requiring "guards. . . so adjusted at the point of contact of the rolls so as to prevent the fingers of hands of the employees from being drawn into the rolls."

This feature of the condition must be borne in mind when we are asked to consider that the appellant had no notice of the actual fact of a want of guard. In the report of the respondent to appellant of the nature of the accident and probable cause which was made on the form supplied by appellant, we find the following question and answer:— "35.— Narrate below how accident happened, its cause, etc., and illustrate by any marked rough sketch which you think will enable the cause of the accident to be easily understood: Girl was ironing handker-

chiefs and odds and ends. It is figured out that the ring on her finger caught in the fabric, and the rolls took her hand in on to the heated ironing surface before hand was released was burned."

How could appellant relying, if its present pretensions are well founded, upon such a clause as quoted above by way of limitation of its obligation, fail to discern instantly on reading such an answer that there was no guard such as called for?

It seems to me inconceivable that anyone knowing and relying upon such a condition could read said statement of the nature of the accident and not have his attention aroused thereby. I can conceive of his feeling that no known guard could have prevented it.

Its next or concurrent step was to send its agent, Sinclair, who was such a trusted agent as to be the same man who had countersigned the policy in question and given it vitality a few months previously, to make inquiries on its behalf into all that was involved.

He was shewn the place and how the accident happened, and returned and had further discussion, according to respondent's evidence. And, according to the foreman's evidence, he was told the machine was running in the same condition at the time of the accident. It was unguarded.

Trotter, the manager of appellant's local agency, came later, as I infer, and was told by the mother of the injured employee that the machine was unguarded. Trotter pretends he does not recollect, but admits it was possible she had done so.

Severin, the general manager of the appellant, was examined for discovery and part of his said examination was put in evidence.

He was asked and answered thus:—"Q.—Who were your authorised agents at Saskatoon? A.— Willoughby-Summer & Company. Q.—Was there a Mr. Sinclair connected with that Co? A.—There was in 1914."

That examination disclosed a mass of correspondence which passed between him and appellant's head office and the local agency, which leads me to the conclusion that the appellant abandoned, if it ever had any intention of relying upon such a defence as now set up, and instead to take its chance in preference thereto of defending the action the employee might bring against the respondent.

And when that action was brought the appellant was

Can.

S.C.

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE CO. v. PARROTT.

notified by respondent and the former asserted its right under the policy to defend same.

It entrusted the defence to a firm of solicitors of whom one was called and produced the appellant's letter of instructions to defend.

That letter clearly indicates, that instead of raising any question, such as involved in the condition in question, the appellant could by defending the action try to defeat the employee in that action by relying on her having worn a heavy ring and thus being drawn in, and the law which shewed she had assumed the risk, despite the law for her protection.

I cannot understand and I am not at all inclined to believe the assertion or contention that the writer of such a letter did not well know and understand all the foregoing facts, tending to prove that it was by that time well understood by the appellant that there were no such guards in use as required at the time of the accident, or for a long time before the policy issued as required either by the local statute or the more rigid terms of the condition indorsed on the policy.

The solicitor says, after producing said letter: "I assumed machinery was unguarded from letter from defendant instructing me. I discussed question of guard having been removed with Severin before trial."

I agree with him that the clear inference from the letter of instructions indicates as much and in face of his disclosure as to discussing the question of absence of guards with Mr. Severin before the trial, I am unable to understand why the trial was gone on with unless upon the assumption that Severin had for the appellant elected his chance of defeating the employee to his then chance of defeating respondent in such an action as this.

There is abundant evidence I think that the respondent was induced by the action of the appellant to change his position, by reason of the course of conduct of appellant, to his detriment. And I am of the opinion that it is thereby estopped from setting up the condition relied upon.

I might have mentioned the contribution by appellant to redress the wrong the employee had suffered, which never should have been made if it had any thought of turning round on respondent and setting up the condition in question.

Hence I am of opinion that the Court of Appeal was right in allowing the appeal on the main issue and in regard to

the cross-appeal which arose out of such contributions.

They, in any other light than as flowing from appellant's election to abandon its condition, might be treated as voluntary payments and hence not recoverable.

The allowance of the costs of defence in pursuing such a course of conduct is, if possible, still more indefensible.

The cases cited from 29 Can. S. C. R. proceed on the want of authority in those concerned and are clearly distinguishable from this where the general manager is ultimately the authority who made the election to abandon the condition.

The appeal should be dismissed with costs throughout.

Duff, J.:—After carefully considering the evidence I have come to the conclusion that the appeal should be dismissed. I think the weight of evidence supports the view contended for on behalf of the respondent that the appellant company assumed the defence of Miss Oxenham's action with the knowledge that the basis of the claim was, in part at all events, the fact that the machine she was tending was unguarded and that there was no misrepresentation of fact by the respondent as to the state of the machine.

The defence having been assumed in such circumstances and persisted in down to the trial with the acquiescence of the respondent, there is, I think, ample evidence to support the inference, and that I think is the right inference, that the company agreed to assume the responsibility under the policy.

The agreement of the respondent by which the control of the proceedings and negotiations for settlement, if there should be any, were delivered over to the company is a sufficient consideration.

There is, I think, not the slightest ground for suggesting that the company's officials were not acting with the authority of the company; and I can see no ground whatever for doubting that the company is bound by the agreement.

The case does not raise any of the nice points that sometimes arise when a claim is founded upon election, estoppel or waiver taking effect on equitable principles.

Anglin, J.:—Assuming in the appellant company's favour that, but for its continued conduct of the defence in the action of Oxenham v. Parrott after becoming aware by Parrott's own admission that the machine on which Oxenham was injured was unguarded, it would have had a good defence to Parrott's claim in this action for indemnity under the policy held by him on the ground that accidents in the

Can.

S.C.

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE CO. v. PARROTT.

use of unguarded machinery were not within the risk, its continuation of that defence down to judgment estops it in my opinion from now setting up that answer to this action. Its right to conduct Parrott's defence to the Oxenham claim existed only if and because the injury to Oxenham was within the risk covered by its policy.

On becoming aware of the fact which it now alleges excluded Parrott's liability to Oxenham from that risk, it had an election to repudiate liability to Parrott and decline further to carry on his defence or to accept such liability and continue that defence. Its action in continuing the defence would seem to be unequivocal and to import an election to undertake liability upon its policy. But it was at all events conduct from which Parrott was justified in assuming that it had so determined and that he therefore need not concern himself with the Oxenham claim—either to defend that action or to endeavour to settle it.

Judgment was recovered by Oxenham for $1,400.09. Parrott's evidence is that he believed he could have effected a settlement of the action for $700, and circumstances detailed in the evidence indicate a probability that a settlement could have been effected for a sum substantially less than $1,400. The principles enunciated in the judgment of the Court of Exchequer Chamber in the leading case of Clough v. London and North Western R. Co. (1871), L.R. 7 Ex. 26 at p. 35, delivered by Mellor, J., but written by Blackburn, J., as he tells us in Scarf v. Jardine (1882), 7 App. Cas. 345, at p. 360, and approved in Morrison v. The Universal Marine Insurance Co. (1873), L.R. 8 Ex. 197, 203-5, govern this case.

Assuming that the fact that Oxenham was injured on an unguarded machine excluded any claim in respect thereof from its policy, the appellant company had a right of election either to repudiate or to accept liability therefor. With full knowledge of that fact, if it did not actually elect to do so (Scarf v. Jardine, L.R. 7 App Cas. at p. 361), it so acted as to create the impression that it accepted responsibility. The position of the respondent—the other party to the contract—was affected. He took no step to protect himself because lulled into security by the belief, induced by the company's action, that it would indemnify him against whatever judgment Oxenham might recover. Prejudice sufficient to support an estoppel would seem to be implied in these circumstances. Ogilvie v.

Western Australia Mortgage and Agency Corp., [1896] A.C. 257, 270; Knights v. Wiffen (1870), L.R. 5 Q.B. 660, 664-7. After Oxenham had recovered judgment the respondent had no chance to avoid payment of the damages thereby awarded. The burden lies on the appellant company, whose conduct lulled the respondent to rest, to shew that he could not have escaped any part of that liability after the time when its officers learned the fact that the machine on which Oxenham was injured was unguarded. Dixon v. Kennaway & Co., [1900] 1 Ch. 833, 839-40.

The appeal in my opinion fails and should be dismissed with costs.

Brodeur, J.:—I concur in the result.

Mignault, J.:—I am inclined to think that the fact that the mangling machine by which Miss Oxenham was injured was unguarded, notwithstanding that the respondent had declared that all machinery would be provided with proper guards, was a breach of the conditions of the policy issued to him by the appellant at a lower premium than if the risk insured were against accidents caused by unguarded machinery, and that for this reason the appellant could have been relieved from liability under the policy. But the question here is whether the appellant is now entitled to repudiate liability for this breach of contract, in view of the fact that when the respondent was sued by the mother of Miss Oxenham, the appellant undertook to contest the latter's claim with the result that a judgment was recovered against the respondent for $1,400.09 which the latter has paid and now seeks to recover from the appellant. The respondent states that if he had been left free to compromise the claim against him, he could have settled it for $700. Mrs. Oxenham, at the trial, swore that she refused an offer of $100 made on behalf of the appellant, but that she offered to the respondent to settle for $700 and would have done so.

Haultain, C.J.S., who tried the case, stated that the appellant may be held to have first had knowledge of the unguarded condition of the mangling machine at the time the solicitor for the plaintiff in the Oxenham action became aware of the fact on the examination for discovery of Parrott. The Chief Justice however considered that the appellant having under the policies the right to defend the action, the fact that it continued to do so after having obtained this knowledge, did not suggest any waiver of the conditions of the policy.

Can.

S.C.

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE CO. v. PARROTT.

The Court of Appeal (1920), 53 D. L. R. 533, 13 S. L. R. 405, being of opinion that this conduct involved waiver of any right to dispute liability under the policy and that the position of Parrott had been prejudiced by the conduct of the appellant in contesting the Oxenham action, when he, Parrott, could have settled for one half of the amount he was eventually condemned to pay, reversed the judgment the trial Judge had rendered in favour of the appellant.

The only construction, in my opinion, that can be placed on the conduct of the appellant in defending the Oxenham action on behalf of the respondent is that it assumed liability under the policy, for this was its obligation by virtue of the contract it made with the respondent. So far as this conduct was induced by its ignorance of Parrott's breach of contract, it could not be set up by the latter against the appellant. But when the appellant discovered this breach, which entitled it to repudiate liability under the policy, it was placed on its election between repudiating liability and treating the policy as existing between Parrott and itself. It was then that it should have made its election and given notice thereof to Parrott. By continuing with full knowledge of the breach to contest the action it elected to treat the policy as existing. From that point of view it would not seem necessary to shew that the respondent was prejudiced by the continuance of the defence set up by the appellant against the Oxenham action, but the existence of this prejudice strengthens the respondent's contention that, notwithstanding his breach of contract, the appellant should be held to have elected to treat the contract as still existing. And the least that can be said is that the appellant so conducted itself as to give Parrott reason to believe that it had elected to continue the policy and thus prevented him from making the best terms possible with Mrs. Oxenham.

I do not think that under the law of contract there can be any doubt that when a breach of contract by one of the contracting parties occurs, the other party can elect to rescind the contract or to continue it notwithstanding the breach, and if it elects to continue the contract, it is held to all the covenants therein contained. I may perhaps on this point be permitted to refer to my judgment in American Red Cross v. Geddes Bros. (1920), 55 D.L.R. 194, 61 Can. S.C.R. 143, in which, although I wrote a dissenting opinion, there was, as I understand it, no dissent as to this legal proposition which rests on very solid authority; Clough

v. London & North Western R. Co., L.R. 7 Ex. 26 at p. 34; Scarf v. Jardine, 7 App. Cas 345; Frost v. Knight (1872), L.R. 7 Ex. 111; Johnstone v. Milling (1886), 16 Q.B.D. 460.

Applying therefore this rule, I must find that the appellant, which could have repudiated liability when it acquired knowledge of the unguarded condition of the mangling machine, elected not to do so by continuing to contest in the respondent's name the Oxenham action. And therefore I think it cannot now set up the breach as a defence to the respondent's action claiming to be reimbursed for what he was forced to pay to Mrs. Oxenham, the more so as the conduct of the appellant in continuing to contest the Oxenham action after knowledge of the breach, caused a prejudice to the respondent by preventing him to affect an advantageous compromise with Mrs. Oxenham.

My impression is that some forms of guarantee policies expressly state that the defence by the company of any action taken against the insured shall not be deemed an admission of liability under the policy. There is nothing of the kind here, and the conduct of the appellant distinctly shews that it recognised its liability toward the respondent.

I would dismiss the appeal with costs.

Appeal dismissed.

THE KING v. PEDRICK & PALEN.

Exchequer Court of Canada, Audette, J. May 19, 1921.

Taxes (§VII.—230)—Revenue—Special War Revenue Act, 1915, as Amended by 10-11 Geo. V. 1920 (Can.), ch. 71—Construction—Sales Tax—Custom Tailors—"Manufacturers."

Defendants carried on the business of retail merchant tailors in the city of Ottawa—taking orders for suits or garments to be made to measure, cutting the cloth, assembling the same and turning out or delivering the garments to the consumer.

HELD. That they were not "manufacturers" within the meaning of sec. 19 BBB. of the Special War Revenue Act, 1915, 5 Geo. V. (Can.), ch. 8, as amended by 10-11 Geo. V. 1920 (Can.), ch. 71, and were not liable to pay the sales tax of one per cent. therein imposed upon manufacturers in respect of their sales and deliveries.

AN INFORMATION by the Attorney-General of Canada seeking the recovery of penalties from the defendants for neglect and refusal to pay a sales tax leviable upon them under the provisions of sec. 19 BBB. of the Special War Revenue Act, 1915, as amended by 10-11 Geo. V., ch. 71. The defendants were retail merchant tailors, doing business in Ottawa at the time the information was filed

Can.

Ex.

THE KING v. PEDRICK & PALEN.

F. D. Hogg for plaintiff; T. A. Beament for defendants.

Audette, J.:—This is an information exhibited by the Attorney-General of Canada, whereby it is sought to recover, from the defendants, penalties, in respect of which it is alleged they are liable, for the violation and transgression of sec. 19 BBB. of the Special War Revenue Act 1915 (5 Geo. V. ch. 8) as amended by 10-11 Geo. V. ch. 71, in respect of taxes on sales.

This section 19 BBB. under which the present action is instituted, reads as follows:—

"19 BBB. (1) In addition to the present duty of excise and customs a tax of one per cent. shall be imposed levied and collected on sales and deliveries by manufacturers and wholesalers, or jobbers, and on the duty paid value of importations, but in respect of sales by manufacturers to retailers or consumers, or on importations by retailers or consumers, the tax payable shall be two per cent.; the purchaser shall be furnished with a written invoice of any sale, which invoice shall state separately the amount of such tax to at least the extent of one per cent. but such tax must not be included in the manufacturer's or wholesaler's costs on which profit is calculated; and the tax shall be payable by the purchaser to the wholesaler or manufacturer at the time of such sale, and by the wholesaler or manufacturer to His Majesty in accordance with such regulations as may be prescribed, and such wholesaler or manufacturer shall be liable to a penalty not exceeding five hundred dollars, if such payments are not made, and in addition shall be liable to a penalty equal to double the amount of the excise duties unpaid." ..... (2) The Minister may require every manufacturer and wholesaler to take out an annual license for the purposes aforesaid, and may prescribe a fee therefore not exceeding five dollars, and the penalty for neglect or refusal shall be a sum not exceeding one thousand dollars."

This Act came into force on May 19, 1920.

The defendants are carrying on, in the city of Ottawa, the business of retail merchant tailors—taking orders for suits or garments, cutting their cloth, assembling the same and turning out the garments to the consumer.

Treating the defendants, under the said section 19 BBB., as manufacturers selling to consumers, the Crown claims and avers, by sec. 2 of the Information, that they were and are "under the obligation, since May, 1920, to collect a tax of two per cent. on all sales made of clothing manufac-

tured by them, from consumers to whom the said clothing was and is sold and to pay the amount of the said tax to His Majesty."

The primary question which arises on the very threshold of the controversy is whether or not, the retail merchant tailor making garments for the consumers can be considered a manufacturer within the meaning of the provisions of sec. 19 BBB. above recited.

It is an elementary rule of statutory construction that every word ought to be construed in its ordinary or primary sense, unless a second or more limited sense, is required by the subject-matter of the context.

What is the primary and natural meaning of the word "manufacturer?" From its etymology the word obviously means to make by hand—that is manus the hand, and factura, a making, from facio to make. Under this primary signification every human being, it must be conceded, is a manufacturer in the sense that, owing to the rigor of the punitive dispensation to which our race was condemned after the fall of Adam, he has to use his hands, be he the man that handles the pick and shovel, the plough, the pen or the sword, etc. Labores manuum tuarum quia manducabis. That is our fate.

Now that is not the meaning that is to be attached to this word manufacturer in the present issue. The object of the Act cannot be to weld into the class of manufacturer all classes of men who manufacture, who make or do any work, or part thereof, with their hands. In legislating in respect of, as well as in construing a clause of, the tariff reference must be had to the language, understanding and usage of trade. Dominion Bag Co. v. The Queen (1894), 4 Can. Ex. 311.

Not only by the usage of trade, but in common parlance, the word "manufacturer" would seem to come within the ambit of the definitions given by the best dictionaries of the day—such as Littre and the Oxford, under which a manufacturer in our days, is one who produces by labour on a large scale.

As stated in The Queen v. Peters (1886), 16 Q.B.D. 636, at p. 641, it may be that dictionaries are not to be definitely taken as authoritative exponents of the meaning of words used in Acts of Parliament, but it is a well known rule of Courts of Law that words should be taken to be used in their ordinary sense.

Apart from any legal rule of construction would it not

Can.

Ex.

THE KING v. PEDRICK & PALEN.

seem to submit the word to an undue straining, to do violence to the English language to hold for instance a humble seamstress, dressmaker, making a few dresses for consumers to be a manufacturer—or, as in the present controversy, a humble merchant tailor making suits for consumers to be a manufacturer? When speaking of a manufacturing centre, one would not mean a centre where dressmakers or retail merchant tailors carry on a business. If a meeting of manufacturers were called to discuss matters relating to their business, neither dressmakers nor retail merchant tailors would be expected or even allowed to attend such gathering. There is but one sane conclusion to be arrived at, if one is to be guided by common sense, and that is the retailer is not a manufacturer in the general acceptance of the word.

Approaching under a legal aspect the question of the construction of the word manufacturer as found in the statute in question, it may be said that notwithstanding the interpretation clause under sub-sec. 2 of the Customs Act, which provides that customs law shall receive such liberal construction as will best insure the protection of the revenue.....etc., in cases of doubtful interpretation, it was held by Ritchie, C. J., in The Queen v. The J. C. Ayer Co. (1887), 1 Can. Ex. 232, that its construction should be in favour of the importer. However, in Algoma Central R. Co. v. The King (1902), 32 Can. S.C.R. 277; [1903] A.C. 478, the Courts held that a taxing Act is not to be construed differently from any other statute and that is the accepted doctrine to-day. See Atty-Genl. v. Carlton Bank, [1899] 2 Q.B. 158, at p. 164; O'Grady v. Wiseman (1900), 9 Que.Q.B. 169.

And Elmes, Law of Customs, p. 22, sec. 49, says:—

"Laws imposing duties on importations of goods are intended for practical use and application by men engaged in commerce, and hence it has become a settled rule of interpretation of customs statutes to construe the language adopted by the Legislature, and particularly in the denomination of articles, according to commercial understanding at the time."

Sitting here to interpret the statute, am I not entitled to assume that the construction and meaning attached to the word "manufacturer" shall be what the people in the trade would take it to be, as proved at trial and what is of public notoriety, used in common parlance and accepted by all of us, assuming also that the framers of the Act did not

indicate any intention of departing from the general acceptance respecting the meaning of that word.

Then under the provisions of sec. 15 of the Interpretation Act, R. S. C. 1906, ch. 1, it is enacted that "every Act and every provision and enactment thereof, etc. ..... shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true, intent, meaning and spirit."

Section 19 BBB. states: "In addition to the present duty of excise and customs a tax of one per cent. shall be imposed, levied and collected on sales and deliveries by manufacturers and wholesalers or jobbers, and on the duty paid value of importations, but in respect of sales by manufacturers to retailers or consumers, etc."

It would seem obvious that when that word "manufacturer" is mentioned in the section, associated as it is with the words "wholesalers and jobbers," that means one who manufactures and carries on business on a large scale, alike the wholesalers and jobbers, with whom he is classified. The controversy arising herein is with respect to the meaning of the word "manufacturer" appearing, two lines lower, when associated with these words "but in respect of sales by manufacturers to retailers or consumers." Should the word "manufacturer" in the latter case be given a different meaning than that when used a couple of lines before, associated as it is with the words wholesalers and jobbers?

Why should this word have different and distinct meaning when used in one and the same section? Why should this word "manufacturer" in the latter case be deprived of its primary and natural meaning? Its meaning must be gathered from the whole context and the intention is to be taken and governed according to what is consonant with reason and good sense.

The words "manufacturers, wholesalers and jobbers" found at the beginning—but two lines above—must control, restrict and determine the meaning of such word as therein mentioned of cognate character and description: noscitur ex sociis. That is the necessary conclusion we are led to under the well known canon of construction of ejusdem generis. Indeed, verba generalia restringuntur ad habilitatem rei vel personae, as said by Lord Bacon, Hardcastle 2nd ed. 182. And Maxwell, on Interpretation of Statutes, 6th ed. 465, says: "Where an enactment may entail penal consequences, no violence must be done to its language in order

Can.
Ex.
THE KING
v.
PEDRICK
&
PALEN.

to bring people within it; but rather care must be taken that no one is brought within it who is not within its express language."

The section, dealing first with "manufacturers and wholesalers or jobbers," imposes a tax of 1% on sales made by them. Then pursuing [proceeding?] to deal with another branch of that case, linking the first branch with the second with the preposition 'but' (which means excepting however when such sales made as above mentioned, are made to retailers and consumers by manufacturers to retailers and consumers a different tax is payable . . . "in respect of sales by manufacturers to retailers or consumers or on importations by retailers or consumers" - The word "or" then means in the alternative case. Therefore it is always the class of vendor or manufacturer who sells to a special class of purchasers, that is to retailers and consumers, and that is made doubly clear by the words which follow "or on importation by retailers or consumers." That is, what is there provided is the case where a foreign manufacturer is selling to a retailer like the defendant or to a consumer who may have the privilege of buying direct from the manufacturer, who is always a manufacturer of the class first mentioned in the section as associated therewith. In no case the word "manufacturer" used in the section, can be given any other meaning than it usually bears and I am gratified to be able to so find, in approaching its consideration, both from a legal and a common sense standpoint, confirming thereby the construction I have already accepted, under the well known canon of construction of ejusdem generis mentioned above.

There is nothing in sec. 19 BBB. which would authorise us to depart from the meaning usually attaching to the word "manufacturer"; but if the whole statute must be examined in order to decide whether or not it does contain anything to that effect, as decided in the case of Harris v. Runnels (1851), 12 How. 79 at p. 80, we will find in sec. 19 BB., in the third sub-paragraph of sub-sec. (b) of sec. 2 that the meaning of merchant-tailor is then defined and he is not called a manufacturer. The statute there states: "Provided that on clothing covered by this item made to the order (not manufactured) and measure of each individual customer by a merchant tailor or journeyman tailors in his employ."

Therefore it must result that such merchant tailor is not a manufacturer and he is not so called in that sec. 19 BBB

without doubt deals exclusively with manufacturers and wholesalers or jobbers, - earmarking that very class, as distinguished from the merchant tailors defined in section 19 BB. who cannot be at the same time a manufacturer and a merchant tailor selling to consumers, as therein provided. Section 19 B.B. would seem to put a limitation upon the word "manufacturers" in sec. 19 BBB. and thus remove any perplexing doubt.

Williams, J. in Cooney v. Covell (1901), 21 N. Z. L. R. 106, at p. 108. said: "There is a very well known rule of construction that if a general word follows a particular and specific word of the same nature as itself, it takes its meaning from that word, and is presumed to be restricted to the same genus as that word."

Among the cases, cited in Bouvier's Law Dictionary, 3rd ed., under verbo "Manufacturer", is the case of Cohn & Feibelman v. Parker, (1889), 41 La. Ann. 894, 6 So. 718, wherein it was decided that "one engaged in cutting and making coats and pants out of jeans cloth which has been already manufactured by another is not a manufacturer." See also the case of The City of Toronto v. Foss, (1913), 10 D. L. R. 627, 27 O. L. R. 612 which decides that a place where three or four persons make clothes for customers, etc., is not a "manufactory." McNicol et al v. Pinch, [1906] 2 K. B. 352.

The word "manufacturer" used and associated with the words "wholesalers and jobbers" when first used in the section, retains its original, recognised and accepted meaning, nature and character when used the second time in the same section, a couple of lines lower. This interpretation is the more consistent with the text of the enactment and is in accord with common sense and the meaning given to this word by the public generally.

Why, indeed, should we depart from the general and plain meaning of this specific word "manufacturer", which is of common and dominant feature, to endeavour, for the convenience of a special case, to extend to it, by doing violence to the English language, a meaning which to every one would so strain it as to nearly amount to an absurdity on its very face. Common sense alone rebels at accepting and applying to this word "manufacturer" the narrowest meaning of which it is susceptible and which is contrary to the understanding of the public, the language and usage of trade and of what is commonly and commercially known.

With the policy of Parliament on the legislation the

Alta.

S.C.

CAMPBELL, WILSON & HORNE LTD. v. THE GREAT WEST SADDLERY CO. LTD.

Court has nothing to do. The duty of the Court is to construe the language used in the statute and if that construction does not fully carry out the intention of Parliament (a very doubtful matter!) and if a narrower and new meaning is to be attached to the word "manufacturer" in the Customs Act, R. S. C. 1906, ch. 48 the Act can easily be amended.

In the view I take of the case, it becomes unnecessary to pass upon other questions raised at Bar and more especially that stressed with respect to the nature and effect of the document filed as Ex. No. 2, and termed "Regulations", because such regulations must always be subject to the statute and could not proprio vigore create a tax. See Belanger v. The King (1916), 34 D.L.R. 221, 54 Can. S. C. R. 265, 20 Can. Ry. Cas. 343.

I therefore find that the defendants are not liable to the penalties sued for and the action is dismissed with costs.

Action dismissed.

CAMPBELL, WILSON & HORNE LTD. v. THE GREAT WEST SADDLERY CO. LTD.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 29, 1921.

Taxes (§III.H—155)—Owner of Land—Grant of Easement of Passageway—Liability—Apportionment.

The granting of a right of way over land owned by the grantor who continues to have the use of the land for all purposes subject only to the easement of the passageway does not relieve such grantor from liability for the taxes on such land, nor fix the grantee with liability for any part of such taxes, but there is no authority for the Court to order it to pay the taxes and redeem the land in order that the grantee may not be disturbed in the exercise of the right of way.

[Essery v. Bell (1909), 18 O.L.R. 76; Smith v. Curry (1918), 42 D.L.R. 225, 29 Man. L.R. 97, referred to.]

ACTION for a declaration of the respective rights of parties and for a declaration that the defendant is liable to pay the taxes on certain land over which it has granted an easement of passage and for an order requiring it to pay the taxes and redeem the land.

A. McL. Sinclair, K. C. for appellants; D. S. Moffat for respondent.

Harvey, C. J.:— The three persons, whose names appear in the name of the plaintiff company, were in partnership prior to the incorporation of the limited company, which took place about 1903. They owned certain lots in the city of Calgary adjoining lots owned by the defendants and on November 9, 1903, an agreement was entered

into between them and the defendants. Lot 30 was one of the lots owned by them while Lot 29 adjoining was one of those owned by defendants. At the time of the agreement they were preparing to erect a building on their lots while the defendants contemplated erecting one on their lots later, and one of the purposes of the agreement was to provide for an open lane or passage way between the two buildings. The assessed value of the lots at that time was at $450 or less than $20 a foot which, however, by 1911 had increased to $12,000. The plaintiffs, however, paid $40 a foot for their lot, and, for a consideration of $200, they agreed to transfer to the defendants all except the rear 12 ft. of the easterly 12 ft. of Lot 30 over which they were to have an easement for the passageway, the defendants, on their part, undertaking to appropriate for the lane the westerly 6 ft. in front and the westerly 12 ft. at the rear of their Lot 29 which was also to be subject to the plaintiffs' easement. The agreement also provided for an easement in favor of the defendants in respect of the wall of the plaintiffs' building about to be erected on their lot adjoining the lane for the purpose of its use as a party wall, one-half the cost to be borne by defendants, and for the transfer of a strip of land one foot in width adjoining the lane being half the land on which the wall would stand. This, of course, contemplated that the defendants' building would be attached to the party wall but to provide for the lane or driveway this could only be for the upper portion of the building and the agreement provided for the erection of the defendants' building over the lane and for the manner of construction and the division of the costs of arches for support and of the wall one story high bounding the lane on the east. The agreement also contained provisions respecting a spur railway track on the rear portion of the lots over which the lane did not extend. The question for determination is the respective liabilities of the parties for the city taxes on the easterly 13 ft. of Lot 30, which was duly transferred to the defendants according to the terms of the agreement.

For several years after the transfer it was assessed to the plaintiffs and the taxes paid. The amount of taxes was then small and apparently it was not observed by the plaintiffs that they were paying taxes on land they did not own. When their attention was called to this they directed the assessor to assess the land to the defendants, who, in their turn, paid for a couple of years without their attention

Alta.

S.C.

CAMPBELL, WILSON & HORNE LTD. v. THE GREAT WEST SADDLERY CO. LTD.

being specially directed to the matter, but since and including the year 1913 the taxes have not been paid, defendants have insisted that the plaintiffs should pay one-half the taxes imposed on the land used as a lane. This has been disputed by the plaintiffs, who denied liability for any of the taxes. A certificate of delinquency for the taxes for 1913, 1914 and 1915 was sold by the city and purchased by R. J. Hutchings, the Calgary manager of the defendant company.

This action is brought for a declaration of the respective rights of the parties and for a declaration that the defendant is liable to pay the taxes and an order requiring them to pay the taxes and redeem the land.

Judgment was given in their favour and the defendants have appealed. The agreement, after setting out the boundaries of the land to be used for a lane or passage way contains the following:—"All the land included within the said described bounds shall be vested in the second party hereto (the defendants) but subject to a perpetual easement in favour of all the parties for the purpose of being enjoyed by them severally as a lane or passage way as herein recited and for that purpose the first parties shall as soon as conveniently may be after the execution hereof and on payment to them by the second party of two hundred dollars transfer to the second party subject to such easement so much of the land embraced in said lane or passage way as is contained within the bounds of said lot thirty &c. "

The defendants contend that they are in substance trustees for themselves and the plaintiffs both being beneficially interested equally. But this is clearly not so, except for the use of the land surface for the purposes of a lane or driveway. For the purpose of support for a building for the exclusive use of the defendants they and they only are beneficially interested in the land. Indeed for all purposes apparently they have the use of the land subject only to the easement of the passageway. This, it is quite clear, is the construction they and their mortagees put upon the situation when on November 21, 1916, they gave a mortgage to The Edinburgh Life Assurance Co. of Lots 27, 28 and 29 and the easterly 13 ft. of Lot 30 of which they declared themselves to be the owners "subject to the servitude of the easement for party wall and right-of-way created by the said agreement."

There seems no room for contending that as to the portion of land used for a lane, which is part of the lot, always

owned by the defendants the plaintiffs can have any interest other than as represented by this easement and the purpose of the transfer was apparently to put it all in the same position. It may not have been very accurate to represent the defendants as having an easement in respect of lands they owned but where the agreement was signed some of the land was still owned by the plaintiffs, who were not to transfer it until they were paid $200. I can, therefore, see no ground for fixing the plaintiffs with liability for any of the taxes upon the land vested in and owned by the defendants.

The plaintiffs, however, contend that they have the right to compel the defendants to pay the taxes for which they alone are liable. Mr. Moffat admits that he can find no authority directly supporting his contention but he argues that it follows by analogy from the rule, that there must be no disturbance of the easement. It appears to me a somewhat startling proposition to hold that a person by a free gift of grant of a right-of-way thereby gives the donee the right to require him to keep the taxes paid up so that he may not be disturbed in the exercise of his right-of-way but it would, I think, follow from the contentions advanced. In the absence of authority for such a proposition, I would not feel disposed to make one. Goddard's Law of Easements, 7th ed., p. 457, treating of the subject of disturbance of easements, states that the general rule as to repair is "that the dominant owner, who has the use of the thing must keep it in repair and that it is contrary to the nature of an easement to subject the servient owner to any personal obligation to do anything, his obligation being merely to suffer something to be done on his land or to refrain from doing something otherwise lawful.",and again on p. 541 "Actions will lie against a servient owner for obstruction of a way only when he causes the obstruction by his own act."

Clearly the servient owner could not be called on to remove a trespasser who is obstructing the use of the way nor can I see on what principle he can be called on to remove a burden such as taxes imposed without any volition of his.

The agreement expressly provides for the maintenance of the party wall and the arches supporting the structure over the lane, the cost of such maintenance being borne in equal shares by the parties but there is nothing calling for any other maintenance and I see nothing warranting

Alta.

S.C.

CAMPBELL, WILSON & HORNE LTD. v. THE GREAT WEST SADDLERY CO. LTD.

an order requiring the defendants to pay taxes. The only reason the plaintiffs have for this claim is to prevent the land being sold for taxes and this easement being thereby wiped out but if the view expressed by Boyd, C. in Essery v. Bell (1909), 18 O. L. R. 76, is correct there would appear to be no risk of that.

It may be also, that the plaintiffs could, owing to their interest in the land, upon payment of the taxes be granted a charge on the land for the amount but that question does not arise and need not be considered.

I think the judgment is, therefore, wrong in ordering the defendants to pay the taxes and should be limited to a declaration that as between the parties the defendants alone are liable and are not entitled to any contribution from the plaintiffs, and I would direct it to be amended accordingly but in other respects to stand.

The appellants have had such substantial success in the appeal as, in my opinion, to entitle them to the costs of it.

Stuart, J.:— I agree with both the opinions expressed on this case by Harvey, C.J. and my brother Beck, except that with reference to the latter I hesitate more greatly to entertain the possibility of a direct personal obligation enforceable by action.

I, therefore, agree in the result.

Beck, J.:— There is no doubt that where there is an express contract, obligations and correlative rights which are not expressed may be implied. It is scarcely possible to lay down any general rule for the application of this principal but the principal itself is established beyond all question. See 7 Hals. tit. "Contract" p. 512, sec. 1035, "Implied terms," and Sharpe v. Durrant (1911), 55 Sol. Jo. 423.

In the present case, notwithstanding the interesting and ingenious argument of counsel for the defendant, I think that the agreement between the plaintiff and the defendant with regard to the title to the property in question and the transfer of the title in accordance therewith, must be taken as settling the question of title according to their purport and consequently the liability of the property and of its owner from time to time to assessment and taxation in respect thereof.

I am, therefore, thus far in agreement with Harvey, C.J. holding that the defendants and their successors in title as owners of the land in question are the parties liable to assessment and taxation in respect of the land.

The agreement provides that: "All of the land included within the said described bounds shall be vested in the second party hereto (the defendant) but subject to a perpetual easement in favour of all the parties hereto for the purpose of being enjoyed by them severally as a lane or passage-way as herein recited." The agreement also contains a general declaration in the following words:

"The covenants contained herein shall operate and be construed as covenants running with the land and binding on the parties as well as their respective heirs, executors, administrators, and assigns; and all the rights, privileges, and obligations hereby created, granted, assumed, or imposed shall extend to and operate in favor of and be binding upon the heirs, executors, administrators and assigns of both parties respectively &c."

The rights of the plaintiff in respect of the lane in question, the property in which is vested in the defendant and the restrictions, by reason of the plaintiff's rights therein, on the defendant's title, both seem to be meant by the terms of the agreement to be included in the word - "easement". There were at common law a number of species of easements. Tested by the rules of the common law, this use of the word is probably incorrect or insufficient; but it was a convenient word to use and that meaning must be given to it, which it was obviously intended to have, namely, the rights and obligations defined by the agreement.

Owing to the fusion of law and equity and their administration by the same Court, rights and remedies which were not recognised by law are now recognised and enforced with the result that a quantity of law, as distinguished from equity, has disappeared; and an instance of this the rejection of the old and well known case of Wood v. Leadbitter (1845), 13 M. & W. 838, 153 E. R. 351, by the decision in Hurst v. Picture Theatres Ltd. [1915] 1 K. B. 1, which approved McManus v. Cooke (1887), 35 Ch. D. 681. These cases were considered by the Court of Appeal of Manitoba in Smith v. Curry (1918), 42 D. L. R. 225, 29 Man. L. R. 97.

The result is that it is quite clear that rights analogous to a common law easement can be created otherwise than at common law, e.g. by oral agreement partly performed and that such rights will be enforced; and that where the right is created by agreement the agreement (consisting

Alta.

S.C.

CAMPBELL, WILSON & HORNE LTD. v. THE GREAT WEST SADDLERY CO. LTD.

of its express and implied terms) is the measure of the right.

In this view it is dangerous and of doubtful value to refer to the old common law of easements in order to ascertain the mutual rights and obligations in respect of the so-called easement in question here.

The ownership of the land being vested in the defendant and the obligation consequently, as we hold, falling upon the owners to bear the taxes imposed upon it by the proper taxing authority, it would seem quite clear that if the plaintiff or its successor in title were necessitated in order to preserve the easement in its favor, to pay the taxes against the land, it would be entitled to be subrogated to the right of the taxing authority and upon paying enforce the charge for its own benefit.

The case of Skene v. Cook, [1902] 1 K. B. 682, a case under a Land Tax Redemption Act, 42 Geo. III. 1802, (Imp.) ch. 116, explains the earlier case of Cousins v. Harris (1848), 12 Q. B. 726, 116 E. R. 1043.

Collins, M.R. says at p. 688:—"The plaintiff's counsel admits that there is a charge, but he says that the case is not within the section, because no action could be brought to enforce the charge for which proposition he cites Cousins v. Harris. When that case is examined, it appears not to deal with the equitable aspect of such a charge or the rights of the persons entitled to it in equity. The particular point here raised did not arise for discussion in that case, and it is not a decision that a suit in equity could not be brought to enforce such a charge. In the absence of any other authority, it appears to me that the charge on the premises by virtue of the statute must be a charge which is capable of being enforced by the usual procedure in equity like any other charge."

Romer L.J. says, at p. 689:—"Then is there anything in the statute to take away the rights which would ordinarily follow from a charge of a principal sum and interest thereon on land? I can see nothing. It is true that there may be no personal remedy against the owner of the land for the amount of the charge. That I think was what in substance was held in Cousins v. Harris, but it was also held in that case that the owners of the land would have a right to redeem the charge. I think that it follows that there must be a reciprocal right on the part of the owner of the charge to enforce it in the ordinary way."

Matthew, L. J. was of the same opinion.

I think, therefore, that it is unquestionable that if the taxes on the land in question are allowed by the owners to fall in arrear, the plaintiff or its successors in title will have the right to pay them and take appropriate proceedings to enforce payment of them as a charge upon the land.

So much seems quite clear.

With regard to the question of a personal liability on the part of the defendant and its successors in title to the plaintiff and its successors in title, I am not at all sure that notwithstanding the observations which I have quoted apparently against such a liability there may not be such a liability here inasmuch as the liability to pay the taxes arises under a special contract while in the case cited it arose under a statute and related to a tax, the payment of which was regulated in a peculiar way.

I am inclined to the view that there is an implied covenant on the part of the defendant as owners to pay the taxes—a covenant which could be enforced against its successors in title. See Woodfall, Landlord & Tenant, 19th ed. pp. 189 et seq; Smith's Leading Cases, 12 ed. vol. 1 pp. 88 et seq. But this precise point was scarcely argued before us and in the circumstances is of little practical moment, and I am therefore, not prepared to differ from the opinion of the other members of the Court.

Some discussion took place as to the right of the parties or of the municipality to assess the easement as distinct from the land or to increase the assessment of the plaintiff's land by reason of the easement or decrease that of the defendant by reason of the servitude consequent upon the easement. These are questions which we are not called upon to decide but the best available material for a study of the question by anyone interested seems to be Essery v. Bell (1909), 18 O. L. R. 76; A. J. Reach Co. v. Crosland (1918), 43 O. L. R. 209 [affirmed 45 D. L. R. 140, 43 O. L. R. 635]; Re Land Titles Act, Bank of B.N.A. v. London Sask. Investment Co. Ltd., (1919), 46 D.L.R. 90, 12 S.L.R. 191.

Though having somewhat different views on some of the questions raised from those expressed by the Chief Justice, I agree in the result which he arrives at.

Judgment varied.

B.C.

Ex.

THE "FREIYA" v. THE "R.S."

THE "FREIYA" v. THE "R.S."

British Columbia Admiralty District, Martin, J., Adm. April 26, 1921.

Salvage (§I.—1)—Action for Salvage of a Fishing Boat by Another in Same Industry—Long Established Custom of Voluntary and Gratuitous Assistance—Defence.

The long established custom on the Pacific Coast of British Columbia that all vessels engaged in the fishing industry afford to each other in the common interest and for their joint benefit, voluntary and gratuitous assistance to crews and vessels in distress in any of the frequent accidents which are incidental to vessels of various descriptions engaged in that industry is, when established, a sufficient defence to an action for the salvage of a fishing boat, by another boat engaged in buying and marketing fish.

[Wright v. Western Can. Accident Co. (1914), 20 D.L.R. 478, 20 B.C.R. 321; Clayoquot Sound Canning Co. Ltd. v. Princess Adelaide (1919), 48 D.L.R. 478, 19 Can. Ex. 128, applied.]

ACTION for the salvage of a fishing boat in Knight Inlet. Action dismissed.

D. N. Hossie, for plaintiff.

E. C. Mayers, for defendant.

Martin, J., Adm.:—This is an action for the salvage of the gas fishing boat "R.S." in Knight Inlet on July 29 last. The boat was chartered by the Glendale Cove Cannery Co., and engaged at the time in catching fish for that cannery. The power boat "Freiya" is owned by one Carson and she was engaged at the time in buying fish from the Glendale Cannery and others and taking it to market at Seattle, or as might be. She had been at the cannery in question for some days before and after the accident to the "R.S." buying and loading fish from the company, and she claims an award for alleged salvage services rendered to the "R.S." when adrift in Knight Inlet as aforesaid.

The first defence set up is one of much importance to those engaged in the fishing industry on this Pacific coast of British Columbia, and it is that there is a long-established custom in these waters that all vessels engaged in the fishing industry afford to each other in the common interest and for their joint benefit voluntary and gratuitous assistance to crews and vessels in distress in any of the frequent accidents which are incidental to vessels of various descriptions engaged in that industry, and that this mutual assistance is not confined to the vessels attached to or employed in connection with the various canneries, but extends to those who carry on independently the fishing business in its various aspects. Obviously there cannot be anything unreasonable in such a custom, as it is both in the interests of humanity and industry, but on the contrary, everything

is in favour of it to one at all familiar with the waters of this Province and the conditions in general under which fishing operations are carried on, and so the only other aspect of the question is: Has the custom being sufficiently established with reasonable certainty as being so notorious and generally acquiesced in that it may be presumed to have been known to all persons engaged in that industry who sought to inform themselves on so important a matter, as it was incumbent upon them to do in working under local conditions?

After careful consideration of the evidence I am satisfied that the defendant vessel has discharged the burden imposed upon it in that respect, and, indeed, it is confirmed in its submission by the evidence of Carson, the owner of the plaintiff ship, whose cross-examination upon this point was unsatisfactory and he attempted to evade it by saying that he was not sufficiently interested to inquire into the existence of such a custom, though the evidence shews that there were special reasons why he should have done so.

In Wright v. Western Can. Accident Co. (1914), 20 D. L. R 478, at pp. 482-3, 20 B.C.R. 321, I decided there was a custom in Victoria in the building trade to make allowance for the extra cost occasioned by the discovery of unexpected rock encountered in excavation work, and there is a noteworthy case in connection with the fishing industry which supports my view. I refer to Noble v. Kennoway (1780), 2 Doug. 510, 99 E.R. 326, a decision of Lord Mansfield relating to the Labrador fishery, wherein it was decided that though a policy on fishing vessels in terms expressed only 24 hours after their safe arrival for the discharge of cargo, yet by the custom of the Labrador fishery the liability of the underwriters was extended to cover a period of several months within which the cargo or part thereof was kept on board, which custom was alleged to be in accordance with the trade on that coast. The custom there was proved by witnesses who had never been in Labrador and it was supported by evidence given as to the similar custom in Newfoundland, where the fishing trade had long been established though the new trade of Labrador had only been opened up since the Treaty of Paris, for a period of 3 years. Lord Mansfield said at p. 513 (2 Doug.):—

"Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is established or not. If he does not know it, he ought to

B.C.
Ex.
THE "FREIYA" V. THE "R.S."

inform himself. It is no matter if the usage has only been for a year. This trade has existed, and had been conducted in the same manner for three years. It is well known that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at Newfoundland. I still think the evidence on that subject was properly admitted, to shew the nature of the trade. The point is not analogous to a question concerning a common-law custom."

The other Justices concurred with Lord Mansfield, Buller, J., adding that there was sufficient evidence to support evidence to support the custom "without calling in aid the usage in the Newfoundland trade" although he was of opinion that such evidence was admissible in order to prove the reasonableness of the custom in Labrador.

In the case at Bar I have before me evidence of reputable persons on the ground, who speak with reasonable certainty from their personal experience and knowledge of these waters for many years, and I have no doubt that if it had been the "Freiya" which had the misfortune to be the victim of an accident at the time in question, she would have invoked (and successfully) in her own favour the benefit of the custom which I now decide exists in favour of the "R.S."

Such being the view I have taken of the case it is not, strictly speaking, necessary to go into the question of the alleged salvage service or decide the nice point as to whether it should in the most favourable light be regarded as anything more than towage, and I think it only now desirable to say that if the services could be regarded as salvage (as to which cf. Clayoquot Sound Canning Co. Ltd. v. S.S. "Princess Adelaide" (1919), 48 D.L.R. 478, 19 Can. Ex. 128, 27 B.C.R. 526, it would only be so in a technical sense, and the amount awarded would be so small that it would be difficult in the circumstances and in the absence of necessary evidence as to the set of the tide to distinguish it in practice from what would be allowed as towage in which service the "Fir Leaf" was of the greater assistance. Upon the evidence I could not find that the loss of the fish on the "Freiya" was due to the services rendered whatever they were.

I make these observations because of the objection that has been taken to the extravagant amount of the claim, viz., $6,000, for which the ship was arrested, and though the plaintiff's solicitor subsequently agreed to bail being

given for half that amount, yet it was so extravagant and oppressive that I call attention to my observations in The Vermont S.S. Co. v. The Ship "Abby Palmer" (1904), 8 Can. Ex. 462, and G. T. P. Coast S. S. Co. v. The "B. B." (1914), Mayer's Admiralty Law and Practice 544, on the impropriety of that course, i.e., forcing upon the owners the always onerous, and sometimes impossible burden of furnishing large bail; see also The "Freedom" (1871), L.R. 3 A. & E. 495, at p. 499, 25 L.T. 392, wherein it was said "The Court has always discouraged the institution of a suit for an excessive amount."

It follows that the action should be dismissed with costs.

Action dismissed.

KOWALENKO v. LEWIS and LEPINE.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. May 25, 1921.

Pleading (§I.N—118)—Appeal to District Court Judge from a Conviction of Justices of the Peace—Appeal not Perfected by Serving Respondents with Notice—Powers of District Judge under Rule 354—Powers of Court of Appeal under Rule 654 (Sask.).

Where it appears that a plaintiff has not perfected his appeal from a magistrate's conviction by serving the respondent with the notice of appeal as required by the Criminal Code, the District Court Judge has jurisdiction under R. 354 (Sask.) to find a verdict as if the appeal had been perfected, and the verdict shall take effect on such appeal being perfected as directed, and where it appears on appeal to the Court of Appeal that this would have been the course adopted by the District Court Judge had his attention been directed to the omission, the Court of Appeal has jurisdiction under R. 654 to direct that the plaintiff be allowed to complete his case by filing an affidavit establishing such service.

[Wills and Sons v. McSherry, [1913] 1 K.B. 20; The Queen v. Joseph (1900), 6 Can. Cr. Cas. 144; Banbury v. Bank of Montreal, 44 D.L.R. 234, [1918] A.C. 626, referred to.]

APPEAL by defendants (Justices of the Peace) from the judgment of a District Court Judge awarding damages against them, for denying him a right to have an appeal from their conviction for receiving stolen goods.

L. McK. Robinson, for appellants.

F. H. Bence, for respondent.

The judgment of the Court was delivered by

Turgeon, J.A.:—In this case the plaintiff claims damages against the defendants, who are Justices of the Peace, under the following circumstances. The plaintiff was convicted by the defendants on April 1, 1919, on a charge of receiving stolen goods. The plaintiff appealed from the conviction, and the appeal came on for hearing before

Sask.

C.A.

KOWALENKO v. LEWIS AND LEPINE.

the District Court Judge at Vonda on June 24, 1919. Upon the opening of the proceedings counsel for the respondents moved to dismiss the appeal on the ground that the conviction itself, the deposit made to cover costs, and the other material pertaining to the conviction, had not been transmitted to the Court as required by sec. 757 of the Criminal Code. The motion was allowed and the appeal dismissed. The plaintiff then brought this action for damages against the defendants, alleging that by their failure to comply with the requirements of the Code he had been denied the right to have his appeal heard. The District Court Judge gave judgment in favour of the plaintiff and fixed the damages at $234. From this judgment the defendants appeal.

Upon the argument before this Court, counsel for the defendants took the objection that the plaintiff had not alleged in his statement of claim and had not proved at the trial that he had complied with the provisions of sec. 750 (b) of the Crim. Code, regarding appeals from summary convictions, by serving a copy of his notice of appeal upon the defendants and that consequently he had not established, as he ought to have established, that he would have been entitled to have his appeal heard on June 24, 1919, had it not been for the default of the defendants.

This objection is a substantial one. If the plaintiff had failed to serve the defendants as required by the Code, his appeal could not have been heard, unless, at least, he could have shewn that he had endeavoured with all diligence to effect the service and had been deterred therefrom by circumstances altogether beyond his control, and which rendered such service impossible. Wills & Sons v. McSherry, [1913] 1 K.B. 20; The Queen v. Joseph, (1900), 6 Can. Cr. Cas. 144.

In that case, of course, he would have no action against the defendants, because he could not attribute his inability to proceed with his appeal solely to their negligence.

Although this objection does not appear to have been raised at the trial, and is not specifically set out in the notice of appeal, I think that under the circumstances it should be dealt with. The plaintiff in his statement of claim does not allege generally that he had complied with all the requirements of the Code necessary to entitle him to have his appeal heard, but he sets out in detail the different steps taken by him to perfect his appeal. He alleges (1) that he duly filed his notice of appeal with

the clerk of the Court within the 10 days allowed by the Code; (2) that he served copy of this notice on the defendant Lewis; (3) that he served a copy of the said notice on the defendant Lepine; and (4) that he paid to the magistrates the amount of the fine and the deposit for the costs of the appeal. The defendant denies specificially each of these allegations. Nothing is to be found in either pleading, either specifically or by implication, concerning service upon the respondent. Then, at the trial the plaintiff proved all his specific allegations, but went no further.

I do not think that, under the circumstances, the plaintiff did all that he should have done to establish a complete prima facie case against the defendants. If at the close of the plaintiff's case the defendants had taken objection to the sufficiency of the cause of action made out by the plaintiff, I think that the trial Judge would have had to give effect to the objection. I do not mean, however, that the trial Judge would necessarily have had to dismiss the plaintiff's action. In view of the conditions of the pleadings and the course of the trial, I think that the circumstances would have justified the application of R. 354 of our Rules of Court, which reads as follows:—

354. Where, through accident or mistake or other cause, any party omits or fails to prove some fact material to his case, the Judge may proceed with the trial subject to such fact being afterwards proved, at such time and subject to such terms and conditions as to costs and otherwise as the Judge shall direct; and, if the case is being tried by a jury, the Judge may direct the jury to find a verdict as if such fact had been proved, and the verdict shall take effect on such fact being afterwards proved as directed; and, if not so proved, judgment shall be entered for the opposite party, unless the Court or Judge otherwise directs. This rule shall not apply to action for libel or slander.

This rule, it seems to me, is intended to cover a case like the present, where a litigant may find himself out of Court and unable to have a substantial cause of action heard and disposed of on its merits, on account of a slip made by counsel at the trial. This rule is not to be found among the English rules, and I believe that it should be used sparingly and only where a clearly meritorious case is made out and where a substantial injustice might otherwise be done, as no doubt it is a rule easily susceptible of abuse and liable, if too freely applied, to serve as an encouragement to carelessness. Nevertheless I think the

Man.
K.B.
VANCE
v.
BALDWIN.

trial Judge might very well have applied it in this case, if the objection had been taken before him.

But the objection to the plaintiff's case having been taken for the first time upon the argument before this Court, we have first to decide whether we should give effect to it. I believe we should, as it clearly shews upon investigation that the plaintiff did not prove a material part of his cause of action. We have then to determine what effect we should give to the objection. In my opinion we should make as liberal a use of the powers conferred upon this Court by R. 654 as I believe the trial Judge might have made of R. 354, if the necessity had arisen before him. Rule 654 gives this Court power "to give any judgment and to make any order which ought to have been made," and, moreover, "to make such further or other order as the case may require." As was pointed out by Lord Atkinson in the case of Banbury v. Bank of Montreal, 44 D.L.R. 234, [1918] A.C. 626, 87 L.J. (K.B.) 1158, at pp. 269, 270, these latter words extend to the making of an order which the Court appealed from could not have made, the intent of the rule being that pains should be taken by the Court to see that substantial justice is done between the parties. I believe, therefore, that this appeal should not be proceeded with further at present, but that an opportunity should be given to the plaintiff to complete his case by proving that he had perfected his appeal from the magistrates' conviction, by serving the respondent with a copy of the notice of appeal as required by the Code. For this purpose the plaintiff should be allowed to file an affidavit establishing such service on or before Tuesday, June 14 next. The matter can be spoken to when the Court meets on that day, when any further questions that may arise from the making of this order, as well as the question of costs, can be considered and disposed of.

Judgment accordingly.

VANCE v. BALDWIN.

Manitoba King's Bench, Curran, J. February 18, 1921.

Vendor and Purchaser (§I.E—28)—Sale of Land—Agreement—"Determination," "Rescission," Distinction Between—Damages on Determination.

There is a well-defined distinction in law between "rescission" and "determination" of a contract for the sale of land. The former proceeds upon the principle of disaffirmance and the latter upon that of affirmance. It is quite consistent in the latter case to claim damages in addition to a judicial determination of the agreement, but such damages must be distinct from and have no relation to the purchase price.

ACTION by a vendor of land under agreement of sale, for damages for breach of contract, and for a declaration of determination of the agreement.

J. F. Kilgour, K.C., for plaintiff.

J. D. Paterson, for defendant Baldwin.

Curran, J.:—The plaintiff and the defendant Baldwin are the original parties to the sale agreement which is the subject of this action, the plaintiff being vendor and the defendant Baldwin being the purchaser. The statement of claim was amended on November 6, 1920, by adding the defendants Padfield and Leithead as parties defendant. This was done pursuant to an order to amend, dated November 1, 1920, after the statement of defence of the defendant Baldwin had been filed, and in consequence of certain allegations in the defence to the effect that the defendant Baldwin's interest in the land in question had been sold to Padfield and the purchaser's interest under the original agreement of sale assigned to the defendant Leithead. Neither of the defendants lastly named filed any defence to the action and the plaintiff accordingly signed interlocutory judgment against them.

The allegations in the statement of claim upon which the plaintiff relies for relief sought have all been admitted by the defendant Baldwin except those setting up a claim for damages against him and it is over these claims that the real controversy arises.

The plaintiff has elected to affirm the original sale agreement as still in force and asks in addition to damages that it may be declared to be abandoned, determined and at an end as against all defendants, or, in the alternative, specifically performed by the defendant Baldwin; he is not asking for rescission.

There is of course a well-defined distinction in law between "rescission" and "determination." The former proceeds upon the principle of disaffirmance and the latter upon that of affirmance of the contract of sale. It is quite consistent in the latter case to claim damages in addition to a judicial determination of the agreement: Harvey v. Wiens (1906), 16 Man. L. R. 230, but such damages must be distinct from and have no relation to the purchase price.

A vendor is precluded from keeping the land and recovering the money contracted to be paid as the purchase price of it, where the contract has been rescinded, that is, ended by the mutual action of both parties. The contract is at an end and all rights thereunder and remedies thereon

Man.

K.B.

VANCE v. BALDWIN.

and therewith except that damages for breach of it may be sought by the vendor: Fraser v. Ryan (1897), 24 A.R. (Ont.), 441, and Icely v. Grew (1836), 6 Nev. & M. (K.B.) 467. Here the purchase price was to be liquidated and paid out of crops to be grown upon the land in question beginning with the year 1920, half of each year's crop to be devoted to this purpose. No crops whatever were sown or grown upon the land by any of the defendants in any year and default therefore existed in respect to this obligation.

The plaintiff makes claim for damages by reason of breaches of the agreement as follows:—"Estimated crop of wheat 1920, 90 acres at 20 bushels per acre, one-half share at $2.00 per bushel, $2,250; failure to break 10 acres in 1919 and 10 acres in 1920, $1,400 (this amount is clearly an error); damage for noxious weeds, $500—total, $4,150."

As to the first item, I think that clearly goes to the consideration of purchase price and is not recoverable.

The second item was abandoned in toto at the trial for this reason and need not be considered.

The last item alone is I think tenable. There has been a clear and undoubted breach of the covenant to kill and destroy noxious weeds and also of the covenant to summer fallow, although it is not clear from the terms of the covenant to summer fallow what quantity or acreage was to be summer fallowed in each year. The covenant reads:—"To do all summer fallowing in proper season and manner according to the best methods of cultivation and not later than the first day of August in each year."

The plaintiff's evidence is to the effect that when the agreement was entered into the cultivated land was then in stubble, 79 or 80 acres cropped in the previous year on new breaking and that the land was then clean and free from noxious weeds; that the defendant Baldwin went into possession in June, 1919, and ploughed about 50 acres but did no harrowing or cultivating that year; that this ploughing was very badly done and not in accordance with the best methods of cultivation.

The defendant Baldwin on the other hand says there were at the outside from 60 to 65 acres that had been ploughed when he got possession and very badly done at that; that of this he back-set about 50 acres, double-disced of this 25 to 30 acres twice and a portion three times.

I cannot say upon the evidence whether the land was in condition for summer fallow in 1919 so-called, but it certainly could have been properly ploughed, i.e., back-set.

harrowed and cultivated during that year and the weeds eliminated so that the land would have been fit for crop in 1920. I find that the defendant did not do this and that no bona-fide effort was made to prevent the growth of noxious weeds or kill or destroy such as came up and that there has been a clear breach of the covenant in the agreement respecting these matters by the defendant Baldwin resulting in a rank growth of noxious weeds which were allowed to mature and producing a condition which not only prevented any crop being sown in 1920 but also in 1921. Nothing at all was done on the land in 1920 by any of the defendants either by way of cropping, breaking or summer fallowing.

I accept the evidence produced by the plaintiff as to the weedy condition of the land in 1919 and 1920, which was in substance that the land became infested with a growth of pig weed and mustard so rank and thick that it cannot now be ploughed without first cutting the weeds, piling and burning them. The cost of this operation would amount to at least $500 according to the evidence of Joseph Lawson, who saw the condition the land was in. No attempt was made to contradict this man's evidence beyond a statement by the defendant Baldwin that there were quite a lot of weeds on the land when he took possession. This is contradicted by both the plaintiff and Lawsqn.

I think the weight of evidence is against the defendant, and he must be held responsible for the conditions indicated which it was both his duty and within his power to have prevented by timely and proper farming methods; he failed utterly in performing his covenant duty in this respect and must answer for his neglect in damages to the plaintiff which I assess at the sum of $500 as claimed.

There remains only to consider the other claim for damages set out in para. 16 of the statement of claim. The defendant admits liability for the damage done by his horses to the oat stacks in question but disputes the amount claimed by the plaintiff, viz., $825. He admits the sum of $25 being the quantum of damage to the stacks in question assessed by the municipal appraisers who were called in by him to view the damage. Both of these appraisers were produced as witnesses by the defendant, and I accept their evidence rather than that of the plaintiff's witnesses whose valuation, in my opinion, was extravagant and unwarranted. It appears that the oat sheaves put into these stacks stood out in the field all winter, were stacked in the

Can.

S.C.

REMILLARD v. THE KING.

spring of 1919 and damaged by the defendant's horses in the latter part of December in the same year. The plaintiff admitted that part of one of the stacks got wet. From the evidence of Evans and Lawn, the two appraisers, and both wholly disinterested witnesses, I am satisfied that the quantity of sheaves destroyed has been greatly exaggerated by the plaintiff's witnesses as well as their quality. Evans said the sheaves remaining in the stacks which he pulled out here and there were musty and weedy and that personally he would not pay anything for them. Lawn, the other appraiser, said that the sheaves in the stack which he examined were very musty and contained wild oats and weeds; that he would not feed such sheaves to his cattle and would not pay anything for them.

Both these men who appeared to me to be intelligent farmers and wholly distinterested stated that they came to the conclusion that $25 would adequately cover the damage, taking into consideration the condition of the sheaves. Both also expressed the opinion that there were four loads of sheaves intact in one stack and two in the other, whereas the plaintiff's witnesses put the salvage at less than two loads.

I assess the damage in respect of these oats at $25 and find for the plaintiff on both counts for damages the sum of $525. The plaintiff will have judgment against the defendant Baldwin for this amount in addition to judgment determining the agreement as asked for in para. 1 of the prayer for relief, and immediate possession of the land as against all the defendants.

The plaintiff will be entitled to costs of the action against the defendant Baldwin but against the other defendants up to the trial only and to include a counsel fee upon Court motion for judgment. It would not be just to award costs against these defendants of the contest over the claims for damages which alone concerned the original parties to the action.

Judgment accordingly.

REMILLARD v. THE KING.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault, JJ. March 11, 1921.

Murder (§I.—1)—Criminal Law—Author of Crime Convicted of Manslaughter—Aider and Abettor on Subsequent Trial Convicted of Murder—Legality of Conviction—Criminal Code, sec. 69.

Section 69 of the Criminal Code enumerates those who are parties to and guilty of an offence and makes one who formerly was

termed an accessory before the fact a party to and equally guilty with the perpetrator of the offence, and therefore where the author of a crime has been previously convicted of manslaughter, an aider and abettor may at a subsequent trial on another indictment resting on the same killing be convicted of the crime of murder.

APPEAL from the Quebec Court of King's Bench, on a case started as to whether the accused as an aider and abettor could be convicted of the crime of murder, the author of the crime having been previously convicted of manslaughter. Affirmed.

N. K. Laflamme, K.C., and M. A. Lemieux, K.C., for appellant.

A. Marchand, K.C., and L. A. Cannon, K.C., for respondent.

Idington, J.:—The appellant was indicted for murder and convicted therefor.

The Court of Appeal has, with the exception of Guerin, J., so answered the questions submitted in a reserved case relative thereto as to maintain the conviction.

The pith of the dissenting opinion of Guerin, J., in said Court which gives appellant the right to come here, and is the measure of our jurisdiction to interfere, is that because appellant's son on another indictment for murder, resting on same killing, had on his trial been only found guilty of manslaughter, therefore the appellant cannot be found guilty of any greater offence than that of manslaughter.

The contention is a most remarkable one and seems to me to have been so well and effectually answered by the several opinions of the other Judges in the Court below writing opinions with which I substantially agree, that I do not feel at liberty to repeat same here. Some of them illustrate the unfounded nature of such pretensions as made, by various alternatives.

I only add another and that is, if this case had, as it might have been in law, been tried before the other, despite what appellant's counsel suggests is customary in such cases, how could he have invoked the pretension of law now set up?

The appeal should be dismissed.

Duff, J.:—I have carefully considered the charge of the trial Judge and I am by no means satisfied that he instructed the jury insufficiently touching the elements of the offence of manslaughter and the distinctions between that offence and murder.

I am unable to perceive any force in the argument found-

Can.

S.C.

REMILLARD v. THE KING.

ed upon the verdict and judgment against the younger Remillard.

Anglin, J.:—In my opinion this appeal fails. The fact that in another trial another jury passing upon evidence which may have been somewhat different, decided that the offence committed by Romeo Remillard in killing Lucien Morissette amounted only to manslaughter is wholly irrelevant to the question whether Joseph Remillard could rightly be put on trial for, and could upon proof that he had aided, abetted or instigated, the homicide, be convicted of murder. As between Romeo Remillard and the Crown the verdict of the jury who tried him is no doubt conclusive as to the nature of his crime. As between Joseph Remillard and the Crown it determines nothing. The character of the offence actually committed by each must be decided by the jury charged with the disposition of the indictment against him. To the first question in the reserved case the only possible answer was in the negative.

The Judge, in my opinion, sufficiently instructed the jury as to the three verdicts which may be rendered on an indictment for murder and as to the distinction between murder and manslaughter. He discussed adequately and correctly all the relevant grounds on which in this case the culpable homicide charged to have been aided, abetted or instigated by Joseph Remillard might possibly have been reduced from murder to manslaughter. Having read to the jury the definitive provisions of sec. 259 of the Criminal Code dealing with murder, he instructed them that, if the homicide were not excusable, their verdict should be guilty of manslaughter, unless the facts proved warranted a verdict of murder. That was equivalent to a reading to them of sec. 262 of the Code—the omission of which from the charge was made the subject of serious complaint. The Judge also read and explained sec. 261, which deals with the effect of provocation, and discussed the several matters suggested in the course of the defence by way of excuse and in palliation. Without characterising the charge as a model presentation of the case to the jury, with Carroll, J., I regard it as fulfilling the requirements of the law and not warranting interference by an Appellate Court on any ground covered by the reserved case.

The second and third questions should, in my opinion, be answered as they were by the Court of King's Bench.

Brodeur, J. (dissenting):—There are three main questions submitted to us. The first deals with the validity

of a verdict of murder against an accessory where the principal has been found guilty only of manslaughter. The others raise an issue as to the sufficiency of the explanation given by the trial Judge of the difference between murder and manslaughter.

The appellant is accused of having killed a man named Morissette, and he was found guilty of murder. It was not he, however, who fired the fatal shot, but his son Romeo. The accused in the present case was only the accessory to the crime.

Certain witnesses, and I suppose that their version was accepted by the jury although it was contradicted by other witnesses, declared that the father, the accused in the present case, had urged his son to fire at the victim. It was, I suppose for this reason that the Crown persisted in proceeding against the accessory on a charge of murder, when the principal had been found guilty only of manslaughter.

Article 69 of the Criminal Code justifies this procedure, as it places principal and accessory on the same footing and declares that they are both parties to and guilty of the offence. He who abets, incites, or counsels murder may then be found guilty of murder, although he may not have been the actual perpetrator of the act which resulted in death.

Since the codification of our criminal law, the somewhat subtle classification of parties to the commission of an offence into principals in the first degree, principals in the second degree and accessories before the fact, has been abandoned. All these criminals are now placed on the same footing. Each one of them may be charged as a principal, although he may only have aided, abetted, or counselled the perpetrator of the crime. Russell on Crimes, 6th ed., pp. 176-177.

Thus in the case of murder, he who has only incited a person to kill may be accused of murder as if he had himself delivered the fatal blow. Hawkins, Pleas of the Crown, 8th ed., Vol. II., p. 439, states that even in a case of homicide, the accessory may be found guilty of murder while the principal may be guilty only of manslaughter.

"All those who are present when a felony is committed and abet the doing of it, as by holding the party while another strikes him or by delivering a weapon to him that strikes him, or by moving him to strike, are principals in the highest degree in respect of such abetment, as much as the person who does the act, which in judgment of law is as

Can.
S.C.
REMILLARD
v.
THE KING.

much the act of them all as if they had actually done it; and if there were malice in the abettor and none in the person who struck the party, it will be murder as to the abettor and manslaughter only as to the other."

In the case before us, the jury could find a verdict of murder, even if the accused were only an accessory and had not himself fired the fatal shot. Each case could be decided on its own merits, according to the proof made in and the nature of the offence. The verdict in the one need not be adopted in the other.

The first question submitted to us must then be answered in the negative.

As to the other two questions which affect the Judge's charge to the jury, I have not been able to reach the same conclusions as the Court of Appeal.

The question arose at the outset as to whether there had been culpable homicide. The accused attempted to prove provocation and accident. These two defences, if established, would have cleared him from any criminal charge.

The Judge, in his charge to the jury, instructed them that the provocation was not sufficient to justify Romeo Remillard in committing the act in question, and that the shooting could not be placed in the category of accidents.

After a careful reading of all the evidence, I am convinced that the provocation alleged was not sufficient to justify homicide. Nor do I believe that the circumstances under which the shooting took place are such as to place it in the category of purely accidental happenings so as to free the author of the act or his accessories from all criminal responsibility. I am of the opinion that there was culpable homicide. It was neither justifiable nor excusable.

But was this homicide voluntary or involuntary? In other words was it murder or only manslaughter?

Unfortunately the Judge does not appear to have sufficiently brought out the distinction between these two offences, murder and manslaughter.

Carroll, J., who presided in appeal, held that the Judge's charge, taken as a whole, was legal, and therefore gave judgment against the appellant. He said however that the charge was "such as might have given the jury the impression that the verdict of murder was the only possible finding."

If such is the case, can it be said that the Judge sufficiently instructed the jury as to the facts of the case in

relation to the crime of manslaughter? As I have said above, I have no doubt that the provocation and the accidental nature of the shooting were not sufficient to relieve the accused from the guilt of homicide, for even if certain persons had taken it into their heads to visit his wife at an undue hour of night, the accused would not have been justified in taking a gun and shooting them. There was not sufficient provocation for that.

But if his object was to protect his home from the evil reputation that might result from the nocturnal visit of these young men, if he took his gun and while trying to fire at their legs, hit one of these visitors in a vital part, either as the result of excitement or from lack of skill, without any intention on his part to cause death, would not the circumstances be such as to call for a clear distinction in the Judge's charge between an offence constituting murder and one which might only constitute manslaughter.

In the present case this distinction was not so drawn. On the contrary, the Judge in his charge dwelt on these incidents as elements of the crime of murder, whereas the whole of the evidence shewed that the case before the jury was rather one of manslaughter.

To me it seems evident that there was no intention to kill, but only a desire to make such a demonstration as would deter these visitors from repeating their nocturnal visits, and would compel them and their fellows to respect the home of the accused. His poor wife was unfortunately addicted to drink, and her morals were a subject of scandal to her own family—the usual state of affairs in such cases. The accused sought to protect her from those who would have taken advantage of her weakness to bring dishonour to his home.

In law that would not justify him in resorting to firearms and killing the visitors. But if, as in the present case, the Judge must insist on instructing the jury that a criminal offence exists, he must do so in such a manner as to make them understand what is murder, and what is manslaughter. Referring to the sentence I have detached from the opinion of Carroll, J., my opinion is that if the Judge's charge could give the jury the impression that they could only return a verdict of murder, then there ought to be a new trial.

The Judge should not content himself with a general quotation of the text of the code which says that on a charge of murder an accused may be found guilty of murder, or of manslaughter, or he may be acquitted. Nor

Can.

S.C.

REMILLARD
v.
THE KING.

must he give a more or less vague definition of these two offences, but he must proceed to consider the two offences in the light of the evidence and he must in a clear and precise fashion set the facts before the jury in their relation to the crime of murder and to that of manslaughter. The object of the Judge's charge to the jury is to explain to them the law applicable to the case, and to instruct them as to the essential facts which must be proved on either side, and as to the relation of the evidence to the points in issue. Further, in a case in which the evidence is such as to justify a verdict for two different offences, it is the Judge's duty to determine if a crime has been committed, and to indicate clearly the degree of crime attaching to the offences of which the accused may be found guilty.

The Judge must define the crime with which the accused is charged, and he must also explain the difference between that crime and any other of which he might be found guilty. The Judge's failure to instruct the jury as to murder and manslaughter, in the case of The King v. Wong (1904), 8 Can. Cr. Cas. 423, was held to be sufficient ground for a new trial.

Sir James Stephen, in his work, General View of Criminal Law, 2nd ed., p. 170, says:—"I think, however, that a judge who merely states to the jury certain propositions of law and then reads over his notes does not discharge his duty."

A fairly similar case was decided in England only a few years ago. The King v. Hopper, [1915] 2 K.B. 431.

This was also a murder trial, and as in the present case the defence was provocation and accident. At the trial the Judge expressed his firm opinion that it was a case of murder or acquittal. He failed to state that the provocation and accidental circumstances were such that the offence could be considered manslaughter. Lord Reading, who delivered the judgment of the Court of Appeal, held that the facts established could justify a verdict of manslaughter and that the Judge should have instructed the jury accordingly.

In the present case it is true that the Judge was not so positive as in the Hopper case, but, nevertheless, he left the jury under the impression that the only verdict which could be found was one of murder.

I am for these reasons of the opinion that the Judge's charge to the jury was incomplete and therefore illegal. There should be a new trial and the appeal should be allowed.

Mignault, J.:—The appellant having been tried at Quebec

on an indictment for the murder of one Lucien Morissette before Desy, J., and a jury, was found guilty and death sentence was passed on him. The trial Judge refused to state certain questions for the opinion of the Court of King's Bench sitting in appeal, but on appeal to the latter Court, he was ordered to state for the opinion of that Court the following questions:—

"1.—Should I have told the jury, as a matter of law, that the author of the crime, Romeo Remillard, having been by another jury previously convicted of the crime of manslaughter, the accused (if in the opinion of the jury he was an aider and abettor) could not be convicted of the crime of murder; but the only verdict that could be rendered was one for manslaughter or acquittal?

"2.—(a) Should I have pointed out to the jury the three verdicts that could be rendered upon a charge of murder, viz., guilty of murder, guilty of manslaughter, or not guilty? (b) If, yes, did I sufficiently so instruct the jury?

"3.—(a) Should I have pointed out to the jury what in law constituted the offence of manslaughter? (b) If yes, did I sufficiently so instruct the jury?"

After hearing counsel, the Court of King's Bench answered the first question in the negative, the two branches or questions in the affirmative and the two branches of question three also in the affirmative.

Guerin, J., dissented and would have answered question one in the affirmative, the first branches of questions two and three in the affirmative and the second branches of these questions in the negative.

This dissent permitted the further appeal which has been taken to this Court, and, in view of its terms, the whole case is open for review. It should be remarked, as to questions two and three, that the five Judges were of opinion that it was the duty of the trial Judge to direct the jury in the manner stated in the first branches of these questions, the majority of the Judges being of opinion that the trial Judge had sufficiently instructed the jury on the points referred to.

First question. Briefly stated the contention of counsel for the appellant is that the trial Judge should have told the jury that inasmuch as Romeo Remillard, the appellant's son, who fired the fatal shot, was previously tried on an indictment for the murder of Morissette, and found guilty of manslaughter only, the appellant, if in the opinion of the jury he was an aider and abettor, could not be con-

Can.
S.C.
REMILLARD
v.
THE KING.

victed of the crime of murder, but that the only verdict that could be rendered was one for manslaughter or acquittal.

The circumstances under which the jury found a verdict of murder against the appellant are not mentioned in the reserved case, and cannot be perfectly ascertained by reading the charge to the jury, in which the trial Judge commented on facts well known to the jury. I think however that we have only to deal with the facts assumed in question one, that is to say that Romeo Remillard was the author of the crime, and was previously convicted by another jury of manslaughter. We must also assume that there was evidence upon which the jury could find that the appellant was an aider and abettor in the crime committed by Romeo Remillard.

Assuming these facts, in order to determine whether it was the duty of the trial Judge to direct the jury that the only verdict they could find against the appellant was one for manslaughter or acquittal, it is necessary to consider certain sections of the Crim. Code. The old distinction between accessories before the fact and principals has been abolished, and sec. 69, para. 1, of the Crim. Code enumerates those who are parties to and guilty of an offence.

"Every one is a party to and guilty of an offence who—(a) actually commits it; or (b) does or omits an act for the purpose of aiding any person to commit the offence; or (c) abets any person in commission of the offence; or (d) counsels or procures any person to commit the offence."

Paragraph (a) of sub-sec. 1 applies to Romeo Remillard, who actually committed the offence, and the other paragraphs comprise those who formerly were termed accessories before the fact, and who are now, equally with the perpetrator, parties to and guilty of the offence. If the jury were of the opinion that the appellant was an aider and abettor in the offence committed by Romeo Remillard, they could undoubtedly find him a party to and guilty of this offence.

To aid or abet is defined as follows in Stroud's Judicial Dictionary, vol. I., p. 64:—

"To constitute an aider or abettor, some active steps must be taken, by word or action, with intent to instigate the principal or principals."

"Encouragement does not, of necessity, amount to aiding and abetting. It may be intentional or unintentional. A man may unwittingly encourage another in fact by his pre-

sence, by misinterpreted words or gestures, or by his silence or non-interference; or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets; in the former he does not. It is no criminal offence to stand by a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent it and had the power to do so at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged, and so aided and abetted. But it would be purely a question for the jury whether he did so or not" (per Hawkins, J. in The Queen v. Coney (1882), 8 Q.B.D. 534, at pp. 557, 558, 51 L.J. (M.C.), 66.

It is obvious here that it was for the jury to determine whether a case of aiding and abetting was made out.

But it is contended that the offence committed by Romeo Remillard was manslaughter, as shewn by the verdict rendered against him and which must be taken to have been justified by the evidence, and that therefore they could not find the appellant guilty of the greater offence, that of murder.

This reasoning necessarily implies that the verdict found in another trial against Romeo Remillard is conclusive evidence in the trial of Joseph Remillard of the nature of the offence committed by the former, of which offence question one assumes that the latter could be found to have been an aider and abettor. I think that this shews the fallacy of the appellant's contention, for what was decided in Romeo Remillard's case was entirely irrelevant in the trial of his father, and the trial Judge would have erred had he told the jury that because the son in another case had been found guilty of manslaughter, the father, when separately tried, could not be convicted of the greater offence of murder, for that would have been giving to the verdict in the Romeo Remillard case a conclusive effect in the Joseph Remillard trial, in other words, treating it as res judicata, which it certainly is not. Unless the provisions of sec. 69 Cr. Code are borne in mind, confusion may be caused by treating the one as the actual perpetrator, the other as the aider and abettor, and measuring the guilt of the latter by the guilt of the former. Both are principals

Can.
S.C.
REMILLARD
v.
THE KING.

or rather parties to and guilty of the offence committed (sec. 69), that is to say culpable homicide, and culpable homicide is murder when committed with intent actual, or presumed in the cases mentioned in sec. 259, sub-secs. (b) (c) and (d), to cause death, and manslaughter when that intent does not exist. So between two parties, within the meaning of sec. 69, to a culpable homicide, it is conceivable that one may be shewn to be guilty of murder and the other of manslaughter. And on the trial of the appellant, the jury could certainly determine what was the crime committed and, if the evidence justified the verdict, find the appellant guilty of murder, notwithstanding the fact that Romeo Remillard in another trial was, for the same culpable homicide, convicted of manslaughter.

My opinion therefore is that question one must be answered in the negative.

Question two. I would answer both branches of this question in the affirmative. It is common ground that it was the duty of the trial Judge to tell the jury that three verdicts could be rendered upon a charge of murder, to wit, murder, manslaughter or acquittal, and the Judge did so.

Question three. The appellant's counsel greatly insisted on this question, contending that the evidence was such as would have rendered a verdict of manslaughter possible, and that the jury were not sufficiently instructed as to what constitutes the offence of manslaughter.

I have twice read the Judge's charge. He very particularly explained to the jury the nature of murder, quoting the different provisions of the Code which deal with this crime. There is no definition in the Code of manslaughter, and sec. 262, stating that culpable homicide, not amounting to murder, is manslaughter, even if it could be regarded as a definition, was not read to the jury. However at different parts of his charge, while discussing the defences urged by the appellant, the Judge referred to manslaughter. Thus on the defence of provocation, the Judge cited sec. 261 of the Code, the effect of which is that culpable homicide may be reduced to manslaughter where death is caused in the heat of passion occasioned by a sudden provocation. After reading the first and second paragraphs of sec. 261, he said: "You must ask yourselves if that is the case here, and if the passion of the accused had sufficient time to cool before the shot was fired. And after reading the third paragraph of this section he adds: "It is accordingly a question which

you must yourselves determine whether any act here proved or any particular insult constitutes provocation, and if the person provoked was really in the heat of passion as a result of the provocation. These are questions of fact of which you are the sole judges and which you must answer after considering the evidence in the light of the principles of law which have been explained to you. "

Further on, the trial Judge quoted from Russell on Crimes. vol. l. p. 693.

"In order to reduce murder to involuntary homicide on account of provocation, the circumstances must justify the conclusion that the act committed with intent to cause death or serious bodily wounds was not the result of cool and deliberate decision and malice aforethought, but can only be imputed to the weakness of human nature."

And the Judge thus commented on this passage.

"You must ask yourselves if the evidence establishes beyond the possibility of a doubt that what was done between midnight and one o'clock in the morning of the twenty-eighth of January had not begun to take shape and to be gradually carried into execution from the preceding evening to the morning.

"You will examine the acts, gestures, steps, and proceedings of the prisoner at the bar, the declarations he made, and his whole conduct, and you will then answer this question."

Immediately following the passage I have quoted, the trial Judge instructed the jury as to the claim made that the accused was justified in using force to prevent the breaking into of his house at night. He said: Section 60 of the Criminal Code says:—

"Everyone who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting by his authority, is justified in using such force as is necessary to prevent the forcible breaking and entering of such dwelling-house by night by any person, if he believes on reasonable and probable grounds, that such breaking and entering is attempted with the intent to commit any indictable offence therein. In this case did anyone attempt to break and enter into the house of the prisoner at the bar? Is it not established beyond all doubt that Morissette passed Remillard's house and walked a few feet toward the Baker's, and then became doubtful as to whether the Baker's house was really what it was, his doubt being based on the fact that Baker had left them only half an

Can.

S.C.

REMILLARD v. THE KING.

hour before and there was no light in his house, while there was light in Remillard's? Was there then a breaking on the part of Morissette? Is it not true that Morrissette acted in the same manner as any well-bred man who comes to a respectable house, and that he rang at the door before going in? Is it not proved that he raised his hat, and politely asked a question to the person who came to the door? "

Again the Judge, referring to the suggestion of the defence that the prisoner's wife was a prostitute and that the deceased and his companions had come to the prisoner's house at night in order to commit adultery with her, quoted from some unnamed authority as follows:— "If one man finds another committing adultery and kills or shoots him in the first transports of passion, he is guilty only of involuntary homicide, for the provocation is serious and the law presumes that the husband could not control his anger. But he who deliberately kills the adulterer in revenge is guilty of murder. Thus if a father sees anyone committing an unnatural offence with his son and kills him on the spot, it would be only involuntary homicide. But if he only hears the thing spoken of, and then seeks out the offender and kills him, after sufficient time has elapsed to allow him to recover his senses, it is murder."

And as to the claim made that the accused had acted in self defence, the Judge said:—

"If a person receives a blow and immediately retaliates with a weapon or instrument that comes to his hand, the offence will be only involuntary homicide, provided that he struck back in the heat of passion resulting from the provocation, for anger is a passion to which both the good and the bad are subject. But the law exacts two conditions, -first, there must have been provocation, and second, the blow must be clearly attributable to the influence of the passion resulting from the provocation.

Was there an assault in the present case?

Was the shot fired in the heat of passion, a passion provoked by this assault, the whole to the knowledge of the accused in this case?

If you reach the conclusion that this tragedy was acted under the sudden influence of passion, you must apply the law I have just outlined to you. If you reach the conclusion that the accused first performed some acts of omission or commission according to the legal principles I have just quoted, and that he acted or refused to act without

being then under the sudden influence of passion, but rather under the influence of that evil spirit and depraved disposition that the law calls by the name of "malice" in defining murder, the offence will not be involuntary homicide. It will be murder."

In view of all this I cannot come to the conclusion that the trial Judge did not sufficiently instruct the jury as to what in law constitutes the offence of manslaughter, at least in so far as was necessary to decide upon the different defences relied on by the accused, and as to these defences the Judge told the jury under what circumstances, if they thought them established, a verdict of manslaughter could be returned. Such a method of instruction was probably more useful to the jury than citing to them sec. 262 of the Crim. Code. or theoretically explaining the differences between murder and manslaughter. The charge as a whole was a strong one against the prisoner and may have given the jury the impression that the proper verdict to return was a verdict of murder, while leaving them entirely free to appreciate the evidence and come to their own conclusions thereon. Even if I thought that this amounts to misdirection, and I cannot say that, I would not be justified in setting aside the verdict unless I felt convinced that some substantial wrong or miscarriage was occasioned by the judge's charge (sec. 1019 Crim. Code). I cannot come to this conclusion after carefully reading the judge's charge and the circumstances then referred to as far as disclosed, and if the trial Judge's comments on the facts are fair, and no objection thereto was taken at the trial, my opinion is that no substantial wrong or miscarriage was occasioned, even if the impression was left on the minds of the members of the jury that the proper verdict to return was one of guilty of murder.

I would therefore answer both branches of question three in the affirmative.

As a result the appeal must be dismissed.

Appeal dismissed.

MOROSCHAN v. MOROSCHAN.

Saskatchewan King's Bench, McKay, J. April 25, 1921.

Bankruptcy (§IV.—40)—Seizure by Sheriff under Execution—Notice of Assignment—Property Turned Over to Trustee—No Money Realised—Sheriff's Costs—Right to Poundage—Taxation—Jurisdiction of Master and Registrar of Court.

The proper officer to tax the sheriff's bill where he has made a seizure under execution and turned over the property to the

Sask.

K.B.

MOROSCHAN v. MOROSCHAN.

trustee upon receiving a copy of the assignment, as required by sec. 11 (3) of the Bankruptcy Act, is the taxing officer of the Court in which the execution was issued. The Master under R. 620 (c) Sask. has jurisdiction to review the taxation by the local Registrar of the Court of King's Bench.

Where the sheriff has made a seizure under execution and has turned over the property to the trustee without realising any money for the execution debtor he is not entitled to poundage except under R. 495 (Sask), which leaves the amount to the discretion of the Judge according to the circumstances of the case.

[See Annotation Bankruptcy Act of Canada 1920, 53 D.L.R. 135, also Annotation, Bankruptcy Act Amendment Act, 1921, 59 D.L.R.]

Mr. Carter, for the authorised trustee.

Gerald Davidson, for the sheriff.

McKay, J.:—In this case the sheriff, on September 3, 1920, under a writ of execution, seized certain goods of the defendant, and on October 14, 1920, advertised them for sale, to be sold on October 28, 1920.

On October 16, 1920, the defendant made an authorised assignment for the benefit of creditors in favor of the Saskatchewan General Trust Corporation, a copy of which assignment was received by the said sheriff on October 21, 1920.

The sheriff submitted his bill to the authorised trustee amounting to $200.83, in which was an item, "Poundage $122.50." The local Registrar taxed this bill at $78.33, and left the amount for poundage (if any) to be fixed by a Judge on application to be made to him for that purpose.

On this taxation, counsel for the authorised trustee objected to the taxation by the local Registrar, and contended the bill should be taxed by Mr. Charlton, the taxing officer under the Bankruptcy Act, 9-10 Geo. V. 1919, (Can.) ch. 36.

The sheriff applied under Rule of Court 495 to the Master in Chambers to fix the amount of poundage he was entitled to, and on this application the Master made an order fixing the poundage at $100 and for costs of this application, $15, to be paid to the sheriff by the authorised trustee.

The authorised trustee appeals from this order, contending—

1. That the Master had no jurisdiction to make the order, as the bill should have been taxed by the taxing officer under the Bankruptcy Act, and from such officer's taxation the review or appeal would be to the Judge in Bankruptcy.

2. Even if the local Registrar had authority to tax the bill, the application to the Master was a new application

under Rules of Court 495 and 620 (i), and not a review of the local Registrar's taxation under Rule 620 (c), and therefore the Master had no jurisdiction.

3. The amount allowed is excessive.

1. As to the first objection:

Section 11 (3) of the Bankruptcy Act provides that if an authorised assignment has been made, the sheriff having seized property of the debtor under execution, shall upon receiving a copy of the assignment certified by the trustee named therein, forthwith deliver to the trustee all the property of the execution debtor in his hands, upon payment by the trustee of his fees and charges and the costs of the execution creditor.

There is no express provision in our Act or rules for the taxation of the above fees, charges and costs, as is the case in the English Bankruptcy Rules of 1915. See Rule 110, which directs that the sheriff's bill of costs is to be taxed by the taxing officer of the Court having jurisdiction in the bankruptcy.

In the absence of any such express provision, in my opinion the proper Court wherein to tax the sheriff's bill is the Court in which the execution was issued, and by the taxing officer of that Court, namely the local Registrar of the Court of King's Bench, at Regina, as was done in this case.

2. With regard to the 2nd objection:

The Master under R. 620 (c) had jurisdiction to review the taxation by the local Registrar, and he dealt with application to him as a review, as appears from his fiat. True it is that the notice of the application does not expressly ask for a review, but it gives all that is required by R. 732 providing for a review of taxation. The sheriff's bill was for $200.83 and the local Registrar taxed and allowed the said bill of costs at $78.33 and did not allow the item of $122.50 for poundage. This is in effect a disallowance of this item. The fact that he added to his certificate the words, "and leave the amount to be allowed for poundage (if any) to be fixed by a Judge on application to be made to him for that purpose" does not alter the fact that he did not allow it. It seems to me under R. 495 the local Registrar should have allowed poundage on the value of the property seized, not exceeding the amount indorsed on the writ as he does not appear under this rule to have power to do otherwise, and when he did not allow it, the sheriff had the right to apply to a Judge to review the taxation and

Man.

C.A.

ARMSTRONG TRADING CO. v. GRENON.

fix the amount, and under Rules of Court 620 (a) and 620 (c) the Master would have jurisdiction to deal with the application.

3. As to the 3rd objection, that the amount allowed by the Master, namely $100, is excessive:

The general principle appears to be that the sheriff is not entitled to poundage unless he has obtained some money for the execution creditor. In re Ludmore (1884), 13 Q. B. D. 415; In re Thomas, [1899] 1 Q.B. 460, a case similar to the case at Bar, no poundage was allowed.

But our R. 495 to my mind contemplates that the sheriff should receive something, as he is to be entitled to his poundage, "or such less sum as a Judge may deem reasonable under the circumstances of the case." But for this rule the sheriff would not be entitled to any poundage in the case at Bar, as no money was realised by him, and no money has been paid to the execution creditor or settlement made through his efforts. Furthermore it is to be remembered that the authorised trustee will also be entitled to fees for selling the estate, and it is for selling the goods and realising the money that poundage is generally allowed to the sheriff.

In my opinion the value of the property is more like $2500 than $5000, and the most the sheriff would be entitled to would be poundage on $2500. But as no sale was made and no one has obtained any money by means of anything that the sheriff has done, and apart from R. 495 he has no right to poundage, I will allow him $25. and the order of the Master will be varied accordingly. The sheriff will be entitled to his costs of the appeal out of the assignor's estate.

Judgment accordingly.

ARMSTRONG TRADING CO. v. GRENON.

Manitoba Court of Appeal, Perdue. C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. April 4, 1921.

Companies (§IV.A—44)—Managing Director—Power to Bind Company to Purchase Property and Transfer to Another Director—No Special Authority—Validity.

A transaction whereby a managing director of a company without special authority, attempts to bind the company by a contract with another director to purchase certain property under mortgage sale proceedings, take over the chattel mortgage on the furniture and transfer both to such other director upon being reimbursed certain monies advanced and payment of a judgment obtained by the company, and registered against the property, and for this purpose pays out the company's monies and pledges the company's credit, is invalid and cannot be enforced.

[Transvaal Lands Co. v. New Belgium, etc., Co., [1914] 2 Ch. 488; North-West Transportation Co. v. Beatty (1887), 12 App. Cas. 589; Cook v. Deeks, 27 D.L.R. 1, [1916] 1 A.C. 563; Roxborough Gardens of Hamilton v. Davis (1920), 52 D.L.R. 572, 46 O.L.R. 615, applied.]

Appeal by plaintiff company from a judgment of Mathers, C.J.K.B., Manitoba, in an action for the recovery of the possession of certain lands of which the defendant claimed the beneficial ownership and right to possession and claimed that the plaintiff company was a bare trustee for him. Reversed.

S. E. Richards, K.C. and W. A. T. Sweatman, K.C. for appellant.

H J. Symington, K. C. for respondent.

Perdue C. J. M. would allow the appeal.

Cameron, J. A.:— This action was brought January 16, 1918, by the plaintiff company against the defendants for the recovery of the possession of certain premises in the town of Winnipegosis in this Province, on which there are situate an hotel building and stable. The plaintiff claims under a certificate of title issued July 13, 1917. The defendant claims the beneficial ownership of the property and right to possession, alleging that the plaintiff company is a bare trustee for him, that the company has executed a conveyance to him and that he is a mortgagee of the premises which the plaintiff company purchased at a sale thereof but had defaulted in payment of the purchase price. The plaintiff company denies these allegations and says that the conveyance was executed without authority and offers to pay whatever amount may be found due the defendant Grenon.

The action was tried before Mathers, C.J.K.B., who gave judgment dismissing the plaintiff's action, declaring the defendant Grenon the beneficial owner of the lands in question and vesting the same in him for all the estate, right and title of the plaintiff and the defendants. From this judgment the plaintiff company appeals.

The plaintiff company is a subsidiary company of the Booth Fisheries Co. of Chicago, which owns all its shares except a few held in the names of directors for qualification purposes. Until May 1917, the head office was at Portage la Prairie, and Mr. Hugh Armstrong was its president and managing director. There was a branch office of the company at Winnipegosis, where the defendant Grenon, a director of the company, was manager.

Man.

C.A.

ARMSTRONG TRADING CO. v. GRENON.

Grenon had originally owned the property in question and had sold it in March 1912 to one McInnis for $19,000 and taken a mortgage back for $11,000 as part of the purchase price. This amount was reduced to $2,372.38 on March 1, 1916, by McInnis, who was further indebted to McDonogh & Shae in the sum of $1,850, to secure which he had given them a chattel mortgage on the hotel furniture and a second mortgage on the land. McInnis was also indebted to the plaintiff company, which May 30, 1916, recovered a judgment against him for $931.08. McInnis abandoned the hotel and Grenon caused sale proceedings to be taken and the property was advertised to be sold October 24, 1916.

Grenon then interviewed Armstrong with respect to the plaintiff's judgment against McInnis, and the various events then followed that are fully referred to in the Chief Justice's reasons for judgment. The plaintiff company took an assignment of the McDonogh & Shea claim. Shears, the bookkeeper and cashier of the plaintiff company's branch at Winnipegosis, bought the property in at the sale for $3,000 and the company's cheque signed by Grenon for $600 was given to the auctioneer as the 20% required by the terms of sale. An application to bring the property under the Real Property Act was signed by Armstrong in the name of the company, October 26, 1916, but not filed until April 27, 1917.

In January 1917, the defendant Grenon resigned as director. Armstrong continued as president and managing director until May 4, 1917, when he resigned. Grenon resigned as director January 24, 1917, but continued as manager at Winnipegosis until October 29, 1917.

Grenon took possession of the property after the mortgage sale and claims that he entered into an agreement with Armstrong to purchase it from the company. He leased the stable to one tenant and parts of the building to others.

On March 4, 1917, the company's premises at Winnipegosis were destroyed by fire and Grenon moved the company's office into the hotel premises. After that he went to Chicago and effected a lease to the company at a rental of $135 per month. He then returned and it is alleged saw Armstrong at Winnipeg on his way to Winnipegosis. Grenon said nothing to the manager of the Chicago company about the purchase of the hotel property by the Arm-

strong Trading Co. and its alleged resale to him. The plaintiff company, on discovery of the facts, immediately brought this action.

On March 28, 1917, Armstrong wrote two letters to Grenon, one with reference to the payment of amount advanced to take over the McDonogh & Shea claim and the other with reference to a letter from Bowman & McFadden, solicitors, concerning the title to the property. Grenon paid the amount and took up the two notes given by the company which were still outstanding. Grenon wrote the solicitors, April 3, to hasten the proceedings to give him his proper title.

April 12, Armstrong executed in the company's name a transfer of the land and sent it to the solicitors. The certificate was issued July 13, 1917. The transfer, executed April 12, was then dated July 16, and tendered for registration, but was held back by the Registrar pending the production of a by-law.

Mathers, C. J. K. B. held that the sale under the power of sale to the company was a genuine sale for its own benefit and not as trustee for Grenon, that the sole purpose in buying was to protect the interests of the company and not to acquire it, and found that Armstrong had Grenon's undertaking that the purchaser of the real estate at the sale would also purchase the chattel or that he (Grenon) would take over, and that it was on this undertaking that Armstrong agreed to transfer the property to Grenon on the latter reimbursing the company.

On the undisputed facts of the case the plaintiff company is, in my judgment, entitled to relief. Grenon was a director and agent of the plaintiff and disqualified from entering into a transaction such as that in question with his company and principal. The authorities are emphatic on the point and are collected in Palmer's Company Law, 192, 193, and Bowstead on Agency, 6th ed. arts. 48 to 52 inclusive at pp. 134-148 inclusive. "No agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to

Man.

C.A.

ARMSTRONG TRADING CO. v. GRENON.

put his principal to the danger of such an inquiry as that." per Lord Justice James in Parker v. McKenna (1874), L. R. 10 Ch. 96 at pp. 124, 125.

In Transvaal Lands Co. v. New Belgium etc. Co., [1914] 2 Ch. 488, it was held by Swinfen Eady, L. J., who delivered the judgment of the Court, (at p. 502).

"The law was thus stated by Sir Richard Baggallay, in the Privy Council, in North-West Transportation Co. v. Beatty, (1887), 12 App. Cas. 589, 593: 'A director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director.'

"This was in substance the language of Lord Cranworth in the House of Lords in Aberdeen Ry. Co. v. Blaikie, (1853), 1 Macq. 461. It was there decided that directors of a company have duties to discharge of a fiduciary nature towards their principal, and that it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into arguments in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect: and that so strictly is this adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into."

See also Cook v. Deeks, 27 D.L.R. 1, [1916] 1 A.C. 563, at p. 564, and Roxborough Gardens of Hamilton v. Davis, (1920), 52 D. L. R. 572, 46 O. L. R. 615.

It was urged by the appellants that the transaction should be set aside as a fraudulent scheme on the part of Grenon and Armstrong to deprive the company of the ownership of the property. It was contended that their original intention was to buy the property in for the plaintiff company but that that intention was changed when the company's premises were burnt and the hotel property was seen to become valuable, and it was then schemed to vest it in Grenon absolutely. It was argued that the documentary evidence throughout is in accord with this contention, and there is much ground for this view. The application to bring the land under the Real Property Act, signed by Armstrong for the company, states that the company is

the owner of an estate in fee simple in possession in the property and he made an affidavit verifying the terms of the application, October 26, 1916. Then we have the statutory declaration of Grenon, declared May 10, 1917, in which he says: "That the sale to The Armstrong Trading Co. was made in good faith and was a genuine sale." "I am informed and verily believe that prior to the sale of the said property, The Armstrong Trading Co. recovered a judgment against the said James McInnis, and that the property was purchased by the said The Armstrong Trading Co. in order to protect their interest as such judgment creditors. There is no relationship of trust of any kind whatsoever in connection with this property between myself and The Armstrong Trading Co. Ltd." How is it possible, it can well be asked, for this Court to allow the defence to deny the truth of these statements?

There is further documentary evidence in the company's books and elsewhere which can be regarded as inconsistent with the line of defence taken at the trial. It is also pointed out that it was not until after the Chicago interview that Grenon made any payments of his own money, and that the guarantee alleged to have been given by Grenon to Armstrong, which was put forward at the trial as the consideration for the company advancing cash and assuming liability, was not disclosed by him on his examination for discovery. He then held to the view that the mortgage sale had to be protected as against the mortgagor. Amongst other facts and circumstances tending to throw doubt on the genuineness of the sale to Grenon was the failure of Armstrong and Grenon to disclose to the other directors of the company and to the manager of the Chicago company the nature of the transaction. It is to be borne in mind that these men were utilising the cash and credit resources of the company, of which they were directors and officers, for the benefit of one of them, if not indeed for that of both, for they subsequently formed a partnership. These circumstances, it does seem to me, call for the most jealous scrutiny by the Court and place Grenon in a position where it is incumbent on him to satisfy the Court beyond any question of his good faith in the transaction. But these facts are inseparably bound up with the fiduciary relationship of Grenon to the company and his obligations arising therefrom and as the plaintiff's right to relief is in consequence thereof put beyond doubt

Man.

C.A.

ARMSTRONG TRADING CO. v. GRENON.

in view of the authorities, there is no object to be attained in dealing further with this branch of the appeal.

I think the appeal should be allowed and the judgment set aside and judgment entered for the plaintiff in the terms set out in the judgment of Fullerton, J. A..

Fullerton, J.A.:—In this case the trial Judge has made the following findings of fact:—

"1. The plaintiff company is a subsidiary of the Booth Fisheries Co. of Chicago, the principle business of which, as its name implies, is dealing in fish. Up until May, 1917, its head office has been at Portage la Prairie. Mr. Hugh Armstrong of that city was its president and managing director. All its shares, with the exception of a few qualifying shares held by other directors, stood in his name, but their real owner was the Chicago company.

"2. There was a branch of the company's business at Winnipegosis. The defendant Grenon, a director of the company, holding one qualifying share, was manager of this branch.

"3. The property in dispute was first acquired by the defendant Grenon, 7 or 8 years ago. The price paid, together with the cost of erecting an addition to the hotel building, situate thereon, amounted to about $12,500. In March, 1912, Grenon sold and conveyed the property to one James McInnis for $19,000 and took a first mortgage, dated March 14, 1912, back thereon for $11,000, part of the purchase price.

"4. McInnis went into possession and conducted the business of an hotel-keeper until some time after the coming into force of the Manitoba Temperance Act, 6 Geo. V, 1916, (Man.) ch. 112. In the meantime he had reduced the amount of Grenon's mortage $2,372.38 as of March 1, 1916, but he had become indebted to McDonogh & Shea for $1,850 and had given them as security a chattel mortgage upon the hotel furniture and a second mortgage upon the land and building. He had also become indebted to the plaintiff company and it had on May 30, 1916, recovered a judgment in this Court against him for $931.08 and had registered a certificate thereof.

"5. McInnis had abandoned the hotel and on August 16, 1916, the defendant Grenon, through his solicitors, Messrs. Bowman & McFadden, served notice of his intention to exercise the power of sale contained in his mortgage and subsequently the property was advertised to be sold on October 24, 1916.

"6. Sometime prior to the last-mentioned date the defendant Grenon had a conversation with Hugh Armstrong, the plaintiff's president, and managing director, with respect to protecting the plaintiff's judgment. As McDonogh & Shea had priority over the plaintiff's judgment, Grenon suggested that the plaintiff buy their claim for $1,850 and take an assignment of the mortgage and chattel mortgage. Armstrong objected to risking so large a sum to protect the judgment, but upon Grenon undertaking to see that whoever bought the building when sold would also buy the chattels covered by the chattel mortgage or that he would himself take over the claim and reimburse the plaintiff, Armstrong consented.

"7. In pursuance of this arrangement the plaintiff took over the McDonogh & Shea claim and paid them in cash $462.50 and gave them three promissory notes for like amounts maturing in 3, 6 and 9 months. The first note fell due in January, 1917, and was paid by the plaintiff. The other 2 notes were not paid by the company but were taken up by Grenon as hereinafter stated.

"8. Before the mortgage sale on October 24, 1916, Grenon by telephone asked Armstrong if F. G. Shears, at that time bookkeeper and cashier of the plaintiff at Winnipegosis, might bid the property in on behalf of the company, and Armstrong consented to his doing so. Armstrong had no intention either then or at any other time of buying the property on behalf of the company and for its own use. His sole purpose was to secure payment of the plaintiff's judgment against McInnis and his intention was that the company should hold it more as security for that judgment and the amount paid for the McDonogh & Shea claim. His impression appears to have been that Grenon would take it off the company's hands for whatever the company had against it.

"9. At the sale the highest bid was for $3,000 made by Shears in the name of the company and the property was knocked down to it. By the conditions of sale 20% of the purchase price was to be paid at the time of sale and the balance on or before November 24 following. The company's cheque for $600, signed by Grenon, was handed to the auctioneer and by him to one of the solicitors for the mortgagee, who was present at the sale. The following day, Bowman & McFadden notified Armstrong by letter, of the sale to the company at the sum of $3,000 and the payment of $600 as a deposit. Armstrong was under the impression that this $600 had been provided by Grenon.

Man.

C.A.

ARMSTRONG TRADING CO. v. GRENON.

"10. Neither Armstrong nor the defendant Grenon notified the parent company in Chicago or any of its officers of the transaction.

"11. In November following the sale, Armstrong and Grenon had a further conversation at which it was definitely agreed that Grenon should repay to the company the full amount of its claim against the property including the McDonogh & Shea mortgage and the McInnis judgment, whereupon the company would transfer the property to him.

"12. An application to bring the land under the Real Property Act R. S. M. 1913, ch. 171 was signed by Armstrong in the name of the company on October 26, 1916, 2 days after the sale, but it was not filed in the land titles office until April 27, 1917.

"13. In December, 1916, the relations between Armstrong and Smithers, the manager at Chicago of the parent company, became strained and the former notified the latter that he would sever his connection with the company the following spring.

"14. At a meeting of the directors held January 26, 1917, Armstrong transferred to Smithers or his nominees all but one of the shares held by him. The defendant Grenon and 2 other directors resigned and their places were filled. Armstrong continued as president and managing director until May 4, 1917, when he resigned -- his resignation being accepted on May 10.

"15. At a meeting of directors held February 12, 1917, it was resolved to move the head office of the company from Portage la Prairie to Winnipeg, but the office at Portage la Prairie was to be retained at the will of the directors as a branch office.

"16. The defendant Grenon continued in possession and control of the property after the mortgage sale. As mortgagee Grenon would have the right to remain in possession until the sale was completed. Before the time for completion had arrived he had entered into an agreement with Armstrong to purchase the property from the company and thereafter he dealt with it as his own. He caused an account to be opened in the customer's ledger in which the accounts of customers and those relating to other properties of his own were kept. Accounts relating to property belonging to the company were invariably kept in a private ledger. He leased the stable to one tenant and different parts of the building to others. The upstairs rooms

he conducted as a rooming house under the control of a man and his wife hired by him.

"17. On March 4, 1917, the company's premises at Winnipegosis were totally destroyed by fire and Grenon, who was still the company's manager at that point, moved the company's office and effects into a portion of this hotel property. Shortly afterwards he, by arrangement, went to Chicago and while there he made an agreement with Smithers to lease to the company the portion of the hotel property required by it at a monthly rental of $135. He was back in Winnipegosis on March 28. It is not clear whether or not he met Armstrong on his way home in Winnipeg, but the point is not material. Nothing was said by Grenon to Smithers about the purchase by the company of the property at the mortgage sale or the resale of it to him, and at the time of making the arrangement for a lease before referred to Smithers had no knowledge of either transaction.

"18. The purchase money on the sale was not paid and nothing was done in the way of carrying out either the mortgage sale or the agreement made between Armstrong and Grenon in November, 1916, until March 28, 1917, on which date Armstrong wrote two letters to Grenon, one reminding him that when the company settled with McDonogh & Shea it had given them a cheque for $462.50 and 3 notes at 3 months intervals for the same amount, one of which amounting with interest to $470.90 had been paid and requesting that he send his cheque for $943.40 before the end of the month. He adds: "Under the circumstances it might be just as well to have this out of the way before the end of the month." The other letter states that he has a letter from Bowman & McFadden, dated October 25, to the effect that the hotel property had been purchased in the name of the company, and adds: "I don't know what procedure will be necessary in order to bring the property into your name, but Mr. Bowman will doubtless understand all this." He further adds that if not convenient to pay the balance the company might carry a mortgage for a year for $1,500. On March 31, 1917, Grenon sent the plaintiff company a cheque for $943.40 as requested, which cheque was endorsed by the company and paid on April 5, 1917. He also retired the two notes still outstanding.

"19. On April 3, Armstrong wrote Bowman & McFadden instructing them to arrange for the transfer of the hotel to Grenon and continues: "You wrote under date October 25th saying that our Manager had bought the property for

Man.

C.A.

ARMSTRONG TRADING CO. v. GRENON.

$3,000 and paid $600, being 20% of the purchase price. I rather think that the $600 was furnished by Mr. Grenon personally. The Armstrong Trading Company bought the claim of McDonogh & Shea for the sake of protecting itself in the matter of the indebtedness of McInnis which you state to be $931.08." He goes on to refer to the amount paid McDonogh & Shea and the two notes still outstanding against which Grenon is required to protect the company. These he says, with the McInnis judgment, "will be the amount that The Armstrong Trading Company required from Mr. Grenon for the relinquishment of the claim of this Company against the property."

"20. On April 3, 1917, Grenon wrote to Bowman that he had arranged with Armstrong to pay the McDonogh & Shea chattel mortgage and the McInnis judgment, and requesting that in accordance with Armstrong's wishes transfers of the property be made in his favour. "Do this without delay and whatever proceedings necessary take immediately."

"21. On or about April 12, Armstrong executed in the company's name and affixed its corporate seal to a transfer under the Real Property Act of the land in question to the defendant Grenon and on that day mailed it to Bowman. At the same time the plaintiff company drew a draft signed in the name of the company by "Hugh Armstrong, President," upon Grenon for $965.37, the amount for which the company was still liable to McDonogh & Shea. This draft was paid on April 14, 1917. The defendant Grenon also paid to the plaintiff the amount of the McInnis judgment and about the same time the $600 paid by the company as a deposit on the sale was repaid to it, by Bowman & McFadden.

"22. A certificate of title was issued to the company on July 13, 1917. The transfer executed by Armstrong on April 12 was then dated July 16 and tendered for registration. The district registrar requested the production of a by-law authorising the execution of the transfer and as none could be produced the transfer was rejected.

"23. There was no special reason why the agreement made between Armstrong and Grenon in November, 1916, was not at once carried out. The delay was probably due to mere carelessness. It was no doubt thought to be desirable that all such outstanding matters should be cleared up while Armstrong was in office. The time at which he proposed to retire from the company was approaching. To this cause is, I think, attributable the activity displayed beginning with March 28, 1917, in having this agreement carried out. It

was suggested by counsel for the plaintiff that Armstrong and Grenon conceived the scheme of having this property transferred to the latter after he had succeeded in negotiating a lease of it to the company on favourable terms. This suggestion is not, in my opinion, borne out by the evidence."

I think these findings are fully supported by the evidence except in one particular. In para. 8 of the above findings the trial Judge says that "His (Armstrong's) sole purpose was to secure payment of the plaintiff's judgment against McInnis, etc." Now I think the evidence shews clearly that he had also, if not mainly, in view helping the defendant realise the moneys due under his mortgage on the hotel. Defendant had a mortgage on the hotel upon which there was due $2,372.38 as of March 1, 1916. McDonogh & Shea held a second mortgage for $1,850 and also a chattel mortgage for the same indebtedness upon the hotel furniture. The Manitoba Temperance Act had come into force in April, 1916. McInnis, the mortgagor, had abandoned the hotel and the defendant in August, 1916, had begun mortgage sale proceedings. Unless the furniture could be secured the hotel itself under then existing conditions would be practically worthless. Under these circumstances defendant approached Armstrong and suggested that the plaintiff company should buy the McDonogh & Shea claim and purchase the hotel at the sale then pending, the defendant on his part agreeing to take over the hotel and reimburse all moneys advanced and pay the amount of the judgment held by the plaintiff. Unless some such agreement had been made it is inconceivable that Armstrong would have made the plaintiff liable for $1,850, the price of the furniture, plus $3,000, the price of the hotel, in the hope of realising from this property the amount of the plaintiff's judgment.

In arriving at this conclusion of fact I am not disbelieving the evidence of any of the witnesses, but am drawing a conclusion from all the evidence slightly different from the inference drawn by the trial Judge, who holds that the sale under the power of sale in the mortgage to the company was a genuine sale for its own benefit and not as a trustee for Grenon.

The trial Judge has considered the question of the power of Armstrong to enter into such an arrangement, but has apparently entirely overlooked the more important question of the right of the defendant, as a director of the company, to enter into the contract in question with the company. I have grave doubts whether Armstrong, as managing director, could purchase the property in question even from

Man.

C.A.

ARMSTRONG TRADING CO. v. GRENON.

a stranger without the authority of the board of directors, even with the sole object of realising a debt due the company, but it is unnecessary to decide this. The present case goes much further. Armstrong, the managing director, here attempts to bind the company by a contract with the defendant, a director, to purchase the hotel under mortgage sale proceedings, take over the chattel mortgage on the furniture and transfer both to the defendant upon being reimbursed the moneys advanced and payment of the judgment. For this purpose and for the defendant's benefit, entirely upon his own authority and without any security from the defendant other than his mere promise, he paid out the company's moneys and pledged the company's credit.

I think the authorities shew clearly that such a transaction will not be supported.

The law is laid down in Palmer's Company Law, 10th ed. at p. 192, as follows:—"Unless the articles confer on a director express powers of contracting with the company, a director's powers of so contracting are extremely limited. He may take up shares in the company, he may subscribe for debentures in the ordinary course of business, but otherwise he is, like a trustee, disqualified from contracting with the company, and for a good reason. The company is entitled to the collective wisdom of its directors, and if all or any of such directors are interested in a contract, the company loses the benefit of its directors' unbiassed judgment; for on any such contract being entered into, a conflict of interest and duty must or may arise and in this conflict the interests of those whom the director is bound to protect run a great risk of being sacrificed. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of the contract in question."

Under these principles and the cases cited in support, I think the contract in question was clearly voidable at the option of the company.

The appeal should be allowed, the judgment set aside and it should be referred to the Master to take the accounts between the parties in connection with the said hotel property.

Upon repayment by the plaintiff to the defendant of the amount found due by the Master the defendant shall deliver up to the plaintiff the certificate of title to the said property and the transfer of same now in his possession. The plaintiff will have the costs of the trial and of this appeal.

Dennistoun, J. A., concurs. Appeal allowed.

ANNOTATION.

Power of Attorney—Provision Not to be Revoked by Death—Effect.

By E. DOUGLAS ARMOUR, K.C.,
of the Toronto Bar.

RE McCARTY.*

(1919), 46 O.L.R. 405; (1920), 53 D.L.R. 249; 47 O.L.R. 285.

The acute differences of opinion as to the meaning of this enactment afford great scope for conjecture as to what was in the mind of the draughtsman, not respecting its main purpose, but respecting the method by which its terms should be carried out. It was passed at a time when land descended to heirs and personalty passed to the personal representative; and by its express terms the constituent is empowered to bind realty and personalty after his death, so that his attorney shall (in some way) be empowered to sell either kind of property. The fact that realty now passes to the personal representative cannot affect the generality and scope of the enactment, for whatever the property, and wherever it is lodged after the death of the constituent, the power is to be effectual. All must agree that this is the main purpose of the enactment and therefore its chief purpose must not be rendered impossible of accomplishment by either a too meticulous or a too critical analysis of the means by which it is to be carried into effect That they are extraordinary and unprecedented, and in part have to be imagined or invented goes without saying from the nature of the enactment.

The enactment literally appears to provide for two cases: (1) a power to be exercised in the name of heirs or devisees, executors or administrators; (2) a power simply providing that it shall not be revoked by death. But in effect, there is only one case to be provided for, viz., the continued efficacy of the power after the death of the constituent. If the word "other" had been inserted before "form of words," the whole clause would have borne the signification that where the power is shewn to be exercisable after death, by declaring that it may be exercised in the name of the heirs, etc., or where it is similarly shewn to be exercisable after death by any other form of words, then it shall be effectual. Or, changing the expression, if the power of attorney is shewn to be exercisable after death, either by declaring that it may be exercised in the name of heirs, etc., or by any

*The case Re McCarthy in connection with which this note is written was published in 53 D.L.R. 249, and was thought to be of sufficient importance to warrant the following note by the learned author, consulting editor of the D.L.R.

ANNOTATION

other form of words, then it shall be effectual. This reduces the enactment to one case, viz., non-revocation by death, however expressed in the power. It is submitted, with great deference under the circumstances, that that is the true construction; and that is not only a permissible interpretation, but a necessary one. Is it permissible then to interpolate, or to understand, the word "other"? It is submitted that it is not only permissible, but necessary. Where heirs or personal representative are nominated as the persons in whose name the power is to be exercised the whole of the chief significance of the clause is that the power is not to be revoked by death. The subsidiary meaning is that it is to be exercised in the name of the specified persons. In other words it is expressed to be non-revocable by death by naming the heirs, etc. Therefore, when it is declared to be non-revocable by death by "any form of words," it must necessarily mean any other form than that which might with more particularity be used. Thus the constituent may express himself as declaring that the power is non-revocable by death, either by declaring that it may be exercised in the name of heirs, etc., or by any other form of words. If the first limb of the clause had not borne that signification, the understanding of the word "other" would not have been permissible. But where it undoubtedly does bear this signification, the additional method of expressing it must be another form of words. Therefore, we have an enactment whose single purpose is to enable a constituent to create a power which shall be effectual after his death however he may express it. It seems logically to follow that there is, in fact, only one event provided for, viz., the death and non-revocation of the power, by whatever form of words shewn; and when that occurs the power is valid and effectual and some means must be found by which to exercise the power. It is submitted that this is a better interpretation than construing the Act as providing for two cases, one in which heirs, etc., are named and in whose name the power is to be exercised, and another in which no one is named, and a search has to be made for the person in whose name the power is to be exercised.

It is submitted, again with deference, that the person in whose name the power is to be exercised is always the personal representative, or on the shifting of the land under the Devolution of Estates Act, the heir or devisee. The contrary opinion arrived at by some of the Judges, where

ANNOTATION

heirs are not named is reached by reasoning which starts with the premiss that ordinarily a power must be exercised in the name of the constituent, and proceeds on the fact that there is nothing in the enactment to change this primary proposition except where heirs are named. But it is equally as strong a proposition that a power cannot be exercised in the name of a deceased person, and there is nothing in the enactment which declares that it shall so be exercised when made non-revocable by death. When the Act states that a power expressly exercisable by heirs or executors where named shall be effectual, it assumes the fact that it cannot be exercised in the name of a deceased person. And if we treat the second limb of the clause as drawing into the effect of the first any other form of words by which the same idea is expressed, we have the same result, viz., that the successor in title is to be subject to the terms of the power; and therefore that it must be exercised in the name of such successor.

To turn now to the principles of conveyancing. Upon the death of the constituent there is no doubt that the property in the land passes to the personal representative by law, and ultimately to the heir or devisee. And he can make a conveyance and give a good title to a purchaser without notice of the power. But the power constitutes a charge binding the lands in the hands of the constituent's successor in title, and therefore the title which the heirs or personal representative acquires is qualified and subject to the power. It is his title which has to be divested on a sale. The title of the constituent was divested by death, and in divesting the title of the heir or personal representative, is there logically any other mode of doing so than by exercising the power in his name? There is nothing in the enactment to require the power to be exercised in the name of a deceased person from whom the title to the land has necessarily departed. And, if there is no positive enactment requiring a mere form of conveyance from a person who has no title (having no existence) in order to divest the title of a living person who has a title and can himself convey, such a providing, it is submitted, ought not to be resorted to. As the title to the land and the right to dispose of it are both in the personal representative or the heir, as the case may be, what is there more logical than that the conveyance to a purchaser should be made either by him or in his name. It must be admitted that the effect of the

ANNOTATION power is to qualify his title and to enable the donee of the power to divest his estate. Why then not act in the name of the person whose estate he is conveying? In other words the constituent intends by the power that his appointee shall be able to divest the legal owner by descent or devise of his undoubted title and right to convey, and what can be more clear than that the conveyance should be made in the name of the latter. The donee of the power is in exactly the same position as if the power had been granted by the heir or personal representative. It is therefore submitted that as the Act does not expressly require that the power should be exercised in the name of the deceased person, that means of exercising it should not be resorted to, and further, that, as the Act enables the constituent to divest the legal title from the successor in title to the constituent, he should divest that title by acting in the name of the person who has the title. The choice lies between taking a conveyance from a person who has no title, and thus divesting a person who has title, and taking a conveyance from a person who has title but whose right to convey has been rendered subject to a valid instrument enabling another to divest him of it. The latter seems to be the preferable view.

A process of reasoning which leads to the conclusion that the power, though not revoked by death, cannot be acted on, and is therefore not "effectual" for any purpose, cannot be sound where the statute distinctly states that it "shall be valid and effectual"; for it cannot be effectual unless some one can exercise it, and to declare that no one can exercise it is to make it ineffectual. If it is good reasoning to say that an appointee must always act in the name of his constituent, causing impossible or absurd consequences to follow where no person is named to exercise the power, it is also good reasoning to say that where a title is vested in a certain person who has power by his property right to convey, either he or some one acting in his name should convey in order to divest him of the title, and no absurd conveyances follow the reasoning from this premiss.

Nor can it be said to be sound that, because the exercise of the power would interfere with the administration of the estate, the Act is not to be given effect to by treating the power as "effectual." If the administration should be interfered with it must be interfered with in order to give effect to the statute in question—otherwise a living Act is

killed by its own interpretation. But it does not follow that the administration will be interfered with in any way. Where an appointee disposes, let us say, of shares and receives the purchase money, he must account for it to the person whose title he has divested, viz., the personal representative whose functions are interrupted by the sale but not taken away or otherwise interfered with. The appointee has only done what the personal representative might have done himself. If the personal representative had given a power of attorney to a stock-broker to sell the shares, he would be doing no more and no less than the appointee of the deceased constituent.

With great deference, then, it seems to be the preferable view that where a power is given, which is non-revocable by death of the constituent, whether that is shewn by naming the heirs, etc., or by any other form of words, the power should be exercised in the name of the person whose title is to be divested.

CANADIAN PACIFIC R. CO. v. SMITH.*

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, and Mignault, JJ. June 20, 1921.

Railways (§IV.—91).—Accident at Crossing—Failure to Stop, Look and Listen—Contributory Negligence—Evidence to Justify the Trial Judge in Taking the Case from the Jury and Dismissing the Action.

A person crossing a level railway crossing must act as a reasonable person should act and not attempt to cross without looking for an approaching train to see whether he may safely cross, and where the evidence is irresistible that he did not look, but chose recklessly to run into danger he must take the consequences and the trial Judge is justified, in withdrawing the case from the jury and dismissing his personal action for damages against the railway company, but a daughter of such negligent person, who was in the motor car at the time of the accident, but who had no control or right of control over the driver is not responsible for his negligence and may maintain an action for damages.

[Mills v. Armstrong (The "Bernina") (1888), 13 App. Cas. 1, applied. See Annotation on Sufficiency of Evidence to go to the Jury in Negligence Actions, 39 D.L.R. 615.]

APPEAL by defendant from the judgment of the Saskatchewan Court of Appeal (1920), 55 D.L.R. 542, reversing

---

*[Compare this case with that of Wabash R. Co. v. Follick (1920), 56 D.L.R. 201, 60 Can. S.C.R. 375, where plaintiff was held entitled to recover although he was quite unable to explain why he did not notice the approaching train, and that it was for the jury to decide on conflicting evidence whether the company was at fault and whether there was contributory negligence.]

Can.

S.C.

CANADIAN PACIFIC R. CO. v. SMITH.

the judgment of Embury, J., at the trial (1920), 53 D.L.R. 411, withdrawing the case from the jury and dismissing the action for damages for injuries caused by plaintiff's automobile being hit by defendant's train at a level railway crossing. Reversed in part.

G. H. Barr, K.C., for respondent.

Davies, C.J.:—The reasonable and salutory rule frequently laid down by the Court with respect to persons crossing level railway crossings is that they must act as reasonable persons should act and not attempt to cross without looking for an approaching train to see whether they can safely cross. If they should choose recklessly and foolishly to run into danger they must take the consequence.

The rule so requiring persons crossing railway tracks to look for a possible approaching train may not be an absolutely arbitrary one. Circumstances may exist which might excuse their not looking, but those circumstances must be such as would reasonably warrant a jury in finding they were excused from their duty in that regard. It is not enough to prove that some precautions required on the part of the railway, such as whistling or ringing the bell before coming to the crossing were not observed or followed by the train officials, of which there was evidence on which a jury might so find in this case. Counsel for the company admitted that he had to argue his case on the basis that the train did not either ring the bell or sound the whistle. But he contended that notwithstanding this assumed negligence on the part of the train officials, the plaintiff's injuries, and those of his daughters in the car with him, were caused by his own contributory negligence in running his car on to the railway track without looking to see whether a train was approaching. The trial Judge withdrew the case from the jury holding that there was no evidence which would justify them in finding either that the plaintiff did look for the train before attempting to cross the railway track or would excuse his not having done so.

On appeal from this judgment of the trial Judge, Embury, J. (1920), 53 D.L.R. 411, the Court of Appeal in Saskatchewan, by a majority judgment, allowed the same on the ground, as I understand the reasons of Lamont, J. (1920), 55 D.L.R. 542 at p. 548, 13 S.L.R. 535), who delivered the judgment of the majority of the Court, that "there are considerations from which a jury might reasonably conclude that it was the failure to give the statutory warnings rather

than the plaintiffs' own recklessness that was the causa causans of the injury," and that "those considerations must be passed upon by the jury."

If I could reach such a conclusion I would gladly do so, but I cannot. The plaintiff's own evidence, coupled with that of the witnesses in the motor which was following that of the plaintiff, removes the possibility of any finding that he did look. If he had looked he could not have failed to have seen the approaching train. The suggestions by counsel as excuses for his not looking, relied on it is true by the majority of the Appeal Court as sufficient for granting a new trial, seemed never to have entered into the plaintiff's own mind as he in his evidence did not suggest them. On the contrary, he said he believed he did look because he always did but did not remember having done so in this instance, and the inference from his evidence and that of the other witnesses examined is irresistible that he did not look and so justified the trial Judge in dismissing his personal action. I am quite unable to accept these suggestions of counsel as constituting any excuse for his not looking.

While, however, I am of opinion that plaintiff's personal action was rightly dismissed, I am also of opinion that the daughter's action stood in an altogether different position. She was simply a passenger in the motor with her father and was in my judgment in no sense responsible for his contributory negligence. Nor can it be said that he was her agent or so identified with him that she was responsible for his negligence. Supposing an action had been brought by someone injured by his negligence in driving could it be successfully contended that the passenger who had no control or right of control over the driver would be liable? I cannot for a moment think that such a contention could be sustained and I cannot find any authority supporting it.

I think that the law which must govern in this case is that laid down by the House of Lords in the well-known case of The "Bernina" (Mills v. Armstrong) (1888), 13 App. Cas. 1, where it was held, affirming the decision of the Court of Appeal (1887), 12 P.D. 58, at p. 1 (13 App. Cas.), that:—

"A collision having occurred between the steamships Bushire and Bernina through the fault or default of the masters and crews of both, two persons on board the Bushire, one of the crew and a passenger, neither of whom had anything to do with the negligent navigation, were drowned, the deceased persons were not identified in respect

Can.
S.C.
CANADIAN PACIFIC R. CO. v. SMITH.

of the negligence with those navigating the Bushire, that their representatives could maintain the actions."

This decision overruled Thorogood v. Bryan (1849), 8 C.B. 115, 137 E.R. 452, and decisively settled once and for all the doctine of "identification" on which Thorogood v. Bryan was based. The very question, as Lord Watson said in delivering his judgment in the "Bernina" case, 13 App. Cas., pp. 18, 19, was whether the contributory negligence of the driver of the vehicle was a defence as against the passenger when suing another wrongdoer. In his speech he said:—

"It humbly appears to me that the identification upon which the decision in Thorogood v. Bryan is based has no foundation in fact. I am of the opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle except, perhaps, the right of remonstrance when he is doing or threatens to do, something which is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am therefore unable to assent to the principle upon which the case of Thorogood v. Bryan rests. In my opinion an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case of the driver, and in the other of the master and crew by whom the ship is navigated unless he actually assumes control over their actions, and thereby occasions mischief. In that case he must of course, be responsible for the consequences of his interference * * * The theory that an adult passenger places himself under the guardianship of the driver so as to be affected by his negligence appears to me to be absolutely without foundation either in fact or law."

I cannot see any reason why the law as definitely stated in the "Bernina" case with respect to the non-liability of passengers on board of omnibus cabs and steamships is not applicable in the absence of any special facts to the contrary to those travelling in private motors. The reasons which negative such non-liability in the one case are

equally cogent and convincing in the other. The case of Grand Trunk R. Co. v. Dixon (1920), 51 D.L.R. 576, 47 O.L.R. 115, was cited in the appellant's factum in support of the contention that it was the duty of the girl to look out for an approaching train and if she entrusted that duty to the driver of the car she is affected by his negligence. But the basis of the judgment in that case was that the driver of the motor car was acting as the agent or servant of his companions and that the five men in the car were the persons having the control of it. Meredith, C.J.O., in delivering the judgment of the Court, said at p. 578:—

"My view is that the five men had the control of the motor car. It was hired by them, although Scott was the one who acted for his companions as well as himself in hiring it. It was they who entrusted the driving to Scott. In my opinion, the "Bernina" case has no application if Scott in driving the motor car was acting as the agent or servant of his companions. That he was acting as their agent is clear, I think, because it is also clear that he was entrusted by them with the duty of driving the car. The five men in the motor car were, in my opinion, the persons having control of it."

That decision, of course, therefore, has no bearing on the liability of the daughter Mary for the contributory negligence of the driver of the automobile as he was neither her servant nor agent but was the owner, and the driver of the car having sole control of it with which she had neither the right nor the power to interfere.

In Shearman and Redfield on Negligence, 6th ed., vol. 1, pp. 164, 168, I find the following statement of the law on this point in the United States:—

66.—Doctrine of "Identification."

* * * As already stated, the fact that the injury was caused by the joint negligence of the defendant and a mere stranger is universally admitted to be no defence. But in the famous case of Thorogood v. Bryan an English Court invented a new application of the old Roman Doctrine of identification, and held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of its managers which contributed to an injury inflicted upon such passenger by the negligence of a stranger. In former editions we devoted much space to the refutation of this

Can.

S.C.

CANADIAN PACIFIC R. CO. v. SMITH.

doctrine of "identification." But it is needless to do so any longer, since the entire doctrine has, since our first edition, been exploded in every court, beginning with New York and ending with Pennsylvania. It was finally over-ruled in England a few years ago. The only remnant of the doctrine which remains in sight anywhere is the theory that one who rides in a private conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has absolutely no power or right to control the driver. This extraordinary theory, which did not even occur to the hair-splitting judges in Thorogood v. Bryan, was invented in Wisconsin, and sustained by a process of elaborate reasoning; and this Wisconsin decision, in evident ignorance of all decisions to the contrary, was recently followed with some similar reasoning in Montana, and in Nebraska without any reasoning whatsoever; which last is certainly the best method of reaching a conclusion directly opposed to common sense and to the decision of twenty other courts. The notion that one is the "agent" of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three States mentioned, and it must soon be abandoned even there."

Apart, therefore, from the exploded doctrine of "identification," I find nothing to justify the theory that the driver in this case was either the servant or the agent of the daughter Mary.

In the result, I would allow the appeal so far as the plaintiff's personal action is concerned and dismiss such action with costs throughout, and would dismiss the appeal as far as the action is brought on behalf of Mary Smith, who was 17 years of age when the action was tried, with costs.

Idington, J.:—The respondent, Smith, was driving his automobile, in which he was accompanied by his two daughters, westward on the highway toward Regina. A passenger train of the appellant company running south toward Regina, at the intersection of the said highway with said railway, struck the said automobile, wrecked it, and so seriously injured one of the said respondent's daughters that she died a few days later, and very seriously injured the surviving daughter, one of the respondents herein, as well as the respondent so driving the automobile.

For the respective injuries in question, to the survivors and the said automobile, this action was brought by said Smith and his surviving daughter by him as her next friend, alleging that the accident was caused by reason of the failure of the appellant either to give the statutory warning of whistling, or to ring the bell.

Embury, J., dismissed the action which was being tried with a jury, at the close of the plaintiff's case, alleging as ground therefor, the contributory negligence of the respondent driver, Smith.

In doing so he said at p. 412 (53 D.L.R.):—

"In this case the evidence of negligence is as follows: that the bell did not ring and that the whistle did not blow as provided by the statute. In dealing with the question of contributory negligence one must consider the natural situation of the ground: at a point threequarters of a mile south of a bend in the defendant's railway, the railway is crossed almost at right angles by a road which runs itself for something less than half a mile to another railway, the Grand Trunk Pacific Railway. A train on the said C.P.R. track approaching from the north, from the time it passes the bend till it gets to the crossing is, continuously in view of any person who is coming along this road from the Grand Trunk Pacific railway crossing. There is evidence that it takes a minute and a quarter for the train to travel the distance, and that there is nothing whatsoever in the nature of an obstruction to the view."

The appellant's negligence, according to this finding, is clear, and it is equally clear that the entire negligence of the respondent driving (if any) was the failure to have discovered the coming train, within the minute and a quarter that elapsed whilst driving from the point where it first became possible for him to have seen it to the intersection of the highway and railway.

The train, it is clearly proven, would be coming along a down grade of the railway track, which would accelerate its rate of speed, and would have no steam or smoke assuredly visible, for, as expressly stated by one of the witnesses, it merely coasted along that part of its road.

There of course, is need for a careful driver to look both ways for trains.

The respondent driver in this case was seated on the left hand side of his automobile. On one side of him the curtain was drawn but, as the Judge finds, there was on the

Can.

S.C.

CANADIAN PACIFIC R. CO. v. SMITH.

side next the train an apron which contained mica glasses described. Possibly it was the reverse but that curtain, as I understand respondent's evidence, was on the left side and the front seat not curtained off from the approaching train.

The trial Judge omits entirely to refer to the evidence given by the respondent driver relative to his usual care in looking for the train and belief that he did on this occasion, which ought to have been considered.

He testifies as follows:—"Q. What were you giving attention to as you were rising up this grade, or what was occupying your attention as you were rising up the grade just before crossing the track? A. Well, the automobile coming behind me having blown his horn on me, I figured he wanted to pass, and I was considering letting him pass as soon as I got across the railway crossing. Q. Did you look to see if the train was coming as you came along from the Grand Trunk crossing towards the C.P.R. crossing? A. I believe I did. Q. Why do you say that? A. Well I always do that. It is natural.

"His Lordship: That is not a reason. Do you remember whether you did or not? A. I don't remember actually turning my head and looking, or anything like that, but I believe I did. Q. But you don't know whether you did? You don't remember whether you did or not? A. No. I can't say I remember turning my head and looking to see if there was a train or not."

And on cross-examination as follows:—

"Q. Is Regina your trading town? A. Generally. Sometimes I go to Pilot Butte. Q. But at any rate, Mr. Smith, you have been into Regina during that twenty years a great many times? A. Quite a few, yes. Q. Well, hundreds of times, I suppose? A. Well, the average number of times that any farmer would come, I suppose. * * * Q. Let me, then, call your attention to this, Mr. Smith. Then would a prudent man look for a train? At what distance would he look for a train coming? A. Well, when he knew that there was a railway crossing he would probably look several times * * * Q. And as you said in your examination by my learned friend, you cannot say that you ever looked to see whether there was a train coming or not after you passed over the Grand Trunk Pacific crossing? A. I said that I believed I looked. Q. I know, but you said you could not remember that you did. Is that not correct? A. I said I believed I looked. Q. Never mind

that. A. Let me finish my answer, please—please. Q. You can't remember that you looked for the train after you passed over the Grand Trunk Pacific crossing? A. No, I can't remember the actual act of looking."

The evidence is clear that if he looked when he would have been distant a space more than a minute and a quarter of time as he travelled, he could not see the coming train, by reason of buildings between that point and the coming train obstructing the view.

The question of whether he actually looked or not was one for the jury to consider. The probability is that he looked, but possibly at a minute and a quarter too early, and surely it was for the jury to decide whether or not he was negligent, or merely erred in judgment.

And immediately after that narrow margin of time had begun to run, his attention was distracted by a car behind him, and his asking his daughters of the driver thereof seemed desirous of passing, and when they looked back and concluded, and reported, that the driver thereof did not seem desirous of passing, his attention was directed to crossing the railway to get to a better place to pass than the grade approaching the crossing.

To make matters more distracting and worse, the driver of the car behind saw the train at that stage and kindly desiring to warn respondent driver, blew his horn loudly and sharply in such a way as calculated to arrest his attention.

That had the effect of giving the respondent the impression that the driver of the car behind wished to pass and accordingly hasten on for next 50 feet or so with the purpose of securing the better place to pass when across the railway track.

Before reaching that goal the appellant's engine had 50 feet or yards away, given two "toots" of its whistle. That was too late and if ever there was a case for the jury to have been called upon for its verdict of whether respondent driver had been negligent, or merely mistaken in judgment which that situation called for the assistance of the jury to determine this was one and the case should not have been withdrawn from them.

Such was the opinion of the majority of the Court of Appeal for Saskatchewan better qualified, by local knowledge of the actual condition of things to be considered, than we can be, as to whether or not the respondent driver

Can.

S.C.

CANADIAN PACIFIC R. CO. v. SMITH.

was, when due regard is had to the alternative propositions presented by that master of our law, Lord Cairns, in the case of Dublin, Wicklow & Wexford R. Co. v. Slattery (1878), 3 App. Cas. 1155, quoted by the majority judgment therein of the Appellate Court below, 55 D.L.R. 542, at p. 544, to have been condemned as clearly guilty of that contributory negligence which deprives him of the right to have his conduct passed upon by a jury.

The two alternatives presented by Lord Cairns in said case are quoted in said judgment, and properly as I think, the second acted as that fits this case.

I so entirely agree with the reasoning of the judgment of the majority of the Court below, based on other authorities, as well as the speech of Lord Cairns in the House of Lords in said Slattery case, that I need not repeat same here.

If there is a driver of any vehicle who can be excused from failure to look at the exact moment of time that will be effective, it is the driver of an auto, whose mind, if discharging his duty, is concentrated primarily on the safety and rights of those using the same highway as he is himself travelling over.

I think this respondent driver was far more excusable than the unfortunate in the Slattery case by reason of the absolute necessity for concentration of his mind on the said duties as such devolving upon him.

The question is raised by those of my brother Judges taking another view than I do of the facts and relevant law, that in any event the alleged contributory negligence does not attach to the case of the infant respondent.

In my view that is not necessary to be decided, but, if driven thereto, I agree that there is not that identification of her (an infant being carried) with the case presented by her father.

I would dismiss the appeal entirely with costs.

Duff, J.:—As regards the infant plaintiff I am quite unable to distinguish this case from the Bernina case (Mills v. Armstrong, 13 App. Cas. 1). On that point I have nothing to add to the judgment of the Chief Justice in whose opinion I fully concur.

I am, however, unable to agree with the view of the Court of Appeal, 55 D.L.R. 542, as to the claim of the adult plaintiff. Contributory negligence is, I think, virtually admitted. In point of law the case is entirely governed, I think, by the

judgment of Lord Cairns in Slattery's case and the judgments of Campbell, C. and O'Conner, L. J., in Neenan v. Hosford, [1920] 2 I.R. 258.

Anglin, J.:—The main question presented on this appeal is whether contributory negligence on the part of the adult plaintiff is such an irresistible inference from the evidence adduced by him that the Judge was justified in withdrawing the case from the jury on that ground. The Court of Appeal for Saskatchewan has determined it is not, and has ordered a new trial, 55 D.L.R. 542. Is that order so clearly wrong that it should be reversed?

The alleged contributory negligence consisted in failing to look for an approaching train before driving an automobile upon the railway crossing where it was struck. The appellant alleges that there was evidence upon which a jury might have found that the adult plaintiff did in fact look or that, if he did not, there were attendant circumstances upon which a jury might reasonably have found that his failure to do so did not amount to negligence. Although the case is undoubtedly very close to the line, careful consideration of it has led me to the conclusion that it should have been submitted to the jury, if not upon both issues, at all events upon the latter. The judgments of the House of Lords in Dublin, Wicklow & Wexford R. Co. v. Slattery, 3 App. Cas. 1155, and of this Court in Wabash R. Co. v. Follick (1920), 56 D.L.R. 201, 60 Can. S.C.R. 375, and Ottawa Elec. Rly. v. Booth (will be reported in 60 D.L.R.), go far to support that view.

The adult plaintiff himself swore to his belief that he had in fact looked for the train though unable to say as a matter of positive recollection that he had done so. There were circumstances which indicated that he might have looked when within 300 or 400 yards of the crossing and been unable to see the train. There were also circumstances deposed to which indicated that his mind may have been so fully taken up with other duties arising out of his position at the moment that failure to remember that he was approaching a railway crossing and should look out for approaching trains would be excusable. I am not prepared to say that no jury could reasonably so find. As the case should, in my opinion, go back for a new trial, I refrain from any discussion of the evidence beyond what is necessary to indicate the grounds on which I think the judgment appealed from may be supported.

Can.

S.C.

CANADIAN PACIFIC R. CO. v. SMITH.

Not, I confess, without some hesitation, but because I have not been convinced that the judgment a quo is erroneous I would dismiss this appeal.

But if I were of opinion that the defendants should succeed as against the plaintiff Smith because his contributory negligence was so clearly established that his personal claim was properly withdrawn from the jury, for the reasons stated by my Lord the Chief Justice I should nevertheless dismiss the defendant's appeal as to the claim of the infant plaintiff Mary Smith.

Mignault, J.:—The question here is whether the trial Judge was justified in withdrawing the case from the jury at the close of the plaintiff's evidence and dismissing the action. On appeal, this judgment was reversed by the Court of Appeal of Saskatchewan (55 D.L.R. 542), Elwood, J.A., dissenting, and a new trial was ordered.

The pertinent facts may be briefly stated. The plaintiff had left his home, some miles from the City of Regina, about 2 o'clock in the afternoon of September 29, 1919, to bring his daughters, Mary and Edna, to school in the latter city. He drove himself a two seated Reo car, occupying the front seat with his daughter Edna, the plaintiff being on the left side, and his daughter Mary sat on the rear seat where also their baggage was placed. The curtains were closed on the right side but there were mica windows through which persons sitting on the front and rear seats could see; the other side of the car was open. The road at the place in question runs east to west (the plaintiff was going west) and is intersected, at a distance of half a mile to one from the other, by two lines of railway; the Grand Trunk Pacific and the Canadian Pacific, the latter being to the west of the former. The country is flat and a person going west along the road has full view of the defendant's line, there being no obstructions of any kind. The plaintiff drove at a speed of from 10 to 15 miles an hour, probably the latter speed, and at the time he crossed the Grand Trunk Pacific line, the defendant's train was about one mile from the place of the accident, and was then travelling in a southerly direction at a speed of 30 miles an hour down a slight grade, where to the plaintiff's knowledge, for he had often used this road, it was customary to close off the steam and the exhaust of the engine. As the plaintiff drove along the road after crossing the Grand Trunk Pacific line, he was followed at a distance of some 20 yards by

another car occupied by 3 persons and which travelled at the same speed as the plaintiff. Two of these persons were called at the trial and swear that they saw the defendant's train from the time they crossed the Grand Trunk Pacific, and that they had no difficulty whatever in seeing it.

They also say that the engine did not whistle at any time—there is a whistling post at the usual distance north of the road—until it gave two short blasts immediately before the accident, nor did the bell ring. The plaintiff states he did not hear the whistle or the bell before these two short blasts were blown, and then the front portion of his car was already on the tracks and it was impossible to prevent the accident.

On the vital question whether he looked to see if a train was approaching before attempting to cross the railway, the plaintiff stated that he believed he did, but that he did not actually remember turning his head and looking. As this point is extremely important, I will quote the plaintiff's testimony:

"Q. Did you look to see if the train was coming as you came along from the Grand Trunk crossing towards the C.P.R. crossing? A. I believe I did. Q. Why do you say that? A. Well, I always do that. It is natural.

"His Lordship: That is not a reason. Do you remember whether you did not not? A. I don't remember actually turning my head and looking, or anything like that, but I believe I did. Q. But you don't know whether you did? You don't remember whether you did or not? A. No. I can't say I remember turning my head and looking to see if there was a train or not."

I think the testimony of the men in the automobile following the plaintiff's car clearly shews that had the plaintiff looked, he would undoubtedly have seen the approaching train, for these men saw it without any difficulty. It is true that the plaintiff states that there are some buildings on the other side of the railway more than a mile from the crossing, against and opposite which the train as it rounds a curve appears from the road to come head on and cannot be easily noticed apart from these buildings which serve as a background. But while the plaintiff's witnesses say that by a casual glance a person on the road might not notice the approaching train as it stands against this background, they add that if such a person took any precaution other than a casual glance he would be bound

Can.

S.C.

CANADIAN PACIFIC R. CO. v. SMITH.

to see the train. Surely the plaintiff did not discharge the duty of taking reasonable precautions before crossing the railway or of acting as an ordinary prudent man would have done if he cast a mere casual glance towards the railway, and he is not sure that he even did that. And the fact that the train might be taken at a casual glance to be a part of these buildings and that it generally went down the grade silently and with the steam shut off was well known to the plaintiff, who had often travelled along this road, and it was obviously his duty before crossing the railway to look in time so as to be able to stop his car if a train was approaching.

It is true that the plaintiff's witnesses prove that the engine did not whistle as it passed the whistling post and that the bell was not rung. But notwithstanding this negligence of the company, had the plaintiff been reasonably careful he would have seen the train in time, and the fact that the statutory warnings were not given cannot, in my opinion, excuse him in rushing with his eyes open to his own destruction. I may simply refer to the often quoted passage from Lord Cairns' judgment in Dublin, Wicklow & Wexford R. Co. v. Slattery, 3 App. Cas. 1155, at p. 1166, as a complete answer to any contention based on the absence of the statutory warnings.

The plaintiff also says that when approaching the railway he heard several toots from the automobile behind him, that he thought this automobile wished to pass him as several others had already done, and that as the place was not suitable for passing, he went ahead with the idea of letting it pass him further on. As a matter of fact, this tooting was resorted to in order to warn the plaintiff of his imminent danger, but it is said that it confused him and that under the circumstances he should not be considered as lacking in ordinary prudence.

I would indeed be slow to say as my deliberate opinion that even such a circumstance can excuse an automobile driver in rushing across a railway without first looking to see whether the line is clear. Moreover, the plaintiff by keeping his position on the road could have prevented any car passing him. And should the defendant under such circumstances be held liable for an accident which, notwithstanding the failure to give the statutory warnings, I must hold was brought about solely by the recklessness of the plaintiff?

The counsel for the respondent relied on several decisions of this Court, and from the bench his attention was called to the recent case of the Ottawa Electric R. Co. v. Booth, 60 D.L.R. where I concurred with the majority of the Court in sustaining the jury's verdict. It is obvious that the special facts of each case must be considered, and no decision is conclusive unless the circumstances are the same. In the Booth case, probably the nearest in point, the victim crossed behind a tram car which stopped at a street corner, and was struck by another car running on the far track at an excessive speed and without ringing its gong. There certainly the victim has no time for reflection and he followed quite a common though not commendable practice in crossing behind the car from which he had just alighted. Here the plaintiff was in full view of the approaching train for a distance of half a mile and, in my opinion, was the author of his own misfortune. In the words of Lord Cairns (3 App. Cas. 1155 at p. 1166), "it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death."

Naturally one hesitates before removing from a jury a case of which normally they are the proper judges. But in such a case no jury could reasonably find in favour of the plaintiff. I think it is the duty of the trial Judge if he feels convinced that a verdict for the plaintiff could not be sustained, to take the responsibility of dismissing the action. I would certainly not say that the trial Judge was wrong in taking this responsibility in the present case, in so far as Smith's personal action is concerned.

With regard to the representation action taken by him on behalf of his daughter Mary, an infant, I think that the latter is not identified with her father and that the contributory negligence of Smith does not disentitle her to recover any damages to which she may be entitled as against the appellant. On this branch of the case I am satisfied to rely on the reasons given by my Lord the Chief Justice.

I think therefore that the judgment of the Appellate Division should be affirmed in so far as it orders a new trial on the issue raised by the action on behalf of Mary Smith, and set aside as to the order of a new trial of the plaintiffs personal action, which should stand dismissed.

I concur in the disposition of the costs by my Lord the Chief Justice.

Appeal allowed in part.

Sask.

K.B.

KERR v. CAPITAL GROCERY LTD.

KERR v. CAPITAL GROCERY, LTD.

Saskatchewan King's Bench, McKay, J. July 31, 1920.

Landlord and Tenant (§II.D—30)—Assignment for Benefit of Creditors—Disclaimer of Lease by Assignee—Effect on Sublease.

A disclaimer of a lease under sec. 32 (b) of the Assignments Act, R.S.S. 1909, ch. 142, sec. 32 (b), as named by sec. 19 of ch. 34 of 1917 Sask. Stats., by the assignee operates as a forfeiture and not as a surrender of the lease, and the lease of a sublessee ends with the disclaimer of the superior lease.

Section 52 (5) of the Bankruptcy Act, 1919 (Can.), ch. 36, contains a similar provision to that contained in sec. 32 (b), which is repealed.

[See Annotations, Bankruptcy Act of Canada 1920, 53 D.L.R. 135; and Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.]

ACTION for possession of certain premises and mesne profits.

J. F. Frame, K. C., and P. H. Gordon, for plaintiff.

G. H. Barr, K C. for defendant.

McKay, J.:—The facts in this case are shortly as follows:-

By lease dated September 7, 1912, (given in place of a prior lease) the plaintiff leased to the North Western Electric Ltd., Lots 24 and 25 in block 307 in the city of Regina in the Province of Saskatchewan according to a map or plan of the said city on record in the Land Titles Office for the Assiniboia land registration district as old number 33, as tenant for the space of 10 years from August 1, 1911, with power to sublet the said premises or any part thereof.

There is a large brick building erected on said lots. There are two stores or shops on the ground floor with basements.

By lease dated May 10, 1911, the said North Western Electric Ltd., sublet to Andrew Thomson and Percy Selby the south half of the ground floor and basement of the said brick building (being the south store or shop and basement of said brick building) as tenant for the space of 10 years from August 1, 1911, at a yearly rental of $2,700 payable in equal monthly payments of $225, each payable on the first day of each month, the first payment payable on August 1, 1911. These monthly payments were on October 13, 1916, reduced to $200 per month.

On November 2, 1916, Thomson and Selby transferred their lease to E. H. Thomas.

On December 15, 1916, E. H. Thomas transferred this lease to the defendant.

On April 7, 1917, the North Western Electric Ltd., made an assignment for the benefit of its creditors in favour of the Sterling Trusts Corp'n.

The assignee, the Sterling Trusts Corp'n, disclaimed the lease of September 7, 1912, from plaintiff to the North Western Electric Ltd., and served disclaimer, dated May 4, 1917, on plaintiff on May 5, 1917. This is put in evidence as Ex. "1."

Some time before June 1, 1917, the plaintiff informed the defendant company through its manager Thomas that the building was thrown back on his hands, the North Western Electric Ltd., having made an assignment, and the defendant's sub-lease was at an end, and that the defendant would have to pay increased rent. Thomas objected to this, claiming the defendant's lease was still good. Thereafter defendant continued to pay $200 a month rent to plaintiff.

On February 28, 1918, plaintiff gave defendant notice in writing to quit the premises at the expiration of June, 1918. The defendant did not quit the premises, and still occupies the same.

And the plaintiff now brings this action for possession and mesne profits, contending that defendant's lease ended when the assignee of the North Western Electric Ltd., disclaimed the head lease, and thereafter was a monthly tenant.

The assignee disclaimed under sec. 32 b of ch. 142 of R. S. S. 1909, The Assignments Act as amended by sec. 19 of ch. 34 of 1917, Sask. Stats., which reads as follows:—

"32b. Notwithstanding any provision or stipulation to the contrary, the assignee may within one month from the execution of the assignment, by notice in writing signed by him given to the landlord, elect to retain the premises occupied by the assignor at time of the assignment for the unexpired term for which they were held, or for such portion of the term as he shall see fit, upon the terms of the lease and subject to payment of the rent thereby provided; or he may disclaim the lease."

The question is, what is the effect of a disclaimer upon the estate of the defendant who is an under-lessee? The following cases have been cited to me by defendant's counsel: O'Farrell v. Stephenson (1879), 4 L. R. Ir. 715; Smalley v. Hardinge (1881), 7 Q. B. D. 524, 50 L. J. (Q. B.) 367; ex parte Walton; In re Levy (1881), 17 Ch. D. 746, 50 L. J. (Ch.) 657.

Sask.

K.B.

KERR v. CAPITAL GROCERY LTD.

But these cases do not help much as they were decisions, the first on the Irish Bankruptcy Act, 1872 (Imp.), ch. 58, and the other two on the English Bankruptcy Act, 1869 (Imp.), ch. 71, both of which Acts expressly state that if the disclaimer is as to a lease, the lease shall be deemed to have been surrendered, which would lead one to think that but for this provision it would operate as a forfeiture.

By virtue of secs. 7 and 8, ch. 142, R. S. S. 1909, when the North Western Electric Ltd., made the assignment to the Sterling Trusts Corp'n, the assignee, its lease from the plaintiff became vested in the said assignee, and when the assignee disclaimed the lease, the lease was at an end, so far as the lessor, the plaintiff, and the assignee were concerned.

The section contemplates that the assignee should disclaim to the lessor and not to the assignor. Were it to disclaim to the latter, possibly it may then be considered that the lease reverted in the assignor and continued. But this ending of the lease was without any option on the part of the lessor as to whether he was willing to end the lease or not. It was a compulsory ending of the lease as far as he was concerned. Under these circumstances, in my opinion, the disclaimer does not operate as a surrender as contended by the defendant's counsel. A surrender is a voluntary surrender of the lease by mutual agreement between lessor and lessee as surrender by the lessee on the one hand, and a voluntary acceptance by the lessor on the other hand. This voluntary acceptance by the lessor is entirely absent in the case of a disclaimer under above section. In my opinion then the disclaimer operates rather as a forfeiture than a surrender, and the lease of the sublessee the defendant ended with the disclaimer of the superior lease.

Defendant's counsel also contends that even if the defendant's lease was cancelled by the disclaimer, it thereafter became a tenant from year to year, by the plaintiff accepting it as its tenant for over a year and accepting rent from it.

The evidence shews that before June 1, 1917, the plaintiff interviewed Thomas, during which conversation plaintiff told him the defendant's lease was ended and there would be an increase of rent. Later, the defendant received the notice from the Sterling Trusts Corp'n, dated June 1, 1917, informing the defendant that the lease to the North Western Electric Ltd., was "determined," and it

was not collecting any further rents from sub-tenants. The defendant then paid $200 a month to the plaintiff for 13 months, knowing that plaintiff intended to raise the rent. In my opinion the plaintiff clearly indicated to defendant that he did not intend to continue the terms of the old lease or accept defendant as a yearly tenant but only as a monthly tenant. In my opinion then the defendant should have quit the premises at the end of June, 1918, in accordance with the notice given by plaintiff to it dated May 18, 1918, and the plaintiff is entitled to possession of the premises and to mesne profits since July 1, 1918.

The evidence as to what rent the premises in question would bring since July 1, 1918, is very conflicting, but all the evidence shews that the rents gradually increased since July, 1918.

[The Court after dealing with the rents chargeable and the payments made and giving judgment for the balance due, continued as follows.]:—

The plaintiff is also entitled to judgment declaring that he is entitled to the premises covered by the lease in question and that defendant do vacate the same within 2 months from date. Defendant in the meantime to pay at the rate of $350 per month for the occupation of the premises.

The plaintiff will be entitled to costs.

The result of my conclusions may be a hardship on the defendant, but unfortunately I must deal with the Act as I find it. As was said by Bramwell, L. J. in Smalley v. Hardinge, 7 Q. B. D. 524 at p. 527.:— "We are not to speculate upon the hardships which may be occasioned by our decision, and we are not to be deterred from administering Acts of Parliament as we find them."

Judgment accordingly.

MATAMAJAW SALMON CLUB v. DUCHAINE.

Judicial Committee of the Privy Council, Viscount Haldane, Lord Buckmaster, Lord Parmoor, Lord Carson and Sir Louis Davies.
August 1, 1921.

Fisheries (§II—10).—Province of Quebec—Owner of Land to Which Fishing Right Extend—Right to Convey Rights Separately—Use of Solum—Right in Perpetuity—Article 470 of the Civil Code Quebec—Interpretation.

The owner of land in Quebec, to which fishing rights in a non-navigable river extend, may by virtue of his general title, divide or split off the fishing rights which fall within his ownership and convey them separately as a subject of property, strictly so called. Such right is transferable and carries the right of using the solum necessary to its enjoyment, and article 479 of the Civil Code of Quebec is not to be read

Imp.
P.C.
MATAMAJAW SALMON CLUB v. DUCHAINE.

as cutting down the duration of such right when granted under circumstances in which there is no practical objection to its existence in perpetuity.

[See Annotation, Profits a Prendre, 40 D.L.R. 144.]

APPEAL from the judgment of the Supreme Court of Canada (1919), 47 D.L.R. 625, 58 Can. S.C.R. 222, which held that an indefinite grant of fishing rights in a non-navigable river, by the riparian owner was essentially temporary in its nature, and could not endure beyond the lifetime of the grantee. Reversed.

The judgment of the Board was delivered by

Viscount Haldane:—This is an appeal from a judgment of the Supreme Court of Canada (1919), 47 D.L.R. 625, 58 Can. S.C.R. 222, which reversed (by a majority consisting of Anglin, Brodeur and Mignault, JJ., Idington and Cassels, JJ., dissenting) a judgment of the Court of King's Bench of Quebec (1917), 27 Que. K.B. 196, affirming a judgment of the Superior Court.

The question to be decided relates to the title of the appellant Club to the fishing rights in a stretch of the Matapedia River opposite to a certain piece of land on one of its banks, and to the bed of the river itself at that place. It is common ground that there is title of some sort to a right of fishing there. The appellants claim that this title is not only vested in them, but is a right in perpetuity. The respondents maintain that it has never amounted to more than a right personal to the individual who originally acquired it, and terminable with his life.

A further point was raised on behalf of the respondents, which was in substance that even if Lord Mount Stephen, the original holder, possessed and had conveyed a transmissible right, that right no longer subsisted in the appellants by reason of failure in renewing the registration of the deed by which it was originally conveyed to Lord Mount Stephen. This point was, however, decided adversely to the respondents in all the Courts below, the Supreme Court of Canada having affirmed, 47 D.L.R. 625, so far as the point was concerned, a declaration made by the Court of King's Bench of Quebec on the subject. As the respondents have lodged no cross-appeal against the judgment of the Supreme Court on this point, their Lordships hold that it cannot be raised in the present appeal. The only question before them therefore is that as to the character of the title acquired by Lord Mount Stephen and transmitted by him.

In order to see what this title really was it is in the first

place necessary to examine the character of the deed of September 6, 1890, by which Lord Mount Stephen, then Sir George Stephen, acquired it. That deed was one of exchange, and under it one Blais, purported to cede by way of exchange all the rights of fishing in the River Matapedia, vis-a-vis the lot of the cedant, as described in a plan annexed, "with right to the said George Stephen to pass over the said lot, on foot or in vehicles, for the exercise of the said right of fishing." There was ceded in counter exchange by Sir George Stephen on his part a certain piece of land in the deed described. Consequently, "the parties disseised themselves respectively of what was above ceded by them in exchange and counter exchange, and took seisin of it reciprocally." The deed was registered.

It will be observed that the language of the deed itself is unrestrained, so far as the duration of the rights granted under it is concerned, not less completely in the case of the cession of the fishing rights to Sir George Stephen than in that of the cession of land by way of exchange to Blais. The introduction of the words relating to reciprocal disseisin and seisin point to an intention to convey in perpetuity in each case. Unless the words "right of fishing" import in the character itself of the title granted something short of a perpetual right, there is no restriction in the deed itself on the duration of the right.

The action out of which the appeal arises was brought by the appellants against the predecessor in title of the respondents because the latter had interfered with the alleged exclusive title of the appellants to the fishing rights in question, and had formally denied its validity. The action was for a declaration that the appellants were the sole proprietors of the part of this river and of its bed so far as these fronted the bank at the locus in quo, as well as of the fishing rights and for possession. The defence, which admitted that the river was unnavigable and non-floatable, and that there existed the alleged formal documents of title relied on by the appellants, denied possession in the past, and asserted that Sir George Stephen obtained no more than a personal servitude which was not transferable and was operative only against Blais and his heirs. The defence further alleged that the curators in bankruptcy of Blais had duly sold the land to which the fishing rights were opposite, to the predecessor in title of the respondents who had thus become its proprietor. It was further pleaded that if the

Imp.
P.C.

MATAMAJAW SALMON CLUB v. DUCHAINE.

appellants had acquired a right it had lapsed for want of renewal of registration as prescribed by law.

The action was tried in the Superior Court of the Province of Quebec before Roy, J. That Judge decided in favour of the appellants, declaring the appellants to be proprietors of the rights of fishing in the river opposite the bank at the locus in quo, and decreeing their right to possession. Roy, J., considered a number of statements of the law contained mainly in French and Quebec textbooks and decisions, and held that what was passed to Sir George Stephen was a real right or one of property, which had been validly conferred in perpetuity in favour of a non-riparian proprietor, and had been duly transferred by him to the appellants. The Court of King's Bench of the Province on appeal, 27 Que. K.B. 196, took the same view, holding that the law of Quebec permitted the creation of such a right of property, including a right to the bed of the river to the extent required for the purposes of fishing, so far and so long as this purpose necessitated it for its efficacy. In that Court, Pelletier, J., agreed in substance with the reasoning of Roy, J. Archambault, C.J., found rather more difficulty, but he also arrived at the conclusion that the right in question was a real right available against the world, and created by the dismemberment of immoveable property. Even the old law of France had apparently regarded as possible the creation by dismemberment of the original right of property, of a servitude of this kind. But in that law there was the difficulty that personal servitudes were prohibited, and the right to fish would have become a personal servitude if it had been alienated in perpetuity for the benefit of a person and not for the benefit of an immoveable. But in the law of Quebec, the Chief Justice considered this difficulty did not arise, for personal servitudes were admitted. Whatever might be the precise character of the right, he was of opinion that it was not merely a right of personal servitude, but one of usufruct which Sir George Stephen had obtained not only for himself but for his representatives. This would in itself be enough to call for a decision in favour of the appellants, for Sir George Stephen was still living. But the Chief Justice went further. A full right of property comprises a jus utendi, a jus fruendi, and a jus abutendi. This full set of rights was possessed by the owners of the river bank, with a title extending to the centre of the stream. A usufruct comprises only the first two of these three rights. If these were ceded a usufruct was estab-

lished. It would not comprise merely personal rights, but a veritable real right. And it was because what took place was the dismemberment of the property in immoveable, that the right of the usufructuary was a true, real and immoveable right of servitude.

In the Supreme Court of Canada, 47 D.L.R. 625, at p. 643, Mignault, J., expressed the opinion that in the law of the Province of Quebec there was nothing similar to the English common law right of profit-a-prendre, a right which might be created in perpetuity, to enter the land of another person and take some profit of the soil or a portion of the soil itself for the use of the owner of the right. In Quebec he held that real servitudes can be granted for the benefit only of an immoveable and not of a person. The title in question could not, accordingly, be one of real servitude. Nor was it a right of ownership, for the purchase was not one of the river bed. It gave no more than a right of enjoyment, with at most the right to pass over the land of the grantor so far as necessary for the exercise of the title to fish. There was no real servitude within the Code, for the provisions there relate only to a "charge imposed on one real estate for the benefit of another belonging to a different proprietor." It was only in virtue of a right of enjoyment that Sir George could use the river bed, and he was not made co-owner of it. No doubt if, as Archambault C. J. thought, the right was one of usufruct, this would be a right of enjoyment differing from both ownership of a profit-a-prendre and from a real servitude. The old French law recognised such a right and that it could be restricted to certain fruits or products of a property. But could such a right extend beyond the life of Sir George Stephen or be assigned by him? That it could be assigned Mignault, J., had no doubt. But on the other hand it was in his opinion only temporary and could not be granted in perpetuity. This was in his view not only to be expected as the outcome of public policy, but was prescribed by art. 479 of the Quebec Code, which said that "usufruct ends by the natural death of the usufructuary, if for life," by the expiration of the term for which it was granted. These words meant that the usufruct might be created for life or for a term only. In the former case it ended with the life of the usufructuary, in the latter with the term. The reasonable construction was that if no term were fixed the usufruct ended with the life of the usufructuary. This view accorded with the gen-

Imp.
P.C.
MATAMAJAW SALMON CLUB v. DUCHAINE.

eral law of France, as stated by certain of the commentators, and with the Roman law. The right of Sir George Stephen was therefore one of mere enjoyment, but it should be made clear in the judgment that it would not come to an end till he died.

Anglin, J., and Brodeur, J., expressed similar views on the main question discussed by Mignault, J., Brodeur, J., added that, in his opinion, registration of the conveyance to Sir George Stephen had been essential.

Idington, J., was of a different opinion from that of the majority. It was to him clear that the substance of the transaction was that what Sir George Stephen bargained for was not merely a personal right, and unless the language of the deed and the state of the law rendered it necessary to hold otherwise it should not be so held. There were no doubt rights of personal servitude known to the law which ceased with the life of the grantee. But in his view there was no prohibition in the law of Quebec against an owner in perpetuity of property dismembering his property in any way he chose. The deed itself ran in terms which shewed dismemberment as being the purpose for which it was framed.

Cassels, J., agreed with the conclusions of Idington, J. The deed purported to be a conveyance of property. The question whether the right sought to be granted was in the nature of a profit-a-prendre, and whether such a right was known to the law of Quebec was, in his opinion, one of language only. The analogy of the grants by the King of France of rights to fish in the St. Lawrence River, to seigniors, shewed that such a title as was claimed through Sir George Stephen was possible, for the rights in such cases were more than rights during the lifetime of the seignior.

In considering which of these diverging sets of opinions is right, their Lordships are impressed with the necessity of bearing in mind that the principles on which the jurisprudence of Quebec with regard to rights in land rests are very different from those which obtain in the common law of England. In the latter country there has always been permitted great latitude in splitting up the title to the fee simple, with important results as regards the right of possession. But in other countries, such as those where the Roman law prevails, and in countries such as Scotland, which has its own system, the fee simple cannot be so freely disintegrated. The property title may, as for example in the latter country, be in the main indissoluble, a

right for life only being treated, not as a separate right of property as in England, but as a mere burden on the radical title. It follows that it is necessary to ask at the outset how far the system in Quebec has permitted encroachments on the radical right of property.

It appears that at all events to some extent, and quite apart from Code, such encroachments have been permitted. The Seigniorial Court, to which fell the duty, under the Seigniorial Act of 1854 (Can.) ch. 3 passed for Lower Canada, of giving authoritative answers to question specially submitted to it, relating to the terms on which feudal rights were to be abolished in Lower Canada, gave an answer to Question 27 submitted to it which bears on this point. The Court declared that "in seigniories bounded by a navigable river or stream, seigniors could lawfully reserve to themselves the right of fishing therein, or impose dues on their tenants (censitaires) for the exercise of that right, when the right of fishing in the same had been granted to them, but they could not make the reservation nor impose the dues without grant and as seigniors only." This answer implies that a right of fishing could be excluded and held separately from the right of the tenant to the land held by him under the seignior. Although the answer is concerned only with navigable rivers or streams, their Lordships see no reason to think that this makes any difference to the principle. If the title to the fishing could be separated from that to the other rights in the land in the case of a navigable river, it does not appear that there is any reason for coming to a different conclusion in the case of a river that is non-navigable. In the present case it is common ground that the tenure of the land to which the fishing rights belonged was not seigniorial, but was of the ordinary kind. The question is therefore whether the owner of the land could, in virtue of his general title, divide or split off the fishing rights which fell within his ownership and convey them separately as a subject of property strictly so called. That such a division could take place in the case of seigniorial lands appears from what has been quoted. If so, it must have been because the law of Quebec permitted fishing rights to be isolated as separate items from the aggregate of proprietary rights. The land and the fishing rights constitute, in other words, separate subjects. It may be that no grant of fishing rights is practically possible without its comprising some right of using the solum. If this be so

Imp.

P.C.

MATAMAJAW SALMON CLUB v. DUCHAINE.

then the terms of the cession are sufficient to have passed such a right. Even if the right to fish and to use the solum for the purpose constituted no more than a usufruct, this would not, in their Lordships' opinion, constitute a difficulty in the appellants' way. For according to some at least of the French authorities cited in the judgment of Roy, J., such a right may be a transferable one. Their Lordships do not think that art. 479 C.C. (Que.) ought to be read as cutting down the duration of such a right, at all events when granted under circumstances in which there is no practical objection to its existence in perpetuity. That article provides that "usufruct ends by the natural death of the usufructuary if for life," or "by the expiration of the term for which it was granted." Their Lordships see no sufficient reason for treating the words "if for life" as doing more than refer only to the kind of usufruct which is ended by death. They have considered what was said on this point by Mignault, J., in his judgment in the Supreme Court, 47 D.L.R. 625 at p. 645. But after consideration of the authorities it appears to them that, however marked was the tendency in the earlier Roman and French law to restrict what was called usufruct to a personal title, this tendency became relaxed in the later phases of both of these systems, to such an extent that the expression usufruct became so general as to extend to rights analogous in incident to those of property. They are impressed by the reasoning of Archambault, C. J., in the passage in his judgment already referred to in which he comes to the conclusion that at least in modern times dismemberment of the complex of property rights is now possible under Quebec law, through which a usufruct may be created which is a veritable right in rem. As he points out a usufruct is a right of enjoying things in which another possesses the property. But he adds that it may, by a splitting off of incidents in that property, become a true, real right against all who seek to interfere with it.

Their Lordships, in agreement so far with the Chief Justice, think that the right here was more than usufructuary in the older and stricter meaning. It is their opinion a right to a separable subject or incident of property. There is no inherent reason for refusing to treat a fishing right as a self-contained and separable subject. In the seigniorial cases they appear to have been treated as self-contained and separable. In the law of Scotland, where the fee cannot be split up, they are regarded as proper sub-

jects for a separate title to property in fee. The definition in art. 405 of the Quebec Code presents this analogy that it places no difficulty in the way of regarding the right of fishing as an item among the others comprised in the subject matter. It says, in general terms, that "a person may have on property either a right of ownership or a simple right of enjoyment or a servitude to exercise." Article 406 says that "ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations." Article 408 provides that "ownership in a thing, whether moveable or immoveable, gives the right to all it produces, and to all that is joined to it as an accessory, whether naturally or artificially. This right is called the right of accession." There appears to be no reason why, consistently with the language of these articles, there should not be ownership of a fishing right as a mode of enjoying and disposing of a separable physical subject for possession. The title to take the fish is a title to take a product of the river, and art. 408 recognises as possible in law the union with it as an accessory of the right to use the bed of the river or the banks when naturally or artificially stipulated for as part of that which is joined to the fishing right. Their Lordships not only think that this conclusion is that which is natural having regard to the character of the transactions which the law of Quebec was probably fashioned to provide for, but they find confirmation of the view they take in the authority cited in support of it in the judgments of both Roy, J., and Pelletier, J.

They will therefore humbly advise his Majesty that the judgment of the Supreme Court of Canada 47 D.L.R. 625, should be reversed, and that the judgment of the Superior Court of the Province of Quebec should be restored. The respondents must pay the costs here and in the Courts below.

Appeal allowed.

CITY OF VICTORIA v. THE BISHOP OF VANCOUVER ISLAND.

Judicial Committee of the Privy Council, Viscount Cane, Lord Dunedin, Lord Atkinson, Lord Shaw and Lord Phillimore. August 1, 1921.

Taxes (§IF—87)—Exemption of Building set Apart and in Use for the Public Worship of God—Land Included in Exemption—Municipal Act R.S.B.C. 1911 ch. 170 sec. 228—Amendment 1914 ch. 52, sec. 197(1)—Construction.

Under the provisions of the Municipal Act R.S.B.C. 1911 ch. 170

Imp.

P.C.

CITY OF VICTORIA v. THE BISHOP OF VANCOUVER ISLAND.

sec. 228 (1), as amended by 1914 (B.C.) ch. 52 sec, 197 (1), the exemption from taxation of "every building set apart and in use for the public worship of God" includes exemption of the land on which the building is situate.

APPEAL by defendant from the judgment of the British Columbia Court of Appeal (1920), 54 D.L.R. 615, 28 B.C.R. 533, reversing the judgment of Macdonald J. in an action commenced to prevent the Corporation of the City of Victoria selling St. Andrew's Cathedral at a municipal tax sale. Affirmed.

The judgment of the Board was delivered by :

Lord Atkinson:—This is an appeal from the judgment of the Court of Appeal of British Columbia (1920), 54. D.L.R. 615, 28 B.C.R. 533, dated September 15, 1920, allowing an appeal from the judgment, dated November 28, 1919, of the trial Judge, Macdonald, J., by which latter judgment the respondent's action was dismissed and the appellants given judgment on their counter-claim.

The action out of which the appeal has arisen was brought by the Bishop of Vancouver Island, who is by the statute of British Columbia of 1892, ch. 56, created a corporation sole, against the corporation of the City of Victoria, claiming in the first place, a declaration that no rates or taxes had been lawfully imposed upon certain lands, belonging to him by virtue of his office, upon which lands there had been at all material times erected a building known as St. Andrew's Cathedral dedicated and set apart and in constant use for the public worship of God, and in the second place, an injunction restraining the defendants and their collector of taxes from offering for sale for taxes the aforesaid lands upon which the said cathedral had been erected or any part thereof on May 26, 1919, or any other date, and thirdly general relief.

To this statement of claim the defendants filed a lengthy defence setting forth the provisions of many statutes which they alleged conferred upon them the power, under the conditions above mentioned, to tax the aforesaid lands upon which the said cathedral stands, described as Lots 9, 10 and 11, Block 12, in the city of Victoria, and also other provisions which it was alleged barred the plaintiff's right to obtain the relief claimed, and averring that there was due in respect of these lands for general rates and taxes and also for local improvement rates and taxes, together a sum of $15,934.44 for which they counter-claimed.

To this defence the plaintiff filed a reply, and to the de-

fendants' counter-claim a defence; to which latter again the defendants filed a reply.

Notwithstanding the voluminous character of these pleadings two questions alone emerge for decision on this appeal. The first and main question is whether by the provisions of sec. 197 of the Municipal Act ch. 52 of the statutes of British Columbia, 1914, hereafter, referred to as the Act of 1914, the land upon which the fabric of St. Andrew's Cathedral stands is exempted from liability for all rates and taxes as completely as the fabric itself is admitted to be. The second and subsidiary question is whether, even if the said lands are not by these provisions so exempted, yet in the events which have happened the general and local rates and taxes in fact assessed upon the said lands for the year 1914 to 1918 both inclusive, amounting to the aforesaid sum of $15,934.44, are due and recoverable by the corporation under their counter-claim. This latter question though raised in the pleadings is not alluded to in the judgment delivered by the Judges who decided the appeal; but counsel assure their Lordships it was argued and, of course, they accept that assurance.

Section 197 of the Act of 1914 upon which the main question turns, runs as follows:—

PART VIII.

Taxation, including licences and statute labour.

Division (1).—Taxes on Land or Improvements.

197. Rates and taxes may be settled, imposed and levied upon land or upon real property or upon improvements within a municipality by the Council thereof, subject to the following exemptions, that is to say:—(1) Every building set apart and in use for the public worship of God. (2) Every burying-ground in actual use solely as such, and every cemetery. (3) Every building set apart and in use solely as an hospital in which the sick, injured, infirm or aged are received, treated or maintained, and the land adjoining thereto and actually used therewith, not, however, exceeding twenty acres in case of public hospital and three acres in case of a private hospital. (4) All property vested in or held by his Majesty, or vested in any public body or body corporate, officer or person, in trust for his Majesty, or for the public uses of the province, and also all property vested in or held by his Majesty, or any other person or body corporate, in trust for or for the use of any tribe or body of Indians, and either unoccupied or occupied by

Imp.
P.C.
CITY OF VICTORIA v. THE BISHOP OF VANCOUVER ISLAND.

some person in an official capacity: (a) Where any property mentioned in the last preceding clause is occupied by any person otherwise than in an official capacity, the occupant shall be assessed in respect thereof, but the property itself shall not be liable. (5) All land and improvements the property of the municipality. (6) The buildings of every institution which has for its object the care and charge of orphan and destitute children, and the lands actually used for the purposes of and surrounding the same, not to exceed five acres. (7) The buildings of every horticultural or agricultural society which is affiliated with the Farmers' Institute and in which there are neither shareholders or stockholders, and the lands actually used for the purpose of and surrounding the same, not exceeding five acres. (R.S. 1911, c. 170 s. 228; 1912, c. 25, s. 34.)

In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. In Grey v. Pearson (1857), 6 H.L.C. 61 at p.106, 10 E.R. 1216, Lord Wensleydale said:—

"I have been long and deeply impressed with the wisdom of the rule now, I believe, universally adopted at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency but no further."

Lord Blackburn quoted this passage with approval in The Caledonian R. Co. v. The North British R. Co. (1881), 6 App. Cas. 114, at p. 131, as did also Jessel, M.R. in Ex parte Walton, in re Levy (1881), 17 Ch. D. 746. There is another principle in the construction of statutes specially applicable to this section. It is thus stated by Lord Esher, M.R. in The Queen v. The Judge of the City of London Court, [1892] 1 Q.B. 273 at p. 290:—

"If the words of an Act are clear you must follow them even though they lead to a manifest absurdity. The Court has nothing to do with the question whether or not the leg-

islature committed an absurdity. In my opinion the rule has always been this:—If the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity and the other does not, the Court will conclude that the legislature did not intend to lead to an absurdity and will adopt the other interpretation."

And Lord Halsbury in Cooke v. The Charles A. Vogeler Co., [1901] A.C. 102, at p. 107, said:—"But a court of law has nothing to do with the reasonableness or unreasonableness of a provision except so far as it may help them in interpreting what the Legislature has said."

Which necessarily means that for this latter purpose it is legitimate to take into consideration the reasonableness or unreasonableness of a provision of a statute. Again a section of a statute should, if possible, be construed so that there may be no repugnancy or inconsistency between its different portions or members.

Taking then sec. 197 by itself and considering it apart from all other sections, one has to ask oneself what ideas its language, taken in its ordinary grammatic sense, conveys to the mind of one who reads it. Mr. Robertson, in his forcible argument on behalf of the appellants, insisted much upon the fact that under the system of taxation set up by this Act of 1914, and earlier statutes, "land" and "improvements" in the sense defined, which includes buildings, were separately assessed (sec. 199), and rates were levied on the land and improvements so assessed (sec. 201).

That, no doubt, is so, but that fact affords little help to the true construction of this sec. 197, for the obvious reason that several of the subjects of property mentioned in it are admittedly, expressly or impliedly put outside the reach of the taxing powers of municipal councils. Of those impliedly so put outside the reach of those powers, graveyards and cemeteries are good examples. Unless the land be in these cases exempted from taxation there is nothing to exempt, nothing upon which the exempting clause can reasonably operate. As to them it becomes simply a collection of idle words without sense or meaning. The question for decision is, are the lands under the buildings set apart and used for the public worship of God dealt within sub-sec. 1 of this section, also impliedly put outside the reach of those taxing powers.

If one takes the first sub-section of this sec. 197 and asks oneself what idea do those words in their ordinary gram-

Imp.
P.C.
CITY OF VICTORIA v. THE BISHOP OF VANCOUVER ISLAND.

matic meaning convey to the mind, the answer must be. a building in which the public worship of God can be carried on. The words "in actual use for" necessarily convey that, and therefore that everything needed to have that worship carried on is comprised in the description of the edifice in which it is to be carried on.

The thing most necessary for the use of the cathedral as a place for public worship is that the congregation which frequents it should be able to stand or kneel upon the ground embraced within its walls and forming the floor of it, or sit upon chairs resting upon that floor. The use of the floor is infinitely more essential than the use of a roof. In fact, is is impossible to conceive the public worship of God being carried on in a building without the use of the land which it embraces within its walls, as it is impossible to conceive walls existing without the support, direct or indirect, of the soil of the earth. The conception of such things is not the less impossible because the legislature has by statute made the attempt fancifully to divide, for the purpose of taxation, concrete entities notionally into sections or portions which are presumably mutually exclusive and independent of each other. Their attempt will be abortive unless the language used be clear and plain. Should it not be so, one must judge by the meaning of the ordinary language used what is the nature of thing to be dealt with as it is described in that language.

To hold that the ground upon which the cathedral stands is exempt from taxation though not by express words is only to do what to avoid gross absurdity must be done in the case of the buildings mentioned in sub-secs. 3, 6 and 7 of this very sec. 197. In the case of a building set apart and solely used as a hospital, the land adjoining thereto and actually used therewith, not exceeding 20 acres in the case of a public hospital and 3 acres in the case of a private hospital, is expressly exempted from taxation, but the ground upon which the hospital stands is not expressly exempted, though it necessarily contributes more to the services of suffering mankind than does the adjoining land. The only rational explanation of that provision is that the latter lands are impliedly exempted because the word "building," as used in ordinary language, comprises not only the fabric of the building, but the land upon which it stands. The same considerations apply to the case of an orphanage mentioned in sub-sec. 6 and to the horticultural societies mentioned in sub-sec. 7.

If in these sub-sections the ordinary and natural meaning be given to the word "building," as including fabric and the ground on which it stands, the legislation is rational. If to that word be given the meaning of fabric without the ground upon which it stands the results are absurd. But if, to make sense, this comprehensive meaning be given to the word "building" as used in sub-secs. 3, 6, and 7, it would be contrary to every sound principle of construction to create an antagonism and inconsistency between these sub-sections and the first sub-section by not giving to the word "building" in the first the same comprehensive meaning it bears in the others, especially as the purposes for which the building is to be used go strongly to shew that it should get the comprehensive meaning, and there is no provision to shew it should get the restricted one. Taking sec. 197 by itself, their Lordships are clearly of opinion that, if rationally and justly construed, the word "building" must receive the same meaning in secs. 1, 3, 6 and 7, that is its natural and ordinary meaning, including the fabric of which it is composed, the ground upon which its walls stand, and the ground embraced within those walls.

It is contended, however, on the part of the appellants that sec. 197 of the Act of 1914 cannot be considered by itself, that on the contrary it must be considered in conjunction with the other statutes in pari materia which preceded; and that the provisions of these latter require that the word "building," found in sub-sec. 1 of this sec. 197, should thus receive a meaning different from its ordinary meaning, namely one including the fabric, but not the ground on which it stands. The particular provisions most relied upon by the appellants on this point are those contained in sec. 228 of ch. 170 of the statutes of British Columbia of 1911, hereinafter referred to as the Act of 1911. This section is in the main identical with sec. 197 of the Act of 1914. They differ, however, in two particulars. The former contains no sub-section corresponding with sub-sec. 7 of the latter, and in sub-sec. 1 of sec. 228, the words "or the site thereof" are introduced after the word "building," so that the sub-section runs thus: "Every building or the site thereof set apart and in use for the public worship of God." By an Act ch. 47 of the statutes of British Columbia 1913, hereafter referred to as the Act of 1913, this sec. 228 is amended by striking out the words, "or the site thereof," thereby restoring the section to what it was in the earlier statute, i.e., sec. 159 of ch. 29 of the statute of

Imp.
P.C.
CITY OF VICTORIA v. THE BISHOP OF VANCOUVER ISLAND.

British Columbia, 1891, and what it continued to be up to the passing of the Act of 1914. Their Lordships' attention has not been called to anything expressly suggesting the object to effect which these words were introduced into the Act of 1911, and deleted two years later, or what construction was given to the section by the Courts while these words formed part of it. The explanation of their deletion may possibly be that they were considered mere surplusage, and that the true construction of the word "building" by itself was considered to be that for which the respondent the Bishop now contends; or it may conceivably be that the Legislature which added these words discovered, as the fact is, that the word "site" has not one and only one precise and definite meaning—that it might be used to describe a plot of land much larger than that on which a building actually stands, or again might describe the situation or local position of a building. In Webster's New International Dictionary, the word "site" is defined as "the place where anything is or is to be fixed, situation or position, as the site of a city or for a church." In the Imperial Dictionary it is defined as "situation, local position as the site of a city or of a house, in arch. the situation of a building or the plot of ground on which it stands." And in Johnson's Dictionary, "site" is defined as "situation or position." He gives two quotations in which the word occurs to illustrate its meaning. The first from Fairfax:—

> "The city's self he strongly fortifies,
> Three sides by site it well defenced has."

and the second from Bacon:—"Manifold streams of goodly navigable rivers, as so many chains, environed the same site and temple."

The mystery, however, remains unsolved, why if the Legislature, as the appellants now contend, deleted these words in 1913 for the very purpose of indicating their intention that the ground upon which a building of the kind described in sub-sec. 1 of sec. 197 of the Act of 1914 stood, should not be exempt from taxation, they did not take the trouble of substituting in 1913 for the words deleted, the words "exclusive of the land upon which the walls of the building stand, and also of the lands these walls embrace within them." In this condition of things, it appears to their Lordships impossible to hold that the above-mentioned enactments give any adequate indication of an intention on the part of the Legislature of British Columbia that the word "building" occurring in sec. 197, sub-sec. 1 of the Act

of 1914, should have any meaning other than its ordinary meaning, namely, a thing composed of the fabric of the building and the ground that the fabric rests upon and encloses.

The second class of provisions upon which the appellants relied in support of their contention as to the meaning of the word "building" as used in sub-sec. 1 of sec. 197 of the Act of 1914, were the definitions of "land," "real property" and "improvements" respectively contained in sec. 2 of the Act of 1914, and the statutes in pari materia preceding it. They contend that by the legislation anterior to the year 1891 every place of worship, with the land requisite for its use, was exempt from taxation, but that the changes introduced in that year, not in legislation ad hoc but in the definitions of "land," "real property" and "improvements" respectively, perpetuated in subsequent statutes, make it clear that by sec. 197, sub-sec. 1, of the Act of 1914, the buildings mentioned in this later enactment, and not the ground they rest upon, are exempt from taxation. But these definitions, old and new, are as applicable to hospitals, orphanages and agricultural institutions as they are to places of public worship. And therefore, if the contention of the appellants be sound, these definitions must have been designed to bring about or have resulted in bringing about the intense absurdity as to sub-secs. 3, 6, and 7 of this same sec. 197, of taxing the land upon which the buildings stand but not taxing the large plots of land adjoining those buildings.

It is not disputed that from the year 1872 till the year 1889, both inclusive, four statutes were passed dealing with this matter of exemption from rates and taxes in each of which the following clauses were to be found [e.g. 1898 (B.C.) ch. 18, sec. 157 sub-secs.]:—

"(4) Every place of worship, churchyard, burying ground, public school house, public roadway, square, township or city hall, gaol, hospital, with the land requisite for the due enjoyment thereof;

"(5) Real estate and improvements, the property of any fire department or company, or of any mechanics' institute or public library, or of any agricultural society."

It is equally beyond dispute that in the year 1891 an Act entitled an Act to consolidate and amend the Municipal Acts was passed (ch. 29), containing the following definitions:

"'Land' shall mean the land itself with all things therein and thereunder, and all trees or underwood growing upon

Imp.
P.C.
CITY OF VICTORIA v. THE BISHOP OF VANCOUVER ISLAND.

the land, and all mines (other than gold mines), minerals (other than gold), quarries and fossils in and under the land, except mines belonging to Her Majesty.

" 'Real property' shall mean and include not only the land itself with all things therein and thereunder, and all trees or underwood growing upon the land, and all mines (other than gold mines), minerals (other than gold), quarries and fossils, in and under the land, except mines belonging to Her Majesty, but also all buildings, structures, or other things erected upon or affixed to the land, improvements made to the land, and all machinery or other things affixed to any building on the land, so as to form in law part of the realty.

" 'Improvements' shall mean all buildings, structures or other things erected upon or affixed to the land, or improvements made to the land, and all machinery or other things affixed to any building on the land so as to form in law part of the realty."

The definitions of "land" and of "real property" respectively are practically repeated in the statute of 1911 and that of 1914. But the definition of "improvements" is somewhat altered in the latter of these Acts, in which it runs thus:—

" 'Improvements,' when used with regard to city municipalities, shall extend to and mean all buildings and structures, and all machinery and fixtures annexed to any building or structure; and when used with regard to district municipalities shall extend to and mean everything annexed to the soil by the hand of man, such as buildings, structures, fences and all machinery or other things affixed to any building or other structure erected upon or affixed to the soil, or improvements made by clearing, dyking, draining, planting or cultivating the soil; but the erection of buildings and machinery and the construction of skid-roads for temporary use in connection with logging operations or taking lumber off lands (unless a statutory declaration be made that such logging with be forthwith followed by clearance of or settlement upon the land) shall not be deemed improvement for the purpose of this Act."

A proviso follows which does not affect the point in controversy in the present case.

"Land" and "real property" bear the same meaning whether situated within city municipalities or without them, but the word "improvements" when used with regard to city municipalities means and includes less than it does when used with reference to town, townships or district municipalities. The main difference between the two consists in

this—that in the latter but not in the former the word "improvements" means and includes improvement made by clearing, dyking, draining or cultivating the soil. The difference is presumably due to the fact that farming operations were not carried on to any extent within city municipalities.

"Land" and "real property" which latter includes the soil and everything annexed to it, such as buildings, structures, &c., and improvements of the soil made by clearing, dyking, draining, planting or cultivating it, are equally assessable wherever situated. This is shewn by the nine sections of the Act of 1914, numbered from 205 to 213, both inclusive. Their Lordships fail therefore entirely to see how the several definitions above mentioned of the word "improvements" tend in any way to support the contention that the word "building" found in sub-sec. 1, sec. 197 of the Act of 1914 means only the fabric of the building and not in addition the land upon which the fabric stands.

The next point relied upon by the appellants is that involving the second question urged before their Lordships, but not dealt with in the judgments in the Court of Appeal. It amounts to this, that even assuming that the land on which the Cathedral stands is not liable to be taxed, it has in fact been taxed to the amount claimed in the counterclaim, and owing to the events which have happened, the respondent is estopped or rendered incapable of contesting his liability for the sum claimed. This contention is based in the first instance upon the provisions of secs. 216 and 230 of the Act of 1914. They provide that every person complaining of an "error or omission in regard to himself as having been wrongfully placed upon the Assessment Roll for general taxes" shall have a right of appeal to a Court of Revision, and that the assessment roll as revised, confirmed and passed by the Court of Revision except as so far as amended on appeal by one of the tribunals mentioned shall be deemed valid and binding on all persons concerned, notwithstanding any defect or error committed in or with regard to such roll or any defect, error or mis-statement in the notice required or transcript of such notice.

It was admitted that the Bishop took no objection to the assessment rolls for the years 1914 to 1917, both inclusive, and that the said rolls were passed and confirmed by the Revision Court, no appeal having been taken; and it was resolutely contended on behalf of the appellants that these assessment rolls become under these circumstances valid

Imp.
P.C.
CITY OF VICTORIA v. THE BISHOP OF VANCOUVER ISLAND.

and binding on the respondent, and that he could not now be permitted to impeach their accuracy. The same considerations apply to each of these two sections. But these sections are merely machinery sections dealing with irregularities, mistakes and errors occurring in the drawing up, shaping and forming of the assessment rolls, and do not by any means empower the corporation or its officers to assess and tax any kind of property expressly or impliedly exempted from taxation by the provisions of these very statutes from 1914 to 1918, both inclusive. To hold that they did so would amount to holding that the corporation and its officers had the power of repealing express provisions of these statutes.

The whole question comes back to the proper construction of sub-sec. 1 of sec. 197 of the Act of 1914. If, according to the true construction of that section, the land upon which the cathedral stands is exempted from taxation, then if the corporation or its officers attempt through the medium of these machinery sections to assess and tax it, their act is ultra vires and illegal, and the respondent is not disabled from assailing it despite the terms of their assessment rolls. In their Lordships' view these sections in no way disentitled the respondent from insisting on the contention that the ground on which the cathedral stands is exempted from general taxation.

As regards taxation in respect of local improvements, much reliance was placed by the appellants on certain statutory enactments. It was contended that the assessment made under by-law 1946 is valid and binding on the respondent, by reason of the provision contained in secs. 141, 241 and 478 of ch. 52 of the statutes of British Columbia 1914. The first of the sections provides that when debentures have been issued by a municipal council under a by-law which has not been quashed, and interest has been paid on these debentures for one year by the municipality, the by-law and debentures issued thereunder shall be binding on the municipality and the ratepayers, and on all parties concerned. That does not mean that a ratepayer having lands that are exempted shall be bound by this by-law, but that ratepayers in the charged area shall, as a body, i.e. collectively, be liable to be made answerable for the debenture debt and interest. The second of these sections provides that any municipal council or any municipality may from time to time make, alter or repeal by-laws, naming and

appointing a day upon or before which any person who pays the annual tax assessed, levied on land, real property, or improvements shall be entitled to the deductions named.

This section is obviously entirely irrelevant. The third of these three sections, that numbered 478, provides that

"The production of a certificate issued under this part of the Act, or of the certified copy of a certificate shall in all Courts and places, and for all purposes whatever be conclusive evidence that the By-law Debenture Stock or Treasury Certificate, described in the certificate has been lawfully and validly made and issued, and that all statutory requirements, have been complied with, and the validity of such debenture or stock or treasury certificate shall not be attacked or questioned, or adjudicated upon in any action suit, or proceeding whatsoever in any Courts of the Province."

This only means that the production of the certificate conclusively proves that all proper and necessary steps have been taken to make valid by-laws, and that the debentures have been validly issued, and all the statutory and other requirements complied with, but the section does not help in any way to determine what is the true meaning of the word "building," as used in sub-sec. 1 of sec. 197 of this Act of 1914, still less does it amount to an enactment to the effect that the council can by passing any particular by-law, or issuing any set of debentures, in the result tax any subject of property which is exempted from taxation by sec. 197 of this very Act of 1914. It does not make legitimate that which is ultra vires.

Their Lordships are clearly of opinion that there is nothing in the several statutory enactments hereinbefore mentioned, and so much relied upon by the appellants to indicate much less require that the word "building" occurring in sub-sec. 1, sec. 197 of the Act of 1914, should be construed as meaning something different from its ordinary meaning as used in popular language, namely, as including not only the actual fabric of the building, but in addition the soil upon which it stands. They think this latter is its true meaning, and therefore that the land upon which the cathedral stands is exempt from taxation. As to the main point contended for as well as the second point the appeal fails.

There only remains for consideration the application of sec. 484 of this Act of 1914 to the appellants' action. That section only deals with actions brought against a municipality for the unlawful doing of a thing which the munici-

B.C.

S.C.

IN RE STEWART MERCANTILE CO. LTD.

pality might have lawfully done. The Bishop's action is not of that character. It is an action brought to obtain a declaration that the land upon which his cathedral stands is not taxable, and an injunction restraining the corporation from offering this land for sale in respect of unpaid rates, on May 26, 1919, or any other day.

Their Lordships are therefore of opinion that the judgment appealed against was right, and should be affirmed, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

IN RE STEWART MERCANTILE CO., LTD.

British Columbia Supreme Court in Bankruptcy, Murphy, J. October, 1920.

Bankruptcy (§IV.—35)—Bankruptcy Act (Can.)—Sec. 8, Sub-sec. 2 (a)—Application.

Where a company has undertaken after the coming into operation of the Bankruptcy Act, 1919 (Can.), ch. 36, liabilities incurred by a partnership before the Act came into operation, a debt based on such agreement is not within sec. 8, sub-sec. 2 (a) of the Act, and a receiving order may be made as regards such debt.

[See Annotation, Bankruptcy Act of Canada, 1920, 53 D.L.R. 135.]

The Stewart Mercantile Co., Ltd., on its incorporation on July 1, 1920, agreed in writing with the Stewart Trading Co., a partnership to take over all the assets and liabilities of the Stewart Trading Co., and shortly afterwards exhibited a statement of its assets and liabilities to a meeting of its creditors which shewed that it was unable to pay its debts as they became due.

E. A. Lucas, for petitioning creditor.

F. C. Aubrey, for debtor.

Murphy, J., on a petition of a creditor for a receiving order under the Bankruptcy Act, 1919 (Can.), ch. 36, held that the debt on which the petition was founded was not one that was contracted or in existence before the coming into operation of the Bankruptcy Act, and that therefore sec. 8, sub-sec. 2 (a), of the Act did not apply.

Section 8, sub-sec. 2 (a), of the Bankruptcy Act is as follows: "Notwithstanding anything in this Part appearing, no act or omission of a debtor in respect of any debt which was contracted or existed before the coming into operation of this Act, shall be deemed an available act of bankruptcy, nor shall any such debt be deemed sufficient to found the

presentation of a bankruptcy petition, but it shall be provable in any proceedings otherwise founded under this Part or otherwise."

WILSON v. MUNICIPAL DISTRICT OF PROGRESS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 27, 1921.

Highways (§IV.—115)—Ice on Highway—Sleigh Overturning—Municipal Districts Act, 2-3 Geo. V. 1911-12 (Alta.), ch. 3—Knowledge of Condition of Road by Party Using—Negligence—Liability of Municipality.

In considering what is a proper state of repair for a highway under the Municipal Districts Act, 2-3 Geo. V. 1911-12 (Alta.), ch. 3, consideration must be given to the size of the district and its financial ability to raise money for the purpose of making repairs, and also the extent to which the road is used. Negligence on the part of the persons travelling over it knowing of its dangerous condition must also be considered in fixing liability.

[Cranston v. Town of Oakville (1916), 10 O.W.N. 315; (1917), 39 D.L.R. 760, 55 Can. S.C.R. 630, applied. See Annotation, Liability of municipality for defective highways or bridges, 46 D.L.R. 133.]

APPEAL from the judgment of Scott J. after trial without a jury. The plaintiffs - husband and wife - met with an accident while travelling on one of the roads in the defendant district, in which the wife was injured. The action is for damages resulting from such injury.

G. F. Auxier for appellants.

A. H. Clarke, K.C., for respondent.

The judgment of the Court was delivered by

Harvey, C. J.:— On January 2, 1920, the plaintiffs were driving in a sleigh in which there was about half a ton of coal in the front end, when they came to a declivity where a road had been constructed along a bank into which a cutting had been made to some extent with the result that on one side of the road there was a bank and on the other a slope downward. Snow had fallen during the winter, though no snow of any consequence had fallen for 3 or 4 weeks, but during that time the weather in the daytime had been mild with sunshine, with the result that there had been thawing and freezing and the road was icy and on the travelled part sloped out and downward toward the sloping side of the bank. The sleigh in which the plaintiffs were driving slid and went down the bank a little way and apparently met an obstruction and was overturned and the female plaintiff was thrown out and received injuries including a broken arm. The male plaintiff was uninjured. The trial

Alta.

S.C.

WILSON v. MUNICIPAL DISTRICT OF PROGRESS.

Judge dismissed the action, being of opinion that the defendants' obligation to keep roads in repair did not require them to keep the roads free from ice, which would be beyond the means at their disposal.

In my opinion there is much to be said for this view. It is true sec. 219 of the Municipal Districts Act 2-3 Geo. V. 1911-12 (Alta.) Ch. 3 declares that "Every council shall keep in repair all bridges, roads, culverts and ferries and the approaches thereto.....and in default of the council so to keep the same in repair the municipality shall be liable for all damage sustained by any person by reason of such default." But, as was pointed out in Foley v. East Flamborough (1898), 29 O. R. 139, at p. 141 "repair" is a relative term and in Town of Oakville v. Cranston (1916), 10 O.W.N. 315, at p. 316, [affirmed (1917), 39 D.L.R. 762, 55 Can. S. C. R. 630], Meredith C. J. C. P. said "In all cases the question should be - is the road in a reasonable state of repair having regard to the needs of the traffic over it and the means at the disposal of the municipality for the repair of all its roads". A consideration of some of the provisions of the Municipal Districts Act shews that the burden with which the district is to be charged in respect of repairs cannot be intended to be very heavy. Section 8 provides that a district generally shall be 18 miles square. The ordinary road allowances in such an area without considering any other trails or roads would be approximately 500 miles in length. The council consists of 6 members who may represent different portions of the district. The council is given the usual authority and duty of self government for rural districts of this character, including the power to raise money for the necessary purposes, but its right to tax is restricted to lands without improvements and the rate of taxation is limited by sec. 294 to a maximum of 1% of the assessed value of such lands.

In some districts the roads may need much more attention and may require a much greater expenditure of money than in others but the limitation of means must be considered with reference to those of the greatest requirements in endeavouring to estimate the extent of the liability imposed by the statute. In respect to the road in question money had been spent in the summer in grading and also in erecting some fences to keep the snow from drifting in and interfering with the traffic.

There is the evidence of several witnesses that the road in question at the place where the accident occurred was

dangerous while there is also evidence that with care all danger could be avoided. But whether or not the road was in a reasonable state of repair, in my opinion the plaintiffs cannot succeed by reason of their contributory negligence in failing to take reasonable care.

There are three respects in which the evidence points to a want of reasonable care.

The accident took place at night but it was bright moonlight and everything could be seen. The road had been travelled frequently by the plaintiffs, the wife says once or twice a week at least. The husband says he knew of other sleighs having slipped over the side. They were, therefore, well aware of the condition of the road and of the need to take care. The evidence is clear that he ought to have driven slowly but one of his own witnesses who arrived on the scene just after the accident, said to him when he saw the accident that he must have been driving fast to have such a spill. Another witness says that after the accident the female plaintiff said they were driving fast. At the trial they both deny that they were driving beyond a walk but their evidence on the point is not wholly satisfying.

Then there is evidence that by driving a little closer to the bank one runner would run in snow or in a depression and thus avoid the danger of sliding. But what appears to me of even more importance and of absolute certainty of application to the case is that the plaintiffs might easily have walked down the hill. They both state that they considered it very dangerous and they call many witnesses to confirm them in this. Then they had a passenger who was riding with them who got out before they reached the top of the descent and walked. He was not a witness and it does not appear that he got out and walked for greater security but he was very close behind and helped pick Mrs. Wilson up after the accident, which happened almost at the foot of the hill. Then near the top of the descent the sleigh started to slide over the side but was pulled back without injury. Thus the plaintiffs had every reason for appreciating the need for taking all reasonable precautions. If the road was not dangerous there is no liability on the defendants. If it was dangerous the plaintiffs had the fullest appreciation of it and by the simple expedient of walking down the hill could have avoided the danger of injury. When they saw fit to ride, especially in a sleigh with a load of coal, in my opinion they did so at their own

Sask.

IN RE LAND TITLES ACT. IN RE CITY GARAGE AND MACHINE CO.

risk.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

IN RE THE LAND TITLES ACT.

IN RE CITY GARAGE AND MACHINE CO., LTD.

Decision of C.J. Milligan, Master of Titles, Saskatchewan. November 3, 1920.

Bankruptcy (§I.—6)—Bankruptcy Act (Can.)—Registration of Assignment in Land Registry Office—Assignments Act, R.S.S. 1909, ch. 142—Homesteads Act, Sask. Stats. 1920, ch. 66.

An assignment which is in the form prescribed by the Bankruptcy Act, 1919 (Can.), ch. 36, which came into operation on July 1, 1920, and which is accompanied by the affidavit of the authorised trustee provided for in sub-sec. 11 of sec. 11 of the Act, must be accepted for registration although not accompanied by the affidavit provided in sec. 7a of the Saskatchewan Assignments Act, R.S.S. 1909, ch. 142, as amended 1917, ch. 34, and sub-sec. 4 of sec. 7 of the Saskatchewan Homesteads Act, R.S.S. 1920, ch. 69, as amended by 1920 Sask., ch. 31.

[See Annotations on Bankruptcy Act of Canada, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 1921, 59 D.L.R.]

A reference under sec. 158 of the Land Titles Act, R.S.S. 1920, ch. 67, by the Registrar of the Swift Current Land Registration District as to whether he should register an assignment for the general benefit of creditors.

E. Jackson, for the authorised trustee.

Milligan, M.T.:—The questions asked by the Registrar in his reference to me are as follows:—(1) Should I register this assignment in view of the uncertainty as to what property is included therein? (2) If I should register it, against which name should I enter it? (3) Should this assignment be accompanied by an affidavit as provided for in sub-sec. 4, sec. 7, of the Homesteads Act, R.S.S. 1920, ch. 69?

My answer to the first question is that this assignment is in the form prescribed by the Bankruptcy Act, 1919 (Can.), ch. 36 (Form No. 18), in the appendix to the general rules under the Bankruptcy Act which came into operation on July 1, 1920, and is accompanied by the affidavit of the authorised trustee provided for in sub-sec. 11 of sec. 11 of the Bankruptcy Act, which sub-section provides that:—

"Every Registrar or other officer for the time being in charge of such proper office to whom any trustee shall tender or cause to be tendered for registration or filing any such receiving order or authorised assignment shall register or file the same according to the ordinary procedure for regis-

tering or filing within such office, documents which evidence liens or charges against real or immovable property (and subject to payment of the like fees) if at the time of the tender of such document for such purpose there be tendered annexed thereto as part thereof an affidavit" by the trustee that the document is tendered for registration by a duly appointed trustee under the Bankruptcy Act. The assignment in question must therefore be registered as sub-sec. 13 of sec. 11 of the Bankruptcy Act provides that a Registrar refusing to register such an instrument shall be guilty of an indictable offence. The fact that the form of assignment does not set out the specific property assigned is not unusual, as the form under our old provincial Assignments Act, R.S.S. 1909, ch. 142, did not necessarily contain the description of the specific lands, and the Registrar must register it in his general register so as to cover all the lands which may be registered in his district in the name of the City Garage & Machine Co., Ltd.

The reason for the Registrar asking the second question is that the assignment is executed, not only by the City Garage & Machine Co., Ltd., under its corporate seal, but is executed by William C. Stewart, Glen Brown and Herbert Linell under their seals, and the Registrar was evidently doubtful whether this was a limited liability company, or a firm composed of these three individuals, as, in the assignment, they describe themselves as "trading under the name of the City Garage & Machine Company, Limited." Mr. Jackson assures me that it is a limited liability corporation, and produced authority from the Canadian Credit Men's Trust Ass'n, Ltd., to me to register it only against the assets of the City Garage & Machine Co., Ltd., as it was not intended as an assignment for the benefit of creditors of the individual members of the company. I would therefore direct the Registrar to register it only against the lands of the City Garage & Machine Co., Ltd.

Having answered the first two questions, there only remains the consideration of the question whether the assignment must be accompanied by an affidavit under the Homesteads Act, 1920, ch. 66.

Section 7, sub-secs. 2, 3 and 4 of the Homesteads Act of this Province provides for the protection of the homestead rights of the wife of the assignor where he makes assignments for the general benefit of his creditors under the provincial Assignments Act, but it seems clear from the deci-

Sask.

IN RE LAND TITLES ACT. IN RE CITY GARAGE AND MACHINE CO.

sion of the Privy Council in the case of Att'y-Gen'l of Ontario v. Att'y-Gen'l for Canada, [1894] A.C. 189, 63 L.J. (P.C.) 59, and from Tooke Brothers v. Brock & Patterson, Ltd. (1907), 3 N.B. Eq. 496, that the Assignments Act of this Province is only valid so long as there is no Dominion Insolvency Act which would conflict with it, and that, when the Dominion Bankruptcy Act came into force, it automatically repealed the Assignments Act of this and other Provinces of the Dominion in so far, at least, as this Act affects assignments of insolvent debtors for the general benefit of their creditors, and that, among other sections of the Assignments Act which must have been repealed by the coming into force of the Dominion Bankruptcy Act, sec. 7a of the Saskatchewan Assignments Act would cease to have effect. That sec. 7a (as amended 1917, ch. 34) provides that:—

"Every assignment for the benefit of creditors shall be accompanied by an affidavit of the assignor stating whether or not he has a homestead, and, if he has, giving a description of the same sufficient to identify it for registration purposes."

And sub-sec. 4 of the same section provides:—"Such affidavit shall also state whether or not the assignor has a wife, and if he has a wife shall give her name and address."

And sub-sec. 5 of the same section provides that the Registrar upon the filing of the assignment shall notify the wife by registered letter that her rights in her husband's homestead shall cease at the expiration of 30 days from mailing of the notice, unless, in the meantime, she files a caveat in Form D in an Act respecting Homesteads, 1915, ch. 29, against the land claimed as a homestead.

Sub-secs. 2, 3 and 4 of sec. 7 of the Homesteads Act, 1920, as amended 1920 (Sask.), ch. 31, contain practically the same provisions, and these sub-sections of sec. 7 of the Homesteads Act must also be considered as having been rendered nugatory by the coming into force of the Dominion Bankruptcy Act, for, if the provincial Assignments Act has gone by the board, as I believe, these sections of the Homesteads Act must also fall with it. From this it does not necessarily follow that the rights of the wife in the homestead cease upon the assignment for the general benefit of creditors under the Dominion Bankruptcy Act, but that is a question which must be left to the Courts to determine. So far as the Registrar is concerned, my opinion is that he can neither

require the assignment under the Dominion Bankruptcy Act to be accompanied by the affidavit provided in sec. 7a of the provincial Assignments Act, and sub-sections of sec. 7 of the Homesteads Act, nor without this can he notify the wife that her rights in the homestead expire unless she files a caveat within 30 days, for the Registrar has not the necessary information as to whether the assignor has a wife, or whether any of the land is homestead land.

Answering the third question of the Registrar specifically, I can only say that, in my opinion, he should register the assignment although it be not accompanied by the affidavit provided for in sub-sec. 4, sec. 7, of the Homestead Act of this Province.

It is quite clear from an examination of the Bankruptcy Act that the provincial legislation will require to be brought into keeping with it, and I understand that the Law Amendment Commission has provided for the elimination of such legislation as is at present in contravention of the Bankruptcy Act.

I have dealt with these matters at length for the reason that the Bankruptcy Act being not only new legislation but legislation covering a field which was formerly pre-empted by the provincial legislation so far as provincial legislation could preempt it, the Registrars naturally require some direction with regard to its application so far as their duties are concerned.

In the consideration of these matters I have had much assistance from Mr. Jackson, the solicitor for the authorised trustee.

FLEWELLING v. JOHNSTON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 26, 1921.

Waters (§I.A—9a)—Navigable Waters — Alberta — Doctrine Applicable—Rights of Riparian Owners Where the Irrigation Act Applies.

The doctrine that in non-tidal waters prima facie the title to the bordering lands runs ad medium filum aquae is not in force in the Province of Alberta so far as to affect waters, lakes or rivers, which are in fact navigable. The evidence as to low and high water marks is of value in deciding the question of navigability, and a river about 300 feet wide at low water mark, about three feet deep, with an ordinary yearly rise of 9.5 feet lasting about two months of about seven months while it remains unfrozen, and on which small boats and even power boats can navigate, is as a matter of fact and of law a navigable river, and even if a river is not navigable in fact

Alta.

S.C.

or for any reason is not to be treated as navigable, yet where the Irrigation Act, R.S.C. 1906, ch. 61, applies the bed of the river is not covered by the Crown Patent.

FLEWELLING v. JOHNSTON.

APPEAL by defendants from a judgment of Crawford, District Court Judge in an action for trespass on land and an injunction. Reversed.

F. C. Jamieson, K. C. for appellant; A. C. L. Adams for respondent.

Harvey, C.J.:—Concurs with Stuart J.

Stuart, J.:— I agree with the conclusions of law reached by my brother Beck.

The real contest in the case is one of fact as to where the average high water mark is situated at the place in question. I agree that on the whole the testimony of Macleod is a safer guide than any inference that may be drawn from the photographs.

But while I concur for this reason in his disposition of the appeal I feel considerable dissatisfaction over the possible permanent decision of a right of property upon such rather meagre evidence as to a matter of fact as was adduced here, particularly when it is still quite possible to determine with certainty what the exact fact is by means of actual observation. As there was really no practical damage resulting to the plaintiff from the alleged trespass upon this almost valueless speck of land I should have preferred a postponement of the trial and the direction of observations by a surveyor appointed by the Court.

However, as the plaintiff sought only an injunction against one individual, the defendant, and there was no party to the action really representing the rights of the public generally or of the Crown, I should wish it to be understood that in agreeing to a reversal of the judgment I do so merely on the ground that the plaintiff did not prove his title to the land in question by the evidence adduced and I think it should still be considered as open to the plaintiff in an action against any other person to ask for a different finding of fact as to the limits of his property. The present defendant is given no rights by our judgment which he can assign, and I do not think the judgment he obtains can as against the plaintiff enure to the benefit of any other person or persons or of the Crown.

The defendant did not claim any right of property or right of way himself. He simply denied that the plaintiff had any right to stop him. Therefore if the plaintiff should hereafter succeed in establishing his ownership of

the land in question as against the Crown or get the Crown to admit it, I do not think the present judgment should stand in his way even as against the defendant. The dispute as to property is exclusively between the plaintiff and the Crown, which was not represented.

Beck, J.:— This is an appeal by the defendants from the judgment of Crawford, Dist. Ct. Judge.

The plaintiff's action is for trespass on land and an injunction. The plaintiff is patentee from the Crown of all of the north-west quarter of sect. 36 in Township 56 range 7 west of the 5th meridian which lies north of the right bank of the Pembina river as shewn on the Dominion Government plan on file in the Department of the Interior, containing 44.70 acres.

The patent contains a proviso as follows:—

"Provided and it is hereby declared that these presents do not vest in the grantee any exclusive or other property or interest in or any exclusive right or privilege with respect to any lake, river, stream or spring, or other body of water within or bordering on or passing through the aforesaid lands or in or with respect to the water contained or flowing therein or the land forming the bed or shore thereof."

The words of this proviso are, it seems, inserted in all patents, in pursuance, I fancy, of a departmental regulation, in consequence of and as a repetition verbatim of the words contained in the Irrigation Act, R. S. C. 1906, ch. 61, sec. 7.

It doubtless appears in all patents although in the description of the lands granted there is no reference to water. Hence it would seem that the proviso can be of no aid in construing the description of the land in question. And the meaning of that description, or rather of the words "north bank" is the question which this appeal calls upon us to decide.

An examination of the official Dominion Government Township plan shews that the four legal subdivisions of the north-west quarter of sect. 36 made fractional by the Pembina river crossing the quarter section have their acreage marked as follows.—

		Acres.
L.S. 16	South & West of the River	21.20
" "	North & East " " "	8.06
" 15	North " " "	36.10

Alta.

S.C.

FLEWELLING v. JOHNSTON.

"	12 South	"	"	39.90
"	11 "	"	"	32.60
				137.86

So that the river takes from the quarter section 22.14

160.00

It is stated in the evidence that the river is about 300 ft. in width at the locality in question. The river has its source in the Rocky Mountains and ultimately joins the Athabasca river.

The Dominion Parliament has exclusive legislative jurisdiction over navigation and shipping. B.N.A. Act. sec. 91, item 10.

R. S. C. 1906, ch. 115, (R. S. C. 1886, ch. 92). An Act Respecting the Protection of Navigable Waters, was declared to be within the competence of the Dominion Parliament in Att'y. Gen'l. for the Dominion of Canada v. Atty's. Gen'l. for the Provinces of Ontario, etc., in [1898] A.C. 700. That Act assumes that the question of tidal or non-tidal does not enter into the question of whether a river is navigable or not. (See e.g. secs. 21, 26).

The question whether a river is navigable or not is one of fact. There is a distinction between "floatable" and "navigable." The former means floatable for loose logs; the latter navigable for boats of any character or even for rafts of logs. This seems to be the distinction made in the case of Tanguay v. The Canadian Electric Light Co. (1908), 40 Can. S. C. R. 1, approved by the Privy Council in Maclaren v. Attorney General for Quebec, 15 D. L. R. 855, [1914] A. C. 258. 20 Rev. Leg. 248. In the last mentioned case the Privy Council held that the English rule of law, that a conveyance of land expressed to be bounded by a non-navigable river must be presumed to confer ownership ad medium filum aquae in the absence of words of exclusion, holds good in the Province of Quebec.

In Barthel v. Scotten (1895), 24 Can. S.C.R. 367, it was held that a grant of land bounded by the bank of a navigable river or an international waterway does not extend ad medium filum aquae.

In re Provincial Fisheries (1896), 26 Can. S.C.R. 444, Gwynne, J., said that the rule that riparian proprietors own ad medium filum aquae does not apply to the great lakes or navigable rivers.

In Keewatin Power Co. v. Kenora (1906), 13 O.L.R. 237, Anglin, J. held, as stated in the head note, that:—

"The restriction of the presumption of the common law, as administered in England, in favour of Crown ownership of the alveus of navigable waters, for the protection of public rights of navigation and fishery therein, to navigable tidal waters, is apparently due to the non-recognition in early times of the necessity of protecting such public rights in other navigable waters, and an acquiescence in the right of riparian owners of land bordering thereon to the bed of such waters ad medium filum aquae; whereas in this Province such public rights in all rivers navigable in fact have been deemed always existent in the Crown ex jure naturae, so that the title in the bed thereof remained in the Crown after it had made grants of land bordering upon the banks of such rivers, the doctrine of ad medium filum aquae not applying thereto."

This Court has declared in Rex v. Cyr (1917), 38 D.L.R. 601, 29 Can. Cr. Cas. 77, 12 Alta. L.R. 320 at p. 325, that where resort is to be had to the common law the applications of its principles are not necessarily to result in same decisions as have been or may be given by the English Courts, but that account must be taken of the different conditions prevailing in this country, not merely physical conditions but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question.

The decision of Anglin, J., was reversed by the Ontario Court of Appeal (1908), 16 O.L.R. 184, but explicitly on the ground of the precise wording of the statute of the Province, R.S.O. 1897, ch. 111, sec. 1, enacting that "In all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England as they stood on the said 15th of October, 1792, as the rule for the decision of the same.....except so far as the said laws may have been repealed by any Act of the late Province of Upper Canada .....still having the force of law in Ontario, or by these Revised Statutes."

The Court held that it was restricted by this express enactment so that the body of law introduced into the Province was thereby much more distinctly defined than the law carried by settlers to a new country, and that, by reason of the restriction, the Court could not make different application of the larger principles of the common law in view of

Alta.

S.C.

FLEWELLING v. JOHNSTON.

the different conditions to and under which it was to be applied.

I much prefer the view expressed by our own Court and believe that that view was equally open to the Court of Ontario as to the Courts of this Province; but in any case there is a very notable difference in the wording of the statute introducing the law of England into the North West Territories and so into this Province.

By the North West Territories Act, R.S.C. 1886, ch. 50, sec. 11, as amended, 60-61 Vict. ch. 28, sec. 4, it was enacted that:—

"Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, 'in so far as the same are 'applicable' to the Territories,' and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories or of the Parliament of Canada, or by any Ordinance of the Lieutenant-Governor in Council or of the Legislative Assembly."

The words which I have quoted do not appear in the Ontario Act. The quoted word "applicable" means "suitable," "properly adapted to the conditions of the country". Brand v. Griffin (1908) 1 Alta. L. R. 510, I accept then, for this Province at least the view propounded by Anglin, J. In that view the doctrine that in non-tidal waters prima facie the title to the bordering lands runs ad medium filum aquae is not in force in the Province so far as to affect waters - lakes or rivers - which are in fact navigable.

Having already reached this conclusion I find that the question has been most carefully considered by the Court of Appeal of New Zealand. In The King v. Joyce (1904), 25 N.Z.L.R. 78, the Court says, at p. 87: "In the case of Mueller v. The Taupiri Coal Mines (Ltd). (1900), 20 N. Z. L. R. 89, this Court held that a grant (by the Crown) of land bounded by a navigable but non-tidal river does not grant the land ad medium filum fluminis." In the earlier case Williams, J., points out that the English decisions distinctly recognise that the presumption that a grant to the border of a non-tidal river carries a title ad medium filum aquae, is easily rebuttable by the term of the grant and the surrounding circumstances, and more easily in the case

of a grant from the Crown.

He then considers the application of the presumption to highways and adopts with entire approval the decision of Higinbotham, J., in the Victorian case of The Garibaldi Mining etc. Co. v. The Craven's New Chum Co. etc. (1884), 10 Vict. L.R. 233, and quotes Higinbotham, J., as saying that the presumption of a grant ad medium filum viae, at pp. 110, 111 (20 N. Z. L. R.) "cannot properly be applied to roads vested in the Crown and held by it in this country as a trustee for the benefit and use of the public. The presumption is itself founded upon a fiction which is not only not true, but is the reverse of the truth.— namely, that the roads are of no use to the Crown as grantor, but that they may be of use to the owners of the adjoining land as grantee. The fact is that the public roads, streets and highways are of the highest value and utility to the public, who are the real and true owners of them, and they cannot lawfully be used for any purpose whatever by the adjoining owners except for the purpose of passage, which is common to those owners and to every member of the community".

Williams, J., continues at pp. 111 (20 N.Z.L.R.): "The principle that the road would not pass by a grant of land adjoining where the grantor had an object in retaining the land over which the road was laid out is recognized in the English cases of Micklethwait v. Newlay Bridge Co. (1886), 33 Ch. D. 133. The Plumstead Board of Works v. The British Land Co. (1875), L.R. 10 Q.B. 203, and Leigh v. Jack (1879), 5 Ex. D. 264". Then he refers to the New Zealand legislation with regard to highways which seems in its general character to correspond closely with our legislation on the same subject.

The other members of the Court put forward much the same arguments. Martin J. refers in addition to the English cases cited by Williams, J., to Prior v. Petre, [1894] 2 Ch. 11 at p. 21; Beckett v. Corpn. of Leeds (1872), L.R. 7 Ch. 421, 425, Williams, J., lays special emphasis on this: that by the law of England there is no public right of navigation in waters, the soil of which is vested in the proprietors of the adjoining lands, unless that right has been acquired by use and cites, as establishing that proposition, the judgment of the House of Lords in Orr-Ewing v. Colquhoun (1877), 2 App. Cas. 839.

He says that the presumption of a grant by the Crown

Alta.

S.C.

FLEWELLING v. JOHNSTON.

ad medium filum aquae is especially rebutted if it is found that the effect of holding the soil of the river to pass will be to destroy the public right of way upon the river.

As to whether the river is in fact navigable, the only witness who was asked directly the question whether or not it is navigable was Driscoll, a Dominion land surveyor, who apparently had never seen the river, or at all events the portion of it in question.

His evidence in this respect was as follows:

"The Court: This is not a navigable river? This is a non-navigable river, is it not? A. Yes. Mr. Adams (counsel for plaintiff): Did you say non-navigable? A. Yes; that is, to all intents and purposes. There has never —I have not heard of any stream flowing into it; it is not what we call a navigable, although small boats can perhaps go on it and in some cases power boats; but I do not think it comes within the meaning of a navigable river."

But the evidence as to low and high water marks is I think of value in deciding the question of navigability. The evidence for the plaintiff was that given by himself and Driscoll—the latter speaking only from photographs; that for the defendants that given by Macleod, a Dominion land surveyor, who had visited the place in question, and by the two defendants. Macleod made a most careful examination testing the correctness of his conclusions, or rather basing his conclusion principally upon his examination of the opposite shore, which, for reasons he gave, seemed the surest method of fixing the ordinary high water mark. He fixed the ordinary high water mark 9.5 feet above the approximate level of the ice—the trial was held in February of this year—the level of the ice being approximately low water mark. The river is stated, as I have said, to be about 300 ft. wide at the point in question. Low water seems to be at the place in question about 3 ft. deep. With a river of such size and depth and an ordinary yearly rise of 9.5 ft. lasting about 2 months of about 7 months while it remains unfrozen, and with Driscoll's practical admission that small boats and even power boats could navigate it—something which must be obvious, and with one's general knowledge of the use to which all such rivers are put to by travellers, traders and others for commercial purposes, it seems to me that it is evident that the Pembina river is as a matter of fact and law a navigable river, notwithstanding Driscoll's opinion—apparently a con-

clusion of law—that it is not so.

The Dominion Land Surveys Act, 7-8 Edw. VII. 1908, (Can.) ch. 21, regulates the surveys of Dominion Lands.

Section 31 says that:—

"The Surveyor General shall require every Dominion land surveyor * * * to take and subscribe an oath or make and subscribe an affirmation, on the return of his survey of Dominion lands that he has faithfully and correctly and in his own proper person, executed such surveys in accordance with the provisions of this Act and the instructions of the Surveyor General".

A book of printed instructions issued by the Surveyor General under the above mentioned section was produced and proved by Driscoll, D. L. S.

The following instructions appear in this book:—

"132. In connection with surveys of Dominion lands, traverses are made for the following purposes:— For defining the boundaries and the contents of a parcel of land fronting upon a river or lake; for ascertaining the area of the portion of a parcel of land occupied by a body of water and thereby rendered useless for farming; for connecting a point or line or a survey with another point or line of the same, or of another survey, or with some other reference object."

"133. The traverse of a water front of a parcel is made for ascertaining the contents of the parcel and as a means of identification of the water boundary.

Other traverses, such as that of a lake entirely within a quartersection, are made only for the purpose of ascertaining the quantity of land subject to sale and to be paid for by the purchaser.

"134. The courses of a traverse are not boundaries of the parcels fronting on bodies of water. Lands abutting on tidal waters are bounded by the line of ordinary high water mark. In the case of a lake or navigable stream, the boundary is the edge of the bed of the lake or stream, which edge is called the bank.

The bed of a body of water has been defined as the land covered so long by water as to wrest it from vegetation, or as to mark a distinct character upon the vegetation and upon the soil itself where vegetation extends into the water. According to this definition the limit of the bank is the line where vegetation ceases, or where the character of the vegetation and soil changes.

Alta.

S.C.

FLEWELLING v. JOHNSTON.

The foreshore or shore is the strip of land lying along tidal water, over which the daily tide ebbs and flows; it is the space between high and low water marks at ordinary tides.

In making traverse surveys, the surveyor must bear in mind the following rules determining the ownership of lands fronting upon bodies of water and the rights of the owners.

"135. The grantee of a parcel of land fronting upon a lake or river acquires not only the land actually surveyed, but also the right to future additions to the parcel which may result from gradual alluvion or dereliction resulting from natural causes.

There the land is slowly and imperceptibly added to, either by alluvion or by the recession of the water of a river or lake, whether navigable or not, the new land thus formed belongs to the riparian owner in front of whose land it is formed, and the process is held to be imperceptible where its effects are so gradual that it is not discernible from moment to moment, though the fact that there has been an increase in the land may be perceptible from year to year or at shorter intervals. The converse is also true, that lands gradually encroached upon by the water upon which they border cease to the extent of the encroachment to belong to the former owner.

On the other hand, sudden and sensible additions to or subtractions from lands arising from similar causes do not cause any change in ownership.

"136. Riparian owners whose lands border upon unnavigable waters are held to be the owners of the bed of such waters in front of their holdings ad filum aquae. Their rights in this regard may depend to some extent upon the precise terms of description by which their lands have been conveyed to them. An exception is made by the Irrigation Act for the Provinces of Saskatchewan and Alberta and for the North West Territories, except the provisional Districts of Mackenzie, Franklin and Ungava, sec. 7 of the Act providing that no grant shall be made by the Crown of any exclusive property or right in the land forming the bed or shore of any lake, river, stream or other body of water. The word shore in this section is presumed to be intended to designate that part of the bed which is uncovered when the water is low.

"137. From the foregoing it follows that along tidal waters the line to be traversed is the high-water mark at ordinary tides.

For a lake or navigable river, and also, where the Irrigation Act applies, for a river not navigable, the line to be traversed is the bank. A parcel fronting on the lake or river does not include the bed, nor does it include the adjoining islands unless the survey shews distinctly that they are included.

Where the Irrigation Act does not apply, the middle of the main channel is the line to be traversed for an unnavigable stream which is adopted as a boundary between the adjoining lands. In such a case a parcel fronting on the stream includes the bed of the stream and the adjoining islands as far as the middle of the stream."

The surveys made under the Dominion Lands Surveys Act and in accordance with the foregoing instructions are the foundation for the issue of Crown Patents. It would seem to be proper to revert to these instructions as an assistance in the construction of patents and as indicating the intention of the Department of the Interior in respect of grants. They should be taken I think as fixing the meaning of the words "bank", "shore", and "bed", and the intention, made more distinct than in other cases, that in the grant of lands in territory where the Irrigation Act applies, as in Alberta, the Crown does not intend to grant the bed of the river.

The evidence of Macleod that the place in respect of which trespass is complained of is below ordinary high water mark must, I think, be accepted.

As I have already said I think too that it must be found to be a fact when the proper definition of "navigable" is adopted, that the river is navigable in fact.

In taking these findings of fact I would hold that there is no rule of law in Canada carrying prima facie the title of a bordering owner to the middle thread of the water in the case of waters navigable in fact; that the boundary in such cases is ordinary high water mark; that even if it were found as a fact that the river is not navigable in fact or if for any reason it is not to be treated as navigable, yet, the Irrigation Act applying, the bed of the river is not covered by the Crown patent to the plaintiff.

I think therefore the appeal should be allowed with costs and the plaintiff's action dismissed with costs.

Appeal dismissed.

Can.

S.C.

HAWKS v. HAWKS.

HAWKS v. HAWKS.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin, and Mignault, JJ. June 20, 1921.

Husband and Wife (II.G—100)—Title to Property Bought and Paid for by Husband—Held in Name of Wife—Mutual Rights—Jurisdiction of Court to Entertain Action when Property Situate in Another Province.

The appellant is the wife of the respondent; they both reside in British Columbia, but for some years have not been living together. Shortly after he was married, the respondent began speculating in some Indian lands near Fort William, Ont., and had got some assignments of the rights of parties who had agreed through the Indian agent there to buy from the Crown a lot of 100 acres more or less. When he had acquired the rights of such locatees to the extent of 600 acres more or less he was warned that in law he could buy no more, and then adopted the plan of buying and dealing with further acquisitions in the name of his wife. As the result thereof, four Crown patents were issued to the appellant each for a hundred acre lot. In an action instituted in British Columbia claiming delivery by respondent to her of such patents, the Court of Appeal reversing the trial judgment dismissed the action on the ground that property bought and paid for by the husband even though held in the wife's name belonged to the husband in the absence of any agreement between the parties to the contrary, and also on the ground that the common law doctrine that what belongs to the husband belongs to the wife, on which the action was based, could not be upheld. The Court held affirming the decision of the Court of Appeal of British Columbia, that upon the plaintiff's own evidence, whatever interest she might have in the property in dispute was not such an interest as entitled her to maintain a claim for the exclusive possession of the title deeds. Quaere as to the jurisdiction of the Supreme Court of British Columbia to entertain the suit, the property being situate in Ontario.

APPEAL by plaintiff from the judgment of the Court of Appeal of British Columbia (1920), 56 D.L.R. 265, dismissing an action by a wife to establish her right to certain lands registered in her name but bought and paid for with the husband's money. Affirmed.

F. H. Chrysler, K.C., for appellant.

E. P. Davis, K.C., for defendant.

Davies, C.J.:—I have reached the conclusion that this appeal must be dismissed.

The action was one brought in British Columbia by the wife of the defendant to recover from her husband the possession of certain title deeds of property in Ontario which stood in her name.

Morrison, J., without giving any reasons, gave judgment for the wife, awarding a return to her of the documents in question.

On appeal to the Court of Appeal (1920, 56 D.L.R. 265),

that judgment was reversed and the action dismissed, Macdonald, C.J.A. of the Court, holding that the plaintiff in her own evidence did not claim the lands in question as her own, but based her claim on the doctrine of the Common Law that "the husband and wife were one and that what was her husband's was hers and that she had entirely failed to show that her husband was a bare trustee for her of the title deeds," and, as Martin, J.A., put it, "it was apparent from plaintiff's own evidence that defendant was as much entitled to the custody of the patents in dispute as she was," or, as Galliher, J.A., states, "her view seemed to be that because she was the defendant's wife any property belonged to her as much as to him."

An examination of the evidence, especially that of the plaintiff herself, satisfies me beyond reasonable doubt that it was ample to support the findings of the majority of the Court of Appeal on the grounds on which they based their judgment, and that I would not be justified in setting aside that judgment. As a matter of fact I agree in the findings of fact of the Appellate Court that the plaintiff's own evidence shewed she did not claim the property as her own, but as property of her husband and not that he was a bare trustee of the title deeds for her.

I have carefully considered the reasons of the dissenting Judge, McPhillips, J.A., but am not able to accept his reasoning or conclusions.

As to the jurisdiction of the Court of British Columbia to determine a question of the title to lands in Ontario without any evidence of the law of that Province on the subject matter in question, I do not feel called upon to express any opinion. If the Courts of British Columbia had no such jurisdiction, then this action was properly dismissed on that ground alone, and, if they had jurisdiction to determine this action, I am not prepared to reverse the findings of the majority of the Judges of the Court of Appeal to the effect that on the plaintiff's own evidence, whatever interest she may have in the property in dispute, is not such an interest as entitled her to maintain her claim for the exclusive possession of the title deeds she claims. No objection was raised by the respondent to our jurisdiction to hear this appeal, and under all circumstances I would dismiss the appeal with costs.

Idington, J. (dissenting):—The appellant is the wife of the respondent to whom she was married September 17, 1902. They both reside in Vancouver in British Columbia; though for some years past not living together.

Can.

S.C.

HAWKS v. HAWKS.

When married he was carrying on some mercantile business in Fort William. In 1904 he began speculating in some Indian lands near that town and had got some assignments of the rights of parties who had each agreed through the Indian Lands' Agent there, to buy from the Crown a lot of 100 acres, more or less.

When such transactions had progressed so far that he had acquired the rights of such locatees to the extent of 600 acres, he was warned that in law he could not buy more. He then adopted the plan of buying and dealing with further acquisitions of said Indian Lands in the name of his wife. This he did with her consent and in pursuance of an oral agreement between them that she would comply with the statutory regulations governing the matters of settlement duties and improvements by virtue of which alone grants could be acquired. As the result thereof, four Crown patents, each granting an 100 acre lot, were issued to the appellant. As was quite natural, these patents were delivered to respondent, either by her or on her behalf, in 1910, exactly how is not clear, for she swears she had them in her hands in the Indian Agent's office, and the respondent has kept possession of them ever since.

This action was instituted in British Columbia claiming delivery by respondent to her of said patents, and was tried there.

The trial Judge decided in favour of the appellant, ordering the delivery to her of the said patents.

The Court of Appeal by a majority reversed said judgment and dismissed the action with costs.

On the opening of the argument herein, objection was taken from the Bench to our jurisdiction to hear this appeal. Neither counsel, apparently, had ever considered such an objection possible, but once taken, counsel for respondent submitted his client was entitled to rest thereon, as well as on the other question raised below, as to the jurisdiction of the Court in British Columbia to try the case. I have no doubt as to our jurisdiction to hear this appeal.

The objection to the jurisdiction of the Court in British Columbia, which tried the case, to do so, is attempted to be maintained on the grounds that the lands in question lie in the Province of Ontario, and the title to the said lands is in dispute, and cannot finally be determined elsewhere than in the appropriate Court in that Province.

Counsel for respondent rests his argument on the decisions in the cases of British South Africa Co. v. Companhia de Mocambique, [1893] A.C. 602, and same case in [1892] 2 Q.B. 358 (C.A.), and other decisions of which that In re Hawthorne, Graham v. Massey (1883), 23 Ch. D. 743, was most stoutly relied on.

The actual point ultimately decided in the firstly cited case was that an action for trespass to lands in a foreign state could not be tried by the Court in England in which the action was brought.

The opinion of Lord Herschel in so disposing of the case reviews the reasons therefor at length and seems to leave untouched the nature of this action which is that of a merely transitory and personal action, and does not necessarily involve the disposition of the ultimate rights of the parties.

Moreover, the respondent, instead of confining himself to his plea of denial of jurisdiction, sets out at length an elaborate defence of the merits which were tried out upon such defence.

I submit that, thereby, he has submitted to the jurisdiction of the Court and as he seeks to obtain the benefit of the judgment of the Court of Appeal on such merits, he must abide by the reversal thereof, if this Court so declares.

Thus for reasons appearing hereinafter, the case is narrowed down not to the trial of any title, but merely to the right to the custody of the patents.

I suggested to counsel for respondent during the argument, that possibly he would waive that judgment on the merits by the Court of Appeal and take a judgment solely based on want of jurisdiction, but that suggestion did not seem to meet with a responsive assent on the part of counsel.

It is, unfortunately, the case that the Court of Appeal did not decide the question of jurisdiction alone or at all, but distinctly, by the reasons assigned by the majority and by the formal judgment, dismissed the appellant's action with costs.

The case was fully argued out upon the merits here as well as upon the questions of jurisdiction of the Courts below. I have, therefore, perused the entire evidence and considered fully the merits of the case as if the issues presented by the pleadings in that regard had to be disposed of, and have, with great respect for the Court, appealed from,

Can.

S.C.

HAWKS v. HAWKS.

come to a very decided opinion that, on the merits raised by such issue, the decision is entirely wrong.

Indeed, I suspect the relevant law bearing upon the said issues, cannot have been presented to the Court. And I find in the factum of appellant herein the statement that the said Court directed counsel for appellant therein to confine his argument to the question of jurisdiction.

It is and has long been undoubted law that although a resulting trust may exist in favour of an acting purchaser who has directed the conveyance of the vendor to be made to a stranger, yet no such presumption exists in favour of a purchaser directing and procuring the deed of grant being made to his wife or child.

It is of course possible that the presumption of an intention of advancement or settlement in such cases may be rebutted. In this case, there was no evidence, of anyone but the parties hereto, of any value in that regard. And their evidence must be weighed in light of the history of their relations.

At the time when the question of the appellant undertaking the duties of a settler upon the lands in such manner and form as to entitle her to claim a patent therefor was first presented to her, in 1904, the parties hereto had been married only two years and were living in such harmony and affection that the prospect of their going upon the land to perform settlement duties, whereby the husband would acquire 600 acres and she 400 acres, if so much, and he pay the almost nominal price asked, it never was likely to occur to either that such a distribution of their acquisitions was inequitable. Nor was he likely to begrudge her then the prospect of enjoying such an acquisition, even if he expended the money he says he did.

Yet the Court of Appeal seems to rely solely upon her accidental descriptive phrase in evidence that man and wife enjoyed, or would enjoy, everything in common.

The vision of 1904 thus poetically described had vanished, I surmise, before the patents had issued and after she had endured the hardships of a settler. And it is not with what such poetic visions present but the actual realities of life. and presumptions of law, that we have to deal.

Before proceeding therewith I may quote the phrase upon which such stress has been laid. It appears thus:—"Q. Is it true that your contention is that you and your husband

are one and therefore what he had you had? A. It was at that time and until Mr. Hawks went off and left me. We were one."

I respectfully submit that is rather a slender basis on which to rest the judgment appealed from in face of her evidence which elsewhere appears as follows:—"Q. Then there is the statement in the defendant's defence which says this, in para. 3 of the statement of defence. There is one thing I want to point out, it deals with a lot, one of the lots, it is not material which. At the request of the defendant, the said Stewart by indenture of assignment transferred all his right, title and interest in the said land and in the said application to purchase unto the plaintiff, who at the same time, verbally agreed with the defendant to hold said lands as trustee for the defendant."

Mrs. Hawks, did you make that verbal agreement? A. Read that again, please. Q. At the time this land was assigned to you by Dufferin Stewart, did you make an agreement with the defendant, a verbal agreement, that you would hold that land in trust for him? A. No. Q. Did you at any other time? A. No, never. That was my own land."

In her cross-examination she had said as follows:—"Q. Mr. Hawks handled this property for the first ten years after it was acquired and paid the taxes and received the rents up to the end of 1915? A. He handled the property up to 1915. Q. Yes. A. No. After Mr. Hawks left the farm in 1911 he didn't handle it then. . Q. Did you live on those lands at this time or did you live on the adjoining lands? A. Lived on the farm. It was all one farm. * * * * Q. Well, go ahead. A. On my way out of course I collected the rent of the farm in Fort William, and he says 'you can go out there, and if you see any place you like you can have a car and a nice home too." When I was buying the home in Vancouver that is the first time he ever asked me about these lots. He never said anything to me before, so, of course, when I seen it was that way I just made up my mind I would say nothing, and when he came out here, he said I had paid too much for the home, and kicked up a fuss, and he said 'Will you sign these papers now?' I said, 'I am not going to sign any papers. You have not treated me right, and you don't want me around you.' And he lived here until October or November until March."

Can.

S.C.

HAWKS v. HAWKS.

Then she tells of his proposing to her to sell the whole of the property and give her a third, which she refused. As I understand it that was after she had, in 1913, arrived at Vancouver and bought a house in her own name for which he paid. And further on in cross-examination she says: "Q. One of the difficulties between you and Mr. Hawks was this, that he wanted to sell these lands and you held them up for what he complained, whether rightly or wrongly, was too high a price. A. Mr. Hawks never had the deal. * * * * Q. You say, then, in 1914 there was a dispute between you and Mr. Hawks, he making this complaint that you were holding up the prices too high? A. Yes, he wanted me to sign it right off. Q. Did you ever say that you were holding these lands for your husband or that you were getting them in your name for your husband? A. No. * * * * Q. You didn't catch my point. When did he make a demand on you for a show-down, so to speak? A. When he wanted me to sign them, do you mean? A. Yes, when he claimed that he was the owner? A. Well, I bought this house in Vancouver in the fall of 1913, and it was about then. Q. That is the first time he ever claimed to be the owner of these lands? A. That is the first time he ever asked me to sign the papers. He never claimed to be the owner. Q. What was it that led up to him making that demand on you? A. In buying the home, I guess. Nothing was said to me. * * * * Q. You cannot recollect? A. I know I worked on them after Mr. Hawks left them."

I submit that this evidence is what is material in regard to any recognition by her of the respondent's claim and furnished a rather complete denial of anything he says as to her acting as his trustee.

When they ceased, shortly after the issue of the patents, to have the regard for each other that they had had for apparently ten years of married life and she refused to assign to him her rights in the land in question, he ceased paying taxes on the lands covered by these patents and, in March, 1919, had got notice of the arrears from the township clerk. Then he wrote her the following letter:

"83 Grenville St.
Toronto, March 4th,1919.

Mrs. Nellie Mabel Hawks,
893 Broughton St.,
Vancouver, B.C.

Please take notice that I have this day received notice

from the Clerk of the Township of Neebing that the arrears of your taxes have not been paid and that the property is now subject to sale by the township. Also that unless they are paid by the 1st of May next, there will be an addtion of 10 per cent on the taxes.

The property referred to are lots 11, 12 and 14 in concession 2, Neebing S.R., District of Thunder Bay. I have no notice as yet concerning lot 12 in the 3rd concession, but as far as I know these taxes are also unpaid.

It is imperative that this matter is attended to at once, and I will be glad to have you advise me by return mail what you intend to do about it, and if you desire my assistance, it will be necessary for you to make business arrangements accordingly at once.

Very truly yours,
R. D. Hawks"

It is to be observed that he distinctly refers to said taxes as "your taxes" and specifies the lands covered by these patents now in question.

She accordingly proceeded, without any help from him, to pay the arrears of taxes to the amount of $935, and got the receipt of the township treasurer therefor, dated May 17, 1919, followed by a post office order for $44.36 to the said treasurer a few days later, being the balance of the total which the official claimed.

It is to be observed that no protecton is given her by the judgment in question for an expenditure invited by the respondent in said letter.

I submit that said letter and the appellant acting thereon is most cogent evidence in the way of estoppel barring respondent from setting up the pretention he makes herein and overcomes any of the suggested difficulties in the maintenance of this action as not within the jurisdiction of the Court in British Columbia.

Before proceeding to deal further with that aspect of the case I may point out how little basis there is for the contention that there was anything in the evidence to rebut the presumption that the payment of the consideration was intended as an advancement or settlement for the benefit of the wife.

The respondent pretends that the Indian Lands' Agent contrary to his duty, when warning him that he had exhausted his own limit of purchase, suggested he might "take up property in the name of his wife or in the name of

Can.
S.C.
HAWKS
v.
HAWKS.

any member of the family, father, mother or anybody else."

After repeatedly swearing to the Indian Agent being the party so advising, he changed that and said it was the son of said agent, and when pressed with the allegation of counsel that the agent never had been married, he answered "I said I supposed he was married."

This part of respondent's evidence, as much else therein, is destructive of any confidence to be placed in the accuracy of his statements and is to be borne in mind when reading the part of his evidence in which he uses the word "trust" or "trustee" in stating what passed between him and his wife relative to the terms on which she was to do settlement duties and acquire the land in question.

The following evidence in cross-examination sheds much light on how the plan he adopted of procuring the property to become vested in his wife arose. It reads as follows: "Q. When you were in Port Arthur you were in business there? A. I was in business in Fort William. Q. And you had this property and it was in your wife's name? Now, supposing you had become insolvent, you see, supposing you failed. Now, how would that property in your wife's name, of which you say she was a trustee, how would that property rank with your creditors? A. Your lordship, I wasn't in business. Q. Supposing you were in business. You are a business man? A. Yes. Q. And you were involved in transactions that might.....A. That might bring insolvency? Q. Yes, and that would leave your wife here stranded. Now, how would any trouble that you got into, how would that affect this property in your wife's name? A. Your Lordship, I never anticipated getting into trouble. Q. Then why did you put this property in your wife's name? A. Because I had exhausted my rights and it was contrary to the regulations of the Government. Q. That is the sole reason? A. That is the sole and only reason: it was absolutely necessary. Q. It was not then for business reasons? A. No, not at all. Q. That is, that she was the only person really who could have got this property and who had the right to it? She was the absolute owner of it in the eye of the officials? A. Yes. Q. And the Government? A. From the Government's point of view she was the owner of the property."

The Indian Act in the R.S.C. 1886, ch. 43—and the Regulations by way of Order in Council passed thereunder, or

later legislation, determined the legal limits of anyone to acquire Indian Lands.

The Order-in-Council bearing upon the question involved herein would seem to be that passed in 1887 which, under the caption of "Regulations for the Disposal of Surrendered Indian Lands," by sec. 1 provides as follows: "1. Not more than four lots of 100 acres each, more or less, nor less than one such lot, or more than one section of 640 acres, more or less, or less than one quarter of such section shall be sold to any one purchaser."

Such being the law prohibiting the respondent from acquiring these lands, it seems to me clearly beyond possible dispute that, as a matter of law, he could not indirectly acquire any right or title to the lands in question which he could not directly acquire. It seems to me idle to argue that respondent could acquire—in face of such a prohibition—any interest in any lands in the name of his wife, or anyone else, which he admittedly could not directly acquire. If this had been brought to the mind of the Court of Appeal which apparently it was not, I imagine an entirely different result would have ensued.

The law may permit a husband, if so disposed, to help his wife to acquire such lands, but he cannot be permitted to pretend that lands she so acquires are his or that she is a trustee thereof for him.

The appellant's factum relies on the case of Brownlee v. McIntosh (1913), 15 D.L.R. 871, 48 Can. S.C.R. 588. That might not be decisive seeing some of the majority of this Court relied upon the facts. But the judgment therein of my brother Duff, J. rested as well on the proposition of law in question, and in that I agree, though I did not feel it necessary to go, in so plain a statement of facts as they appeared to me, further.

The principle involved in the question herein however arose in the case of Scheuerman v. Scheuerman, (1916), 28 D.L.R. 223, 52 Can. S.C.R. 625, and was decided in a sense clearly adverse to the contentions of respondent herein. Indeed I confess it seems idle, when we read the evidence of respondent quoted above, to look for authority that would uphold the claim of respondent resting entirely upon such a plain violation of a statutory regulation as I have just quoted. His expenditure and all else done on the land or in relation thereto on which he relies cannot, in my opinion, help him any more than the like pretensions set

Can.

S.C.

HAWKS v. HAWKS.

up in the cases of Dyer v. Dyer (1788), 2 Cox Eq. 92, and Grey v. Grey, (1677), 2 Sw. 594, 36 E.R. 742 and like cases, where much was done by the purchase tending to shew that the parties receiving the conveyance was a trustee. The pretensions founded thereon in these cases failed notwithstanding such acts done with the knowledge of the grantee.

It seems in the result, clear as anything can be in law, that not only is the respondent barred from relying upon such pretences of trust as he tries to set up, but also that there is nothing involved in the case of any question as to title; and also flowing therefrom, that the jurisdiction of the British Columbia Court could properly be exercised in determining the question raised, for that would involve nothing more than, if as much, as has existed in a great variety of cases wherein the like or some legal relation existed between that claimed and land in a foreign country, yet the objection overruled and jurisdiction asserted on the basis of the action being of a transitory and personal action between parties resident in the same country or province.

The claim to delivery of the patents in question herein fails, in one aspect, within that subject matter of jurisdiction of a Court of Equity set forth in sec. 703 in old editions of Story's Equity Jurisprudence, or sec. 703 of the last edition at p. 297, 3rd ed. relative to the delivery up of title deeds to which the plaintiff in any case brought in such like cases is entitled.

I may, despite, the length of this judgment, be permitted to quote therefrom, as follows: "703. But the jurisdiction of courts of equity to decree a delivery up or cancellation of deeds or other instruments is not limited to cases in which some inherent defect in their original character renders them either voidable or void. On the contrary its remedial justice is often and most beneficially applied by affording specific relief in cases of unexceptionable deeds and other instruments, in favor of persons who are legally entitled to them. This indeed is a very old head of equity jurisdiction, and has been traced back to so early a period as the reign of Edward IV."

I was disposed at first to think that appellant would have been better advised had she brought her suit in Ontario, but on reflection, I see that if she had done so, probably the question would have been raised of her right to the

form of relief sought against a party living beyond the jurisdiction of the Court.

The patents being of the inherent quality of moveables, though relating to inmoveables, must be presumed to be in the possesion of him wheresoever domiciled. And I think the Court of his domicile the proper one to appeal to for relief.

As the nature of the relief as laid down in Story is merely based on quia timet, no harm can come to anyone by ordering a restoration of the custody to her who prima facie is entitled to the property. And it would be quite competent for any Court of Equity to direct, if necessary which I do not think is so here, to have said patents deposited any place within the custody which the court may desire.

I may be permitted to add that the course of the litigation has been such as to lead to looking at the fundamental principles involved and hence referring to numerous authorities which I have not cited.

These, however, can nearly all be found in the notes to Penn v. Baltimore, (1750), 1 Ves. Sen. 444, 27 E.R. 1132 in White & Tudor's Leading Cases, 8th ed. Vol. 1, pp. 800 et seq or those to the case of Mostyn v. Fabrigas (1774), 20 How St. Tr. 80, 1 Cow. 161, 98 E.R. 1021, in Smith's Leading Cases, 12 ed. pp. 662 et seq, or those cited in Westlake's Private International Law, 5th ed., in the chapter on "inmovables" pp. 220 et seq.

The case of Re Hawthorne-Graham v. Massey, 23 Ch. D. 743, so much relied upon by counsel for respondent, does not at all touch the case if we have regard to the peculiar condition of things in the Dominion of Canada especially in the aspect presented by our jurisprudence where we are not only enabled to declare the law within the Dominion but in accordance with our jurisprudence bound to take cognizance of the local law of each province. See the cases of Logan v. Lee, (1907), 39 Can. S.C.R. 311, and Hankin v. John Morrow Screw & Nut Co. (1918), 45 D.L.R. 685, 58 Can. S.C.R. 74.

I prefer the point of view presented by that master of law and fact, Jessel, M.R., in the case of In re Orr Ewing, (1882), 22 Ch. D. 456, determining an issue between Scotch and English jurisdiction. See also the case of The Buenos Ayres & Ensenada Port R. Co. v. Northern R. Co. of Buenos Ayres, (1877), 2 Q.B.D. 210, 46 L.J. (Q.B.) 224.

Can.

S.C.

HAWKS v. HAWKS.

In conclusion I think the appeal should be allowed with costs here and in the Court of Appeal and the judgment of the trial Judge be restored.

And if I had any doubt as to the jurisdiction of the Court in British Columbia, I certainly would think it our duty to so declare and nullify the judgment of the Court of Appeal or amend it so as to declare the want of jurisdiction and protect thereby appellant from being unjustly bound by a judgment such as appealed from.

Duff, J. (dissenting):—The appeal should be allowed in my opinion, and the judgment of Morrison, J., restored.

Substantially, plaintiff's case was that the respondent received the Grown grants in question as her agent and that he held possesion of them as her agent. That case was, I think, abundantly established by the evidence and it is clear enough that Morrison, J., the trial Judge, rejected, and I think rightly rejected, the evidence of the respondent and his sister as to conversations tending to shew an express arrangement that his wife was to hold the property as trustee for him. There are no doubt passages in the plaintiff's own evidence capable of a construction pointing to the conclusion that the properties were held by her for the joint interest of herself and her husband, but this construction would be inconsistent with other explicit and emphatic statements to the contrary effect and to the general tenure of her evidence. The trial Judge, I think, took the right view of her testimony.

The plaintiff's case being, as already mentioned, that the defendant received the instruments as her agent and held possession of them as such, the question of equitable ownership was not strictly in issue. The defendant having received the document as his wife's agent would be estopped from denying that his possession of them was her possession and setting up as against his wife's right to have them delivered to her by him as her agent an adverse right of his own. Eames v. Hacon (1881), 18 Ch. D. 347; Lyell v. Kennedy (1889), 14 App. Cas. 437; Zulueta v. Vinent (1852), 1 De G. M. & G. 315, 42 E.R. 573; Henderson & Co. v. Williams, [1895] 1 Q.B. 521, 64 L.J. (Q.B.) 308.

True it is that, this issue being decided in favour of his wife, that decision would be conclusive against the husband in the controversy raising equitable ownership, but that controversy was only incidentally and not directly involved. It follows, apart altogether from the effect of the cases

establishing the jurisdiction of the Court of Chancery to enforce a trust respecting a foreign immoveable where the trustee is amenable to the jurisdiction of the Court, that doctrine invoked by respondent and applied in British South Africa Co. v. Companhia de Mocambique, [1893] A.C. 602, has no application.

The only point which has given me serious concern is the jurisdiction of this Court to hear the appeal. My conclusion on that point is this: No objection was taken upon the jurisdiction by the respondent, had such objection been taken in time to enable the appellant to prepare material to meet it, I can entertain no doubt whatever that evidence would have been forthcoming showing that the value of the instruments in controversy exceeds $2,000. The grants were never registered and the husband admits that, that without the possession of the grants his wife would be hopelessly embarrassed in attempting to deal with the property.

Anglin, J.:—The plaintiff appeals from a judgment dismissing her action. The appeal is, of course, from the dismissal of the action—not from the grounds on which that dismissal was based.

Either the Supreme Court of British Columbia had jurisdiction to entertain the suit or it had not. If it had not, then the action was rightly dismissed; if it had, I am not prepared to reverse the view of the majority of the Judges of the Court of Appeal, that, on the plaintiff's own evidence, whatever interest, if any, she may have in the property covered by the title deeds sued for is not such as entitles her to claim their possession from the defendant. Several passages from her evidence might be quoted in support of the view that at the highest she has some joint interest with him. The judgment of dismissal, therefore, should not be disturbed, whatever view should be taken as to the jurisdiction of the British Columbia Court.

While inclined to think that the disposition of the action necessarily involved the determination of title to land in Ontario to an extent sufficient to give this Court jurisdiction, I am not disposed to pass upon that somewhat nice question merely to decide whether this appeal should be dismissed because the action was rightly dismissed below or because we have not jurisdiction to entertain it. No objection to our jurisdiction was taken on behalf of the respondent. On the contrary his impeachment of the juris-

Can.

S.C.

HAWKS v. HAWKS.

diction of the Supreme Court of British Columbia rather compelled him to support the appellant in asserting that jurisdiction exists here. Under these circumstances, I do feel bound to pass upon it. Assuming, but without determining, that we have jurisdiction, I would dismiss the appeal with costs.

Mignault, J.:—The appellant (plaintiff) is the wife of the respondent, but they are not now living together. About the year 1904, when the relations between husband and wife were harmonious, some lots in Ontario were acquired by the respondent from the Dominion Government and the patents were made out in the name of the husband for a certain number and of the appellant for the others. By this action taken in British Columbia, the appellant demands that the respondent be ordered to deliver to her the title deeds of the lots for which the patents are in her name. She admits, however, that these lots were paid for by her husband out of his bank account. Her position seems to be that the monies of her husband were her monies as much as his, that she and her husband were in business together and that the money paid for the lots came from the business. This would shew, on the appellant's own statement, that the most she claims is some kind of joint interest in these lots, and, therefore, she could not demand exclusive possession of the title deeds.

The British Columbia Courts would not appear to be competent to determine a question of ownership of lands in Ontario, and the appellant, on that account, treated her action before the British Columbia Courts as being a mere personal action demanding possession of the title deeds. This Court, however, would have no jurisdiction unless the action involved a question of title to these lands. The appellant cannot appeal to this Court in a mere personal action for possesion of unvalued title deeds, which involves no question as to the ownership of these lands. If it did require the determination of the ownership, her action could not be adjudicated upon by the British Columbia Courts.

Under these circumstances, it appears to me sufficient to say that on the appellant's own showing she has not made out a case entitling her to the exclusive possession of the title deeds as against her husband. And if she really has a joint interest, a point on which I express no opinion, she should resort to the proper forum. Notwithstanding a

seeming expression of opinion by Galliher, J.A., that she has no right to the lands, the other Judges forming the majority of the Court of Appeal do not pass on the question of title, and indeed could not do so. Whatever property rights the appellant may have are, therefore, unaffected by this litigation.

I would dismiss the appeal with costs.

Appeal dismissed.

BAIN v. THE CENTRAL VERMONT R. CO.

Judicial Committee of the Privy Council, Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Atkinson and Lord Shaw.
July 21, 1921.

Master and Servant (§IIIA—286).—Railways—Train Run Jointly by Two Companies—Negligence of Engineer—Injuries—Control of Servant at Time of Accident—Damages—Liability.

An agreement was entered into between the Central Vermont R. Co. which was operating a line between St. Albans U.S.A. and St. Johns P.Q. and the Grand Trunk R. Co., which was operating a line between St. Johns and Montreal, whereby they were to run a train jointly between St. Albans and Montreal. The same train crew was to remain in charge during the trip but each company was to pay the crew while running over its own line and each company was to assume all liability for loss or damage sustained in operating trains on its own line.

Their Lordships held affirming the judgment of the Supreme Court of Canada, that the Central Vermont R. Co. could not be held liable for damage for injuries caused by the negligence of the engineer while running on the Grand Trunk R. Co.'s line between St. Johns and Montreal. The engineer being at the time of the accident under the control of and being paid by the Grand Trunk R. Co. it was alone liable.

APPEAL by plaintiff from the judgment of the Supreme Court of Canada (1919), 48 D.L.R. 199, 58 Can. S.C.R. 433, reversing the judgment of the Court of King's Bench, appeal side, (Que) (1918), 28 Que. K.B. 45, in an action by a widow for compensation for the death of her husband. Affirmed.

The judgment of the Board was delivered by:—

Lord Dunedin:—Hedges, a locomotive fireman in the employment of the Grand Trunk R. Co., was killed in the course of his duties at Montreal on February 2, 1915, by being run into by another engine driven by an engineer called Frost. It is admitted that Frost was guilty of negligence. Frost was in the service of the Central Vermont R. Co. The widow of Hedges, for herself and an infant daughter recieved compensation from the Grand Trunk R. Co. under the Workmen's Compensation Act, 1909, (Que.) ch. 66 for

Imp.
P.C.
BAIN
v.
THE
CENTRAL
VERMONT
R. Co.

the death of her husband. This disentitled her to raise any action against the Grand Trunk, but in terms of art. 7334 she was entitled to recover against any person other than the employers against whom she had a right of action. She accordingly raised action against the Central Vermont R. Co. That company is an American Railway company, but owns a line in Canada extending from the boundary to St. Johns in the Province of Quebec. The Grand Trunk have a line from Montreal to St Johns. The two companies entered into an agreement for the joint working of the line from Montreal via St. Johns to St. Albans in Vermont. It is unnecessary to set forth the agreement in full; the relevant clauses are as follows:—

"Whereas, it is considered desirable and to the mutual advantage of both parties hereto to operate jointly, and as one line, the railway from Montreal to St. Albans, for both freight and passenger business. . . .

That each party may furnish its mileage proportion of passenger and freight engines (the engines of both companies to be as nearly as possible of equal capacity), cabooses and train crews thereof used in joint service between Montreal, Canada and St. Albans, Vermont. . . .

That each party hereto shall pay the train and engine men employed in the joint service for the service performed by them on its own line, and neither of the parties hereto shall be held responsible to the other for the actions of such joint employees while upon the line of railway of the other party hereto."

As Frost, at the time of the accident, was driving a train on the Grand Trunk line and as his negligence consisted in his failing to attend to Grand Trunk signals, the Central Vermont Company denied liability on the ground that Frost, at the time of the accident, was in the employment of and subject to the orders of the Grand Trunk.

The trial Judge found for the plaintiff. He thought that as Frost was engaged by the Central Vermont Company he was their servant, and that in question with the plaintiff the agreement between the companies was res inter alios acta. This was manifestly a bad ground of judgment. The agreement between the companies would indeed be res inter alios acta in so far as it covenanted as to liability inter se, but in so far as it determined the position of the servants who performed their functions on the joint line it was obviously admissible as the best evidence. On appeal to the

Court of King's Bench (1918), 28 Que. K.B. 45, that Court by a majority, one Judge dissenting, affirmed the decision of the trial Judge, but on a different ground. On appeal to the Supreme Court of Canada (1919), 48 D.L.R. 199, that Court unanimously agreed with the dissenting Judge and dismissed the action. Appeal has now been taken to His Majesty in Council.

It seems to their Lordships that there was indeed no difference of opinion between any of the Judges in the Courts below, with the exception of the trial Judge, as to the law to be applied to the case. Indeed it cannot be more concisely or accurately stated than it was by Cross, J., who gave the judgment of the majority in the Court of King's Bench when he says at p. 48.:—

"He [Frost] was in the general service of the Central Vermont Railroad Company, but it is well established that the master, in whose general service a man is, is not responsible for the tortious act of the man if the control of the master has been, for the time being, displaced by the power of control of another master into whose temporary service the man has passed by being lent (even gratuitously) or subcontracted. In such a case it is the 'patron momentane' and not the 'patron habituel' who is responsible," and he quotes inter alia is support the case of Donovan v. Laing etc & Syndicate, [1893] 1 Q.B. 629, 63 L.J. (Q.B.) 25.

The same view of the law is repeated in each and all of the admirably clear judgments of the Judges of the Supreme Court of Canada, 48 D.L.R. 199. The difference of opinion arises, therefore, upon the view taken of the facts. It is true that in general it is well to abide by the view of the facts taken by the tribunal of first instance. But while this is so when any question of credibility is involved, it does not follow when the view of facts rests rather upon inference from facts as to which there is no dispute other than a difference of view as to the facts themselves.

What then was the position of Frost? The question is really admirably expressed by the French phrase. It is common ground that the Central Vermont Company was to Frost the "patron habituel" but which of the two companies was the "patron momentane"? Their Lordships have no hesitation in agreeing with the view unanimously taken by the Judges of the Supreme Court. The ratio decidendi of the Court below lies in the view that in the words of Cross, J., at p. 49 (28 Que. K.B.) "the Central Vermont Company

Imp.
P.C.
BAIN
v.
THE
CENTRAL
VERMONT
R. CO.

retained a measure of control of Frost instead of having put him completely under the orders of the other company." He cites as justifying this view that if Frost had been told by the Central Vermont Company to stop at a certain station on the line he must have done so and that he had a duty to keep clean and preserve his engine the property of the Central Vermont Company. It is from these facts he draws the conclusion that the control of the Central Vermont Company was not excluded. Their Lordships think that this is leaving out of view the point of time at which the position must be determined. In the words of the judgment reported by Sirey and quoted by Brodeur, J., you are to look to the "patron momentane qui avait ce prepose sous ses ordres et sur lequel il avait une autorite exclusive au moment de l'accident." [translated, "the employer at the moment who had such 'servant' under his orders and over whom he had exclusive authority at the moment of the accident"] It is nothing to the purpose that there may be at the same time a sort of residuary and dormant control of the "patron habituel." Now what caused the accident? The disregard of the signals. They were Grand Trunk signals. These signals were the mechanical expression of the orders of the Grand Trunk, orders which Frost at that moment was bound to obey. At that moment and for the purpose of regulating the speed of the train Frost was under the orders of the Grand Trunk. As a matter of fact so literally was the arrangement, embodied in sec. 6 of the agreement already quoted, carried out that Frost signed a separate receipt for the payments made to him by each company respectively for his services while working on each line respectively. Payment is not everything; it is a circumstance pointing to who is the employer, but the real test is control, and at the moment of the accident the control of Frost was in the Grand Trunk.

Their Lordships had occasion to examine the law on this subject in a very recent case which had not been decided when the Supreme Court gave judgment. It is the case of La Societe Maritime Francaise v. The Shanghai Dock and Engineering Co. Ltd. (1921), 90 L.J. (P.C.) 85, 37 Times L.R. 379. They can only repeat what they there said, that they were of opinion that the law was accurately laid down by Bowen, L.J., in Donovan v. Laing, etc., [1893] 1 Q.B. 629. The first sentence of the judgment of Bowen, L.J., which was there quoted is as follows at pp. 633, 634:—

"We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act."

This is precisely what was laid down in the case reported by Sirey already quoted, and it expresses precisely the test which the Supreme Court has in this case applied to the facts.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

LEECH v. CITY OF LETHBRIDGE

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. June 7, 1921.

New Trial (§II—8).—Collision between Motor Car and Street Car—Misdirection by Trial Judge as to meaning of by-law—Contributory Negligence of Plaintiff Established—Verdict of Jury not affected by Misdirection—No substantial Wrong or Miscarriage of Justice.

The appellant driving an automobile on one of the streets of Lethbridge which crosses at right angles another street 100 feet wide on which the respondent has a double track street railway, attempted to cross said railway. After crossing the first track in safety and getting on the second track, a street car moving thereon struck his car. The accident happened between one and two o'clock P.M. and was not the result of plaintiff's car being stalled or hampered in any way, unless by his own want of care in closing the side curtains of his automobile. At the trial, the Judge directed the jury that a by-law giving right of way to the defendant's street car on the streets of the town, relieved the motorman when travelling at a proper rate of speed from keeping a lookout. The Court held that, although this was grave misdirection on the part of the Judge, no substantial wrong or miscarriage on the trial resulted therefrom, the jury found that the defendants were negligent in that their motorman did not exercise the necessary observation. The jury also found that the plaintiff could, by the exercise of reasonable care and diligence, have avoided the accident, and this was a sufficient finding of contributory negligence on his part and the negligence found against the plaintiff was not affected by the direction of the Judge complained of, and having regard to sec. 329 of the Judicature Act, O.C. (Alta.) ch. 21 the misdirection was not such as warranted the Court in granting a new trial.

APPEAL by plaintiff from the judgment of the Supreme Court of Alberta, Appellate Division, in an action brought to recover damages for injury caused by a collision between plaintiff's automobile and a street car. Affirmed.

J. H. Leech, K.C., for appellant.

W. S. Ball, for respondent.

Can.

S.C.

LEECH v. CITY OF LETHBRIDGE.

Davies, C.J.:—I am of opinion that this appeal should be dismissed with costs. I think the findings of the jury are fully justified by the evidence.

A question was properly raised by appellant's counsel to the effect that there was misdirection on the part of the trial Judge as to the street car's 'right of way', but I do not think, looking at the case as a whole, that the jury were misled by any such misdirection or that any substantial wrong or miscarriage resulted from it.

The plaintiff's negligence found by the jury on evidence fully warranting it was not affected by the misdirection complained of.

Idington, J.:—The appellant driving an automobile on one of the streets of Lethbridge which crossed at right angles another street 100 feet wide, whereon the respondent has a double track street railway, attempted to cross said railway. After crossing the first track in safety and getting on the second of said tracks, a street car moving thereon struck his car 'amidships' as one of the witnesses aptly describes the results. This happened between one and two o'clock p.m. and not as a result of appellant's car being stalled or hampered in any way, or his vision obscured, unless by his own want of care in closing the side curtains of his automobile.

The appellant sued respondent herein for damages arising from said collision alleging they resulted from said street car being operated negligently, carelessly and recklessly, and at excessive speed, and, in contravention of the law, was in charge of a motorman whose physical defects unfitted him for the proper discharge of his duties. These allegations were denied by the pleadings of the defendant (now respondent) and the latter alleged in its defence that the damages claimed were the result of reckless and careless driving by the plaintiff (now appellant) and that he was unable to see the street car by reason of the enclosed sort of car which he was driving and that he was driving at a high rate of speed and drove it into the street car of respondent.

The trial Judge charged the jury in a most fair and impartial spirit, though some isolated sentences may contain propositions liable to criticism, as possibly capable of better expression of the exact law bearing on the subject. What charge is not? None of such were, if the jury is to

be assumed as possessed of common sense, at all likely to mislead in a case which required only the application of such sense to properly dispose of all involved. He submitted five questions to the jury.

The only objection taken to the charge was to ask the correction of a statement relative to some minor matter of evidence, which was duly acceded to. It was admitted in argument herein that the said questions had been submitted to the counsel engaged at the trial and no objection of any kind was taken thereto, or any request made for further questions.

The first three questions submitted were as follows and answered as appears set opposite each respectively:— "1.- Was there any negligence on the part of the defendant. A.- Yes. 2. If the answer to the first question be 'Yes,' in what respect was the defendant negligent? A.- Inasmuch as the motorman did not exercise the necessary observation in failing to see plaintiff's car approaching from the north. 3.- If there was any negligence on the part of the defendant, could the plaintiff have avoided the accident by the exercise of reasonable care and diligence? A. Decidedly yes."

In light of the pleadings, the evidence, and the Judge's charge, these answers would seem conclusively to dispose of the whole case.

The fourth question related to damages, if assessed, but in the result no need therefor. I will refer to the fifth question presently.

It is to be observed that the first question does not distinctly raise the question of negligence of the defendant causing the accident.

One of the peculiarities of the case is that there is nothing proven as to the alleged excessive speed or anything in the way of neglect in way of outlook or otherwise, which could properly be held to have caused the accident if the plaintiff had observed common sense and prudence. Hence the importance of the answer to the third question. The answers to the first two questions no doubt were the result of evidence as to the defective eyesight of the motorman upon which the trial Judge made some pointed remarks in his charge.

The finding being confined to the outlook question all the other allegations of negligence on the part of respondent presumably failed and hence are impliedly negatived by the answer of the jury.

Can.

S.C.

LEECH v. CITY OF LETHBRIDGE.

When we read the evidence of the appellant and find from his own story such a remarkable mass of evidence of neglect, on his part, of the exercise of ordinary care and prudence, we can realise the import of the answer "Decidedly yes."

The facts, that there was no objection as now taken to the Judge's charge, or to the questions put, or request for further questions thus submitted, would have furnished at almost any of said respective stages in the development of these aspects of trial by jury, an impassable barrier to the plaintiff seeking a new trial. But to put an end, if possible, to such departures from that violation thereof as had become too common, an imperative prohibition was introduced in England and other jurisdictions into the rules against granting new trials, unless some substantial wrong or miscarriage had been occasioned on the trial.

That so far as Alberta is concerned appears in sec. 329 of its Judicature Ordinance, O.C. ch. 21, as follows:— "329.- A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court to which application is made some substantial wrong or miscarriage has been thereby occasioned on the trial; and if it appears to such Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties and direct a new trial as to the other part only or as to the other party or parties."

Having, in order to be able to observe the terms of this rule, read the entire evidence, I fail to understand how any claim can be reasonably made on the part of one so far disregarding, as appellant did, the most ordinary rules of prudence and thereby placing himself where he and his car were injured.

Not only is it quite obvious that he must not have exercised due care, looking from where he claims he did, to see if a street car was in sight, but that his venturing to cross at a moment when, if he had looked or listened properly, he must have realised collision was inevitable; unless he stopped or turned his car aside.

Indeed the street cars in Lethbridge may, by some secret method unexplained, travel in silence instead of making the noise the like cars make elsewhere, especially if running at high speed as charged, quite enough to awaken any ordinary dreamer gliding quietly along in his auto.

There is no evidence on that point. But I rather think from the evidence we have of Commissioner Freedman that the use of whistles and gongs is forbidden unless in case of absolute necessity that might serve a useful purpose as in the case of an auto driver threatening to intrude upon the right of way of the street cars as they in moving make quite enough noise.

Notwithstanding the said evidence the appellant swore as to such warnings, as follows:— "Q.- Do you know whether that is the custom or where there is anyone crossing the track? A.-I could not say as to that; I know it is customary to get a signal at an intersection: I know we have been saved a good many times; I am saying that from my own experience. Q. That is, if crossing a track you get a signal? A. Not always, but I know I have scores of times got a signal as I was approaching a street car on an avenue or street, which has in many cases saved me."

Is it to be inferred that he must have been habitually an offender by getting in the way of street cars?

However all that may be, I am not surprised at the Court of Appeal possessed of local general knowledge which we are not, dismissing his appeal without making any remarks.

The fifth question submitted to the jury, and answer thereto is as follows:— "5. If there was negligence on the part of the defendant and contributory negligence on the part of the plaintiff, could the motorman have then avoided the accident by reasonable care? A. No. As the motorman had right of way."

There was in the evidence no need of this question as very often exists to elicit the facts as to possible ultimate negligence.

The appellant's car came in sight of the motorman of the street car when, as he expresses it, the two were within six or eight feet of each other and he instantly reversed and did all possible to save the situation, and that is corroborated by the uncontradicted evidence of the mechanical condition of the street car when examined after the accident.

Can.

S.C.

LEECH
v.
CITY OF
LETHBRIDGE.

The reference in the answer to the motorman having the right of way must be read in light of the Judge's charge correctly stating the law as fixed by the by-laws when travelling at a reasonable rate of speed.

I submit the appeal should be dismissed with costs.

Duff, J.:—The trial Judge seems to have misstated the law to the jury in a very important point. Nothing in the city by-law could excuse the failure of the motorman to keep a proper lookout; and to tell the jury that this was not required so long as a moderate speed was maintained necessarily must have had the effect of misleading them in respect of the material issues.

The failure to take the objection does not, I think, preclude the appellant from raising the point on appeal. Even when the error complained of is misdirection this is not the necessary consequence of failure to take the objection at the trial, White v. Victoria Lumber & Manufacturing Co., [1910] A.C. 606; and it seems clear that, the trial Judge having explained his view in the clear, precise and concrete terms used by him, no objection taken by counsel was at all likely to lead to an amendment.

The point to be considered is whether it is clear that there has been no substantial wrong or miscarriage of justice. Now, it is plain enough that, on the evidence, it was quite open to the jury to find excessive speed and furthermore to find that by reason of excessive speed, the motorman had disabled himself from avoiding the consequences of appellant's negligence, B.C. Electric R. Co. v. Dunphy. (1919), 50 D.L.R. 264, 59 Can. S.C.R. 263 and also that the motorman by failing to maintain a proper lookout had negligently prevented himself becoming aware of the appellant's negligence in time to avoid the consequences of it. In other words, on the evidence, it was quite open to the jury to have found the facts in such a way as to bring the case within Loach's case, 23 D.L.R. 4, [1916] 1 A. C. 719. In truth the jury probably thought there was excessive speed; otherwise the jury's finding is not easily to be understood. And at all events the finding in answer to the last question is obviously the result of the Judge's erroneous direction as to the necessity of a proper lookout.

The appellant has, I think, suffered substantial wrong, and there should be a new trial.

Anglin, J.:—Although there was undoubtedly grave misdirection in telling the jury that the by-law giving

right of way to the defendants' street car on the streets of the town relieved their motorman when travelling at a proper rate of speed from keeping a lookout, the findings of the jury read in the light of all the evidence satisfy me that no substantial wrong or miscarriage on the trial resulted therefrom (R. 329). The misdirection had to do only with the negligence of the defendants. The jury found that the defendants were negligent in that their "motorman did not exercise the necessary observation" and that finding was not challenged. The negligence charged and found against the plaintiff was not affected by the direction complained of. Apart from misdirection, no ground for interference with that finding was suggested.

The only finding of the jury which could have been affected by the misdirection was that in regard to what has sometimes been termed "ultimate negligence." In answer to the question "If there was negligence on the part of the defendant and contributory negligence on the part of the plaintiff, could the motorman have then avoided the accident by reasonable care? the jury said: — "No, as the motorman had right of way."

But the circumstances of the case were such that no issue of "ultimate" negligence on the part of the defendants arose.

Having regard to all the circumstances I think the finding that the plaintiff could by the exercise of reasonable care and diligence have avoided the accident was a sufficient finding of contributory negligence on his part.

The appeal in my opinion fails.

Mignault, J.:—This is not a very satisfactory case.

The appellant, who was driving an automobile in the streets of Lethbridge, was injured by coming in collision when crossing the street car line with a tram car operated by the respondent. The appellant's side curtains were closed and the only way he could see was through the glass windshield, which would give him range of vision on either side of about 150 feet, and he says he looked when approximately 20 feet from the street on which the cars run, but saw no car. The motorman saw the automobile only when it was on the track and then of course it was too late to avoid the collision. My impression is that he was not keeping a proper lookout, but on the other hand it seems to me that had the appellant acted as a reasonably prudent man

CAN.
S.C.
LEECH
v.
CITY OF
LETHBRIDGE.

would have done he should have seen the tram car in time to stop before reaching the tracks. After hearing the evidence the jury came to the conclusion that both the appellant and the motorman were at fault, the latter because he did not exercise the necessary observation, and their reply to the third question, whether, if there was negligence on the part of the defendant, the plaintiff could have avoided the accident by the exercise of reasonable care and diligence, was "Decidedly yes". The appellant's action was dismissed, and the judgment of the trial Judge was unanimously affirmed by the Appellate Division of the Supreme Court of Alberta.

The answer of the jury to the third question would be conclusive against the appellant if the jury were properly directed. That however is the difficulty here. The trial Judge, referring to a by-law of the City of Lethbridge giving the street cars a right of way over all other vehicles travelling on the highway, said to the jury:—"The effect of that is that travelling at a proper rate of speed when approaching a crossing it is the duty of the automobile owner to avoid a collision and not the duty of the motorman in travelling at a proper rate of speed to keep a lookout."

Further the trial Judge stated:—"It appears to me that, although to a lesser extent, the street car having the right of way and proceeding at a reasonable rate of speed under the circumstances and an automobile comes in contact with it, the owner of the automobile is responsible for the damage sustained and that the owner of the street railway would not incur responsibility. That appears to me to be the effect of this by-law.". . . .

With all deference I cannot think that this was a proper direction to the jury. The by-law giving right of way to the street cars certainly did not dispense the motorman, even when travelling at a proper rate of speed, from the obligation to keep a proper lookout in order to avoid coming in collision with vehicles crossing the car tracks.

The difficulty in the way of the appellant is however twofold.

In the first place no objection was taken on behalf of the appellant at the trial to this direction of the trial Judge, and I cannot but believe that if such an objection had been made the Judge would have found it advisable to qualify

his statement. The appellant by failing to object seems to have taken the chance of the jury's verdict.

In the second place, the jury notwithstanding the statements I have quoted, evidently thought the motorman should have taken proper observation of the roadway, for they found the respondent negligent because he had not done so. And they considered the appellant guilty of the ultimate negligence which caused the accident. No miscarriage therefore occurred on account of the Judge's charge.

As a result I would not interfere with the verdict and the appeal should in my opinion be dismissed with costs.

Appeal dismissed.

IN RE HOWE.

Ontario Supreme Court in Bankruptcy, Holmested Registrar in Bankruptcy. May 6, 1921.

Bankruptcy (§II-17).—Release of Part of Estate to Debtor's Wife—Approval of Majority of Creditors—Sanction of Court—Sec. 13 of the Bankruptcy Act—Approval of Court—Binding Non-assenting Creditors.

Having regard to sec. 13 of the Bankruptcy Act 1919 (Can.) ch. 36, the trustee may seek the sanction of the Court to a proposal which is in effect an agreement for a composition to accept 20 cents on the dollar less than the assets would pay if all realised, so as to bind the non-assenting creditors, and the Court being satisfied that such proposal is reasonable and approved by the majority of the creditors, and there being no facts which would justify it in withholding its approval, will approve of the said scheme.

APPLICATION by a trustee in bankruptcy for the approval of the Court of an arrangement whereby a house (part of the assets of the debtor) was to be released by the trustee to the debtor's wife. Sanction given.

J. M. Kearns for authorised trustee.

Holmested, Registrar in Bankruptcy:—On the application of the authorised trustee, the Guelph Trust Co. and on reading the report of the authorised trustee filed on May 2, 1921, and hearing counsel for the said trustee, no one appearing for the creditors who have not consented to the said scheme, although duly notified of this application, and the Court being satisfied that the required majority of creditors under the said Act have duly accepted the scheme herein, as follows:—

That the said trustee be authorised to convey the real estate at present occupied by the said Edward Howe and

Can.

S.C.

GRAND TRUNK PACIFIC R. CO. v. MORREAU.

his wife and family, and being part of Lot No. 63 on the east side of Isabella St. in the village of Arthur in the County of Wellington, to Mary Howe, wife of the said Edward Howe, subject to the mortgage thereon to one Mrs. Burke free from the claims of the creditors of the said Edward Howe and that the said real estate be not counted as part of the assets of the said estate, provided that the Karn Shoe Co. one of the said creditors, shall receive an amount to be furnished by one J. M. Small acting on behalf of the said Mary Howe which amount shall be equal to the dividend that the said Karn Shoe Co. would have received had the said real estate been considered as part of the assets of the said estate and distributed among the creditors.

And being satisfied that the said terms are reasonable and approved of by the majority of the creditors, and that no facts have been proved which would justify the Court in withholding its approval, the estate scheme is hereby approved and subject to the said amount to be paid to the said Karn Shoe Co., being first deposited with the trustee, the said trustee is authorised to carry out the said arrangement and convey and release the property to the said Mary Howe in accordance with the said arrangement.

GRAND TRUNK PACIFIC R. v. MORREAU.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. June 7, 1921.

Master and Servant (§IID-206).—Workmen's Compensation Act, Alta. Stats. 1908 ch. 12 — Alleged Disobedience of Rules — Establishment of Rules—Course of Employment—Liability.

The plaintiff was permanently injured while engaged in coupling railway cars, which was part of his employment. The immediate cause of his injury was his having used his foot to adjust the alignment of a draw-bar while a car was moving towards another stationary car to which it was to be coupled. The act was said to be prohibited by two alleged rules of the defendant company. The Court held that there was no evidence of these rules as prohibitive rules of the defendant company, or of the plaintiff's knowledge of them, and in the absence of such rules the plaintiff was acting within his employment and was entitled to recover in an action under the Alberta Workmen's Compensation Act.

APPEAL by the defendant from the judgment of the Alberta Supreme Court, Appellate Division (1921), 57 D.L.R. 175, in an action under the Alberta Workmen's Compensation Act. 1908, ch. 12. Affirmed but on another ground.

D. L. McCarthy, K.C. for appellant. C. C. McCaul, K.C. for respondent.

Davies, C.J.:—The judgment appealed from in this case of the Appellate Division of the Supreme Court of Alberta (1921), 57 D.L.R. 175 reversing that of the trial Judge proceeded upon the assumption that there was evidence of a rule of the appellant company which the respondent knew he was breaking when he did what caused the accident, and that the trial Judge had found as a fact the existence of such rule.

The Judges of the Appellate Court proceeding on this assumption of fact as to the existence of a rule of the company known to the plaintiff respondent Morreau held that the accident was one which arose out of and in the course of his employment and as "serious and wilful misconduct" was not a defence under the Alberta statute when permanent injury was sustained—they consequently allowed the appeal and referred the matter back to the District Court Judge for assessment of compensation.

I do not think it either necessary or desirable that I should express any opinion upon the difficult and delicate question on which the Court of Appeal founded its judgment because I have reached the clear conclusion that there was no evidence on which the trial Judge could have found the existence as a fact of the rule of the company relied upon by him as justifying the dismissal of the application of the workman for compensation. The alleged rules which it was contended the workman Morreau violated causing the injuries he complained of were on a sheet of paper (produced by counsel, in cross-examination, put in as an exhibit probably for identification) and were addressed "To the new man" and were termed "Safety Precautions." But they were not proved to be rules or regulations of the company properly promulgated to its employees. These alleged rules were as follows:—

"The Grand Trunk Pacific Railway does not want anyone in its service to take an unnecessary chance in the performance of his duties for the purpose of saving time or for any other reason * * * Mutual protection therefore makes necessary compliance at all times with the following:—

Safety Precautions

"(1) Never go between moving cars for any purpose. If the coupling apparatus should fail to work, thus making it necessary to go between, stop the cars before doing so.

Can.

S.C.

GRAND TRUNK PACIFIC R. CO. v. MORREAU.

(2) Never attempt to adjust drawbar with foot, or in other words, don't kick a drawbar to make coupling. If they don't make the first time, pull ahead and try again."

Beyond the mere production by the company's counsel of a printed sheet of paper containing these rules for the purpose of cross-examination of the plaintiff Morreau, there was no evidence whatever of their existence or promulgation. The plaintiff denied in his evidence any knowledge of them and the company's foreman, Berg, when called as a witness stated that he had never, until the day before he was examined, seen the alleged rules forbidding employees to go between moving cars for any purpose or, that if necessary to go between the cars, to stop them before doing so.

On the ground that there was no evidence as to the existence of the rules relied upon by the company, or that the plaintiff Morreau knew of them, and without expressing any opinion upon the question whether the accident arose out of the plaintiff's employment, I concur in dismissing the appeal.

Idington, J.:—This appeal arises out of a claim made by the respondent under the Alberta Workmen's Compensation Act, 1908, ch. 12.

The Judge who heard the claim for relief held that respondent, by acting contrary to the terms of a notice to new men issued by the vice president of appellant, was debarred from setting up the claim in question. There was no evidence presented on the trial that would justify us in holding that the said notice had ever been made a rule or regulation by appellant or was ever served on respondent, or brought to his attention in any official way, much less in such a way as to enable him to understand that what is set up herein as barring his rights in question herein, was therein intended to imply such limitations of his rights.

The trial Judge therefore had no evidence presented to him entitling him to rely thereon. His finding of facts are to be binding but only as I understand when the evidence is such in any aspect as to present a proper basis of fact for such finding.

Yet it is, I respectfully submit, upon the mere suspicion that respondent's manner if answering gave rise to, upon which the trial Judge acted, despite the positive oath of the respondent to the contrary.

It was also stated by Berg, a witness for the appellant, who was supervisor over him in the service, that he had never seen the notice or known of it until the day before his evidence was given. He moreover stated that he had the book of rules containing 608 questions, as he phrases it, but never saw the notice in question therein.

The case of A. G. Moore & Co. v. Donnelly and other cases heard therewith, as reported in [1921] A.C. 329, may do much to clarify the general conception of the law which has been obscured by over refinements in many cases. But I do not see how it helps much in such a case as therein presented which proceeded on an assumption of facts which clearly did not exist. In this speech therein of Viscount Finlay, at p. 342, the following passage occurs, concisely expressing what should be observed:—

"I desire only to add that the decision that the workman was acting without the sphere of his employment does not depend upon the fact that the regulation which he was infringing was statutory. The same result would follow if the terms of his employment were to the same effect as the statutory regulation. The question is simply whether what the man was doing fell within the sphere of his employment, and is the same whether that sphere be defined by statute or by the contract of employment."

The last sentence especially referring to "the contract of employment" ought, I submit, to be observed by all such companies as appellant in making their contracts with employees such as respondent in such a manner as to bring home to minds, not trained in the law, such express prohibitions as experience teaches is needed.

The safety precautions set forth in the notice "To the new man," above referred to, in items 2 and 6 thereof, if expressly made part of the contract and clearly and distinctly pointed out to him contracting, might help much to prevent such accidents as in question, and such litigation as this.

To be fair, of course, it should not be carefully hidden by forming only part of a volume of rules including a great variety of other servants' duties.

Meantime I see no reason for allowing this appeal and would dismiss same with costs.

Duff, J.:—The question considered in the Court below was whether a certain prohibition assumed to have been one

Can.

S.C.

GRAND TRUNK PACIFIC R. Co. v. MORREAU.

of the terms of the respondent's contract of employment so limited the sphere of that employment as to require the question whether the accident arose "out of and in course of the employment" should be answered in the negative. I am inclined to think that had the prohibition been proved this result must have followed: but it is very clear to me that such a finding if there had been one must have been rejected, as not reasonably arising out of the evidence.

In the absence of such a prohibition it is clear that the respondent would be acting—albeit improperly—within his employment. Was there any evidence that the rule relied upon was part of his contract of employment? There was none. The foreman called by the appellants denied all knowledge of any such rule. Witness after witness called for the appellants who must have known it, if such a rule had been recognised as in force, was not examined on the subject.

The trial Judge concludes from the unsatisfactory manner in which the respondent denied knowledge of the rule that he knew of "some such rule." This is not, I think, a satisfactory way of establishing the terms and conditions of a contract of employment and the finding of the trial Judge, if it was really meant to be a finding, that the prohibition relied upon was in force as part of the terms of respondent's engagement must be considered as one which is not a reasonable conclusion from the relevant evidence.

Anglin, J.:—The plaintiff was permanently disabled while engaged in coupling railway cars. The coupling of cars was part of his employment. The immediate cause of his injury was his having used his foot to adjust the alignment of a draw-bar while a car was moving towards another stationary car to which it was to be coupled. That act is said to be prohibited by two alleged rules of the defendant company:—"(1) Never go between moving cars for any purpose. If the coupling apparatus should fail to work, thus making it necessary to go between, stop the cars before doing so. (2) Never attempt to adjust a draw-bar with the foot, or in other words, don't kick a draw-bar to make coupling...."

The arbitrator finding these rules to be proved and known to the plaintiff, held that the accident did not arise out of his employment and therefore dismissed his claim. On appeal to the Appellate Division, while the existence of the two rules and the plaintiff's knowledge of them was as-

sumed, that Court was of the opinion that the accident arose out of the plaintiff's employment and that inasmuch as "serious and wilful misconduct" is not a defence under the Alberta statute where permanent injury has been sustained, the plaintiff was entitled to recover. 57 D.L.R. 175.

The defendants challenge that view of the law; the plaintiff, while upholding the judgment on the ground on which it was based, also maintains that there was no evidence to warrant the arbitrator's findings that the alleged prohibitory rules existed, or, if they did, that he knew of them. A second question of law, appealable under clause 3 of the second schedule to the Alberta Workmen's Compensation Act (ch. 12, 1908 stats.), is thus raised.

Except the production by counsel for the defendants of a printed sheet of paper containing them, there is no evidence of the existence or promulgation of the alleged rules. The plaintiff in his evidence denied knowledge of them. The foreman, who was called as a witness for the defendants, also deposed that he had never seen them and was unaware of their existence. There is no evidence to the contrary. Ex facie the character of the document itself is doubtful. It purports to be addressed "To the new man" and is rather in the nature of advice as to the course he should pursue in order to become a successful railway man —inter alia, for instance, "Make yourself thoroughly familiar with the Book of Rules." The mere fact that when the plaintiff and his foreman were being examined as to these alleged rules by counsel for the defendants, counsel for the plaintiff asked that they should be marked as an exhibit, no doubt, in my opinion, for the purpose of identification, should not, I think, be treated as an admission of them in evidence as prohibitive rules binding on his client. Apart from their being so marked as an exhibit there is no evidence whatever of their existence as rules of the defendant company or of the plaintiff's knowledge of them. His evidence and that of the foreman Berg, in my opinion, clearly cast on the defendants the burden of establishing those facts. The impugned findings of the arbitrator, with evidence to support them.

While the appeal may be disposed of on that ground alone, to prevent misunderstanding I feel that I should add that I am not convinced that the judgment of the Appellate Division, 57 D.L.R. 175, may not also be maintained on

Can.

S.C.

GRAND TRUNK PACIFIC R. Co. v. MORREAU.

the ground on which it was based by that Court—that the alleged rules did not so "limit the sphere of his employment" as to afford the railway company a defence, but were rather within the category dealing with "conduct within the sphere of the employment."

While the recent decision of the House of Lords in A. G. Moore & Co. v. Donnelly, [1921] A.C. 329, no doubt assimilates prohibitory regulations of the master intended to ensure the workman's safety to like regulations of the Legislature, it also authoritatively re-affirms the distinction formulated by Lord Dunedin in Plumb's Case, [1914] A.C. 62, at p. 67, with the concurrence of the three other members of the House of Lords, between "prohibitions which limit the sphere of the employment and prohibitions which only deal with conduct within the sphere of employment"; and it is quite clear that in reiterating that distinction their Lordships had in mind prohibitions dealing with matters affecting the safety of their employees.

But the view that I have taken that there is no evidence as to the existence of the rules invoked by the defendants and the plaintiff's knowledge of them renders it unnecessary to pass upon the aspect of this case dealt with by the Appellate Division. I allude to it merely to make it clear that no implication adverse to the ground of judgment in that Court is to be drawn from the fact that I think the conclusion reached by it may be supported on another ground.

Mignault, J.:—I do not think it necessary to express any opinion on the interesting question discussed in the Courts below whether the respondent was acting in the course of his employment within the meaning of the Alberta Workmen's Compensation Act of 1908, ch. 12, when he suffered the injury for which compensation is claimed. The so-called rules which the appellant claims he violated, and which are addressed "To the new man" and are termed "Safety Precautions," were not brought home to the respondent, nor were they proved to be rules of the appellant properly promulgated to its employees. Even the appellant's witness and foreman, Berg, stated that he had never seen before the day previous the rule forbidding employees to go between moving cars for any purpose, and if necessary to go between the cars to stop them before doing so.

So if violation of the rules of the company would take the respondent's case outside of the course of his employment, the rule in question has not been proved to be a duly promulgated rule of the appellant.

Possibly the action of the respondent may have amounted to gross misconduct, but the appellant's counsel informed us that when permanent injury ensues, as in this case, gross misconduct is not a defence under the Alberta Compensation law.

Under these circumstances, the appeal should be dismissed with costs.

Appeal dismissed.

STANDARD BANK OF CANADA v. FINUCANE.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. June 7, 1921.

Contracts (§IID-145).—Agreement to Advance Money on Terms—Bank holding Security of Borrower—Knowledge and Approval of Bank—Money Deposited in Bank—Assignment of Agreement—Rights of Assignee.

Where a customer of a bank having hypothecated to the bank its entire product and output as security for advances made, and being in need of more money than its line of credit admits of, borrows from another company on terms, a sum of money which is deposited in the bank and becomes subject to the usual exigencies of business between the bank and its client, the bank, although in no way a party to the borrowing, having knowledge of it and having given its approval, and for a certain period having honoured the cheques to the borrower in payments on the loan, in accordance with the agreement, the approval of the bank is a specific undertaking to see that the payments are made in accordance with the terms of the agreement and an assignee of such agreement may enforce such undertaking.

[Finucane v. Standard Bank (1921), 57 D.L.R. 132, affirmed.]

APPEAL by defendant from the judgment of the British Columbia Court of Appeal (1921), 57 D.L.R. 132, affirming the judgment of Morrison, J. (1920), 53 D.L.R. 720, in an action for the payment of a sum of money and to declare the defendant a trustee for the plaintiff in respect of the said sum and for an accounting. Affirmed.

E. A. Lucas, for appellant.

E. P. Davis, for respondent.

Davies, C.J.:—I am of opinion that this appeal fails and should be dismissed with costs. I do not consider that the construction of the agreement in question admits of any reasonable doubt. The bank was liable under it to account

Can.

S.C.

STANDARD BANK OF CANADA v. FINUCANE.

to the Holly Mason Hardware Co. in consideration of that company's advancing $50,000 to the Rainy River Pulp and Paper Co., for $10 of the proceeds of each ton of pulp deposited with it by the Rainy River Pulp and Paper Co. All the output of that company was hypothecated to the bank as security for the advances made by the bank to this company from time to time. The bank instead of recognising and acting upon its liability under the above agreement with the Holly Mason Hardware Co., paid out the whole of the proceeds of the pulp deposited with it by the Rainy River Pulp and Paper Co. to third parties on the cheques and orders of the Rainy River Co. and now disputes its liability to the Holly Mason Co. for that $10 per ton of the proceeds of the pulp deposited with it.

I cannot doubt their liability so to reserve and account to the Holly Mason Hardware Co. for this $10 per ton of pulp received by it and so would dismiss the appeal.

Idington, J.:—I would dismiss this appeal with costs.

Duff, J.:—The appeal should be dismissed with costs. I can have no doubt that the instruments in question operated as an equitable assignment and that it affected the funds which came into the hands of the bank.

Anglin, J.:—I would dismiss this appeal.

The document executed by the Rainy River Pulp and Paper Co. and assented to and approved by the appellant bank, if not an equitable assignment to the plaintiff's assignor of $10 per ton of the proceeds of its product hypothecated to the bank and received by it (as I incline to regard it) was at least an equitable charge to the extent of such proceeds. It was well understood by all parties when the document was executed that the bank would handle, as it did in fact, all the proceeds of the Rainy River Co.'s output. The purpose of the document given by that company to the plaintiff's assignor was to give the latter effective security on those proceeds for the sum of $50,000 which it was advancing to improve the financial position of the Rainy River Co. In order to make that security effective it was essential that the part of those proceeds intended to go to the plaintiff's assignor should be held for it; and that fact was of course well known to the bank. By its assent to and approval of the instrument the bank, in my opinion, impliedly undertook that out of the monies to be received by it as proceeds of the output of the Rainy River Co. there would be withheld from other dispositions by

that company sums sufficient to satisfy the security on those proceeds given to the plaintiff's assignor. The bank, with full knowledge of what was being done, became a party to the fund so appropriated being diverted, while in its hands, by the Rainy River Co. to third parties. The bank probably benefited indirectly from such diversion. But, apart from deriving benefit therefrom, the fact that it became a party to the diversion renders it liable to the plaintiff. Its officers knew that money in its hands belonging in equity to the plaintiff's assignor or which it was entitled to have held for its benefit was being misapplied by the bank's customer and the bank participated in that misapplication by honouring the cheques by which it was made.

Mignault, J.:—The judgment of the first Court contains the following admission of the parties:—"It being admitted and agreed in lieu of an account in that 844 tons of pulp were manufactured and sold by the Rainy River Pulp and Paper Co. during the months of November and December, 1918, and January, 1919, and that the proceeds of the sale of the 724 tons thereof were deposited in the defendant bank to the credit of the Rainy River Pulp and Paper Co., and that the proceeds of the balance, 120 tons, were paid to the assignee of the said Rainy River Pulp and Paper Co."

On this admission of facts, the trial Judge, instead of ordering an accounting, condemned the appellant to pay the respondent $10 per ton on 724 tons, in all $7,240.

The question whether he was right in so doing—and his judgment was affirmed by the Court of Appeal, McPhillips, J., dissenting—stands to be determined on the construction of the letter of the Rainy River Pulp and Paper Co. to the Holly Mason Hardware Co. (now represented by the respondent, dated May 13, 1916).

By this letter the former company promised to repay $50,000 loaned to it by the latter company, and as security to pay $10 per ton from the proceeds of each ton of pulp manufactured and sold by it from June 1, 1918, until full repayment. The letter added (I copy textually from the plaintiff's exhibit No. 1):—"It is understood that our bankers, the Standard Bank of Canada, to which all our output is hypothecated for advances from time to time, has full knowledge of this arrangement and approves of it, and will waive its security to that extent." At the foot of the letter the approval of the appellant is given by the word

Can.

S.C.

STANDARD BANK OF CANADA v. FINUCANE.

"approved" followed by the signature of the bank, per G. C. Perkins, manager.

Mr. Perkins was replaced as manager of the Vancouver branch of the appellant bank on October 1, 1918, by J. M. Sutherland, who, in his examination on discovery states that, so far as he knows, every cent of the money that was received on account of sales of pulp went into the account, in the appellant bank, of the Rainy River Pulp and Paper Co. The latter company issued drafts against the sale and shipment of pulp and discounted them with the appellant, to whom it was indebted and remained so for large advances. One draft appears to have been sent to another bank, the Bank of Kentucky, but this is immaterial in so far as the issues here are concerned. The whole output of the Rainy River Co. was hypothecated to the appellant, so that the security obtained by the Holly Mason Hardware Co. required the consent of the appellant, and this consent was given no doubt because the loan of $50,000 was for the advantage of the Rainy River Co., and presumably also of the bank, its creditor, where the proceeds of the loan were deposited. I may add that the Rainy River Co. made monthly returns to the Holly Mason Hardware Co. of its sales of pulp, accompanied by its cheque for the 10%, and, although in one instance at least no sufficient funds stood to the credit of the Rainy River Co., these cheques were accepted and paid by the bank until December, 1918, when, on the instructions of Mr. Sutherland, further payments were refused, the Rainy River Co. not having sufficient funds to meet the cheques issued by it in favour of the Holly Mason Hardware Co.

The material facts are, therefore, that the proceeds of pulp sales were deposited in the bank to the credit of the Rainy River Co., that the latter was allowed by the bank to draw out these proceeds, that for some months the 10% on the pulp sales was paid to the Holly Mason Hardware Co. by cheques drawn on the bank, and accepted by the latter, although in one instance, at least, there were not sufficient funds to the credit of the Rainy River Co., and that from December, 1918, the bank refused to pay any further cheques issue in favour of the Holly Mason Hardware Co. although the Rainy River Co. continued to discount its drafts and draw cheques on its account. It does not appear that the debt due the bank was reduced by means of these

discounts. I may add that all drafts discounted were charged in the usual course to the Rainy River Co. and their payment credited to it.

Neither of the parties referred us to sec. 96 of the Bank Act R.S.C. 1906 ch. 297, the effect of which is to exempt a bank from liability by reason of a trust affecting a bank deposit, although the bank has notice thereof, and the receipt of the depositor is declared to be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit.

I am disposed to think that unless the approval given by the bank to the transaction between the Rainy River Co. and the Holly Mason Hardware Co. is more than a mere acknowledgement of notice of the trust affecting the deposit of the proceeds of the pulp sales, this approval would not give a cause of action to the assignee of the Holly Mason Co. against the bank. But this approval seems to me much more than an acknowledgement of notice of this trust. In terms, it waives the bank's security to the extent of 10%, and not only this waiver but the approval of the whole transaction, in my opinion, takes the matter out of the terms of a general provision like sec. 96. It seems unquestionable that an equitable charge was created on the proceeds of the pulp sales to the extent of the 10%, and when these proceeds were deposited in the bank, the latter, in view of its assent to the letter of May 13, 1918, could not, either by asserting its own lien, or by allowing the Rainy River Co. to draw on the proceeds, defeat the claim of the Holly Mason Co. to the 10%. In other words, when the bank received these proceeds of pulp sales on deposit it took them subject to the charge affecting them and became a trustee towards the Holly Mason Hardware Co. for the payment to it of the 10%. On that ground I think the trial Judge and the Court of Appeal rightly held the appellant liable for the 10% of the proceeds of pulp sales actually received by it from the Rainy River Co.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

SKENE v. THE ROYAL BANK.

Supreme Court of Canada, Davies, C.J., Idington, Anglin, Brodeur and Mignault, JJ. November 2, 1920.

Contracts (§IID—180).—Construction—Allowance for Extras in Sub-Contract for Building—Parol Evidence to Vary Written Contract—Non-Admissibility of.

Can.

S.C.

SKENE
v.
THE ROYAL BANK.

The appellants as principal contractors, had undertaken for the Canadian Pacific Railway Company the construction of the Vancouver hotel and made a sub-contract with the National Iron Works for the supplying and installing of skylights, louvres, roofs and flashings; the respondent, assignee of the claims of the sub-contractor, obtained judgment for two items (1) a claim for $969 for louvres installed by the sub-contractors on the skylights over the bathroom vent shafts on the roof garden level of the main roof to the extent that the area of the louvres installed in these skylights exceeds the height of two feet six inches (the height mentioned in the specifications (2) a claim for $1,074 for extra work and materials furnished by the sub-contractors in installing in the skylight over the ladies' tea room, louvres, gauze screenings and accessories. As to the second item the Court held that the matter in dispute was merely one of fact, whether the plan on which the respondents were asked to tender did or did not indicate the louvres, or did or did not carry a notation shewing that they were required. The trial Judge found that it did not and the Appellate Court having affirmed his decision, and there being undoubtedly evidence to sustain conclusion reached by the trial Court the Court would not interfere, and the appeal failed. With regard to the first item the Court held that the contract being in writing and containing no stipulation as to the style of louvre, the respondents could not vary the written contract by parol evidence of another term claimed by them to have been agreed upon as the basis upon which that contract was to be entered into, and without that evidence, there being a contract and specifications which admittedly could have been carried out according to the architect's plan, had flat louvres been used they could not maintain a claim to be allowed as an extra the additional cost of carrying a different kind of louvre to a height of 5 feet instead of 2½ feet shewn on the architect's plan, and as to this item the appeal succeeded.

[See 50 D.L.R. 213.]

APPEAL by contractors from a judgment of the British Columbia Court of Appeal (1920), 28 B.C.R. 401, affirming the judgment of the trial Judge allowing two items to sub-contractors under a building contract, for extra work and material furnished by the sub-contractors in installing certain louvres in the Vancouver hotel. Varied.

J. E. McMullen, for appellant.

E. Lafleur, K.C., and A. Bull, for defendant.

Davies, C.J.:—Two items alone are in dispute in this action which is one brought by the Royal Bank, as assignee of a sub-contractor, against the contractor for the erection of a building. They consist of $969 and $1,074.50 respectively for the installing of skylights, louvres, roofs and flashings on the building. The trial Judge allowed both items and the Appeal Court confirmed that judgment.

I agree with the conclusions of my colleagues Anglin and Mignault, JJ., for the reasons stated at length by them to

allow the appeal as to the $969 and dismiss it as to the $1,074.50.

Idington, J.:—The appellants were contractors employed to do the work of rebuilding for the Canadian Pacific R. Co. the Hotel Vancouver on a percentage basis.

They sublet part of the work to a firm composed of one Shaw and one Haslett, carrying on under the name of The National Iron Works.

These men had been invited to tender to appellants for a specified part of the work and, on June 26, 1913, sent appellants the following tender:—

"425-7 Alexander St.
Vancouver, B.C., June 26th, 1913.

Messrs. Skene & Christie,
Vancouver, B.C.

Dear Sirs,—We propose to supply and erect as above all skylights with wire guards and louvres, etc., complete as specified in clause 6, 7, 8 of the sheet metal work specifications, including skylight over ladies' tea room for a complete 15 storey building, including Marpole Wing, making all skylights, bars and louvres, etc., weather and dust tight and including all flashings in connection with same for the sum of twelve thousand two hundred and twenty-three dollars ($12,223.00).

Yours obediently,
National Iron Works,
Per V. Shaw.

For details of glazing system see our appended latter."

In that letter amongst other things in way of some explanation of the work to be done they said: "We also enclose you a sketch of proposed louvre, which we can guarantee to be perfectly weather tight."

On August 7, 1913, they entered into a long written contract with appellants for the performance of the work so agreed to be done.

The contract recited the fact of appellants having entered into said contract with the C. P. R. Co. and proceeded to recite as follows:—

"The said contract included the supplying and installing skylights, louvres, roofs and flashings in connection with same, as specified in clause 6, 7, and 8 of the sheet metal specifications, the specifications whereof are hereto annexed and made a portion of this contract.

Can.

S.C.

SKENE v. THE ROYAL BANK.

And whereas the parties of the first part, for the consideration hereinafter appearing, have agreed to supply and install all the skylights, louvres, roofs and flashings as stated in the said specifications in the manner hereinafter appearing."

Then the instrument proceeded as follows:—

"Now this indenture witnesseth that the parties of the first part agree to and with the parties of the second part that they will supply all material required for the skylights, louvres, roofs and flashings, and install same as set out in the specifications hereto attached to the complete satisfaction of the C.P.R. representative in charge of the said work and the parties of the second part, and F. S. Swales, Architect.

The parties of the first part shall comply with all the terms and conditions of the hereinbefore recited contract between the parties of the second part and the Canadian Pacific Railway Company as shall be applicable to the supplies to be furnished and the work to be done by the parties of the second part in pursuance of the terms of this contract."

In respect of work done under this contract, or supposed, until this legislation was in sight, by all those directly concerned, to have been done thereunder, many disputes arose. And the money having been assigned to respondent it became the suitor seeking recovery. All these claims by it have been adjusted by the parties, or decided by the trial Judge in such a way as to leave only two items in respect of which there was an appeal to the Court of Appeal, and from there, here.

One of these items (fixed at $969) is in respect of louvres constructed to help the ventilation of many bath rooms in the hotel.

The type used by the sub-contractors was that mentioned in the letter accompanying the tender above quoted.

The sub-contractors chose to rush ahead without regard to the express terms of the contract which provided as follows:—

"(8) Louvres.—Where louvres are shewn in vent shafts they shall be built of two thicknesses of copper, as hereinafter specified, shaped, curved to shed water, with ¼" iron rods copper covered at ends. Louvres shall be of sufficient width to be weather proof, and spaced to provide 50% more open area to the air than the entire area of the shaft, and

shall be framed into iron angle corner posts and covered and left ready to receive skylights. Intake duct shall be built to detail and shall have ⅛" mesh No. 20 gauge brass wire screen back of louvres."

The language of this contract directly in regard to the matter in question in said item of the claim, seems too clear and explicit to need any aid from evidence of experts or others to enable one to understand it.

Such evidence was clearly in violation of the rule of law against extrinsic or parol evidence being admissible to contradict, vary, add to, or subtract from, the terms of a valid written instrument.

Indeed when the evidence went so far as to deal, as a large part of it did, with the utility of the architect's design, the question is suggested, why was it heard?

The explanation is that the respondent was trying to shew there had been a mutual mistake.

If so, then there was, as the trial Judge held quite properly, no such case made out, and I doubt if it ever could be by such methods.

I think this appeal must be clearly allowed in respect of said item.

The other item is one fixed at $1,074.50 in respect of louvres and other work relative to a skylight over the ladies' tea room.

The respondent successfully contended below that this was for extra work beyond that required by the plans given the sub-contractors. Of course this depends, to a limited extent if not entirely, upon the proper appreciation of the evidence.

I am always disposed to uphold the trial Judge when his decision turns upon the respective values he puts upon the evidence of witnesses so far as derived from, and founded upon, demeanour of the witnesses testifying.

He has in that regard an advantage, hard to overestimate, over us who have not seen the witnesses.

Even that, however, may be overborne by surrounding facts and circumstances which he has overlooked.

In this case the crucial fact testified to by Garrow that he had given to the firm members, Shaw and Haslett, or one of them, plan No. 423 with explanations, and entered in his record book such fact of delivery, which is accepted by the trial Judge as true, seems to me conclusive as against respondent.

Can.

S.C.

SKENE
v.
THE ROYAL BANK.

The reasoning, by which the trial Judge seems to avoid following that finding in which I agree, I cannot, with all due respect, follow.

Unless one should come to the conclusion that Garrow had deliberately perjured himself, it seems hard to find that such a record, found under such circumstances, should be false.

The only possible alternative, consistent with honesty, is a mistake, but even if we could conceive such a mistake to have been made, how could he, when only 9 months later dealing with the same subject matter, be led not only to overlook all that, so important, but to make without shadow of authority, a promise, as Shaw seeks to say he did, that they could charge for this work—intending it to be though not so expressed—extra work.

Garrow had not the slightest interest, unless some prompting derivable from the possibility of such a mistake or oversight, being attributable to him, in swearing to anything false.

Shaw had obviously, if Garrow is right, to cover over his own manifold mistakes; suppress the fact of the delivery of the right plan, and the temptation to give—what may have been spoken of in regard to something else—unauthorised directions to charge such an item to appellants as an extra.

Moreover Shaw is not corroborated in any way, unless we accept Goodwin's work and evidence which was all founded on the plans which Shaw had, by mistake, given him, omitting to give him plan 423 which would have led him to discover the mistake.

A perusal of the evidence leads me to infer, that the members of the firm then operating under the name of the National Iron Works, were not so careful and systematic in their business methods of handling and keeping track of the plans given them, as was Garrow, and hence erroneous results which Shaw seeks to unload upon others than himself.

Haslett, speaking from memory, very distinctly corroborates Garrow when he testifies as follows:—

"Q. In regard to the ladies' tea room skylight; the large skylight, what about the design of that? What was your understanding as to the contract, as to the design? A. Well, I never understood anything else but what is in place now.

The Court.—Which is this?

Mr. McMullen: "This is the tea room skylight, my Lord."

What motive can he have for testifying falsely? The only one suggested is the quarrel with his partner. But we have no explanation of the terms on which he quit, shewing that he was freed from any obligation to the respondent.

The part of Shaw's examination for discovery, put in evidence by the appellants, suggests that he had then forgotten which he later recalled to his mind at the trial, or imagined.

He swore in that examination as follows: —

"Q. Did you have a hand in these negotiations at all personally? A. No. Q. Well, where did you get your contention as to your claim being based upon the plans? A. You mean in the first place? Oh, I got that from our quantity surveyor. Q. But you say now that your claim is based upon—? A. The plans. Q. The plans, yes. You see I am getting your information. A. Well, I was in at the first—at the commencement—when we were tendering. Q. You were in at the tendering? A. Yes. Q. You took part in the negotiations, did you? A. In—well, I took this part, that I solicited the order, of course. Q. Yes. A. And the plans were handed over to me for figuring on, and, of course, were eventually handed over to a qualified engineer to get the quantities off."

And specifically as to this item of $1,241, we have the following exhibition of ignorance or perversity:—"Q. This claim, this item of $1,241, is based on the contention that the plan did not shew louvres:

Mr. Bull: You need not answer that question.

Mr. McMullen: Is that what your claim is?

Mr. Bull: I will instruct the witness not to answer that question. It involves a question of law.

Mr. McMullen: What is your claim based on? A. Well, I think I will go by my solicitor, I don't answer that question.

Q. What is your claim for $1,241 based on?

Mr. Bull: Well, you need not answer that, either.

Mr. McMullen: Q. Do you refuse to give me the information about what your claim for $1,241 is based on? A. Yes.

Mr. McMullen: All right. I will apply and compel you to answer.

Mr. Bull: You can answer any question of fact that is

Can.

S.C.

SKENE v. THE ROYAL BANK.

within your knowledge about these items. If there is any question of fact you know, you can answer it.

Mr. McMullen: I submit that is a question of fact.

Mr. Bull: But you must not construe any of these documents; it is not in your province to do that.

Mr. McMullen: I put the question to you again, now, after you have got further instructions from your solicitor; What is your claim of $1,241 based on? A. On the drawings. Q. In what respect? Why on the drawings? Is it that the drawings do not shew any louvres? A. Do not shew any louvres, no. Q. That is the whole foundation of your claim on that item? A. I won't answer that question, because other things might crop up. Q. As far as you know that is the basis of your claim? A. No, I don't answer that question either. Q. You refuse to say what your knowledge and belief is, do you? A. There are other things arise out of that that I—that affect the work—that I don't wish to say at this time, anyhow."

If the story now put forward by him that Garrow on behalf of his employers had told him he would get paid for this work—clearly implying as extra work—had been present to his mind, he would have said so at once. And indeed I cannot imagine in regard to such a simple and natural sort of thing if true, and ever told by Shaw to his counsel, that the latter would have taken the attitude he did relative to the disclosure of any such ground.

I suspect Shaw's statement at the trial was something he had later convinced himself of having happened and he is flatly contradicted by Garrow.

I prefer Garrow's evidence when in conflict with that of Shaw under such circumstances.

And when the matter of complying with plan No. 423 and all the implications connected therewith, or arising therefrom, was taken up as alleged with the architect, there was no such attitude on Shaw's part as one would have expected from a man taken by surprise arising from the failure of the architect of his department and ending in a personal appeal to him.

Moreover, when the case was being prepared for trial we find no such effort made as one would expect to bring the architects to book, but reliance placed on the loose expression of a mere subordinate, as Garrow was, to go ahead and they would be paid, which expression he denied.

A perusal of Garrow's evidence impresses me favourably

as that of a careful, methodical and candid man, of considerable training in the profession he has followed, whether as subordinate or not.

Counsel seems to make a point that he was not in fact entitled to be called an architect. If so, then so much less had the National Iron Works any proper justification in looking to him, or listening to his instructions without having a distinct understanding with his employers, the architects in charge relative to extras.

In conclusion, we have the express terms of the tender which refers to all skylights, including the skylight over the ladies' tea room, and all louvres, impliedly all, connected therewith; the positive statements of Garrow that plan No. 423, and not others taken by Shaw, and given Goodwin, a few months later, were to be the guide, and that the markings on these several plans were such as to lead any careful builder to discern the actual requirements; the corroboration by Haslett; the express provision of "the general conditions" which contained the following:—"Drawings and specifications are intended to be co-operative, and to describe a finished piece of work, and both are binding. Should any difference exist between the drawings and specifications, drawings and details, or should any error, inconsistency or difference occur in any or between any of the drawings or specifications, the contractor, before proceeding with the work, shall ask for instructions, and the architect will decide which is to be followed." The failure to approach, in view thereof, the architect, except through a subordinate, and obtain express directions for such authority, to charge for such an extra as in question; the finding of the trial Judge that Garrow's entry of record shewed a delivery of plan 423; no proof of what became of such delivery indeed a contention set up that it was paid for by the National Iron Works, and that they had a right to retain it, but no satisfactory explanation of what became of it; no pursuit of the inquiry involved herein to the architects or their office, for at the trial Garrow was not in their employment; no possible motive, of important quality, for Garrow misrepresenting what had transpired and swearing thereto, and no evidence of anybody who knew the original facts at the time testifying in corroboration of Shaw, and the express terms of contract as above quoted.

Can.

S.C.

SKENE v. THE ROYAL BANK.

I have no hesitation in arriving at the conclusion that the appeal should be allowed in respect of this item also.

The appeal should be allowed with costs throughout.

Anglin, J.:—Two distinct matters are involved in this appeal. The respondents have been allowed $969 on an extra for the construction of louvres in the ventilating shafts of the Vancouver Hotel to the height of 5 feet instead of to the height of 2½ feet as shewn in the architect's drawings. They have also been allowed $1074.50 as an extra for installing louvres in the skylight over the tea room of the hotel.

As to the latter item the matter in dispute is purely one of fact—whether the plan on which the respondents were asked to tender did or did not indicate the louvres, or did or did not carry a notation shewing that they were required. The trial Judge found that it did not and his finding has been affirmed on appeal. Counsel for the appellant failed to convince me that we should reverse it and further consideration of the relevant evidence has not changed the impression left on my mind at the close of the argument. Whatever view I might have taken of the testimony were the question res integra, there is undoubtedly evidence to sustain the conclusion reached in the trial Court. This branch of the appeal fails.

But, with respect, the appellant should, I think, succeed as to the first item. It is conceded by the respondents that if flat louvres had been used the requirements of the specifications as to the area of air openings in the louvres could have been complied with without constructing them to a greater height than indicated on the architect's plan. It was only because "S" louvres were used that the greater height of construction became necessary. The contract and specifications are silent as to the kind of louvres to be installed.

The respondent's contention is that prior to their contract being made it had been agreed between them and the appellants that the "S" louvres should be used and that this was in fact made the basis of the contract. It is common ground that to obtain the prescribed area of openings to the air using "S" shaped louvres a height of 7½ ft. would have been required and that at the respondent's instance the architect consented to the height of the louvre being restricted to 5 ft. The appellants insist that the use of the "S"

shaped louvre, though approved of by them, was never made a term of the contract.

The contract is in writing. It contains no stipulation as to the style of louvre. It seems reasonably clear to me that what the respondents seek to do is to vary the written contract by parol evidence of another term claimed by them to have been agreed upon as the basis upon which that contract was to be entered into. That, I think, cannot be done. Without that evidence we have a contract and specifications which admittedly could have been carried out according to the architect's plan had flat louvres been used. For their own purposes the respondents used "S" shaped louvres instead. They cannot, in my opinion, under these circumstances, maintain a claim to be allowed as an extra the additional cost of carrying the "S" louvres to a height of 5ft. instead of 2½ft. shewn on the architect's plan. This branch of the appeal therefore succeeds.

Brodeur, J.:—This case arises out of a building subcontract made between the appellants and the National Iron Works. The respondent, the Royal Bank, is the assignee of the claim of the National Iron Works.

Several items were in dispute when the action commenced; but on this appeal there are only two in controversy.

The first one to the amount of $969 has reference to additional louvres put to the skylights on the roof garden; the second one to the amount of $1,074.50 has reference to the roof over the tea room.

On the first claim the facts are the following:—

The specifications provided that the louvres should provide 50% more open area to the air than the entire area of the shaft and that they should be built of two thicknesses of copper. The plan of the building on which the contract was based provided that the ventilating shaft should be of a height of two feet six inches and that the louvres should be straight. When the National Iron Works put in their tender which amounted to $12,223, they suggested in a letter accompanying their tender that the louvres, instead of being straight, should be of the "S" shape. The tenderers admit that their tender was based on the "S" louvres being accepted.

It seems to me very clear that the "S" louvres were accepted by both parties and that the work proceeded on that basis.

Can.

S.C.

SKENE v. THE ROYAL BANK.

It was found, however, that these "S" louvres would not, at the height shewn on the plan, produce the open area to the air stipulated in the specifications; and then, after negotiations between the parties, the open area was reduced and the height of the louvres was increased.

Now the claim is made by the sub-contractor that they should be paid an extra for these additional louvres.

It is very unfortunate that this claim for extras does not seem to have been formulated at the time; and it looks to me as if it were an afterthought.

There was evidently after this change in the shape of the louvres was accepted, an inconsistency between the plan and specifications; and according to the agreement between the parties the architect was to decide which was to be followed.

The architect having decided to increase the height of the louvres and to reduce the space area of ventilation no claim for extra could be made; and if the National Iron Works were not satisfied with this decision they should at least make them a formal claim for extras. Their silence at the time confirms me in the view that they accepted the changes proposed by the architect as a compromise.

Their claim should not be sustained for this extra work and the judgment of the Courts below which sustained it should be set aside in that respect.

As to the claim for the roof over the tea room.

The question is whether a plan shewing the additional work was submitted or not to the National Iron Works. It is a question of credibility of witnesses. The trial Judge has accepted the evidence of the respondent and his decision was confirmed by the Court of Appeal. I would not like to interfere with this finding and it should stand.

On the whole, the decision of the Court below should be varied and the judgment in favour of the respondent should be reduced by $969.

There should be no costs in this Court.

Mignault, J.:—Two items only under the sub-contract which the appellants made with the National Iron Works, now represented by the respondent, are in question in this appeal. The appellants, as principal contractors, had undertaken for the C. P. R. Co. the construction of the Vancouver Hotel, and on August 7, 1913, made this sub-contract with the National Iron Works for the supplying and installing of skylights, louvres, roofs and flashings. The two

items in question are:—1. A claim for $969 for louvres installed by the sub-contractors on six skylights over the bath room vent shafts on the roof garden level of the main roof to the extent that the area of the louvres installed in these skylights exceeds the height of two feet six inches. 2. A claim for $1,074 for extra work and materials, furnished by the sub-contractors in installing in the skylight over the ladies' tea rooms louvres, gauze screenings and accessories.

The amount of these claims, if the respondent is entitled thereto, is admitted by the parties.

The respondent assignee of the claims of the sub-contractor, obtained judgment for these two amounts before Macdonald, J., of the British Columbia Supreme Court, and this judgment was affirmed by the Court of Appeal, the Chief Justice dissenting.

First item: The respondent directed its evidence to shew that there had been a mutual mistake in connection with this item, and the trial Judge came to the conclusion that such mutual mistake had not been established but that the parties had never been ad idem as to this part of the contract, and he held that the sub-contractors were entitled to the value of their work and materials, the extra quantities of louvres, over and above two feet six inches in height, being something outside of the sub-contract for which they could claim on a quantum meruit.

The sub-contract was made for a lump sum of $12,223. As far as this item is concerned it will suffice to say that the sub-contractors undertook the supplying and installing of skylights, louvres, etc., as specified in clauses 6, 7 and 8 of the sheet metal specifications. These specifications stated that the louvres should be of sufficient width to be weatherproof and spaced to provide 50% more open area to the air than the entire area of the shaft. A plan prepared by the architect was furnished the sub-contractors shewing in profile one of these vent shafts and skylights with louvres, and the space occupied by the louvres on this plan measured by scale two feet six inches. The general conditions of the main contract of the appellants with the railway company, incorporated by reference into the sub-contract, contained the quite usual clause that should any difference exist between the drawings and specifications, drawings and details, or should any error, inconsistency or difference occur in any or between any of the drawings or specifications, the con-

Can.

S.C.

SKENE v. THE ROYAL BANK.

tractor before proceeding with the work shall ask for instructions and the architect will decide which is to be followed.

The sub-contractors in a letter accompanying their tender, suggested what is known as the "S" shaped louvre and this louvre was accepted by the appellants. The whole difficulty has arisen on account of this form of louvre, for it is common ground that had flat louvres been used the requirement of the specifications of 50% excess area of the openings between the louvres over the total area of the shaft could have been fulfilled in a total vertical space of two feet six inches, whereas with the "S" shaped louvre this 50% excess area required the building of louvres in the ventilators to a height of seven feet six inches.

With great deference, I cannot agree with the trial Judge when he holds that the parties were not ad idem as to this part of the contract. The sub-contractors entered into the contract undertaking to fulfil all the requirements of the specifications with the "S" shaped louvre. I find that the parties were ad idem as to the use of this louvre; no form of louvre was specified in the contract, and the parties adopted this one. I find also that they were ad idem, for this was an express requirement of the specifications, as to the 50% excess area over the area of the shaft to be furnished by the louvres as installed, the only modification subsequently made therein by the architect, and this was in favour of the sub-contractors, being that the architect consented to the louvres furnishing a total open space equal to the total area of the shaft, instead of 50% greater, so that the louvres installed by the sub-contractors are 5 ft. in height instead of 2 ft. 6 inches. The most that can be said is that the sub-contractors themselves made a mistake in thinking that they could comply with the specifications by building louvres of the form suggested by them to a total height of 2 ft. 6 inches, but this mistake is their misfortune and no fault of the appellants. It is true that the scale of the profile plan of the ventilators and skylights shewed the louvres occupying a vertical space of 2 ft. 6 inches, but if there was here an inconsistency or a contradiction between the drawings and the specifications, it was a matter to be settled by the architect, and it afforded no excuse to the sub-contractors to disregard the requirements of the specifications as to the spacing of the louvres. I may

add that this being entirely a matter of contract, I am not concerned with the question whether these requirements were good or bad practice, nor do I think that the guarantee promised by the sub-contractors gave them the right to disregard their contractual obligations, although it might well have furnished them an excuse if they had faithfully followed the specifications and the instructions of the architect, and the ventilators as constructed had failed to fulfil their purpose.

I have therefore come to the conclusion on this branch of the case that the installation of these louvres was not a matter outside the contract, and that the sub-contractors are not entitled to anything over and above the contract price. The judgments appealed from should therefore be varied so as to reject this claim of the respondent.

Second item.—I have much more difficulty as to this item, restricted as it was by the trial Judge to the louvres installed by the sub-contractors in the skylight over the ladies' tea room. The vital point is this. The trial Judge held that plan 423 (the original of which was not produced at the trial, apparently for the reason that the architect had gone east leaving his Vancouver office locked) was the detail of plan No. 235, and was referred to on the latter by the words "see detail" with an arrow pointing to the roof. He also held, on Garrow's testimony supported by the entries of his book, which he accepted, that a blue print of plan 423 was handed to the sub-contractors before they made their tender. But this plan No. 423 (I refer again to the blue print and not to the original which was not available) had an addition made by Garrow who wrote with a red pencil on the plan the word "louvres" at the place where these louvres were subsequently constructed. Was this word in the blue-print of plan 423 handed by Garrow to the sub-contractors? I cannot find, after carefully reading the reasons for judgment of the trial Judge, that he has in terms answered this question (although it may possibly be implied that he was of the view that this word was not on the blue print handed to sub-contractors), and the respondent's exhibit No. 18, another blue print of plan 423 which the sub-contractors received for another purpose several months after the contract, does not shew the word "louvres" where it appears on the appellant's exhibit No. 34, also a blue print of plan 423.

Can.

S.C.

MAYLAND v. KINDT.

Garrow's testimony is that this word was on the blue print handed to the sub-contractors before the contract and that he explained to them that these louvres would be required. Shaw, one of the sub-contractors, says that the requirement of the louvres was only mentioned by Garrow, who represented the appellants, long after the contract. The respondent could have dispelled any doubt by producing the blue print which the trial Judge held the sub-contractors received before the contract, and I do not think that this non-production has been sufficiently explained. Still a doubt remains on the question whether the word "louvres" was on the blue print handed to the appellant and this doubt is strengthened by its omission on the respondent's exhibit No. 18 although Garrow states that he wrote it on all the blue prints in his possession of plan 423, but he certainly did not write it on exhibit No. 18. Feeling this doubt I cannot say that the trial Judge was clearly wrong when he allowed the respondent this item, and therefore I do not think that I should set aside this portion of the judgment.

In the result I would reject the first item only of the respondent's claim, but as this modification of the judgment is substantial I think the appellants are entitled to their costs here and in the Court of Appeal, except in so far as the costs may have been increased by the unfounded appeal of the appellants on the second item of the respondent's claim. To that extent I would allow the appeal to this Court.

Judgment below varied.

MAYLAND v. KINDT.

Supreme Court of Canada, Davies, C.J., Idington, Duff, Anglin and Mignault, JJ. December 17, 1920.

Appeal (§VIII—515)—Provincial Appellate Court Judgment—Judgment Depending on Surrounding Circumstances—Advantage of Judges Living in Province in Appreciating—Reluctance of Federal Court to Reverse.

Where a case depends merely on the credibility of the parties, an Appellate Court should accept the trial Judge's decision, but where the parties agree on many material points and in the final analysis the question is as to the proper inferences to be drawn from surrounding circumstances and the effect to be given to a transfer of title which admittedly did not express the full agreement of the parties, and a provincial Appellate Court has unanimously reversed the judgment of the trial Judge, the Supreme Court of Canada recognising the great advantages which the provincial Judges have in appreciating the surrounding circumstances, and the bearing thereof in

properly appreciating the evidence given by the litigants will not reverse such appellate decision where it is not shewn to be clearly wrong, the burden of proving which is on the appellant.

Can.
S.C.
MAYLAND v. KINDT.

APPEAL by plaintiff from the judgment of the Alberta Supreme Court, Appellate Division, in an action in which the plaintiff claimed that the defendant had assigned to him absolutely a quarter section of land, the respondent claiming that the transaction was one of mortgage and not of purchase with an option of re-purchase. Affirmed.

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

A. H. Clarke, K.C., for defendant.

Davies, C.J.:—I confess to entertaining some doubts as to the conclusions of fact reached by the Appeal Court in this case, but have not been able to satisfy myself that they are so clearly wrong as would justify me in reversing the judgment.

I would therefore dismiss the appeal with costs.

Idington, J.:—The appellant pretends the respondent assigned to him, absolutely, on March 23, 1914, a quarter section of land near Nanton, in Alberta, for $1,700, sworn, at that time, by him (the appellant), to be worth $4,000, and which he was, on June 9, 1918 (without anything having been done by him meantime to increase the value of said land) selling for $9,600, when intercepted by this redemption suit, instituted by respondent; and that the only privilege the latter had was an option to re-purchase, within 2 years from said first mentioned date, the said land at the said price of $1,700, with 10% per annum over and above the one-third of the crops reaped meantime by respondent, to be paid said appellant.

Meantime the respondent had paid appellant a third of the proceeds of the said crop, so reaped, assuming he had the right of redemption.

The agreement for re-purchase or redemption was to have been drawn up by the agent of the appellant, which never was done.

The parties in their respective stories as to what this agreement was to have contained, are wide asunder as the poles.

The trial Judge accepted the version of the appellant, without, as I most respectfully submit, duly appreciating the manifold circumstances in favour of respondent's version, and reasonable expectation.

The Court of Appeal relying on these, for the most part,

Can.

S.C.

MAYLAND v. KINDT.

undisputed circumstances, has unanimously accepted in the main the version of the respondent, and held that the transaction in question was one of a mortgage and not of a mere purchase with an option given to the respondent to re-purchase.

Needless to say that Court correctly appreciated the distinction in law between a mortgage and an absolute sale with the mere option to re-purchase.

I agree so fully with the reasoning upon which the Judges in the Court of Appeal have proceeded that it is not necessary that I should repeat same herein.

I may further add that I recognise the great advantages they have in appreciating the surrounding circumstances, within the common knowledge of Judges living in Alberta during the years in question, and the bearing thereof in properly appreciating the evidence given by litigants, such as those in question, over those so far removed from the daily observation of such conditions as part of common knowledge which had to be borne in mind, so that even if I did not entertain the opinion I do of the facts, I should pause before reversing such a unanimous opinion as expressed.

I think the appeal should be dismissed with costs throughout.

Duff, J. (dissenting):—The fundamental question in this appeal is whether the Appellate Division was wrong in holding the respondent to have established the proposition that the sum of money which passed to him from the appellant was or was not an advance by way of loan.

It is perhaps not entirely non ad rem to say that the question of the fairness or unfairness of the bargain alleged by the appellant is quite irrelevant except as affording a clue to what the parties agreed upon. The respondent was embarrassed, apprehensive of losing his property; it was a time of some financial stringency and his prospects of relief he appears to have thought to be very slight. In these circumstances it does not appear to be of much moment that the sum paid was said by the witnesses at the trial to be very much below the value of the land at the moment. The crucial test of value for the respondent was his ability to use the land as means for procuring some sort of temporary relief. To my mind there is nothing intrinsically improbable therefore in the appellant's statement that the respondent agreed to sell his land at the price mentioned

upon the undertaking of the appellant that the respondent should have an option to re-purchase for two years. On the other hand I agree with the Judges of the Appellate Division that the reservation of interest payable annually together with a retention of possession throw upon the transaction a somewhat different colour. The retention of possession in itself ought not perhaps to be regarded as especially significant because of course a genuine sale with right of re-purchase is not in the least inconsistent with full expectation on the part of all parties that the right of re-purchase will be exercised within the time limited and given such expectations the retention of possession upon business-like terms would be a reasonable and natural thing especially where the period limited is short. The importance of possession in this case would, of course, entirely disappear, and indeed this would be decisive upon the whole question, if it were conclusively ascertained that as the appellant alleges, the respondent retained possession as tenant. Tenancy while entirely compatible with the interpretation of the facts put forward on behalf of the appellant would be very difficult indeed to reconcile with the contentions of the respondent. If, on the other hand, the share of the crop which the appellant was to get was to be paid annually to the plaintiff and to be credited by him in reduction of the sum he was ultimately to receive from the respondent; that would be a circumstance virtually conclusive against the appellant's contention. Still again the respondent's account of the transaction or his account of his conception of the transaction shews that he expected the appellant to borrow money by mortgaging the land as his own and to become personally responsible for the repayment of the loan, and a still more significant thing, his evidence shews he did not consider he was to be personally responsible for the repayment of the money received from the appellant.

Impressed as I am with the importance of the circumstance (which no doubt influenced the Judges of the Court of Appeal very powerfully in deciding against the appellant) that interest payable annually was reserved by arrangement, I am still, with great respect, of the opinion that the Appellate Division has attached too much importance to the evidence of value, too much importance also to the retention of possession by the respondent. The circum-

Can.

S.C.

MAYLAND v. KINDT.

stances mentioned, important as they are, are only valuable as indicia. Unless the agreement between the parties was in substance an agreement that the land should be transferred as security for the repayment of the money which passed, then the respondent is not entitled to succeed. The trial Judge was right (if he accepted the appellant's evidence as to the interview between him and the respondent in 1917) that respondent's conduct was inconsistent with the view that the transaction was a transaction of loan.

My conclusion is that this is one of those cases in which there being a conflict of evidence in respect of the decisive facts the only persons capable of speaking of them being the parties to the action and the trial Judge having accepted the story of one and rejected the story of the other, his judgment ought not to have been reversed by the Court of Appeal. I may add that I am quite unable to accept the view that consistently with the evidence of the appellant, the transaction could be treated as a transaction of loan. The evidence of the appellant is explicit that the respondent asked for a loan, and that he definitely refused it; the evidence of the respondent is equally explicit that the appellant agreed to advance the money to free the respondent from his difficulties, that he was to make a transfer of the title, that he was to borrow as much as he could by mortgaging the land to a mortgage company, but the sum advanced was to be repaid by the application of one third of the crop annually but that the respondent in no case was to be personally responsible for the repayment of the advance. Of these two accounts of the transaction the trial Judge accepted the first and rejected the second.

The appeal I think should be allowed and the judgment of the trial Judge restored.

Anglin, J.:—Consideration of the evidence in the light of the able argument of which we had the benefit has left me unconvinced that the conclusion reached in the provincial Appellate Court is erroneous.

Mignault, J.:—This is a case on which I feel considerable doubt. The trial Judge decided in favour of the appellant, plaintiff, but his judgment was reversed by the Appellate Division, the very carefully considered reasons for judgment of Stuart, J., having the concurrence of the Chief Justice and of Scott, J. The appellant now seeks to have the

trial Judge's decision restored and of course has the burden of shewing that the judgment of the Appellate Division is clearly wrong.

My doubts are caused first by the fact that there was on some points a conflict of evidence between the appellant and the respondent, and the trial Judge accepted the appellant's version, and secondly by reason of certain circumstances which appear to favour the respondent's story. It is common ground that the respondent applied to the appellant for a loan in order to pay a mortgage on his property for some $1,700 which was on the point of being foreclosed, and that the appellant objected to making a loan secured by a mortgage. I take it as established that the appellant stated that he would purchase the property or take a transfer of the title, for $1,700, and give the respondent a year. . which was changed to 2 years. . to redeem it by paying the $1,700 with 10% interest, this agreement as to the interest being proved by a statement in Ferris' letter to the appellant, which statement the latter did not dispute at the time it was made. Whether such purchase with the right of redemption is not in effect and in the intention of the parties, a real loan is the question which we have to answer. It is also admitted by the appellant that he paid no money to the respondent but gave his cheque for $1,700 to the mortgagee's solicitors, so that he paid off the mortgage and obtained an absolute transfer of title, the agreement as to the redemption by the respondent, although really made, not having been drafted, because Ferris did not feel qualified to put it in legal form and also because there was a second mortgage for a trifling sum which stood in the way of obtaining a discharge of the first mortgage.

It is not disputed that the respondent made considerable crop payments to the appellant but whether they would suffice to pay the $1,700 and 10% interest appears uncertain, and the Appellate Division ordered a reference to determine the fact. Of course the appellant has an absolute transfer but if the agreement was in effect and in the intention of the parties that he would loan the money, taking an absolute transfer of title as better security, and give time to the respondent to repay him and thus get the property back, this transfer, as between the parties, should not stand in the way of the respondent. The conduct of

Can.

S.C.

THORNDYKE REALTY CO. v. LYALL SHIPBUILDING CO.

the appellant during all these years, for he apparently took no interest in the property which he claims to have purchased, and left the respondent in possession, is a circumstance which weakens the effect which the absolute transfer of titles would otherwise have been between these parties. It must also be considered, among other circumstances, the inadequacy of $1,700 as a price for the property which was worth at least $4,000, the fact that the so-called purchase-price was exactly the sum which was considered sufficient to pay the mortgage and, as I have said, was paid directly to the mortgagee's solicitors, and the fact also that the appellant now claims that he leased the property to the respondent under a verbal lease on terms of crop payments of one third of the crops raised on the property, which the respondent denies, asserting that the crop payments were made on account of the loan. In view of all these circumstances I find it impossible to come to the firm conclusion that the Appellate Division was clearly wrong when it decided that the transaction was a loan and not an absolute sale. If this case depended merely on the credibility of the parties I would unhesitatingly accept the trial Judge's decision, but the parties agree on many material points and in the final analysis the question is as to the proper inferences to be drawn from the surrounding circumstances and the effect to be given to a transfer of title which admittedly did not express the full agreement of the parties in that it did not mention the right which the respondent had to redeem the property. I would therefore not feel justified in disturbing the judgment of the Appellate Division.

The appeal should be dismissed

Appeal dismissed.

THORNDYKE REALTY CO. v. LYALL SHIPBUILDING CO.

Supreme Court of Canada, Davies C.J., Idington, Duff, Anglin and Mignault, J.J., June 7, 1921.

Brokers (§IIIB—35)—Sale of Ships—Contractual Arrangement as to Payment of Commission Out of Purchase Moneys—Construction—Purchase Money not Paid—Right to Collect Commission.

Where a contractual arrangement is arrived at between parties, that if a sale should be effected through the intervention of one of the parties and carried to completion, the other will recognise and safeguard his right to be paid a commission out of the purchase money, no obligation to pay the commission arises where the fund out of which the purchase money is to be paid does not come into existence and no part of it is paid.

[See Annotation Brokers—Commission, 4 D.L.R. 531].

APPEAL by plaintiff from a judgment dismissing an action to recover a commission on the sale of certain ships owned by the defendant.

The judgment appealed from is as follows:—

Macdonald, C.J.A.:—On the evidence before us in this appeal, I have come to the conclusion that there was no completed contract for the sale of the ships in question. Counsel on both sides appeared reluctant to discuss this all-important phase of the case, no doubt because a decision upon it might embarrass them in another pending action in which their respective contentions may be out of harmony with those which they would advance in this appeal on that point, but the facts are before me and irrespective of the course pursued by counsel, I must decide this appeal on its own merits.

It was suggested by Mr. Davis, that the Court had, in an interlocutory appeal in the action aforesaid, decided that a sale had been proven, but this is not my understanding of our decision in that case. The Court merely decided that there was an issue on that point to be tried but did not profess to pass upon the true merits of that issue.

In this appeal, however, the issue is squarely before us after trial of the action in the Court below. I found my opinion that there was no completed contract on the evidence which shews that negotiations for sale finally culminated in the execution of a formal agreement, which the parties placed in escrow to be delivered and to come into effect upon performance of a condition, which admittedly, has not been performed. If I am right in this view of the evidence, there is nothing more to be said and the appeal should be dismissed.

Martin J.A. would allow the appeal.

Galliher, J.A.:—Assuming that there was a contract of agency, which is open to doubt, I still think the plaintiffs cannot succeed in this action.

The plaintiffs as general brokers kept in touch with builders of vessels and prospective purchasers, with a view to bringing about sales by reason of which they would earn commissions. In such capacity, knowing that the defendants were building vessels, they got in touch with one Van Hemelryck, a Belgian purchaser of ships and submitted the following offer to be found in A.B. 93:—

Can.

S.C.

THORNDYKE REALTY CO. v. LYALL SHIPBUILDING CO.

"Postal Night Lettergram."

"Lyall Shipbldg. Co.
Transportation Bldg. Seattle Wn.
Montreal, Canada. Sept. 26 1918.
We are authorised to offer your firm four hundred fifty thousand dollars each for your six vessels less five per cent commission, delivery first September, one each interval three weeks thereafter subject Belgian Flag. Payments half cash balance on each vessel as delivered. If deliveries too early accept offers subject your terms of delivery. Buyers to our knowledge are largest purchasers of vessels for Allies we having sold them five to our complete satisfaction. Confirm quickly.
Charge Thorndyke Trenholme Co. Inc."

If we arrive at the right view point as to the effect of this document, much that followed in correspondence and interviews is, upon careful consideration, reconcilable with that document and do not serve to alter or make a new and different contract. The view I think any person receiving this document, is entitled to take, and in my opinion, the effect of it is:—

We are authorised (by a prospective purchaser) to offer you $450,000 each for 6 of your vessels, out of which you will have to pay a commission of 5%, or you will be paid that amount less 5% deducted for commission. In either event the completion of the contract and the payment of the money was a sine qua non of the payment of commission, and if this is the true effect of the document, nothing has as yet taken place to entitle plaintiffs to their commission.

I do not propose to proceed to an analysis of this correspondence—I have read and weighed it all, and after doing so, have arrived at the conclusion that the appeal should be dismissed.

McPhillips, J.A.:—In my opinion, this appeal should succeed. It cannot be gainsaid, as I read the evidence—I do not propose to canvass it in detail—that the appellant, after arduous work and services faithfully carried out, produced a purchaser to the respondent with whom the respondent entered into a firm contract for sale. This acceptance of the purchaser by the respondent must conclude the question in favour of the appellant * * that a purchaser was

produced ready, able and willing to complete and, in passing, upon this point, this is further accentuated in that the respondent sued the purchaser (Van Hemelryck) upon the contract of purchase of the vessels and obtained judgment by default against the purchaser for $1,343,015.57. It is idle now to contend that no sale was effected or that the appellant was not the effective cause of the sale made. The appellant, upon the facts, was acting under the authority of a general employment—to find a purchaser for 6 vessels, one already launched and five more on the way in process of construction. I think the contention, in view of the facts that no contract of sale was made or employment and acceptance of the services of the appellant, must be dismissed from consideration. Then what is to be met is the further contention that the employment was, in its nature a special employment and that a term thereof was that no commission would be required to be paid by the respondent to the appellant unless the purchaser completed the purchase by payment. In fact it can be reasonably said that it is admitted that if there had been completion by payment the commission would be earned and be payable by the respondent to the appellant, but failing payment no liability exists therefor. I cannot, upon the facts, find that there was any such specific or special agreement—it was the case of an open general employment of a broker to produce a purchaser—that would admittedly carry with the obligation that the purchaser was one able, ready and willing to complete, but these essentials, as to ability readiness and willingness are satisfied when the vendor accepts the purchaser and contracts with him. The broker has then assuredly done all that he can be called upon to do, and he has thus earned his commission. Wycott v. Campbell (1871), 31 U.C.Q.B. 584, at p. 590. It is true in Fisher v. Drewett (1878), 39 L.T. 253, Bramwell, L.J. at p. 254 said:—

"Supposing however that it would protect the defendant if he could show that it was through the fault of the lender [there it was the procurement of a loan] that he did not receive the money [but there the commission was by the contract agreed to be paid 'on any money received'—here we have nothing of the kind] I do not think there is any evidence to show it."

In the present case, why should the appellant be de-

Can.

S.C.

THORNDYKE REALTY CO. v. LYALL SHIPBUILDING CO.

prived of the commission when the purchaser produced was accepted? It would seem to me that it is no answer to say, that as yet payment has not been made—the appellant has done all that it was called upon to do. Even in the case last referred to Bramwell, L.J. said at p. 254:—"In my opinion 'on any money received' means on any sum of money in respect of which you shall have procured me a good contract to receive," and in the present case the respondent has asserted that it has a good contract and in fact, at the moment, has a judgment against the purchaser based upon the breach of the contract—to accept and pay the purchase price of the vessels—the purchaser admittedly produced by the appellant to the respondent and accepted by it. See Wolf v. Tait, (1887), 4 Man. L.R. 59. In that the respondent contracted for the sale of the vessels to the purchaser procured by the appellant and has enforced the contract to judgment and given no evidence of the purchaser's inability to discharge it, it would be inequitable (Doner v. Loose, (1920), 53 D.L.R. 39, 30 Man. L.R. 350, to now hold that the appellant is not entitled to recover for services rendered the benefit of which the respondent has accepted (Burchell v. Gowrie and Blockhouse Collieries, Ltd., [1910] A.C. 614, at p. 624.) In Hornby v. Eberle, (1884), 1 Times L. R. 104 at p. 105, Lopes, J. said:—"Has the plaintiff procured a lender willing and able to lend the money against whom the defendant might with some chance of success bring an action for specific performance if necessary?"

In the present case that action has been brought and it is fair to assume "with some chance of success." In McKenzie v. Champion, (1887), 4 Man. L. R. 158, we find this stated in the head-note, "Nor can the owner refuse to pay merely because the purchaser afterwards makes default and unreasonably refuses to carry out the contract." Also see Kay, L.J. in Grogan v. Smith, (1890), 7 Times L.R. 132 at p. 133, "the plaintiff, the agent, had not shewn that he had introduced a party who had bound himself to purchase the house," here that requirement was satisfied. In Galloway v. Stobart Sons & Co. (1904), 35 Can. S.C.R. 301, Davies, J. (now Chief Justice of Canada, said, at p. 307, "I agree that if the owners had, under the circumstances, accepted a purchaser produced to them by the plaintiff, and thus profited by the plaintiff's volunteered services, the case would be different and the plaintiff might recover."

Also see Smith, L.J. in Passingham v. King, (1898), 14 Times L.R. 392:—

"In these circumstances, [and I venture to think the circumstances of the present case are equally forceful] he was of the opinion that the defendant had taken up the negotiations himself and taken them out of the hands of the plaintiff and had accepted Vine as the purchaser and that therefore commission was payable."

Finally, the main defence and the one most strongly pressed at this Bar by the counsel for the respondent was, that the contract was in its nature a special contract and the commission was not to be paid until the completion of the contract by payment in full. This contention is quite untenable, in my opinion, and I would refer to what Killam, J. (afterwards Chief Justice of Manitoba and later again one of the Justices of Appeal in the Supreme Court of Canada) said in McKenzie v. Champion, supra, at pp. 164, 165:—

"Although some expressions in some of the opinions which I have just cited would seem to involve the idea that the commission is not earned if the purchase money be not paid and the conveyance made, unless such a completion as this is prevented by the default of the vendor, yet I do not think that such is their meaning. If the purchase were to be a purely cash purchase, not to depend upon an intermediate contract of sale, this would probably be the case; but if the purchase is not to be wholly for cash and there is to be at first an agreement of purchase and sale, it would seem that, upon production of a party ready and willing to complete the purchase by entering bona fide into such an agreement, the duty of the agent would be completed and his commission payable forthwith. In most cases only a portion of the purchase money would be payable at once, and very often the balance would be payable in instalments extending over a long period of time. Sometimes the balance not payable at once would be secured by mortgage, the property being first conveyed to the purchaser, and the circumstances might point in many cases to the making of the mortgage as being the completion of the purchase; but in many other cases it would not be the intention that there should be such a conveyance until the whole or, at least, several deferred instalments of the purchase money should be paid, the parties being left to depend in the meantime for their mutual security upon an executory agreement between them. Now in case of such an agree-

Can.

S.C.

THORNDYKE REALTY CO. v. LYALL SHIPBUILDING CO.

ment on which instalments would be long deferred, it would never be contended, in the absence of a special agreement to that effect, that the agent's commission should only be payable on payment of the last instalment or proportionately on payment of each instalment; that the agent should, for the whole period over which the payments were deferred, be responsible for the acts or default of the purchaser found by him. If the agent is not to be thus bound by the acts or default of the purchaser, in case of an executory agreement having being entered into, it would appear unimportant as a matter of legal liability whether the agreement be for a long or a short period of credit. It appears to me that the agent has fulfilled his duty and has earned his commission, when he has procured and brought to his principal a party ready and willing to contract with him for the purchase of the lands upon the terms stipulated for, or if the terms be not fully prescribed when the agent is employed, then upon the proposed purchaser and the principal entering bona fide into an agreement of purchase and sale."

The above language is peculiarly applicable to the facts of the present case and effectively meets, I consider, the contention advanced and so strenuously pressed by the counsel for the respondent that there is no right to the commission until there is completion of the purchase by payment.

The counsel for the respondent further submitted that the judgment of the Supreme Court of Canada in Colonial Real Estate Co. v. Sisters of Charity of the General Hospital of Montreal, (1918), 45 D.L.R. 193, 57 Can. S.C.R. 585, was an authority that effectively negatived the right of the appellant to recover commission in the present case. With deference, I cannot so read the case. The situation here is that of a general employment of the broker and the absence of any special contract. Toulmin v. Millar, (1887), 12 App. Cas. 746, and the review of the cases and the analysis thereon by Anglin, J., at pp. 197, 198, 199, 200 and 201, applied to the facts of the present case, in my opinion, establish the right in the appellant to succeed, the case may well be distinguished by adverting to what Anglin, J., said at p. 199 (45 D.L.R.):—

"Having made a contract under which it would become entitled to a commission only upon the happening of a stated event within a definite period, "and not otherwise," the plaintiff in effect agreed to forego all claim to commission

unless that event should happen within the time stipulated. In order that an action in such a contract should succeed the plaintiff must show fulfilment of the contract according to its terms. Alder v. Boyle, (1847) 4 C.B. 635, 136 E.R. 657—Peacock v. Freeman (1888) 4 T.L.R. 541. The authority of the case last cited, so far as relevant to that at bar, is not affected by a distinction in regard to it made by the Court of Appeal in Skinner v. Andrews (1910), 6 T.L.R. 340."

It follows from the foregoing reasons that my opinion is, that the appeal should be allowed.

Eberts, J.A.:—Upon the facts I am of opinion that, although the plaintiffs as brokers introduced to the defendants one Van Hemelryck who appeared to be willing and to be able to purchase the 6 ships from the defendants for $2,700,000; yet, in the result, no concluded contract of purchase and sale was arrived at. The plaintiffs consequently did not succeed in procuring for the defendants a purchaser of the ships, therefore are not entitled to the commission they sue for in this action.

I would dismiss the appeal.

E. P. Davis, K.C., for appellant; C. Sinclair for respondent.

Davies, C.J.:—At the close of the argument I was in some doubt whether a general employment of the plaintiffs had not been proved to get a purchaser ready and willing to enter into a contract for the purchase of defendant's 6 vessels for $450,000 and whether the plaintiffs had not produced such a purchaser and so become entitled to their commission.

After reading the voluminous correspondence between the parties, however, my doubts were removed and I became satisfied that the only contractual arrangement made between the parties was a special one that if a sale of defendant's ships was effected through the plaintiffs and carried to completion the defendant respondent would recognise and protect plaintiffs in its right to a commission out of the purchase money.

I think my brother Anglin in his short but clear statement of the contractual relations entered into by the parties has very fairly stated what the terms of this contract were so far as it related to this commission.

I concur in his reasons for judgment to the effect that if a contract for the sale of the defendant's ships ever was concluded the sale was not carried out through any fault of the defendant respondent who has not received any part of the

Can.
S.C.
THORNDYKE REALTY CO. v. LYALL SHIPBUILDING CO.

purchase monies and was not consequently liable for the commission. The fund out of which the commission was to be paid never came into existence.

I concur in dismissing the appeal with costs.

Idington, J.:—I am of the opinion that this appeal should be dismissed with costs.

Having perused the entire evidence herein I am unable to reach any other conclusion than that the appellant never expected to receive, or so contracted with respondent, as to entitle it to receive any part of the commission now claimed, unless and until the purchaser had paid respondent at least the 10% deposit promised, or the amount of the other cash payments stated in some of the correspondence. Some one or other of such conditions is implied throughout though stated in different terms in some of its communications from that stated in others, as to raise a doubt of exactly which of these made the basis of the claim for commission.

Indeed some of the alternative, such as progressive payments thereof according with the delivery of each ship, may have been had in mind.

But there is, in Ex. 43 of October 4, 1918, in connection with others of same date, on which counsel for appellant relied so much, an expression which gives in a sentence all that respondent contends for herein.

That exhibit reads as follows:—

"Seattle, Wn. Oct. 4th, 1918.

Lyall Shipbuilding Co.

Transportation Bldg. Montreal, Que.

Following cable received from Wulfsberg quote "Cable received Buyers Arment R. Vanhemelryck company nineteen rue Scribe Paris, Belgian Flag Arranging immediately deposit per your instructions ten centum to bind half cash signing contract balance delivery regret cannot alter commission have cabled Lyall Montreal make sure" stop Wulfsberg according to this cable apparently intends claiming full five per cent we do not understand this attitude have their letters stating two and a half satisfactory their end we cabling Wulfsburg for explanation if sale consummated to Vanhemelyrck expect original agreement to be carried out with us we do not anticipate there is any misunderstanding between your company and ours but ask you to confirm that five per cent commission is to be paid us we to protect Wulfsberg we understand of course our commission difference will not interfere with final sale stop Van-

hemelryck American brokers New York tried to negotiate through us purchase your steamers but on account of negotiations already started with Wulfsburg we declined to treat with view avoiding any complications.

Thorndyke Trenholdme Co.

1.30 a.m., Oct. 5, 1918."

How could the sale be said to have "been consummated to Van Hemelryck" unless and until something done in conformity with what was being negotiated for unless the negotiations had gone far beyond anything in evidence herein.

I do not desire to express any opinion as to whether or not the Van Hemelryck negotiations got so far as to render him liable for breach of contract.

If he is, and such recoverable from him in Paris, the appellant is in a measure protected by the formal judgment appealed from.

All I desire to affirm is that unless and until the sale can be said to have been consummated with the terms contemplated by at least the payment of part of the purchase money the respondent was to receive coincident therewith, the appellant is not entitled to recover.

Duff, J.:—I do not propose to consider the question whether or not the appellants have established the essential proposition of this case, namely: that they produced a purchaser ready and willing to purchase on terms acceptable to the respondents. The point presents difficulties into which I shall not enter because I have come without doubt after a careful examination of all the facts, to the conclusion that the circumstances negative the allegation that either expressly or by implication the respondents incurred a contractual obligation to pay commission except out of the purchase money as received. The only express reference to commission is that contained in a letter which plainly manifests the intention that the commission shall be deducted from the purchase money. The sale was not carried out as then contemplated but I think the true inference is that, whatever right the appellants were to have to commission in respect of the transaction it might ultimately shape itself it was to be a right, subject to that condition.

Anglin, J.:—I gravely doubt whether the relation of principal and agent ever existed between the respondent and the appellant. The latter was not employed by the shipbuilding company to find a purchaser for its 6 vessels.

Can.

S.C.

THORNDYKE v. LYALL SHIPBUILDING CO.

But there appears to have been a contractual arrangement between them that if a sale should be effected through the intervention of the appellant and carried to completion the respondent would recognise and safeguard its right to be paid a commission out of the purchase money. No other obligation was incurred or contemplated. If a contract for the sale of the ships was ever concluded, that sale was not carried out— and through no fault of the respondent. It has received no part of the purchase money. It is therefore not liable to pay the commission claimed by the appellant. The fund out of which that payment was to be made did not come into existence. The respondent has not received the consideration for whatever obligation it undertook in regard to that commission.

Mignault, J.:—The importance of this case is merely on account of the large amount claimed by the appellant, $135,000 for the question to be decided presents no difficulty.

The appellants are ship brokers of Seattle, State of Washington, and they claim from the respondent company 5% commission on the sale of 6 auxiliary schooners for $450,000, each or $2,700,000 in all. The contention of the respondent is that no commission was payable until the purchase-price was received by it, which through no fault of its own but by reason of the default of one Van Hemelryck for whom the appellants acted, was never recovered by it.

After due consideration of the voluminous record, I find it impossible to agree with the appellants who urge that the contract of agency between them and the respondent was merely that they would procure a purchaser for the respondent and that having done so and the respondent having made a contract of sale with this purchaser, they have earned their commission.

Looking at the correspondence, mostly by telegram, between the parties, I find that it started by an enquiry by wire on July 13, 1918, from the appellants to the respondent asking whether certain vessels then being built by the latter at North Vancouver were for sale and, if so, for what price, including 5% commission. The telegram stated that the appellants were acting for clients. In answer, the respondent named the price, $450,000 each, for 6 vessels in all. On July 16, the appellants again wired the respondent referring to the then proposed transfer of the vessels to the Cuban flag, adding that the respondent had omitted stating that the terms of payment included 5% commission.

Here also the appellants said they were acting for clients. In September, by an undated telegram, Ex. 22, the appellants enquired of the respondent whether it would permit them to cable for a firm offer for 6 vessels for $450,000 each, less 5%. A similar enquiry was made by the appellants on September 21, again mentioning the price less 5%, and this proposal was accepted by the respondent two days later. Finally on September 26, the appellants wired the respondent that they were authorised to make a firm offer of $450,000 for each of the 6 vessels, less 5%, to be transferred to the Belgian flag. This offer was accepted on September 27, subject to the immediate deposit of one half of the purchase-price to the credit of the respondent in the Mechanics and Metals National Bank, New York.

Any contract between the appellants and the respondent for the payment of a commission is contained in these communications, and invariably the price was stated to include the commission or to be less the 5%. It was only after these telegrams that the appellants named their principals, and it is to be observed that the appellants appear to have acted in these communications as agents for their clients and not for the respondent. This does not really greatly matter however, for the respondent agreed to accept the price named less 5% to be retained by or paid to the appellants, but the important fact is that this commission was always stated as being included in, or proposed to be deducted from, the purchase price.

In view of what I have said, the very able argument of Mr. Davis contending that on a contract of agency for the sale of vessels or other property, the agent earns his commission when he secures a responsible buyer accepted by the seller, does not appear to me acceptable in a case like this where the commission is to be deducted from the purchase price, for obviously the price must then be paid before the commission itself becomes payable. In other words, the right of the agent to his commission is, in a case like this, contingent on the payment of the price. I would therefore conclude that it does not suffice to shew that the respondent made a contract with the appellants' principal, Van Hemelryck for the sale of the vessels, or that, on the latter's breach of contract, it obtained a judgment against him for a large sum of money, which judgment has never been paid. On my construction of the agreement between the appellants and the respondent, the latter not having received the purchase-price of the 6 vessels, and it is cer-

Ont.

S.C.

FISHER v. WILKIE LTD.

tainly not to blame for the purchaser's default, is not liable to pay a commission which was to be paid out of this price and not otherwise.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

FISHER v. WILKIE LTD.

Ontario Supreme Court in Bankruptcy, Holmested, Registrar. December 15, 1920.

Bankruptcy (§1—6)—Petition by Creditors for Adjudication in Bankruptcy—Absence of Evidence as to when debt Accrued—Bankruptcy Act, Sec. 8.

An unopposed motion by creditors on petition for an adjudication of bankruptcy and a receiving order, will not be refused under sec. 8 of the Bankruptcy Act, 1919, (Can.) ch. 36., in the absence of evidence one way or the other as to when the debt accrued.

[See Annotations, Bankruptcy Act of Canada 1920, 53 D.L.R. 135, Bankruptcy Act Amendment Act 1921, 59 D.L.R. 1.]

APPLICATION by creditors on petition for an adjudication of bankruptcy and a receiving order. Application granted.

H. A. Harrison, for the petitioning creditors.

The Registrar, in a written judgment, said that he reserved judgment to consider the point whether, in the absence of evidence as to when the petitioning creditors' debt accrued, the application should be granted, in view of the provisions of sec. 8 of the Bankruptcy Act, 1919, ch. 36, and he had come to the conclusion that it should be granted. The petition had been duly served on the debtor company, and was unopposed. The provisions of sec. 8 were enacted for the benefit of debtors, but they are provisions which may be waived by debtors—quilibet potest renunciare juri pro se introducto—and at all events, in the absence of evidence one way or the other, as the motion was unopposed, it should be assumed that the petitioners were rightly in Court and entitled to the relief which they claimed.

The order should therefore be granted.

RE MAPLE LEAF CONDENSED MILK CO.

Ontario Supreme Court, Middleton, J. January 4. 1921.

Sunday (§III.B—15)—Condensed Milk Factory—Sunday Deliveries from Farmers—Farmers Unable to Keep Milk over Sunday—Work of Necessity—Lord's Day Act R.S.C. 1906 ch. 153 sec. 12 (m)—Caring for Milk.

It is a work of necessity within the meaning of the Lord's Day Act R.S.C. 1906 ch. 153 sec. 12 (m) for a condensed milk factory to take deliveries of milk on Sunday during the summer season, from farmers who are regular customers and who are unable to keep the milk over Sunday and deliver it on Monday morning in a fit condition for manufacture.

CASE STATED by a police magistrate for the opinion of the Court, under the provisions of sec. 761 of the Criminal Code, as follows:—

"On the 4th day of November, 1919, the 29th and 30th days of January, and the 20th day of July, 1920, the Maple Leaf Condensed Milk Company was tried before me on a charge that it did on the 10th day of August, 1919, being the Lord's Day, commonly called Sunday, at the village of Chesterville, in the county of Dundas, unlawfully conduct its ordinary operations in its factory situated in the said village, and did unlawfully solicit, receive, and process milk, and did authorise, direct, or permit its employees to conduct the said operations and to solicit, receive, and process milk, contrary to the form of section 5 and section 15 of the Lord's Day Act, R.S.C. 1906, ch. 153, the same not being a work of necessity or mercy.

"Upon the evidence adduced, I found as a matter of law that the said company was not guilty of the offence charged, and duly dismissed the same.

"The evidence established that the defendant company has a condensed milk factory at the village of Chesterville, in the county of Dundas, in which it manufactures condensed milk, purchasing the raw product from the farmers living within a radius of approximately 12 miles. The price paid for the milk is fixed from time to time by an arrangement between the company and an organisation of the farmers. The milk is brought to the factory by the farmers, who receive tickets shewing the weight of each delivery, and is paid for at the end of each month. Every farmer is expected to deliver his total output of milk to the company, although the written agreement between the farmers' association and the company does not so specifically specify.

The evidence does establish to my satisfaction, and I find as a fact, that, during the hot summer season, the farm-

Ont.

S.C.

RE MAPLE LEAF CONDENSED MILK CO.

ers who sell their milk to the defendant company are not able to keep it over Sunday and deliver it to the company on Monday in a condition suitable for the manufacture of condensed milk, and also that the total amount of labour used in a factory on Sunday is less than the work the farmers have to do on Sunday to care for their milk at home.

"The evidence has satisfied me, and I so find, that any interference with the present method of doing business would constitute a serious financial loss to both the farmers and the defendant company.

"At the request of counsel for the prosecution, I state and sign this case, and now submit for the opinion of the Court the following questions of law:—

"1. Was I right in holding that what was done by the company, as shewn by the evidence aforesaid, was a 'caring for milk,' within the meaning of sec. 12, para. (m), of the Lord's Day Act?

"2. Should I have held upon the evidence that the taking of deliveries of milk on Sunday from the company's regular customers and paying for the same at the end of the month was in law an offence against the provisions of sec. 5 of the said Act, not covered by any of the provisions of sec. 12 of the said Act?

"3. Was I right in holding as a matter of law that what was done by the company was a work of necessity within the meaning of the said Act?"

G. F. Henderson, K.C., for the prosecutor.

Strachan Johnston, K.C., for the company.

Middleton, J.:—Stated case by the police magistrate for the village of Winchester, under sec. 761 of the Criminal Code, upon dismissal of a charge laid against the company under the Lord's Day Act, R.S.C. 1906, ch. 153.

The company has a condensed milk factory at the village of Chesterville, and takes delivery on Sunday from the farmers. The magistrate has found as a fact that during the summer season the farmers are not able to keep the milk over Sunday and deliver it on Monday in a condition suitable for manufacture, and the work occasioned by delivery at the factory is less than the work necessary to care for the milk at the farms.

The statute provides (sec.12) that notwithstanding its provisions—"any person may on the Lord's Day do any work of necessity or mercy, and for greater certainty, but not so as to restrict the ordinary meaning of the expression 'work of necessity or mercy,'" it is declared that this ex-

pression shall be deemed to include a long list of enumerated things, among others (m) "the caring for milk."

The effect of this is to preclude any further inquiry into the question of necessity, when once it appears that what is being done is "caring for milk."

What was done here undoubtedly was "caring for milk" within the meaning of the statute. The milk is produced every day, and must not be wasted, and all that is honestly done for its conservation is protected by the statute. If the milk had not been delivered, it would have been wasted.

It is too narrow a view of the statute to regard the delivery as being part of a sale because there had been some antecedent agreement for its delivery, and so find an offence. The sole test is that prescribed by the statute. Is this a "caring for milk?" If it is, there is no offence.

I answer the questions: (1) Yes; (2) No; (3) Yes.

Judgment accordingly.

CARNAT v. MATTHEWS.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 6, 1921.

Evidence (§IIH—224)—Automobile—Accident—Motor Vehicles Act Alberta—Negligence of Owner of Motor Vehicle—Presumption and Burden of Proof.

Under sec. 33 of the Motor Vehicles Act 2-3 Geo. V. 1911-12 (Alta.), ch. 6, the plaintiff in the first instance need do no more than shew that he sustained damage from a motor vehicle; then in the absence of evidence by the defence he is entitled to succeed because the statute makes a case of presumptive negligence, but when the defendant gives evidence if it is sufficient by itself to make a prima facie case of absence of negligence the burden of proof is shifted to the plaintiff who must give evidence in rebuttal, the side which has the preponderance of evidence on the question of negligence being entitled to win. A man is not negligent in driving his car on a rainy evening because rain gathers on the windshield if he can see sufficiently to drive with safety and exercises the care that a reasonably prudent man would exercise under the circumstances.

[Ferguson v. C.P.R. Co. (1908), 12 O.W.R. 943, followed; Canadian Northern R. Co. v. Horner (1921), 58 D.L.R. 154, referred to. See Annotation, Automobiles and Motor Vehicles, 39 D.L.R. 4.]

APPEAL by defendant from the judgment of McCarthy, J., in an action under sec. 33 of the Alberta Motor Vehicles Act. Reversed.

The facts of the case and the section are fully set out in the judgments delivered.

S. B. Hillocks, for appellant.

J. B. Barron and S. T. Helman, for respondents.

Alta.

S.C.

CARNAT v. MATTHEWS.

Harvey, C.J.:—This is an appeal from a judgment of McCarthy, J., in favour of the plaintiff.

The plaintiff, a boy of fourteen, was riding a bicycle on 4th Street E., in the City of Calgary, between 8 and 9 o'clock in the evening of May 10, 1920, when the defendant, driving an automobile in the same direction, coming from behind, ran into him and threw him to the ground, causing him injuries, though not of a permanent nature.

There was some conflict of evidence as the trial Judge mentions in his reasons for judgment but he gives no suggestion of a conclusion as to what evidence was untrustworthy. He rests his decision on the legal ground of failure to satisfy the burden of proof cast by the statute on the defendant. Referring to the defendant's statement that notwithstanding there was some rain on the windshield, he could see about 40 ft. ahead, the trial Judge states that the evidence does not satisfy him how in that case it was that he ran over the plaintiff.

There being thus no findings of fact upon conflicting evidence, it is necessary to consider the evidence to ascertain whether the refusal to find an absence of negligence is justified. It seems desirable first to consider with some particularity the extent of the burden upon the defendant in this regard.

Section 33 of The Motor Vehicles Act 2-3 Geo. V. 1911-12 (Alta.), ch. 6, provides that "when any loss or damage is incurred or sustained by any person by a motor vehicle, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle."

This takes the burden of proof from the plaintiff and places it on the defendant, in other words, the statute makes applicable the doctrine of res ipsa loquitur, which Brodeur, J., in C.N.R. v. Horner (1921), 58 D.L.R. 154, at p. 163, says he prefers to call a rule of evidence. But the burden of proof in civil cases is not the same as it is in criminal cases. In the latter the Judge and jury must be satisfied beyond a reasonable doubt. In the former the burden is satisfied by the preponderance of evidence.

In a case such as this where the rule of the statute applies, the plaintiff in the first instance need do no more than shew that he sustained damage from a motor vehicle. Then in the absence of evidence by the defence he is entitled to succeed because the statute makes a case of presumptive

negligence, but when the defendant gives his evidence, if it is sufficient by itself to make a prima facie case of absence of negligence, and the plaintiff his evidence in rebuttal, the case is much the same as any damage action. The side which has the preponderance of evidence on the question of negligence should win.

It would thus appear that when once the defendant has made out a prima facie case of absence of negligence, by evidence, which, of course, the Court or jury accepts as reliable, the rule res ipsa loquitur or in this case the rule of the statute, has no further application.

In Ferguson v. C. P. R. Co. (1908), 12 O.W.R. 943, Garrow, J.A., delivering the reasons for judgment of the Court of Appeal of Ontario says at pp. 947-948:—"The fact of an accident happening may, depending upon its nature and circumstances, be in itself evidence of negligence..... But the case thus made is, of course, only a prima facie one—a presumption made in the absence of the real facts, and which for the time shifts the burden of proof. But this burden will be restored if the facts shewn by the defendants satisfactorily account for that upon which the plaintiff relies for his presumption, in this case the derailment."

In that case the rule res ipsa loquitur applied, the plaintiff, a passenger, being injured by the train running off the track. The derailment was due to a broken rail and the report states that there was no evidence of negligence in buying and placing the rail, and the judgment adds: "The derailment, therefore, having been satisfactorily accounted for, the original onus resting upon the plaintiff was, I think, restored." In the result the verdict of the jury which found negligence in the use of too heavy an engine and too great a rate of speed, was set aside on the ground that there was no evidence of these conditions being in fact negligence.

The Court there held that the onus was satisfied by shewing the derailment by a broken rail without the necessity of shewing why the rail became broken.

In many cases it is quite impossible to ascertain all the circumstances so as to determine with certainty the exact cause of an accident. When that can be done it is generally easy to declare where the blame lies, but I can hardly think that the statute intended to impose upon a defendant, in order to escape liability, a burden which in many cases could not be met.

Alta.

S.C.

CARNAT v. MATTHEWS.

All the statute requires is that he should satisfy the Court or jury by the amount of proof required in civil trials that the damage was not due to his negligence. That can be established by shewing to what it was due which was not his negligence or by shewing that he was not in fact negligent, from which it follows that it could not be due to his negligence. The latter is what we would naturally suppose the statute looks to, upon the general principle that the burden should be on the one who has the knowledge or the means of knowledge, but there has, I think, been a tendency which seems to be illustrated in the judgment appealed from to cast on the defendant the burden of explaining completely how the accident happened. In my opinion the statute does not intend to go that far.

Then it is also necessary to keep in mind what negligence really is for fear of imposing too great a burden upon the one upon whom the onus of proof is cast. Negligence is not the taking of such precautions as will avoid an accident in all events. It is simply the failure to exercise the care that a reasonably prudent man would exercise. The most excessively careful man will sometimes have an accident which might have been avoided if some precaution had been taken but the theory of the law, which, however, I think has sometimes not been strictly observed in practice, is that a man is not guilty of negligence if he is as careful as the ordinarily prudent man. This measure of care will of course vary under different circumstances. But it is the conduct of the ordinarily prudent man under the circumstances which is to be the guide.

Now to apply the law to the facts of this case. The accident took place in the evening. It was cloudy with a little rain. The question of the degree of light was of importance. The plaintiff and a witness called by him, said it was light enough to see across the street. The defendant and a witness who was following him in another automobile both said it was dark. Light and dark are relative terms and all the witnesses may be quite honest. The defendant and his witness were both driving in motors with their headlights on and were watching into and with the aid of that artificial light and it would naturally seem much darker to them outside the field of that light than it would to the plaintiff and the witness who had no light, and they might also not have been able to see objects not within the range of that light as easily as if there had been no such light. The plaintiff's account, however, would make

the hour about 8.20 or 8.25 p.m., while that of the defendant would make it about 8.45 or 8.50, and a half hour's time at that hour of the day on a rainy night in early May might make quite a difference in the light.

The hospital record shews that it was 9 p.m. when the plaintiff was taken in and all the evidence shews that it could not have been more than 10 or 15 minutes after the accident before he reached the hospital.

The defendant says he was driving his car at a speed of 8 or 10 miles an hour and the evidence of the person following him, an entirely independent witness, the radiologist at the hospital, confirms him and leads to the conclusion that he was going at a reasonably moderate rate of speed, having regard to all the conditions.

There was no defect apparently in the car, but even if there had been, it could have had no effect on the accident, since there was no possibility of avoiding it when the defendant became aware of the presence of the plaintiff. He says he was keeping a lookout ahead in the field of vision furnished by the search lights of the car, which were apparently quite normal, when suddenly the plaintiff appeared immediately in front of the car on the left side. The plaintiff himself knew nothing of the car till he was struck and no one else saw the accident.

There was a double line of street car tracks and the defendant says he was driving with the whole of the car astride the right-hand rail of the right-hand track. This is confirmed by the person following behind. The plaintiff, however, says that he was riding halfway between that rail and the curb to the right. If they had both been exactly where they said the car would probably have passed the bicycle on the car's right but there seems no room for doubt that the plaintiff and his bicycle were struck by the left front fender of the car which was bent by the impact, and it is also clear that the plaintiff was picked up from the railway track. The lens of the left head light was also cracked, which would indicate that it came in contact with the handle bars or some solid part of the bicycle. This could scarcely have happened if the two had been travelling on parallel lines, and it seems to me scarcely consistent with any other view than that the course of the bicycle was at the time of the accident partially across that of the car from the left to the right. The place of the accident was about halfway between the lane and the following street intersection, or in other words, about one-quarter of the

Alta.

S.C.

CARNAT v. MATTHEWS.

length of the block from the street intersection. The plaintiff's course home would cause him to turn to the right at the street intersection and he may have started to turn without realising or at any rate remembering that he had done so, but be that as it may, I cannot reconcile the evidence with the view that the bicycle was for any appreciable time before the accident, directly in front of any part of the car. As I have said, the trial Judge seems to have had the view that the defendant ought to be required to explain why he did not see the plaintiff. I do not think the obligation on him goes to that extent. He says he did not see him and that he was keeping a lookout. The law does not, in my estimation, require the driver of an automobile to stop entirely because rain gathers on his windshield. If he cannot see clearly and distinctly, he must use greater caution, but to say that a person must not move because he could not see an appreciable distance ahead, would, for example, bring business to a standstill in the greatest metropolis in the world when one of its dense fogs settles over it. That does not arise here, however, because he does say and the other evidence confirms it, that he could see sufficiently to drive with safety.

If the evidence of the defendant is to be believed and the trial Judge makes no suggestion of doubting it, nor do I, after a careful perusal of it, see any reason for doubting its correctness in essentials, it appears to me that he has established an absence of negligence on his part and satisfied the burden cast on him by the statute and there being no evidence of negligence other than the presumption of the statute, he is, in my opinion, entitled to a dismissal of the action. This casts no reflection on the evidence of the plaintiff, the honesty of which is not questioned, though there may be some slight inaccuracies.

The plaintiff's counsel laid much stress on an alleged admission that he thought he had not seen the boy because of rain on the windshield. Admitting that he made the statement and that it was a fact, it does not necessarily shew negligence. There is little doubt that he could not see as clearly through the glass and rain as if the glass had been free, but he could see ahead sufficiently to warrant his going at a moderate rate of speed as he was going, and he had a right to assume that no one would cut across his course in the middle of a block. If, as seems to me the most probable explanation, the bicycle did start to cross in front

of the car, it was that and not the defendant's acts at all which was the proximate cause of the accident.

The oral and real evidence, coupled with the probabilities in my opinion furnish a preponderance in favour of the defendant and I would, therefore, allow the appeal with costs and dismiss the action with costs.

Stuart, J. (dissenting):—I think this appeal should be dismissed. The burden of proving that the plaintiff swerved suddenly in front of the defendant's motor car, as a means of shewing absence of negligence on the part of the defendant, was upon the defendant. I do not think he came anywhere near proving that that was what happened. There is nothing in the plaintiff's evidence to suggest it, but there is quite a bit to suggest the contrary. The defendant's counsel never really asked the plaintiff whether he had not made a turn to his right just before being struck, possibly because he was afraid of a negative answer. But there was the examination for discovery where it could have been asked safely enough. The parts put in contain no such question. Of course it may have been asked in the parts not put in.

The defendant did not pretend to assert positively that the plaintiff suddenly turned in in front of him. He said that he just saw him about a foot ahead of his car straight ahead of him, and that he did not see the bicycle but only his head and shoulders. If the plaintiff had been going transversely surely the defendant would have remembered seeing the side of his face and would have said so. But he made no reference to seeing the side of his face.

Quite aside from any possible inference as to what the trial Judge may have thought about it but did not express, the evidence does not satisfy me that the defendant did anything else than come upon the plaintiff directly from behind.

It is true the injury to the bicycle seems to be principally in its forward part, but that, in my opinion, is not by any means conclusive.

Moreover, the evidence does not satisfy me that the defendant could not have seen the plaintiff quite a considerable distance before he overtook him even if the plaintiff had been travelling somewhat to the defendant's right. Both the plaintiff and Cohen swore that one could easily see across the street which, as we know, is at least 66 feet. And our own knowledge of the condition of light at 8.30 p.m. on May 10 is, I think, properly available as some assistance.

Alta.

S.C.

CARNAT v. MATTHEWS.

It may indeed vary with the thickness of the clouds when the sky is cloudy but we have the positive testimony of the plaintiff and Cohen and I find nothing in the evidence for the defence to justify us in saying that it is proven that they were telling untruths.

The defendant either could, if he had kept a proper look out, have seen the plaintiff even if travelling on the right in time to take his existence there into proper consideration in his management of his car, or if he could not see him then I think the defendant has not shewn that his inability to do so was not due to the rain on his wind shield. His statement to Dr. Milne immediately after the accident that there was rain on his windshield and he did not see the boy seems to me to be a circumstance of prime importance in considering whether the defendant has satisfied the onus of proving that he was not negligent. Bicyclists are not uncommon on the streets, and I am not satisfied by the record that the defendant was free from blame in respect of careful observation of the street, not merely directly in front of him but at a sufficient angle to each side. Furthermore, I have some suspicion that his attitude of mind at the time was too well described when he said in the witness box "Sure there was rain on my glass but I could see within my light, that is all that is necessary. Other people should take care of themselves."

In my opinion that was not all that was necessary. It was his duty to glance continually from side to side to see if anyone is or is likely to be in dangerous proximity, to the dangerous vehicle he was operating. And as I have said, I am not satisfied that he could not have seen the plaintiff, even if to the right, if he had glanced that way. The human eye can be moved with great rapidity and a glance takes but a moment of time. So that even if the plaintiff did make the swerve suggested it is not shewn satisfactorily to me at least, that the defendant could not have seen him in time before he did so and given him the warning of a sound of his horn.

My general view is that upon the whole evidence the defendant did not properly satisfy the burden of pro- which the statute places upon him. The statute was obviously passed just because motor cars are very dangerous machines to be operated on a highway and just because too many of those who operate them have the attitude of mind revealed in the defendant by the remark above quoted.

Beck, J., concurs with Harvey, C.J.

Appeal allowed.

Ont.

S.C.

JAMES RICHARDSON & SONS LTD. v. J. MCCARTHY & SONS CO. LTD.

JAMES RICHARDSON & SONS, LTD. v. J. McCARTHY & SONS CO., LTD.

Ontario Supreme Court, Orde, J. January 11, 1921.

Mortgage (§ID—15).—Given by Company—Money Borrowed in Excess of Powers—Right of Lender to Recover—Power of Directors to Give Mortgage—Right of Lender to Assume Regularity of Meetings at Which Authority Given—Failure to File with Provincial Secretary—Effect on Validity as Between Parties.

One who lends to a company money which is borrowed by the company in excess of its powers, may nevertheless recover if the moneys are in fact used to pay either existing or future legitimate liabilities of the company, and the lender is entitled to hold any securities given him by the company in respect of the moneys so advanced.

The mortgage being one which the directors had power to give and purporting to be duly executed under the corporate seal and the hands of the president and secretary, the lender is not bound to make any inquiry as to the regularity of the meetings at which the authority for the mortgage was given. [McKnight Construction Co. v. Vansickler (1915), 24 D.L.R. 298, 51 Can. S.C.R. 374, followed.]

Failure to file a mortgage as required by sec. 82 of the Ontario Companies Act, R.S.O. 1914, ch. 178, in the office of the Provincial Secretary does not in any way affect the validity of the mortgage as between the parties.

APPEAL by defendants from a certificate of the Local Master at Ottawa of his finding, upon a reference, that the plaintiffs' claim upon a second mortgage should be allowed.

G. F. Henderson, K.C., for plaintiffs.

W. C. McCarthy, for defendants.

Orde, J.:—This is an action for foreclosure brought by the plaintiffs as assignees of a first mortgage given by the defendant company. The plaintiffs also hold a second mortgage from the defendant company for $20,000, and on the reference filed a claim in respect thereof in the Master's office. The defendant company is in the course of being wound up, but the action was brought or continued by leave given in the winding-up proceedings.

Upon the reference the validity of the second mortgage was contested by the defendants. The Local Master at Ottawa has determined that contest in favour of the plaintiffs, and has so certified. From his certificate the defendants now appeal.

The defendant company was incorporated by letters

Ont.

S.C.

JAMES RICHARDSON & SONS LTD. v. J. MCCARTHY & SONS CO.

patent, on May 17, 1895, under the Ontario Joint Stock Companies Letters Patent Act then in force, and carried on business at Brockville. The plaintiff company was incorporated in 1909 and took over the business of the partnership firm of James Richardson & Sons, which had theretofore been carried on at Kingston. The defendants had for many years had business dealings with the Richardson firm and had become heavily indebted to them. Some time prior to 1906 the defendants, at the instance or suggestion of the Richardsons, took into their employ as manager one Joseph McAdam, who was a brother-in-law of one of the Richardsons. The defendants contended on the reference that McAdam was the agent or representative of the Richardsons' firm and afterwards of the plaintiff company, and had been put in charge and control of the defendants' business to protect the plaintiffs' interests as large creditors of the defendants. The Master has found that there was no such agency, and I see no reason for disagreeing with his decision in that respect. That McAdam was appointed at the instance or suggestion of the Richardsons is, I think, quite clear, and I think it may be assumed that he was appointed because it was hoped that his management would so improve the defendants' business as to enable them to pay off their indebtedness to the Richardsons; but there was no evidence whatever that the Richardsons or the plaintiffs had any control over McAdam or that he was accountable to them or they to him in any way. It appears to have been an example of what is not at all an uncommon practice, of a debtor getting an extension of time by consenting to reorganise his business arrangements by taking in some one as manager who is persona grata to the creditors.

On April 22, 1910, the defendants were indebted to the plaintiffs for goods sold and moneys advanced in the sum of $19,378.19, and on that date the mortgage in question was executed by the defendants in favour of the plaintiffs for $20,000, to be paid in 5 years from that date without interest. The mortgage recited that the mortgagors had from time to time purchased grain and coal from the mortgagees upon credit; that the mortgagees had also advanced moneys to the mortgagors to pay other liabilities of the mortgagors, the whole to the extent of $19,378.19; that the mortgagors had agreed to execute this mortgage "for the purpose of securing the said amount now owing to the mortgagees, and also to secure any other advances and credits to be made or given by the mortgagees to the mort-

gagors, the intent being that this mortgage is given as collateral security for the present or any future indebtedness of the mortgagors to the mortgagees, notwithstanding the covenants entered into on the part of the mortgagors." The mortgage was executed under the corporate seal of the defendants and the signatures of T. C. McCarthy as president and J. McAdam as secretary. The mortgage was duly registered in the registry office for the County of Grenville on May 14, 1920, but was not filed in the office of the Provincial Secretary.

The Master finds that there were such irregularities in the manner in which the mortgage was obtained as would render it invalid if the plaintiffs had knowledge of such irregularities, but that McAdam was not the representative or agent of the plaintiffs, and that they were not fixed with knowledge of the irregularities, and that therefore the mortgage is a good and valid security.

There was no evidence to establish any knowledge on the part of the plaintiffs of any irregularity in the execution or giving of the mortgage, apart from McAdam's knowledge; and, as I have held that McAdam did not represent the plaintiffs, the only question remaining to be dealt with is whether the mortgage may not be invalid in spite of the plaintiffs' lack of knowledge of any irregularities.

It was admitted on the argument that if the validity of the mortgage in the hands of the plaintiffs depend alone upon the regularity of the meetings of the directors and shareholders which passed the resolution authorising its execution, it could not be supported. But the plaintiffs contend, and the Master has held, that the plaintiffs are entitled, by reason of their lack of knowledge of these irregularities, to hold the mortgage as a valid security as against the defendants.

The Act which at the time when this mortgage was given governed the defendant company's power to borrow money and to give securities was the Ontario Companies Act of 1907, 7 Edw. VII. ch. 34. Section 73 empowers the directors to make by-laws for borrowing money, and sec. 74 provides that no such by-law shall take effect until it has been confirmed by a vote of two-thirds in value of the shareholders present or represented at a special general meeting. But sec. 78, which gives the directors power to mortgage, makes no provision for confirmation by the shareholders. The material portions of this section are as follows:—"The directors may charge, hypothecate, mortgage, or pledge

Ont.

S.C.

JAMES RICHARDSON & SONS LTD. v. J.McCARTHY & SONS CO. LTD.

any or all of the real or personal property . . . of the corporation to secure any bonds, debentures or other securities or any liability of the corporation, and a duplicate original of such . . . mortgage . . . shall be forthwith filed in the office of the Provincial Secretary as well as registered under the provisions of any other Act in that behalf."

For purposes of reference it may be convenient to note that secs. 73, 74, and 78 of the Act of 1907 correspond to secs. 78, 79, and 82 respectively of the present Act, R.S.O. 1914, ch. 178.

Section 78 in the clearest terms confers upon the directors, without special authority from the shareholders, full power to mortgage the property of the company to secure any "liability" of the company: Hammond v. Bank of Ottawa (1910), 22 O.L.R. 73.

Leaving aside for the moment the question whether or not the directors acted regularly in giving this mortgage, is the liability which it purports to secure such as was enforceable by the plaintiffs against the company? If so, then the directors could give the mortgage. Mr. McCarthy argues that the defendant company failed to comply with certain imperative requirements of the Act, and that the plaintiffs were bound, before granting the credit or making the advances, to ascertain whether or not the necessary resolutions and by-laws had been passed.

The mortgage is given to cover liabilities of three distinct kinds; (a) for goods purchased; (b) for advances to enable the defendants to discharge other liabilities; and (c) for future advances. There was nothing before me to shew in what proportions the plaintiffs' claim as proved on the reference was divided among these three classes of liability. The indebtedness of $19,378.19 which existed in 1910 doubtless continued and was increased from time to time, and it may have been reduced and again increased, but no special argument was advanced upon this point. The defendant company was a trading company; as such it had the power to incur liabilities in the ordinary course of business in the purchase of goods. For any such liability the directors had, by virtue of sec. 78, ample power to mortgage without going to the shareholders for authority. It was, however, strenuously argued that the directors could not borrow money without the authority of a by-law passed and confirmed under secs. 73 and 74, and that those provisions were imperative; and that, in the absence of such a by-law, the plaintiffs could not recover any moneys ad-

vanced. I do not think it is necessary for me to go into the question whether or not the directors of a trading company are excluded, by the express provisions of secs. 73 and 74, from exercising its common law power to borrow money. The mortgage recites that the advances had been made by the plaintiffs "to pay other liabilities" of the defendants. It is not suggested that they were not so applied. It is well established that one who lends to a company money which is borrowed by the company in excess of its powers may nevertheless recover if the moneys are in fact used to pay either existing or future legitimate liabilities of the company, and that the lender is entitled to hold any securities given him by the company in respect of the moneys so advanced: Blackburn Building Society v. Cunliffe Brooks & Co. (1882), 22 Ch.D. 61; Baroness Wenlock v. River Dee Co. (1887), 19 Q.B.D. 155; In re Wrexham Mold and Connah's Quay R. Co., [1899] 1 Ch. 440. This equitable principle would apply not only to the advances already made at the date of the mortgage but to any future advances. There was nothing before me to indicate that the future advances (if there were any) were made otherwise than in discharging legitimate obligations of the company. Under these circumstances, the obligation to repay the moneys advanced by the plaintiffs would be a liability upon the same footing as the liability in respect of the purchased goods, for which the directors could give a mortgage under sec. 78.

The mortgage being one which the directors had power to give, were the plaintiffs put upon any inquiry as to the regularity of the resolutions authorising its execution? The mortgage appears to have been the subject of some correspondence as to its terms prior to its execution and delivery to the plaintiffs. It purports to be duly executed under the corporate seal and the hands of the company's president and secretary. Were the plaintiffs bound to make any inquiry as to the regularity of the meetings at which the authority for the mortgage was given? This is, in my judgment, clearly a case of the "indoor management" of the company which those dealing with the company are entitled to presume is regularly conducted, and as to which they are not put upon inquiry: Lord Hatherley in Mahony v. East Holyford Mining Co. (1875), L.R. 7 H.L. 869, at pp. 893, 894. The principle laid down in Royal British Bank v. Turquand (1856), 6 El. & Bl., 327, 119 E.R. 886, is so well established that it is only necessary to cite authorities as examples of its application. The recent case in the

Ont.

S.C.

JAMES RICHARDSON & SONS LTD. v. J. MCCARTHY & SONS CO. LTD.

Supreme Court of Canada of McKnight Construction Co. v. Vansickler (1915), 24 D.L.R. 298, 51 Can. S.C.R. 374, will be sufficient for that purpose.

The cases referred to by Mr. McCarthy in support of his contention that the provisions of a statute must be strictly complied with do not disturb the broad principle enunciated in the Royal British Bank v. Turquand. I find on examination that they all arose under entirely different circumstances, to which different principles apply. For example, in Re Pakenham Packing Co. (1906), 12 O.L.R. 100, it was held that the directors could not delegate their duty in respect of the allotment of shares to a subordinate officer. Apart from the fact that this was a case where the company was seeking to escape the consequences of its own irregularities, which distinguishes it from this case, where it is attempting to take advantage of its own irregularities, there is no point of resemblance between the formalities surrounding the subscription for and the allotment of shares in a company, and a contract to pay for goods supplied or to repay moneys lent. Manes Tailoring Co. v. Willson (1907), 14 O.L.R. 89, involved the validity of the issue of certain preference shares.

Counsel for the defendants further urged that failure to file the mortgage in the office of the Provincial Secretary, as required by sec. 78, invalidated the mortgage. His only authority for this proposition was a British Columbia case, Dalton v. Dominion Trust Co. (1918), 25 B.C.R. 240. What bearing that case has upon the point here I am unable to discover. The Court held there that sec. 103 of the British Columbia Act did not apply because the real question involved was, which of two charges, both equitable, had priority. Apart from that, sec. 102 of the British Columbia Act is designed for the protection of subsequent purchasers and mortgagees. It corresponds in its nature to the provisions of our Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, by declaring that mortgages of a company's lands if not filed with the Registrar of Companies within a certain time shall be void as against bona fide purchasers and mortgagees for value, and as against creditors and the liquidator.

Section 78 of the Ontario Act of 1907 merely says that the mortgage "shall be forthwith filed in the office of the Provincial Secretary as well as registered under the provisions of any other Act in that behalf." Does failure to comply with this provision render the mortgage void as be-

tween the company and the mortgagees? I do not think so. Just what was intended by the direction to file the mortgage in the office of the Provincial Secretary is not clear. The Act imposes no penalty for failure to file and is silent as to the effect of such failure upon the mortgage itself or the rights of the parties. The Act does not say that until so filed the mortgage shall have no force or validity, and it is, therefore, presumably a valid mortgage as between the parties to it before it is filed. Nor does the Act say by whom it is to be filed, the company or the mortgagee. The only thing to shew what is intended is perhaps afforded by the reference to registration under any other Act. The only other Acts would be the Registry Act, the Land Titles Act, the Bills of Sale and Chattel Mortgages Act, or such other Acts, if any, as provided for registration, not for the protection of the mortgagee but for the protection of subsequent purchasers and mortgagees and of creditors. It may be that filing with the Provincial Secretary was intended to be supplementary to registration under any such other Act. As filing with the Provincial Secretary is coupled with the registration under any other Act, if it were to be held that the direction to file with the Provincial Secretary is so imperative that failure to do so would invalidate the mortgage, then, to be consistent, as the direction to register under any other Act is equally imperative, failure to register in the registry office would also invalidate the mortgage, even as against the mortgagor company. This would be importing into the law of registration a new principle, so far as companies are concerned, which cannot have been intended, I can regard the requirement to file with the Provincial Secretary as directory merely, enforceable possibly against the company at the suit of the Attorney-General, or subjecting the company to such penalties as are imposed for the breach of any provincial statute. Whether failure to file would impair the mortgagee's position as against a subsequent bona fide purchaser or mortgagee for value, I am not called upon to decide. As between the defendant company and the plaintiffs, I hold that failure to file the mortgage in no way affected its validity.

The defendants' appeal from the certificate of the Local Master will therefore be dismissed with costs.

Appeal dismissed.

Alta.

S.C.

BROWN v. ALBERTA AND GREAT WATERWAYS R. CO.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 7, 1921.

BROWN v. ALBERTA AND GREAT WATERWAYS R. CO.

Bonds (§IIIA—58).—Railway—Payable in England—Fixed Rate for Sterling—Canadian Equivalent—Premium of Canadian Currency over Sterling—Right to Pay in English Currency.

The payment of interest on a railway bond, one of a series authorised by chapters 46 and 16 Alta. Stats. 1909, by which the company promised to pay to bearer in 1959 the sum of $1,000 of lawful money of Canada at the counting house of J. S. Morgan, in London, England, with interest thereon at the rate of 5 per cent. per annum and providing that "the principal and interest of this bond shall be payable there at the fixed rate of exchange of $4.86 2-3 for the pound sterling," there being no amount specified in the text of the coupon but the figures $25 or £5. 2. 9 appearing in the margin and beneath, the words "1st of July, 1920," and still lower "Interest coupon No. 21" is satisfied by payment at the place specified of the sum of £5 2. 9., the amount specified in the coupon as the equivalent of $25, the holder is not entitled to receive $25 in Canadian currency.

[Suse v. Pompe (1860), 8 C.B. (N.S.) 538, 141 E.R. 1276, Applied.]

SPECIAL CASE stated by the parties for a declaratory judgment as to the currency in which interest on a bond of the defendant company payable in England is to be paid.

Frank Ford, K.C., for plaintiff.

S. B. Woods, K.C., for defendant.

The judgment of the Court was delivered by

Harvey, C.J.:—This is a special case stated by the parties for a declaratory judgment.

The plaintiff is the bearer of a bond of the defendant company by which it "promises to pay to bearer on the first day of January, 1959, the sum of one thousand dollars of lawful money of Canada at the Counting House of J. S. Morgan & Company, in the City of London, in England, together with interest thereon at the rate of five per centum per annum," etc. Without other interruption after the provision for payment of interest rates than a full stop, the bond continues:—"The principal and interest of this bond shall be payable there at the fixed rate of exchange of $4.86 2-3 for the pound sterling." The interest coupon is in the following terms:—"The Alberta and Great Waterways Railway Company will pay to bearer on the first day of July, 1920, of lawful money of Canada at the fixed rate of exchange of $4.86 2-3 for the pound sterling, at the Counting House of J. S. Morgan & Company, in London, England, being half yearly interest at the rate of five per centum per annum on the above debenture bond."

There is no amount specified in the text of the coupon,

although a blank space is left for it in the form provided, but in the margin opposite the line ending "first day of July, 1920," but in different type, are the words and figures, "$25 or £5 2s 9d," and beneath "1st July, 1920," and still lower "Interest coupon No. 21."

The question we are asked to determine is whether the plaintiff as the holder of the bond is entitled to demand and receive for each interest coupon when due "$25 of lawful money of Canada in Canadian currency at the counting house of J. S. Morgan & Company," or whether the defendant can satisfy its obligation by the payment of £5. 2. 9.

There is nothing in the stated case to shew it, but it is a matter of common knowledge that Canadian currency is, and has been for some time since the close of the war, at a considerable premium over sterling. It is therefore apparent that it is the plaintiff who desires to uphold the first alternative while the defendant maintains the second.

The bond is one of a series of bonds, the total being for $7,400,000, authorised by chs. 46 and 16 of the statutes of this Province for 1909. The bonds were no doubt sold in England, hence the reason for payment there and consequently the reference to the currency in use there.

Unless we disregard the provisions for the fixed rate of exchange, which is as much a part of the contract as the promise to pay, I can see no ground whatever for considering that the rights of the parties are not definitely determined by that provision. The reason for it too seems quite obvious. The lenders were the ones to impose the terms on the borrowers. They, knowing the possibilities of the fluctuation of exchange, desired to protect themselves against any change to their detriment by providing that they should receive back exactly as many pounds sterling as they advanced and that in the meantime they should receive in their own currency exactly 5% interest.

Owing to the conditions due to the war we find the result the possibility of which when the loan was floated in 1909, was, no doubt, not contemplated by the lenders, that the current rate of exchange would be more favourable to them than the normal one.

There is nothing that suggests an option on the part of the bearer of the bond to demand payment either at the current rate of exchange or at the specified rate. "Fixed" surely means "fixed" as much for one party as for the other. It is true that the promise is to pay so many dollars but the promise is not to pay it in dollars but in the equi-

Alta.

S.C.

BROWN v. ALBERTA AND GREAT WATERWAYS R. Co.

valent in the currency where the payment is to be made on a fixed basis of exchange.

The case seems so simple that one would hardly expect to find direct authority upon it, but nevertheless there is a case with facts in part exactly parallel: Suse v. Pompe (1860), 8 C.B. (N.S.) 538, 141 E.R. 1276. In that case a bill of exchange was drawn in England by a merchant upon a drawee in Vienna, Austria, directing him to pay "the sum of £750 sterling at the exchange as per endorsement." The exchange as endorsed was 11 florins 5 cents. The action was against an endorser in England by a purchaser of the bill. The florin had fallen in value since the purchase of the bill and the plaintiff claimed the option to demand either the amount he paid for the bill or the value of the re-exchange. Byles, J., in delivering the judgment of the Court, says at pp. 563, 564: "The solution of this question depends on the contract of the indorser. That contract is . . . that . . . he the indorser will . . . pay the holder the sum which the drawee ought to have paid, etc. The holders are entitled to receive a certain number of Austrian florins in Vienna on the day when the bill is at maturity. It would seem to follow that on non-payment by the drawee the holders are entitled as against the indorsers to so much English money as would have enabled them in Vienna on that day to purchase as many Austrian florins as they ought to have received from the drawee, and further to the expenses necessary to obtain them."

If this were an action to recover the amount of the coupon or bond for default in payment that case would be exactly parallel except for the fact that the action was against an endorser which however did not touch the principle.

In that case it was assumed and in Manners v. Pearson & Son, [1898] 1 Ch. 581, it was expressly held that a judgment for money is to be expressed in the currency of the country where the action is brought.

In Suse v. Pompe, supra, the plaintiff was not held entitled to £750, the sum specified in the bill, but to such sum in English currency as would represent the value at the current rate of exchange of the amount in florins which the bill called for on the basis of the specified rate of exchange.

The form of the transaction there, though not of the action or the parties was the same as in the present case and the case really in fact assumes as unarguable the point which is raised in this case.

For the foregoing reasons I think quite clearly that the defendant is entitled to satisfy its obligations by the payment at the place specified of the sum of £5 2. 9., the amount specified in the coupon, as the equivalent of $25 by the terms of the contract.

Judgment accordingly.

IMPERIAL BANK of CANADA v. BARBER et al.

Ontario Supreme Court in Bankruptcy, Middleton, J. May 11, 1921.

Bankruptcy (§III—28)—No Valuation made of Assets by Assignee on Taking Possession—Assets Advertised for Sale—Purchase by Figurehead for Debtor at Greatly Reduced Price—Chief Creditor Refusing to Consent to Sale—Offer by Chief Creditor to Purchase Property at Substantial Increase in Price—Offer of Creditor Ordered to be Accepted.

The Bankruptcy Act 1919, (Can.) ch. 36, is not intended to be a means by which bankrupts, or the directors and shareholders of a bankrupt company, can absolve themselves from liability and repossess the property at a price which they may dictate from their creditors, and where inspectors are appointed who represent small claims great care should be taken to see that the rights of those more largely interested are not sacrificed to the mere weight of numbers. Where a person who in substance though not in form was the debtor, was enabled, through a figurehead and the instrumentality of the Bankruptcy Act, by the action of the trustee, to acquire the property assigned at a sum which meant a very substantial loss to the creditors, and this against the will of the chief creditor who was willing to offer a substantial amount more for the property than was offered by the figurehead, the Court ordered that the action of the assignee in accepting the offer should be overruled and the offer of the creditor accepted unless a substantially better offer was produced, within a certain time.

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

ACTION by the plaintiff as chief creditor of the defendant company to restrain a sale of the company property.

Macintosh, for Barber; Draper, for Dufton.

Middleton, J.:—The facts giving rise to this action are not complicated. Thomas Waterhouse and Co., carrying on business at Ingersoll, on March 18, 1921, made an assignment for the benefit of its creditors to Henry Barber, an authorised trustee. According to the statement produced, the liabilities amount to $108,523, of which $4,648 were preferred claims, $31,000 are general creditors', $67,000 liabilities to the Imperial Bank, and $6,000 is represented by a mortgage to the Town of Ingersoll. The assets consist of, in round figures, $30,000 stock, $64,000 machinery, plant and equipment, $1,000 book accounts, which would

Ont.

S.C.

IMPERIAL BANK v. BARBER.

leave a nominal surplus of about $27,000. The bank has security upon the stock, and values that security at $10,000. There is, no doubt, some inaccuracy in the amounts of the creditors' claims, but, speaking roughly and leaving on one side the secured claims, the bank represents two-thirds of the unsecured liability, and the general creditors aggregate one-third. The figures given as representing assets are taken from the books of the company, and by no means represent the true value. The extent to which this value is to be cut down is very problematical.

The chief shareholder of the assignor is R. W. Waterhouse. I do not find any precise information as to his real interest in the company, but substantially he is the person beneficially interested in the company.

The assignee on taking possession had no valuation made of the assets, relying to some extent on the knowledge said to be possessed by one Westerway, one of the inspectors. Without any real information, the assets were advertised for sale by the assignee, with the authority of the inspectors, the whole concern being offered in two parcels, the factory, plant, etc., being given an inventory value of $103,500, and stock $31,000. The only tender received was by the defendant Dufton, who offered $25,000 for the factory and plant, etc., which has been interpreted, rightly or wrongly, as meaning over and above the town mortgage, for the building, plant, and machinery.

It now transpires that, although this offer is made by Dufton, the offer is really that of Waterhouse, and Dufton is only a figure-head or nominal purchaser for him: Dufton has no intention for himself of putting his own money into the transaction.

Against the protest of the inspector representing the bank, the assignee and the other inspectors accepted this offer, and seem intent on forcing the transaction through. The bank then instituted this action for the purpose of restraining the sale.

On the argument of the motion, I pointed out to counsel that the remedy seemed to be misconceived, and that the proper course was to invoke the jurisdiction conferred by sec. 39 of the Bankruptcy Act, 1919 (Can.) ch. 36, which provides:—

"If the debtor or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or

modify the act or decision complained of and make such order in the premises as it thinks just."

In my view this section affords to the parties a much more satisfactory remedy than would be open in an action as it removes all the elements of finality in the action of the trustee, and gives to the Court full jurisdiction to reverse or modify the act of the trustee upon any ground that justice may require. I am not sure that, even if an action would lie, the Court in the action would have anything like as wide a discretionary power as it has under the provisions of this statute.

All parties consented to this motion being now treated as an application being heard before me as a bankruptcy Judge under this section.

Stripped of all technicality, the situation resolves itself into this:—A gentleman, who in substance, although not in form, is the debtor, is enabled, through a figurehead and the instrumentality of the Bankruptcy Act, by the action of the trustee, to acquire the property assigned at a sum which will mean a very substantial loss to the creditors, and this against the will of the chief creditor, who represents two-thirds of the total liability. I do not think it is necessary to impute any improper motive to the trustee or to any of the inspectors. The trustee is a gentleman of very high reputation and would not wittingly do anything that could be criticised. The other inspectors have little concern from a practical standpoint: one of them represents a creditor whose claim is under $250; another represents local creditors at Ingersoll, whose claims do not aggregate a large sum and who are naturally anxious to see the local industry started up again. The bank is ready to shew its faith in the situation by its works, for it is ready to give $2,000 more than is offered by Waterhouse through Dufton, and take its chances of realisation. When this was suggested Waterhouse through his counsel protested most strongly against any such sacrifice and desired to have an opportunity of making a further bid. This reveals the situation.

I think the proper disposition of the motion is to direct that the action of the assignee in accepting this offer should be overruled and to direct that the offer of the bank should be accepted unless a substantially better offer is produced. This will protect the position of the other creditors, and if there is a profit to be made out of the transaction there

Can.

S.C.

LORD
v.
ST. JEAN.

is no reason why it should not go to the bank, which is bound to make a very large loss, in preference to the chief shareholder of the insolvent company. If any better offer is received by the trustee, it may be submitted to the Judge in bankruptcy in a week's time, otherwise the order will go approving of the bank's offer.

It is most important that it should be understood that the Bankruptcy Act is not intended to be a means by which bankrupts, or the directors and shareholders of a bankrupt company, can absolve themselves from liability and repossess the property at a price which they may dictate to their creditors. It must also be borne in mind that where inspectors are appointed who represent small claims great care should be taken to see that the rights of those more largely interested are not sacrificed to the mere weight of numbers.

Costs may be allowed out of the estate to the assignee and to the bank, and there should be no costs to Dufton.

Judgment accordingly.

LORD v. ST. JEAN.

Supreme Court of Canada, Idington, Duff, Anglin, Brodeur and Mignault. February 1, 1921.

Dedication (§IA—3).—Strip of Land Forming Part of Highway—Ownership—Immemorial Possession—Prescription.

In an action in boundary to establish the ownership of a strip of land on which the sidewalk opposite certain lots in St. Johns, Quebec, is laid, the defendant corporation claimed ownership by right of immemorial possession, the plaintiff claimed that the defendant's possession was equivocal, promiscuous and common and could not serve as a foundation for acquisitive prescription.

Anglin and Mignault, JJ., held on the evidence that the strip in question had been dedicated to the defendant for the use of the street, and a sidewalk running along plaintiff's property. Brodeur, J., held that the strip in question had been acquired by the corporation by thirty years' prescription and that the doctrine of dedication in English law does not apply in the Province of Quebec.

[Lord v. St. Jean (1918), 24. Rev. Leg. 303, affirmed.]

APPEAL by plaintiff from the judgment of the Quebec Court of King's Bench, appeal side, in an action to establish the ownership of a strip of land on which a municipal sidewalk is built. Affirmed.

A. Geoffrion, K.C., and G. Fortin, for appellant.

F. L. Beique, K.C., and P. A. Chasse, K.C., for respondent.

Idington, J.:—I would dismiss this appeal with costs.

Duff, J.:—The rule governing the acquisition of a public

way by prescription is stated in Proudhon, vol. 2 at p. 372 in the following words:—"Let us conclude then, that when a road between several frequented places has been opened freely to the public, that is to say peaceably enjoyed by what we call the public, for more than 30 years, which is the longest period required today for prescription, the right to it is held by those who have made use of it."

Possession by the public in the manner described is essential. In my opinion the public user proved in this case had not the quality of exclusiveness necessary to enable one to describe it as possession.

I have not been able to convince myself that the principle of dedication as understood in the common law is a part of the law of Quebec. It has rather been assumed to be so upon the authority of an observation in the judgment of Lord Fitzgerald in Chevrotiere v. La Cite de Montreal (1886), 12 App. Cas. 149 at pp. 157-8. Rightly read that passage does not, in my judgment, suggest even that the English principle of dedication is a part of the law of Quebec. The object of the passage is to give a description of the character of the user necessary in prescription, the "abandonment" being referred to as one of the elements indicating the nature of the user; and as regards the character of the user required for the purpose of giving a title by prescription there is no difference between the law of England and Scotland and, of course, as his Lordship points out, the French law on that subject is the same. To construe the passage as laying down the rule that the principle of dedication is a part of the law of Quebec necessarily involves the result that one must ascribe to Lord Fitzgerald speaking for the Judicial Committee the dictum that as regards the principle of dedication the law of England and Scotland are the same, a dictum which would be opposed, as everyone knows, to the fact.

There are no doubt dicta and perhaps even decisions of comparatively recent date by Judges in Quebec which nominally, at all events, seem to involve a recognition of the common law doctrine of dedication. I have been unable to discover any principle of law upon which these dicta and decisions are based which applies in the Province of Quebec. There is one fundamental distinction between the law of England and the law of France in respect of highways: By the law of England, the highway is regarded as a locus in which the public has a right of passage, the proprietorship of the fundus being prima facie vested in the adjoining

Can.
S.C.
LORD
v.
ST. JEAN.

owners. The existence of the public right could be established by prescription, that is by proving a public user from which it might be inferred that the public had enjoyed the right from time immemorial. Later the Courts for the purpose of abridging the period resorted to an expedient analogous to the expedient adopted in the case of easements properly so called the presumption of a lost grant. Facts sufficient to lead to the inference that in fact the owner had devoted the property to the use of the public as a highway and that the public had acted upon and accepted the donation were held to be a sufficient foundation for the public right. But the public right acquired in this way could, like the public right acquired by prescription, be a right of user only. The proprietorship in the fundus could not pass to the public because the public in whom the right of passage was vested was a public consisting of all the King's subjects and such a fluctuating body could not, by the law of England, be the proprietor of a corporeal interest in land.

In the law of France there appears to be no such obstacle: 2 Proudhon, pp. 370-1. But I have looked in vain for any authority shewing that French law ever recognised any principle by which the proprietor of land lost his title to it eo instante by the mere act of opening it to the public with the intention of enabling the public to have the enjoyment of it as a highway.

Anglin, J.:—I am not satisfied that the disposition by the provincial Courts of the several objections to the regularity and sufficiency of the surveyors' report taken by the appellant was erroneous.

On the merits of the case it is quite clear that the respondent city has not a documentary title to the strip of land in dispute. Without determining the sufficiency of its alleged title by prescription (I entertain some doubt as to the exclusiveness of the possession shewn), I am convinced, for the reasons assigned by my brother Mignault, that title in the city corporation by dedication has been established.

Brodeur, J.:—We are called upon in this case to decide whether the plaintiff or the corporation defendant is the owner of the land on which is laid the sidewalk opposite lots 139 and 140 of the cadastre of the town of St. Johns.

The defendant corporation claims the ownership by right of immemorial possession dating back to a period before 1868, since it was in that year that the municipal council

decided to replace the stone sidewalk by a wooden one. This new sidewalk was 7 ft. wide and was constructed on the north side of the street known as Market Square. It touched the plaintiff's buildings.

In 1905 the respondent corporation decided to replace the wooden sidewalk by a cement one of somewhat lesser width than the former, and this time a space of about a foot was left between the sidewalk and plaintiff's house. Apparently defendant's action did not suit the plaintiff. On August 17, 1905, he protested the defendant to make the sidewalk of the same width as the former one, failing which he would claim the ownership and the absolute possession of the land on which the sidewalk was constructed.

The city refused to comply with the terms of this protest, and the present action in boundary was taken. Expert surveyors were appointed to examine the property in question and to take evidence. They reported that the claim of 30 years' possession by the corporation was well founded. The Superior Court accepted the expert's report, and finally the Court of Appeal unanimously confirmed the decision of the Superior Court.

The appellant maintains that the respondent's possession was equivocal, promiscuous and common, and cannot serve as a foundation for acquisitive prescription He relies on art. 2193 of the Civil Code (Que.), which says:—"For the purpose of prescription, the possession of a person must be continuous and uninterrupted, peaceable, public, unequivocal, and as proprietor."

In support of his argument he claims that he always acted as owner of the ground in question, building and keeping outside steps over it, and a drain across it, constructing the cornices of his house over the sidewalk, keeping on it, agricultural machines for display, and paying taxes.

The evidence in the record shows that this strip of land was always used by the defendant as a public sidewalk from time immemorial.

The sidewalk was built, maintained, and renewed by the respondent corporation and was without doubt part of the public road.

There is no question here, as in the case of Gauvreau v. Page (1919), 55 D.L.R. 170, 60 Can. S.C.R. 181, of an equivocal possession, the owner of the land having opened up a road for the development of his property, and having paid all the costs of building and maintenance. In the present case the municipal corporation built the sidewalks

Can.

S.C.

LORD
v.
ST. JEAN.

over 30 years ago on the ground in question, and kept them constantly in repair.

The question is raised, however, does the 30 years' prescription hold in our law?

I cannot do better than quote on this point from Proudhon Traite du Domaine Public, who deals with the question in the following terms (No. 631, p. 964, 2nd ed.):—"But can a public road be acquired by means of ordinary prescription? A road has gradually taken shape over one or more properties, belonging to individuals or to the municipality, and each part serves as a link between settlements or villages. In principle the makers of the road had no title to it. The owners of the properties affected remain silent for more than thirty years, and from this time it is constantly used by the public. Would the owners still be entitled to forbid its use? Could they not, on the contrary, be met with the plea of acquisitive prescription of the road on behalf of the public domain by thirty years' possession? We therefore conclude that where a road serves as the means of communication between several settlements, where it has been publicly opened and freely used, that is to say peaceably possessed by the moral and collective entity which we call the public for over thirty years, the longest period required today for prescription, that road is acquired by the municipality and forms part of the public domain."

The appellant relies on the fact that his steps cover a part of the sidewalk, that the cornices of his house overlook it, and that a drain crosses it.

These various servitudes cannot affect the rights of the corporation. Guillouard, vol. 1, Prescription, No. 375, says: "Not only is it impossible to acquire by prescription any rights of ownership in the soil of public roads or places, but no one can even acquire a servitude over this ground contrary to the destination of the public road or place. The owners whose land borders on a public road or place may doubtless build doors opening on it, and acquire rights of view over it, they may discharge rain on it or the water from their house, for the street is destined to procure these advantages for the bordering owners.

'Loca enim publica, utique privatorum usibus deserviunt jure scilicet civitatis non quasi propria cujusque.'

But where the use of the public place or road is such as to interfere with the general destination of these lands and and the services which they are intended to render, a servi-

tude cannot be acquired any more than a right of ownership."

Speaking of equivocal possession, Guillouard in the same treatise, No. 273, says:—"But if the possession is equivocal, the presumption in our opinion must be in favour of the State or the Municipality." Dalloz, 1854-1-114.

The defendant claims that there has been dedication or abandonment of the land in question.

In view of the finding I have reached on the question of the 30 years' prescription, it is not necessary for me to discuss this point in any detail. I have already expressed my opinion at length on this subject in the case of Gauvreau v. Page, 55 D.L.R. 170, and I have come to the conclusion that the doctrine of dedication in English law does not apply in the Province of Quebec, and that the abandonment of an immovable by gratuitous title cannot take place without a title, seeing that a deed of donation inter vivos must be notarial and the original thereof be kept of record on pain of nullity (art. 776 C.C., Que.). In the present case, however, plaintiff appears to admit in his evidence and in his protest that the land was not ceded gratuitously by his predecessors in title, but for good and valuable consideration. The cession therefore partakes of the nature of a sale rather than that of a gift. In this case a written contract is not required.

For these reasons the appeal should be dismissed with costs.

Mignault, J.:—After examining the voluminous record in this case, I think there can be no doubt (1) that the strip in question does not belong to the respondent by virtue of its titles as forming part of lot No. 136 of the cadastre of St. Johns, known as Market Square; (2) that, without this strip, the appellant does not hold, on Jacques Cartier St., all the width that he is supposed to hold according to his title deeds and the cadastre, for the lots fronting on this street, to wit, 43 ft. for lot No. 140, 31 ft. for lot No. 141, 36 ft. for lot No. 142, in all 110 feet.

This explains the respondent's action in insisting on having the boundary fixed, not according to its titles, but according to what it calls its immemorial possession. As to this last question, I am able to extract from the third record a third fact which is established beyond all doubt, which is, that at the time when appellant took his action in 1905, the strip in question was occupied by a sidewalk that had been used by the public for over 30 years, taking the date, 1873, given

Can.

S.C.

LORD
v.
ST. JEAN.

by appellant as being that at which he first had knowledge of the encroachment. It is clear, however, that a sidewalk on this strip, used by the public, had existed long before this time.

I find in the record a fourth established fact. Originally appellant's outside steps covered part of the strip and of the sidewalk thereon, the cornices of the hotel projected from 25 to 30 inches over the sidewalk, and under the sidewalk there is a sewer the property of the appellant, and draining his hotel. The drain then continues outside of the exterior line of the sidewalk and joins the drain of a neighbour on the east side, finally emptying into respondent's sewer on Champlain St., as there is no public drain on the Market Square except on the side opposite appellant's property. The appellant says that shortly after he came there he drew in his outside steps. In 1907 he rebuilt the hotel, and drew it back about a foot on the north side, farther from the strip and the sidewalk, with the object of building it in line with a store he had on lot No. 139. The supplementary plan, prepared by order of the Superior Court by expert surveyors to shew the division lines claimed by the respective parties, shows that appellant's buildings were from a foot and a half to a foot and eight-tenths distant from the line adopted by the experts, and that the outside steps of the side doors were within this line.

Taking as proved the facts I have just mentioned, it is clear that the respondent must plead prescription or abandonment by dedication in order to succeed in this case. The expert surveyors based themselves on the 30 years' prescription in coming to the conclusion that the respondent was the owner of the strip, and the judgments appealed from also base themselves on this prescription. The trial Judge, whose judgment was confirmed in appeal (1918), 24 Rev. Leg. 303, further held that there had been dedication. The judgment says:—"Considering that the proof shows that the strip in question was dedicated to defendant for the use of the street known as Market Square and a sidewalk running along the south side of plaintiff' property . ."

I am convinced that this was actually the case and that plaintiff's predecessors in title dedicated this strip to the municipality, which, since at least 1866 had obliged itself by by-law to make and maintain the sidewalk on the property. In his protest of August 17, 1905, appellant alleges that his predecessors in title had allowed the laying of a sidewalk on their land only by tolerance and on the con-

dition that it was 7 ft. wide. There is no evidence as to this last condition, and appellant's claim to the exclusive ownership of this strip after so many years, frankly, appears to me untenable. At the time of his protest in 1905, the only thing that had moved him to action was the respondent's proceeding to lay a 5 ft. cement sidewalk in place of the 6 ft. board walk that had long covered the strip. After his protest and after he had taken action, appellant himself constructed on this strip and on the same ground as the sidewalk, although of lesser width, a new sidewalk for the use of the public. He thus confirmed the destination of the strip. It is clear therefore that the strip was dedicated to the public, even if it originally belonged to appellant's predecessors in title, which I believe to be probable. This dedication was accepted by the respondent, which for over 30 years before the action laid and maintained a sidewalk on the strip.

In order to contest the quality, particularly, of respondent's possession, plaintiff relied on the fact that his outside steps covered a part of the sidewalk, that his cornices overlooked it, and that it was and still is crossed by the drain of which I have spoken. The appellant admitted, however, in the course of his evidence that there were in St. Johns a great number of persons whose steps encroached on the respondent's sidewalks, which it appeared to tolerate. We cannot conclude from this with any safety that the respondent was never in possession of the sidewalk. At present appellant's steps do not project over the line adopted by the surveyors, nor does it appear that the cornices are now built over it, so that should this line be maintained, the appellant will not have to take away his steps and his cornices. As to the drain, I attach no importance to the fact that it crosses the sidewalk, at least in so far as that fact may affect the right of ownership and the possession of the sidewalk and the strip. That seems to me to be only an arrangement for the mutual advantage of both parties for draining the properties on Market Square. It has no bearing on their respective property rights.

If the strip in question had been dedicated by the appellant and his predecessors in title, and if this dedication was accepted by respondent, which appears to me to be established beyond doubt, the line laid down by the surveyors should be maintained. I base my decision solely on this dedication duly accepted. In the case of Gauvreau v. Page, 55 D.L.R. 170, at p. 180, I expressed doubt as to whether a

Ont.
S.C.
REX
v.
SEGUIN.

public road could be created by a 30 years' prescription, the difficulty always being to prove the requisite possession for purposes of prescription. This difficulty is increased in the case before us by the existence on the strip in question of the appellant's outside steps for a period of several years. The difficulty as to proving possession of the nature required for prescription no longer exists in dealing with dedication to the public use, as for the purposes of dedication all that is required is a sufficient acceptance by the public or by the municipal authority which represents it. Moreover, while in order to acquire by prescription, there must have been a possession of fixed duration, subject to interruption, dedication or destination for the public use is complete and definite from its acceptance. It is not necessary that the public should have been in possession for a period determined a priori.

I conclude from my study of the record that the division line adopted by the judgments a quo must be maintained. The appellant made several objections to the surveyors' proceedings. These were all dismissed in both Courts and on this point I accept their decision.

On the whole, for the reasons indicated, and without adopting the grounds of the judgments appealed from on the question of prescription, I think the appeal should be dismissed with costs.

Appeal dismissed.

REX v. SEGUIN.

Ontario Supreme Court, Hodgins, J.A. January 6, 1921.

1. **Appeal (§VIIIC—301)—Evidence on Appeal from Summary Conviction—Rehearing—Use of Depositions Taken Below—Ontario Temperance Act, 1916, ch. 50.**

The evidence taken before the justices may be read on the appeal taken by leave of the Attorney-General to a county Judge from a summary conviction under the Ontario Temperance Act, 1916, Ont., ch. 50. The provision of sec. 92 (8) of that Act for further or other oral testimony is one in aid of what had appeared before the justices and the right to supplement the evidence taken below is left by the Act in the discretion of the Judge hearing the appeal.

2. **Intoxicating Liquors (§IIIK—94)—Second and Subsequent Offences—Mode of Enquiring at Trial—Ontario Temperance Act 1916, Ont., ch. 50.**

The directions of sec. 96 of the Ontario Temperance Act, 1916, ch. 50, are not imperative that on a charge of a second offence, the subsequent offence shall be first inquired into and that then in case of conviction for the subsequent offence the magistrate shall inquire concerning the previous conviction charged. In the case of an appeal by leave to a county Judge, if it appears

that the case was properly conducted by the justices and that there was proper proof of guilt for the subsequent offence and then competent evidence of the prior conviction, the county Judge is warranted in holding that a second offence has been established and in reversing the adjudication of the justices for a first offence only and in substituting a conviction for a second offence with the appropriate penalty.

3. Appeal (§IIID—85) — Conditions — Fiat of Attorney-General—Liquor Law—Review of Conviction for First Offence Only on Charge of Second Offence—Prosecutor's Appeal—Ontario Temperance Act, 1916, ch. 50.

The fiat of the Attorney-General authorising an appeal to the county Judge from the "dismissal" of the charge against the accused for a second offence is sufficient on which to found an appeal by the prosecutor where the previous conviction was negatived by the justices but a conviction made as for a first offence.

4. Prohibition (§IV—15)—Want of Jurisdiction—Matters of Procedure.

Error in law upon a question apart from the jurisdiction to try, will not give a right to prohibition. It does not lie in respect of matters of mere procedure after the inferior Court became seised of the case.

[Re Sigurdson (1916), 23 D.L.R. 375, 25 Can. Cr. Cas. 291, 25 Man. L.R. 832, referred to.]

MOTION by the defendant for an order prohibiting Gunn, Co. C.J., acting for and at the request of a Judge of the County Court of the United Counties of Prescott and Russell, and the Judges of that Court, from recording or enforcing a conviction of the defendant made by Gunn, Co. C.J., for a second offence against the Ontario Temperance Act, 6 Geo. V. ch. 50, with a sentence of imprisonment for 6 months.

A. Lemieux, K.C., for the defendant.

F. P. Brennan, for the Crown.

Hodgins, J.A.:—The accused was convicted on the 20th November, 1920, by His Honour Judge Gunn, of a second offence against the Ontario Temperance Act and sentenced to 6 months in gaol. No formal conviction is produced, and no warrant has been issued. The conviction was made on an appeal, pursuant to a direction of the Attorney-General for Ontario, under sec. 92, sub-sec. 6, of that Act, after proceedings before five Justices of the Peace of the united counties.

It is contended by the learned counsel for the accused that prohibition is his only remedy, and that he has no right to appeal, referring perhaps to sec. 1121 of the Criminal Code.

The grounds for prohibition are: (1) that the appeal should have been a rehearing, and that all the witnesses should have been called de novo; (2) that there was no power in the learned Judge to order imprisonment for 6 months;

Ont.

S.C.

REX v. SEGUIN.

(3) that he should have inquired, in the manner prescribed by sec. 96, as to the charge of a subsequent offence; (4) that he should have asked the accused under sec. 96, whether he had been previously convicted; (5) that the learned Judge says that the accused admitted the prior conviction, whereas he pleaded not guilty on that charge; and (6) that the fiat of the Attorney-General did not authorise the issuing of the summons as drawn, nor the hearing as it was conducted, nor the retrial of all the findings of the magistrates.

The proceedings before the five Justices were somewhat peculiar. According to the papers now before the Court, supplemented by affidavits by both counsel who appeared before the Justices, the charge laid was for a second offence, and a majority of the Justices found the accused guilty of the particular breach alleged, and fined him $300 and costs. They then proceeded to inquire whether he had been previously convicted, and a majority held in his favour. Counsel for the prosecutor in his affidavit states that he did not know till after the proceedings had been terminated that the Justices had not only found the accused guilty of the particular offence but had imposed a fine. Hence the appeal directed by the Attorney-General.

If one may draw an inference from the appearance of three additional Justices on the bench at the request of the accused, and of what was done, it would be that these Justices were there, or one of them was, to see that the penalty for a second offence was not imposed. What happened was that a majority refused to find that the offence was a second one, although a prior conviction was produced before them and the accused identified therewith.

Altogether the proceedings were not, according to what appears before me, creditable to the local administration of justice in the united counties.

The learned Judge who heard the appeal decided that the imposition of the fine midway in the proceedings for a second offence was improper, and that there was no jurisdiction in the Justices to impose it, and he reversed their finding. He then held that the accused should have been found guilty of a second offence, and proceeded: "And, as he has admitted the charge of the previous conviction, the finding of the magistrates in favour of the dismissal of the charge against the respondent-defendant be reversed and set aside and the respondent found guilty as of a second offence against the Act." He followed this finding by imposing the punishment complained of.

I now deal with the objections made:—

(1) The propriety of these proceedings is challenged on the ground that an appeal is a rehearing de novo, and that the learned Judge had no power to deal with the case upon the evidence taken before the Justices, but could only hear the charge over again and upon oral testimony.

Section 92 of the Ontario Temperance Act, 6 Geo. V. ch. 50, prescribes the procedure on an appeal. Sub-section 8 is as follows:—

"Upon the return of the summons the Judge, upon hearing the parties, may either affirm or quash the order, or if he thinks fit may hear the evidence of such other witnesses as may be produced before him, or the further evidence of any witnesses already examined, and may make an order affirming the order of dismissal, or may reverse such order and convict the defendant and may impose such fine and costs or other penalty as is provided by this Act, and the order so made shall have the same effect and shall be enforced in the same manner as is provided in the case of a conviction before a magistrate under this Act."

Sub-section 9 reads:—

"The practice and procedure upon such appeals, and all the proceedings thereon, shall thenceforth be governed by the Ontario Summary Convictions Act, so far as the same is not inconsistent with this Act."

On turning to the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, sec. 4 provides that:—

"Except where otherwise provided Part XV. and sections 1121, 1124, 1125 and 1142 of the Criminal Code shall apply mutatis mutandis to every such case as if the provisions thereof were enacted in and formed part of this Act."

Section 752 (contained in Part XV.) of the Criminal Code makes provision for the conduct of an appeal:—

"When an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this Part, the Court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or order.

"2. Any of the parties to the appeal may call witnesses and adduce evidence whether such witnesses were called or evidence adduced at the hearing before the Justice or not, either as to the credibility of any witness, or as to any other fact material to the inquiry.

"3. Any evidence taken before the Justice at the hearing below, certified by the Justice, may be read on such ap-

Ont.
S.C.
REX
v.
SEGUIN.

peal, and shall have the like force and effect as if the witness was there examined if the court appealed to is satisfied by affidavit or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts."

Whatever difference there is between this part of the Criminal Code and sec. 92, sub-sec. 8, of the Ontario Temperance Act, the latter must govern. They can, however, be well read together. In both the evidence taken below may be read; under the Code if the witness cannot be obtained, and under the Ontario Act by implication, because the Judge "if he thinks fit may hear the evidence of such other witnesses. . . or the further evidence of any witnesses already examined," i.e., at the trial before the Justices. Indeed it is reasonably clear that this provision as to further or other oral testimony is only in aid of what had appeared before the Justices, as the Judge, "upon hearing the parties," is empowered to affirm or quash the conviction. The right to supplement the evidence is left in his sole discretion.

In this case, on consulting the judgment of the learned County Court Judge (no transcript of the proceedings before him being produced), I find that the parties and also some of the magistrates were present, either in person or by their respective counsel, at the hearing of the appeal on the 20th November, 1920, and that the learned Judge heard their arguments and contentions.

After discussing what appears in the evidence taken before the Justices, the learned Judge proceeds:—

"There was no defence or contradictory evidence given by respondent-defendant, and he tenders none now, but counsel for the respondent-defendant contended that no conviction could be made, because on the 20th day of August, 1920, an information was then pending since the 6th August against him, and a conviction was made against one Timothee Seguin, a brother of the respondent-defendant, for that he 'did allow liquor to be sold at his residence indirectly,' and that conviction remained in force until the same was quashed by the order of the Chief Justice, and sec. 84 applies and protects, and that the withdrawal of the information of the 6th April, 1920, against respondent is equivalent to an acquittal.

"I do not consider these contentions well-founded, as there is not and never should have been any conviction of Timothee on the accusation against him, and the respondent-defendant is unable to produce any conviction as de-

fined in section 84, and he tenders no evidence, and the information of the 6th August in no way affects this appeal—or the proceedings leading to it."

The learned Judge then disposed of this objection, and held that the Justices had no jurisdiction to fine the accused. He found the accused guilty, and adds: "And, as he has admitted the charge of the previous conviction," the finding of acquittal must be set aside and the accused found guilty. The penalty imposed is 6 months in gaol for a second offence.

I do not think that the learned Judge misconceived the proper procedure on the appeal. He followed the course prescribed by sec. 92, sub-sec. 8, and it is not alleged that he refused to hear evidence or that any was tendered, nor is it suggested that there was the slightest unfairness in what was done. The cases cited as to a rehearing are nothing more than an explanation of the meaning of sec. 752 of the Criminal Code. As the Ontario Temperance Act lays down its own procedure, I must hold that there is no necessity for reference to the decisions as to what is a rehearing wholly under the provisions of the Criminal Code: Regina v. Salter (1887), 20 N.S.R. 206; Rex v. Coote (1910), 22 O.L.R. 269. 17 Can. Cr. Cas. 211. The two statutes can well be read together in many respects, but where their provisions are inconsistent our statute must govern. What was done is quite within the ordinary meaning of "reheard" and "rehearing," the latter term not being found in sec. 92. See The King v. The Inhabitants of Causton (1824), 4 Dow & Ry. 445. Counsel referred to the expressions in some cases such as "the Court hears the case de novo" no doubt without realising that these remarks referred to a different set of statutory enactments.

(2), (3), (4), (5). These objections, except No. 2, which disappears if the learned Judge had power to do what he did, deal with matters of procedure under sec. 96, which are within the jurisdiction of the learned Judge if he became seised of the matter, as he undoubtedly did; and so are not any ground for prohibition. "If justices have jurisdiction over the subject-matter of the proceedings before them, a prohibition cannot be issued upon the ground that they may make a mistake in law in exercising their jurisdiction . . . But it is necessary that the subject-matter of the inquiry should be within their jurisdiction:" Regina v. Justices of Kent (1889), 24 Q.B.D. 181 at pp. 183-184. "The question is whether the inferior Court had jurisdiction

Ont.

S.C.

REX v. SEGUIN.

to enter upon the enquiry and not whether there has been miscarriage in the course of the enquiry:" In re Long Point Co. v. Anderson (1891), 18 A.R. (Ont.) 401, at p. 405. "Prohibition will not lie unless there is a lack of jurisdiction in the judicial officer or Court dealing with the proceedings:" per Boyd, C., in Rex v. Phillips (1906), 11 Can. Cr. Cas. 89, 11 O.L.R. 478, at p. 479. "Error in law, upon a question apart from the jurisdiction to try will not give a right to prohibition:" Re Sigurdson (1916), 28 D.L.R. 375, 25 Can. Cr. Cas. 291, 25 Man. L.R. 832.

I may say that I do not agree with the argument put forward by Mr. Lemieux that the provisions of sec. 96* are imperative. The decisions are adverse to that contention. See Rex v. Graves (1910), 21 O.L.R. 329; Rex v. Coote (ante); Rex v. McDevitt (1917), 39 O.L.R. 138, 28 Can. Cr. Cas. 352: Regina v. Wallace, per Armour, J. (1883), 4 O.R. 127.

Besides this, how is it possible to comply literally with the requirements of the section after the evidence has all been taken and the facts warranting the conviction proved before the Justices, if these proceedings are properly before the learned Judge hearing the appeal, as I have held they are? If, when looked at, they disclose a properly conducted case before the Justices and proper proof of guilt on the charge and then competent evidence of a prior conviction, all regularly given according to sec. 96 (and each of these

*96. The proceedings upon any information for an offence against any of the provisions of this Act in a case where a previous conviction or convictions are charged, shall be as follows:—

(a) The magistrate . . . shall in the first instance inquire concerning such subsequent offence only, and if the accused be found guilty thereof he shall then be asked whether he was so previously convicted as alleged in the information and, if he answers that he was so previously convicted, he shall be sentenced accordingly: but, if he denies that he was so previously convicted or does not answer such question, the . . . magistrate . . . shall then inquire concerning such previous conviction or convictions.

(b) Such previous convictions may be proved prima facie by the production of a certificate purporting to be under the hand of the convicting magistrate . . . without proof of signature or official character.

things does appear in the papers filed on this motion), then the learned Judge is warranted, as it appears to me, in holding that a second offence has been established and in inflicting the appropriate penalty. Under the opposite view, why should it be necessary for the learned Judge to pursue sec. 96 if he had before him a record which shewed him that its provisions had been complied with by the Justices? If they had not been so complied with, then the conviction would necessarily have to be quashed. The duty of the learned appeal Judge would then be to proceed pursuant to sub-sec. 8, which is wide enough to enable him to convict. He can follow, so far as it is possible, the method prescribed for the Justice at the initial trial. If the circumstances are such that he cannot do this, then I think he can act under the broad provisions of sub-sec. 8, and convict and impose such penalty as is appropriate.

I should add here that, but for the fact that no formal conviction has been drawn up and signed, there would be nothing to prohibit—the warrant to arrest being merely a ministerial act: Regina v. Coursey (1895), 27 O.R. 181.

In regard to (5), I think this is founded on a misconception. The accused pleaded not guilty before the Justices, it is true; but on the appeal he does not appear to have contested the proof already in of his prior conviction. I presume the learned Judge meant this by the expression he used.

(6) The fiat of the Attorney-General authorises an appeal from the dismissal of the charge against the accused. There were several stages in this trial and adjudication before the five Justices, and just what exact legal phraseology is the most correct to describe the kaleidoscopic character of the proceedings I cannot say. But it is clear that it resulted in a failure to establish a finding of guilt or a conviction for the offence charged, and I think the description of its outcome as a dismissal quite correct. All the various features present in the end only one aspect, that of lack of success in establishing the offence laid in the information. It would be absurd to grant prohibition because the language used in that fiat was not meticulous enough to satisfy every critic.

I have read with care the numerous cases cited by Mr. Lemieux in his well-presented and exhaustive argument, but I have found nothing in them to cause me to doubt the correctness of the conclusion to which I have come, namely, that this application must be dismissed with costs.

Man.

C.A.

LONDON MUTUAL v. MILLER.

LONDON MUTUAL v. MILLER.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron, Fullerton and Dennistoun, JJ.A. January 7, 1921.

Evidence (§IIE—193)—Fire Insurance—Loss of Property—Investigation by adjuster—Payment of claim—Action to recover back on ground of fraud—Establishing claim—Burden of proof.

Where an insurance company comes into Court to recover back a claim paid by it after investigation by its agent and adjuster, alleging fraudulent representations by the insured, it must establish clearly and specifically the fraudulent acts and conduct which induced it to pay over the money. Contradictions and discrepancies in the accounts given of the fire and of the property insured of the owner, a foreigner who does not properly understand English, are not enough to establish fraud where there is apparently no motive and the value of the property destroyed substantially exceeds the amount of the insurance.

APPEAL by plaintiff from the trial judgment dismissing an action to recover back moneys paid in settlement of a fire insurance claim on the ground of fraud, misrepresentations and false statements. Affirmed.

R. T. Robinson, for appellant.

W. S. Morrisey, for defendant.

Perdue, C.J.M., concurs with Cameron J.A.

Cameron, J.A.:—The defendant, a married woman, on July 29, 1918, applied to the plaintiff company for a policy of insurance in the sum of $1800, on the following property at Elma in this Province: one frame dwelling house in the sum of $300, and one brick stable in the sum of $1500. On September 13, 1918, she applied for a policy of insurance on household furniture and other goods and chattels situate in the said dwelling house in the sum of $500. In both cases the applications were accepted, the premiums paid and policies issued by the plaintiff company.

Both the buildings and the goods insured were destroyed by fire on November 19, 1918, and the defendant forthwith notified the plaintiff company thereof and claimed indemnity. The company thereupon sent an adjuster, Hudson, to make an adjustment of the defendant's claim. He went by train to the nearest station, met the defendant on the train, walked with her some three miles to the scene of the fire, inspected the ruins and obtained information from the defendant as to the loss and returned to Winnipeg the afternoon of the same day. Hudson subsequently made his report to the company, November 26, 1918, fixing the net value of the house at $979.28, of the furniture at $1256.57, and of the stable at $2192.40, which was adopted by his

principal, Walsh, November 27, 1918. Proofs of loss were prepared and a statutory declaration made by the defendant and certificates given by the adjuster thereon recommending payment of the sum of $1800 for the loss of the buildings and $500 for loss of furniture. On December 7, 1918, the plaintiff company accordingly paid the defendant the sum of $2300.

On August 8, 1919, the company instituted this action alleging fraudulent representations by the defendant to the plaintiff's agent and adjuster of the value of the property insured and fraudulent removal and concealment of the property insured, and the statutory declaration made by the defendant was false and untrue in stating that nothing was saved from the fire and otherwise and that by reason thereof the contracts of insurance were vitiated and void. It is alleged that the discovery of such frauds and false statements was made in January, 1919, after payment of the amounts of the policies and repayment thereof by the defendant is claimed. In the statement of defence the allegations of fraud, misrepresentation and false statements are denied.

The action came on for trial before Macdonald, J., on December 4, 1919, and was adjourned from time to time, lasting in all 8 days. The trial Judge delivered judgment March 8, 1920, and in giving his reasons states that he has come to his conclusions with hesitation as the case was full of suspicious circumstances. As to the stable, he was loth to believe that it cost $1500 but he doubted the defendant's intention to misrepresent its value and refused to order the repayment of the $1500 paid by the company. As to the $300 on the house he also refused to entertain the claim for the return of that amount. As to the furniture the trial Judge declared that he had grave suspicions of incendiarism and with respect to some of the articles, and wholly discredited the defendant's evidence in some respects, but he was not prepared to hold that there were not goods insured to the value of $500. In the result he dismissed the plaintiff's action without costs. From this judgment the plaintiff appeals to this Court.

The first ground taken on the argument was that the trial Judge had erred in not holding that the fire was of an incendiary origin and character. This constitutes a most serious charge against the defendant and was not alleged in the statement of claim. It is now too late to reconstitute the plaintiff's action. The plaintiff company sent its agent

Man.

C.A.

LONDON MUTUAL v. MILLER.

to the spot, he made his report on which the plaintiff acted and paid over the money. Later the plaintiff comes into Court seeking to have its money returned on certain grounds of fraud definitely stated. Now, after an eight day trial, and after judgment, the plaintiff asks to add this charge of incendiarism. It cannot be allowed. Even if it were it would be impossible to hold on the evidence that the charge was established.

Attention was called to the statement in the proof of loss by the defendant that there was nothing saved and to facts and statements appearing in the evidence in contradiction. The articles that were saved were of no great value and their absence from the premises susceptible of explanation. I do not think we would be justified in holding this a fraudulent statement. Moreover it occurs to me the statement by the defendant on the proof of loss is ambiguous.

"8. That the following articles only were saved from the fire.

"Nothing saved."

It is not impossible that these words when read to her meant to her understanding that nothing was saved that was burned, in which case they were correct. We cannot hold this woman, of foreign birth and illiterate, too strictly to account in the circumstances.

There is nothing to substantiate the conjecture that the granary, which was examined from without by Whittle, and the fire commissioner, contained articles removed from the house before the fire. Nor can I see anything but mere grounds of suspicion in the transaction spoken of as the "Fredenko shipment," though the defendant's explanations are confusing to say the least.

The main point in the matter of the goods claimed concerns the statement made to the agent with reference to the piano, as to which the trial Judge refused to believe the defendant. The statement is found in the schedule to Ex. 8, Hudson's report, and appears in the details of loss in the adjuster's statement. "1 piano, 3 years old, $425.00." In the debris were found the remnants of the pedal frame of a Doherty organ. The defendant says she told Hudson she had two pianos in the house, a big one and a small one, and that she gave $275 for it "and I paid for the other one $150," that is, she gave for it $275 and another taken at $150 as part of the price. Then she says she had a piano and an organ. When she was asked on her examination for

discovery whether it was a piano or an organ she said, "I cannot tell you which it was. I gave him (the man who sold it) my old organ and I gave him $275." Further on she says in answer to the question. "You still say you had a piano in the house?" "I do not know if it was a piano or an organ. This organ I paid $150 and I paid $275."

And further: Q. Where is the man you bought it from? A. I do not know the man.It was near the subway. Q. It was a piano? A. I do not know. Q. Do you not know the difference between a piano and an organ? A. I do not play I cannot tell. Q. Why did you change it? A. I wanted a nice one, a new one. Q. This was a new one you bought? A. Yes. Q. Your husband says it was an organ and that it always was there and that you never made any trade? A. My husband does not understand good.

All these questions and answers were on her examination before the trial.

On her examination at the trial the following questions were asked her and answers given: "His Lordship:—When did you trade the organ for the piano? A. Before we went on the farm. Q. You didn't take the organ to the farm at all, did you? A. Yes, I took the new one. Q. That is the piano? A. Yes. Q. You don't know the difference between a piano and an organ? A. No, I never play. Q. You only took one musical instrument on the farm? A. We took a gramophone also. Q. Were there stops to the piano— stops that you pulled out? A. I never play. The children play them and I just know how to play on the gramophone and that is all. Q. Who plays on the piano? A. I have four daughters, married, and they come home, and everyone could play."

Later on, when asked how many pianos or organs she had in the house the day before the fire, she said "Two," and that she told Hudson of the two but he didn't put it down. The piano, she says, was in the front room. As for the organ she says "the small one was in the plastered room" and that she got from Hilson's. One of the witnesses says there was a piano and an organ, another that he saw two pianos, one bigger than the other, another that there was an organ or piano and still another that she saw an organ but no piano.

The evidence is contradictory and confusing. It is remotely possible that there may have been a piano, which was consumed leaving no trace behind. The probability is there were two organs one of which may have been similar-

Man.

C.A.

LONDON MUTUAL v. MILLER.

ly consumed. Beyond question there was one which may well have been of considerable value and there is no evidence to contradict the defendant's testimony on that point. It is obvious that the words "piano" and "organ" did not convey the concepts of separate and distinct instruments to her and to some of the other witnesses. Clearly the defendant herself never pretends to make any distinction between them. I have, of course, no idea what the corresponding words are in the defendant's native tongue and we have no information on the point . It would seem that to her the one word denoted a musical instrument just as did the other, and they were both of them more or less indefinite and interchangeable. The confusion about the two instruments being in the house may have originated in the fact that the one there represented itself and the other given in exchange for it, but that is, however, mere conjecture. But the fact remains that there was undoubtedly a Doherty organ consumed. No adequate motive can be assigned to account for the defendant wilfully misrepresenting that she had a piano instead of an organ when the organ was undoubtedly there. After consideration, I am prepared to adopt the view that she was mistaken in the term she used and that she spoke in ignorance of the distinction between the words used as known to those familiar with our language. Moreover a representation that there was a piano destroyed instead of an organ cannot surely be material. No organ appears in Hudson's list. And there were most certainly an organ and other goods of a value in excess of the insurance. No doubt the defendant's evidence is confusing, contradictory and unsatisfactory, but we must remember her disabilities and disadvantages. Her statements do create an atmosphere of suspicion, but we must have more than that where an insurance company comes to Court to recover back a claim paid by it after investigation by its agent and adjuster. The company must establish clearly and specifically the fraudulent acts and conduct which it alleges induced it to part with its money.

We were given a close examination of the evidence relating to some of the other articles claimed to have been destroyed, such as the chairs, rugs and crockery. We were also invited to consider the number and bulk of those articles said to be in the confined space of the lean-to or kitchen. No doubt contradictions and difficulties are apparent. But while they give rise to suspicion they do not materially affect the substance of the defendant's representations or destroy

their credibility.

As to the house there is little question. It was unquestionably of the value insured.

With reference to the barn there was much discussion and examination of the evidence by plaintiff's counsel, directed to demonstrating that it was constructed in part or largely of second-hand lumber. Hudson says he was told that "first class" lumber was used and states, cautiously, that if he had known it was second-hand he might have gone a little slower and investigated more carefully. The fact that the first house built by the defendant had been torn down and its lumber used (which was not disclosed on the defendant's examination for discovery) was pressed. Yet the plaintiff's witnesses speak of it as a fine and well-built barn. Some new lumber was undoubtedly used in its erection and other elements of cost must be taken into consideration. On consideration of the evidence I can arrive at no other conclusion than that a barn of the size and construction of the one in question was of a value well in excess of the amount insured.

There are no doubt discrepancies in the accounts given of the circumstances of the fire, but these are of details and are not really material. I cannot entertain the idea of incendiarism and that the defendant should be confused in her recollection of an event that menaced the lives of her children is not unnatural.

It is quite true that it would have been more satisfactory had the defendant's husband and her married daughters given evidence and their absence at the trial is a legitimate subject for criticism. But that does not alter the material facts brought out in the evidence.

It is evident that the defendant is a woman of ability and energy. She had been in business and had accumulated money and property. But she is illiterate, can neither read nor write and is not at home in the use of the English language. The statutory declarations drawn up by the plaintiff company's agent were placed before her and signed for her, she making her mark in one case but not in the other. She has been subjected to long, searching and severe examinations. Yet the impression left on my mind is that she has not been shewn guilty of any such misrepresentation as can be considered fraudulent. I fail to see any adequate motive therefor on her part. There can be no other conclusion, I think, than that the furniture and other goods and chattels destroyed substantially exceeded in value the

Man.

C.A.

LONDON MUTUAL v. MILLER.

insurance on them. And the like conclusion is unquestionable with reference to the house and barn.

The plaintiff company is seeking to recover money paid by it upon the report of its authorised and experienced agent who had made a personal investigation on the spot. Surely in such a case, if ever, the allegations of fraud necessary to establish the right to recover must be specific and proved conclusively. In my opinion the plaintiff has not succeeded in doing this in any one essential particular and the appeal must be dismissed with costs.

The trial Judge dismissed the plaintiff's action without costs. From this the defendant appeals, with the leave of the Judge, on the usual grounds, such as that the trial Judge exercised his discretion erroneously. No question the defendant is deprived of much of the fruits of her success in contesting the plaintiff's claim. But we must be careful not to interfere with the discretion of a trial Judge in these matters. I can see no ground myself on which we could satisfactorily base a decision to reverse the trial Judge's order as to costs in this case. The responsibility and the discretion are alike his. I would dismiss the cross appeal without costs.

Fullerton, J.A.:—On December 2, 1918, the plaintiff paid the defendant $2,300 in settlement of losses under two policies of fire insurance. The action is to recover from the defendant the amount so paid on the ground that she had made false and fraudulent statements in the proofs of loss.

One policy was for $1,800—$300 on dwelling house and $1,500 on barn. The other was for $500 on furniture in said dwelling house.

Both policies contained the following statutory condition: "Any fraud or false statement in any statutory declaration in relation to any of the above particulars, shall vitiate the claim of the person making the declaration."

The plaintiff alleges that in the proofs of loss under the first policy the defendant made a statutory declaration in which she declared that the value of the house and barn to be $3,172.68, whereas it was in fact of a value not in excess of $300.

Similarly with regard to the policy on the furniture they allege that in the proofs of loss she made a statutory declaration in which she declared the value of the furniture was $1,486.27, whereas it was in fact of value not in excess of $100.

As to the claim to recover monies paid under the policy on

the house and barn, I was of the opinion at the conclusion of the argument, and further examination of the evidence has confirmed me in that opinion, that the plaintiffs have wholly failed to make out a case. Upon the evidence I am satisfied that neither the house nor the barn were over-valued.

As to the policy on the furniture, while there is some evidence which might throw suspicions on the defendant's claim, there is nothing of a nature sufficiently definite to justify this Court in interfering with the judgment.

I would dismiss the appeal with costs.

Dennistoun, J.A., concurs.

Appeal dismissed.

In RE BLUEBIRD FASHION SHOPS, LTD.

Ontario Supreme Court in Bankruptcy, Orde, J. September 3, 1921.

Bankruptcy (§II—19)—Compositions with Creditors—Voting Powers—Calculation of "Two-thirds in Value"—"Majority of Creditors"—Meaning of—Sec. 13 (3) of the Bankruptcy Act as amended by 1921, (Can.) ch. 17 sec. 12.

Under sec. 13 (3) of the Bankruptcy Act 1919, (Can.) ch. 36 as amended by 1921, (Can.) ch. 17 sec. 12 it is necessary in calculating the two-thirds in value of the proved debts to take into consideration all the proved claims including those under $25, but the majority of the creditors is to be calculated not by mere numbers but by voting power, and therefore in such calculation, claims under $25 are to be excluded, the creditors of such claims being prohibited from voting under sec. 42 of the Act.

[See Annotations Bankruptcy Act of Canada Act 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.]

MOTION before the Registrar to approve of a proposed extension of time under sec. 13 of the Bankruptcy Act. The matter was referred by him to Orde, J. for a ruling as to the meaning of sub-sec. 3 of sec. 13 of the Bankruptcy Act as amended by 1921, (Can.) ch. 17 sec. 12.

B. Luxenberg, for the authorised trustee.

Orde, J.:—This matter was referred to me by the Registrar for a ruling as to the meaning of sub-sec. 3 of sec. 13 of the Bankruptcy Act, 1919 (Can.) ch. 36 as amended by the Act of last session, 1921, (Can) ch. 17, sec. 12.

The debtors made a proposal for an extension of time under sec. 13. No receiving order or assignment has been made. The trustee duly called a meeting of the creditors to consider the proposal and at the meeting a resolution accepting the proposal was adopted. The question which

Ont.

S.C.

IN RE BLUEBIRD FASHION SHOPS LTD.

now arises is as to whether or not the provisions of the concluding sentence of sub-sec. 3 of sec. 13 have been satisfied. The total amount of the claims of 33 unsecured creditors as shewn in the debtors' statement of affairs was $9,420.45. Among them were several creditors for sums of less than $25 dollars each. The resolution accepting the proposal was approved by 15 creditors (including one for less than $25) whose claims amounted in the aggregate to $5,274.18, and there were 2 creditors, whose claims together amounted to $1,157.35, who dissented. At the date of the meeting only 19 of the 33 unsecured creditors had filed formal proof of their claims, the total amount so filed being $7,566.65. One of these claims was for less than $25.

Sub-section 3 of sec. 13 as originally passed provided that "if at such meeting a majority in number of creditors who hold two-thirds in amount of the proved debts resolve to accept the proposal . . . it shall be deemed to be duly accepted by the creditors." The amended sub-section reads: "If at the meeting . . . a majority of all the creditors and holding two-thirds in amount of all the proved debts, resolves, etc."

In the present case those voting to accept the proposal hold $5,274.18 out of $7,566.55, the amount of the proved debts, so that the requirement of the Act as to the two-thirds in value is satisfied, but what is the meaning of the provision that there must be "a majority of all the creditors?" It is suggested that this may mean that the resolution must be accepted by a majority in number of all the creditors including those whose claims are under $25 and without regard to the votes which by sub-sec. 14 of sec. 42 are given to creditors according to the respective amounts of their claims. I think that a little consideration will shew the fallacy of this suggestion. The original sub-section speaks of a "majority in number" while in the amended sub-section the words are "a majority of all the creditors." If the dropping of the words "in number" is of any significance it strengthens the argument that the majority under the amendment is not to be ascertained merely by counting those in favour of the motion without regard to their voting power under sec. 42. In other words, the words "a majority of all the creditors" mean "a majority of the votes of all those creditors entitled to vote." Except in so far as sec. 13 has expressly provided otherwise, I am of the opinion that the provisions of sec.

42 apply to meetings called under sec. 13, and I do not regard that portion of sub-sec. 3 of sec. 13 now under consideration as constituting any exception to the provisions of sub-sec. 14 of sec. 42, which regulate the voting powers of creditors. It must not be overlooked that sec. 13 applies as well to cases where a receiving order or an authorised assignment has been made, and it would be anomalous to have different methods of calculating the votes at meetings of creditors merely because in one case sec. 13 had been resorted to without any receiving order or authorised assignment. To exclude the provisions of sub-sec. 14 of sec. 42 would be to give to the smaller creditors a preponderance of voting power which the Act did not intend. In fact it would enable, for example, 3 creditors with claims of $5 each to prevent a proposal for an extension being accepted by two creditors with claims of a million each.

I am therefore of the opinion that while in calculating the two-thirds in value it is necessary to take into consideration all the proved claims including those under $25, the majority is to be calculated not by mere numbers but by voting power and therefore to the exclusion in such calculation of the claims under $25. Upon this principle the majority in favour of the proposal in the present case is sufficient and the proposal is therefore approved by the Court.

Memo. by the Registrar—September 3, 1921.

The motion was made in the first place to the Registrar to approve the proposed extension. He had previously ruled, in In re Hodgson & Co., that in estimating the majority of creditors required under sec. 13, as amended by 1921, (Can.) ch. 17, sec. 12, "all the creditors" must be construed to mean "all the creditors entitled to vote," and that, as creditors whose claims were under $25 were by sec. 42 excluded from voting, their claims were not to be taken into account except for the purpose of calculating the required two-thirds of the proved debts. As the point, however, was one which seemed to be likely to arise frequently, he thought it would be better to have the opinion of the Judge in Bankruptcy and he therefore adjourned the motion before the Judge.

Alta.

S.C.

McGINITIE v. GOUDREAU.

McGINITIE v. GOUDREAU.

Alberta Supreme Court, Appellate Division, Scott, C.J., Stuart, Beck, Hyndman and Clarke, JJ.A. October 3, 1921.

Automobiles (§IIIB—264)—Sudden swerve to avoid accident on narrow highway—Incompetency in handling car afterwards—Accident—Damages—Recovery of.

The driver of a motor car who is forced to make a sudden turn or swerve on a narrow highway in order to avoid a collision owing to the negligence of another driver, but who in doing so loses his head and because of unskillful handling of his car meets with another accident which could have been avoided by a competent driver, cannot recover in an action for damages against such other driver.

[British Columbia Electric R. Co. v. Loach. 23 D.L.R. 4, 20 C.R.C. 309, [1916] 1 A.C. 719, applied.]

APPEAL by defendant from the trial judgment in an action to recover damages for injuries caused by accident on highway. Reversed action dismissed.

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

E. Brice, for respondent.

Scott, C.J., concurs with Hyndman, J.A.

Stuart, J.A.:—I think that this appeal should be allowed and agree with what is said by my brother Hyndman. But I think it desirable also to point out that each of these parties was breaking the law at the time. By sec. 25 of the Motor Vehicle Act, 1911-12 (Alta.), ch. 6, as amended by sec. 21 of ch. 3 of the Statutes of 1917, it is enacted that "upon approaching a bridge, dam, curve, culvert or steep descent and also in traversing such bridge, dam, curve, culvert or descent a person operating a motor vehicle shall have it under control and operate it at a rate of speed not exceeding one mile in six minutes," i.e., ten miles an hour.

The plaintiff when approaching a place where there was both a curve and a bridge was admittedly going nearly twice as fast as the law allows. And there would appear to be no doubt that this contributed to the accident which befell him. In such a case a plaintiff cannot recover. See Street, Foundations of Legal Liability, vol. 1, pp. 175 et seq.

Beck, J.A., concurs with Hyndman, J.A.

Hyndman, J.A.:—On July 5, 1921, the plaintiffs and defendant, in their respective motor cars were driving towards Edmonton on the Cooking Lake Trail, one of the main roads leading into the city. At the point where the said trail turns west on to that part of it which (though outside the city) is called Whyte Ave., the plaintiff alleges

that he had to make a sudden turn or swerve to the right to allow the defendant's car to pass, otherwise a collision might have occurred owing to the negligence of the defendant in the operation of his car. The result was that he was carried over the crest of the road to the side and it was thus made impossible or was difficult for him to afterwards bring his car up the slight incline to the centre in time to avoid running into the side or apron of a comparatively narrow bridge in the centre of the roadway, a distance of 116 or 117 ft. from the corner referred to whereby the plaintiff Mrs. McGinitie was thrown out of the car and precipitated down into the depression to the right of such bridge.

At the trial damages were awarded in favour of the plaintiffs in the sum of $250. The evidence is very conflicting as to just what the acts and conduct of both parties were, but I think the findings of fact by the trial Judge are as favourable to the plaintiffs as could possibly be expected. The trial Judge finds in effect:—

"1. That the defendant was negligent in two particulars, and (2) that the plaintiff could have kept on the road and avoided the bridge in safety if he had been able to handle his car properly. That he became rattled apparently and thought there was going to be a collision and he lost his head and got his car down on the side of the road and tried to get it up. There was plenty of space between him and the bridge to stop the car or slow down sufficiently to let the defendant pass. So the only question is, is he to be charged with contributory negligence because in an emergency caused by the defendant's negligence he did not handle his car skilfully, he did not handle his car in a way that a competent driver would handle his car and in a way which, if handled by a competent driver, would have avoided an accident. There is no doubt the defendant's conduct contributed to the excitement of the plaintiff, but should the plaintiff have operated a car on a road which is used by a great many cars without being able to handle his car in an emergency, that is really the issue here."

A careful perusal of the whole evidence amply justified the above remarks of the trial Judge. That being the case the situation then amounts to this—that the defendant was negligent and thus caused the plaintiff to swerve his car to the right but that thereafter had the plaintiff exercised ordinary care and skill he would or should have avoided the

Alta.

S.C.

McGINITIE v. GOUDREAU.

accident. The ultimate cause of the accident then seems to me to have clearly been the lack of care and skill of the plaintiff. Nor do I think the excitement of the plaintiff sufficient to excuse him, for it surely must be assumed that in driving a dangerous engine such as a motor car one must expect emergencies, and a few surprises and excitement, and be prepared for them, and losing one's head must be regarded as a weakness in the plaintiff and not chargeable to the defendant.

Assuming then that what the trial Judge says is correct, that the plaintiff by the exercise of ordinary care and skill might have avoided the accident, the only conclusion in law is that the defendant is not liable, as the case falls within the principles laid down by the Judicial Committee of the Privy Council in The British Columbia Electric R. Co. v. Loach, 23 D.L.R. 4, 20 C.R.C. 309, [1916] 1 A.C. 719. That case is really the converse of the one at Bar but the principles are the same. Lord Sumner at p. 9 quotes with approval the dicta of Anglin, J., in Brenner v. Toronto R. W. Co. (1907), 13 O.L.R. 423, as follows:—

"Again the duty of the defendants to the plaintiff, breach of which would constitute ultimate negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with sufficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfil that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff, to avoid the consequences of her negligence by the exercise of ordinary care. Up to that moment there was no such breach of duty to the plaintiff. In that sense the failure of the defendants to avoid the mischief, though the result of an antecedent want of care, was negligence which occurred in the sense of becoming operative immediately after the duty in the breach of which it consisted arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty.

"But there is a class of cases, when a situation of imminent peril has been created either by the joint negligence of both the plaintiff and the defendant, or it may be that of the plaintiff alone, in which, after the danger is, or should be, apparent, there is a period of time of some per-

ceptible duration during which both, or either, may endeavour to avert the impending catastrophe . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful but for some self-created incapacity, which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a causa sine qua non—it is in very truth the efficient, the proximate, the decisive cause of the incapacity, and therefore, of the mischief. Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence may in some cases, though anterior in point of time to the plaintiff's negligence, constitute ultimate negligence rendering the defendant liable, notwithstanding a finding of contributory negligence of the plaintiff . . . . ."

Tracing the various happenings in the case it is quite clear that after the negligence of the defendant a period of time elapsed during which had he not lost his head and had he handled his motor as a competent driver should have done, the plaintiff might have avoided the accident. The accident then was directly attributable to the plaintiff himself, and consequently he must shoulder responsibility for the damage.

But although the defendant escapes liability he was grossly violating sec. 25 of the Motor Vehicles Act, which limits the speed of a motor approaching a bridge or curve to 10 miles an hour he should not have attempted to pass the plaintiff at the speed he was going. Under the circumstances I would give him no costs of the action.

I must therefore allow the appeal with costs and dismiss the action without costs.

Clarke, J.A., concurs with Hyndman, J.A.

RE GARDNER; EX PARTE CROFT & SONS.

Ontario Supreme Court in Bankruptcy, Orde, J. January 31, 1921.

Bankruptcy (§11—17)—Proposal for a Composition—Section 13 Bankruptcy Act—Payment of 50 per cent. on the Dollar to all but one Creditor—Creditor financing Scheme to be paid in full—Reasonableness—Sanction by Court—Scrutiny by Court if any Suggestion of Collusion.

Where the terms of a proposal of a composition in accordance with sec. 13 of the Bankruptcy Act, 1919, (Can.) ch. 36 are reasonable and calculated to benefit the general body of creditors and provide for the immediate payment of all but one of the creditors of more than 50 per cent. on the dollar, the proposal should be approved although it affords an opportunity for one

Ont.

S.C.

RE GARDNER; EX PARTE CROFT & SONS.

of the creditors financing the scheme to retain his right to payment in full, while all the other creditors receive only a portion of their claims. The Court will scrutinise any scheme of composition if there is any suggestion of collusion or secret advantage.

[See in Re Howe, 59 D.L.R. 457, See Annotations 53 D.L.R. 135, 59 D.L.R. 1.]

APPLICATION by the authorised trustee under sec. 13 of the Bankruptcy Act for the approval of the Court of a scheme of arrangement of the insolvent debtor's affairs prepared by the debtor. Arrangement approved.

J. M. Bullen, for the Canadian Credit Men's Association, authorised trustee. The opposing creditor was represented by one of its officers.

Orde, J.:—This is an application made by the authorised trustee under sec. 13 of the Bankruptcy Act 1919, (Can.) ch. 36 for the approval by the Court of a scheme of arrangement of the insolvent debtor's affairs prepared by the debtor. The scheme is actively opposed by a creditor.

The report of the authorised trustee shews that the debtor had assets consisting of stock in trade and fixtures nominally of the value of $66,163.44, and unsecured liabilities to the extent of $61,007.35, leaving an apparent surplus of $5,156.09. It was stated before me and not contradicted that the assets if forced to sale would hardly realise more than 35 cents on the dollar. Proof of claims to the amount of $57,636.07 was made to the trustee by 37 creditors. Of these creditors Gordon MacKay & Co. Ltd., are the largest, their claim amounting to $41,848.69. The next largest claim is for $2,081.28; there are two for about $1,500 each; and the remainder are all under $1,000 each. The proposal submitted to the creditors is that Gordon MacKay & Co. are willing to advance a sum sufficient to pay all the creditors, other than themselves, 55 cents on the dollar. This means, of course, that Gordon MacKay & Co. will still retain the right to call for payment of their claim in full, while the other creditors, if the scheme is approved by the Court, will forego 45% of their claims.

At the meeting of creditors called by the trustee to consider the proposal, there were 29 creditors, present or who had communicated their decision to the trustee by letter. Apart from Gordon MacKay & Co., 26 of these with claims aggregating $11,316.01 assented to the scheme, while two creditors with claims of $211.96 and $954.10 respectively, dissented. I think it may fairly be assumed that those creditors who were notified and who failed either to attend

Ont.

S.C.

RE GARDNER; EX PARTE CROFT & SONS.

or to communicate their decision to the trustee either assent, or at least do not actively dissent.

Upon the application for the approval of the scheme, the dissenting creditor for $954.10 did not appear, but Wm. Croft & Sons, whose claim amounts to $211.96, appear and object to the scheme being approved on the ground that its effect is to give a preference to Gordan MacKay & Co. by allowing them to be paid in full, and that in the interest of the debtor as well as of the other creditors, no minority creditor, no matter how small his claim may be, should be forced in effect to release part of his claim unless all the creditors are placed upon an equal footing. There is much force in this objection, because if the object of such a scheme as this is not only to clear off the claims of the creditors, but to put the debtor on his feet again, that object may be defeated. The debtor's future solvency would undoubtedly be much greater if all the creditors were to abandon 45 cents on the dollar of their claims, whereas under the proposed scheme he will still have liabilities, all to one creditor, of approximately $51,000 or $52,000. This argument would have more weight if the debtor were proposing to borrow money elsewhere sufficient not only to compound with the other creditors but to pay Gordon MacKay & Co. in full. He could not, of course, obtain a loan of that amount, and if he did it would hardly seem proper to approve of it. But here a large creditor is willing to advance an additional $10,000 or $11,000, and to take the chance of getting repayment of that sum and also of its existing claim from the debtor, provided that it is permitted to retain the right to call for payment in full. It was pointed out that if Gordon MacKay & Co. were offering to buy the assets for a sum which would be sufficient to pay all the creditors 55 cents on the dollar, there could be no reasonable objection to the proposal. And yet the result here will be in many respects the same, so far as the creditors other than Gordon MacKay & Co. are concerned. The scheme of arrangement seems to me to be one which in the interests of the general body of creditors and of the debtor, ought to be approved unless there is some rule or principle applicable in bankruptcy matters which would make it improper or inequitable that I should, in the exercise of my discretion, give the Court's approval to it.

In determining whether or not the scheme should be approved, I am governed by the provisions of sub-secs. (8), (9) and (16) of sec. 13. None of the creditors hold any

Sask.

C.A.

WEISBROT v. REINHORN.

security upon the property of the debtor and there are no preferential claims, so that sub-sec. (16) does not apply.

The terms of the proposal are reasonable, and they are calculated to benefit the general body of creditors, and they will provide for the immediate payment to the creditors, other than Gordon the MacKay & Co., of more than fifty cents on the dollar. Gordon MacKay & Co. are willing to take the risk of getting payment of their claim from the debtor. If the arrangement whereby Gordon MacKay & Co. are to be entitled to payment in full, if they are ultimately able to obtain it, had not been disclosed to the creditors, the scheme could not be approved, but with full disclosure I am unable to find any principle which requires that the Court ought to exercise its discretion by disapproving of the scheme. It is my duty to take into consideration not only the wishes and interests of the creditors but the conduct of the debtor, the interests of the public and future creditors, and the requirements of commercial morality. The burden of proof is on the party who opposes the approval of the composition or scheme: Baldwin on Bankruptcy, 11th ed., pp. 784-5. The only case to which I was referred which approaches the point raised here, was In re E.A.B., 9 Mans. 105, [1902] 1 K.B. 457. It really does not afford much assistance, except as illustrating the care with which the Court will scrutinise the matter if there is any suggestion of collusion or secret advantage. Many of the cases cited were cases where a bankrupt was applying for an annulment of the bankruptcy order. The effect of such an order is different from that of a discharge, because an annulment enables the debtor to face the world, not as a discharged bankrupt, but as one who has not been, or ought not to have been, declared bankrupt. In such cases the Court applies certain principles which do not seem to be necessarily applicable to an application of this sort.

The scheme of arrangement will therefore be approved, and an order of the Court will issue accordingly. The scheme provides that the trustee's costs and expenses are to be included in the amount to be advanced by Gordon MacKay & Co. Ltd.

WEISBROT v. REINHORN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. May 25, 1921.

Master and Servant (§V.—340)—Workmen's Compensation Act R.S.S. 1920, Ch. 210——Warehouse Within Meaning of Act—Place Where Furniture Stored Pending Sale by Owner.

The word "warehouse" as used in the Workmen's Compensation Act, R.S.S. 1920, ch. 210, is broad enough to apply to a place where furniture is stored by a retail furniture dealer, pending its removal to the store for sale.

APPEAL by plaintiff from the judgment at the trial in an action brought under the Workmen's Compensation Act R.S.S. 1920, ch. 210, for injuries sustained through an accident arising out of and in the course of his employment.

D. A. McNiven, for appellant.

T. D. Brown, K.C., and D. R. Kilman, for respondent.

The judgment of the Court was delivered by:—

Haultain, C.J.S.:—This action was brought under the the Workmen's Compensation Act, R.S.S. 1920, ch. 210, for damages for injuries alleged to have been sustained by the appellant through an accident arising out of and in the course of his employment in the service of the respondent.

The respondent is a furniture dealer carrying on business in Regina. His shop, or place of business, is situated on South Railway St. in that city. In connection with this business, the respondent used a portion (the 3rd and 4th floors) of a certain building on South Railway St., in Regina, rented by him for that purpose, for storing furniture . This building adjoins the railway track, and the furniture, which was brought in in carload lots, was unloaded from the railway cars and stored in the building. For the purpose of taking the furniture up to the 3rd and 4th floors a lift, or elevator, was used. The furniture was removed from time to time from the store-house to the shop, which was in another part of the city, and sometimes sales would be made on samples in the shop and a similar article would be shipped or delivered from the store-house. Among other duties of the appellant he had to assist in unloading furniture from the cars and placing it in the store-house, and to operate the lift for that purpose. On March 29, 1920, the appellant was assisting in moving furniture from the ground floor of the building in question to the floors occupied by the respondent. Finding that the elevator was at the third floor, he went upstairs to bring it down. In order to do so, he stepped on the elevator, which immediately fell to the ground, carrying the appellant with it. The accident was caused by the elevator being out of repair, a fact of which the appellant was not aware. The injuries complained of were caused by the fall. On the trial of the action, the trial Judge found that the building in question was not a "warehouse," within the meaning of the Work-

Sask.

C.A.

WEISBROT v. REINHORN.

men's Compensation Act, and dismissed the action with costs. The plaintiff now appeals.

Section 2 of the Workmen's Compensation Act provides that the Act shall only apply to employment on or in or about, among other places, a factory. "Factory" is defined by the Act as follows:—

Section 3 (5). "Factory" means a building, workshop, or place where machinery driven by steam, water or other mechanical power is used, and includes mills where manufactures of wood, flour, meal, pulp or other substances are being carried on; smelters where metals are sorted, extracted or operated on; laundries worked by steam, water or other mechanical power, and docks, wharves, quays, warehouses and ship-building yards where goods or materials are stored, handled, transported or manufactured.

The evidence shews that the respondent was only carrying on a retail business, and that the warehouse (using the word in its widest meaning) was used in connection with that business. In the English decisions to which we have been referred "warehouse" has been held not to apply to a building used as a place for storing articles pending their sale in a retail shop. Burr v. Whiteley (1902), 19 T. L.R. 117; Green v. Britten, [1904] 1 K.B. 350, 73 L.J. (K.B.) 126.

These decisions have been cited as authority for the broad statement that a store-house which is only used in connection with a retail business cannot be a "warehouse" within the Act.

In Moreton v. Reeve, [1907] 2 K.B. 401, 97 L.T. 63, Cozens-Hardy, M.R., is reported at pp. 404, 405 as saying:— "The question is whether the learned county court judge was justified in saying that it is an absolute rule of law that a store which is merely ancillary to a retail business is not and cannot be a warehouse within the Act. In my opinion there is nothing in the authorities which justifies so wide a statement of the law as that. It is only fair and just to limit the effect of language used by judges to the general nature of the facts to which their judgment is applied. And, although there are in the judgments of Collins, M.R. in Green v. Britten and Gilson, ([1904] 1 K.B. 350) one or two sentences which, taken by themselves, might lead to the conclusion that under no circumstances could premises which are merely ancillary to a retail business or shop be a warehouse within the Act, yet I do not think on the whole that that can be the fair meaning of the case. The illustration suggested by the President of a retail car-

riage business which necessitates the keeping of a large store for raw materials, it may be for years, solely for the purpose of manufacturing goods to be sold in the retail shop, seems to me to be one of such difficulty that it is impossible to say that the store could in no circumstances be a warehouse. Suppose the timber for carriage building required to be seasoned, and was kept, not in the shop, but in an adjacent building or in a building at a considerable distance from the shop, and suppose it was kept not for sale but for no other purpose than for the manufacture of carriages for the business, I do not think that there is anything which binds us to say that that could not be a warehouse within the Act."

In the same case Sir Gorell Barnes at p. 407 said:—

"I think that when the judgments in Green v. Britten and Gilson ([1904] 1 K.B. 350) are carefully read, having regard to the facts with which the Court was dealing and the cases cited to them—Hunt v. Grantham Co-Operative Society, 112 L.T. newspaper 364) and Burr v. Whiteley Limited (19 Times L. Rep. 117), it is apparent that the question raised in this case was not present to the minds of the learned judges who decided the case. They were dealing with a building used in connection with a wholesale and retail business for storage of goods for sale in either business. I do not think that they had any intention of laying down an absolute rule of law that no building can be a warehouse if it is connected with a retail business alone. It is possible even in a retail business to have a building which may be in the fullest sense of the term a warehouse. It is quite true that many authorities distinguish between retail and wholesale businesses and that may be a very good ground of distinction.....but I cannot agree that that distinction can be absolutely conclusive in every case."

While it is true that, according to the decisions in England, "warehouse," "dock," "quay," and "wharf," do not include every warehouse, dock, quay or wharf, the result of the cases seems to limit their application to those places to which certain provisions of the Factory Act (Eng.) have been applied.

The Workman's Compensation Act, 1897 60-61 Vict. (Imp.) ch. 37, enacts that "factory shall have the same meaning as in the Factory and Workshop Acts, 1871 to 1891, and shall also include any dock, wharf, quay, warehouse, etc., to which any provisions of the Factory Acts is applied by the Factory and Workshop Act, 1895, 58-59 Vict. (Imp.)

Man.

K.B.

WOODWARD & Co. v. KOEFOED.

ch. 37. In order to arrive at the meaning of "warehouse," the English Courts would quite properly consider the scope and object of the various Acts referred to.

Here, I do not think we are confronted with any such question. The language of our Act is broad and comprehensive, and we are not required to interpret it in the light of other legislation. "Warehouse," apart from such restrictions, has a perfectly plain meaning. In the present case the "warehouse" is situated in another part of the city from the shop. I cannot see any reason for drawing any distinction under our Act between a warehouse used in connection with a retail business and a warehouse used in connection with a wholesale business. An Eaton or Simpson warehouse would surely be no less a "warehouse" under our Act simply because it was used as a place for storing goods for retail establishments.

I would allow the appeal, with costs, and refer the case to the trial judge for assessment of compensation.

Appeal allowed.

WOODWARD & CO. v. KOEFOED.

Manitoba King's Bench, Curran, J. January 18, 1921.

Bills and Notes (§IC—28) — Sale of Grain — Winnipeg Grain Exchange—Future Delivery—No Intention by Parties of Making or Receiving Actual Delivery—Illegality—Crim. Code Sec. 231—Note Given to Cover Margins—Recovery on.

Where the evidence clearly shews that transactions for the sale and purchase of grain for future delivery are such as are inhibited and declared to be illegal under sec. 231 of the Criminal Code, because neither party intended that there should be actual delivery made or received of the grain to which the purchasers or sales related, payment of a renewal promissory note given to protect margins, that may be required to be put up in connection with these transactions cannot be enforced by one who is merely an endorsee after the maturity of the note and not a holder in due course.

[Medicine Hat Grain Co. v. Norris Commission Co. (1919), 45 D.L.R. 114, 14 Alta. L.R. 235, followed; Beamish v. Richardson (1914), 16 D.L.R. 855, reversing 13 D.L.R. 400, 23 Man. L.R. 306, distinguished.]

ACTION to recover the amount due on a promissory note given to protect margins in transactions for future delivery on the Winnipeg Grain Exchange. Dismissed.

H. J. Symington, K. C., and J. T. Thorson, for plaintiff.

T. A. Hunt, K. C., and J. Auld, for defendant.

Curran, J.:—The plaintiff company sues to recover a balance of $1,510.76 alleged to be due it as endorsees of a prom-

issory note made by the defendant for $2,000, payable to the order of Terwilliger and Wolfe of Calgary, in the Province of Alberta, grain merchants.

The defendant raises defences which, if given effect to, would defeat his liability on the note. The plaintiff company is merely an endorsee after the maturity of the note and is not a holder in due course.

The indebtedness of the defendant alleged to be represented or secured by this note was duly assigned to the plaintiff and it claims in the alternative to recover as assignee of such indebtedness.

The defendant relies upon the following defences:—(1) Absence of consideration for the making of the note; (2) Illegaliy by reason of sec. 231 of the Criminal Code; (3) Want of privity between the defendant and the plaintiff.

The making and non-payment of the note sued on is admitted by the defendant. I find that the various endorsements are satisfactorily proven and that the plaintiff company is the legal holder of the note but not a holder in due course.

The note sued on is a renewal of a note for a similar amount made between the same parties (Ex. 6) dated January 6, 1917, and put in at the trial. When Ex. 6 was given by the defendant to the payees, Terwilliger and Wolfe, the receipt (Ex. 2) was handed to the defendant. It reads:—"This will acknowledge receipt of note from Mr. J. C. Koefoed for $2,000 to be considered the same as money and to be used as margins on any future options purchased or sold.

[Sgd.] Terwilliger & Wolfe,
Per Philip Wolfe."

The purpose for which this note was given is thus clearly indicated.

The defendant is a farmer living about 5 miles from Gleichen, in Alberta. In 1916 he farmed 800 acres of land and had a gross crop of 12,000 bushels of wheat. Of this, 4,000 bushels belonged to the owner of rented land, 1,000 was required for seed, leaving 7,000 bushels net for sale. Of this defendant stated about 2,000 bushels graded No. 2 northern and the remainder at lower grades. He had no No. 1 northern of his own and knew that this latter grade was the only grade that could be bought or sold for future delivery on the Winnipeg grain exchange. The defendant had formerly farmed in North Dakota and had done business

Man.

K.B.

WOODWARD & Co. v. KOEFOED.

in the Minneapolis grain exchange. He had also in 1915 done business through the plaintiff company on the Winnipeg grain exchange by way of trades for future delivery. I quote from my notes of the defendant's evidence on cross-examination as to his knowledge of operations in the grain exchange.

"I knew pretty well what I was doing. I knew the conditions under which trades were made for future delivery. I knew basis of trade was No. 1 Northern at Fort William. I knew place of delivery was Fort William. I knew I had to fulfil the contract or take the consequences by paying the difference in price to buy wheat in May to fulfil the contract [he was speaking of a trade for May delivery]. I knew I could buy in the market before the time for delivery arrived other wheat to fulfil my contract."

It is apparent that the defendant was no novice in this business and further that he had no wheat of his own which could be made available to fill any of his trades calling for future delivery. He admits that he knew what the confirmation slips were for (these are the pink slips attached to Exs. 7, 8, 9, 10, 11 and 12); that he had received such before in connection with other deals; that he knew the slips in question were notifications of and represented trades which had been made on his behalf by the plaintiff company and did not object though he claims he did not read the printed matter over. He admits receiving one of these confirmation slips by mail; the others were delivered to him by Wolfe. All were destroyed by the defendant and cannot be produced. Under the circumstances I think the defendant must be affected with notice of the contents of these slips and therefore knew that the plaintiff company, acting as his broker in Winnipeg on the Winnipeg grain exchange, had made these several trades in grain for future delivery which he, the defendant, had instructed Wolfe, the plaintiff's agent at Calgary, to transact for him.

In his dealings with Wolfe I find as a fact that he knew that Wolfe was merely an agent of the plaintiff and the note (Ex. 6), the first note given, was in fact given to protect plaintiff and not Terwilliger and Wolfe as to margins that might be required to be put up by plaintiff in connection with these trades. If these trades were legitimate transactions there was legal consideration given for the making of this note and the defence of no consideration and also of illegality will fail.

Man.

K.B.

WOODWARD & CO. v. KOEFOED.

In the year 1917, E. A. Woodward and F. C. Hale were carrying on business as grain commission merchants in the city of Winnipeg and elsewhere under the partnership name of Woodward & Co. The firm had an agency office in Calgary of which Philip Wolfe was the manager. The firm were members of the Winnipeg grain exchange and dealt in the buying and selling of grain for future delivery. Instructions were sent to this firm at Winnipeg by Wolfe, its agent at Calgary, for the execution of certain trades in grain on the defendant's account at the Winnipeg grain exchange. Exhibits 8, 9, 10, 11 and 12, indicate the nature and particulars of these trades, which I find the defendant duly authorised.

The defendant's note (Ex. 6) was, I find, given as security to protect these trades and was for the sole benefit of Woodward & Co., now represented by the plaintiff company.

In addition to the security afforded by this note the defendant put up for margins in Woodward & Co.'s hands, two sums of money, $1,500 on or about February 5, 1917, and $265.44 on or about February 7, 1917. Wolfe received the orders or instructions given by the defendant and wired his principals Woodward & Co. at Winnipeg to execute the trades, which they did. Defendant was duly advised of such having been done through the medium of the purchase and sale slips and confirmatory memoranda attached to Exs. 7, 8, 9, 10, 11 and 12. These were made out in duplicate, one copy retained by Woodward & Co., and the other sent the defendant through Terwilliger & Wolfe at Calgary. Such was the invariable custom of Woodward & Co., and Wolfe testified that in each of these trades he O.K.'d as correct the purchase and saleslips and then sent or handed them to the defendant.

I see no reason to doubt this and the defendant does not deny it. Furthermore, he admits that he did not question or take exception to these transactions, until after he had been closed out on the trades.

He cannot plead ignorance of these transactions because each purchase and sale slip indicates clearly the particulars and also the result of the trade, whether it had made a profit or a loss to the defendant. It seems to me that the terms of the confirmation memoranda make it clear what the contractual rights and obligations of the parties were and if the transactions in question were real and bona-fide dealings in grain, as they purport to be, I can see no ground for

Man.

K.B.

WOODWARD & Co. v. KOEFOED.

the contention by the defendant that there is want of privity of contract. Want of privity of contract is not pleaded and even if it had been I think the provisions of the confirmation slips are a complete answer to that objection. But the crux of the whole matter in my opinion is this: Are the transactions in question such as are prohibited by sec. 231 of the Criminal Code? If they are the plaintiff cannot recover. If they are not I think the plaintiff ought to recover the money sued for.

Sec. 231 of the Criminal Code R. S. C. 1906, ch. 146, is as follows:

"231. Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise, (a) Without the bona fide intention of acquiring any such shares, goods, wares, or merchandise, or of selling the same, as the case may be, makes or signs, or authorises to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or (b) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the bona fide intention to make or receive such delivery."

Whether these transactions are or are not within the prohibitions of this section is a question of intention and this in turn is a question of fact upon the evidence offered.

The only evidence of the actual trades is that afforded by the purchase and sale memoranda and confirmation slips, Exs. 7, 8, 9, 10, 11 and 12. The actual contracts, if there were any, are not produced. The names and identity of the other contracting parties, this is, purchasers [sellers?] and buyers as the case may be, is not disclosed. Wolfe said there was no actual wheat delivered in this case and that he did not know whether the intention was to deliver the wheat or not to deliver it. The fact is, no actual deliveries of wheat were made to or by the defendant in connection with any of these transactions.

Was this necessary to take them out of the operation of

sec. 231 of the Criminal Code? I do not think so, if the contracts were real, bona-fide and obligatory as to fulfilment upon each of the contracting parties and not entered into without the bona-fide intention to make or receive such delivery.

The confirmation slips contained the material terms and conditions of each transaction and I have already held that the defendant had notice of these by delivery to him of duplicates; that he made no objection to and is bound by them.

The by-laws, rules and regulations and customs of the Winnipeg grain exchange and of the Winnipeg Grain and Produce Exchange Clearing Association, were not produced and put in evidence at the trial.

The case of Richardson v. Beamish (1913), 13 D. L. R. 400, 23 Man. L. R. 306, reversed on appeal to the Supreme Court, (1914), 16 D.L.R. 855, 49 Can. S.C.R. 595, 23 Can. Cr. Cas. 394, is similar in some of its facts to the case at Bar but differs very radically in one particular, viz., the terms of notice of confirmation of each transaction made on defendant's account. The notification in the former case was in the following terms, 13 D.L.R. p. 416:—

"We confirm the following trades made for your account today on the Winnipeg Option Market:

	Quantity.	Delivery.	Article.	Price.	Remarks.
Sold	5M	May	Wht	108⅝	

On all marginal business we reserve the right to close transactions when margins are running out without further notice. All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Winnipeg Grain Exchange."

Whereas, in the case at Bar the notification of trades to the defendant by the plaintiff was as follows:

"Memorandum

Winnipeg 19 Woodward & Company
M..... Commission Merchants
..... Grain Exchange

We have made the following transactions for your account and risk, under the by-laws, rules, regulations and customs of the Winnipeg Grain Exchange and also those of the Winnipeg Grain and Produce Exchange Clearing Association.

All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor. On all marginal business we reserve

Man.

K.B.

WOODWARD & CO. v. KOEFOED.

the right to close transactions when margins are running out without further notice. We also reserve the privilege of substituting other responsible parties as principals with you in these transactions at any time until closed, in accordance with the rules of the Winnipeg Grain Exchange, where the transactions are made, and to clear all transactions through clearing associations from day to day in accordance with the usage prevailing at the time.

This trade has been, or may be, cleared through the said clearing association, and on being so cleared, we will be the only persons responsible for the carrying out of this trade or trades, and furthermore we will be the only persons against whom you will have any recourse for the fulfilment thereof.

Bought or sold | Quantity | Delivery | Kind of Property | Price | Transactions with "

Then followed the particulars of each trade.

It seems to me that the terms of this notice in the case at Bar distinguish it in some respects from Richardson v. Beamish, supra, but not as to the question of illegality raised under sec. 231 of the Criminal Code.

The defendant relies very strongly upon this defence which is contained in para. 10 of the statement of defence. The plaintiff on the other hand contends that the defence of illegality under the above section of the Criminal Code is not properly pleaded and should be ignored by the Court, and is not applicable any way to the dealings in question. I cannot agree with this contention. I have carefully considered this paragraph of the statement of defence and I think it does raise the question of illegality in such form that the Court is bound to consider it. The language of the section of the Code itself has been used though without naming the section relied on. No authority for the plaintiff's contention was cited and I can see no reason why I should not consider this defence in the terms in which I find it pleaded upon the record and in relation to the evidence before me. In my opinion the evidence shews quite clearly that the transactions in question were such as the Code inhibited and declared to be illegal because neither party intended that there should be actual delivery made or received of the grain to which the purchases or sales relate. Beamish v. Richardson, 16 D. L. R. 855.

In Medicine Hat Wheat Co. v. Norris Commission Co. (1919), 45 D.L.R. 114, 14 Alta. L. R. 235, following Un-

iversal Stock Exchange v. Strachan, [1896] A.C. 166 at p. 171, 65 L. J. (Q.B.) 429, it was held that "when considering whether there was an actual intention to deliver grain in pursuance of contracts alleged to be contrary to sec. 231 of the Criminal Code the transactions as a whole must be looked at especially with respect to their magnitude and the amount of grain available."

Now the amount of grain involved in the different transactions between the plaintiff and the defendant was all told 90,000 bushels, divided as follows: Sold, 50,000 bushels; bought, 60,000; leaving defendant on the market 10,000 bushels. The total amount of grain actually owned by the defendant and held for sale was 7,000 bushels, none of it of grade applicable for delivery purposes to fulfil any of his sale contracts.

Can there be any doubt that these transactions were purely speculative and never intended to be implemented in the ordinary way by actual delivery of the grain sold and actual receipt and payment for the grain purchased. When the defendant embarked upon this (as it turned out very risky and costly business) he had no money in hand. His crop of some 7,000 bushels was his sole dependence and this he seems to have figured would put him in funds to put up necessary margins to cover and protect his trades, nothing more. There is no pretense that he had the financial ability to pay outright for the wheat he bought, or to purchase the wheat necessary to fulfil the sales he made for future delivery when the time for such delivery and payment arrived. In this respect I cannot distinguish this case from Beamish v. Richardson, 16 D. L. R. 855, Richardson v. Gilbertson, (1917,) 39 D.L.R. 56, 39 O.L.R. 423, 28 Can. Cr. Cas. 431; Medicine Hat Wheat Co. v. Norris Commission Co., supra, and it is within the principle of In re Gieve, [1899] 1 Q.B. 794, 68 L.J. (Q.B.) 509, and Universal Stock Exchange v. Strachan, supra.

The fact that there was here a real and enforceable contract for actual wheat for every purchase or sale that was made as the plaintiff contends does not, in my opinion, make any difference, as "the statute contemplates such contracts and declares illegal the making of them for the purpose of gain, without the bona-fide intention of performing them in the ordinary way," per Harvey, C.J. in Medicine Hat Wheat Co. v. Norris Commission., 45 D. L. R. 114 at p. 117.

The case of Canada Grain Co. Ltd v. Nichol (1920), 53

Man.

K.B.

BEST v. DUSSESSOYE.

D. L. R. 375, 13 S. L. R. 395, cited by the plaintiff, is not in point upon the defence of illegality because there was an express finding of fact that it was the intention of the parties to deliver the wheat contracted for, whereas, in the case at Bar I have found that such was not the case. Similarly, the case of Smith Grain Co. v. Pound (1917), 36 D.L.R. 675, 10 S.L.R. 368, where the trial Judge found there was a like intention.

These cases were also cited on the question of privity of contract but as I think the notices of confirmation establish such privity, or at all events constitute an agreement (to which after notice the defendant did not dissent) that the plaintiff was to be the only party against whom the defendant would have recourse for the fulfilment of his contracts, this defence of want of privity cannot be supported.

In view of my finding upon the question of illegality the plaintiff cannot succeed and the statement of claim must be dismissed with costs, to include costs for any examinations for discovery.

Action dismissed.

BEST v. DUSSESSOYE.

Manitoba King's Bench, Mathers, C.J.K.B. December 24, 1920.

Appeal (§III.F—98)—Extension of Time for Application for—What Must be Shewn by Applicant.

The rule of practice is that a party applying for an extension of time to appeal must shew amongst other things a bona fide intention to appeal held while the right of appeal existed, and that the correctness of the judgment is at least arguable.

APPLICATION for an extension of time for appealing from a judgmnt in an action for foreclosure under an agreement of sale. Refused.

C. H. Locke, for plaintiff.

H. J. Symington, K.C., for defendant.

Mathers, C. J. K. B.:—On June 16, 1913, the plaintiff entered into an agreement to sell to Charles Muys certain farm lands for the price of $12,000, payable $2,750 by the transfer of some real estate; $1,000 on January 1, March 1, and May 1, 1914; $1,575 on December 1 in the years 1914, 1915 and 1916, and $1,525 on December 1, 1917, with interest at 6%.

C. Muys paid the sum of $2,750 by the transfer of the land referred to and paid other sums so that on November 2, 1915, the total amount then due upon the purchase price was $3,892.30. No further sum was paid at the time of

the commencement of this action. On December 12, 1918, there had accrued the further sum of $1,011 for interest unpaid.

On February 3, 1916, Muys assigned all his interest under the agreement to purchase and in the lands referred to therein to the defendants, the Central Canada Investment Corporation. On July 11, 1918, he executed a quit-claim deed of the land in favour of the defendant Dussessoye.

This action was commenced on December 12, 1918, to foreclose the interest of the defendants under Charles Muys' agreement to purchase because of default in payment. The relief asked was that the accounts be taken under the agreement and time fixed for payment and in default of payment by the time so fixed that the payments already made under the agreement should be declared forfeited and the agreement for sale cancelled and rescinded and that the defendants be absolutely debarred and foreclosed of all rights, title, or interest claimed in the land.

The defendant Dussessoye entered no defence but defence was entered by the Central Canada Investment Corp. denying that there was due under the agreement $3,982.30 as of November 2, 1915, and the sum of $1,011 for subsequent interest and alleging that the plaintiff had received from Muys other moneys the proceeds of crop grown upon the land for which he had not accounted. There was no other material allegation of defence except that the corporation pleaded the Act relating to contracts of land commonly known as the Moratorium Act, 5 Geo. V. 1915 (Man.) ch. 88.

The defence asked that the accounts be taken between the plaintiff and Muys and if found that payments had been made by Muys or anyone on his behalf sufficient to protect the land under the Moratorium Act, that the action be dismissed with costs.

The action came on for trial and judment was pronounced on March 25, 1919, referring it to the Master to take accounts and to appoint a day 3 months after the making of his report for the payment by the defendants of the amount found due. There were other directions in the judgment to which it is not necessary to refer. The judgment provided that if default was made in payment according to the report of the Master, "that the said agreement for sale be declared determined, rescinded, cancelled, foreclosed, and at an end and be delivered up to the plain-

Man.

K.B.

BEST
v.
DUSSESSOYE.

tiff, and that the payments made thereunder be declared forfeited and that all improvments made upon the land be declared to be the property of the plaintiff and that the defendants deliver up to the plaintiff immediate possession of the land; * * * and that the defendants stand absolutely debarred and foreclosed of all equity of redemption, and that any caveats filed by the said defendants or any persons claiming through or under them be vacated and discharged and that the plaintiff shall be entitled to an order on their application therefor, and doth order and decree the same accordingly."

The Master made his report on July 8, 1919, by which he found there was due to the plaintiff on October 8, 1919, $5,404,95, and he appointed that sum to be paid by the defendants into the chief branch or agent's office in the city of Winnipeg of the Bank of Hamilton to the joint credit of the plaintiff and the accountant of this Court, between the hours of 10 o'clock in the forenoon and 1 o'clock in the afternoon of the said October 8, 1919.

The terms of the Master's report not having been complied with on October 8, and no sum having been paid into the bank in compliance with it, the plaintiff upon an affidavit of default and certificate from the bank, applied to the referee in Chambers on October 11, 1919, and obtained from him a final order of foreclosure. This order was entered on October 14, 1919. On October 22, the solicitors for the defendant corporation served upon the plaintiff's solicitors a notice of motion to be made before the referee on October 25 for an order vacating and setting aside the final order of foreclosure before referred to and allowing the defendant corporation to redeem and extending the time for that purpose until November 1 following.

This application was based upon an affidavit made by one of the solicitors for the defendant corporation, who was also its president, that it was always the intention of the defendant corporation to pay the amount found by the Master's report to be due to the plaintiff, and that he confidently expected that the money would have been realised from crops then growing upon the lands and other lands and that the company would be in a position to have the crops threshed and disposed of prior to the time fixed for the redemption and would be in a position to redeem but owing to wet weather during September, threshing operations were interfered with and that the company was un-

able to have the crops threshed in sufficient time to dispose of it before October 8, the time fixed for redemption in the report; that he, therefore, early in October, provided the amount found owing under the reference and instructed his partner to pay the amount over to the solicitors for the plaintiff; that he was obliged to leave Winnipeg on urgent business and supposed his instructions for payment of the money would be carried out but on his return to Winnipeg on October 20 was informed that his partner had also been absent from the city and had overlooked and neglected paying the money to the plaintiff's solicitors; and that he immediately caused a request to be made to the plaintiff's solicitors to accept the amount and was informed that he would not do so; that on October 21 he caused a tender to be made to the plaintiff's solicitors of the full amount directed to be paid and with interest to the date of tender, which tender was refused; that the amount would have been paid some time prior to the date of redemption but for the inability to have the crop threshed and disposed of and that he and the company were otherwise unable to raise the money.

He swears to the belief that the property was worth $8,900 over and above the plaintiff's claim, and that the defendant company was ready and willing to pay the full amount of the plaintiff's claim and costs.

That affidavit was supported by one from Davidson, Mv-Murray's partner referred to. He swears to the fact that he was under the belief that the final order of foreclosure would not be absolute until 14 days after same had been made and that payment of the amount found in the Master's report to be due could be paid at any time within the 14 days, and that he did not leave instructions in the office for any other person to make it when he was called out of town.

In reply to this application it was shewn that on October 18, 1919, the plaintiff had given an option to purchase the land in question for the price of $5,650 to Mary Muys, wife of the original purchaser, the option to expire on April 1, 1920, for which Mary Muys paid the sum of $100.

On November 25, 1919, the referee made an order directing that Mary Muys be made a party defendant to the action and that upon payment of the sum of $5,453.81 into the Bank of Hamilton to the joint credit of the plaintiff and the accountant of the Court of King's Bench, on or be-

Man.

K.B.

BEST v. DUSSESSOYE.

fore December 2, that the final order previously made should be vacated and set aside.

From this order an appeal was taken to a Judge in Chambers by Mary Muys. The appeal was heard before Galt, J. who on December 23, 1919, allowed the appeal and set aside the order of the referee of November 25, 50 D. L. R. 640. A further appeal was taken to the Court of Appeal and on April 22, 1920, the order of Galt, J. was affirmed, 52 D. L. R. 249, 30 Man. L. R. 270. Nothing was done by the company until May 26, when counsel was consulted with respect to further proceedings and on July 5, a motion was made by the defendant corporation for leave to appeal from the judgment pronounced on March 25, 1919, for the purpose of obtaining relief from that part of the judgment which declares payments already made by the defendant C. Muys forfeited to the plaintiff.

Subsequent to the judgment of the Court of Appeal, to wit, on April 28, the plaintiff re-purchased from Mary Muys her rights under the option before referred to for $1,500, and on May 14 entered into an agreement to sell the land to one Schreiber for the sum of $12,000.

The application to extend the time to appeal on the judgment of March 25, 1919, is based upon the fact that C. Muys, to whose interests the defendants succeeded, had paid to the plaintiff $6,500, more than half the total purchase-price, and that he should not be permitted to retain this money and also the land.

It is not pretended that failure to appeal within the time fixed by the rules was due to any accident or mistake or oversight. They did not appeal because they did not intend to appeal. They accepted the judgment as right, as in fact it was, upon the issues raised by the pleadings. Not only that but they acted upon it. They acquiesced in taking the accounts in the Master's office and the fixing of a time for payment. They did not pay the amount found due within the time fixed by the Master's report because of a misunderstanding in their solicitor's office. They endeavoured to obtain relief from their neglect by application to the referee to extend the time for payment. It was not until after the judgment of Galt, J., 50 D. L. R. 640, setting aside the referee's order obtained on their application was affirmed in the Court of Appeal 52 D. L. R. 249, that any thought of appealing from the judgment was entertained. Up to that time their every act was in affir-

mation of the judgment and their whole course of conduct was consistent only with an intention not to appeal.

Having failed in the line of defence adopted and consistently followed, until finally defeated in the Court of Appeal 52 D. L. R. 249, they now ask that they be allowed to amend their defence by raising an issue which was not before the Court when the action was tried, and appeal from the judgment upon the issue so raised.

The rule of practice is that a party applying for an extension of time to appeal must shew amongst other things a bona fide intention to appeal, held while the right of appeal existed. (Smith v. Hunt (1902), 5 O. L. R. 97); and that the correctness of the judgment is at least arguable (Union Bank v. Rideau Lumber Co. (1900), 19 P. R. (Ont.) 106). Not only have the applicants failed to shew that they entertained such intention, but that the contrary was the fact conclusively appears.

It is not contended that the judgment did not correctly dispose of the issues raised by the pleadings. The application is really one for leave to amend the statement of defence by raising the question of their right to be relieved from the forfeiture of the moneys paid as a condition of granting foreclosure of the agreement. It is quite possible that had such an issue been raised at the trial, evidence might have been directed to it and it seems to me it would be unfair to dispose of that issue without the plaintiff having had an opportunity of doing so. A further objection to granting the extension is that the parties seeking to appeal have acted upon the judgment from which they now seek to appeal (International Wrecking Co. v. Lobb. (1887), 12 P. R. (Ont.) 207.

There must be some finality to litigation and after the plaintiff has had his right affirmed in the Court of Appeal the defendants would not now be allowed to go back and take up a line of defence which was open to them from the beginning and which they deliberately refrained from setting up.

I concur with my brother Galt 50 D. L. R. 640 in thinking that the maxim interest republicae ut sit finis litem applies to this case.

The company relies upon the suggestion of Lord Haldane in Steedman v. Drinkle, 25 D.L.R. 420, [1916] 1 A.C. 275. That case is distinguishable because in it the purchasers' assignee had not acquiesced in the judgment and acted up-

Man.

K.B.

BEST
v.
DUSSESSOYE.

on it. He appealed from it and succeeded in the Court of Appeal. (1913), 14 D. L. R. 835, 7 S. L. R. 20. The vendor in turn appealed to the Privy Council when the judgment of the trial Judge was affirmed and the right to specific performance finally denied. Under the circumstances Lord Haldane suggested that the purchaser might still be relieved against the forfeiture of the money paid and for that purpose might apply to the Court of first instance. Whether or not the suggestion was acted upon and, if so, with what result does not appear.

It is conceded that the company's interest in the land has been finally extinguished and their right to acquire title under the agreement of sale forever lost but they say that the plaintiff having got back his land ought to be compelled to repay the money paid to him pursuant to the agreement, and which, in accordance with the terms of the agreement, the judgment declared should be forfeited if default were made in payment. After the Court of Appeal had decided that the referee had no power to open the foreclosure and allow further time for payment, and before he had any notice of this application, the plaintiff bought the right of Mary Muys under the option before referred to for $1,500, and entered into an agreement to sell the land to one Schreiber for $12,000.

It is possible that had the company at or before the trial asked to be relieved against the forfeiture of the moneys paid, the plaintiff might have granted further time for payment rather than have such a term imposed upon him. Since then the interest of a third party has intervened and that election is no longer open to him.

On the whole, I think, an extension of time should be refused. I base my refusal upon 4 principal grounds: (1) That the company had no intention of appealing until long after the expiration of the time for doing so; (2) That there appears to be no error in the judgment sought to be appealed; (3) That the company acted upon the judgment, intended to take advantage of its provisions, and was prevented from doing so only by their own neglect; and (4) That the application is not in reality for an extension of time to appeal from the judgment but for leave to amend their defence and now raise an issue which they deliberately refrained from raising at the trial and which would be unfair to permit at this stage.

Judgment accordingly.

E. & N. R. CO. v. WILSON.
E. & N. R. CO. v. DUNLOP.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher, McPhillips and Eberts, JJA. February 3, 1921.

Statutes (§II.B—113)—Vancouver Island Settlers' Rights Act—Construction — Intention — Occupation and Improvement of Lands.

The Vancouver Island Settlers' Rights Act, 3 & 4 Edw. VII., 1904 (B.C.), ch. 54, was enacted on the assumption that the persons defined as "settlers," meaning persons who had prior to December, 1883, occupied or improved lands within the railway belt with the bona fide intention of living thereon, had been in equity and good conscience entitled to grants in fee simple, but had been denied their just claim thereto. The Court held in the Wilson case, affirming the judgment of Gregory, J., that there was no reasonable proof of occupancy or improvement of the land with the bona fide intention of living on it as required by the Act. In the Dunlop case the Court held that there was ample evidence of occupation and improvement, and of intention to reside on the land, and that the appeal should be allowed.

APPEALS by defendants from a judgment of Gregory J., (1920), 54 D. L. R. 584, in an action under the Settlers' Rights Act. In the Wilson case the judgment was affirmed, in the Dunlop case it was reversed.

S. S. Taylor, K. C. and R. Smith, for appellant; E. P. Davis, K. C. and H. B. Robertson, for respondents.

Macdonald, C. J. A.:—The Vancouver Island Settlers' Rights Act, 3-4 Edw. VII, 1903-4 (B.C.) ch. 54, was, I think, enacted on the assumption that the presons defined as "settlers," meaning persons who had prior to December 19, 1883, occupied or improved lands within the railway belt, with the bona fide intention of living thereon, had been in equity and good conscience entitled to grants in fee simple, but had theretofore been denied their just claim thereto. Section 3 of the Act as amended by 7-8 Geo. V, 1917, (B. C.), ch. 71, sec. 2 reads as follows:—

"Upon application being made to the Lieutenant Governor-in-Council, on or before the first day of September, 1917, showing that any settler occupied or improved land within said railway land belt prior to the enactment of chapter 14 of 47 Victoria, with the bona fide intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when

B.C.

C.A.

E. & N. R. Co. v. Wilson and Dunlop.

said land was first so occupied or improved by said settler."

By provincial Orders in Council passed in 1873, a tract of land which embraced within its boundaries the lands in question herein, was reserved from settlement but notwithstanding this numerous persons squatted upon different portions of this tract, presumably in the expectation that they would be able at some future time to procure grants from the Crown in accordance with the provisions in favour of settlers or pre-emptors contained in the land law then in force. Subsequently, viz., in 1883, an agreement was reached between the Dominion and Provincial Governments and ratified by Provincial Act 47 Vict. ch. 14, assented to on December, 19, 1883, under which roughly speaking the tract aforesaid was conveyed to the Dominion for railway purposes subject to certain exceptions in favour of alienees but not of squatters. Many, if not all, of these squatters however, obtained by subsequent pre-emption or purchase under privileges extended to them by the said Act of 1883, grants of the surface of the lands occupied by them as aforesaid, but the squatters were not satisfied with these grants and an agitation was commenced and persisted in which culminated in the passage of the said Act of 1904, the object of which was to give the persons within its benefit the fee simple.

The appellants are the executors of the late Joseph Ganner, who they allege was a "settler" entitled to the benefit of the Act. Ganner was a teamster residing with his family at the city of Nanaimo at some distance from the land in question. The appellants' case is that Ganner settled upon these lands in 1880 or 1881. It is admitted that he pre-empted the land in 1885, taking advantage of the provisions of said statute of 1883 and the agreement thereby ratified and that a grant of the surface was made to him in 1890. In support of his pre-emption entry he made a sworn declaration that the land was at that date (July 29, 1885) unoccupied Crown land. The fact that he procured the land other than the minerals in this way does not necessarily preclude his executors from taking advantage of the Vancouver Island Settlers' Rights Act, of 1904. While he was not entitled to the benefit of the last mentioned Act qua preemptor, yet if it were proven that he had been a "settler" prior to December 19, 1883, this would bring his personal representatives the appellants, within the benefit of that Act in respect of the minerals. Nor do

I attach much importance to Ganner's declaration in 1885 that the land was unoccupied Crown land, since he may have meant no more than this, that it was not in adverse occupation.

Coming then to the several declarations which accompanied the application, I think it is apparent upon reading that of the appellants' themselves, that they had no personal knowledge of the matters of which they profess to speak. This conclusion is emphasised by their conflicting declarations. The declaration of Gribble is limited to a statement that Ganner "squatted" on the land in 1883. He does not say that he had ever been upon the land himself or had any personal knowledge. If he meant that Ganner had resided on it and to be a "squatter" he must have been in actual possession and occupation, then he is mistaken, since all the evidence of those who must have known of Ganner's residence is inconsistent with this. The declaration of Lizzie Peck proves nothing. Margaret McKenzie, the daughter of Ganner, speaks from hearsay only; she professes to have had an intimate knowledge of her late father's affairs and she says she understood that her father had built a cabin or dwelling upon the land, but she had no personal knowledge whatever in respect of it. She does not even bring her evidence within the rule as to declarations by her father which might be said to form part of the res gestae, if indeed that doctrine is applicable. What her declaration omits is significant. She was living with her father in the city of Nanaimo at this time, yet she does not say that her father lived away from his home, even for a short time. The inference I draw from her declaration is that he resided with his family in Nanaimo during the period when he is alleged to have settled or squatted upon the land. This witness fixed the date of the settlement as in 1880 or 1881. The declarant Morton, says that in addition to the "many talks" he had with Ganner about the land, the latter had driven him to a place in the near vicinity of the land, but he does not say that he saw it. McAdie speaks from knowledge of his (Ganner's) business and says that Ganner "took up" land in Cranberry, but he does not say that he saw the land or had any personal knowledge of Ganner's connection with it. The only declarant who professes to speak from personal knowledge of the locus in quo is W. H. Ganner, son of the deceased. He alleges a distinct recollection of his father "taking up"

B.C.

C.A.

E. & N. R. Co. v. Wilson and Dunlop.

this land and of having, in company with his father's hired man and another young man named Meakin, done work "slashing and piling brush preparatory to clearing". Not a single one of the declarants ventures to say that Joseph Ganner ever resided upon the land. It is therefore to my mind quite clear that there is no legal evidence that Ganner occupied the land within the meaning of sec. 3 of the Act of 1904.

But this lack of proof of occupancy does not necessarily defeat the appellants' case. It is sufficient for their purpose to shew that Ganner improved the land with the bona fide intention of living on it. The only evidence upon this point is that of the son and daughter mentioned above. That of the daughter amounts to nothing as I have already pointed out. That of the son consists of the above-mentioned statement of the slashing and piling of brush preparatory to clearing, and which for aught we are told may have been of the most trifling character. The witness does not say whether the work lasted one hour or one day, nor does the evidence indicate that it was of any value whatsoever in the way of improvement to the land. One may therefore ask, how is it that this witness, who would be expected to know something of the work actually done upon the land, including the alleged building of the cabin or dwelling house, has told nothing of the slightest value? He was either not possessed of or has withheld the facts in respect of the alleged improvements. Not a single person has said that he or she saw the alleged cabin. Not one of the declarants has named a single item of real improvement made upon the land. There is therefore nothing from which the inference may be drawn of a bona fide intention on Ganner's part to live on this land.

For these reasons I am of opinion that the conditions upon which the Legislature has declared that the Lieutenant-Governor in Council shall have power to make grants to settlers have not been performed by the appellants and that the grant was therefore rightly annulled.

In this result the several other questions argued need not be answered. There should be an assessment of damages on the footing of innocent trespass without negligence, applying the rule referred to by Parke, B. in Wood v. Morewood (1841), 3 Q.B. 440, 114 E.R. 575.

Martin, J.A., would dismiss the appeal.

Galliher, J. A.:— A number of points both on the law

and the evidence, were argued before us on this appeal, but owing to the clear conclusion I have reached on one point which if I am right, disposes of the appeal, I have deemed it unnecessary to deal with the others.

The statute Vancouver Island Settlers Rights Act, 3-4 Edw. V11, 1903-4 (B. C.) ch. 54, does not leave it at large but says a Crown grant shall issue upon "reasonable proof". The statute has fixed the condition and the Courts have power to consider and determine what is "reasonable proof".

In a case of this sort where there were rival claimants to the lands of which the Governor in Council had due notice, one would have looked for fairly conclusive proof, but even eliminating the factor of rival claimants, I would still conclude that no reasonable proof of occupation or improvements was had and by reasonable proof I mean proof which in my opinion, reasonable men could reasonably act upon in complying with the words of the statute.

Whether the council were bound to grant a hearing or not I do not decide but they purported to grant a hearing and upon that hearing the proof set out in the appeal book was before them.

Mr. Taylor suggests that that material might not have been all that was before them upon which they decided, but if it were otherwise, it could easily have been shewn. He had the conduct of the appeal and could have had it included if such existed.

I am deciding the case on what appears before us. I have carefully examined the declarations filed and so far from being reasonable proof of residence, occupation or improvement they are in the general terms in which the statements are made and in their very indefiniteness, as pointed out by the Chief Justice, (and which I will not repeat) and without any apparent attempt to verify or check them up, in my opinion, almost no evidence at all or at all events, far from such evidence as should be accepted by any one as reasonable proof.

I would dismiss the appeal. I agree with the Chief Justice as to the measure of damages.

McPhillips, J.A. (dissenting):—In my opinion this appeal should succeed. It is a matter of history in this Province that the Vancouver Island Settler's Rights Act, 1904, was a remedial statute.

It has been said, and I think rightly, that in the Crown

B.C.
C.A.
E. & N. R. Co. v. Wilson and Dunlop.

resides "infallible justice" (see Boyd, C. in Niagara Falls Park v. Howard (1892), 23 O.R. 1, at p. 27: "It would seem contrary to the infallible justice of the Crown....) Rex non debet esse sub homine sed sub Deo et sub lege, quia lex facit regem—Rex non potest peccare,—Salus populi est suprema lex.—Ubi jus ibi remedium. It is only necessary to read the preamble to the Act which has to be construed in this appeal to see that the Legislature enacted it in the furtherance of justice, the carrying out of the true attributes of the Crown and fundamental legal principles. The Legislature being Sovereign as to "property....in the Province"—(B. N. A. Act, 1867, sec. 92, sub-sec. 13) may make such disposition thereof as it in its wisdom may determine. The Act as stated is: "An Act to secure to certain Pioneer Settlers within the Esquimalt and Nanaimo Railway Land Belt, their surface and under-surface rights." The real contest in this appeal has relation to the under-surface rights, i.e., the coal in upon or under the lands. Gregory, J. (1920), 54 D.L.R. 584, proceeded upon one point only in his judgment and that was that there was no proper notice of hearing or hearing had under the provisions of the Vancouver Island Settlers' Rights Act, 1904, ch. 54, sec. 3, as amended by 7-8 Geo. V. ch. 71 the Vancouver Island Settlers' Rights Act, 1904, Amendment Act 1917, and it was by the judgment declared that the Crown grant was null and void. From this judgment comes this appeal. Gregory, J., (at p. 586) considered that he was bound by the decision of the then Full Court in E. & N. R. Co. v Fiddick, (1909), 14 B.C.R. 412, and that upon the facts as adduced at the trial the Fiddick case was determinative of the point and that no proper hearing was had admitting of the issuance of the Crown grant. With great respect, I am not of the opinion that the Fiddick case is binding upon the Court of Appeal, further, I am not in agreement with what is there decided (see Lord Dunedin in Davidson v. McRobb, [1918] A.C. 304). Undoubtedly the judgments of the Full Court are entitled to the greatest respect, but it is to be observed that the judgment is the judgment of but two of the Judges of the Supreme Court, the Court then consisting of five Judges, and the judgment was one of reversal of the judgment of Hunter, C.J.B.C., and Morrison, J., dissented, my brother Martin (then a Judge of the Supreme Court) not sitting. It is true though that the statutory quorum existed and the judgment is one

of the then highest Courts of the Province. This action is not brought by the Attorney-General of the Province, nor is it an action by way of petition of right. The Attorney-General has been added as a defendant in the action but the Attorney-General supports the Crown grant as he is by statutory mandate required to do, (see sec. 4 of the Vancouver Island Settlers' Rights Act, 1904) and denies the jurisdiction of the Court to reverse the decision of the Lieutenant-Governor in Council. It is without hesitation that I come to the conclusion that no jurisdiction exists in the Court to pass upon, enquire into or set aside the Crown grant challenged in this action, and which has been declared by the trial Judge to be null and void. The Crown grant did not issue following compliance or attempted compliance with rules and regulations ending with the decision only for some departmental or ministerial officer—this is the fallacy that runs throughout the whole proceedings upon the part of the respondent. The insuperable obstacle the respondent meets with on this appeal is this—that that which is challenged is a Crown grant which has issued at the mandate of Parliament by the Lieutenant-Governor in Council and having issued has statutory effect. The statute does not provide for any review or appeal from the decision of the Lieutenant-Governor in Council, and without that there can be no review or appeal. In McGregor v. E. & N. R. Co., [1907] A.C. 462, 76 L.J. (P.C.) 85, Sir Henri Elzear Taschereau delivering the judgment of their Lordships of the Privy Council, dealing with the same Act we here have to construe, said at p. 467:

"It seems clear to them [their Lordships] that the true construction of that clause, [sec. 3 of the Vancouver Settlers' Rights Act, 1904] is that it imposes upon the Crown the obligation, and does not merely confer the power, of issuing a grant to certain of the settlers therein mentioned, of whom the appellant is one."

And further on we find this language:

"In their Lordships' opinion this enactment in a remedial Act, read with the other parts of it, means clearly that a grant in simple fee, without any reservations as to mines and minerals, of any of the land therein mentioned, including the lot in question, if applied for within twelve months, as was done by the appellant, should be issued to the settlers therein mentioned, including the appellant as to the particular lot in dispute, though previously such a grant could not legally have been issued, because the said land

B.C.

C.A.

E. & N. R. Co. v. Wilson and Dunlop.

had already been granted, with its mines and minerals, to the Dominion Government by the Provincial Act of 1883, and subsequently by the Dominion Government to the respondents. If the Act of 1904 did not apply to this lot, amongst others, because the title to it was then vested in the respondents, it would have no possible application at all. Such a construction would defeat the clear intention of the Legislature."

Now it is important to note the statutory interpretation given to the "Lieutenant-Governor in Council" by sec. 26 (4) of the Interpretation Act, R.S.B.C. 1911, ch. 1. It is enacted:—

"26 (4) In every Act of the Legislature unless the context otherwise requires—'Lieutenant-Governor in Council' means the Lieutenant-Governor of British Columbia, or person administering the Government of British Columbia for the time being, acting by and with the advice of the Executive Council of British Columbia."

It is therefore at once seen that the issuance of the Crown grant is a duty imposed by statute upon the Lieutenant-Governor who is to act on the advice of the Executive Council in other words, the duty is to be performed by the Government of British Columbia; it is not a duty cast upon a ministerial officer in the ordinary discharge of his office. Nor is it the case of the validity of an Order in Council which lately has been the subject of judicial decision, notably by their Lordships of the Privy Council in The Zamora, [1916] 2 A.C. 77. What we have here is a legislative enactment giving certain rights with a legislative mandate directed to the Lieutenant-Governor in Council to proceed and issue Crown grants in pursuance of the provisions of the Act, i.e., Parliament has defined, directed and ordered what the Lieutenant-Governor in Council must do and as we have seen the Lieutenant-Governor in Council acts upon the advice of the Executive Council. Therefore it comes to this—that if there is the power of review it means that that review is the review of the advice given by the Executive Council, a power of review certainly not given by the Act and I may say a power of review unknown to the law. Here we have a Crown grant issued as it must be assumed, as it in fact was—by the Lieutenant-Governor in Council acting upon the advice of the Executive Council. It cannot be said that there was any want of jurisdiction and there being jurisdiction and no right of review or appeal given to the Courts,—how can

it be successfully contended that there is any power of review in the Supreme Court? In effect what is contended for is that the Lieutenant-Governor in Council has been constituted a Court of Judicature and notwithstanding that the statute is silent as to appeal, nevertheless, an appeal lies. This is the advancing of a proposition that is against fundamental law, and with great respect to all contrary opinion, seems to me to be in antagonism to that which may be said to be elementary in jurisprudence. Apart from the restraint that there is upon the Court from transgressing upon the domain of Executive Government—which to my mind is also fundamental—there would only be in other cases possibly the right of review or the right of appeal where something was done which was clearly repugnant to natural justice. (See Christian v Corren. (1716) 1 P. Wms. 329, 330, Bacon Abr. (tit.) Prerog. D., p. 428, Cushing v. Dupuy (1880), 5 App. Cas. 409, Reg. v. Alloo Paroo (1847), 5 Moo. P.C. 296, 13 E.R. 504.)

Should I be wrong in this view then my further answer is, that the Executive Council had evidence before it which constituted "reasonable proof," (ch. 54, sec. 3, Vancouver Island Settlers's Rights Act, 1904), which admitted the Lieutenant-Governor in Council to direct that the Crown grant should issue and the Crown grant having issued, the result is as stated by Hunter, C.J. B.C., in the Fiddick case, 14 B.C.R. 412 at p. 415:

"As I read the decision of the Judicial Committee in the McGregor case; the statute in effect enacts that upon the issue of the defendant's grant the plaintiffs' rights shall cease and determine. Ex hypothesi, then, the defendant's title destroys the plaintiffs,' and there is nothing left to take the case out of the ordinary rule to which I have referred."

The rule that the Chief Justice had previously in his judgment stated was expressed in these words, at p.414:
"There is no principle better established in our law than that in an ordinary suit between subjects, a patent from the Crown which is ex facie valid cannot be attacked in the absence of statutory authority on the ground of any irregularity, mistake, misrepresentation or fraud, which is alleged to have occurred in the proceedings leading up to its issue but such matters may be canvassed only in a suit properly framed for that purpose by or with the assent of the Crown, such as an action by the Attorney-General or by petition

B.C.

C.A.

E. & N. R. Co. v. WILSON AND DUNLOP.

of right. If it were so, no man's title would be safe, and the foundations on which the right to real property at present rest would be swept away."

Further if it be that there is jurisdiction in the Court to review the action of the Lieutenant-Governor in Council, which I of course do not admit but deny, a hearing was had in my opinion in complete compliance with the provisions of the statute and there was absolute discretion in the Lieutenant-Governor in Council to refuse any adjournment of the hearing and nothing took place which could be said to be repugnant to natural justice. See Mulvihill v. The King (1914), 18 D.L.R. 217, 49 Can. S.C.R. 587, 23 Can. Cr. Cas. 194.

Then it is said that as the Vancouver Island Settlers' Rights Act, 1904 Amendment Act 1917 (7-8 Geo. V. ch. 71) was disallowed although after the issuance of the Crown grant (see secs. 56 and 90 of the B.N.A. Act) it has the effect of rendering the Crown grant invalid and void. It would seem to me that it is unnecessary to do other than call attention to the language of the statute, the effect being to only "annul the Act from and after the day of such signification," (see sec. 56 B. N. A. Act.) This must and can only mean that until such "signification" the Act has the force of law, otherwise all government and law in Canada would be arrested during the time of the respective periods, namely, during 2 years in the case enactments of the Parliament of Canada and 1 year in the case of enactments of the Parliaments of the Provinces. It is unthinkable that this should be the law, if it were, all would be chaos and there would be an end to autonomy, and it would be idle to say that Canada had conferred upon her complete autonomy and the full status of a nation within the Empire. It must follow upon the application of the true canons of construction of statute law that all which has been done upon the faith of the statute law having in the interim the full force of law has been rightly and validly done.

The only remaining question which in my opinion needs be adverted to is the point as to whether the respondent is in a better position than it was in the McGregor case, [1907] A.C. 462, 76 L.J. (P.C.) 85, by reason of its undertaking having been declared to be a work for the general advantage of Canada; the jurisdiction of the Dominion Parliament over the undertaking is unquestionably unfettered and cannot be affected by legislation of the Parliament of

the Province, and in so far as there may be conflict all Provincial enactments are displaced but this cannot be operative to affect that which is dehors the undertaking, i.e., apart from the railway undertaking, and that which is in question here, is property and civil rights independent of the railway undertaking. In this connection I would refer again to the McGregor case, [1907] A.C. 462, and to the apt language of Sir Henri Elzear Taschereau at p. 468:

"On the constitutionality of the Act of 1904, and the power of the British Columbia Legislature to enact it, their Lordships see no reason for doubt. The Legislature had the exclusive right to so amend or appeal in whole or in part its own said statute of December 1883 (47 Vict. c. 14). And the Act relates, not to public property of the Dominion, as contended for by the respondents, but to property and civil rights in the province, and affects a work and undertaking purely local (section 92, sub-section 10 of the British North America Act). This railway is the property of the respondents, and the said land had ceased to be the property of the Dominion in 1887 by the grant thereof to the respondents. By an Act passed in 1905 by the Dominion Parliament the legislative power over the company has since been transferred to the Federal authority; but that Act, of course has no application to this case."

Finally, I would say and with great respect to the trial Judge, that the Act under consideration cannot be said to be "confiscatory in its nature," it is only necessary to read the preamble to the Act to advise oneself to the contrary, and it is admitted that the Crown has made compensation and granted in lieu lands in respect to Crown grants already issued under the Vancouver Island Settlers' Rights Act, 1904 —see the Vancouver Island Settlers' Rights Agreement Ratification Act, 10 Edw. VII, 1910 B.C., ch. 17, whereby a free grant of 20,000 acres of land was made to the respondent by the Parliament of the Province of British Columbia with exemption of taxation from the date of the issuance of the Crown grants for 10 years with the grant of the foreshore and coal under the sea—demonstrating that right has been done in the premises and as right has been done it is fair to assume that right will still be done. Further it is not within the province of the Court to animadvert upon the law making authority. It may be fairly said that the land subsidy was acquired by the respondent with the knowledge of the adverse possession (National Bank of

B.C.
C.A.
E. & N. R. Co. v. WILSON AND DUNLOP.

Australasia v. Joseph [1921] 1 W.W.R. 379) outstanding equities or inchoate rights of the pioneer settlers it is true the legislation did not preserve these equities or inchoate rights to the pioneer settlers, but if the interests of justice required that right be done,—although belated—why should it not be done?

The questions of fact and the justice of the legislation may be well gleaned by reading the preamble of the Vancouver Island Settlers' Rights Act, 1904, I will not quote it all but content myself by quoting only the concluding paragraph, which well portrays the reason for the enactment founded upon natural justice and in conformity with well-known attributes of the Crown. That paragraph reads as follows: "And whereas all of said settlers are entitled to peaceable and absolute possession of said land occupied by them and title thereto in fee simple, in accordance with the Statutes of British Columbia at the time existing governing the disposal of public lands."

It follows that in my opinion the appeal should be allowed, and my reasons for judgment in this case are equally applicable to the appeal in the E. & N. R. Co. v Dunlop et al, which appeal also should, in my opinion, be allowed.

Eberts, J.A.:—This is an appeal from the judgment of Gregory, J., in the above cause. The facts shortly are as follows:

By sec. 3, 47 Vict. 1884, (B.C.), ch. 14, a block of land in Vancouver Island was granted to the Dominion Government for the purpose of construction and to aid in the construction of a railway between Esquimalt and Nanaimo on Vancouver Island. This railway was duly completed under the provisions of the Act by the E. & N. Railway Company, and the lands mentioned in said sec. 3 were conveyed to the said railway company by the Dominion Government and duly registered in the Land Registry Office, Victoria. The lands in dispute in this action, being sect. 2, range 7,100 acres and the easterly 60 acres of sect.3, range 7, Cranberry District, B.C., lie within the boundaries of the land conveyed to the Dominion Government and by the latter conveyed to the railway company. By virtue of sec. (f) of the agreement set out in the preamble to the Act, the lands so conveyed were open for pre-emption for 4 years from December 19, 1883, the date of the passage of the Act, "to actual settlers for agricultural purposes," and the Government of British Columbia was authorised

to make and issue pre-emption records to actual settlers of said lands. By sec. 23 of the Act, bona fide "squatters" who had continuously occupied and improved any of said lands for a period of one year prior to the 1st January, 1883, were entitled to a grant of the freehold of the surface rights only of the squatted land to the extent of 160 acres to each squatter on payment of $1 an acre.

One Joseph Ganner, a teamster, who was living with his family in the city of Nanaimo in this Province, made an application for and there was issued to him on August 4, 1885, a pre-emption record under sub-sec. (f) aforesaid, of the lands in question and on December 24, 1890, a conveyance of the surface of said lands was made to said Ganner by the E. & N. R. Co. It does not appear by the record that Ganner as a squatter asserted any right under sec. 23 of ch. 14 aforesaid, which became law December 19, 1883, nor did his trustees make any application under the Settlers' Rights Act of 1904, and not till July 5, 1917 did they assert any claim to the lands in question until an amendment was passed to the Settlers' Rights Act of 1904 in 1917, 7 Geo. V. 1917, ch. 71, evidently for giving a renewed opportunity to these settlers who had acquired rights under the Settlement Act to apply for grants.

It may be noted that Ganner acquired the surface rights to the lands in question from the E. & N. R. Co., on January 24, 1890, and the appellants as Ganner's trustees for valuable consideration gave a conveyance in fee of the lands to one Bing Kee on March 13, 1905. Ganner died in December, 1903, devising all his estate to the defendants, Wilson and McKenzie in trust. Chapter 54 of the Statutes of British Columbia, 1904, entitled an Act to secure to certain Pioneer Settlers within the Esquimalt and Nanaimo Railway Land Belt their surface and undersurface rights was passed by the Legislative Assembly of British Columbia, and by sec. 3 it was enacted that: [See judgment of Macdonald, C.J.A., ante p. 577]

Under that section the defendants Wilson and McKenzie as trustees, and executors of the will of Ganner, deceased, made an application to the Lieutenant-Governor in Council for a Crown grant of the lands above mentioned and in support of the application filed several declarations purporting to be reasonable proof of the requirements called for under sec. 3, that Ganner occupied and improved the land in question prior to the enactment of ch. 14 of 47 Vict.,

B.C.
C.A.
E. & N. R. Co. v. WILSON AND DUNLOP.

1884, (B.C.) with the bona fide intention of living on same. The respondents' solicitor, (who for some time previously had been in communication with the Government with reference to appellants' application to the Lieutenant-Governor in Council) were, on February 2, 1918, served with a notice by the Provincial Secretary that the claims of Wilson and McKenzie, (the appellants) under the Vancouver Island Settlers' Rights Act, 1904, and Vancouver Island Settlers' Rights Act, 1904 Amendment Act, 1917, would be passed on by the Lieutenant-Governor in Council on February 9, 1918 at 11.00 A.M. and enclosing copies of the various documents filed by the claimants in support of their application. It may be here noted that the "various documents" filed by the claimants with the Government had been in the possession of the Executive for some months prior to their notice of February 2, 1918, and that the respondents' solicitors were refused copies or inspection of same until February 2, 1918. The respondents' solicitor and counsel appeared on February 9, 1918, and applied for an adjournment of the hearing for the purpose of properly preparing the respondents' answer to the declarations filed by the claimants in their case. This application was not acceded to and the application asking that the declarants be produced for cross-examination was also refused, as the record shews. It might be said by the Executive that they had no power to compel the claimants to attend for cross-examination. If the claimants and their witnesses refused to attend, the Lieutenant-Governor in Council could in turn withhold the grants until they had submitted themselves for cross-examination. It was strenuously argued by Mr. Taylor (for appellants) before this Court, that respondents were not entitled to notice of the hearing or to be heard before the Executive Council. It was decided by the Full Court of British Columbia in the case of E. & N. R. Co. v Fiddick, 14 B.C.R. 412 at p. 421, that the respondents were entitled to appear and be heard in an application of a similar kind under the Settlers' Rights Act, and which decision I feel I am bound to follow.

It is a well known principle in British jurisprudence that all statutes dealing with the liberty of the subject or which are in terms "confiscatory" all parties interested are entitled to notice and to be heard. In the Queen v. The Wardens, etc., of the Saddlers' Co. (1863), 10 H.L.Cas. 404 at p. 423, 32 L.J. (Q.B.) 337, 11 E.R. 1083, it is said: That it is "of the

B.C.

C.A.

E. & N. R. Co. v. Wilson and Dunlop.

very essence of justice that every person should be heard before judgment is given against him," and the hearing being a quasi-judicial one, the Lieutenant-Governor in Council on the principle of natural justice should have given the respondents' hearing a full and complete opportunity of being heard by presenting their case and by cross-examination of the declarants. The cross-examination would have been a most important feature on the hearing, especially in view of the "flimsy" evidence filed in support of the application. Vide Burns v. National Amalgamated Labourers Union, etc., [1920] 2 Ch. 364, at pp. 374 and 377, and Paley on Convictions, 1904 ed. p. 134; Dominus Rex v. Simpson (1717), 1 Stra. 44, 93 E.R. 375.

In McGregor v E. & N. R. Co., [1907] A. C. 462 at p. 466, it was held by their Lordships of the Privy Council that "but for the British Columbia Act of 1904, (Settlers' Rights Act) and the grant to him (the appellant McGregor) under its provisions the respondents' title to the mines and minerals in question, would be incontrovertible."

That was the respondents' position up to the hearing before the Executive. At that time the Government of British Columbia had no interest in the lands in question, having granted them under the 1884 Act to the Dominion of Canada and it thereafter conveyed them to the respondents herein for railway purposes, such conveyance being duly registered in the name of the E. & N. R. Co. The Province of British Columbia having no title to the lands, the Lieutenant-Governor in Council could not, in my opinion, grant to the appellants the lands otherwise than under ch. 54 aforesaid. They were a judicial body appointed by the Legislative Assembly under ch. 54, 1903-4 B.C., to issue a Crown grant to a "settler" who is defined in the Act as follows: (b) "Shall mean a person who prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt, with the bona fide intention of living thereon."

Therefore in my view, the trial Judge's conclusion was correct that the respondents were entitled to appear and be heard before the Lieutenant-Governor in Council and should have been given a reasonable time in which to prepare their case and above all that the application to cross-examine the persons who made declarations on behalf of the appellants should have been acceded to, and the respondents should be entitled to the declaration asked for and damages for

B.C.

C.A.

E. & N. R. Co. v. WILSON AND DUNLOP.

trespass.

I am also of opinion the respondents should succeed on the ground that the evidence produced to the Lieutenant-Governor in Council in no way complied with that which is called for under ch. 54 sec. 3, 1903 (B.C.) which enacts that (1) A settler shall mean a person who occupied or improved land within said railway land belt prior to the enactment of ch. 14 of 47 Vict. (B.C.) with the bona fide intention of living on the said land, and.... (2) by reasonable proof of such occupation or improvement.

The declarations in the record are almost valueless to shew that Ganner had complied with sec. 3 of the statute to entitle his legal representatives to a Crown grant of the lands.

It must be borne in mind that at the time of the hearing the lands in question stood registered in the E. & N. Railway and to dispossess them of such valuable lands the clearest evidence was necessary and the strictest proof in conformity with the statute should have been required.

The evidence filed in support of the contentions of the trustees consisted of a number of short declarations made by the following persons: John Gribble, Chas. Wilson and A. D. McKenzie, (Ganner's Trustees), Lizzie Peck, Margaret McKenzie, W. H. Morton, W. H. Ganner, and Henry McAddie.

I find on analyzing the declarations that not one of them shewed "reasonable" proof that Ganner was a "settler" as defined in the Settlers' Rights Act, that he "occupied or improved land within the railway land belt," being lands described by sec. 3 of ch. 14 of 47 Vict., 1884, (B.C.), being "An Act relating to the Island Railway, the Graving Dock and Railway lands of the Province," with the bona fide intention of living on the land, accompanied by "reasonable" proof of such occupation or improvement and intention. There is nothing to shew in any of the declarations that the dwelling-house referred to in the declaration of Margaret Harvey as having been built by Ganner had been built by him or that any declarant had ever seen a dwelling house on the land prior to January 1, 1883, nor did they shew any real improvement or was there anything to shew Ganner's bona fide intention of living on the lands in question. Appellants Wilson and McKenzie in a declaration filed with the Lieutenant-Governor in Council, made on July 5, 1917, said: "The said land was first occupied and improved by Joseph

Ganner on or about the day of May, 1883." (Para. 3) "That his claim to receive such grant was based on the following facts:

He settled upon the said land, sections 2 and 3, in range 7, Cranberry District, with the intention of making his home there in the spring of 1883, plans and affidavits are all filed in the Government Office with the application. This surface land was sold to Bing Kee in February, 1904."

On August 29, 1917, the said trustees made a further declaration of which the following is part, viz: "That the said land (meaning the land in question) was first occupied and improved by Joseph Ganner on or about the year 1880 or 1881. (Para. 3) That our claim to receive such grant is based upon the following facts: The said Joseph Ganner took up the land at the date above referred to with the intention of making a home thereon; built a cabin and had some clearing done, and finally sold to one Bing Kee (a Chinese) in February, 1904."

The above declarations of the trustees are so conflicting that I place no reliance on them whatever.

For the above reasons I would dismiss the appeal with costs against the defendants, other than the Crown. In my opinion the Granby company had full knowledge at all times of the respondents' contention that the coal belonged to them. I agree with the principle of assessing the damages set out in the original judgment.

I express no opinions on several other questions argu d before the Court.

Appeal dismissed.

Macdonald, C.J.A.:—The argument of this appeal followed that in E. & N. R. Co. v. Wilson et al, ante p. 577, and was very short. Counsel on both sides relying generally upon their submissions in that case.

The proofs submitted by the appellants in this case are vastly different I think from those in the other one. There is here ample evidence of occupation and improvement and of intention to reside on the land, on the part of the late Archibald Dunlop, and it is therefore impossible to say that there was not reasonable proof thereof submitted to the Lieutenant-Governor in Council.

This conclusion makes it necessary that I should consider the other issues which in view of my opinion of the evidence in the other appeal, I was not there constrained to decide.

B.C.
C.A.
E. & N. R. Co. v. WILSON AND DUNLOP.

The railway company complains that though it received notice of the hearing of the application and was represented by counsel, yet the length of the notice was not reasonably sufficient and further that an adjournment was unreasonably refused, as was also the request that the attendance of those persons who had made statutory declarations in support of the application should be procured for purposes of cross-examination. No practice or procedure is required by statute to be observed by the Lieutenant-Governor in Council, and assuming that the statute contemplates a hearing, though the inference I would draw from its language is against that assumption, I do not think we are at liberty to call in question the mode of procedure adopted or the discretion exercised. It does not appear to me that we are much concerned with what took place before or at the time of hearing. This action is brought to set aside the grant substantially on the ground that the same was not authorised by the statute. We have to decide the question of law, namely was there the "reasonable proof" which the statute requires?

Respondents' counsel further contended that the disallowance of the Amending Act of 1917 destroyed the grant. I adhere to the contrary opinion, which I expressed in In Re Granby Consolidated Co. and the Registrar General of Titles, (1918), 26 B. C. R. 523 at p. 534. They also argued that because of non-registration of the instruments of title no interest in the land passed to appellants the Granby company. I cannot see the relevancy of this. The deed from the Crown is not nullified by non-registration and what is left of the submission is no concern of the respondents. They further argued that because one member of the council was absent from the hearing of appellants' application for the grant that it was therefore null and void. In addition to what I have already said on the question of a hearing, I would add that we were not referred to any authority, statutory or otherwise, in support of this contention, and in the absence of authority to the contrary, I shall infer that the usual procedure followed by the council was observed and that a quorum was present. Again they argued that the amendment of 1917 was ultra vires. The original Act was held by the Judicial Committee to be intra vires, but they argued that because since then the respondents' railway has been declared to be a work for the general benefit of Canada,

and therefore has been brought under Dominion jurisdiction it was not, in 1917, competent to the Provincial Legislature in this way to deplete respondents' assets. This contention in my opinion though ingenious, is untenable. The most that can be urged is that when circumstances require it, the jurisdiction of the Province in respect of property and civil rights must give way to Dominion powers. In this case, no such necessity has been shewn to exist.

The final submission on behalf of respondents calls for very careful consideration. It is that the grant could be made of such lands only as had been in the actual possession of or had been improved by the settler, that is to say, that occupation or improvement of part of the parcel or parcels granted, cannot be said to be occupation or improvement of the whole. When land is not enclosed that is usually so. In this case the answer to the submission is to be found in the Act itself if not in direct terms, at least by fair inference from its terms and its object. Under the land laws then and now in force, persons were enabled to acquire unoccupied and unreserved Crown lands. The lands in question here were not then unreserved, but the Legislature has chosen to treat the matter in favour of the "settler" as if there had been no reserve. That is plain from the language and particularly so from the object of the Act.

The three parcels in question appear to have been surveyed Crown lands. Archibald Dunlop applied to the Land Commissioner of the Province in 1885 for a preemption record and was granted it, and in 1892 the railway company, (respondents) conveyed the surface of these three parcels to him, no doubt in pursuance of the agreement ratified by said Act of 1883. Now while these subsequent acts of the respondents may not be relied upon as a recognition by them of Dunlop's occupancy of these parcels prior to December 19, 1883, they are circumstances which may be taken into consideration, when construing the Act of 1904. The grievance of the settlers was notorious. It was not that they had been unable to obtain title to the surface of their holdings but that title to the minerals, particularly the coal, had been withheld. The object of the Act was to remedy this grievance and if it is to be construed as giving them nothing more than the coal under such portions of their surface holdings as can now be shewn to have been enclosed, or if they are to get relief

B.C.

C.A.

E. & N. R. Co. v. WILSON AND DUNLOP.

limited to the patch or field actually cultivated or otherwise improved, the manifest object of the Act will have been substantially defeated.

I would allow the appeal and dismiss the action with costs here and below.

Martin, J. A. would allow the appeal.

Galliher, J.A.:—I would agree with the Chief Justice.

McPhillips, J.A., would allow the appeal for the same reasons as in the Wilson case. See ante p. 577.

Eberts, J.A. (dissenting):—This is an appeal from the judgment of Gregory, J., 54 D. L. R. 584 in the above cause, arising from the applications for and grant to the appellant Dunlop, (who is the sole devisee under the will of her husband Archibald Dunlop) of the fee of the south-east portion of sect. 4, range 7, the west part of sect. 3, range 8, and the west part of sec. 4, range 8, on the official plan or survey of Cranberry District in the Province of British Columbia, under and by virtue of ch. 54, of the Statutes of British Columbia, 1903-4.

In my opinion given in the case of E. & N. Railway v. Wilson ante p. 577, I set out my reasons why the appeal should be dismissed. This case and the Wilson case came up for hearing before the Lieutenant-Governor in Council on February 9, 1918 and the same application was made in this case as was made in the Wilson case by counsel who acted for both parties, asking for an adjournment for the purpose of preparing the respondents' case in answer to the applicant's case and also for the purpose of cross-examination of the declarations that had been filed. Following the case of E. & N. R. Co. v. Fiddick, (1908), 14 B. C. R. 412 at p. 421, it was held that the respondents were entitled to appear and be heard in an application of a similar kind and under the same Act, and which opinion I feel bound to follow in this case, and to the well-known principles set out in The Queen v. The Wardens etc. of the Saddlers' Company (1863), 10 H. L. Cas. 404, at p. 423, 11 E. R. 1083; Burn v. National Amalgamated Labourers Union etc., [1920] 2 Ch. 364, pp. 375 and 377; Paley on Convictions, 1904 ed. p. 134; Dominus Rex v. Simpson, (1717), 1 Stra. 44.

For the above reasons I would dismiss the appeal with costs against the defendant, other than the Crown, as expressed by me in E. & N. R. Co. v. Wilson. The Granby

Company had full knowledge at all times of the respondents' contention that the coal belonged to them.

I agree with the principles of assessed damages set out in the original judgment.

I express no opinion on the sufficiency of the declarations filed by Elizabeth Dunlop in her application, nor on several other questions argued before the Court.

Appeal allowed.

Can.
Ex. C.
THE KING v. WESTERN TRUST CO.

THE KING v. THE WESTERN TRUST CO.

Exchequer Court of Canada, Audette, J. April 4, 1921.

Escheat (§I.-1).—Constitutional Law—Bona Vacantia—B.N.A. Act, secs. 102-109—Saskatchewan Act, sec. 3—Interpretation—Jurisdiction.

In 1916 one A. H. then domiciled in the Province of Saskatchewan died leaving no heirs or other persons legally entitled to his estate. The estate consisted principally of lands in the Province of Saskatchewan sold under an agreement of sale, which by equitable conversion, made it personal property. The Western Trust Company was appointed administrator and realised assets amounting to $8,123.71. Both the Dominion and the Province claimed this estate as bona vacantia enuring to them by right of escheat. The Dominion suggested that to settle the controversy it should exhibit an information in this Court, making the administrator and the Attorney-General of the Province co-defendants, to which the latter agreed. This was done, and subsequently a defence was filed to the information claiming the bona vacantia in question, without raising therein any objection to the jurisdiction. At trial, for the first time, it was argued by the Attorney-General for the Province that sec. 32 of the Exchequer Court Act, R.S.C. 1906, ch. 140, only conferred jurisdiction in the matter of a controversy between the Dominion and the Province when the latter had passed an Act agreeing thereto, and that sec. 31 did not apply, in view of sec. 32. No such Act was passed by the Province, and no fiat was obtained for the purpose of taking proceedings against the Province.

HELD: That the agreement or consent of the Attorney-General could not bind the Crown in right of the Province; that sec. 32 of the Exchequer Court Act did not apply; and that, on the facts, the Court had no jurisdiction to hear and determine the controversy between the two Governments.

That, however, the Court clearly had jurisdiction in the subject matter with respect to the other defendants, both under sec. 31 of the Exchequer Court Act and sec. 2 of 9-10 Edw. VII. ch. 18.

2. As the Province of Saskatchewan was not at the date of its establishment, owner of any lands, mines, minerals and royalties, nor had any vested rights in any duties or revenues in respect of the lands from which the Province was carved, differing in this respect from the original Provinces of Confederation, secs. 102 and 109 of the B.N.A. Act do not apply to it, notwithstanding sec. 3 of the Saskatchewan Act, in any event, said sections did not purport to transfer any "property" or rights to the Provinces.

Can.

Ex. C.

THE KING v. WESTERN TRUST CO.

3. That the word "royalties" in sec. 109 of the B.N.A. Act does not embrace all kinds of royalties, but is limited in its meaning by the text to such as are connected with lands, mines and minerals, such as inter alia, the right to bona vacantia and of escheat arising by reason of a failure of heirs, which "royalties" by sec. 21 of the Saskatchewan Act are reserved to the Dominion "for the purposes of Canada."

That said sec. 21 did not purport to transfer to or vest any property in either the Dominion or the Province, but was merely declaratory of the Dominion's own right, enacted with a view of removing doubt and for greater certainty.

INFORMATION exhibited by the Attorney-General of Canada to have it declared that a certain estate for which no heirs were found belongs to the Dominion Crown.

The facts are stated in the reasons for judgment.

Audette, J.:—This is an information, exhibited by the Attorney-General of Canada, whereby it is sought to recover the whole estate of a person dying, in the Province of Saskatchewan, without any heirs. The case, furthermore, presents an interest of a high political nature, in that it involves the attribution of such estate, in the nature of bona vacantia, either to the Crown in the right of the Dominion or to the Crown in the right of the Province of Saskatchewan.

On November 13, 1916, one Augustus Heyer, being then domiciled in the said Province, died intestate and unmarried, leaving no heirs or other persons lawfully entitled to his state, and in the course of the following month letters of administration of his estate were granted by the Surrogate Court of the Judicial District of Regina, to the defendant, Western Trust Co. The latter has realised assets amounting to $8,123.71, less $364.50 paid on account of creditors' claims.

The estate, as alleged in the information, wholly consisted at the time of his death of personal property. However, counsel at Bar on behalf of the Dominion stated that the estate consisted principally of a piece of land which had been sold under an agreement of sale, with a mortgage on the land. The sale, by equitable conversion, made the property personal property and subject to a mortgage in favour of a land company, which will have to be paid.

Counsel at Bar, on behalf of the Dominion and the Province, rest their respective claims to these bona vacantia, both under the B.N.A. Act, 1867, and the Saskatchewan Act, 4-5 Edw. VII., 1905 (Can.), ch. 42.

By sec. 3 of the Saskatchewan Act, it is provided:

"3. The provisions of the British North America Acts, 1867 to 1886, shall apply to the province of Saskatchewan in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Saskatchewan had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces."

And it is contended by the Province, that this section had the effect of introducing, in the said Act, the provisions of secs. 102 and 109 of the B.N.A. Act, which provide for the distribution of the revenues between the Dominion and the 4 Provinces therein mentioned. In other words, sec. 102 creates and establishes the source of the consolidated revenue fund of the Dominion; excepting therefrom what is specially reserved by sec. 109 of the said Act, namely: 1st, such portions thereof as are by that Act (B.N.A. Act) reserved to the respective Legislatures of the provinces; 2nd, or are raised by them in accordance with the special powers conferred on them by the Act.

These two sections read, as follows, viz:—

"102. All duties and revenues over which the respective Legislatures of Canada, Nova Scotia and New Brunswick before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided."

"109. All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

The first question that suggests itself on the consideration of these two sections, is whether or not the position of

Can.

Ex. C.

THE KING v. WESTERN TRUST CO.

the Province of Saskatchewan is identical to that of the 4 Provinces which originally formed part of Confederation.

Raising this question is almost solving it.

Section 109 in proceeding to fix the revenues of the 4 Provinces, prefaces by stating that "All lands, mines, minerals and royalties belonging to the several Provinces . . . . . at the Union . . . . . shall belong to the said Provinces."

Now it is of common and elementary knowledge in Canada, that previous to the passing of the Saskatchewan Act, in 1905, that the territory out of which that Province was carved belonged to the Dominion of Canada.

It is unnecessary to labour establishing such a question which has become a well-known page of our Canadian history; but, if it is desired by anyone to so acquaint himself with the details of such facts, reference may be had—to save a long nomenclature of such facts—to the elaborate judgment of Cassels, J., in the case of The King v. The Trust and Guarantee Co. (1916), 26 D.L.R. 129, at pp. 131 et seq., 15 Can. Ex. 403; affirmed 32 D.L.R. 469, 54 Can. S.C.R. 107, where the sequence of such events is stated in detail.

From this statement it follows that the public lands or territory taken from the lands or territory belonging to the Dominion, to form the Province of Saskatchewan in 1905, all belonged to the Dominion—no public lands were given or passed to the Province at the time of its creation, and that, moreover, that these public lands still at the present time remain the property of the Dominion. The very "lands and minerals and royalties incident thereto" referred to in sec. 109 of the B.N.A. Act, are by sec. 21 of the Saskatchewan Act specifically reserved to the Dominion. In 1905, at the time of the formation of the Province of Saskatchewan, this very word "royalties" in sec. 109 of the B.N.A. Act having been already commented upon; in enacting this sec. 21 the matter was made clearer in adding after the word "royalties" the other qualifying words "incident thereto," and these last words constitute a further argument in favour of the canon of construction of ejusdem generis in reading the word royalties in sec. 109 of the B.N.A. Act.

This sec. 21 of the Saskatchewan Act, relied upon by the Province, appears to be an enactment that owes its existence only to the consideration of making matters clearer and removing any doubt and for greater certainty; because it has no other effect than affirming that these "properties"

belonged to the Dominion before 1905, and will continue to belong to it, notwithstanding there was not in the Saskatchewan Act any enactment declaratory of its ownership to the contrary. The section is declaratory of the Dominion's ownership in these lands, mines, minerals and royalties.

Therefore, if the Province can gain any benefit from this section 109 of the B.N.A. Act, it would have to establish that, at the union, at the time the Province was created, "lands, mines, minerals and royalties" belonged to the Province. These premises being obviously established in the negative, it follows necessarily that these "lands, mines, minerals and royalties" come within the ambit of sec. 102 of the B.N.A. Act, and belong to the Dominion, and that the revenues accruing under the "royalties" mentioned in sec. 109, with respect to that Province, either as escheat or bona vacantia, belong to the Dominion under the provisions of sec. 102.

Lord Watson, in delivering the judgment of the Board in the St. Catherine Milling Co. case (1888), 14 App. Cas. 46 at p. 58, referring to sec. 109, said: "Its legal effect is to exclude from the 'duties and revenues' appropriated to the Dominion all ordinary territorial revenues of the Crown arising within the Provinces."

The Province of Saskatchewan stands in quite a different position from that of the 4 original Provinces at the union, in respect of "lands, mines, minerals and royalties" (sec. 109), as these belonged to the 4 Provinces before they entered into the federal pact.

Now, the word "royalties" mentioned in sec. 109, used as it is, must be given the meaning controlled by the text. It cannot be contended that the word "royalties" therein mentioned can or should be given its full extended and literal meaning so as to embrace all kinds of royalties. It means the royalties governed by the context, applying the common rule of construction of ejusdem generis. It is too obvious that all royalties, such as all droits of Admiralty and droits of the Crown, royalties accruing to the Crown from unclaimed wrecks, deodands (now abolished), waifs (bona waviata), bona confiscata, &c., cannot form part of the royalties mentioned in sec. 109. All of this leads to the irresistible conclusion that the meaning of the word "royalties" was intended to be controlled and restricted by the context of cognate matters, Cooney v. Covell (1901), 21

Can.
Ex. C.
THE KING
v.
WESTERN
TRUST CO.

N.Z.L.R. 106; Maxwell on Statutes, 5th ed., 538, 539; The Earl of Ailesbury v. Pattison (1778), 1 Doug. 28, 99 E.R. 22; Forsyth's Cases and Opinions Constitutional Law, 119 et seq.; Mercer case (1883), 8 App. Cas. 767, at p. 778; The King v. Rithet (1918), 40 D.L.R. 670, 17 Can. Ex. 109; The Trust & Guarantee Company v. The King (1916), 26 D.L.R. 129 (annotated), 15 Can. Ex. 403 (1916), 32 D.L.R. 469, 54 Can. S.C.R. 107.

At pages 119, 123 and 124 of Forsyth's Cases and Opinions on Constitutional Law, a similar interpretation is placed upon the word "royalties" associated with the word "land" and like descriptive words.

In the consideration of sec. 109 of the B.N.A. Act, both in the Mercer case, 8 App. Cas. 767, and the St. Catherine's Milling & Lumber Co. case, 14 App. Cas. 46, the Earl of Selborne and Lord Watson in the Judicial Committee of the Privy Council speak of these royalties as "royal territorial rights" and as "territorial revenue," leading to the obvious conclusion that these rights and revenues are exclusively in connection with "lands, mines and minerals" and no others.

Section 109 of the B.N.A. Act would not, up to the present day, seem to be at all applicable to the Province of Saskatchewan, because that Province was not possessed of the ownership of the "lands, mines and minerals and royalties" either as a Province or as a portion of the North West Territories before 1905.

The Parliament of Canada in 1910 passed the Escheats Act, 9-10 Edw. VII. (Can.), ch. 18, whereby it is provided by sec. 2:—"Where His Majesty the King, in his right of Canada, is entitled to any land or other real or personal property by reason of the person last seized or entitled thereto having died intestate and without lawful heirs the Attorney-General of Canada may cause possession thereof to be taken in the name of His Majesty, or if possession is withheld may exhibit an information in the Exchequer Court for the recovery thereof.

This Act entitled the Crown, in the right of Canada, to bona vacantia—and a fortiori in a Province where the lands already belonged to the Dominion—and the Act further provides for the disposition of the proceeds of such escheat or jura regalia.

The third section of that Act provides for the distribution

of the assets of such an estate, in the manner therein set forth and by the Government of the Dominion of Canada.

Having come to the conclusion that the right to the bona vacantia in question, never passed to the Province, but belonged to the Crown in the right of the Dominion of Canada, I am led to the consideration of the position assumed by the defendants respectively.

The Province.

When the question of the conflicting claims by the two Governments to these bona vacantia arose, the Deputy-Attorney-General of the Province, wrote to the plaintiff's solicitor and counsel, the following letter:—

"Regina, August 20th, 1919.

Sirs:—

Re Estate of Augustave Heyer, deceased.

I have the honour to acknowledge receipt of your letter of the 12th instant, and note that the Dominion Government is not willing that this estate should be turned over to the Province of Saskatchewan. I also observe your suggestion that the Attorney General of Canada should file an information in the Exchequer Court, making the administrators of the estate and the Attorney-General of Saskatchewan parties to the information.

This course appears to be desirable in the circumstances, and I may say that it is quite satisfactory to me to have proceedings begun by the Dominion Government in the Exchequer Court as is suggested.

I have the honour to be, Sirs,
Your obedient servant,
T. A. Colclough,
Deputy-Attorney-General.

Messrs. Turnbull & Kinsman,
Regina, Sask."

Acting upon this letter, the information was exhibited making the Attorney-General of the Province a party thereto, and the Attorney-General of the Province, by his solicitors, filed a plea to the information, whereby he claims on behalf of the Province, the bona vacantia in question. However, after consenting to be so made defendant in the case, and having filed and served a defence to the action without raising therein any objection to the jurisdiction of the Court, the Attorney-General of the Province, by counsel at Bar, did not hesitate to argue that the Court had no jurisdiction in the matter as between the two Governments;

Can.

Ex. C.

THE KING v. WESTERN TRUST CO.

that such jurisdiction could only exist, under sec. 32 of the Exchequer Court Act, after the Legislature of the Province of Saskatchewan had passed an Act agreeing to such jurisdiction in cases of controversies.

The Province is not, it is true, legally bound by the letter of the Deputy-Attorney-General, under the decision of De Galindez v. The King (1906), 15 Que. K.B. 320, and the large jurisprudence establishing the Crown is not bound by the laches of its officers. However, the question becomes more serious when the Attorney-General, by his statement in defence, attorns to the jurisdiction and afterwards at trial, by a reflex argument, goes back on his first attitude and blows hot and cold. Qui approbat non reprobat. It is not within my province to pass upon the ethics of such attitude. The Crown in the right of the Dominion by courtesy advised the Province of its intention of instituting the present action; but there was no necessity to do so—an action against the party who has the control of the assets of the deceased's estate would have been quite sufficient.

However, I have come to the conclusion to give effect to this plea of jurisdiction in respect to suing the Provincial Crown, without obtaining, as a condition precedent the issue of a fiat. While the Exchequer Court of Canada may not have jurisdiction to hear, under the provisions of sec. 32 of the Exchequer Court Act, the controversy between the two Governments, it has clearly jurisdiction with respect to the other two defendants to hear and determine the claim made by the information, both under sec. 31 of the Exchequer Court Act and under sec. 2 of the Escheats Act.

The action as against the Attorney-General of the Province of Saskatchewan will stand dismissed. On the question of costs, while, under the present circumstances after attorning to the jurisdiction, there would be justification for a condemnation for costs up to and including the trial; however, taking into consideration that the issues are between two Governments and that the question is a new one, there will be no costs to either party.

The defendant, The Western Trust Company, by their statement in defence, admit the statements in paras. 1, 2, 3, 4 and 7 of the information, and claim no interest in the deceased's estate, except for their costs of administration and payments made by them out of the estate on creditors' claims, but submit their right to the Court to abide by its judgment.

The defendant Henrietta Shulze having, at trial, abandoned any claim under the allegation of common law wife. now rests her claim solely for wages. And I might add that when one accepts and has the benefit of the services of another and there is no reason why these services should be given gratuituously, ordinarily no other conclusion can be reached than that there was a tacit agreement between the parties that the services should be paid for.

It would seem that at the deceased's death, his estate became vested in the Sovereign, as represented by the Dominion of Canada and that the Sovereign could not be divested of the same, only by matter of record.

1st. There will be judgment adjudging and determining that the Crown, in the right of the Dominion of Canada, do recover the bona vacantia in question, the proceeds of the said deceased's estate.

2nd. The action as against the defendant the Attorney-General of the Province of Saskatchewan is dismissed without costs.

3rd. The Western Trust Company is condemned and ordered to pay over and deliver to the plaintiff, the whole of the said estate and the proceeds thereof; to account for its administration, and is at liberty to file a claim with the plaintiff to be dealt with in pursuance of the Escheats Act.

4th. The defendant Henrietta Shulze will be at liberty to file her claim with the plaintiff, proving and establishing the same, and to be thereafter dealt with in accordance with the provisions of the Escheats Act.

Judgment accordingly.

FEINSTEIN v. PAULIN-CHAMBERS CO., LTD.

Manitoba King's Bench, Macdonald, J. January 28, 1921.

Trespass (§I.A—5)—Seizure under Order of Attachment—Maliciously Suing Out Process—Reasonable and Probable Cause—Absence of Malice—Damages.

In an action brought to recover damages for improperly seizing goods under an order of attachment the Court held that the action was not maintainable for maliciously suing out process, because malice without which the action could not be supported had not been proved nor for trespass because the seizure was made under a valid attachment order induced by the conduct of those in charge of the business.

[Clissold v. Cratchley, [1910] 2 K.B. 244, 79 L.J. (K.B.) 274, distinguished.]

ACTION brought to recover damages for improperly

Man.

K.B.

FEINSTEIN v. PAULIN-CHAMBERS CO.

seizing goods under an order of attachment, and alternatively for trespass.

B. L. Deacon, for plaintiff.

S. P. Gemmill and R. A. Bruce for defendants.

Macdonald, J.:—Under paras. 3, 4, 5 and 6 of the statement of claim, the plaintiff alleges that the defendants falsely and without reason or probable cause, caused its officers, agents and employees to make false affidavits on an application for an attachment order and upon such affidavits wrongfully, illegally and unlawfully procured an attachment order and placed the same in the hands of the sheriff of the eastern judicial district, under which the sheriff, on February 12, 1919, did enter into possession of the plaintiff's store, did eject the plaintiff from the said store and said business and thereafter excluded and has kept excluded the plaintiff therefrom and from the possession of said goods, wares and merchandise and has deprived the plaintiff of the said goods, wares and merchandise, and of the use and possession of same and of the said store; and posted up a notice of the said seizure on the said store and the plaintiff has been prevented from carrying on business since that date and has lost the profit that she would have made from carrying on said business, and the said business has been disrupted and she has been injured in her credit and standing with her customers and by reason of the acts of the defendants all customers of said business have ceased to trade with the plaintiff; and that the said defendants unlawfully, illegally and wrongfully continued the sheriff in possession under the said order until on or about March 13, 1919, when the plaintiff was compelled to and did, by reason of the acts of the defendants, assign for the benefit of creditors.

And in the alternative the plaintiff charges that on or about February 12, the plaintiff was in possession of premises known as 341 Nairn Ave. in the City of Winnipeg, and the owner and in possession of the goods, chattels, stock in trade, furniture and effects therein, and that on the said day the defendant by his servants or agents, namely, the sheriff of the eastern judicial district, seized and took possession of the plaintiff's goods, chattels, furniture and effects and also took and kept possession and illegally ejected the plaintiff from the said premises and refused to permit the plaintiff to carry on business therein and converted the

said goods to its own use and deprived the plaintiff of said goods and possession of said premises.

The plaintiff claims that there was no indebtedness owing by her to the defendant and that, therefore, the attachment order was wholly illegal and unjustifiable, and she further claims that the defendant committed the acts complained of under an order of attachment signed by a Judge of this Court when as a matter of fact the said Judge had no jurisdiction to make such order by reason of the fact that the affidavits on which the said order was based did not comply with Rule 814 of the King's Bench Act, R.S.M., 1913, ch. 46, in omitting to state that the debtor is justly and truly indebted to the creditor or is legally liable to him in damages "after making all proper and just set-offs, allowances and discounts."

The affidavit contains the words "after making all just discounts and allowances," omitting the word "set-offs."

It is the omission of this word "set-offs" which the plaintiff claims makes the order for attachment wholly void.

The indebtedness, upon which the proceedings under the attachment order were based, was contracted under the following circumstances:—In 1917, Sam H. Feinstein called at the place of business of the defendant company and purchased some goods in the name of the Royal Supply Co., and paid for them in cash at the time.

In the fall of the same year he called again and discussed a line of credit and represented himself as a jobber with a warehouse at 341 Flora Ave., in which he stated he had stock to the value of $4,000.

A line of credit was arranged.

In November and December of that year he failed in his payments as arranged, and a clerk was sent to interview him at his warehouse at 341 Flora Ave. The clerk returned and reported that there was no warehouse at 341 Flora Ave.; that 341 Flora Ave. was a small residence.

The defendants then consulted with other creditors with whom debts were contracted in a similar way, and not being able to locate Feinstein, they engaged a detective agency. This agency made an investigation and reported from day to day.

In the meantime, Wardrope, manager of the defendant company, remembering the name under which Feinstein had represented himself as carrying on business, discovered a store at 341 Nairn Ave. carrying on business under the

Man.

K.B.

FEINSTEIN v. PAULIN-CHAMBERS CO.

name of the Royal Supply Co. He called at the store and interviewed the father of Sam H. Feinstein, the only one present and apparently in charge of the business. He made a few enquiries, asked for Sam and was informed by the father that Sam was down town and would be back after lunch, and he was also told by the father that they were selling out the business and that they were going out of business. This witness then asked about Sam's business when the father refused to discuss the matter any further and ordered him out of the store. As a matter of fact at this time Sam had absconded and had been gone for upwards of a fortnight.

On this occasion this witness saw their own goods in the store, that is goods in which they were dealing and which they were manufacturing, there being close to one hundred packages, with several barrels and boxes of biscuits and his company's make of chocolates.

They discovered that Sam H. Feinstein, his father, mother, brother Louis, and sister, all lived in the cottage at 341 Flora Ave., and that the goods which were ordered by Sam and for which he obtained credit were stored in this cottage. The report of the detective agency was in part to the effect that automobile loads of goods were moved from time to time from this cottage to 341 Nairn Ave.

The defendants then further consulted the other creditors referred to and they decided on consulting their solicitors and reported the result of their investigation and the reports of the detective agency and were advised to proceed against all those who appeared to be connected with the business of the Royal Supply Co., and as a consequence a statement of claim was issued.

Shortly after the issue of this statement of claim it was found that goods were being sold out of the store in larger quantities than in the usual course of trade and at much reduced rates, and the defendants, realising that the goods were being speedily disposed of, again consulted their solicitors, and it was considered advisable, and they were so advised, to issue an attachment and the attachment order complained of issued, under which the goods were seized by the sheriff.

Shortly after the seizure an application was made by the plaintiff in the action to set aside the order of attachment This application was dismissed. The plaintiffs then appealed from the order dismissing the motion to set aside the

attachment order and upon coming before the Court of Appeal this appeal was dismissed.

In the meantime the sheriff continued in possession and when the plaintiffs found they could not set aside the order of attachment, they made an assignment for the benefit of their creditors and the sheriff withdrew from possession upon payment by the assignee of his costs, amounting to $105.50.

The claim, under paras. 3 to 6 inclusive, of the plaintiff's statement of claim, discloses an action on the case to succeed in which the plaintiff would have to prove malice. See Clissold v. Cratchley, [1910] 2 K.B. 244, 79 L.J. (K.B.) 274.

Both parties to the action rely strongly upon this case, the plaintiff's counsel practically confining his right to succeed on it.

Under paras. 9 and 10, being a claim in trespass, malice is not an ingredient.

Under the facts as they have developed in this case there is no appearance of malice nor is there an absence of reasonable and probable cause.

The case presents the appearance of a deliberate and well-thought-out scheme to obtain credit, to dispose of the goods, and to escape liability for payment.

Louis Feinstein says that the business of the Royal Supply Co. was the business of the mother and that she was the sole and only proprietor and owner of the goods and chattels connected with that business; that he himself was the manager at a salary, assisted by his father and sister, and that Sam had nothing whatever to do with the business and that he took no part or interest in the business. I place little reliance on his evidence. Exhibits 12, 13 and 14 are cheques made payable to the Royal Supply Co. and endorsed "Royal Supply Company, General Merchants, 341 Nairn Avenue, Winnipeg, S. Feinstein," two of them having the rubber stamp of the Royal Supply Co., the other without the rubber stamp, simply in writing "Royal Supply Company, per S. Feinstein" (it is admitted these cheques were connected with the business at 341 Nairn Ave), and yet in the face of these cheques this witness says that Sam Feinstein never had anything to do with the business of the Royal Supply Co. and his only explanation is, although admitting that this is Sam's signature, that Sam had no authority.

In their action against the Feinsteins, Sam did not enter a defence and as against him the plaintiffs (defendants here)

Man.

K.B.

FEINSTEIN v. PAULIN-CHAMBERS CO.

recovered judgment but failed as against Anna Feinstein, the plaintiff herein, and her other co-defendants, and as a result of this action the order for attachment was dissolved.

This fact, however, does not establish the ownership in the goods in this plaintiff. Were the goods the property of Anna Feinstein is to my mind still a doubtful question. Apart from this, however, and assuming that she was the owner, has there been a trespass?

In Clissold v. Cratchley, [1910] 2 K.B. 244, the action was brought to recover damages for improperly levying execution, and alternatively for trespass.

It was there held that for maliciously suing out process the allegation of malice is one of fact which must be proved and that if it is not proved the action cannot be supported but in actions for trespass malice is not a necessary ingredient.

In that case the defendant issued execution notwithstanding that the total amount of debt and costs ordered by it to be paid by the plaintiff had been in fact paid and Vaughan Williams, L.J., says, at p. 250: "If the judgment was not an existing judgment, it is manifest that the writ of execution issued under it was void ab initio, and that an entry has been made upon the plaintiff's premises under a writ void ab initio. The defendants are consequently liable in an action of trespass."

But here the seizure of the goods was under an attachment order that is valid and the issue of the order was induced by the conduct of those in charge of the business disposing of the goods in such a way that there was likelihood of a hopeless result from a successful determination of the action brought for the price of the goods, the subject of the action preceding the attachment order, and this latter proceeding was for the purpose of preserving the goods pending the result of that action.

The conduct of the defendants was to my mind reasonable and justifiable, whereas, that of Sam Feinstein was of the most rascally character, aided and abetted, I am satisfied, by all the others actively engaged and interested in the business carried on under the name of the Royal Supply Co.

I find that there was no trespass by reason of the issue of the attachment order and I am not satisfied that the plaintiff herein is the owner of the goods in question. I

therefore dismiss the action.

Costs to the defendant with respect to which I remove the statutory limitations.

Action dismissed.

BELLAMY v. CITY OF EDMONTON.

Alberta Supreme Court, Appellate Division, Harvey. C.J., Stuart and Beck, JJ. April 1, 1921.

Municipal Corporations (§IIA.-30).—Right to Give Gratuities to Officers and Employees—Edmonton Charter sec. 57.

The fact that the City of Edmonton is authorised by sec. 57 of its charter to give gratuities to officers of the corporation in certain specified cases, does not by implication prohibit it from giving gratuities to employees for faithful service in cases which do not come within the section.

[Enright v. Montreal (1909), 37 Que. S.C. 448; Hampson v. Price's Patent Candle Co. (1876), 45 L.J. (Ch.), 437, 34 L.T. 711, 24 W.R. 754; Montreal v. Tremblay (1906), 15 Que. K.B. 425; Hatton v. West Cork R. Co. (1883), 23 Ch. D. 654, considered.]

THE PLAINTIFF, an elector and burgess of the City of Edmonton, has brought an action against the city treasurer asking for an injunction restraining the defendants from paying certain bonuses to certain employees upon their retirement from the city's service. An ex parte injunction was granted by Hyndman, J., and upon a motion in Chambers on notice to continue it until the trial the matter was by agreement referred to this Court. It was agreed that the motion to continue should be turned into a motion for final judgment in the action.

P. G. Thompson, for appellant.

J. C. F. Bown, K.C., for respondent.

The judgment of the Court was delivered by

Stuart, J.:—On March 14, 1921, the finance committee of the city council presented a report to the council in the following words:

"The Mayor and Council:

Gentlemen:—Your committee have considered the attached report of the Commissioners submitted by His Worship the Mayor. We appreciate the fact that there are special circumstances in connection with each of these cases which would warrant the granting of a bonus and would recommend as follows:—(1) Mr. W. A. Ormsby, in recognition of his long service, $1,000. (2) Mr. R. English, in view of his efficient discharge of very exacting duties, $1,000. (3) Mr. A. R. Duncan, whose retirement is due to injuries received while on duty, $1,000.

Alta.

S.C.

BELLAMY v. CITY OF EDMONTON.

We feel that the above recommendation is justified by the individual merits of each case but are of opinion that this should not be considered as establishing a precedent for any future action." The Commissioners' report is also before us. The question is whether the City Council has authority to make these payments out of the funds of the city.

The only specific reference in the Edmonton Charter to the question of granting bonuses to retiring employees is contained in sec. 57, which reads as follows:—

57. The Council may grant any officer of the City who has been in the service of the City, including its previous existence as a town, for at least twenty years, and who, while in such service, has become incapable through age or illness of efficiently discharging the duties of his office, a sum not exceeding his aggregate salary for the last three years of his service as a gratuity upon his dismissal or resignation.

It was contended by the plaintiff that inasmuch as the statute had expressly given power to grant a gratuity in the specified cases there must be implied a prohibition against the granting of one in any other case which does not come within the words of the section. In other words, it was suggested that the rule expressio unius est exclusio alterius should be applied.

But as Wills, J., said in Colquhoun v. Brooks (1887), 19 Q.B.D. 400, at p. 406, "The method of construction summarised in the maxim 'expressio unius exclusio alterius' is one that certainly requires to be watched," or as Lopes, L.J., in the same case in appeal (1888), 21 Q.B.D. 52, at p. 65, said, "It is often a valuable servant but a dangerous master to follow in the construction of statutes or documents."

In my opinion it is fairly clear that in passing the section the Legislature was not considering the ordinary case of a comparatively small gratuity that any employer may feel just to give to a retiring employee but was actually intending to grant an extraordinary power to go to a very great length in certain very special circumstances. The power to give the total salary for the last three years is certainly a very unusual power. What the Legislature was, I think, obviously intending to do was to authorise the payment of an extremely large bonus or gratuity where there had been service for 20 years and age or illness had come on which prevented further efficient service. In the case of Ormsby, assuming him to come within the terms of the section in

respect of age or illness, the council would have authority to grant him as much as ten or twelve thousand dollars. The Legislature evidently felt that it was right to authorise the council in its discretion in the circumstances mentioned to go even as far as that but that express authority was necessary to create the power to do so. In this view I think the Legislature left untouched, by specific reference, the question of the granting of what may be called ordinary gratuities. Certainly I cannot conceive it possible that the Legislature intended by sec. 57 to prohibit the granting of small gratuities to the very numerous common employees of the city.

It must be observed also that sec. 57 speaks only of "any "officer" of the City as pointed out by Beck, J., in delivering the judgment of the Court in Speakman v. City of Calgary (1908), 1, Alta.L.R., 454, at p. 461, "The distinction between an officer and a mere employee is fully recognised though it is not always easy to draw the line between the two." In that case it was decided that a city engineer was not an "officer" within the meaning of that word as used in the Calgary charter.

The deliberate omission of all expressions other than "officer" in sec. 57, although in many of the foregoing sections the word is found associated with a number of other expressions, points, I think very clearly, to an intention that the provisions of sec. 57 should apply only to "officers" strictly so-called and that the case of other employees was not being considered at all. In other words, I think the Legislature in substance said: Where the city has had an officer, in the proper sense of that word as explained in the Speakman case, in its employ for over twenty years, and he has to retire through age or ill health, the council may go so far as to give him a gratuity amounting to three years' salary. In such particular cases, that is, the enactment expressly permits for special reasons which might otherwise have been thought a most excessive and unreasonable exercise of power in rewarding a public servant for faithful service.

Now clearly neither English nor Duncan was an "officer" within the meaning of the section. That, however, only means that in their case the council has not the special authority to give as much as three years' salary to them. I do not think, for the reasons I have given, that it neces-

Alta.

S.C.

BELLAMY v. CITY OF EDMONTON.

sarily means that it is absolutely impossible for the council to give them any bonus or gratuity at all.

With respect to Ormsby indeed who was a city commissioner, who had been in the city service for twenty-one years and who in his letter of resignation gave the condition of his health as his reason for resigning, I think his bonus may be authorised by the section. I think he might perhaps be considered an "officer" within its meaning; and I also think in the absence of any evidence to the contrary the statement in his letter of resignation must be accepted as sufficient proof that owing to ill health he was not capable of performing efficiently the duties of his office. But even if this were not so and the condition of illness could not be considered as fulfilled I do not think it necessarily follows that even an officer is excluded from the possibility of such a bonus as might probably be given to an ordinary employee. It would merely follow that there was no express authority for the large grant of three years' salary in his case.

The question, therefore remains, to consider whether the city council has a general power to grant reasonable gratuities to its employees. In considering this question I think there are two circumstances which must be remembered. The first is the very wide and general powers given by the charter to the city council. By sec. 221 the council is authorised to "make by-laws and regulations for the peace, order, good government and general welfare of the City of Edmonton." This is a general power which was never found in the older municipal statutes and charters under which the theory of strict limitation upon a council's powers grew up. It was under a similarly wide clause that it was held in Enright v. The City of Montreal (1909), 37 Que. S.C. 448, and in Montreal v. Tremblay (1906), 15 Que. K.B. 425, that some such payments as are in question here could lawfully be made.

The other consideration, perhaps growing out of the first, is that the City of Edmonton does carry on business undertakings or so-called "utilities" which in older days were considered to be entirely reserved for private trading or business companies. In these circumstances I think it is the law of trading corporations, rather than that of municipal corporations, in the old, strict sense, that may be more properly applied. I do not observe that it appears where, in the actual city accounting, the sums voted are to be charged.

But I would suggest that it might perhaps be quite open to the council to charge up these sums, or part of them, distributively against the revenues of these various utilities or businesses. Indeed I have no doubt that the necessity of employing a claims agent such as Duncan was due to some extent to the fact that the city is really carrying on a railway business, and other businesses similarly productive of accidents, just like the ordinary railway companies have to do.

Now, in Robson and Hugg, Municipal Manual, at p. 332, in a note to a clause in the Municipal Act in the exact wording of sec. 247, it is said:

"A gratuity to employees in the case of joint stock companies can be given without express powers. Hampson v. Price's Patent Candle Co. (1876), 45 L.J. Ch. 437, [34 L.J. Ch. 711, 24 W.R. 754]; Hutton v. West Cork R. Co. (1883), 23 Ch. D. 654, and the rule would probably apply to municipal corporations; but a gratuity on removal or resignation would require express authority."

For this last expression no authority is cited but the passage deals only with municipal corporations in the narrow sense, and it raised a distinction the principle of which I cannot quite clearly see, that is, I cannot see just why a gratuity may not be given on retirement from service as well as during service. It is not merely for the effect on the recipient that such a thing is done but for the effect upon the general body of employees.

In Hutton v. West Cork R. Co., 23 Ch.D. at p. 665, Cotton, L.J., referred to Hampson v. Price's Patent Candle Co., saying, "Where the Master of the Rolls held that the directors of Price's Patent Candle Company were at liberty to make and could not be restrained from making a gratuity to their servants when there had been a very good year, by giving each of them who was in their service and was of good character a gratuity equal to a week's wages. In my opinion those cases (referring also to another case) went on a principle which is not applicable to the existing state of this company from the time when it handed over its railway to another company and existed only for the purpose of winding up the concern. The principle of those cases, as I understand, is this, that where there are directors of a trading company those directors necessarily have incidentally the power of doing that which is ordinarily and reasonably done in every such business with a view to getting

Alta.

S.C.

BELLAMY v. CITY OF EDMONTON.

either better work from their servants or with a view to attract customers to them as in the case of an insurance company. In the last mentioned case the Master of the Rolls refers to this—that although it is said that nothing of this kind is to be expected again, yet when such a gratuity is given to servants in a good year the servants then in the company's service whom the directors may reasonably expect to stay naturally look forward, not as a matter of right, but as a matter of liberality, to this, that they will probably be dealt with in a similar way if by their exertions they get a good profit and that therefore that was a reasonable mode of carrying on the business of the company for the purpose of making it most profitable. But that assumes that it is a going concern, that it is a continuing business and it is with reference to the effect upon the continuing business that the directors are said to have that power incidentally."

It was therefore merely because the company in question was being wound up that the gratuity was there held to be ultra vires. In the case before us the city is certainly not going out of business. It is continuing necessarily its various utilities as well as its municipal business in the narrower sense of the term. And I am of opinion that the principle referred to by Cotton, L.J., can and ought properly to be applied to a municipal corporation which carries on such operations as the City of Edmonton does. The only point of possible doubt would seem to lie in the fact that the servants in question are retiring from the service. But as the case cited shews it is on account of the probable encouragement to employees generally, those who still remain in the service, and not merely those who at the moment receive the gratuity, that the payment is held to be proper.

No doubt the payment must be within reason and made bona fide and an utterly unreasonable amount would probably be considered as evidence at least of the absence of bona fides. In such a case I think the Court could probably interfere but there is no question of such a situation in the case before us.

I think therefore the injunction should be dissolved and the action dismissed with costs.

Action dismissed.

IN RE X.

Ontario Supreme Court, in Bankruptcy, Holmested, Registrar. August 16, 1920.

Bankruptcy (§I.—6)—Petition in Bankruptcy—Trustee Acting in Person in Filing—Liability—Solicitors Act.

A petition in bankruptcy can only be filed by a duly qualified solicitor. The appointment as a trustee does not entitle the trustee to act personally in such a proceeding.

[See Annotations, Bankruptcy Act of Canada 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act 1921, 59 D.L.R. 1].

TENDER by one of the appointed trustees under the Bankruptcy Act of a petition in bankruptcy of three persons, calling themselves creditors of X. Tender refused.

One of the duly appointed trustees under the Dominion Bankruptcy Act 1919, ch. 36, tendered to G. S. Holmested, K.C., Senior Registrar of the High Court Division of the Supreme Court of Ontario, for filing, a petition in bankruptcy of three persons, calling themselves creditors of X.

The Registrar declined to receive or file the petition, giving reasons for so declining in a memorandum.

(1) The Act and Rules made thereunder being silent as to the particular officer or officers of the Court who are to act in bankruptcy, the Registrar was inclined to think that all the officers of the Court holding the position of Registrar were intended to act as Registrars in bankruptcy. The only officers on whom any duties are expressly imposed or powers conferred by the Act are the Registrars: see sec. 65. By sec. 2 (ee), "registrar" includes any other officer who performs duties like to those of a Registrar. The Supreme Court of Ontario is constituted the Bankruptcy Court for Ontario: Section 63 (1) (a), but it is nowhere specifically stated that all the Registrars, or any particular Registrar, are or is to be the Registrars, or Registrar in bankruptcy. The Act seems to have committed to the Chief Justice of each Court the power to "from time to time appoint and assign such registrars, clerks, and other officers in bankruptcy as he deems necessary or expedient for the transaction or disposal of matters in respect of which power or jurisdiction is given by the Act," sec. 64 (4). So far as the Registrar was aware, no such appointment or assignment had been made. It appeared to him that it was his duty to facilitate the working of the Act by holding that he had jurisdiction rather than to take the position that none of the Registrars has any jurisdiction, and more particularly so as, by R. 66, any officer refusing to act as

Ont.
S.C.
RE X.

Registrar in Bankruptcy exposes himself to a charge of contempt of Court. The Registrar, therefore, held that he had jurisdiction in bankruptcy in the present state of affairs.

(2) The Registrar, while inclined to think that the central office was the best and most appropriate place for filing petitions in bankruptcy, yet thought that he ought not to refuse to receive and file in his office petitions tendered to him. In case it should be determined that they should be filed in some other office, he would be ready to transfer them on the direction of a Judge. No regulations having been made, the officers of the Court are left to adopt such course as might seem best to themselves: It is their duty to facilitate as far as they can, and not to obstruct, proceedings in Court.

(3) An officer of the Court ought not to assist any person, assuming to act as a solicitor in any proceeding in Court, whom he knows or has good reason to believe to be not duly qualified.

(4) By R. 152, the general practice of the Court in civil actions is, in cases not otherwise provided for, to govern the procedure in bankruptcy. The filing of a petition in bankruptcy is equivalent to taking any initiatory step in a civil proceeding; and the ordinary rules governing the issue of writs of summons apply to the filing of petitions in bankruptcy. Litigants in bankruptcy may, as in civil proceedings, act in person; but they cannot act by any other person except a practising solicitor. The gentleman tendering the petition here does not pretend to be a solicitor, and he is mistaken in supposing that his appointment as a trustee in bankruptcy entitles him to act as the agent of creditors in proceedings in Court. If he were to file the petition, he would be exposing himself to the penalties for practising as a solicitor without authority: The Solicitors Act, R.S.O., 1914, ch. 159 sec. 4.

(5) The petition itself is manifestly defective: it omits the name of the Court, the words "In Bankruptcy," and the name of the matter to which it relates: R. 7, and Form 1. It also omits to state by whom it is filed and the address of the person filing it, as required by the practice in civil cases. It should not be filed in its present form.

(6) The petition is also defective in substance, for it fails to specify any act of bankruptcy. The petition states only one thing as an act of bankruptcy viz., that X. "is and has of late been unable to conveniently pay his liabilities

as they mature." That is not one of the acts of bankruptcy mentioned in sec. 3; and the acts specified in that section are the only acts which constitute acts of bankruptcy entitling creditors to proceed against the debtor under the Act.

(7) The petition is not verified by affidavit: sec. 4 and Form 3.

Filing refused.

RE SHAW.

Ontario Supreme Court in Bankruptcy, Holmested, Registrar. October 28, 1920.

Bankruptcy (§I—6)—Application for Approval of Court of Composition and Extension Arrangement—Application made by official Trustee in person—"Party to the Proceeding"—Meaning of—Solicitors Act, Sec. 4—Bankruptcy Act, Sec. 13 (5).

An official trustee in bankruptcy is a party to the proceeding within the meaning of the Solicitors Act in an application for the approval of the Court of a composition and extension of time arrangement, and so is entitled to make the application under sec. 13 (5) in person. It is however advisable that such applications—especially contentious applications—should be made by a solicitor.

[See Annotations Bankruptcy Act of Canada, 1920, 53 D.L.R. 135; Bankruptcy Act Amendment Act, 1921, 59 D.L.R. 1.].

APPLICATION by an official trustee in Bankruptcy for the approval of the Court of a composition and extension arrangement under sec. 13 (5) of the Bankruptcy Act 1919, (Can.) ch. 36.

The Registrar, in a written judgment, said that the Act expressly authorised the trustee to apply to the Court to approve of the agreement: see sec. 13 (5).This was the first application of the kind; and the question whether the trustee may apply in person, or whether he must apply by solicitor, where he does not happen himself to be a practising solicitor, arose.

It is to be noted that the application is not a mere matter of form, but involves the exercise of judicial discretion. Before approval, the report of the trustee as to the terms of the agreement, and as to the conduct of the debtor, and any objections which may be made on behalf of any creditor (sec. 13 (7)) have to be considered; and, if the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, or in any case where circumstances are proved which would require the Court to refuse or suspend a discharge to a bankrupt, the application to sanction the proposal must be refused: see sec. 13 (8).

Ont.

S.C.

RE SHAW.

The Registrar had already held in Re X. (1920), ante p. 617, that an official trustee who is not a solicitor cannot file a petition in bankruptcy. But this application involved different considerations. The Solicitors Act, R.S.O. 1914 ch. 159, secs. 3 and 4, forbids any person acting as a solicitor in any Court who is not duly qualified, and exposes any person contravening the Act to punishment "unless himself a party to the proceedings." The question therefore arises: "can a trustee in bankruptcy be said to be "a party to the proceedings," in an application of this kind in which he is the official trustee? He is the person in whom the estate in question is vested; and, in the opinion of the Registrar, the official trustee may be said to be "a party to the proceedings," within sec. 4 of the Solicitors Act, and as such entitled to make the present application. At the same time it would appear to be advisable that such applications—and especially contentious applications—should be made by a solicitor; in many cases there might be a saving of time and expense if a solicitor were employed.

The Registrar, therefore, appointed a time for the hearing of the application as asked.

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.

WESTERN CANADA FLOUR MILLS CO. LTD. v. THE WHITE BAKERY.

Alberta Supreme Court, Blain, M.C. January 4, 1921.

Money in Court (§I.—1)—Payment in Under Garnishee Summons—Not Payment to Garnishing Creditor Within Meaning of the Bankruptcy Act—Application for Payment Out—Assignment Made Subsequent to Argument—Payment Out to Trustee.

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

MOTION by attaching creditors, for payment out of moneys paid into Court on a garnishee summons.

S. H. McCuaig, for plaintiffs.

G. B. O'Connor, K.C., for defendant, and for the bankruptcy trustee, claimant.

Blain, M.C.:—I do not think that payment into Court under a garnishee summons is payment to the garnishing creditor within the meaning of sec. 11 of the Bankruptcy Act, 1919, 9-10 Geo. V. (Can.), ch. 36, as amended 1920 (Can.) ch. 34, sec. 6. The garnishee summons requires the garnishee, if he does not dispute his liability, etc., to pay the money, or sufficient of it to answer the debt, into Court and the moneys are not to be paid out except on consent or under an order. In this case an application had been made for payment out of garnisheed moneys in Court, and the assignment under the Bankruptcy Act was made subsequent to the argument of the application but before any order was signed or entered. The money had not been actually paid to the attaching creditor and must be paid out to the trustee. The attaching creditor is however entitled to a lien thereon for his costs which should, I think, include the costs of the application for payment out. The order will provide for payment out to the attaching creditor, the amount of his taxed costs, and payment of the balance to the trustee.

Judgment accordingly.

HELLWIG v. NICHOLSON.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 20, 1921.

Landlord and Tenant (§III.B—45)—Fixtures—Removal of by Tenant—Damages.

APPEAL by defendant from a District Court judgment allowing plaintiff damages for the removal of certain fixtures from premises occupied by the defendant as a tenant.

Alta.

J. Cormack, K.C. for appellant.

A. D. Harvie for respondent.

The judgment of the Court was delivered by

Harvey, C.J.:—The amount allowed was $135 for certain mirrors and paneling taken from the walls, $74 for three dining booths and $25 for a sink. The defendant did not put any of these in but he claimed by purchase from his predecessor who assigned the lease to him and sold him some goods and fixtures.

Of the booths one only was put in by the tenant, the other two being there when he first became tenant. They were in fact partitions creating private rooms or alcoves and to remove them some of the lumber had to be sawn. The sink had always been in the premises but parts had been replaced and repaired by the tenant. I would feel no doubt that these could not be considered tenant's fixtures unless by special arrangement with the landlord. It is not necessary however to decide, for I think there was ample evidence to warrant the trial Judge in coming to the conclusion that neither they nor the mirrors and paneling ever became the property of the defendant. The latter says that when he purchased from his predecessor Sakas he had him point out all the things being purchased and thereupon a bill of sale was drawn up which describes the property as "all the fixtures furnishings and furniture owned and used in connection therewith, (i.e., the restaurant) including the following:—1 cash register No. 1190930; 1 victrola with all the records used in connection therewith; 1 desk; 1 cigar case; 1 wall case; 1 lunch counter; 11 stools; 28 chairs; 7 tables; 1 milk cooler; 1 coffee urn; 1 long mirror; 2 jars; 1 clock; 2 electric fans; 1 ice box; 1 range; 5 electric fixtures; with all the dishes, cutlery and other tableware and 1 Remington Typewriter No. 7." It is to be observed that not one of the things in dispute is mentioned for the mirror is admitted to be quite different from the mirrors in question and it seems very strange that when mentioning things of so little value as stools, jars, etc., no mention should have been made of them if they had been intended to be included.

The plaintiff distinctly says also that when the mirrors and paneling were put in by Sakas it was understood between them that they were to remain and this is not denied and if they were not owned by him the bill of sale did not purport to carry them to the defendant.

I would dismiss the appeal with costs.

Appeal dismissed.

CLARK v. NORTHERN INVESTMENT CO. Alta.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. April 5, 1921.

Damages (III.A—64)—Agreement to Lease Premises to Plaintiff—Definite Date for Delivery of Possession—Workmen's Strike—Failure to Complete Building—Breach of Agreement.

APPEAL from the judgment of a District Court Judge dismissing an action for damages for breach of an agreement to lease certain premises. Reversed.

N. D. Maclean, for appellant.

G. B. O'Connor, K.C., for respondent.

The judgment of the Court was delivered by

Harvey, C.J.:—This is an appeal from Crawford, Co. Ct. J., who dismissed the plaintiff's claim for damages for breach of an agreement of lease.

Early in May 1919, the defendant agreed to lease to plaintiff certain premises and on the 13th of that month the latter paid $25 on account of the first month's rent when a receipt was given in the following terms:

Edmonton, Canada, 13 May 1919.

Received from J. E. Clarke twenty five dollars being a/c rent 10350 101 Avenue to date from 1 June 1919. (Rent $100 per month)

Sgd. Northern Investment Company, Limited
By R. H. Drever."

Mr. Drever was the manager of the defendant company and he was made aware that the plaintiff was required to give up the premises he was then occupying on June 1. The plaintiff however also knew that there were tenants in the new premises he was leasing who intended to vacate only when they could get into new premises which were then being prepared and which the defendant also controlled. There was a strike in the spring of 1919, and it was stated that by reason of it the premises being prepared were not ready for occupation on June 1 or till some weeks after and in consequence the premises leased to the plaintiff were not vacated and he was unable to obtain possession. There were attempts to arrange matters but without success, with the result that the plaintiff, who had to move, was obliged to obtain storage premises for a time and later new premises which he claims are not as suitable for his business.

The defendant contends that the lease was to begin on June 1 only upon condition of the tenant vacating by that time and Drever swears that was so stated. It is to be observed however that the written document is inconsis-

Alta.

tent with this as is also the fact that on May 31 the defendant wrote the plaintiff formally notifying him that on the next day there would be due from him $75 balance of rent for the month of June. It is said this was a formal letter sent out in the ordinary office routine. But it shews at least that in the records of the defendant's office there was nothing to indicate that the lease was other than an absolute one from June 1.

The action was tried on March 26, 1920, and on August 25 following judgment was given in these words: "This action stands dismissed with costs for the reasons given in the argument of counsel for defendant."

The case shews that arguments in writing were submitted and in his factum defendant's counsel sets out what he states was his written argument below. The ground then stated is that June 1 was a tentative date conditional upon the other tenant vacating. The same ground is argued before us as well as that in a case such as this where a strike intervened there should be a reasonable view taken, and a giving and taking by the parties. The plaintiff naturally objects to his doing all the giving and the defendant doing all the taking, for it is not to be overlooked that the reason the premises were not vacated by June 1 was due to the default, not of a third party, but of the defendant itself to have the new premises ready. There may have been excuse for it but still it was their default and they could not put their old tenants out.

Then as to the condition, besides the evidence of Drever, Deighton, the occupant of the leased premises stated that he told plaintiff that he was promised his new premises by June 1 but that he would not guarantee anything, but that plaintiff could come in as soon as he got out. He also says that the strike came on after this. Drever also says that when he made the lease with plaintiff he had no doubt whatever that the new store would be ready by June 1.

In my opinion Deighton's evidence does not strengthen Drever's in the least and the latter does not impress me very favorably. We have time and again said that when a trial Judge after seeing witnesses and hearing their examination and cross-examination accepts the evidence of one in preference to that of another with which it is in conflict a Court of Appeal will hesitate to interfere. The situation here is however hardly that. In the first place the plaintiff was not given an opportunity to deny Drever's evidence for when

Alta.

it was proposed to call him in reply for that purpose, owing it is stated to the trial Judge not being very well, defendant's counsel said that he would admit that he denied it. The Judge therefore had no opportunity of judging between the two. Then from his reasons it is not entirely clear that he did rely upon Drever's evidence. Under these circumstances I feel free to form my own opinion and that is that in view of the written evidence and the circumstances and the admitted denial of the plaintiff the defendant has not satisfied the burden of establishing the condition it set up and it is unnecessary to consider whether in the face of the writings it could be permitted to do so in any event.

The plaintiff is therefore entitled to damages. There is no way in which such damages can be arrived at with any certainty. The plaintiff was put to considerable inconvenience in trying to make arrangements in connection with these and other premises. He was out of business for several weeks and he was put to expense in having a double move. I think $250 would be a reasonable amount to allow.

I would therefore allow the appeal with costs and direct judgment for the plaintiff for $250 with costs.

Appeal allowed.

RE BANNAN.

Alberta Supreme Court, Appellate Division, Harvey, C.J., Stuart and Beck, JJ. May 6, 1921.

Solicitors (§IIC—35)—Claim Against City for Costs and Fees—Bill Delivered—Possession of Documents—Refusal to Deliver up Until Account Paid—Order of Court directing City to File Statement of Claim, Claiming Documents and Pay into Court Amount of Solicitor's Bill, and Directing Delivery of Documents.

APPEAL from an order, refusing an application for delivery up of documents held by a solicitor until his bill was paid.

A. B. Clow, for City of Medicine Hat, applicant.

S. G. Bannan, for himself.

The judgment of the Court was delivered by

Beck, J.:—The solicitor claims a large sum for costs against the City of Medicine Hat, a bill for which has been delivered. The city made an application to McCarthy, J., for the delivery up of a number of documents, the property of the city, the solicitor refusing delivery until his bill is paid.

The city disputes its liability for any part of the bill. It is therefore, not a question, at present at least, of taxation,

B.C.

but a question of liability. McCarthy, J., refused the city's application, notwithstanding that the city on the hearing of the application offered to pay the whole amount of the solicitor's claim into Court.

I am not prepared to say that even in face of that offer the Judge was wrong in refusing to exercise the summary jurisdiction of the Court and leaving the city to its remedy to bring action against the solicitor but it seems to be a convenient disposition of the matter and satisfactory to both parties to direct that upon the city filing a statement of claim against the solicitor, claiming the documents to be wrongfully detained and paying into Court the amount of the solicitor's bill rendered, the solicitor shall deliver all the documents in question, under oath if demanded, the action thus commenced continuing as if the solicitor still retained the documents, the money being substituted for them. I would leave the liability for the costs of the motion upon the city but make them costs in the cause in any event in the action to be commenced and I would make the costs of this appeal costs in the cause in the action.

Judgment accordingly.

RE WONG SHEE.

British Columbia Supreme Court, Hunter, C.J.B.C. May 20, 1921.

Deportation (§II—10)—Chinese woman entering Canada from United States—Non-payment of tax imposed by Chinese Immigration Act, R.S.C. 1906, ch. 95—Refusal of United States authorities to receive back—No authority to deport to China.

APPLICATION for the release of one Wong Shee on habeas corpus on the ground that she was being unlawfully detained by the Comptroller of Immigration at Vancouver, B.C.

A similar application had been refused by Morrison, J.

The application was based on the following facts:—The applicant, a woman of Chinese origin, unlawfully entered Canada by crossing the line near Blaine, Washington, without reporting to the customs authorities nor complying in any way with the provisions of the Chinese Immigration Act R.S.C. 1906, ch. 95. She was arrested by the immigration authorities and convicted by Howay, Co. Ct. J.; on October 16, 1918, for that she did on or about May 21, 1918, being a person of Chinese origin, land in Canada without payment of the tax payable under the Chinese Immigration Act.

Pursuant to the said conviction, she was ordered by the

B.C.

Minister of Immigration and Colonisation to be deported pursuant to sec. 27 (a) as enacted by 7-8 Edw. VII. 1908 (Can.) ch. 14, sec. 6.

The United States authorities would not receive her back to the States, where she had lived for 14 years, and the Canadian Immigration officials therefore proposed to deport her to China.

R. A. Maitland, for the applicant. There is no power under the Chinese Immigration Act to deport an immigrant to a place other than the port of entry. Section 27 (a) of the Act contemplates that the immigrant be deported to the country from whence he came into Canada.

R. L. Reid, K.C., for the Comptroller of Immigration. United States refused to accept her, therefore the Immigration Department has a perfect right to send her to China, which was the country of her origin. The Minister of Colonization has the power to make an order that she be forced to leave Canada and the immigration officials have the authority to carry this order out.

Hunter, C.J.B.C.:—It is beyond the pale of reason that it is possible to deport an undesirable Mexican, for example, to Russia. There is nothing in the Act which permits the Department to send her to the North Pole. This is a matter for diplomatic arrangement and if the American immigration people refuse to admit her then representations should be made to Washington. The prisoner is discharged, but there shall be no action against the Immigration Department as a result.

Prisoner discharged.

REX v. KERR.

British Columbia Court of Appeal, Macdonald, C.J.A., Martin, Galliher and McPhillips, JJ.A. April 9, 1921.

Intoxicating Liquors (§IIIE—79)—Room in Building— Separated from Social Club by Hall—Private Dwelling—Internal Communication—Meaning of.

APPEAL by Crown from the judgment of a County Judge quashing a conviction under the British Columbia Prohibition Act. Affirmed by an equally divided Court.

W. D. Carter, K.C., for Crown; E. P. Davis, K.C., for accused.

Macdonald, C.J.A.:—The accused occupied one room of a building in which there were the quarters of a social club, a tailor shop and some other rooms, all of which premises were connected with the street and alley by a common hall-

B.C.

way and stairways at front and rear. Whether there were doors of entrance at the street and alley is, to my mind, immaterial. I will assume in the accused's favour that his room falls within the general definition of a "dwelling house," contained in sec. 3 of the Prohibition Act, 1916 (B.C.), ch. 49. The question then arises, was it excluded from that category by sub-section (a) of said sec. 3?

The County Court Judge from whom the appeal is taken, read sub-sec. (a) out of the section altogether as being meaningless, holding that because of its opening words, "without restricting the generality of the above definition," the sub-section was self-destructive. In this I think he was in error. It is the duty of the Court to interpret a statute and to give to it, when the language of it is inapt or equivocal, a construction which will not destroy any part of it, if this can be effected. What the Legislature mean by the words above quoted, is not open to very serious doubt. I think the words under discussion merely meant this, that except in the particulars set forth in sub-sec. (a), the generality of the definition in the principal section was not to be affected.

It is declared by sub-sec. (a) that the expression "private dwelling house" shall not include or mean any house connected by a doorway or covered passage way, or way of internal communication with any club house or club room.

Treating the room occupied by the accused, apart from the exclusive words above referred to, as a private dwelling house, which is defined in the main section to mean, "a separate dwelling house with a separate door for ingress and egress," the question then arises, was it a house connected by way of internal communication with the club rooms across the hall from it and with all the other rooms in the building opening upon the common hallway? I think it was and that the conviction should be restored.

Martin J.A. would dismiss the appeal.

Galliher, J.A.:—I would allow the appeal and restore the conviction.

McPhillips, J.A. would dismiss the appeal.

Appeal dismissed by an equally divided Court.

BEAUMONT v. HARRIS.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips, JJ.A. February 16, 1920.

Parties (§II.A—75)—Option to Purchase Mineral Claim—Agreement to Sell Part Interest—Money Borrowed to Make Payment—Failure to Complete Purchase—Person Loaning Money

Agreeing to take over Interest for Money Advanced—Failure to Record Interest Owing to Interim Injunction Filed in Action for Specific Performance.

B.C.

APPEAL by defendant from an order of Morrison, J., restraining the defendant from disposing of three mineral claims known as "True Blue," "Premier Extension Number One," "Premier Extension Number Two," in the Salmon River Valley, and ordering that the mining recorder refrain from registering any transfer of or charge upon said claims. The defendant Harris held an option to purchase the three claims for $3,500. He instructed his agent, P. W. Racey that he would sell 51 per cent. of the claims for $3,500. Racey communicated with the plaintiff who lived in Prince Rupert with a view to a sale, and on the morning of December 22, 1919, the plaintiff agreed to purchase said interests. As the defendant had to pay the $3,500 on his option on that day (the money from the plaintiff not having arrived), he borrowed $3,500 from Dr. Shewan on that afternoon for that purpose. On the following day the Bank of Montreal received instructions from the plaintiff to pay the defendant for the interest on the title being passed by C. H. Nicholson, and on December 24 Nicholson refused to pass the title, on the ground that the bill of sale of the properties to the defendant did not shew the number of his free miner's certificate, nor the dates of location, and record of the claims. A week later the parties again met with a view to closing the sale, but as the defendant could not produce his certificate, Nicholson would not pass the title and the defendant called the deal off. It was then arranged between the defendant and Dr. Shewan that Shewan should take the 51 per cent. interest in the claims for the $3,500 that he had advanced, and the defendant transferred the interest to Shewan by bill of sale, but he was unable to record same by reason of the interim injunction. The plaintiff brought an action for specific performance and an injunction. An interim injunction issued on January 14, 1920, and subsequent motion to dissolve was dismissed.

F. C. Saunders, for appellant; A. Alexander, for respondent.

Macdonald, C.J.A.:—I think the appeal should be allowed to this extent, that Dr. Shewan, by the consent of the plaintiff's counsel, should be added as a defendant; that the injunction should extend to him as well as to the other defendant, and should not otherwise be interfered with.

B.C.

Now the alternative to that, had the plaintiff's counsel not so consented, would have been to have dissolved the injunction against the mining recorder. As to whether or not the injunction was properly directed to the mining recorder I desire to express no opinion. I do not wish this case to be taken as a precedent upon the propriety of joining an official of that kind who is not a party to the action. I do not say whether it was proper or improper; I refrain from expressing any opinion, because the point has not been argued before us.

The result, therefore, is that the appeal is allowed in part and is dismissed in part.

The appeal contained a prayer that the injunction should be entirely dissolved. Of course, the appellant failed in that. Having succeeded in part and having failed in part, strictly, the order which the Court ought to make if the parties do not agree is that the appellant should have the costs of the appeal and the respondent should have the costs of the appeal, in respect to that issue in which the respondent succeeded. However, by consent, the costs in this appeal shall be costs in the cause. I would like to add my view in relation to what my brother Galliher has just said, so that if it should be the subject of discussion in proceedings that may follow there may be no misunderstanding. In adding Dr. Shewan as a defendant, I think he should be free to take any course which he should be advised to take, and if he should take any course which is embarassing to the plaintiff, then the plaintiff has his right, to make application to the Court. To make any other order, it seems to me, might lead to considerable confusion; it might be misleading, and also might interfere with what might be the proper attitude of Dr. Shewan in the action, which we do not foresee. In other words, it might be more or less a prophetic judgment. In connection with my judgment as delivered originally, I think the course which I am adopting in this case is supported by the Metropolitan District R. Co. v. Earl's Court (1911), 55 Sol. Jo. 807.

Galliher, J.A.:—As to costs, it seems to me there should be no difficulty in counsel arriving at an agreement. I agree with what the Chief Justice says, except with this limitation, that so far as I am concerned, I think Dr. Shewan should be added as a party defendant, but at the same time, by so doing, he should not be permitted to raise by way of defence any issues which are not involved in the action as it stands. I might say that the difference be-

Man.

tween the Chief Justice and myself in this matter is simply this, that placed on strict grounds, I would not be in favour of adding Dr. Shewan as a defendant at large, which is what is asked for in the notice of appeal.

McPhillips, J.A.:—I am of the like opinion as the Chief Justice. I wish to add also that I am of the like opinion with the Chief Justice on the question of adding the defendant—that he should be added without trammels at all.

Appeal allowed in part.

PFEIFER v. SHELDHELM.

Manitoba King's Bench, Mathers, C.J.K.B. April 5, 1921.

Replevin (§IA—3)—Threshing Engine left on Defendant's Land—Plaintiff requested to remove—Land not dry enough to permit Removal—Land Cropped and Security for Resulting Damage Demanded before Removal Permitted.

ACTION of replevin for a threshing engine owned by the plaintiff.

A. McDonald, for plaintiff; W. S. Morrisey, for defendant.

Mathers, C.J.K.B.:—This is an action of replevin for a threshing engine owned by the plaintiff.

The engine was in the defendant's field where it had remained from the fall before. It had been brought there to thresh the crop of the defendant's brother and predecessor in title, and had been left there with the consent of the then occupant.

In the spring of 1920 the defendant notified the plaintiff to take it away as he intended to seed the land and the plaintiff agreed to do so as soon as the land was sufficiently dry to enable it to be done. About the end of May he tried but found it impossible to remove it owing to the condition of the ground. On June 28 the plaintiff again went to the defendant's farm prepared to take the engine away under its own power. A week or two before this the defendant had ploughed and seeded the land with flax, which was at this time showing through the ground, and he refused to allow the engine to be removed until the plaintiff had made a settlement with one Duncan, residing in Winnipeg, for the damage the removal would cause to the growing crop. The defendant was farming the land for a share of the crop and Duncan was agent for the owner who was entitled to the other share. To prevent the plaintiff from moving the engine, the defendant had taken off the throttle valve. The plaintiff offered to pay double the damage which would be caused by taking away the engine and to abide by an

Man.

assessment made by any two disinterested farmers of the neighbourhood. The engine was only about 30 feet in on the seeded land and the damage would only be trifling. The defendant admits that the total damage done when the engine was removed did not exceed $5, an estimate which I think was high. He, nevertheless, refused to return the throttle valve or permit the engine to be taken unless a settlement were first made with Duncan. Subsequently the defendant through his solicitor offered to let it be removed if the plaintiff would deposit $100 as security for the damage such removal would cause. This offer was refused and the order of replevin was obtained under which the engine was replevied to the plaintiff.

It is not denied that the plaintiff is the owner of the engine but the defendant claims he had a right to prevent him from taking it away until he paid or secured the damage which would thereby be caused to the crop. The plaintiff brought his engine onto the land by the invitation of the defendant's predecessor in title and it remained there under an implied license to the plaintiff to enter and remove it at any time he desired to do so. That a license may be implied from the circumstances is shewn by Ditcham v. Bond (1814), 3 Camp. 524. The defendant had a knowledge of these circumstances and of the plaintiff's right to take the engine away. He acknowledged the plaintiff's right to enter and remove the engine by requesting him to do so.

The plaintiff's right to enter and recover his engine being coupled with an interest was irrevocable: Wood v. Manley (1869), 11 Ad. & El. 34, 113 E.R. 325, 3 P. & D. 5; Wood v. Leadbitter (1845), 13 M. & W. 838, 153 E.R. 351; Cornish v. Stubbs (1870), L.R. 5 C.P. 334, at p. 340.

It was unfortunate that the engine could not have been removed before the field was seeded but I believe the plaintiff made an honest effort to do so and was only prevented by the condition of the soil. I do not think the soil was in a condition to permit the engine to be removed before the field was seeded. In short, I find that the plaintiff came to take the engine away as soon as he could reasonably do so.

If the defendant occupied the farm subject to the plaintiff's right as licensee, as I am inclined to think he did, he had no right to prevent the plaintiff taking his engine on June 28, when he came for that purpose. I do not, however, rest my judgment on that ground. The most that is

Man.

claimed by the defendant in his pleading is that he had a right to compensation for the damages which the removal would cause to the growing crop and to security for payment of such damages before the engine was taken. He rejected the plaintiff's offer to pay double damage and through his solicitors asked the deposit of $100 as security. The damage of course could not be ascertained before the engine was removed and even if the defendant had a right to insist upon reasonable security the request for a deposit of $100 was so far beyond what was reasonable as to suggest some motive other than an honest desire for security. The fact appears to be that the defendant acted under Duncan's instructions and was not willing to agree to any terms without his assent.

In my opinion the defendant had no right to retain the plaintiff's property to secure the fulfilment of such a preposterous demand.

The defendant did not plead that he had distrained the engine damage-feasant but his counsel argued that what he did amounted to such a distress. He might have detained it for the damage it had caused and was still causing to the ground which it occupied. The Ambergate Nottingham, etc., R. Co. v. The Midland R. Co. (1853), 2 El. & Bl. 793, 118 E.R. 964, if he had not lost that right by removing the throttle valve. His right was that of detention only. He had no right to otherwise interfere with the engine and his doing so made him a trespasser ab initio. The law is very strict with respect to dealing with the subject matter of the distress. For example, horses or other animals distrained damage-feasant must not be tied up even to prevent their escape: Vaspor v. Edwards (1701), 12 Mod. 658, 88 E.R. 1585; Bullen's Law of Distress, at p. 173, 180.

The right of distress damage-feasant extends only as the language implies to damage which is actually being done or continuing at the time, not to damage done on another occasion in the past or which it is anticipated may be done in the future: Vaspor v. Edwards, supra; Wormer v. Biggs (1845), 2 Car. & Kir. 31; 27 Hals. 858. The damage for which the defendant claimed and for which he wanted security was that which would be caused by the removal of the engine and not that which it might cause as an obstruction in the field. For these reasons the defendant had not, in my opinion, the right to detain the engine damage-feasant.

There will be judgment for the plaintiff for the replevin

Man.

of the engine with $5 damages for replevin bond and costs of suit.

The defendant has counterclaimed for damages for trespass and for damage done by permitting the engine to remain in the field. He cannot claim the right to hold the engine as distress damage-feasant and at the same time sue to recover the damages in an action of trespass: Boden v. Roscoe, [1894] 1 Q.B. 608. In any event the engine was lawfully on the land and the defendant has no right to claim damages because of its being there.

As the plaintiff is willing to pay for the damage caused by the removal of the engine the defendant may have judgment upon his counterclaim for $5, the amount at which he himself estimates such damage, but without costs. The judgment on the counterclaim to be set off against the plaintiff's judgment.

Judgment for plaintiff.

THE RELIANCE GRAIN CO. v. THE CANADIAN NORTHERN R. CO.

Manitoba King's Bench, Galt, J. February 16, 1921.

Contracts (§IID—145)—Lease of Land Beside Railway Tracks—Erection of Elevator on Leased Land—Special Clause Providing Against Damage by Sparks and Fire from Locomotives.—Lessee to Assume all Risks and all Loss or Damage Caused in Any Manner Whatever—Engine Jumping Track and Damaging Elevator—Construction of Lease—Liability of Railway Lessor.

ACTION for damages for injury caused to plaintiff's elevator by defendant's locomotive. Action dismissed.

A. E. Hoskin, K.C., and P. J. Montague, for plaintiffs.

D. H. Laird, K.C., and W. D. Owens, for defendants.

Galt, J.:—The decision in this case depends upon the construction to be given to the lease made between the parties of January 1, 1912, and apparently renewed from time to time every year.

The lease is in writing, prepared by the Canadian Northern R. Co., and executed by both parties.

It appears that the railway company leased to the plaintiffs a small block of land, said to be one hundred feet square, near the station at Ardath, in the Province of Saskatchewan, for the purpose of plaintiffs erecting thereon and running an elevator close to the defendants' line of railway. A plan is attached to the lease, shewing the main line of the railway company, and a siding is extended alongside of the plaintiff's elevator premises. No part of the

Man.

track, however, appears to be on the plaintiff's premises.

On March 24, 1919, a train of the defendants, for some reason which is not disclosed by the evidence, either jumped the main track, as the expression is, or was deflected off it by the siding and the locomotive and part of the train ran with great violence into the plaintiff's elevator, thereby practically demolishing it, and injuring a large amount of grain.

The defence set up by the defendants is based upon certain provisions of the lease purporting to exempt the defendants from liability for damage. The case has been very ably argued by counsel for both parties, and I must confess that it is with some diffidence that I have arrived at the conclusion I am about to express.

On the part of the plaintiffs Mr. Hoskin points to a special clause of the lease, providing against damage by sparks or fire escaping from the locomotives of the lessors, and he argues that this provision is, in truth, the only exemption which the defendants are entitled to rely upon, and that it does not assist them in the present case.

In construing the lease it is, of course, necessary and proper to consider all the provisions of it, in order to ascertain as far as possible the intention of the parties with regard to its provisions.

The first clause "Witnesseth that in consideration of the rents and covenants hereinafter mentioned to be paid, kept and performed by the lessee the lessors have demised and leased, and by these presents do demise and lease unto the lessee, all that parcel of land and premises, being in the town of Ardath, Saskatchewan, and more particularly mentioned in the plan and description herein, saving and reserving to the lessors the right to construct and operate a track or tracks of railway over any part of the said land and premises not actually covered by the elevator or grain warehouse hereinafter mentioned, and to enter for such purposes, the whole without payment by the lessors, of any damage or compensation for damage of any nature or for any such cause whatever."

Mr. Laird relies strongly upon this clause as a key to the construction of the subsequent clauses of the agreement. But, on the other hand, Mr. Hoskin points out that this clause is limited to the right reserved to lessors to construct and operate a track, or tracks, of railway over any portion of the said land, and it appears that the lessors

Man.

never did erect any such tracks. I am inclined to agree with Mr. Hoskin's argument, that this clause is limited to the particular reservations expressed.

The lessee then proceeds to covenant with the lessors . . . "that they will assume all risks and all loss or damage to said premises and elevator and any other buildings now or hereafter to be erected on said premises, and the contents thereof that may or shall arise, or be caused in any manner whatever, whether by sparks or fire escaping from the locomotives of the lessors or otherwise howsoever, for which loss and damage the lessors and their assigns and employees and each and all of them shall be free and released from all liability, and from which and from all claims for loss or damage to grain or other property to whomsoever belonging, that may be stored in such elevator or on said premises, the lessee will indemnify and save harmless, the lessors."

This clause has been the subject of most of the argument before me, Mr. Hoskin contending that the risk assumed by the plaintiffs is only risk of loss occasioned by sparks or fire escaping from the locomotives of the lessors or otherwise howsoever.

Counsel for the defendants, on the other hand, relies strongly upon the words immediately preceding this, viz., "that may or shall arise or be caused in any manner whatever." The question is whether the insertion of the words, "whether by sparks or fire escaping from the locomotives of the lessors, or otherwise howsoever," narrow or limit the previous words, which would otherwise protect the defendants from loss or damage caused in any manner whatever.

The only other clause of the lease which bears the construction of the clause I have just mentioned, reads as follows:—"And in consideration of the nominal rental hereby fixed, and of the fact that the lessees are allowed for its own convenience and profit to construct the said elevator in close proximity to the railway track of the lessors, it is hereby expressly agreed that between the parties hereto for themselves, their respective representatives and assigns that the foregoing condition and stipulation shall apply and be binding upon the lessee, even although such damage shall be caused by or shall arise from the default or the neglect of the employees of the lessors, or by or from defects in the construction of the locomotives of the lessors,

Man.

or any of them, or in any other manner whatsoever, and that the lessee shall assume and hereby assume, the risk of all or any such default, neglect or defect in construction."

It appears to me from the provisions of this lease that the lessors did intend to protect themselves from all loss or damage occurring to the plaintiffs' elevator and its contents by reason of anything caused by the railway company or its servants. I think that this is sufficiently apparent from the clause of the lease providing that the lessee "will assume all risks and all loss or damage to said premises and elevator, and any other buildings now or hereafter to be erected on said premises, and the contents thereof, that may or shall arise, or be caused in any manner whatever.

The words which follow, and which are so strongly relied upon by counsel for the plaintiffs, viz., "whether by sparks or fire escaping from locomotives of the lessors or otherwise however," are in a parenthesis by themselves, and it appears to me that they have been inserted by the defendants ex abundanti cautela, probably with a view to emphasise the fact that they were protecting themselves against certain liabilities from fire which are provided for in the Railway Act.

I am, therefore, of opinion that the defendants have brought themselves within the terms of the release from damages expressed in the lease, and that this action must be dismissed with costs.

Action dismissed.

ALBYN TRUST v. KING'S PARK CO.

Manitoba King's Bench, Prendergast, J. September 29, 1920.

Mortgage (§VI.A—70) — Enforcement — Transfer by Original Parties—Mortgage Subject to Prior Mortgage—Separate Agreement to Pay Interest on Mortgage Sued on as Contained in a Letter—Proof of Agreement—Covenants—Construction—Rights and Liabilities of Parties.

ACTION on a mortgage and on a separate agreement to pay interest on the mortgage sued on. Judgment for plaintiff.

C. H. Locke, for plaintiffs; Williams, for defendants.

Prendergast, J.:—The plaintiffs sue, first, on a mortgage for $200,000 made by the defendants to the Red River Realty Co., which was transferred by the latter to Elgin and Simpson, and then again by the latter to the plaintiffs, —said mortgage being subject to a prior mortgage of $66,-

Man.

250 from the Red River Realty Co. to Joseph and Edmond Champagne; and, secondly, on a separate agreement to pay 15 per cent. interest on the mortgage sued upon, as contained in a letter (Ex. 6) from the defendants to Brydges & Waugh, agents for the mortgagees.

Upon admissions made pursuant to notice (Ex. 7) I hold the special agreement duly proven, as well as the mortgage and transfers.

There are several grounds of defence, but the only two relied on for the defendants on the argument, are based on the two following Covenants contained in the said mortgage:—"The mortgagee will pay the mortgage now on said lands in favor of Joseph and Edmond Champagne and will indemnify and save harmless the mortgagors therefrom, and if the mortgagees shall make default in payment of said mortgage or any part thereof the mortgagors shall be at liberty to pay said mortgage and deduct the same from the payments falling due to the mortgagees. The mortgagees will give a release from this mortgage of any portion of the lands covered by this mortgage consisting of not less than five acres from time to time on payment to the mortgagees of the sum of one thousand dollars per acre for the lands so released such release to be prepared by the solicitors for the mortgagees at the expense of the mortgagors, all moneys paid for the releases to apply on the next instalment falling due under this mortgage and for the said consideration of one thousand dollars an acre as aforesaid the mortgagees will from time to time as required without further payment to them procure and register partial discharges of the said mortgage in favor of Joseph Champagne and Edmond Champagne releasing such lands as the mortgagors are entitled to have released from this mortgage."

As to the first covenant I am of opinion that it is an independant covenant. When a covenant of this nature goes only to part of the consideration of the general agreement, it has always been held, in the absence of anything formally declaratory or shewing a contrary intention, to be an independant covenant. (Beal on Cardinal Rules of Legal Interpretation, pp. 179 and 180). Then, part of the moneys claimed in this action were due before some of the moneys secured by the Champagne mortgage. The former could of course have been claimed when due independently of any effect of the said covenant. Can it be said that the

Man.

mere delay by the plaintiffs in enforcing their claim, has now had the effect of making the same dependent on the covenants in question? Of course breach of this covenant might entitle the defendants to damages; but I hold that none such have been shewn.

As to the second covenant, I quite agree that while the subsequent registration of the sub-division plan has made it impossible to grant releases by areas of five acres, the defendants were still entitled, on account of the plaintiffs' assent to such plan, to releases of more or less equivalent areas to be determined on some equitable principle warranted by the conditions. But in either case, the areas or lots to be released would have to be defined and a specific demand made by the mortgagors. Neither on the evidence of Mr. Waugh, nor on Mr. Shantz's examination for discovery, do I find that this has been done. Mr. Waugh says:—"There were many releases of individual lots that we gave to help them, although we were not bound to; and in no case did we refuse a release for a particular lot when the same was specified." This is in no way contradicted, neither by Mr. Shantz nor anybody else.

There will be judgment for the plaintiffs on their claim for $198,080, and the counterclaim will be dismissed, with costs to the plaintiff.

Judgment accordingly.

RADINOWSKY v. SHEPS.

Manitoba Court of Appeal, Perdue, C.J.M., Cameron and Dennistoun, JJ.A. December 1, 1920.

Land Titles (§IV—40)—Right of Judge to Direct an Issue under sec. 146 of the Real Property Act R.S.M. 1913 ch. 171—Sec. 146—Construction.

APPEAL by caveator from a judgment directing an issue in which the caveator was to be plaintiff and ordering him to proceed within fifteen days to establish his claim, otherwise the caveat to be discharged. Affirmed.

R. A. Bruce, for appellant; W. J. Donovan, for respondent.

The judgment of the Court was delivered by

Cameron, J.A.:—This was an application by Sheps, the caveatee, under sec. 146 of the Real Property Act, R.S.M. 1913, ch. 171, for an order discharging a caveat filed by Radinowsky, the caveator, against certain lands. Macdonald, J., refused the motion to discharge but directed an issue in which the caveator was to be plaintiff and ordered

N.S.

him to proceed with in 15 days to establish his claim, otherwise the caveat to be discharged. The caveator appealed from this order.

On this appeal the right of the Judge to direct an issue under the above section of the Act was questioned. It was argued that the section only went so far as to permit a Judge to determine summarily, motions brought before him thereunder and did not give him authority to direct the commencement of proceedings as expressly provided in sec. 149 in cases of caveats filed by the District Registrar. We think this is too narrow a construction of the words in the sec. 146, when it says that upon the hearing of a motion to discharge a caveat "a judge may make such order in the premises . . . as to such . . . judge may seem just." We think these words might well include a further hearing by the Judge to try the issue raised on the material before him or a determination by him that an issue be stated between the parties and tried in due course. If there were any doubt about this, the propriety of the Judge's order is fully justified by the rules in Schedule L to the Act. These are called "rules and regulations for procedure in the matter of caveats." They are not restricted to proceedings where the caveator initiates them but have a general application. This conclusion clearly appears when we read sec. 6 of the rules, where it is provided that the Court can direct an issue in any matter brought before it. See also secs. 10 and 11 of the rules.

Section 152 of the Act simply provides that a caveator to establish his caveat may either resort to the proceedings prescribed by the rules in Schedule L or he may take action in Court if he deems that the better course. There is nothing whatever in this section to make the rules in Schedule L the special property of caveators only.

The appeal from Macdonald, J.'s order must be dismissed with costs, and the caveator will proceed to the trial of an issue in which he is plaintiff as therein directed.

Appeal dismissed.

SCHWARTZ v. HEISLER.

Nova Scotia Supreme Court, Russell, Longley and Mellish, JJ. March 21, 1921.

Damages (§IIIA—85)—Contract—Preparing Goods for Market—Breach—Wrongful Entry and Taking of Goods—Impossibility of performing Contract—Measure of Compensation.

APPEAL from the judgment of Forbes, Co. Ct. J., in

N.S.

favour of plaintiff in an action claiming damages for the alleged wrongful entry upon plaintiff's premises and taking and carrying away a quantity of fish which had been delivered to plaintiff for the purpose of being prepared for market under an agreement by which plaintiff was to be paid a fixed sum for his services. Affirmed.

W. C. McDonald and W. P. Potter, for appellant; T. R. Robertson, K.C., and D. F. Matheson, K.C., for respondent.

The judgment of the Court was delivered by

Mellish, J.:—The plaintiff agreed to "make" for defendant 100 qtls. of fish. The defendants delivered instead 126 qtls. which plaintiff received and washed preparatory to drying same. Before the drying process had begun the defendant on November 8, 1919, in plaintiff's absence came to plaintiff's premises and took away the fish rendering it impossible for the plaintiff to complete his contract.

The plaintiff accordingly brought this action for damages and recovered in the County Court $110 damages.

From this judgment an appeal is taken. The questions of fact raised by the pleadings and decided by the trial Judge I cannot say were wrongly decided. Many of them, if not all, depend upon the credibility of the witnesses.

I do not agree with everything in the reasons for judgment appealed from, but I am not prepared to disagree with the findings of fact on the salient features of this case.

What I have said has no application to the question of damages. And in regard to damages it would appear that the trial Judge has in all awarded the sum of $110 the same being made up of $100 for breach of contract; and $10 apparently in the nature of exemplary damages.

If the plaintiff had completed his contract he would have been entitled to receive $126. I do not think under the conditions which apparently exist with fish makers that the damage can properly be measured by merely allowing the plaintiff reasonable days wages for the work actually done on the fish. He apparently had regular labour employed and was entitled to the benefit of his contract at the end of the season when it could not be replaced by similar work, and I am not prepared to say that $100 was too much to allow for the breach of it.

Then, as to the $10, plaintiff says, and he was apparently believed, that he had expressly told the defendant not to disturb the fish without coming again to see him. The

N.S.

parties were then apparently negotiating as to the terms on which the contract might be cancelled and this statement of plaintiff's would indicate that he was willing to negotiate further if necessary. Notwithstanding this, defendant in the absence of plaintiff from the work, but when the plaintiff was home, removed the fish and according to evidence which the trial Judge might well believe, in a rather insolent way, evidenced by his indicating that he had been "fooled" long enough, and against the apparent wish of the plaintiff's man in charge.

Taking all these matters into consideration I would not feel justified in interfering with the judgment appealed from.

The appeal should be dismissed with costs.

Appeal dismissed.

MOORE v. BROWN.

Nova Scotia Supreme Court, Russell and Longley, JJ. and Ritchie, E.J. April 16, 1921.

Contracts (§IIA—125)—Agreement Leasing Mills to Plaintiff—Option to Purchase During Tenancy—Assignment of Agreement by Plaintiff to Defendant—Collateral Agreement as to Assignment of a One-Quarter Interest—Construction—Rights of Parties.

APPEAL from the judgment of Mellish, J. in favour of plaintiff in an action claiming among other things a declaration that plaintiff was entitled to have assigned and transferred to him by defendant a one quarter interest in certain lands and premises described in an agreement in writing made between plaintiff and the Nova Scotia Wood, Pulp and Paper Co., Ltd.

V. J. Paton, K.C., for appellant.

L. A. Lovett, K.C., for respondent.

Russell, J., agrees with Ritchie, E.J.

Longley, J.:—The point in this case seems to be whether Brown is compelled to give one quarter interest in the real estate of the Medway Pulp and Power Co., or whether it is sufficient for him to give an assignment of one quarter interest in the stock. There may be a very great difference in what would follow in this course.

Mr. Paton, K.C., urged that there was evidence almost conclusive to the effect that Davison and Moore had agreed to a change in the contract of sale. This must have been disbelieved by the Judge who tried the cause. Whether it was properly disbelieved or not is a question of no great

N.S.

importance just now. At all events I am not prepared to take advantage of the seeming preponderance of evidence to override the judgment of the Court, and I will not take the responsibility of saying at this stage that the verdict should be reversed.

Ritchie, E.J.:—I quote the judgment appealed from because it contains a clear statement of the facts:—

"On the 2nd October, 1916, the plaintiff and the Nova Scotia Wood, Pulp and Paper Co., Ltd., entered into the agreement in writing set out in para. 1 of the statement of claim. By this agreement the company leased to plaintiff its mills, buildings, machinery and lands for three years, giving to the lessee an option of purchasing the same during the tenancy for $30,000 which sum included the rent reserved of $2000 per year.

By an agreement in writing of the same date the plaintiff assigned his rights under the agreement first mentioned to the defendant. Under the agreement between the parties hereto the plaintiff was to be the manager of the business of pulp making, etc., to be carried on by the defendant on the premises. For such services the agreement provides that the plaintiff is to have 25 per cent. of the net earnings which is to remain invested in the business for the purpose of purchasing the property above referred to. It is further provided that the plaintiff is to be advanced on account of profits $200 a month by defendant and that an accounting of the profits is to be made at the end of each month; that if defendant purchases the property out of the net earnings at any time the plaintiff is to have assigned to him by the defendant a one quarter interest therein and that if defendant should purchase the property before the net earnings are sufficient for that purpose the plaintiff is to have the option of withdrawing his net profits or of purchasing therewith and with any other money, an interest not to exceed one quarter of the whole which is to be valued for such purpose at $30,000.

The plaintiff acted as manager under this agreement until about the end of September, 1919.

It is to be noted that, as collateral to the first agreement, there was an understanding between the plaintiff and the president of the Nova Scotia Co., the original owners, that in the event of the option being exercised the plaintiff would have a rebate or commission of $3,000, i.e., 10 per cent. on the purchase price, and plaintiff agreed to divide this sum

N.S.

equally with defendant should the latter purchase the property. The defendant Brown operated the mills under the name of the Medway Pulp and Power Co. with plaintiff as manager as above stated.

On September 10, 1919, plaintiff wrote defendant a letter asking him at what date he intended to take over the title to the property and therein notified defendant that he intended exercising his right of acquiring a quarter interest as provided in the agreement between them. To this letter defendant apparently made no reply, but on September 15, 1919, the defendant entered into an agreement by which he became entitled to all the capital stock of the Nova Scotia Wood, Pulp and Paper Co. This agreement was made with Reginald Davison and other stock holders of the company, and this mode of putting the company's property in the hands of the defendant appears to have been adopted rather than a conveyance by deed for the advantage or supposed advantage of both the company and the defendant. The stock was acquired by the defendant under the terms of the original agreement with the company, viz., on payment of $30,000 less rentals, and allowing commissions previously paid thereon leaving a balance of $24,000 which was paid by defendant for the stock out of which the vendor paid plaintiff his commission of $2,400 as originally agreed. Defendant thus became the sole stockholder in the company owning the property—and in my opinion as between him and the plaintiff the defendant must be held to have purchased the property within the meaning of the agreement between them. I think there was a permanent intention from the outset to so purchase the property either for the purpose of operating the same or for a resale.

On September 23, 1919, the plaintiff tendered the defendant $7,500 being one quarter of the purchase price of $30,000 and demanded a transfer of one quarter interest which was refused and I think wrongly refused.

It was the fee simple in the lands that the agreement covered. It provides: "The lessee shall have the sole and exclusive option at any time during the existence of this lease of purchasing the fee simple of the lands, etc."

The trial Judge has found that as between the plaintiff and defendant the defendant must be held to have purchased the property under the agreement. With this finding I agree. There is evidence to support it and that is what Davison understood at the time. It is one thing for

Ont.

plaintiff to have a one quarter interest in the lands, which was what the agreement contemplated, and it is quite another thing for him to have a one quarter interest in the stock of the company, the defendant holding the balance of the stock and therefore having the controlling interest. It is quite clear from the defendant's letter of September 18 that the defendant did not intend to recognise the plaintiff's rights at all. Apparently that position was subsequently regarded as too flagrant and he now offers one quarter of the stock. In my opinion defendant has acted in bad faith, and is subject to the control of a Court of Equity. The defendant is in effect the Nova Scotia Wood, Pulp and Paper Co.; that is to say, it is a one man company. He now sets up that the company under its charter only has power to purchase and hold lands and not to sell and that therefore a one quarter interest in the lands cannot be conveyed. This defence is not pleaded and Mr. Lovett, K.C., for the plaintiff, took that objection. Mr. Paton, K.C., for the defendant, did not ask for an amendment: if he had done so I would have refused it as I most certainly would not exercise my discretion in favour of the defendant in view of the course which he has adopted in attempting to defeat the rights of the plaintiff.

But if the point was open, I am of opinion that it could not prevail. It does not follow that because a company has not power to sell under its charter that an Equity Court is powerless to make a decree to prevent bad faith being successful.

As I have said, the defendant is for all practical purposes the company. He can cause the company to be wound up voluntarily and the liquidator to convey to the plaintiff his one quarter interest. This Court in pursuance of its equity jurisdiction and acting in personam can and if necessary ought to make a decree that the defendant cause an undivided quarter of the lands to be conveyed to the plaintiff.

I would dismiss the appeal with costs.

Appeal dismissed.

RE McBURNEY.

Ontario Supreme Court, Middleton, J. January 3, 1921.

Wills (§IIIA—75)—Construction—Devise of Land to Trustees in Trust for Grandson upon his Attaining a Specified Age—Fulfillment of Condition—No Express Disposition of Income in the Meantime—Residuary Devise—Absence of Gift over—Right to Accumulated Rents in Intermediate Period—Freehold not in Abeyance—Vested Devise.

Ont.

MOTION by the executors of the will of Ann Jane McBurney, deceased, for an order determining two questions arising upon the terms of the will.

W. G. Thurston, K.C., for the executors; R. B. Henderson, for Charles McBurney; A. Courtney Kingstone, for a residuary legatee; George Wilkie, for other residuary legatees; R. B. Beaumont, for the next of kin.

Middleton, J.:—Two questions arise on the will of Ann Jane McBurney, who died on February 7, 1915. The first question relates to a devise of a share of the residue to the Erskine Presbyterian Church. The effect of the amalgamation of this congregation with St. Paul's was considered by my brother Latchford (Re Murray (1920), 19 O.W.N. 238), and I make an order in accordance with his views.

The second question is much more difficult and calls for much consideration.

The testatrix devised certain lands to her trustees "in trust for my grandson Charles McBurney upon his attaining twenty-five years." There is a residuary devise, but there is no gift over if the grandson does not attain 25, and there is no express disposition of the income in the meantime.

There are five other devises of lands to grandsons and grand-daughters, each expressed to be in fee. Charles McBurney has now attained the age of 25, and there is no doubt that he is now entitled to the lands, but his right to $1,200 rent accumulated in the hands of the trustees is denied.

The claim of the next of kin and heirs may be put aside without discussion, as it is clear that there is no intestacy.

I have come to the conclusion that Charles takes this fund.

If the gift to him is vested and is not conditional, then there can be no doubt as to his right.

The case is not one in which there is a mere executory devise to one on his attaining the given age with no disposition of the freehold in the meantime. Here there is an immediate devise of the freehold to the trustees, who are to hold it for the grandson on his attaining 25.

It has been established that where there is an executory devise, and no provision has been made with respect to the property in the meantime, the heir will take, unless he is cut out by a residuary devise, because the estate must in the period before the rights of the devisee arise be vested in some one, and that person must have the right to occupy

Ont.

or to receive the rents and profits in lieu of personal occupation.

This rule has never extended to personal estate, because the personal representative can receive the increment and will hold it for the benefit of the person entitled under any executory disposition of such property. This is regarded as passing with the property, given as a mere accessory and increment.

This distinction and the foundation for it are shewn in Bective v. Hodgson (1864), 10 H.L.Cas. 656, 11 E.R. 1181, where it was said by Lord Westbury (pp. 664, 665):—

"It is an indisputable rule of law, that if a freehold estate be given by way of executory devise, there is no disposition of the property until that estate arises and becomes vested; and, consequently, in the meantime the freehold property descends to the heir at law. Now, this is the consequence of the great principle or rule of law that the freehold cannot remain in abeyance; but that rule has no application to bequests of personal estate . . . the income of such personal estate follows the principle as an accessory . . . The distinction arises wholly and entirely from the operation of the rule of law, that the freehold of real estate cannot be permitted to remain in abeyance."

Where, as here, there is an immediate devise of the freehold to trustees, the rule does not operate, for the reason for it does not exist. The freehold is not in abeyance, but is vested in the trustees, and the heir at law is excluded by the very terms of the devise. The rule as to the income from personal estate is well settled and is founded upon the view the Court has always entertained as to the intention of the testator. This intention has to give way to the rule of law which has been referred to when the case is one of an executory devise of land, but this exception is not to be extended so as to defeat the wish of the testator in any case not falling within the letter of this rule of law.

It may be that where the beneficial interest is contingent on the attaining of a given age, the beneficiary who fails to attain that age will take nothing; and in such case the income, as well as the property devised, will fall into the residue; but, in my view, when once the beneficiary complies with the condition of the gift, the whole subject of the trust, the accumulated income as well as the corpus, is his.

The thing given is the property at the testator's death;

Ont.

the time of beneficial enjoyment and of vesting is postponed until the beneficiary complies with a certain condition, and then the trust ends; there is no division contemplated; the whole trust estate goes to the beneficiary.

The trustees are in the meantime to manage the property prudently. They are to receive the rents and meet the outgoings, make proper repairs, etc. There is no thought on the part of the testatrix of the grandson not attaining twenty-five; when he does so it is his. If he does not attain this age, there is no provision, because the testatrix has not thought of the contingency, rather than because there is any deliberate intention to make the gift contingent.

Against this view is cited the passage in Theobald, 6th ed., p. 178: "A future devise of lands, whether residuary or not and whether the fee is vested in trustees or is in abeyance, does not carry the intermediate rents and profits." I cannot accept the words indicating that this rule applies when the fee is vested in trustees—if the writer intends to cover a case such as this. I am inclined to think that the words "a future devise of lands" dominates the whole clause, and that it is not intended to apply to a present gift of lands to trustees, where there is a future beneficial interest.

Duffield v. Duffield (1829), 3 Bligh N.S. 260, 4 E.R. 1334, does not touch this question. It was found that no interest in those who took under an executory devise arose until the event. It was not a devise to a named person if he lived, etc., but a gift to such persons as should be found to answer a certain description at a future date, and it was held that this gave no right to income accrued before that time, which in fact was dealt with by another testamentary provision.

Perceval v. Perceval (1870), L.R. 9 Eq. 386, does not touch this point at all.

In re Eddels' Trusts (1871), L.R. 11 Eq. 559, at first sight seems to have some bearing, but when understood has none. There was a devise to trustees for the life of A.; then a gift to B. on his attaining 21. When A. died the trust came to an end; and, B. not having attained 21, the intermediate rents went to the heir. It would seem that the result would have been different had the trust not terminated on the death of A. Bacon, V.-C., professes to follow Holmes v. Prescott (1864), 12 W.R. 636, 33 L.J. Ch. 264, where this was the precise point. These, with Bective v. Hodgson, supra, and Hopkins v. Hopkins (1734), Cas. temp. Talb. 44, 25 E.R.

Ont.

653, are the cases relied upon, and they do not conflict with what I regard as the true rule.

There is an alternative aspect of the case to which I have already alluded. The right of Charles is unquestionable if the devise to him can be regarded as vested. I have given effect to the view that the right of the residuary devisees is defeated by the present gift to the trustees, but do not think the alternative aspect should be ignored. I would first emphasise the absence of any gift over, as pointing to the intention of gift to the grandson with beneficial enjoyment postponed. And, secondly, I would draw attention to the marked distinction between a gift to a person named, with an added provision as to age of taking, and the class of cases in which the legatee cannot be found or ascertained until the contingency happens. Holmes v. Prescott, supra, discusses this. Finally, it has been laid down that where an estate, prior to the attainment of the named age, is given to a third person either for the benefit of the devisee or some other person, the estate is to be regarded as vested. See the cases collected in Theobald, 6th ed., p. 551. This brings the matter very near to the principle which I think governs—such provision being sufficient to defeat the heir.

Dobbie v. McPherson (1872), 19 Gr. 262, a decision of that extremely accurate and most careful Judge, Spragge, C., goes far to support my view. There the land was given to trustees to convey to the sons on attaining 21. There was no provision as to intermediate rents. The holding was that the sons took an equitable fee on the death of the father, personal enjoyment only postponed. The sons took the rents, for it was the testator's intention that the sons should have "everything in the land as to which no other appropriation is made."

Declare that Charles takes the accumulated rents.

Costs out of the estate.

J. WITKOWSKI & CO. LTD. v. GAULT BROS. CO. LTD.

Ontario Supreme Court, Middleton, J., February 8, 1921.

Pleading (§IS—146)—Endorsement on writ—Sufficiency—Motion to set aside—Application of Rule 124—Rules 56; 111 and 112 (1) and (3).

APPEAL by the defendants from an order of the Master in Chambers refusing to set aside the writ of summons upon the ground that the plaintiffs could not sue for the price of the goods said to have been sold to the defendants, but at

Ont.

most for damages for refusal to accept, and that a claim for such damages could not be made the subject of a special endorsement.

H. S. White, for defendants.

Erichsen Brown, for plaintiffs.

Middleton, J.:—I think the motion fails because it is not open to a defendant to dictate to a plaintiff how he shall sue. The claim as endorsed on the writ is sufficient in form, and all that is said is that the plaintiffs cannot succeed, and that when the truth is told they will find themselves out of court with respect to the cause of action alleged, for the cause of action implies that the property in the goods sold has passed. This may well be, and it is by no means a matter of course that an amendment will be permitted.

Regarding the endorsement as a pleading, R. 24 applies, and the pleading cannot be struck out unless "it discloses no reasonable cause of action." If an attempt were made to specially endorse a claim which on its face did not fall within R. 33, a motion would be proper.

In this case the writ has, in addition to the claim specially endorsed, another claim for damages, so that a statement of claim is necessary. Rule 56, so far as it provides for a right of election and speedy trial, and R. 111 and 112 (1) and (3), * do not enable a plaintiff whose writ is endorsed with a claim other than that which is properly specially endorsed to escape delivery of a statement of claim covering both claims. The affidavit filed on this motion is quite adequate as an affidavit to accompany the appearance of a specially endorsed writ, and thus there is no real object in such a motion—a special endorsement contains in most cases an adequate statement of the nature of the plaintiff's claim, and so may be well regarded as a statement of claim. If the issue raised by the defendants is simple, then the plaintiffs may elect to go to trial on this affidavit, leaving the defendants to obtain leave to file a further defence if it is deemed necessary—Rule 56 (5). When the plaintiff does not so elect, the normal and proper course is for the defendant to file a defence. Leaving the affidavit to stand as a defence (under R. 112 (3)) should be regarded as an abnormal state of affairs.

The result is that this motion is not only misconceived, but its success would not advance the interest of either party.

*Par. 3 was added to R. 112 by amendment made on December 24, 1913.

Que.

Motion dismissed; costs to the plaintiffs in the cause in any event.

KATZMAN v. MANNIE.

Ontario Supreme Court, Appellate Division, Maclaren, Magee, Hodgins and Ferguson, JJ.A. December 30, 1920.

Damages (§IIIJ—202)—Detention of Motor Vechicle—Assertion of Lien for Repairs—Election—Form of Judgment—Return of Car—Appeal—Amendment of Judgment—Substitution of Award of Damages—Terms—Costs—Quantum of Damages.

APPEAL by the plaintiff from the judgment of Sutherland, J. (1919), 46 O.L.R. 121.

The appeal was not as to any of the questions of law discussed by Sutherland, J., in his judgment, but as to the form of the judgment and the quantum of damages. The plaintiff, the appellant, stated that by an inadvertence the judgment, as drawn up and issued, contained an order (par. 2) for the return of the plaintiff's car by the defendant. The plaintiff desired damages instead of the return of the car, and asked that the damages should be increased from $800 to $1,200.

A. St. George Ellis, for appellant.

The judgment of the Court was delivered by

Hodgins, J.A.:—The effect of the judgment of Sutherland, J., as delivered, is to determine that the respondent wrongfully detained the car, and he was given 10 days to redeliver it. The delay in taking out the judgment and the apparent election of the appellant to insist on the return of the car long after the expiry of the 10 days, and then to appeal against the provision for return, is somewhat unusual. We are, in fact, now asked by the appellant not only to change his election but in doing so to increase the damages. . . . I see no sufficient reason for increasing the damages.

If the appellant files an affidavit shewing that the car was not returned or tendered before his notice of appeal was served or since, the judgment will be amended by striking out para. 2 thereof and substituting therefor judgment for the sum of $800 with $75 costs, less the $67.75 unpaid, and there will be no costs of the appeal. If the affidavit is not filed within two weeks, the appeal will be dismissed without costs. Order accordingly.

HAMEL and CASGRAIN v. TREMBLAY.

Quebec King's Bench, Lamothe, C.J., Lavergne, Carroll, Pelletier and Martin, JJ. March 8, 1919.

Intoxicating Liquors (§IIID—74)—Illegal Sale by Physician who is also a Druggist — Powers of Magistrate — Amending of Charge—Jurisdiction of Court to Review on Appeal—Validity of Prohibitive By-law.

Que.

APPEAL from a conviction of a Magistrate imposing imprisonment for a third offence under complaint charging a first offence. Conviction affirmed.

The judgments of the Superior Court of the District of Chicoutimi pronounced on September 3, 1918, by Letellier, J., are affirmed.

These judgments have annulled two writs of prohibition by which the appellants wish to set aside sentences of imprisonment pronounced against them for infraction of the Licence Act R.S.Q., 1909, art. 903. The grounds of objection of the appellants are set out in the following remarks.

E. Levesque, for appellants; O. Tremblay, for defendants.

Pelletier, J.:—This is the case of two writs of prohibition, which the two physicians, the appellants, have obtained to endeavour to set aside a judgment which condemned them to three months' imprisonment each. The respondent is the revenue official for the district of Chicoutimi and in that capacity he prosecuted the appellants for having sold intoxicating liquors in violation of the municipal prohibition by-law in force at Chicoutimi since 1915.

The appellants are physicians, and the magistrate in view of the evidence given before him has not only found them guilty of the infraction of which they were accused, but he has moreover clearly stated that it was not a case of a first infraction—for which a sentence of imprisonment could not have been imposed—but one of a third and of a fourth infraction.

Using then the powers clearly given to him by the Licence Act of Quebec, R.S.Q. (1909) art. 903, the magistrate ordered the complaint to be amended. He certainly had the right to do this and the fact that no formal amendment was written upon the summons does not prevent the amendment having been made for all purposes of law and to the knowledge of the appellants who had the advantage if they wished to profit by it, of being able to answer the complaint as amended.

The Licence Act contains a provision, art. 1166, sec. 2, which reads as follows:—

"The court or the judge before whom a demand is made should decide the question on the merits without taking account of any variance between the complaint and the conviction nor of any defect whether of form or of substance provided that it appears by the conviction that the

Que.

condemnation was pronounced and signed for an offence against some provision of the present section."

This provision is perhaps Draconic, but it is the law and renders invalid the objections that the appellants submit to us.

In consequence of all this we come to the conclusion that the judgments a quo are well founded and should be affirmed with costs.

Martin, J.:—On December 15, 1917, the respondent Tremblay, in his quality of Collector of Provincial Revenue for the District of Chicoutimi, instituted proceedings against the appellant for having sold and delivered intoxicating liquors to different persons on or about November 25, 1917, without a licence, contrary to law and in violation of a prohibitive by-law in force in Chicoutimi since 1915.

The appellant appeared in answer to this complaint and pleaded "Not guilty," and on January 16, 1918, after proof made, was condemned by Magistrate Bergeron to three months' imprisonment for a third offence.

After this judgment, the appellant applied for and obtained in the Superior Court at Chicoutimi, a writ of prohibition seeking to restrain the magistrate and the complainant from taking any proceedings to enforce such conviction. The main grounds alleged on this proceeding by the appellant were: (1) that the magistrate had exceeded his jurisdiction;—(2) that the appellant as druggist had the right to sell intoxicating liquors upon prescription or preparations containing alcohol; (3) that the complaint alleged a first offence and that the magistrate had not the right to order an amendment of the complaint and condemn the appellant for a third offence; (4) that the prohibitive by-law was irregularly produced; (5) that the appellant's request for an adjournment of the case had been refused; (6) that the licence law and the prohibitive by-law were ultra vires and unconstitutional.

The respondent Tremblay contested the writ of prohibition averring that the magistrate had jurisdiction and that the proof made supported the charge and that the magistrate had authority to amend the complaint making it a third offence.

By judgment of the Superior Court rendered on September 3, 1918, the writ of prohibition was dismissed; hence the present appeal.

The jurisdiction of the magistrate is clearly given by

Que.

art. 1112, R.S.Q. 1909, and neither the Superior Court nor this Court has any right or authority to revise or pass upon the proof or the judgment of the magistrate within the latter's jurisdiction.

The appellant is a druggist and the magistrate found that he had sold intoxicating liquor without a certificate or prescription, claiming the right to sell medicinal preparations containing alcohol for medicinal use only, under the provisions of the Quebec Pharmacy Act, R.S.Q. 5029, evidently overlooking the fact that such right of sale does not exist within a prohibited area under arts. 678 and 981, R.S.Q.

The point which was most seriously pressed for our consideration on this appeal was that, while the magistrate had the power to change the complaint making it a third offence, the amendment, though ordered, was not actually made.

The provisions of art. 1075, R.S.Q. were amended by 7 Geo. V., ch. 17, sec. 25, replacing the word "may" in the second line thereof by the word "must."

The amendment was allowed and ordered by the magistrate on January 4, 1918, and the case adjourned to January 15. On that day counsel for the accused applied for an adjournment which was granted to the next day, and on the 16th, under objection declared that he was ready to proceed and did proceed with the enquete.

While it might have been more regular to have had the amendment actually made on the declaration, I fail to see how the appellant was prejudiced by the failure to do so, and when guilt appears from the evidence which has been adduced before the magistrate, the accused should not escape by mere defects in form occasioned by an error of the magistrate.

Was the accused deprived of a fair trial? I do not think so. The amendment was a proper one and the conviction is warranted by the evidence. The amendment did not involve investigation of new facts. Certified copies of the previous convictions were produced and that was all that was required to be done.

The act which formed the foundation of the original charge as laid was the same. Prohibition cannot be resorted to cover mere irregularities in procedure, unless the same are equivalent to excessive jurisdiction or constitute an imminent danger of failure of justice.

Sask.

The test whether a defendant can be prejudiced by such an amendment is whether a defence under an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other; in such case the amendment would not be one by which the defendant could be prejudiced in his defence. In fine, if the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed, but if the amendment would substitute a different transaction from that alleged or would render a different plea necessary, it ought not to be made. In this case the transaction alleged in the indictment is the same after the amendment as before it was made, and the amendment cannot necessitate a different plea from the plea of not guilty which was made when the defendant was arraigned. An amendment should not be allowed, if it involves the investigation of entirely new facts.

It was urged before us that the prohibitive by-law had been irregularly produced before the magistrate. The secretary-treasurer of Chicoutimi was produced as a witness and testified without objection that there was a by-law prohibiting the sale of intoxicating liquors in force in Chicoutimi during the period in question. He was asked to produce a copy of this by-law and a copy was delivered to the magistrate while the case was en delibere, and it is suggested that this production was irregular.

I find nothing unusual or irregular in this production. Moreover, the evidence of the secretary-treasurer Tremblay was clear, precise and positive as to such a by-law being in force.

The question of ultra vires of the Act was not pressed for our consideration by counsel for the appellant.

I would dismiss this appeal with costs.

Appeal dismissed.

LINDELL v. NORTH AMERICAN LIFE ASSURANCE CO.

Saskatchewan King's Bench, Brown, C.J., K.B. March 21, 1921.

Insurance (§III.G—150)—Application for Life Insurance—Policy Issued—First Premium Paid—Subsequent Premium Settled for by Note—Note Not Paid at Maturity—Rule of Company Requiring Proof of Good Health Before Reinstatement—Note Afterwards Paid and Note Cancelled—Letter Asking for Proof of Good Health—Letter Not Received—Proof Not Forwarded—Liability.

Sask.

ACTION to recover the amount of a life insurance policy.

L. H. Johnson, for plaintiff.

N. Gentles, for defendants.

Brown, C.J.K.B.:—The plaintiff is the widow of Andrew Lindell, deceased, and executrix of his last will and testament. On May 28, 1918, the deceased, Andrew Lindell, applied to the defendant company for life insurance in the sum of $2500 and on June 10 of that year a policy was duly issued in his favour. This policy called for an annual premium of $124.40 to be paid in advance on June 5 of each year, the first payment to be made on June 5, 1918. Following are several provisions of the policy material to the action:

"(a) Under no circumstances shall this policy be held to be in force until the actual payment of the first premium thereon to an authorized agent of the Company and its acceptance by him and until the delivery to the Applicant, when in the same condition of health as stated in the application for this policy of the official receipt, signed by the Managing Director, Actuary, Secretary or Assistant Secretary.

"(b) Payment of premiums to agents will not be valid unless receipts be given, signed by one of the said Executive Officers. When receipts are sent to agents for delivery, such agents shall countersign and date the same only on the day of the actual payment of premium, and as evidence of its then payment to them. All premiums are due and payable at the Head Office in Toronto. For the convenience of the insured, payment of a premium, when not overdue may be made to an agent, but only upon production of the receipt above specified.

"(c) One month, not less than thirty days, will be allowed for payment of each renewal premium on this Policy after the same has become payable during which time the Policy will continue in force.

"(d) If a note, cheque, draft or other obligation, given for the first or any subsequent premium, or any part thereof, or any renewal of any such note or other obligation or part thereof, be not paid when due, this policy, subject to the Automatic Non-Forfeiture provision hereof, will thereupon cease to be in force without any notice or act on the part of the Company.

"(e) If, in the event of default in the premium pay-

Sask.

ments, the original policy shall not have been surrendered to the Company and cancelled, the Policy may be reinstated at any time upon receipt at the Head Office of evidence of insurance satisfactory to the Company and of arrears with compound interest at a rate not exceeding 6 per cent. per annum.

"(k) No provision of this contract can be changed, waived or modified, nor can any permit be granted, except by written agreement, signed by the President or Vice-President and the Managing Director, Actuary, Secretary or Assistant Secretary of the Company."

On July 5, 1919, the deceased arranged with the defendant's agent at Moose Jaw for a premium falling due on June 5, 1919, by paying $10 in cash and giving a note in favour of the defendant, dated July 5 for $114.50 with interest at 6 per cent. per annum and falling due or payable on October 4, 1919. The official receipt for the premium which was thus arranged for was attached to the note and both the note and the official receipt were held by the defendant's Moose Jaw agent who was W. S. Newman. Newman was something more than a mere local agent. He held the post of district manager for that part of the Province in which the deceased resided. The deceased made default in payment of the note so given and did not pay same until November 3, 1919. The payment was apparently made on the above date by mailing the money through the post to Newman's office at Moose Jaw. Upon receipt of the money Newman mailed to the deceased the note and renewal receipt and also the following letter:

"November 4th, 1919. Andrew Lindell, Esq., Brownlee, Sask. Dear Sir: We beg to acknowledge with thanks receipt of your remittance for $116.80 and beg to hand you herewith your cancelled note and premium receipt, which we trust you will find in order. Yours truly, (sgd) W. S. Newman, District Manager."

On November 25, 1919, Newman wrote the deceased a further letter as follows:—

"November 25, 1919. Andrew Lindell, Esq., Brownlee, Sask. Dear Sir: Re Policy No. 98745: With reference to your settlement for the premium on the above policy we have received advice from our Home Office that they require you to complete the enclosed form showing that you are still in good health, as the settlement of the note was not received on the due date. Kindly complete the form

Sask.

and return to us in the enclosed envelope. Yours truly, (Sgd.) W. S. Newman, District Manager."

The deceased had for some years been suffering from indigestion and I infer from the evidence that he was suffering to such an extent just prior to the payment of the note aforesaid that he deemed it necessary or at least advisable to consult Mayo Bros. at Rochester about his condition. It is clear that he had made up his mind to take the trip before he made payment and left home for Rochester on November 12 shortly after making the payment aforesaid. The deceased apparently found it necessary to undergo an opertion at Rochester and he died on December 3. Newman's letter of November 25 was never seen by the deceased. He had left for Rochester before it was written and the letter was apparently received by the plaintiff through the mail and held by her pending her husband's return. The deceased did not sign the form or any form required for reinstatement and no reinstatement took place. The defendant denies liability, claiming that the policy had lapsed. The plaintiff in reply sets up waiver and estoppel. By clause (d) of the policy above cited when default was made in payment of the note on its due date, the policy ipso facto ceased to be in force. By clause (e) referred to, provision was made for reinstatement upon receipt at the head office of the defendant of evidence of insurability satisfactory to the defendant. The consequences following default in payment of the note in question are set out in various documents as well as the policy itself. In the application for insurance which was signed by the deceased I find the following stipulation: "That if a note cheque, draft or other obligation be given for the first or any subsequent premium or any part thereof, and the same be not paid at maturity, any Policy issued on this Application or renewed, shall, subject to its terms and privileges be null and void, but such obligation must nevertheless be paid."

The official receipt for the first premium which was apparently given to the deceased on July 17, 1918, specially directs attention to the endorsement on the receipt and here again we find the provision referred to set out and a further stipulation as follows: "N.B.—Agents are not authorised to make any change whatever in receipts for premiums or to waive forfeiture, or any condition of a policy or premium receipt; that can be done only by a writing signed by the

President or Managing Director, under the direction of the Directors."

Sask.

Then, again, the official receipt enclosed with Newman's letter of November 4, 1919, has on it similar conditions and stipulations to those contained in and on the official receipt given for the first premium. Moreover, the form of application for reinstatement which was enclosed with the letter of November 25, 1919, contains the following provision:— "I hereby apply for the reinstatement of the above numbered policy and declare on behalf of myself and all parties interested therein that the statements and answers above made are true and complete and are material to the reinstatement of the said Policy. I further agree that reinstatement shall not be deemed effective until officially notified by the company and not in consequence only of this application or by reason of any cash payment made in respect thereof."

It is true that the deceased never received this letter of November 25 but it appears that twice in the year 1918 the deceased was required to sign and did sign for the purpose of reinstatement a similar form to that enclosed with the letter of November 25 for he was during that year in default both in settlement for the first premium and also later in payment of the note given for the first premium. On the whole therefore the deceased must be held to have been fully aware of the consequences of his failure to make payment of the note on due date; of the necessity for reinstatement; of the requirements for purpose of reinstatement; and of the limited authority of the local agent or district manager at Moose Jaw in that connection.

It is contended on behalf of the plaintiff that the acceptance and retention of the money, the writing of the letter of November 4 and the forwarding of the note and official receipt had the effect of causing the deceased to believe that his policy was in full force and that he in that belief underwent a serious operation as a result of which he died, and as a result that the defendant waived the necessity for reinstatement and is estopped from denying the validity of the plaintiff's claim.

Dealing with these various matters and first with respect to the acceptance and retention of the money, the contract itself expressly stipulates that the note must be paid even after maturity notwithstanding that default in payment at date of maturity voids the contract.

Sask.

The acceptance and retention of the money and the forwarding of the note in satisfaction of which the money was paid could not therefore be in any way regarded as a waiver of the necessity for reinstatement. The forwarding of the official receipt duly signed in proper form and by the defendant's proper officers is a more serious matter. It is however noticeable that the receipt indicates that settlement for the premium was made partly by cash and partly by note. I see no reason why this receipt should not have been given to the deceased on July 5, the day when settlement for the premium was made. If it had been given at that time it could scarcely be contended that the giving of the receipt in any way relieved the deceased from payment of the note or from the consequences of default in payment of the note at maturity.

I am of opinion under all the circumstances, but not without some hesitation, that the result was not different in that the receipt was held until the note was paid and given to the deceased at the time of payment and with the cancelled note.

As to the letter of November 4, there is nothing stated in the letter nor is there a lack of statement in the letter which in my opinion could be regarded as constituting a waiver of the necessity for reinstatement.

On the whole therefore I am of opinion that there was nothing said or done nor was there anything that could be regarded as a failure to say or do anything which could be interpreted as a suggestion or intimation that the full requirements for reinstatement on default of payment of the note would not be insisted upon and especially so in view of the fact that the necessity for reinstatement was staring the deceased in the face in nearly every document that came into his possession, even the official receipt which last came into his possession and on which much reliance is placed by the plaintiff.

I therefore find for the defendant irrespective of the want of authority on the part of the local agent on which I express no opinion and irrespective of the condition of health of the deceased at the time of payment of the note concerning which I am very dubious.

There will therefore be judgment in favour of the defendant with costs.

Judgment for defendant.

Sask.

LIERLE v. ABBS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. May 25, 1921.

Master and Servant (§I.C—10)—Action for Wages—Conflicting Evidence as to Hiring—Finding of Trial Judge.

APPEAL by defendant from the trial judgment in an action for wages. Affirmed.

C. E. Gregory, K.C., for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.S.:—This was an action for wages alleged to be due to the plaintiff by the defendant. The plaintiff's claim was contested by the defendant on the ground that the plaintiff was hired for a term certain, and having left before the end of the term, without justification, is not entitled to any wages. On the trial of the action the trial Judge found in favour of the plaintiff and gave judgment accordingly. The evidence with regard to the terms of hiring is conflicting, but the trial Judge, while attributing equal credibility to both parties, has accepted the version of the plaintiff. A consideration of the evidence does not lead me to a different conclusion.

The case of Neville v. Macdonald (1917), 36 D.L.R. 594, 10 S.L.R. 284, was much relied on by counsel for the appellant. In that case, however, the plaintiff practically conceded a hiring for a term certain in his evidence quoted in the judgment of Brown, J. In this case the plaintiff denies a hiring for any definite term. I should also be inclined to gather from the evidence that, owing to the failure of crop in the season in question, the defendant agreed to the plaintiff leaving, whatever the terms of hiring might have been. It also appears from the evidence that, when the plaintiff was leaving, the defendant offered to settle for the wages by giving the plaintiff a note or a horse.

The appeal should be dismissed with costs.

Appeal dismissed.

GRANT v. BROWN. (2 Decisions)

Saskatchewan King's Bench, Taylor, J. April 28, 1921; Bigelow, J. May 10, 1921.

Judgment (§VII.C—282)—Default—Refusal of Local Master to Set Aside—Appeal to Court of Appeal—King's Bench Proper Court to Hear Appeal—Application to Judge of King's Bench to Extend time for Appeal—Time Extended—Order of King's Bench Setting Aside Judgment and Giving Leave to Proceed with Action.

Sask.

APPLICATION to extend time for appealing from the refusal of the Local Master to set aside a default judgment, and application to set aside the judgment.

Taylor, J.:—On July 13, 1920, an order was made by the Local Master at Gravelbourg refusing to set aside a judgment dismissing the plaintiff's action, signed for default in attending on examination for discovery. From this order the plaintiff appealed to the Court of Appeal for Saskatchewan. When the appeal came on for hearing the Court held that the appeal should have been to a Judge of the King's Bench in Chambers, and that there was no appeal to the Court of Appeal. At the same time, the Chief Justice in delivering judgment referred to the proceedings and expressed a clear opinion on the merits of the application, and that the order which had been made dismissing the plaintiff's action for non-attendance on examination for discovery should not have been made.

Application is now made to a Judge of the Court of King's Bench to extend the time for appeal from the order of the Local Master made on July 13, 1920, and by way of appeal therefrom. The application to extend the time was argued before me. With some hesitation, and after discussing the matter with one of the Judges of the Appellate Court, I have decided to extend the time for appeal to enable the plaintiff to bring the matter before a Judge of the Court of King's Bench in Chambers.

The plaintiff's plight appears to be due in a great measure to the negligence and ignorance of the solicitor whom he has had the misfortune to employ in the conduct of this litigation.

The time for appeal is extended until after the hearing of the appeal, which is adjourned until the next Chamber day. As to the objection taken to the reading of the affidavit of the plaintiff's former solicitor, L. P. Beaubien, I do not deal with it, as it should be considered in connection with the merits on the appeal if the Judge hearing the appeal decides that the Court should permit the plaintiff's former solicitor in this action to disclose confidential communications between himself and his client and verify the same by affidavit for the benefit of the defendant.

P. G. Hodges, for appellant; H. Ward, for respondent.

Bigelow, J.:—On February 4, 1919, an order was made by the Local Master that the plaintiff do appear at his own expense and attend for his examination for discovery at the

Sask.

Court house in the town of Gravelbourg in the Province of Saskatchewan within 30 days from this date.

On May 31, 1919, an order was made by the Local Master striking out the writ and pleadings and ordering the plaintiff to pay costs.

An application was made to the Local Master on July 13, 1920, over a year afterwards, by the plaintiff to open up that judgment which was refused.

An application was made to the Court of Appeal to extend the time for appealing from that order and was dismissed on November 1, 1920, as such application should have been made to a Judge in Chambers. Grant v. Brown (1920), 55 D.L.R. 722.

On November 10, 1920, the plaintiff launched a motion appealing from the order of July 13, 1920, and to extend the time for appealing returnable before a Judge in Chambers November 16, 1920. This motion came before Taylor, J., who, with some hesitation, granted an order extending the time for appealing, but did not dispose of the rest of the motion,—just why, I do not understand, and the appeal now comes before me.

I agree with Taylor, J., that the plaintiff's plight appears to be due in great measure to the negligence and ignorance of the solicitors whom he has had the misfortune to employ in the conduct of this litigation. The solicitors are not wholly to blame, however, for the delay. On December 19, 1919 the defendant's solicitors wrote to the plaintiff the following letter:—

Dec. 19th 1919

Ebeneezer Grant,
La Fleche, Sask.

re yourself vs Grant

In this matter we beg to advise you that we have signed judgment against you for the costs of this action which amounts to $145.46. We have issued execution against your lands and goods, and we beg to advise you that unless this execution is satisfied within 8 days of this letter, we shall send the sheriff to seize.

You can govern yourself accordingly.

Yours truly."

The receipt of this letter was practically admitted by the plaintiff on his examination for discovery, so that we have it established that the plaintiff knew at the latest in any event in December 1919 of the judgment against him. No

Sask.

steps were taken to set that judgment aside until July 1920. Such delay I would have considered fatal to an application to open up a regular judgment, but the Court of Appeal has said that the order of May 31, 1919 should never have been made. Grant v. Brown, 55 D.L.R. 722. I would have considered the delay fatal on the application for an order extending the time for appealing from the order of July 13, 1920, but Taylor, J., has granted that order, and I do not have to consider that.

I allow the appeal from the Local Master's order of July 13, 1920, and order the judgment entered against the plaintiff to be opened up, and that the plaintiff have leave to proceed with his action.

Mr. Ward asks that terms be imposed which I would readily do if it were a regular judgment, but the Court of Appeal has said it was not a regular judgment, and plaintiff is then entitled to have it opened up ex debito justitiæ and without terms.

The plaintiff will have costs of the application before Taylor, J., and this application.

Judgment accordingly.

MILLER v. FOLEY & SONS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 30, 1921.

Appeal (§VII.M—575)—Findings of Fact—Case Tried by Judges Without a Jury—Interference by Appellate Court.

APPEAL by defendant from the judgment at the trial without a jury. Affirmed.

G. A. Cruise, for appellants; P. H. Gordon, for respondent.

The judgment of the Court was delivered by

Turgeon, J.A.:—This appeal turns entirely upon a finding of fact by the trial Judge. We are asked to set aside the judgment in the Court below given in favour of the plaintiff upon the ground that the said judgment is not supported by the evidence adduced at the trial.

The principle upon which a Court of Appeal will interfere with the findings of fact in a case tried by a Judge without a jury has been discussed on different occasions in cases to be found in our reports. See Davis v. Burt (1910), 3 S. L. R. 446; Coventry v. Annable (1911), 4 S.L.R. 425; [Affirmed by the Supreme Court of Canada, 5 D.L.R. 661.] Cowie v. Robins (1916), 27 D. L. R. 502, 9 S. L. R. 191; Thompson v. Greenwood (1916), 9 S. L. R. 311; Goddard v. Prime

(1917), 33 D. L. R. 790, 10 S. L. R. 102. Sask.

The rule no doubt is that, in cases of this kind, it is the duty of this Court to re-hear the case and to over-rule it when on full consideration the Court is convinced that the judgment appealed from is wrong. However, the degree of certainty which the Court should possess as to the trial Judge being in error before reversing his judgment, is expressed as follows by Anglin, J., in Green, Swift & Co. v. Lawrence (1912), 7 D.L.R. 589 at p. 599:

> "However loath we may be to reverse the decision of a trial Judge on the question of fact 'it is our duty to do so if the evidence coerces our judgment so to do.' The 'Gairloch,' [1899] 2 Ir. 1, 13; Coghlan v. Cumberland,]1898] 1 Ch. 704."

In this case there was a conflict of evidence upon the point in controversy between the parties, the question of the credibility of witnesses had to be considered, and after weighing and considering the judgment in the light of these circumstances I believe that it should be allowed to stand and the appeal dismissed with costs.

Appeal dismissed.

BAKER LUMBER CO. LTD. v. LEE ET AL.

Saskatchewan, King's Bench, Taylor, J. April 21, 1921.

Mechanics Liens (§VIII—60)—Sale Under Judgment—Application to Confirm—Time Extended—Application Adjourned—Regularity of Proceedings—Order Confirming to be Made in Absence of Fraud.

APPEAL by plaintiff from an order made by a District Court Judge on an application to confirm a sale of land sold under a judgment of the Court, in a mechanic's lien action. Reversed.

H. D. Pickett, for appellant.

E. S. Williams, for Weyburn Security Bank.

W. D. Graham, for defendant.

Taylor, J.:—This is an appeal by the plaintiff from an order made in a mechanic's lien action by the Judge of the District Court at Weyburn on March 29, 1921 on the application of the plaintiff to confirm a sale of certain land sold under a judgment of the Court to realise the claimant's lien.

On the return of the motion of the plaintiff to confirm the sale, the defendant who had been served with notice of motion appeared and opposed the application. He had not

Sask.

entered an appearance but had, without an order, been served with notice of the motion.

The disposal made by the Judge of the District Court of the application to confirm is peculiar. Under the order nisi directing sale it had been directed that the amount of the lien be paid into Court within 5 months after the clerk's certificate which was July 14, 1920. This time is extended by the Judge of the District Court until December 31, 1921, and application for confirmation of the sale is adjourned until December 31, 1921, and leave is given to the purchasers to withdraw as purchasers on or before December 31st, 1921. In such event they are entitled to have the purchase price paid into Court by them returned to them, and, in the event of their withdrawing, the plaintiff is to be at liberty to apply for a further order and reference in respect of the mechanic's lien. The defendant is to pay the costs.

As pointed out in the judgment under review, no objection to the regularity of the proceedings under which the sale was had herein is raised, nor is there any suggestion of any impropriety in directing the sale or in the conduct thereof. The Judge arrives at the conclusion that owing to the conditions prevailing in the district in which the defendant resides he has had no crop for some years, and the Judge is of the opinion that the defendant's prospects for a good crop in 1921 are excellent, and that with careful handling by the defendant of his business affairs he should be able to clear off all liabilities which are charged against his land. In the exercise of what the Judge conceives to be a just, reasonable and equitable discretion, the defendant should be given a further opportunity to redeem.

I quite agree that it seems a hardship that for the small amount of the plaintiff's claim the defendant should have his land sold, but it must be remembered that the Judges are not in any way responsible for the legislation conferring upon the plaintiff a right of lien and to have the land sold to realise his lien in the event of non-payment.

It has been held by the Court en banc in Canada Permanent Mortgage Corporation v. Jesse (1909), 2 S. L. R. 251 that the provisions of the Imperial Statute 30-31 Vict. (1867) ch. 48, the Sale of Land by Auction Act (1867), and particularly section 7 thereof, apply in this Province. This section 7 provides:—

"And whereas it is the long settled Practice of Courts

Sask.

of Equity in Sales by Auction of Land under their Authority to open Biddings even more than once, and much Inconvenience has arisen from such Practice, and it is expedient that the Courts of Equity should no longer have the power to open Biddings after Sales by Auction of Land under their Authority: Be it further enacted by the Authority aforesaid, That the Practice of opening the Biddings on any Sale by Auction of Land under or by virtue of any Order of the High Court of Chancery shall, from and after the Time appointed for the Commencement of this Act, be discontinued, and the highest bona fide bidder at such Sale, provided he shall have bid a Sum equal to or higher than the reserved Price (if any) shall be declared and allowed the Purchaser, unless the Court or Judge shall, on the ground of Fraud or improper Conduct in the Management of the Sale, upon the Application of any Person interested in the Land (such application to be made to the Court or Judge before the Chief Clerk's Certificate of the Result of the Sale shall have become binding), either open the Biddings, holding such Bidder bound by his Bidding, or discharge him from being the Purchaser, and order the Land to be resold upon such Terms as to Costs or otherwise as the Court or Judge shall think fit."

This section has recently been considered by Peterson, J. in Re Joseph Clayton Ltd.; Smith v. The Company, [1920] 1 Ch. 257. Peterson, J. reviewing the authorities points out that in England there is a series of decisions which establish that a purchaser was not entitled to the benefit of his purchase until the certificate of the result of the sale had become binding, but when the certificate became binding it related back to the date of the sale. The certificate recognised, allowed or approved of the highest bidder as the purchaser, and it was the certificate which enabled the highest bidder to say that he was the purchaser and entitled to the benefit of his purchase. Taking advantage of the fact that the highest bidder did not become the purchaser before the certificate was binding the Court of Chancery was in the habit of opening the biddings where a higher bid was obtained after the sale, so that the highest bidder at the auction was always exposed to the risk that the property might be sold to some other person who subsequently offered a better price. In order to meet the inconvenience of that practice sec. 7 of the Sale of Land by

Sask.

Auction Act (1867), which I have quoted, was passed, the practice of opening the bidding was prohibited, and it was enacted that the highest bidder should be declared and allowed the purchaser if the sale had been conducted as required by the statute. In re Clayton (supra), Peterson J. held that as one of the conditions; that the reserved price be reached had not been complied with the Court was not bound to certify the highest bidder to be the purchaser and refused the certificate.

In my opinion the reasons inducing such legislation in England are applicable here. The Court will always strive in sales under its direction to obtain the highest possible price. That can be obtained only if a proposed bidder can feel that, should he be the highest bidder and be declared by the auctioneer to be the purchaser, he is secure in his purchase. How otherwise would a purchaser care to sign an agreement to purchase and pay his purchase price? He is bidding for the property, not for a chance to buy the property; and while this is probably a hard case, yet to hold that the Court would refuse to confirm a sale held under judicial process or its direction where sale proceedings were regularly and properly conducted in accordance with the order of the Court, would be liable to work hardship to a a great number in other cases, and jeopardise all sales by auction under judicial process.

In my opinion the application to confirm the sale is analogous to the application for a certificate; and the highest bona fide bidder at a sale under judicial process provided he shall bid a sum equal to or higher than the reserved price (if any) should be declared and allowed the purchaser, unless the Court or Judge on the ground of fraud or improper conduct in the management of the sale, either opens the biddings, holding such bidder bound by his bidding, or discharges him from being the purchaser. Unless it is a case where the bidding should be opened or the purchaser discharged under the provisions of sec. 7 of the Sale of Land by Auction Act (1867), the sale would be confirmed.

My understanding of the practice in vogue in this Province is that the order for confirmation of sale goes as a matter of course unless there is some fraud, irregularity, or impropriety in the sale.

It is further to be noted that counsel for the purchaser intimates that in this particular case, should confirmation

Sask.

be refused and the order under appeal be affirmed, they will at once under the leave granted withdraw from the sale. The property is subject to a prior encumbrance, and it is stated by counsel for the purchaser, that for overdue payments thereunder no provision is now made.

It is too late on an application to confirm a sale regularly made to apply for further time to redeem. Had the application been made before the sale the decision under review does not appear to be in conformity with that of Embury, J. in Everson v. Hodgson (1921), 14 S.L.R. 158, in which the conditions upon which a defaulting mortgagor may obtain an extension of time are set out.

I have not overlooked the objection taken to the appeal that this was a final and not an interlocutory order, but in my opinion the order under review is an interlocutory order.

The appeal will be allowed and an order made confirming the sale. The plaintiff is entitled to costs of the appeal and the application to confirm.

Appeal allowed.

HAMRE v. WESTERN TRUST CO.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 30, 1921.

New Trial (§11—9)—Evidence—Notes of Trial Judge Insufficient—Reference back for further evidence necessary.

APPEAL by plaintiff from the trial judgment in an action against the executor of an estate to recover a sum of money due under a lease made between the plaintiff and the deceased. New trial ordered.

C. H. J. Burrows, for appellant.

L. McK. Robinson, for respondent.

The judgment of the Court was delivered by

Turgeon, J.A.:—In this case the plaintiff brings action against the defendant as administrator of the estate of John D. Roberts, deceased, to recover the sum of $420, which he claims under the terms of a lease made between himself and the deceased on April 25, 1917, covering the west half of section 30 in Tp. 11 and Range 8, west of the 3rd Meridian. This sum of $420 is stated to be the value of 140 acres of summer fallow, at $3 per acre, done upon the said land in the year 1916 and which it is alleged the defendant agreed to pay for. The defendant, among other grounds of defence, alleges that the lease in question was illegal and void by virtue of sec. 31, sub-sec. 1 of the

Sask.

Dominion Lands Act, 7-8 Edw. VII., 1908 (Can.), ch. 20, because, at the date of the lease, part of the land was held as a pre-emption entry by one Otto Kroneing and the title to the same was thus vested in the Crown.

The Appeal Book, at p. 21, contains the following notes certified by the District Court Judge:

"Admitted by counsel that patent to N.W. ½ 30/11/8 W/3rd M., was granted to Otto Kroneing on the 23rd of June, 1917.

Admitted by counsel that patent to S.W. ¼ 30/11/8 W/3 was granted to Otto Kroneing on the 5th of Nov. 1914.

Admitted by counsel that lease filed and dated 25th April, 1917, was executed by the parties thereto on or before the 25th of April, 1917.

Thomas Henry Bristow. I am the Commissioner who took the affidavit of the witness. I also drew the document, being a lease between Ole Anderson Hamre and John D. Roberts, and dated the 25th day of April, 1917, and said document is in the same condition as when executed by the parties thereto. Lease put in as Exhibit "A."

Cross-Examination. The paper attached to third page was attached before the parties signed the lease.

Admitted by counsel for plaintiff that at the date of the lease herein the plaintiff held the land in question under an agreement for sale from Otto Kroneing as vendor to himself as purchaser.

Under section 31, sub-section 1 of Dominion Lands Act of 1908, I hold a lease of the N.W. ¼ of 30/11/8 W/3rd M., granted before the patent issued is void, and that as the lease was for the half section, the part that is void cannot be severed from the part which is not, so that the whole lease is void, and the plaintiff has no right of action.

Action dismissed with costs.

I certify the foregoing to be a true copy of my notes of evidence taken in this case at the trial thereof, held at Ponteix on the first day of June, A.D. 1920."

According to the foregoing notes of evidence supplied by the District Court Judge, it would appear that the only point considered and decided by him was the point relative to the effect upon the lease executed on April 25, 1917, of sec. 31, sub-sec. 1 of the Dominion Lands Act. No evidence was taken, apparently, to determine any of the other

Sask.

issues raised by the pleadings. Reading the plaintiff's statement of claim and the lease together, I infer that the terms of the lease were performed by the deceased Roberts (the lessee), with the exception of the payment of $3 per acre for the acreage that was summer fallowed during the year 1916. The plaintiff makes no claim relative to the share of the crop he was to receive under the lease, from which I infer that he received it. This also may be inferred from certain allegations made in the notice of appeal and which may be taken as admissions by the plaintiff, in so far as they assert that the plaintiff received any of the advantages which were to come to him under the lease. Matters raised as a defence and set-off in the statement of defence are not mentioned in the Judge's notes, and, presumably, no evidence concerning them was offered, or, if offered, was received by him. For instance, the defendant alleges in para. 10 of his defence that the deceased Roberts was entitled to receive $50 from the plaintiff for plastering the dwelling-house on the leased land. In his notice of appeal the plaintiff states that he tendered evidence to shew (among other things) that he, the plaintiff, paid for this plastering, but that such evidence was rejected by the trial Judge. The statement in the notice of appeal is not supported by affidavit, and I mention it here merely as tending to shew, along with the other circumstances of the case, that some of the facts involved are not agreed upon by the parties, and that the only evidence received by the Judge was as to the title to the land and the effect of the aforesaid section of the Dominion Lands Act on the lease at the time the lease was executed.

In order to determine the rights of the parties finally, this Court will require to be supplied with evidence which, unfortunately, is lacking at present. For instance, did the deceased occupy the land during the term of two years provided by the lease, or until his death (if his death occurred sooner), or, in any event, for how long a period? How many acres of the summer-fallow in question were upon the north-west quarter of this land and how many upon the south-west quarter? What transactions, if any, occurred between the plaintiff and the deceased concerning the leased premises after June 23, 1917? What evidence is there to support the matters alleged in defence and in set-off by the defendant? We cannot dispose of this case unless we are informed whether or not there is any evidence which the parties wish to produce on these points,

Sask.

and, if so, what the evidence is. On the case as submitted to us by the trial Judge it would appear that we are merely being asked to determine academically whether or not sec. 31 of the Dominion Lands Act renders illegal or void a lease concerning land made on April 25, 1917, when title to part of the said land was issued by the Crown only on June 23 of the same year. In the concrete case between the parties other elements exist which must be considered, and which will have their effect upon the disposition to be made of the academic question propounded for us by the District Court Judge, and upon the subsequent rights of the parties.

In the circumstances, therefore, I have come to the conclusion that this Court should not deal finally with this case in its present form, but that the same should be referred back to the trial Judge to be re-tried by him, so that all evidence relevant to the matters in issue may be of record. It is certainly regrettable that we should have to adopt this course, and I suggest it only after having satisfied myself that justice cannot be done in any other manner.

In any event, I may add, acting on the assumption that we are dealing here with a contract which was at least partially executed, that I am of the opinion that, even if illegal in so far as the pre-emption land is concerned, it is a severable contract and can be sued upon in so far as it affects that part of the leased land of which the plaintiff was the owner at the time the lease was made.

(Payne v. The Mayor, etc., of Brecon (1858), 3 H. & N. 572, 157 E.R. 597, 27 L.J. (Ex.) 495; Pickering and another v. The Illfracombe R. Co. (1868), L. R. 3 C. P. 235, 37 L. J. (C. P.) 118).

I think I am justified in going this far on the material before us, and if this view is to be acted upon the case will have to be referred back to the District Court in any case, if only for the purpose of ascertaining how much of the 1916 summer-fallow was on this particular quarter-section, in order that judgment may be rendered for the plaintiff accordingly; unless, of course, he has already received payment therefor,—as to which latter fact we have no evidence before us. But since there must be a reference back in any case, I think it better, under the circumstances, that a new trial be ordered.

The appellant will have his costs of this appeal. The costs of the former trial will be costs in the cause.

New trial ordered.

Sask.

DUKE v. BROWN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont, and Turgeon, JJ.A. March 30, 1921.

Appeal (§III.F—98)—Notice of—Application for Stay of Proceedings pending—Leave of Judge not obtained—Jurisdiction of Judge to grant Leave—Court of Appeal without Jurisdiction to hear Application to extend Time until Appeal lodged.

APPLICATION by plaintiff to extend the time for appealing to the Court of Appeal from an order made by Brown, C.J., K.B. in Chambers setting aside an interlocutory order of the Judge of the District Court. Application dismissed.

G. W. Thorn, for appellant; F. P. Collins, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—This is an application by the plaintiff to extend the time for appealing to this Court from an order made by Brown, C.J., K.B. in Chambers setting aside an interlocutory order of the Judge of the District Court herein.

The order of Brown, C.J., K.B., was made on November 18, 1920. Notice of appeal was served on December 3rd, the last day upon which such notice could be given under the rules. On December 8 the plaintiff applied to the Chief Justice for a stay of proceedings until after the hearing of the appeal. On that application it was pointed out by counsel for the defendant that no appeal was pending, notwithstanding that notice of appeal had been served because, by sec. 56, sub-sec. 3 of the District Courts Act, R. S. S. 1920, ch. 40, a decision of a Judge of the Court of King's Bench upon appeal from an interlocutory order made in the District Court is not subject to further appeal except by leave of the Judge, and that such leave had not been obtained. Counsel for the plaintiff then asked Brown, C.J., K.B., to grant the leave required by the statute. The Chief Justice, being in some doubt as to his jurisdiction to grant leave after the expiration of the time limited for appeal, but considering it a proper case for appeal, directed an order to go "granting leave to appeal so far as I can do so." At the same time he gave the plaintiff leave to make application to this Court. Neither then nor at any other time did the plaintiff apply to the Chief Justice or any other Judge of the Court of King's Bench for an order extending the time for appealing to this Court. Nothing further appears to have been done until January 5, 1921, when the plaintiff launched the present motion.

As there was no right of appeal from the order of

Sask.

November 18 without the leave of Brown, C.J., K.B., the service of a notice of appeal without having obtained such leave was improper.

I am of opinion, however, that the Chief Justice had jurisdiction to give the leave required by the statute even after the expiration of the time limited by the rules for appealing. That leave, however, would not entitle the plaintiff to serve a notice of appeal if the time within which he would have the right to appeal with leave had expired. Before he could commence his appeal, he must obtain an order extending the time for serving a notice of appeal. That order should be obtained from a Judge of the Court of King's Bench, for, until an appeal is lodged, this Court would not appear to have any jurisdiction. Under an Ontario rule which empowers the Court to enlarge or abridge the time prescribed by the rules or by an order for doing any act or taking any proceedings, I find in Holmested's Judicature Act, 1915 ed., at p. 634, the following:

> "In appeals to the Appellate Division the application for an extension of time to appeal should be made to a Judge of the High Court Division, as, until the appeal is lodged, the Appellate Division would not appear to have any jurisdiction."

The plaintiff has therefore, in my opinion, made his application to the wrong Court, and the application here must be dismissed, but owing to the divergent views existing among members of the Court of King's Bench as to the proper tribunal before which the application should be made, there should be no costs.

Application dismissed.

HAWKER v. THE ROYAL BANK OF CANADA.

Saskatchewan King's Bench, Bigelow, J. April 20, 1921.

Banks (§VIII.C—202)—Document securing an Advance—Bank Act, 3-4 Geo. V. 1913 (Can.), ch. 9, secs. 88 and 90—Grain given in Security not Threshed at Time of Giving—Validity—Sale to Third Party of Goods pledged—Right of Bank to follow Proceeds.

ACTION against plaintiff for refusing to allow defendant credit for the amount of elevator certificates deposited with it.

J. Macklem, for plaintiff.

P. E. MacKenzie, K.C., and R. Dingwall for defendant.

Sask.

Bigelow, J.:—On August 7, 1920, one T. A. Gardner, a farmer residing near Brock, secured an advance of $2,000 from the defendant, signing a promissory note as well as the following document:—

"Brock, Sask., 7th August, 1920.

To the Manager, The Royal Bank of Canada, Brock.

Dear Sir:—The Bank is hereby requested by the undersigned to grant and continue during the current season (which shall be considered to terminate (1) six months after the date hereof) a revolving line of credit for my/our farming business of $2500.00 and to make advances to the undersigned thereunder on the security of all the (2) crop for season 1920 (herein referred to as "goods") which are now owned or which may be owned by the undersigned from time to time while any advances made under this credit remain unpaid, and which are now or may hereafter be in (3) .... situated all W ½ of 23-29-20 W.3, S.E. ¼ 23-29-20 W.3. And the undersigned promise and agree to give the said Bank from time to time and as often as required security and further security for the said advances by way of assignments under section 88 of The Bank Act, covering all the said goods or part thereof, and/or bills of lading and/or warehouse receipts for goods of the above kinds or some of them; and you or the Acting Manager for the time being are hereby appointed the Attorney of the undersigned, to give from time to time to the Bank the security and further security above mentioned and to sign the same on behalf of the undersigned. The Bank may from time to time take from the undersigned bills and/or notes representing the advances in whole or part. Such bills and/or notes shall not extinguish or pay the indebtedness created by such advances but shall represent the same only. This undertaking is to apply to all advances made to the undersigned under the said line of credit, the intention being that all said goods which the undersigned may from time to time have in said place or places shall from time to time be assigned and further assigned as often as required to the bank under sec. 88 as security for all advances, and that all bills of lading or warehouse receipts covering goods of the above kinds which the undersigned may receive from time to time shall be given to the Bank as such security, and that no security taken shall be merged in any sub-

Sask.

sequent security or be taken to be substituted for any former security. Yours truly, (sgd.) T. A. Gardner."

Gardner also signed another document the same day appointing defendant's manager his attorney to sign securities necessary to carry out the original contract. On August 20 the defendant advanced Gardner another $100, taking his note therefor.

Defendant's manager at Brock tried to get Gardner to come in to complete the security but apparently with no result and on September 28, 1920, under the power of attorney signed a document in Form C of The Bank Act 3-4 Geo. V., 1913 (Can.), ch. 9, purporting to give the bank security on Gardner's crop of all the oats and all the flax estimated at 6,000 bushels of oats and 1,000 bushels of flax situated on section 23-29-20 W.3rd, and then "in the granaries."

The evidence shews that the flax which is in question in this action was not threshed on that date but that it was threshed on September 30 and October 1. Gardner hauled 857 bushels of this flax to the elevator at Brock, the hauling being completed on October 12 and obtained storage tickets. On October 12 Gardner sold this flax to the plaintiff at $2.50 a bushel. On October 16 plaintiff sold it to the elevator at $2.58 a bushel and the Elevator company gave plaintiff a purchase certificate shewing that plaintiff was entitled to $2211.05.

The plaintiff did his banking with the defendant at Brock and on October 16 took this certificate to the defendant's office at Brock to cash. The ledger-keeper made out a deposit slip shewing that plaintiff deposited $2211.05 in defendant's bank at Brock on that date. The defendant soon afterwards collected the amount for the grain but refused to honour plaintiff's cheques on this amount or to pay plaintiff any of this amount, hence this action. The defendant claims the said flax and the proceeds thereof.

So far as is material for this case the Bank Act, 3-4 Geo. V., 1913, (Can.) ch. 9, sec. 88, provides:—

"2. The bank may lend money to a farmer upon the security of his threshed grain grown upon the farm.

6. The security may be taken in the form set forth in Schedule C to this Act, or to the like effect."

And sec. 90 provides:—

"The Bank shall not acquire or hold any warehouse receipt or bill of lading, or any such security as aforesaid, to

Sask.

secure the payment of any bill, note, debt or liability, unless such bill, note, debt or liability is negotiated or contracted—(a) at the time of the acquisition thereof by the bank; or, (b) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank."

It is quite clear and it was practically conceded at the argument that as the grain was not threshed at the time the document of September 28, 1920 (Ex. D. 7), was executed; that that document is no security to the bank. The bank then has to rely upon the document (Ex. D 3) quoted above which is an agreement to give security. I think that document would in any event only be good for the $2,000 advanced at the time and would not cover the $100 advanced afterwards. Clarkson v. Dominion Bank (1919), 46 D.L.R. 281, 58 Can. S.C.R. 448.

Is it a good promise to give security to the extent of $2,000? It was held in Clarkson v. Dominion Bank supra that the written promise required by sec. 90 of the Bank Act refers to a specific loan then being negotiated for and to specific goods proposed to be given in security for such loan. The security promised in this document is all the crop for season 1920 situated on the W.½ of 23-29-20 W. 3rd and S.E.¼ of 23-29-20 W.3rd. This might include hay and vegetables whereas the Act only allows the bank to loan on the security of threshed grain. I would strictly construe such a section which validates a secret and unregistered security on personal property not in possession of the grantee bank and in direct opposition to all provincial laws on the subject requiring registration of such a security.

I would therefore hold that the document in question was not good as against third parties, even as a promise to give security. Assuming that it was a good promise to give security, the defendant, to succeed, must shew that the plaintiff has fraudulently conspired with and is acting in collusion with Gardner to defraud the defendant and that the plaintiff has no interest in the flax. In my opinion the facts do not warrant any such findings. On October 12, the date of the sale to the plaintiff, Gardner was indebted to plaintiff in the sum of $947.75. I find that the sale to Gardner was a bona fide sale and for good consideration, namely, the debt due $947.75 and a seed grain lien which

Sask.

plaintiff paid to the municipality $965.90 and $500 cash paid to Gardner.

In Union Bank of Halifax v. Spinney Churchill (1906), 38 Can. S.C.R. 187, cited by the defendant, it was held that "A bank to which goods have been transferred as security for advances under sec. 74 of the Bank Act, 1890, can follow the proceeds of sale of said goods in the hands of a creditor of the assignor to whom the latter has paid them, when the purchaser knew or must be presumed to have known that the same belonged to the bank." But it will be observed in that case that the goods had actually been transferred as security to the bank. This is not the case here. At the very most there was a promise to give security to the bank of the grain in question, and besides I cannot find that the plaintiff knew or must be presumed to have known of Gardner's agreement to give security to the bank when he bought the grain on October 12.

Plaintiff will have judgment against defendant for $2211.05 and interest at 5 per cent. per annum from October 16, 1920, and costs.

Defendant's counter-claim against plaintiff is dismissed with costs.

Defendant will have judgment against Gardner, a defendant by counter-claim, for $2,000 and interest at 5 per cent. per annum from November 4, 1920, and for $100 and interest at 9 per cent. per annum from August 20, 1920, and default costs as Gardner did not appear.

Judgment accordingly.

OKE v. SPELLER.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 30, 1921.

Appeal (§IV.B—116)—From District Court Judge—Conflict of Evidence—Finding of Fact—Necessity of District Judges taking reasonably complete Notes of Evidence.

APPEAL by plaintiff from the judgment of the District Court in an action brought to recover possession of a colt alleged to be his property. Affirmed.

A. G. Mackinnon, for appellant.

P. H. Gordon, for respondent.

The judgment of the Court was delivered by

Haultain, C.J.S.:—This action was brought by the plaintiff to recover possession of a colt alleged to be his property and to be unlawfully detained by the defendant. On the

Sask.

trial of the action the District Court Judge of the Judicial District of Gravelbourg found that the animal was the property of the defendant and dismissed the action with costs. The plaintiff now appeals from that decision.

No reasons for his decision are given by the trial Judge. According to the notes of evidence, twelve witnesses were called and examined, but not one word of the evidence of ten of them was taken down. The evidence of the plaintiff appears to have been taken down at considerable length, and there is one immaterial statement attributed to the defendant. Clarence Oke, Charles Oke and G. Oke appear to have been called by the plaintiff, but none of their evidence is given. The notes shew that Bert Dehais was called by the plaintiff "as to identification of colt," but none of his evidence is set out. S. Whitman, C. B. Robinson, R. Robinson and E. Raymond are shewn by the notes to have been called by the defendant. Their evidence is not given, but there is a note to the effect that they all "swore to the identification of the colt." Whether they identified it as the property of the plaintiff or defendant does not appear. Kathleen Speller's evidence is not shewn in the notes, but the following comment by the trial Judge follows her name in the notes: "This witness described the colt so well not having seen it for about two months, I was convinced she knew it better than anyone else."

It also appears from the notes that one Archibald Lockwood was called in rebuttal by the plaintiff, but was not permitted to give evidence because he had remained in the Court room although all the witnesses had been excluded by order of the Court. On this extremely unsatisfactory material we are asked to reverse the finding of the trial Judge or to order a new trial.

While the notes of evidence are so meagre and unsatisfactory, it is quite plain that the whole case turned on the identity of the animal, and that there was a distinct conflict of evidence on that point. The finding of the trial Judge should therefore, in my opinion, not be disturbed. The evidence of the witness Lockwood should not have been refused. Cook v. Nethercote (1835), 6 C. & P. 741; Chandler v. Horne (1842), 2 Moo. & R. 423.

The mere fact that this evidence was improperly rejected is not, in itself, a sufficient ground for ordering a new trial. It must be shewn that some substantial wrong or miscarriage has been thereby occasioned in the trial. As

Sask.

there is nothing in the material before us to indicate what the evidence of Lockwood would have been, we are not in a position to judge what possible effect it might have had.

I would therefore dismiss the appeal with costs.

I feel constrained to make some general comment on the necessity for taking reasonably complete notes of the evidence, and for giving the actual grounds for decisions and findings of fact in District Court cases. The present case is only one of several cases already heard by us at the present sitting of the Court where proper notes have not been taken. Neglect in that regard has also been the subject of comment by this Court on more than one occasion at former sittings.

In another case heard in the present term, a District Court Judge attributed his inability to supply his reasons for judgment, given orally, to the fact that no Court reporter was supplied by the Government. That, with all deference, is not, in my opinion, a satisfactory reason. If reporters are not supplied, then the work must be done without them as it was done for many years by the Judges of the Supreme Court of the Territories and the Supreme Court of Saskatchewan. It is not fair to litigants that the right of appeal should be made quite useless because proper notes of evidence have not been taken. It is now provided by statute, R.S.S., 1920, ch. 26, sec. 2, that "the judge presiding at a trial shall take such notes of the evidence as may be required to reproduce the same in substance and effect." This is only a statutory declaration of what was always the duty of a Judge trying a case which might be the subject of an appeal.

In view of the specific directions of the statute above referred to, and of the decisions of this Court in Duck v. Floht (1914), 20 D.L.R. 497, 7 S.L.R. 389, and Skagen v. Smith and Balkwell (1920), 53 D.L.R. 245, 13 S.L.R. 306, it is to be hoped that further comment on these matters will not be required.

Appeal dismissed.

HALE v. STEPHENS.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 30, 1921.

Appeal (§IV.B—116)—From District Court Judge—Necessity of Judges at trial taking reasonably complete Notes of Evidence—Reasons for Judgment furnished after Notice of Appeal admittedly not identical with Reasons given at Trial.

Sask.

APPEAL by defendant from the judgment of the District Court, in an action on a lien note. Affirmed.

C. W. Hoffman, for appellant.

P. H. Gordon, for respondent.

Haultain, C.J.S.:—This action was brought on a lien note given by the defendant to the plaintiff on the sale of a team of horses and a set of harness sold by the plaintiff to the defendant.

In the statement of defence several alternative defences are set up, but the defendant's evidence narrows his defence down to an alleged express warranty that the horses were gentle, good travellers and good for general farm work. The plaintiff in his examination for discovery, a portion of which was put in by the defence, admitted that he told the defendant that the team would do general farm work. There is no evidence of the defendant to shew that he relied on the statement referred to, and the evidence given by both parties leads me to the conclusion that the defendant, who is a rancher and farmer, relied on his own judgment in the matter. In any event, the evidence, in my opinion, shews that the team reasonably complies with the warranty, if any such warranty was given. I would therefore agree with the result arrived at by the trial Judge, and would dismiss the appeal with costs.

This action was tried on July 6, 1920, and the trial Judge gave judgment for the plaintiff orally at the close of the case. On August 3, presumably in response to a request for his notes of evidence and reasons for judgment, he supplied the written reasons for judgment which appear in the appeal book. These reasons contain the following prefatory remarks:

> "This acton was tried before me at Leader on the 6th day of July and judgment was rendered from the Bench. At that time I gave fully my reasons for judgment but owing to the fact that the Government does not provide a stenographer to take either the notes of evidence or the judgment I am confronted with the same difficulty that I am confronted with in all cases tried at outlying points, namely, that I must rely on my memory with regard to my reasons for judgment except for the assistance that I can get from the notes which I may have taken and which are always inadequate. For these reasons the reasons I now give for judgment will naturally not be identical with the reasons I gave for judgment at the trial."

Sask.

I have already referred to this matter in another case, Oke v. Speller (1921) ante p. 678, heard during the present term, and will add to what I then said by saying that parties appealing from District Court judgments have the right to have the reasons for judgment actually given by the trial Judge set out in the appeal book for the information of the Court of Appeal. The notes of evidence should contain all the material evidence. in substance at least, and it is most essential that all findings of fact should be clearly stated. I quite realise the additional time and trouble involved in doing this, but justice to litigants demands that it should be done. Counsel in District Court appeals should not be obliged, as has too frequently happened, either to ask the Court to infer evidence from the reasons for judgment or to infer reasons for judgment from the notes of evidence.

Lamont, J.A.:—I concur in the conclusion reached by Haultain, C.J.S., and would only add that in my opinion reasons for judgment given by a Judge after notice of appeal is served which are admittedly not identical with the reasons given by him at the trial should not be looked at by the Court.

Turgeon, J.A. concurs with Haultain, C.J.S.

Appeal dismissed.

ZIULKOWSKI v. RABUKA AND FERTUCK.

Saskatchewan King's Bench, Bigelow, J. April 21, 1921.

Landlord and Tenant (§IIID—110)—Landlord and Tenant Act R.S.S. 1920, ch. 160, sec. 29—Fraudulent Removal of Grain—Assignment—Distraint.

ACTION for damages for illegal distraint of grain. Action dismissed.

J. W. Estey, for the plaintiff.

D. Maclean, K.C., and P. Makaroff, for the defendants.

Bigelow, J.:—This action involves a construction of sec. 29 of the Landlord and Tenant Act, R.S.S., 1920, ch. 160, which is the same as the Act in force at the time of the events in question. Under that sec. where goods have been fraudulently or clandestinely removed from the leased premises the landlord may seize such goods within 60 days.

The defendant Rabuka leased to Tedor Ziulkowski, the husband of the plaintiff, certain farm lands on which there was due for rent and unpaid the sum of $600 on October 1, 1919. In 1920, Ziulkowski had a crop of 1,400 bushels of wheat on the land in question. Rabuka was away and gave

Sask.

a power of attorney to Fertuck his co-defendant to collect his rents. On November 4, 1920, Fertuck saw Ziulkowski about the rent when Ziulkowski told him he had not sold his wheat yet and that it was still on the premises. This statement was not entirely true as Ziulkowski had before that date sold some wheat to the Saskatchewan Co-operative Elevator and to the Northern Star Elevator at Perdue, and, according to the evidence of Edward his son, he had hauled about 200 bushels to the granary of Ziulkowski's wife, the plaintiff. Almost immediately, namely on November 6, 7 and 8—the 7th being a Sunday—Ziulkowski got very busy and hauled away all of his grain from the rented land, excepting about 50 bushels of wheat, some of it to the elevators, and about 600 bushels to his wife's granary.

I do not believe Ziulkowski's evidence. The evidence of Sklrenko and Serack convinces me that Ziulkowski and his sons were hauling the wheat to plaintiff's granary, and I am satisfied that 600 bushels at least was so hauled. On account of the fact that it was hauled so hurriedly after Fertuck tried to collect the rent, and that it was hauled on a Sunday, I find that it was fraudulently removed to prevent the landlord from distraining, and that no sufficient distress remained on the premises after the removal.

The plaintiff contends that 200 bushels were given to her in payment of a debt, and that it was hauled beyond the 60 days. I am not satisfied there was any debt or that these 200 bushels were hauled beyond the 60 days. There is only the evidence of Edward the son. If this were true, corroboration was possible, and I think should have been given. Koop v. Smith (1915), 25 D.L.R. 355, 51 Can. S.C.R. 554. Davies, J., at p. 356 says:—

> "I think the rule laid down by the Courts of Ontario with regard to assignments made between near relations and impeached by the creditors of the assignor as fraudulent is a salutory one, namely, that where it is accessible some corroborative evidence of the bona fides of the transaction should be given."

Edward did not impress me as a very reliable witness, and, without corroboration of his evidence, I doubt the veracity of it. On November 10, Fertuck, as agent for Rabuka, distrained the wheat in question, namely 600 bushels. The plaintiff, the wife of Ziulkowski, brings this action for damages, claiming the wheat was hers. I find it was the

Sask.

wheat that Ziulkowski fraudulently moved from the leased premises and put in the plaintiff's granary.

Plaintiff's counsel contends that the distress warrant only empowered Fertuck to distrain on the leased land. The distress warrant was not put in evidence, and all that the evidence shews is that on November 10 Fertuck distrained the wheat in question which he had the right to do under his power of attorney as agent for the defendant Rabuka.

The plaintiff's action is dismissed with costs.

Action dismissed.

ADVANCE RUMELY THRESHER CO. v. BAIN.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 30, 1921.

Costs (§I.—19)—Joint debtors—Mortgage given by each—Discharge of one Mortgage—Release of one Debtor—Liability of Other—Reference to ascertain Value of Land—Reference necessary owing to failure of Plaintiffs to furnish necessary Evidence.

APPLICATION for an order settling the question of costs, including witness fees, of a reference to the local registrar pursuant to an order of the Court of Appeal and also to adjust the question of certain taxes paid. The former case in which the reference was ordered is reported in (1920), 55 D.L.R. 661, 13 S.L.R. 505.

C. E. Gregory, K.C., for appellant.

F. L. Bastedo, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—This is an application for an order settling the question of costs, including witness fees, of the reference to the local registrar pursuant to the order of this Court, and also to adjust the question of certain taxes paid.

The plaintiff sued to recover the amount of a mortgage made in its favour by the defendant, and claimed the sum of $3592.18, the mortgage having been given in respect of the purchase price of a threshing outfit purchased by the defendant and one W. J. Merriman.

The defendant disputed the plaintiff's claim on the following ground, among others: that his mortgage indebtedness was satisfied because his co-purchaser Merriman had given a mortgage on his own quarter for the full amount of the same indebtedness, and had transferred the mortgaged lands to the plaintiff and it had become the registered owner thereof and had released Merriman from the indebtedness secured by his mortgage.

Sask.

In reply the plaintiff alleged that it had "credited the defendant with the proceeds of all the securities assigned over to it"; also, that if the plaintiff "obtained transfer as alleged (which the plaintiff does not admit but denies) the plaintiff says it is still the registered owner of the said land, and is able, ready and willing to transfer the title thereto upon payment of its claim and costs herein as this Honourable Court may direct."

The trial judge gave judgment in favour of the plaintiff for the amount claimed. On appeal this Court held that the plaintiff must give credit on the defendant's mortgage for the value of Merriman's quarter as of the time it was taken over by the plaintiff. At the trial the defendant put in evidence as to the value of the quarter, but the plaintiff put in no evidence. This Court ordered a reference as to its value. The registrar has found it to be worth $3,200.

The only matter really in dispute now is, who should bear the costs of the reference. The plaintiff took over Merriman's quarter in satisfaction of the joint indebtedness to the extent of the full value of the land. It was therefore the duty of the plaintiff to ascertain that value, and to give credit therefor on the defendant's mortgage. Had the Judge on the trial taken the view that the plaintiff must give this credit, the onus would then and there have been upon the plaintiff to supply evidence of the value thereof, so as to enable the Judge to fix the amount of the credit and determine the balance due on the defendant's mortgage. This was part of the plaintiff's case. The plaintiff, not having given the evidence at the trial, was obliged to have a reference to enable it to furnish it. The costs of the reference were incurred by its failure to furnish the necessary evidence to the trial Judge; it should therefore pay the costs thereof.

As to the taxes, it is admitted that the plaintiff should be credited with the sum of $139.20, taxes, which was against the land at the time they took it over, but which was not included in the certificate of the registrar. From the value of the land there should be deducted the sum of $139.20, and credit given on the defendant's mortgage for the difference with interest from the date upon which the land was taken over.

Costs of this motion will be costs in the cause.

Judgment accordingly

Sask.

FLOOD v. CITY of REGINA.

Saskatchewan King's Bench, Embury, J. May 18, 1921.

Volunteers and Reservists (§I—1)—Volunteers and Reservists Relief Act Sask. Stats. 1916, ch. 7 as amended by 1917, 2nd sess. ch. 59—Discharge before Leaving Canada on Military Service—Meaning of.

APPLICATION by a volunteer during the recent war for relief against having his land sold for taxes. Dismissed.

B. Thompson, for plaintiff; G. F. Blair, K.C., for City of Regina; F. L. Bastedo, for Senator J. H. Ross.

Embury, J.:—The plaintiff as a volunteer during the recent war seeks the benefit of the Volunteers and Reservists Relief Act, being ch. 7, 6 Geo. V., 1916 (Sask.).

On the argument herein many interesting points were raised, but it seems to me that the primary point to be considered is, did the plaintiff while on military service actually move out of the area comprised in the Dominion of Canada? If (as he contends) he did, the plaintiff is entitled to the benefit of the Volunteers and Reservists Relief Act as amended by 8 Geo. V. 1917 (Sask.), 2nd sess., ch. 59, sec. 4, which section reads as follows:—

> "11a. Notwithstanding anything in The Arrears of Taxes Act contained, land assessed to a volunteer or reservist, and not exempt from taxation either in whole or in part as being his home, shall nevertheless not be sold for taxes until the year following the conclusion of the war or the discharge of the soldier, whichever shall first take place."

If (as is contended by the defendants) he did not, then he comes within the class provided for in section 5 amendment to said ch. 7 by said ch. 59 of the statutes of 1917, 2nd sess., which reads as follows:—

> "14a. Should a volunteer or reservist have been heretofore discharged before leaving Canada on military service, he shall be deemed to have lost the benefit of this Act, and should he be hereafter discharged before leaving Canada on such service, he shall lose the benefit of this Act from the date of his discharge."

The plaintiff in this case proceeded to Halifax with the 249th Battalion, and with the battalion embarked on board a transport for overseas. They (the battalion as a whole including the plaintiff remained on board over-night, and on the following day were disembarked, and the plaintiff with some others did not have the privilege of proceeding further. He returned to Regina where he was struck off

Sask.

the strength of the Canadian Expeditionary Force as of March 16, 1918. (See certificate of service filed). During the period of such embarkation the transport was stationed alongside the quay in the harbour at Halifax, which harbour forms part of a bay land-locked except as to its entrance and of no considerable width. The land adjoining the bay is all Canadian territory. There is no evidence from which one could find that the transport moved from its position alongside the quay during the interval between the embarkation and disembarkation of the troops above referred to.

Without going into the question in detail, it is clear on the authorities that the place where the transport ("The Olympic") was situated was within the area of the Dominion of Canada, (particularly see Direct U.S. Cable Co. v. Anglo-American Telegraph Co., (1877), 2 App. Cas. 394) and on the evidence that the ship did not move therefrom with the plaintiff on board. All other considerations, such as that of Admiralty jurisdiction seem to me to be beside the point at issue. It does not satisfy the provisions of sec. 14a above referred to that the plaintiff embarked for overseas; in order that he may have the benefit claimed he must go further, and actually be carried beyond the area of the territory comprised in the Dominion of Canada. Accordingly the plaintiff comes within the class provided for by said sec. 14a and is not entitled to the benefits of the statute after the time of his discharge.

The defendant Ross is entitled to succeed on his counterclaim, with costs, and there will be a reference as prayed for, and judgment, and on default of payment an order for sale, and application may be made to the Master for directions regarding same.

Plaintiff's claim dismissed with costs.

Authorities: Regina v. Keen, (1847), 4 Dow. & L. 622; The Direct U.S. Cable Co. v. Anglo American Tel. Co., supra; Coulson and Forbes on Waters, p. 13; King v. Schwab, (1907), 12 Can. Cr. Cas. 539 and footnote; Holman v. Green, (1881), 6 Can. S.C.R. 707.

Claim dismissed.

TULLY v. ANDREWS.

Saskatchewan King's Bench, Taylor, J. April 28, 1921.

Vendor and Purchaser (§II—33)—Agreement for Sale and Purchase of Land and Chattels—Failure to Pay Taxes and Insurance—Breach of Covenants as to Cultivation—Order nisi of Master.

Sask.

APPEAL by plaintiff from an order of the Master in Chambers in an action upon an agreement for sale of land and chattels. Affirmed.

F. W. Turnbull, for appellant.

Taylor, J.:—This is an appeal from an order of the Master in Chambers at Regina made on April 20, 1921. The action, which was commenced on January 20, 1921, is the usual action upon an agreement for sale of land and chattels, an order for cancellation in default of payment, and for immediate possession of the property.

It is alleged in the statement of claim that on June 30, 1919, an agreement was made between the parties, whereby the plaintiff agreed to sell and the defendant to purchase the plaintiff's interest in three-quarters of a section of land, and certain farm stock, machinery and fodder. The agreed price was $25,000. I have nothing before me which would show the value of the chattel property, but the long list would easily run into several thousand dollars. The defendant paid $10,200 down by the transfer of certain house properties to the plaintiff. He agreed to pay $800 on January 1, 1920, and the balance spread over 7 years, the first payment on January 1, 1921; and also to pay interest at 7 per cent. the first of such payments to be made on January 1, 1920. Credit is given for $500 for an automobile retained by the plaintiff, and for $355 alleged to have been received by the plaintiff on October 31, 1920. It is alleged that covenants for cultivation and putting in crop were not performed; that there had been default in payment of taxes and insurance premiums.

There is no allegation in the statement of claim, as was subsequently advanced in the affidavits on applications, that by the wrongful act of the defendant the chattel property had been mortgaged in a way to defeat the plaintiff's charge thereon.

An appearance was entered on February 14, 1921, but no defence was filed, and on March 15, 1921, application was made on notice to the defendant's solicitors for an order for cancellation of the agreement, and for delivery and possession of the lands and chattels. On this application the Master made a fiat on March 16, 1921: "Issue order nisi, cancellation land and chattels one month. Immediate possession of land and chattels and order as asked re chattels disposed of, if any. Add John Crooks as party defendant

and serve copy order nisi upon his solicitor and a copy also upon solicitors for defendant." Sask.

On March 23, 1921, fiat was endorsed: "Order for possession to issue at once."

In the affidavit of the plaintiff filed on his behalf on this application the default and other allegations in the statement of claim are verified, and it is also stated that the defendant in 1920 did not properly cultivate the lands and has allowed the lands to depreciate in value through lack of cultivation and neglect and lack of care, and that the plaintiff believed that if the defendant were allowed to remain in possession during 1921 he would suffer further loss and damage through the carelessness and neglect of the defendant, and would suffer large personal loss through the depreciation of his real estate and to his chattels; and there is also a paragraph that the plaintiff further desires an order that in the event of the defendant having disposed of any of the said chattels or having encumbered same that the plaintiff should have judgment against the defendant for the value of the chattels so disposed of and for the amount of any such encumbrances. It is to be noted that neither in this affidavit nor in any other material used on this application is it shewn that any depreciation has rendered the plaintiff's security precarious, nor is there any allegation that as a fact the defendant had disposed of any of the chattels.

The order nisi issued on March 16 under this fiat fixes the amount due at $3644.50, and requires payment into Court of this sum with interest thereon at 7 per cent. on or before April 30, 1921, in default, cancellation. It is ordered, further, that in the event of the defendant failing to deliver to the plaintiffs any of the chattels, that there will be a reference to ascertain the value thereof and judgment against the defendant Andrews for such value. How this could creep into the order in the absence of any claim therefor in the statement of claim, notice of motion or application to amend, or material shewing facts warranting it, puzzles me; especially in view of the fact that counsel for the defendant appeared on the application. Although the fiat for the order for possession is under date of March 23, 1921, a separate order therefor appears to have issued under date of March 16, 1921. It is ordered that the plaintiff do have immediate possession of the land and forthwith deliver up possession to the plaintiff; that the defendant

Sask.

do forthwith deliver up to the plaintiff the chattels referred to in the statement of claim, and that the plaintiff be at liberty forthwith upon the service of this order upon the defendant to enter into possession of the lands and take possession of the chattels and hold the same against the defendant or any person or persons claiming through or under him. This order apparently was made without any material whatever to shew that the defendant did not intend to crop the land in 1921, and was unable to do so. The plaintiff's affidavit, as I have referred to it, deposes to his belief that the defendant did not intend to do so, but I need hardly state that that is not the way in which a fact should be proved.

In the absence of evidence to shew any depreciation which would leave the plaintiff but poorly secured, or that the defendant was unable or unwilling to properly farm these lands in 1921, I do not understand why the time for redemption should have been so limited, or the defendant immediately deprived of possession of the land. A writ of possession under this order was issued on April 9, 1921, without any further application being made therefor, although the order did not direct the issue of a writ of possession, but merely that the defendant deliver possession to the plaintiff. The writ was executed, according to the sheriff's return, on April 14, and under that writ the defendant was dispossessed of the land and possession delivered to the plaintiff.

Notice of motion was given on the 15th, returnable on April 20, for an order to have the Master reconsider the orders granted by him on March 16, 1921, or in the alternative for an order extending the time for redemption, and for possession of the land. A stay of execution was given by the Master on April 15. On April 20 his fiat is: "Extend time to 1st of June 1921 with leave to the defendant to apply for a further extension of time upon shewing that the land in question is properly cropped. Leave to plaintiff to apply meanwhile to shorten the period for redemption upon proving abandonment or other material damage to the security herein. Costs to the plaintiff in any event."

The fiat does not deal with the question of possession, but the order issued provides that the two orders made by the Master in Chambers, of March 16, 1921, be varied accordingly, and one may infer (and I need not say that in legal proceedings it should not be necessary to have to infer) that

Sask.

the purport of the order was to permit the defendant to have possession, as otherwise it would be impossible for him to see that the land was "properly cropped," whatever may be meant by that rather indefinite expression.

To support this application the defendant filed his own affidavit, that he took possession on July 1, 1919; that the crop for 1919 yielded only 600 bushels of wheat; that in 1920 he properly prepared a certain amount of land for crop but on account of excessive dry summer he threshed only 720 bushels of wheat and 560 bushels of oats, and of the wheat the plaintiff took 180 bushels; that in 1920 he had properly summer-fallowed 200 acres and this 200 acres was ready for crop in 1921, and that he is ready, able and willing to put in the crop if not interfered with by the plaintiff; that the small crops were due entirely to the dry weather, and a similar state of affairs existed with respect to surrounding neighbours and he deposes to his opinion that with favourable climatic conditions in 1921 he can pay a very substantial portion of the indebtedness to the plaintiff.

In reply to this an affidavit was filed on behalf of the plaintiff, in which it is again alleged that the poor returns from the farming operations were due to the negligence of the defendant, this time setting out more particulars; denying the allegation that 200 acres were properly summer-fallowed; stating that there is an execution outstanding against the chattels in question; that they have been seized and advertised for sale but the plaintiff paid the sheriff $41 costs to secure his temporary withdrawal of the seizure; that on December 6, 1920, the defendant had executed a chattel mortgage to the Bank of Nova Scotia for $750 covering 9 head of horses and 19 cattle, covered by the agreement for sale. In this connection the plaintiff's counsel now states that they neglected to file the agreement as a conditional sale agreement and the mortgage has therefore obtained priority. The affidavit deposes that by correspondence the plaintiff has ascertained that the bank is threatening to proceed to collect without further delay, and if they are seized and sold the defendant will be unable to farm the land at all.

Then there is a most material issue raised in the affidavit, in which the plaintiff is corroborated by an affidavit filed by the sheriff's officer. This is that when possession was delivered by the sheriff to the plaintiff what would in effect

Sask.

be a settlement of the action was arrived at; that the defendant verbally agreed to give up the contract and allow the plaintiff to have possession of the land and chattels free from any claim of him thereto, and in consideration thereof the plaintiff left with the sheriff's officer a cheque for $800 (this cheque is produced by the sheriff's officer as an exhibit to his affidavit) which was to be delivered to the defendant on the defendant Andrews removing his chattels and household effects from the land, which he agreed to do by April 20, 1921, and under this arrangement the defendant was allowed to remain in possession of a house on the farm.

An appeal is now taken by the plaintiff from the order of the Master in Chambers, and I have before me the question as to what disposition should now be made of the matter on this appeal.

A further affidavit on behalf of the defendant has been filed. The allegations in the plaintiff's affidavit as to the neglect in farming are again denied; with regard to the chattel mortgage, the defendant says that recently in conversation with the manager of the bank which holds the mortgage he was advised that the bank would carry the mortgage until fall; he says that he did not enter into the verbal agreement settling the action; plaintiff proposed the agreement but the defendant refused to relinquish his rights, and never received the cheque referred to in the affidavit. This affidavit was not of course before the Master. He did not have any verified denial of the settlement of the action before him, but it is stated that counsel intimated that they were prepared to file such an affidavit if it were required by the Master.

On the argument I expressed the view that this settlement must be taken to have ended the action, but on further consideration it seems to me that the onus of proving that the action has been settled lies on the plaintiff, and the plaintiff cannot be said to have satisfied this onus by the production of affidavits shewing a verbal arrangement for a settlement not carried out; that it was open to him to have applied for an issue if he so desired, but the onus of proof would be upon the plaintiff in the issue and until the determination thereof it cannot be held that the action has been settled.

I have already held that the material before the Master in Chambers on the application for order nisi and possession

Sask.

did not justify an order for immediate possession or limiting the time for redemption. I am unable now on the whole material filed to conclude that should the defendant be allowed to retain possession during 1921 that the security will be so depreciated that the plaintiff runs the risk of losing the balance due him under the agreement. It of course shews there is an outstanding mortgage for $750 and an execution against the chattels, but there is nothing to shew what is the present value of the land or of the balance of the chattels. The plaintiff received $10,200 on account of the purchase-price, and has since by retaining the automobile and out of the wheat gotten another $800. It is a matter of common knowledge that the dry seasons of the last 2 years have produced short crops, and on the whole I think that the plaintiff has failed to shew ground for immediate forfeiture to him of the whole of the land and the chattels for the balance due him, and that the defendant should be given no further opportunity to redeem.

The defendant has not appealed from the order of the Master, but as the hearing is an appeal de novo I think the order of April 20, 1921, under review should be varied and its terms made clear and distinct; that the order should provide that the order for immediate possession issued on March 16, 1921, be set aside and that the defendant do have possession of the lands and chattels in the statement of claim referred to; that the order provide that a new day for redemption be appointed as of June 1, 1921, and the defendant do have until the said date to redeem. It is unnecessary that the order should contain leave to apply for a further extension of time, as it is open to the defendant to make such application for leave at any time. The purport of the fiat is that after that date and before final order issues the Master's opinion would be that if the defendant were able to shew that the land had been properly seeded to crop he should receive further opportunity to redeem and a new date again be fixed.

I doubt the propriety of reserving leave to shorten the date, but there is no cross-appeal and that provision will therefore have to stand.

In the result the plaintiff's appeal from the Master fails and the defendant should have the costs of the application to be taxed and set off against the costs taxed against the defendant.

Sask.

I have delivered this long judgment and reviewed these proceedings for the purpose of impressing the necessity for exercising care in the conduct of these actions, where the failure to exercise care may cause the Court to unjustly deprive a purchaser of land of his equity therein and put him on the road deprived of a reasonable opportunity to earn a livelihood, the whole of his assets having in the course of a short time practically passed to the vendor.

Appeal dismissed.

THE CITY GARAGE v. JUNOD.

Saskatchewan Court of Appeal, Haultain, C.J.S. Lamont and Turgeon, JJ.A. April 25, 1921.

Contracts (§IID—194)—To Repair Automobile for a Certain Sum—Repairer to Supply Material Necessary—Work Improperly Done over by Another Mechanic — Right to Payment for Work and Material—Counterclaim for Damages.

APPEAL by plaintiff from the trial judgment in an action to recover the sum of $301 being balance due on an account for work done and repair parts supplied to defendant's automobile. Reversed.

G. W. Thorn, for appellant.

A. E. Mackinnon, for respondent.

The judgment of the Court was delivered by

Turgeon, J.A.:—In this case the plaintiff sued the defendant for the sum of $301, being the balance claimed by him after allowing credit for a payment of $100, upon an account for work done upon the defendant's automobile and for repair parts supplied for the same. The defendant denied liability for any part of the amount claimed, alleging that the work was improperly done and the material supplied worthless. He stated that, on account of the plaintiff's failure to perform his contract properly, he was obliged to have the work done over again and the automobile further repaired by another mechanic, and he counterclaimed against the plaintiff for this alleged breach of contract and consequent damages. The trial Judge dismissed the plaintiff's action with costs, and allowed the defendant's counterclaim in the sum of $142 and costs.

We have first to determine what the contract between the parties was. It seems clear upon the evidence that the plaintiff undertook to overhaul and repair the defendant's automobile for the sum of $35, the necessary material to be

Sask.

supplied by the plaintiff and paid for by the defendant at the cost price plus 10 per cent.

There is no doubt that the plaintiff did not perform his work properly and that the defendant had to take his automobile to another workman to have the work done. In any event, counsel for the plaintiff upon the hearing of the appeal waived all claim for remuneration for work done, and directed his argument to the plaintiff's claim for material supplied and retained by the defendant and to a reduction of the defendant's counterclaim. The defendant is entitled, therefore, on account of this breach of contract, to recover from the plaintiff the difference between the sum of $35 and the larger sum which it actually cost him, or should reasonably have cost him, to have the same work done elsewhere.

We are met at this point with some difficulty in determining precisely what work the plaintiff undertook to do and what it cost. This work cannot have been all the work which was subsequently done upon the automobile by the Woodrow Garage, because William Trott, the mechanic who did this work, was asked by the defendant's counsel to place an approximate value upon the work undertaken by the plaintiff, and he says it would be between $50 and $60. Alexandre Doutre, another expert, was also examined on behalf of the defendant and asked to state hypothetically the value of this work. His evidence places it between $60 and $70. G. Brown, the plaintiff's mechanic, values it at between $50 and $75. It is admitted that the plaintiff undertook to do the work for a lesser amount than the ordinary price because the work was handed in to be done at an off time of the year when he was not busy. I think, from the evidence, that it would be reasonable to assume that $60 of the total amount subsequently paid by the defendant to the Woodrow Garage represents the cost of this work to him, and I would allow the defendant on this count the sum of $25, being the difference between $35 and $60. There are also a few items damages which the defendant claims on account of bad workmanship by the plaintiff. He claims in the first instance that he had to buy a new frame which cost $11, because the old frame had been put out of shape by the plaintiff. But the evidence shews that this old frame had been broken and repaired previously; no evidence was given as to its value, which could not have been great, and I am not satisfied that the new frame had to be

Sask.

bought solely through the fault of the plaintiff. This applies also to the claim of $2.25 for a new gasket. There is no evidence that the old gasket became leaky on account of anything the plaintiff did. The onus of proving these damages specifically is upon the defendant, and I find that he has not discharged that onus.

In his counterclaim the defendant sought to recover for one voltage regulator and one Gray-Dort spring which he claimed were removed from his car, left upon the plaintiff's premises and never returned to him. The evidence on these points is very conflicting; it seems to shew, if it shews anything at all, that these articles were valueless in any case, and I cannot see how this portion of the counterclaim can be allowed.

Now as to the plaintiff's claim, we have to consider only the question of awarding him the price of the material supplied by him to the defendant and retained by the defendant, he having expressly abandoned all claim for work done. On behalf of the defendant it was urged that, on account of the nature of the contract entered into, the plaintiff can recover nothing, either for work done or for material supplied, because he failed to complete the contract satisfactorily. I cannot agree with this contention, which, apparently, was adopted by the trial Judge. It would mean that because the plaintiff failed to do his repair work satisfactorily he cannot recover, for instance, the item in the account of $80.80 for new tires supplied by him and accepted by the defendant and concerning which no complaint is made. I know of no authority for any such proposition. In my opinion the result of the contract is that the defendant must pay for such of these materials, at least, as have been of benefit to the automobile. These articles, in the aggregate, amount to $324.97.

In addition the defendant must reimburse the plaintiff the sum of $18 for a license obtained for him and accepted by the defendant. As against this amount of $342.97, credit will be allowed the defendant for the sum of $100 paid by him.

The appeal should be allowed with costs and the judgment in the Court below set aside; the plaintiff to have judgment upon his claim for the sum of $242.97, with costs, and the defendant upon his counterclaim for the sum of $25 and costs.

Appeal allowed.

McDONALD v. PANKOSKI. Sask.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. May 25, 1921.

Contracts (§IID—145)—Sale of Hay in Stack—Agreement as to Quantity—Conduct of Parties—Construction.

ACTION to recover the amount alleged to be due for a quantity of hay purchased. Reference ordered to ascertain amount due.

S. R. Curtin, for appellant; D. A. McNiven, for respondent.

The judgment of the Court was delivered by

Lamont, J.A.:—The plaintiff sues for the price of 41 tons of hay at $15 per ton, less the amount paid on account. The defence is that the defendant did not receive 41 tons. The plaintiff had two stacks of hay which he sold to the defendant at $15 per ton. The stacks were measured: one was found to be 54 ft. long, 13 ft. wide, and 30 ft. over-throw; the other was 45 ft. long, 15 ft. wide, and 31 ft. over-throw. The parties and one Chesney set about ascertaining the number of tons in the two stacks. Neither the defendant nor Chesney knew how to figure it up. The plaintiff did some figuring which he said shewed that the stacks contained 42 tons. In his evidence he said, "We all agreed at 42 tons of hay in the two stacks. The defendant said, 'We will call it 40 tons,' but I said, 'No, we will call it 41 tons.'" On this evidence the trial Judge held that, although the sale was at $15 per ton, the defendant agreed to take the two stacks at 41 tons. In his evidence the defendant stated that when the plaintiff figured up the amount at 41 tons and asked him for payment of the balance, he expressed a doubt as to there being that quantity in the stacks, and that he said to the plaintiff, "What if there is not that much hay?" To this the plaintiff replied, "If you get somebody to figure the stacks and there is not that much hay, I will do what is right and give you back the money not coming to me." This statement the plaintiff nowhere denies. Further, the defendant says that next morning he telephoned the measurements to a Mr. Spice, and asked him to figure it up, and that Spice reported that there were only 27¾ tons in the stacks; that he thereupon went to the plaintiff, and that it was agreed between them that they should go into Yorkton the following day and get the amount figured up. This also is not denied by the plaintiff, and it is corroborated by Chesney. It is also corroborated by the fact that next day they went to Yorkton to the office of the plaintiff's present solicitors, where the amount was figured up at 34

Sask.

tons. The defendant told the plaintiff he would pay this amount, but the plaintiff did not think it was right. The plaintiff then brought this action.

In view of the fact that the plaintiff did not deny the above statements made by the defendant in his evidence, and in view of the fact that they went to Yorkton and had the contents of the stacks figured up there after the time when the plaintiff says the defendant agreed to take them at 41 tons, the finding of the trial Judge in my opinion, cannot be upheld. Had it been a fact that the understanding between the parties was that the defendant was to pay for 41 tons, irrespective of the actual quantity of hay in the stacks, I would have expected that, instead of going to Yorkton to have the contents figured up, the plaintiff would have told the defendant that there was no necessity for so doing, as he had agreed to pay for 41 tons, no matter whether the stacks figured to that amount or not. According to the evidence, the plaintiff did not take that stand at any time before the trial. The proper inference from all the evidence, in my opinion, is, that the understanding was that the defendant would give his cheque for $330, being the balance, upon the basis that there were 41 tons in the two stacks; that the plaintiff would return to him the difference between that amount and the actual value of the hay, provided the stacks were found not to contain 41 tons. In other words, that the defendant was to pay only for the actual amount of hay in the stacks. The defendant gave his cheque, but stopped payment thereof on getting Spice's report.

The appeal should, therefore, be allowed with costs, the judgment below set aside, and the matter referred back to the trial Judge to ascertain the number of tons contained in stacks having the above measurements. The plaintiff will be entitled to judgment for the number of tons so found at $15 per ton. As there was no dispute as to the measurements, and as the whole question in this action was the number of tons in the two stacks, and as neither party called any witnesses to testify to the number of tons as shewn by the measurements, I would not allow any costs either of the trial or of the reference to either party.

Appeal allowed.

KEENOY v. KEENOY. Sask.

Saskatchewan King's Bench, Bigelow, J. February 23, 1921.

Depositions (§IA—2) — Application for Commission to Take — Witnesses in Another Province—Material Necessary to Granting—Practice—Irregularity—Sask. Rule 417.

APPEAL from an order of the Master refusing an application by defendant for an order for a commission to examine witnesses in another Province. Affirmed.

J. J. Stapleton, for appellant.

P. H. Gordon, for respondent.

Bigelow, J.:—This is an application by defendant for an order for a commission to examine witnesses in Ontario. The Master refused it, and it comes before me by way of appeal.

I am not surprised that the Master refused this application. Probably if all the facts were properly before the Master, which the defendant's counsel states to be so, the application would have been granted.

(1) The notice of motion is dated February 9 and states "that on the return will be read the affidavit of Charles B. McClurg, the pleadings and proceedings had and taken herein, and such other and further material as counsel may advise." The affidavit of McClurg could not be used unless the Judge so directs, as it is not endorsed with a note shewing on whose behalf it is filed. (Rule 417). I would direct it to be used now under that rule if this was the only fault, but the application is so faulty in other respects that this would not help matters. The other affidavits referred to by defendant have the same fault.

(2) The defendant's counsel seeks to read on this appeal an affidavit of defendant sworn January 7, 1921, and an affidavit of William J. Keenoy sworn January 7, 1921, used on another motion, contending that they come within the expression "pleadings and proceedings had and taken herein." These affidavits could have been used on this motion if they had been referred to in the notice, or even if they had been referred to on the motion before the Master, but the Master states in his reasons for judgment, "there is no affidavit of the defendant before me." I do not think it is the duty of the Master or a Judge to search among the files to see if there is any material that would support the motion. Allin v. Ferguson, et al (1912), 5 D.L.R. 19, 5 S.L.R. 204.

(3) After the notice of motion was filed on February 9, the affidavit of John J. Stapleton was sworn February 10,

Sask.

and served the same date. I think the motion should be decided on the material filed at the time of the service of the notice. (Rule 418.) Allin v. Ferguson, supra: Kerr Co. v. Suter (1907), 5 W.L.R., 256.

This affidavit is faulty also in not being properly endorsed; and in several important paragraphs the deponent states that he is advised, etc., without stating that he believes it to be true. This affidavit should not be used, and without it the defendant has not made out a case to obtain an order for a commission.

I think the Master's order is right, and the appeal is dismissed with costs.

Appeal dismissed.

DICKENSON v. VILLAGE of LIMERICK.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. April 25, 1921.

Municipal Corporations (§IIG—241)—Construction of Ditch—Surface Water Carried to Plaintiff's Premises—Damages by Flooding of Basement—Liability of Municipality—Findings of Fact by Trial Judge—Conflicting Evidence—Appeal.

APPEAL by defendant from the trial judgment in an action for damages caused by the flooding of the basement of plaintiff's building. Affirmed.

W. H. McEwen, for appellant.

C. E. Gregory, K.C., for respondent.

Haultain, C.J.S.:—In this case the trial Judge has awarded damages to the plaintiff for injury done to her property, caused by the flooding of the basement of her building. This flooding, he finds on the evidence, was the result of the construction of a ditch, by the defendant village, which carried a quantity of water to a point close to the plaintiff's building. He also finds that this water would not otherwise have accumulated at that point and that no proper outlet for it was provided by the village. These findings are supported by the evidence given on behalf of the plaintiff. There was a great deal of evidence given on behalf of the defendant to shew that the accumulation of water could not have been caused by the ditch in question, and that the water, owing to the contour of the ground, would run away from and not towards the plaintiff's building.

The trial Judge, however, after seeing and hearing all the witnesses, has, on very conflicting evidence, found in favour of the plaintiff. Under the circumstances, I do not think that that finding should be disturbed. I would, therefore, dismiss the appeal with costs.

Sask.

Lamont, J.A.:—This is an appeal from a judgment awarding the plaintiff damages for loss sustained by her through having the basement of her hotel flooded as a result, as she alleges, of the defective system of drainage installed by the defendants. In 1913 the plaintiff commenced to erect an hotel on Lots 7, 8, 9, 10, in Block 2, Limerick, and in July or August, 1914, entered into possession of the hotel and has since occupied it by herself or tenants. The cellar of the hotel was flooded and causing damage. The plaintiff alleges that this flooding was due to the fact that the village constructed a ditch on the west side of Main St. at a point opposite to her hotel, which ditch conveyed to that point surface waters in larger quantities than would otherwise have been there conveyed, and, having brought these waters to that point, failed to provide an outlet for the same.

The trial Judge found as follows:—

"Prior to the date of the grading done by the defendant village in 1914, the natural flow of the water was down Main Street from the north to a low point opposite Lot 13, some distance north of the building in question. Thence it ran south-westerly under an office building owned by the rural municipality into a large slough.

"In 1914 the defendant village graded Main Street from a point a few feet north of Railway Avenue and for some considerable distance north of the building in question. In grading, earth was taken from the two sides of the street and thrown on its centre, so that the centre was raised or "crowned" and a ditch was formed on each side. The ditch stopped a little short of Railway Avenue and no outlet was there provided. In its most southerly two hundred feet the ditch on the west side of Main Street is practically level, and thence going north rises one foot in one hundred and fifty feet. In consequence, water flowing southerly down the drain on the west side of Main Street would lodge in front of the hotel in question.

The result has been that the basement of the hotel has at many times been flooded, in consequence whereof the concrete walls became cracked, both vertically and horizontally, the building settled at various points, some goods in the basement became spoiled, and the plaintiff was put to expense in purchasing a pump and in pumping out water. . . .

On these facts I conclude that the defendant was negli-

Sask.

gent in not providing an outlet at the junction of Railway Avenue and Main Street to carry off the water running down the drain on the west side of Main Street."

This finding, I take it, means that the village, by its ditch, conveyed to a point opposite the plaintiff's hotel a quantity of water which otherwise would not have been there, and by failing to provide a proper outlet for the same the plaintiff was damaged. If there was evidence to justify this finding, the appeal must be dismissed.

Eakins v. Town of Shaunovon (1918), 11 S.L.R. 310, affirmed (1918), 42 D.L.R. 473; Kenny v. Rural Municipality of St. Clements (1913), 15 D.L.R. 229, 24 Man. L.R. 51.

A perusal of the appeal book shews that there was evidence which, if accepted, justified the finding. Dickenson testified that in the fall of 1914 the village graded Main St. To do this they ploughed on each side of the street and scooped the ploughed up earth to the centre. This left a ditch on each side. Dickenson further says that the ditch on the west side extended to within 8 or 10 ft. of Railway Avenue, where it stopped; that this ditch drained the water down to the plaintiff's place, where it collected because the ditch had not been continued through to Railway Ave., or any provision made for the water escaping on to Railway Ave. There was considerable evidence on the part of the defendant's witnesses that no water could come down the ditch to the plaintiff's place because the slope of the street was the other way. It was for the trial Judge, however, to say which line of evidence he would accept. He accepted the evidence given on behalf of the plaintiff, and in so doing I cannot say he was wrong.

The appeal, therefore, should be dismissed with costs.

Turgeon, J.A.:—I concur.

Appeal dismissed.

SODERBERG v. RURAL MUNICIPALITY OF MEDSTEAD.

Saskatchewan Court of Appeal, Haultain, C.J.S., Lamont and Turgeon, JJ.A. March 30, 1921.

Fires (§1—1)—Prairie Fire—Negligence in Starting—Alleged Breach of Statutory Duty—Liability—Damages.

APPEAL by plaintiff from the trial judgment dismissing an action for damages caused by a prairie fire. Affirmed.

P. H. Gordon, for appellant; H. M. Allan, for respondents.

The judgment of the Court was delivered by

Haultain, C.J.S.:—This is an action for damages oc-

Sask.

casioned by a prairie fire, which it is alleged was kindled and allowed to run at large by the defendant Short. I will refer later on to the action as against the municipality.

The trial Judge dismissed the action as against the defendant Short, a result with which I quite agree. The plaintiff has not, in my opinion, shewn by satisfactory evidence that the fire was caused by defendant Short. There is no direct evidence on the point, and the evidence as given does not, in my opinion, disclose any facts from which a reasonable inference against the defendant can be drawn.

The claim against the defendant municipality is stated in the statement of claim as follows:—

"The defendant, Rural Municipality of Medstead, No. 497, hereinafter called the municipality, did not at its first meeting in the year 1919, or at any meeting in the year 1919, appoint for each, or for any, division of the municipality from among the resident householders thereof, fire guardians, or any fire-guardian, who should carry out the provisions of the Prairie and Forest Fires Act, the regulations made thereunder and the by-laws passed by the municipality with respect to the prevention of and protection of property against prairie fires.

By reason of such default in not appointing a fire guardian the fire hereinbefore mentioned spread from the north west quarter of section thirteen (13) township fifty range fourteen (14) west of the third meridian, in the Province of Saskatchewan, and extended on to the land of the plaintiff, being the land described in paragraph 1 of the statement of claim and destroyed the building, hay and chattels mentioned in paragraph 7 thereof.

The council of the said municipality did not provide the fire guardians, or any fire guardian, with suitable appliances for suppressing or extinguishing fires as required by the provisions of the Prairie and Forest Fires Act.

By reason of such default in providing suitable appliances for suppressing or extinguishing fires, the fire hereinbefore mentioned spread from the north west quarter of section thirteen (13) township fifty (50) range fourteen (14) west of the third meridian in the Province of Saskatchewan and extended on to the land of the plaintiff, described in paragraph 1 hereof, and destroyed the buildings, hay and chattels mentioned and enumerated in paragraph 7 hereof.

Sask.

The fire hereinbefore mentioned was an extensive fire, as contemplated by the Prairie and Forest Fires Act, but by reason of the fact that no fire guardians had been appointed and the people who were fighting the said fire were not divided into bands and there was no fire guardian to take control of each band, and the bands required to be organised under the provisions of the Act were not placed along the line of fire, nor was there any provision for ordering or placing them along the line of fire because of the said default.

By reason of the said default the above mentioned fire which commenced on the north west section thirteen (13) township fifty (50) range fourteen (14) extended on to the lands of the plaintiff being land described in paragraph 1 hereof and destroyed the buildings, hay and chattels mentioned in paragraph 7 hereof."

The evidence with regard to the appointment of a fire guardian is not very clear. I would gather, however, from the evidence that a fire guardian was appointed, but that there is some doubt as to whether he was ever notified of his appointment. Even if no fire guardian was appointed there is not, in my opinion, any claim against the municipality. That claim is based upon too many hypotheses. We shall have to assume that the fire guardian would have resided within 6 miles of the fire, and would have been duly notified of its existence by some resident of the municipality. We shall also have to assume that the notification would have been given early enough to enable the fire guardian to notify sufficient persons to proceed with him to the locality in time to save the plaintiff's property. Even admitting for the sake of argument that a fire guardian was not duly appointed, the circumstances of this case do not establish the most remote connection between the default of the municipality and the destruction of the plaintiff's property.

I would dismiss the appeal with costs.

Appeal dismissed.

INDEX

CASES—Continued.

Winfrey v. Winfrey (1921), 57 D.L.R. 706, affirmed 248

COMPANIES—

CONSTITUTIONAL LAW—

CONTRACTS—