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. I-XXIV D.L.R., See Pages ix-xviii.

VOL. 24

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TORONTO:
CANADA LAW BOOK CO., LIMITED
84 BAY STREET
1915

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CASES REPORTED

IN THIS VOLUME.

TABLE OF ANNOTATIONS

(Alphabetically arranged)

APPEARING IN VOLS. 1 TO 24 INCLUSIVE
OF THE DOMINION LAW REPORTS.

SUTTLES v. CANTIN.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. August 10, 1915.

1. NUISANCES (§ II C—41)—MINING TAILINGS—ABATEMENT—NOTICE.

The washing down of tailings of mining property on another's lands constitutes a nuisance by commission and also of emergency, which justifies the aggrieved party to trespass upon the wrongdoer's land, without any previous notice or request, for the purpose of abating it. [*Lemmon* v. *Webb*, [1895] A.C. 1, 64 L.J. Ch. 205; *Raikes* v. *Townsend*, 2 Smith 9, followed; *McCurdy* v. *Norrie*, 6 D.L.R. 134, applied.]

Statement

APPEAL from judgment of Macaulay, J., in favour of defendant in an action for trespass to land.

Charles Macdonald, for appellant.

J. B. Patullo, for respondent.

Macdonald, C.J.A. Irving, J.A. (dissented) Martin, J.A.

MACDONALD, C.J.A., and IRVING, J.A., dissented.

MARTIN, J.A.:—In this action the plaintiff sought to recover damages, laid at $2,000 to his mining claims on Dublin Gulch, Yukon Territory, alleged to be caused by the act of the defendant in opening a water gate in the plaintiff's dam on said claims thereby diverting the water which caused tailings to be distributed over portions of said claim covering up virgin ground which had not been mined. The defendant denied the damage, and justified his action as being done by him by order of the mining inspector under sec. 15 of the Yukon Placer Mining Act, ch. 64, R.S.C., and also as being done in order to abate the nuisance of the water carrying tailings from the plaintiff's claims down to and upon his claim on Haggart Creek (of which Dublin Gulch is a tributary) and he counterclaims for damages caused by plaintiff's tailings.

The learned trial Judge found on evidence which fully warrants the conclusion that the plaintiff suffered no damage and dismissed his action with costs, but that the defendant had suffered nominal damages—$1. He also found that the defendant had entered upon the plaintiff's mining claim for the purpose of abating the said nuisance which had been erected and maintained there by the plaintiff, and the question is was the

B. C.
C. A.
SUTTLES
v.
CANTIN.
Martin, J.A.

defendant justified in so doing to the extent that he can escape even nominal damages for the trespass upon the plaintiff's property. We were informed by appellant's counsel that he did not quarrel with the learned Judge's finding as to damages, and only the one question, just stated, was argued. It is not suggested that the defendant did more than was necessary or other than was proper to abate the nuisance (only opening another gate to let the water run out into the waste ditch) or acted in other than a peaceable manner and the plaintiff at the time of the abatement was not operating his claim.

The case of *Raikes* v. *Townsend* (1804), 2 Smith 9, is an old and sound authority for the proposition, stated aptly in the head-note, that:—

> If a man in his own soil erect a thing which is a nuisance to another as by stopping a rivulet, and so diminishing the water used by him for his cattle, the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass; and this right of abatement is not confined merely to nuisances to a house, to a mill, or to land.

This is a nuisance of commission, and it is conceded that no notice to abate the nuisance was given, and it is beyond question that none is necessary in case of an emergency: Addison on Torts (1906), 72, 101, 105; Underhill on Torts (1912), 235; Pollock on Torts (1912), 434; *Lemmon* v. *Webb*, [1895] A.C. 1, at 5-8; 21 Hals. 548. The emergency, however, is disputed in this case, and that question of fact is so difficult to decide that I feel special weight should be given to the finding of the learned trial Judge, which is based upon valuable local experience of mining conditions, apart from what appears directly upon the record, which places him in a far better position than we are to determine that nice question of practical mining in a far distant territory where so much depends upon the natural conditions in a very short season. All I need say is that in my opinion there is at least some evidence on the record which he would have been entitled to act on, apart from his local knowledge and experience, or judicial notice, and he finds expressly that—

> Even if he had not been acting under the directions of the mining inspector, in my opinion he would still have been justified in opening the gate in the manner in which it was opened, and for the purposes for which it was opened, and still would not have been a trespasser.

This justification of the defendant's action would include the existence of an emergency, thereby dispensing with notice.

But even if there were no emergency, still as this is a nuisance of commission there is, I think, ample authority to dispense with notice. While the general rule is that notice has to be given, Lord Davey saying in *Lemmon's* Case, *supra*, p. 8:—

> It is true that where a person desires to abate a nuisance, which can only be abated by going on the land of the person from whom the nuisance proceeds, he must usually give notice of his intention to do so. That seems to me to be reasonable, because his act of going upon his neighbour's land is *primâ facie* a trespass, and I can understand that he should be bound to give notice of his intention to do that which would be *primâ facie* a trespass before doing it.

Yet in *Jones* v. *Williams* (1843), 11 M. & W. 176, Baron Parke in delivering the judgment of the Court in a case of nuisance of commission, expressly decided the present point, saying, p. 181:—

> It is clear, that if the plaintiff himself was the original wrongdoer, by placing the filth upon the *locus in quo*, it might be removed by the party injured, without any notice to the plaintiff; and so, possibly, if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the *locus in quo* afterwards, the authorities are in favour of the necessity of a notice being given to him to remove, before the party aggrieved can take the law into his own hands. [And at p. 182.] We think that a notice or request is necessary, upon these authorities, in the case of a nuisance continued by an alienee; and, therefore, the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrongdoer, by having levied the nuisance, or neglected to perform some obligation, by the breach of which it was created.

This is in accordance with the dictum of Best, J., in *Earl of Lonsdale* v. *Nelson* (1823), 2 B. & C. 302, at 311:—

> Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them.

These two cases were cited to the House of Lords in *Lemmon* v. *Webb*, *supra*, and nothing was there said to detract from their weight, though, of course, as Lord Herschell said, p. 5, the only question there was that of notice "prior to the removal of boughs overhanging a man's own land."

After a careful search I can find no judicial utterance which would entitle me to limit the effect of the unanimous judgment of the five barons of the Exchequer in *Jones* v. *Williams* (1843),

B. C.

C. A.

SUTTLES v. CANTIN.

Martin, J.A.

11 M. & W. 176, in which it is to be noted that Lord Abinger added with the concurrence of the rest of the Court, after the judgment had been given that notice was necessary in the case of an alienee, that even in this case

it might be necessary in some cases, where there was such immediate damage to life or health as to render it unsafe to wait, to remove without notice.

And it is to be observed that there was no allegation of notice in *Raikes* v. *Townsend, supra,* where the right to abate a nuisance of commission was upheld. I, therefore, am of the opinion that the defendant here was right in doing what he did without notice and that the *primâ facie* trespass has been in all respects justified.

The learned Judge also justified his action by said secs. 15 and 16 of the Yukon Placer Act, but in the view I have taken it is not necessary to express an opinion upon the nice question as to whether or no sec. 15 relates only to the safety of persons, and not to property, apart from persons.

Finally, and apart from all other questions, this appeal ought to be dismissed for the reason given by the Lord Chancellor in *Lemmon's* Case, *supra,* p. 7, even if there had been a technical trespass, as follows:—

Then, my Lords, it was said there had been some small trespass. The learned Judge who tried the case said he did not think that was of importance; and it is obvious that this action was not brought on that account—it was brought to try the question of right between the parties. Your Lordship would not enter on an inquiry of that description now. It would make no difference whatever as to the costs of the action, because that was not the substantial question to be tried, and it is not suggested for a moment that there were any damages that could be more than nominal. Under these circumstances, I move, your Lordships, that the judgment appealed from be affirmed, and the appeal dismissed with costs.

I conclude with a note of warning that this proceeding to abate a nuisance by the act of the party aggrieved instead of resorting to the Courts is one which should not be encouraged because of its liability to bring about a breach of the peace, a recent illustration of which is to be found in *McCurdy* v. *Norrie* (1912), 6 D.L.R. 134.

Galliher, J.A.

GALLIHER, J.A.:—In cases of a nuisance of commission the authorities are clear that one may enter upon the property of

another in case of emergency and without notice abate the nuisance.

In the case at bar no notice was given and the evidence to my mind discloses no case of emergency, nor has the trial Judge so specifically found. I do not think the sections of the Yukon Placer Mining Act are applicable to this case. The case, therefore, in my view is narrowed down to this: In cases of nuisance of commission (such as here) and where no emergency is shewn, did the defendant commit a trespass by going upon the property of the plaintiff to abate the nuisance without giving notice to the plaintiff?

There was ample opportunity to do so as the mining inspector and the defendant met the plaintiff, on their way up to examine the property and could, and should, in my opinion, have informed the plaintiff of their errand. It is true they said they wanted to see the plaintiff when they came back, and on returning and not finding the plaintiff at his cabin, he being temporarily absent, the defendant went back at the suggestion of the inspector and opened the gate in the dam which is the act complained of.

It is suggested that the plaintiff should have remained until their return as they requested, but I entirely dissent from that view. They know what their errand was when they met him and should in all decency have told him.

Such acts are liable to lead to a breach of the peace and should be discouraged, and had I been trying the case, holding those views, I should have felt that under the circumstances of this case I would have been justified in taking it out of the principle laid down in *Jones* v. *Williams* (1843), 11 M. & W. 176.

The learned trial Judge, however, took a different view, and I am not prepared to say he could not reasonably do so, and feel that I should not interfere.

McPHILLIPS, J.A.:—This is an appeal from the judgment of the Hon. Mr. Justice Macaulay sitting without a jury in the Territorial Court of the Yukon Territory. The learned Judge dismissed the action which was one of trespass upon and damage to mining property of the plaintiff and entered judgment for the defendant for nominal damages in respect of his counter-

McPhillips, J.A.

B. C.
C. A.
SUTTLES
v.
CANTIN.
McPhillips, J.A.

claim—that tailings from the plaintiff's mining property were allowed to be carried upon the defendant's mining property—it not being possible upon the evidence to differentiate as to the actual damage caused—by reason of the fact that tailings from other mining property than that of the plaintiff was also carried upon the defendant's mining property. The learned trial Judge held that the defendant was justified in entering

> upon mining property of the plaintiff in that he did so by and with the direction of the mining inspector acting in pursuance of the Yukon Placer Mining Act (ch. 64, R.S.C., 1906), secs. 15 and 16.

and upon the further ground that there was the right in the defendant even apart from the statute law to abate the nuisance. In my opinion the learned Judge arrived at the right conclusion—and the defendant was entitled to justify what he did as being done under the order and direction of the mining inspector—who was acting in pursuance of the statute—the evidence shews that the mining inspector had called the plaintiff's attention to the requirement that he should brush the tailings below before he turned the water on—which he had failed to do—but if I should be wrong in this upon the facts it is clear that there was the right in the defendant to abate the nuisance. It was argued that as a penalty is provided by the statute—the Yukon Placer Mining Act, sec. 89—the defendant had no right of action, but in my opinion the statute in no way precluded the defendant from insisting upon his right of action by reason of the special damage that was occasioned by the plaintiff's wrongful act: see *Little* v. *Ince* (1863), 3 U.C.C.P. 528 at pp. 544, 545; *Truesdale* v. *McDonald* (1824), Taylor U.C.K.B.R. 121, and *Stiles* v. *Laird* (5 California, 120, Supreme Court, 1855), 11 Morr. Min. Rep. 21; and sec. 75 of the Yukon Placer Mining Act.

It is contended that there was no right to abate the nuisance by entry upon the plaintiff's land because of the fact that there was no previous request requiring the removal of the nuisance—in my opinion there was upon the facts sufficient previous request, but if I should be wrong in this, in the present case the plaintiff was the original wrongdoer and the notice was not necessary: *Norris* v. *Baker*, 1 Roll. Rep. 393, fol. 15; further, the nuisance arose by default in performance of a duty cast upon

the plaintiff by law: see sec. 75 of the Yukon Placer Mining Act; *Lemmon* v. *Webb*, [1895] A.C. 1, 64 L.J. Ch. (H.L.) 205; and Underhill on Torts (1912), 3rd Can. ed. at pp. 235, 236.

It may be contended that *Lemmon* v. *Webb*, *supra*, goes the length of holding that a nuisance cannot be abated without previous notice, where to abate it it is necessary to trespass on the neighbour's land. I hardly think that the case is rightly reported in so stating, in any case the nuisance here was one of commission and was also a case of emergency and comes within the language of the Lord Chancellor (Lord Herschell), at p. 206:—

> Now, what are the only authorities to which appeal has been made? They are cases where a nuisance has existed on neighbouring soil where the person complaining of the nuisance could only get rid of it by going on to the soil of his neighbour; and there is no doubt it has been held that he cannot justify going on to the soil of his neighbour to remove the nuisance *except in the case of emergency* unless he has first given his neighbour notice to remove.

And it is to be observed that Lord Davey says in his judgment, at p. 209:—

> I entirely agree with what has fallen from my noble and learned friend on the woolsack that there is no such obvious consideration of justice as would induce this House to lay down for the first time the proposition contended for by the appellant.

Then as to any damage to the plaintiff if it could be said that there was a trespass the learned trial Judge in his judgment has said:—

> I have found as a fact that no damage was caused by the opening of the gate as aforesaid.

In the light of this I would refer to what the Lord Chancellor said in *Lemmon* v. *Webb*, *supra*, at p. 207:—

> Then it was said that there had been some small trespass. The learned Judge who tried the case said that he did not think that was of importance and it is obvious that this action was not brought on that account—it was brought to try the question of right between the parties. Your Lordships would not enter on an enquiry of that description now. It would make no difference whatever in the costs of the action because that was not the substantial question to be tried, and it is not suggested, of course, for a moment that there were any damages that could be more than nominal. Under these circumstances I move that the judgment appealed from be affirmed and the appeal dismissed with costs.

In the Court of Appeal in *Lemmon* v. *Webb*, [1895] A.C. 1,

B. C.

C. A.

SUTTLES v. CANTIN.

McPhillips, J.A.

64 L.J. Ch. 205, referring to *Jones* v. *Williams*, 11 M. & W. 176, 12 L.J. Ex. 249, Lord Justice Lindley said:—

> *Jones* v. *Williams was not a case of cutting trees, but it is the leading authority on the right to abate nuisances without notice; and it was decided that a person who suffers from a nuisance on another person's land can enter upon that land and abate that nuisance without notice if the person in possession of the land himself created the nuisance or in case of emergency,* but that in other cases notice to the person in possession and a request to him to abate the nuisance, and compliance with that request are necessary to justify the entering and the abatement of the nuisance by the party aggrieved by it.

And it can be rightly said that the Court of Appeal and the House of Lords quite accepted the authority of *Jones* v. *Williams, supra,* in *Lemmon* v. *Webb, supra.* Also see Best, J., at p. 312, in *Earl of Lonsdale* v. *Nelson* (1823), 2 B. & C. 302, 311-312 (26 R.R. 363):—

> *Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case* which sanctions the abatement by an individual of nuisances from omission except that of cutting the branches of trees which overhang a public road or the private party of the person who cuts them.

The learned editor of the Revised Reports in 26 R.R. at p. 370, says, referring to the language of Best, J., above quoted:—

> This decision is cited and applied by Lord Herschell (Lord Chancellor) in *Lemmon* v. *Webb* (H.L. 27th Nov., 1894), [1895] A.C. 1, 64 L.J. Ch. 205, where the right to cut down overhanging branches came directly in question.

In the present case the plaintiff being the original wrongdoer, bringing into existence the nuisance and it being an act of commission and also one of emergency, the defendant was clearly entitled to abate the nuisance, and the evidence establishing that the defendant's mining property was damnified by the nuisance the defendant was entitled to recover damages for the injury sustained—nominal damages only have been allowed to the defendant upon the counterclaim—and they have been rightly allowed.

It follows that in my opinion the appeal should be dismissed and the judgment of the learned trial Judge affirmed.

Appeal dismissed.

HILE v. GRAND TRUNK PACIFIC R. CO.

MAN.

C. A.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, and Cameron, JJ.A. April 5, 1915.

1. MASTER AND SERVANT (§ II C 2—198)—INJURIES TO SWITCHMAN—DEFECTIVE ENGINE—UNAUTHORIZED USE—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

There can be no recovery either at common law or under the statute where the real and basic cause of an accident and the resultant injuries to a switchman is the unauthorized taking and using of an untested and defective engine by the switching crew whom he voluntarily assisted in the taking and using of the engine with knowledge of its defective condition.

2. MASTER AND SERVANT (§ II A 4—80)—INJURY TO SWITCHMAN—NEGLIGENCE—WANT OF PRINTED RULES—SPECIFIC FINDINGS.

The general finding of a jury that the injuries sustained by a switchman were caused by the negligence of the railway company is limited by a specific finding that the negligence consisted in not having definite printed rules and in not seeing that they are at all times strictly obeyed, and discloses no specific act of negligence on which an action at common law is maintainable.

3. NEW TRIAL (§ II—8)—GROUNDS FOR—NON-DIRECTION BY COURT—FORMS OF QUESTIONS—FAILURE TO OBJECT.

No new trial will be granted if no objections are taken to the non-direction of the judge or to the forms of questions asked, or that further or other questions should be submitted.

[*Nevill* v. *Fine Arts, Etc. Co.*, [1897] A.C. 68, 75, followed; *Olver* v. *Winnipeg*, 16 D.L.R. 340, 24 Man. L.R. 25, applied.]

Statement

APPEAL from judgment of nonsuit in action for personal injuries.

H. J. Symington, for appellant, defendant.

S. H. McKay, for respondent, plaintiff.

Howell, C.J.M.

HOWELL, C.J.M., concurred with CAMERON, J.A.

Richards, J.A.

RICHARDS, J.A., concurred with PERDUE and CAMERON except that he thought it should not be left open to the plaintiff to bring another action.

Perdue, J.A.

PERDUE, J.A.:—My brother Cameron has fully set out the facts that are of importance in this case. I need not, therefore, repeat them and shall simply state the conclusions at which I have arrived after consideration of the evidence and of the findings made by the jury.

The learned trial Judge, after carefully charging the jury, submitted to them a number of questions, to none of which any objection was taken on the part of the plaintiff. The answers to these questions were also acquiesced in by the plaintiff and no request was made on his behalf that any of the questions should be re-submitted to the jury for further or more definite answers. By the answer to the first question the jury found

MAN.
C. A.
HILE
v.
G.T.P.
R. Co.
Perdue, J.A.

that the plaintiff's injury was caused by the negligence of the defendants. But the answer to the second question qualifies this finding and declares that the negligence "consisted in not having definite printed rules and in not seeing that these rules are at all times strictly obeyed." This answer is merely a criticism of the defendants' method of controlling its business and its employees. It discloses no specific act of negligence that would entitle the plaintiff to maintain an action upon the facts as given in evidence in this case, and the general finding of negligence by the answer to the first question is limited by, and confined to, the kind of negligence specified in the answer to the second question. These questions were asked, no doubt, in respect of the action at common law, and the answers fail to disclose any cause of action.

The remaining questions deal with the plaintiff's claim under the statute. The third question was directed to ascertaining whether the injury was caused by the negligence of any person in the service of the defendants to whose orders or directions the plaintiff was bound to conform and did conform. After answering this in the affirmative, the jury in their answer to the fourth question disclose another kind of negligence. They there find that the plaintiff's injury was caused, (*a*) by the negligence of Robertson, the yardmaster, "in neglecting to find why change was made when switching crew was under his orders;" (*b*) by switching engineer Rymal for making the change of engines without reporting to foreman Mitchell; (*c*) by foreman Mitchell, "for not enforcing such rules as they had." We therefore have it that the injury was caused by three different persons, all of whom had separate and distinct functions to perform. According to the plaintiff's own evidence there was no one but Robertson who had any right to give him orders. As I understand the evidence, Rymal, instead of being in a position to give orders to the plaintiff, conformed to the directions of the plaintiff while the switching operations were going on. At all events, Rymal had no authority over the plaintiff according to the plaintiff's own evidence. Mitchell was not consulted as to the change of engines and gave no permission for the change. According to the plaintiff's own statement.

Mitchell did not do anything which he should not have done. Robertson gave no direction to make the change of engines. The evidence shews that the engineer might make the change if the engine he was in charge of got out of order, subject to obtaining permission from Mitchell who had complete control of the engines. It was quite reasonable for Robertson to assume that there was a sufficient reason for the change and that Mitchell's permission had been given. The finding of the jury, that Robertson was negligent in not finding out why the change was made, does not go to the root of the matter and does not touch what the actual cause of the accident was. It relates to a thing which the jury thought Robertson should have done after the unauthorized use was made of the engine and when he discovered it was being used. This could only be of importance if Robertson's acts amounted to a ratification, but as he was in ignorance of the fact that the engine had not been tested and did not know that permission had not been given by Mitchell, there could not be ratification upon his part.

The following questions and answers are taken from the cross-examination of the plaintiff:—

Q. What caused that accident, the basic cause of that accident, was the taking of an imperfect engine to use for switching? A. I suppose that is it.

Q. That is unquestionably the basic cause of that accident? A. Well, it looks that way.

It is plain from the evidence that the real cause of the accident and the resultant injury to the plaintiff was the unauthorized taking and using of an untested and defective engine by the switching crew consisting of the plaintiff, the engineer and fireman and the other switchman. The plaintiff was the one who first called attention to engine No. 407, and the evidence is very strong that he suggested taking and using it. If he was not primarily responsible for taking engine No. 407, he certainly suggested, connived at and voluntarily assisted in the taking and using of the engine. He knew at the time that the engine had not been tested after the extensive repairs that had been made. In giving his assistance in taking and using the engine he was not acting under orders from anyone who had any control over him. He was unable to give any reason why

MAN.

C. A.

HILE
v.
G.T.P.
R. Co.

Perdue, J.A.

they changed the engine. No valid reason was given or suggested for making the change.

After considering the questions submitted to the jury and the answers given, I am of opinion that no judgment either at common law or under the statute can be entered in favour of the plaintiff. As I have pointed out, no objection was taken on the part of the plaintiff as to non-direction of the Judge or to the form of the questions asked, or that further or other questions should be submitted. This disentitles him to a new trial: *Nevill* v. *Fine Arts, etc., Co.*, [1897] A.C. 68, 76. I think, therefore, that a nonsuit should be entered, without prejudice to the plaintiff bringing a new action if he should be so advised. The plaintiff will have to pay the costs in the Court of King's Bench and the costs of this appeal.

Cameron, J.A.

CAMERON, J.A.:—The plaintiff was employed as a switchman by the defendant at Rivers in this province. It is alleged in the statement of claim that on August 29, 1913, he, in the discharge of his duties, was assisting in taking two cars of coal upon a coal dock at Rivers and was compelled to jump from the car on which he was, to avoid being carried over the said coal dock, and thus precipitated to the ground, whereby he sustained such severe injuries to his right foot that the same had to be amputated.

The statement of claim further alleges that the cause of such injuries was the negligence of the defendant, consisting: (1) in not having the engine, on which the plaintiff was working, in proper repair in that the wire split key was left in the throttle box on said engine, making it impossible for the engineer to stop the engine and cars attached thereto, whereby the same were precipitated from the coal dock to the ground, and (2) in not having the engine properly equipped for the checking of speed and stoppage of the engine as provided by sec. 264 of the Railway Act, and in not having the safety appliances required by the Act.

Alternatively it is alleged that the plaintiff was ordered by the yardmaster in charge of the defendants' engine and cars to place two cars of coal upon the said coal dock, and while acting

in obedience to said orders he was injured because of the negligence of the defendant in respect of the matters above set forth.

On the evidence at the trial before Mr. Justice Galt and a jury, at Brandon, it appeared that one W. E. Robertson was the yardmaster at Rivers at the time of the accident. He had charge of the yard, of incoming and outgoing trains, of switching and movement of cars generally. He had to do with the engines only when they were being used in these operations. There is a standing order for an engine at 7 o'clock in the morning and 7 o'clock at night. A switching crew usually consists of an engineer and fireman and two switchmen, as it did in this case. The engine is in charge of the yardmaster once the engineer and fireman are on it. They, the engineer and fireman, take their orders from the switchmen, who, on the day in question, were the plaintiff and one Raymer. J. E. Mitchell was the locomotive foreman at Rivers, who had charge at Rivers of the power, that is, of the engines. When he wanted the switchmen to take or change an engine he would notify the yardmaster, who had no right to take out an engine without Mitchell's authority.

The engine placed at the disposal of the switching crew on the day of the accident was No. 14. The engine that was in use ordinarily, was No. 407, and it had been in the shops for general repairs. About 3.30 o'clock Robertson gave an order to switch coal cars up on the coal chute. The crew went with No. 14 up the chute and coupled it to two empty cars, which were brought down. Robertson then threw a switch and allowed the crew to put the two empty cars on a spur known as the P. & F. spur. He then left the crew and went to the coal dock. The crew then went down the lead track and with No. 14, when Hile saw No. 407 outside the shops about 500 ft. away.

The plaintiff says he was working under orders of Robertson and no one else. He saw No. 407 near the round-house after the empties had been brought down with No. 14 from the chute and put on the P. & F. spur. They took No. 14 to within about 20 ft. of No. 407, which was on the same track. There the crew found Porter, a machinist, and Anderson, an hostler, Crosbie,

MAN.
C. A.
HELE
v.
G.T.P.
R. Co.
Cameron, J.A.

the engine house foreman, was not far from the engine No. 407. Anderson took No. 14 away to the round-house.

The plaintiff says that Robertson left them when they went up to get the empties down, and that Robertson did nothing toward enabling them to take No. 14 to the round-house, though he was in a position to see it. There was a switch to be turned to take No. 14 to the round-house and, apparently, the plaintiff threw this switch, p. 11. Throwing the switches and coupling were part of his duties. Robertson threw some switches to place No. 14 on the "slab track" as it is called, which is near the round-house. The crew took No. 407, and went up No. 6 track for two cars of coal, and proceeded to take them up the coal dock. All that Robertson had to do with getting the coal up the dock was to throw the switch so that they could do so. The engine going up the coal dock was head first, with the two cars of coal ahead, the plaintiff being on the first car. At the proper time he gave the signal to stop, but it did not, when the plaintiff jumped to save himself, and was injured. The cars went over the dock which was some 50 ft. high.

On cross-examination the plaintiff stated that the engine crew obeyed his signals. There are three occasions on which an engine can be changed: (1) if the yardmaster decides an engine does not suit him for switching purposes; (2) if the locomotive engineer decides that an engine is not safe and should be changed; and (3) if the locomotive foreman wants an engine changed, in which case he notifies the yardmaster, who gives the locomotive engineer instructions accordingly. Every engine going in or going out of the shops is booked with the locomotive foreman. This the plaintiff knew (p. 26). After the crew had brought down the empties, the yardmaster went to the coal chute about a thousand feet from the shops. As to what followed, I quote the following from the cross-examination:—

Q. Then you threw a switch? A. No, Sir. Q. Somebody threw a switch? A. Raymer threw a switch. Q. And you went back to the engine (No. 14)? A. Yes. Q. And you said to the engineer? A. I said "There is No. 407." He said, "I see her," and I said, "I wonder if she is ready: she is popping off steam." He said, "We can go down and see." . . .

Q. You were the first man who suggested the change from No. 14 to 407? A. Yes. Q. Mr. Robertson, your boss, had not mentioned it in any way, shape or form? A. No. . . .

Q. Mr. Robertson did not tell you to change from No. 14 to 407? A. No. Q. And as far as you know, he did not know that you were going to change? A. Well, not so far as I know. (pp. 27 & 28.)

The plaintiff, with the others, went in on the engine and found No. 407 on the ingoing track. The crew left No. 14, changed tools, got on No. 407.

The plaintiff stated further that engines after being in for repairs should be tested and usually are tested.

Q. And you knew it was a proper railroad procedure, she should be tested and you knew on this occasion, on August 29th, No. 407 had not been tested? A. Yes. (p. 37.) . . . Q. And you knew in face of that, you had your engineer and fireman to take 407 on to the yard? A. Yes.

As for the plaintiff's reason for taking, or assisting in taking, engine No. 407, he gives no satisfactory account. "I did not have any reason at all."

He can point out no act of negligence on the part of the yardmaster or the locomotive foreman. The real offender, apparently, was, in his opinion, the unknown man who left the coulter pin in the locomotive, which was carried up into the throttle, making it impossible to stop the engine.

Robertson, the yardmaster, says he saw No. 14 going back up the lead and pulled the switch to let it in on the "slab" track. Next he saw No. 407 coming back and he threw the switch so that they could go upon the coal dock. He had given no orders as to the change of engines and No. 407 was taken without his authority, nor had he received authority to take it from the locomotive foreman or instructions that it was ready for service. Nor had the crew the right to take it without authority from himself or the locomotive foreman. But so far as he knew he would assume (or would have assumed) that the crew had taken it on the authorization of the locomotive foreman, as they had a right to get it there. He says, further, and this is to be noted, that when he threw the switch for No. 14 to go in on the "slab" track, it was in charge of the "hostler" (p. 28).

Robertson says the engineer has the right to change engines, but he must do this through the locomotive foreman.

Mitchell, the locomotive foreman at Rivers, states his position, and that no one can get switch engines without authority

MAN.
C. A.
HILE
v.
G.T.P.
R. CO.
Cameron, J.A.

from him, and he gave no authority to any one to take out No. 407 on August 29. At that time No. 407 was not completed, and before being used it should have been taken for a test trip. He describes the split key in question and says it fell from some mechanic's pocket and had become lodged between the throttle and the valve seat, as a consequence of which the throttle could not be closed.

Rymal, the locomotive engineer on No. 14, states that, in switching, he follows the signals of the switchman. Over the switchmen he has no control whatever. After they had put the empty cars on the spur he says, "it was then that Hile said 407 was out and we would go down and get her"—which differs from the plaintiff's version of what he said. Then follows:—

Q. What did you do? A. I sat there until he gave me the signal to go ahead.

Q. Who? A. Hile.

Raymer and Rymal, after they came down to where No. 407 was, went over to the round-house and in the meantime the others changed the tools from No. 14 to No. 407. He assumed that Hile knew what he was doing and he had authority to take out No. 407 from no one but Hile (p. 137). The accident happened, he says, because he could not close the throttle.

The statement made by the plaintiff in his report to the company, dated October 29, 1913, was put in and is of importance. In this he says he said to Raymer, with reference to No. 407: "I said she would be a fine thing to put up coal with, let us go down and see," and at the end of the report, "Did not get authority from locomotive foreman to take engine 407."

At the conclusion of the case the learned trial Judge submitted certain questions to the jury, which, with the answers thereto, are as follows:—

Q. 1. Was plaintiff's injury caused by the negligence of the defendant company? A. Plaintiff's injury was caused by the negligence of the defendant company. Q. 2. If so, in what did such negligence consist? A. Defendant's negligence consisted in not having definite printed rules and in not seeing that those rules are at all times strictly obeyed. Q. 3. Was plaintiff's injury caused by the negligence of any person in the service of the defendants to whose orders or directions the plaintiff, at the time of the injury, was bound to conform and did conform? A. Yes. Q. 4. If so, who was the person who gave such orders or direction, and what was the negligence of which he was guilty? A. (*a*) Yardmaster Robertson in neg-

lecting to find why change was made when switching crew was under his orders. (*b*) Switching engineer Rymal for making change of engines without reporting to foreman Mitchell. (*c*) Foreman Mitchell for not enforcing such rules as they had. Q. 5. Was the plaintiff guilty of any negligence which contributed to the injury. If so, what was the negligence? A. As plaintiff had no authority he was not responsible. Q. 6. If your answers are in favour of the plaintiff, what damages do you award him? A. We award the plaintiff $4,500.

Now, as to Q. 2, the question as to having printed rules was not raised by the pleadings. It is impossible to say that there could be negligence on the part of the defendant in not having its rules printed. There is no evidence whatever to justify this finding. And it is equally impossible to say that there can be negligence in not having rules, when printed, strictly obeyed. In a word, this answer of the jury is wholly ineffective, irrelevant, does not disclose an act or acts of negligence on the defendant's part, and cannot form the basis of a judgment against the defendant.

As to Q. 4 (*a*). Yardmaster Robertson gave no orders whatever in respect of the change of engine from No. 14 to No. 407. That he was guilty of negligence in not finding why the change was made cannot be admitted, inasmuch as he (Robertson) undoubtedly assumed, and was justified in assuming, that the change of engines was made with due authority. In these circumstances it cannot be seriously contended that Robertson's act in throwing the switch for the coal dock for No. 407 was an act of ratification.

As to Q. 4 (*b*). The plaintiff did not take orders from Rymal. The contrary was the case. He obeyed the plaintiff's signals and supposed, and was justified in supposing, that he (the plaintiff) knew what he was about.

As to Q. 4 (*c*). There is no evidence whatever that Foreman Mitchell failed in his duty. In any event, the plaintiff was not answerable to Mitchell and the answer is wholly without bearing on the real issues in the case. Upon the findings of the jury, therefore, it does seem to me that the judgment cannot be sustained.

The contention that the verdict might be supported on the ground that the engine was defective within the meaning of

MAN.

C. A.

HILE v. G.T.P. R. Co.

Cameron, J. A.

sub-sec. (*a*) of sec. 3, of the Employers Liability Act, which gives a remedy for injuries sustained,

(*a*) by reason of any defect in the condition of the ways, works, machinery, plant, buildings or premises connected with, intended for or used in, the business of the employer,

cannot, in my opinion, be upheld. The application of this sub-section to the facts of this case was discussed by the learned trial Judge in his charge (p. 153). He held it inapplicable in the circumstances, and nothing more was said of the matter. Plaintiff's counsel did not object to the learned Judge's view, and did not ask that a question under sub-sec. (*a*), or any question to the like effect, or under any other sub-section, should be submitted to the jury. It is altogether too late to have such a question now asked and answered by a tribunal other than the jury. I refer to the clear-cut statement of Lord Halsbury in *Neville* v. *Fine Arts*, [1897] A.C. p. 76:—

But what puts him out of Court in that respect is this, that, where you are complaining of the non-direction of the Judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking it, no Court would ever have granted you a new trial,

cited in the judgment of the Chief Justice of this Court in *Olver* v. *Winnipeg*, 16 D.L.R. 310.

I think the learned trial Judge would have been justified in entering a nonsuit, and I would do so now. But I would not preclude the plaintiff from bringing another action should he be so advised. *Appeal dismissed.*

ALTA.

S. C.

POLSON IRON WORKS v. MUNNS.

Alberta Supreme Court, Harvey, C.J. October 4, 1915.

1. CONSTITUTIONAL LAW (§ I D—88)—APPOINTMENT OF JUDGES—MASTERS—POWERS OF PROVINCE TO APPOINT.

The office of the Master is essentially that of an officer, and while his duties are largely judicial in their character they do not constitute him a judge within the meaning of sec. 96 of the British North America Act, so as to require his appointment by the Governor-General.

Statement

APPEAL from Master's order for judgment in favour of plaintiff in action on judgment of sister province, affirmed.

A. Macleod Sinclair, for appellant.

S. W. Field, for respondent.

Harvey, C.J.

HARVEY, C.J.:—This is an appeal from an order of the Master, directing that the defence of the defendant be struck out

and giving leave to the plaintiff to sign judgment for the amount of the claim.

The action is founded on a judgment obtained in the Supreme Court of Ontario. The defences raised by the pleadings are: (1) An allegation that the plaintiff is a foreign unregistered company; (2) a denial that the plaintiff obtained the judgment in the Supreme Court of Ontario; (3) A denial of the jurisdiction of that Court.

It is apparent that the first defence is of no value because the company does not require to be registered simply to sue here, and no argument is based on this. No argument is based on either of the other two alleged defences either, the judgment having been proved in the usual way.

The only defences raised in the argument are to the jurisdiction of the Master, and it is a somewhat singular coincidence that the judgment sued on is one obtained upon an order of the Master of the Ontario Court with a jurisdiction similar to that of the Master of our Court upon an application similar to the one here, and upon the consent of the defendant.

The order in question was made under rule 275, which provides that the application may be made to a Judge.

The first objection is that the Master is not a Judge and therefore cannot hear the application. The conclusion, however, does not follow from the premises. The Master does not hear the application because he is a Judge, but because, under rules 536 and 541, he has the powers of a Judge in such matters. The second objection is that the Master is a Judge and therefore cannot hear the application because it is beyond the power of the province to appoint a Judge. This objection involves a much wider field.

By sec. 96 of the B.N.A. Act it is provided that:—

The Governor-General shall appoint the Judges of the Superior, District and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

By par. 14 of sec. 92, however, exclusive jurisdiction is given to the province in respect to,

The administration of justice in the province, including the constitution, maintenance and organization of provincial Courts, both of civil and criminal jurisdiction and including procedure in civil matters in those Courts.

ALTA.
S. C.
POLSON IRON WORKS v. MUNNS.
Harvey, C.J.

If the Master is a Judge within sec. 96, his appointment by provincial authority is void. If, however, his office and duties properly are comprised in the constitution and organization of the Courts or their procedure, then it is by provincial authority that provision should be made for his appointment as well as for his office and duties. It is true that the office of Master is one of comparatively recent origin in this Court, and it is also true that the duties which the Master performs were, before the creation of the office, largely performed, as far as they then existed, by the Judges of the Court, but it by no means follows that he is therefore a Judge any more than it would follow, if a Judge acted as clerk of his own Court, swearing the witnesses, making records and performing other clerical duties, that a clerk, to relieve him of those duties would be a Judge. There is, however, the important difference that the duties performed by the Master in relief of the Judges are, to a considerable extent at least, judicial in their character.

But, while there has been a Master in this jurisdiction for only a short time, the office of Master in Ontario, with duties of the same character, has existed since the passing of the Judicature Act in 1881, and so far as I have been able to ascertain the question of the power of the provincial authorities to appoint him has never been raised in the Courts or by Ministers of Justice in considering the validity of the legislation. Perhaps there may be a partial explanation for that in the fact that, while the name was then new the office and duties were not, for the Master in Chambers was simply given the authority and duties theretofore had by the Clerk of the Crown and Pleas of the Court of Queen's Bench, and by the Referee in Chambers of the Court of Chancery. The office of the Clerk of the Crown and Pleas was one which existed prior to confederation as will be seen by reference to ch. 10, sec. 24 of the Consolidated Statutes of Upper Canada of 1859, ch. 12, of the same statutes relating to the Court of Chancery, by sec. 9 authorizes the appointment of a Registrar and Master in Ordinary and by ch. 10 of 1870-71 provision is made for the appointment of a Referee in Chambers. This statute also empowers the Court to authorize him to transact such business as was transacted by a Judge in Chambers with

certain specified exceptions. The Referee was also to take such references as the Master in Ordinary was unable to take. This last mentioned Act appears to be a new Act as no reference is made to an earlier one on the same subject, and it recites that it is for the purpose of providing greater facilities for the transaction of business in the Court of Chancery. There appears, however, to have been, prior to confederation, an officer called a "referee" exercising certain judicial functions, for, in the Chancery Chambers Reports, references are made to such officer, *e.g.*, "Referee," 2 Ch. Ch. 22 (1866), in which it was held that the referee had jurisdiction over costs. On the same page appears a report in *Allan* v. *O'Neill*, in which a reference was made to the Master to "ascertain" certain facts, in other words, to make a judicial enquiry. Numerous other reports in this and the preceding volume shew that the Master in Ordinary exercised important judicial functions.

Likewise in England the office of Master is several centuries old in the Court of Chancery. The Masters were officers of the Court, but the chief of them, the Master of the Rolls, subsequently developed into one of the most important of the Judges, and the offices of the others were subsequently abolished in 1852, and in their stead were appointed Chief Clerks who exercised a jurisdiction in Chambers. In 1897, the name was again changed to "Master."

In the common Law Courts the office of Master was created in 1837. By the statute creating the office they were called officers of the Court and were to be appointed to conduct the civil business thereof, and in 1867 it was provided that the Judges might empower them to transact all the business transacted by a Judge in Chambers not affecting the liberty of the subject. In Hals. vol. 9, 66, under the head of "Officers," sec. 5, we find sub.-sec. 3, "Masters of the Supreme Court." In par. 142, it is stated that their duties are:—

(1) The control and superintendence of the central office of the Supreme Court; (2) judicial work in Chambers, and (3) issuing directions in points of practice.

From the foregoing it is apparent that at the time of the passing of the B.N.A. Act, judicial work of the character now assigned to the Master in Chambers was being performed in

ALTA.

S. C.

POLSON IRON WORKS v. MUNNS.

Harvey, C.J.

both the English and Canadian Courts by persons designated by the name "Master" or some other name, who, by the statutes providing for these offices were termed "officers" and not "Judges" of the Court.

It is perfectly clear, of course, that the legislature could not provide for the office, either specifically or generally, and leave the executive or the Judges to give him a jurisdiction which would make him practically a Judge, but, in my opinion, that has not been done here. The Judge's chief duty is to determine the rights of parties in the first instance by trial, and subsequently on appeal. The practice and procedure is for the purpose of accomplishing these results advantageously and expeditiously. The work in Chambers is practically all leading up to trial and appeal. It is to this subsidiary work that the Master's jurisdiction is confined. The order under consideration is perhaps the nearest approach to determining the rights of parties by trial that the rules authorize the Master to make. But in reality he is not trying the rights of the parties. He is determining that there is no real issue to be tried. It is only when such a situation is found to exist that the Master is authorized to give a judgment in favour of the plaintiff. When he gives a judgment in favour of the defendant apparently all he does is to give effect to and enforce some rule of practice, *e.g.*, for failure to prosecute the action as required by the rules.

The Master has no jurisdiction in trials or in appeals and all of his acts are subject to review by a Judge.

His office is essentially that of an officer preparing litigation for its legitimate purpose, *viz.*, a trial of the rights of the parties which is exclusively reserved for the Judges to whom it essentially belongs. His duties, therefore, while largely judicial in their character do not constitute him a Judge, since from them are reserved the essential duties of a Judge.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Annotation

Annotation—Constitutional law—Power of Provincial Legislatures to confer authority on Masters in Chambers and Local Judges.

This is an important decision, inasmuch as it appears to be the first reported case—and, therefore, we may probably say—the first case, which deals with the power, under the Constitution, of provincial legislatures to

ALTA.

Annotation

Annotation (*continued*)—Constitutional Law—Power of Provincial Legislatures to confer authority on Masters in Chambers and Local Judges.

appoint judicial officers with authority to exercise the functions, in Superior Court actions, which are assigned under Judicature Acts and rules to Masters in Chambers in Ontario and in Alberta, and in other provinces. To understand the judgment it is necessary to have before one the following Rules of the Supreme Court of Alberta.

275. When a statement of claim includes a claim for a debt or liquidated demand and any defendant has delivered a defence, the plaintiff may, on affidavit made by himself, or any other person who can swear positively to the facts, verifying the cause of action in respect of the debt or liquidated demand and the amount claimed and stating that in his belief there is no defence thereto, apply to a Judge for leave to enter final judgment for the amount so verified together with interest, if any, and costs.

536. A local Judge of the Supreme Court shall, in actions brought or proceedings taken, or proposed to be brought or taken, in the Supreme Court in the Judicial District of which he is Judge or Acting Judge, possess the like powers of a Judge of the Supreme Court sitting in Chambers, save and except in respect of the matters following, etc.

541. A Master in Chambers in regard to all actions brought or proposed to be brought in the Supreme Court shall have power and be required to do all such things, transact all such business, and exercise all such authority and jurisdiction in respect to the same, as may be done, transacted, or exercised under and by virtue of these Rules, by any Local Judge of the Supreme Court, with or without the consent of the parties, except the trial of actions.

The question involved is whether the local legislature can confer, directly or indirectly, upon an official of provincial appointment, the powers described in the above Rule 275: or whether to do so infringes upon section 96 of the British North America Act, which enacts that:—

"The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

Even though the powers thus given by section 96 to the Governor-General would otherwise have come within the power of the provincial legislature under No. 14, section 92, to make laws in relation to:—

"The administration of justice in the province, including the Constitution, Maintenance, and Organization of Provincal Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in these Courts"—they are taken out of the latter power by section 96. This will not be disputed, for the British North America Act has to be read as a whole, as the Judicial Committee long since pointed out.

The whole question then is whether conferring upon a provincial official the powers described in Rule 275, in Superior Court actions, is, or is not, virtually appointing a Superior Court Judge?

The learned Chief Justice holds that it is not, because the Master in acting under Rule 275 "is not trying the rights of the parties. He is determining that there is no real issue to be tried. It is only when such a situa-

ALTA.

Annotation

Annotation (*continued*)—**Constitutional Law—Power of Provincial Legislatures to confer authority on Masters in Chambers and Local Judges.**

tion is found to exist that the Master is authorized to give a judgment in favour of the plaintiff."

It is true that this is apparently the first decision on the precise case of a Master in Chambers, and that the constitutional position of this functionary has not been dealt with in Reports of Ministers of Justice. But the late Sir John Thompson dealt very thoroughly with the general question of intrusions by provincial legislatures and Governments on section 96, in his report of January 18th, 1889, on the subject of the disallowance of a Quebec Act respecting District Magistrates, as the Act in question termed them. This Report will be found in Hodgins' Provincial Legislation, 2nd ed., at pp. 354-368; and is printed almost *in extenso* in Legislative Power in Canada, at pp. 140-174.

Sir John Thompson reviews the previous reports of Ministers of Justice, and the decisions of the Courts in respect to provincial appointments of officers exercising judicial functions, such as Police Magistrates and Justices of the Peace Fire Marshalls, Division Court Judges, and Judges of Parish Courts in New Brunswick; and, speaking generally, he says:—

"The most remarkable instance in which provincial legislation has overrun the limits of provincial competence has been the legislation in reference to the administration of justice. . . . Doubtful legislation has been adopted in nearly all the provinces, setting up Courts with Civil and Criminal jurisdiction, with Judges appointed by provincial or municipal authority. . . . In most cases, as in the case of Quebec, now under consideration, the legislatures have been careful to avoid conferring the title of 'Judges' upon the officers whom they have really undertaken to clothe with Judicial functions."

The report of a Minister of Justice which comes nearest to having a direct bearing upon this Alberta decision, is that of Sir Alexander Campbell, of January 30th, 1882, who took exception therein to a provision of the Ontario Judicature Act, 1881, constituting the Judges of County Courts, Official Referees and Local Masters. He says: "The undersigned thinks it doubtful whether the provincial legislature can constitutionally in this manner appoint Judges, who hold office by commissions from your Excellency, to other offices under the provincial Government. The expediency of allowing County Judges to act as Referees and Local Masters is questionable; the same may at some future time require the consideration of Parliament."

The decisions and reports of Ministers of Justice subsequent to Sir John Thompson's report of January, 18th, 1889, are the following: *The King* v. *Sweeney* (1912), 1 D.L.R. 476, wherein the Supreme Court of Nova Scotia held, that under No. 14 of section 92, provincial legislatures have power to appoint stipendiary magistrates notwithstanding section 96; (to the same effect is *The King* v. *Basker* (1912), 1 D.L.R. 295); and *Ex parte Vancini* (1904), 36 N.B.R. 456, where the Supreme Court of New Brunswick held that a provincial Act which created stipendiary and police magistrates a Court with all the powers and jurisdictions which any Act

ALTA.

Annotation

Annotation (*continued*)—Constitutional Law—Power of Provincial Legislatures to confer authority on Masters in Chambers and Local Judges.

of the parliament of Canada had conferred or might confer, was *intra vires*. This was followed in *Geller* v. *Loughrin* (1911), 24 O.L.R. 18, see at pp. 23, 33. Then there is *Regina ex rel. McGuire* v. *Birkett* (1891), 21 O.R. 162, where it was held that the provincial legislature had power to invest the Master in Chambers in Toronto with authority to try controverted municipal election cases; but this was rested upon the provincial power in relation to municipal institutions; *In re Dominion Provident Benevolent and Endowment Association* (1894), 25 O.R. 619, when it was held that the Ontario legislature had power to confer on the Master in Ordinary the powers it assumed to confer upon him by the Ontario Corporations Act, 1862, which directs that he shall—settle schedules of creditors and contributories . . . and generally shall have all the powers which might be exercised on any reference to him, under a judgment or order of the High Court.

Lastly, there is a Report of Sir John Thompson, of March 24th, 1892, upon a Quebec Act empowering the Lieutenant-Governor in Council, upon the report of the Railway Committee of the Executive Council to cancel the charter of any railway company incorporated under the laws of the province, in certain cases, in which he makes the remark that it seems clear that a legislature may invest other bodies than the Courts with powers and functions generally reposed by legislation in legal tribunals, without exceeding its jurisdiction. But he is here referring to the power of a provincial legislature to create a special tribunal for the determination of a special matter and not of the power to confer general jurisdiction.

Reference may also be made to *In re Queen's Counsel* (1896), 23 A.R. (Ont.) 792, where the question of the power of the provincial legislature to authorize a Judge of the Supreme Court to depute a Queen's Counsel to perform his judicial duties is somewhat discussed at pp. 799, 811.

In another report of 1889, besides the one already referred to (Hodgins' Provl. Legisl. 2nd ed., at p. 372), Sir John Thompson says that "the view has been taken by nearly all the Ministers of Justice since the union of the provinces, that the words of the British North America Act, referring to Judges of the Superior, District, and County Courts, include all classes of Judges like those designated, and not merely the Judges of the particular Courts which, at the time of the passage of the British North America Act happened to bear those names."

It all, therefore, seems to come back to the question whether the Master in Chambers when acting under the Alberta Rule 275, above set out, is acting as a Superior Court Judge, and exercising jurisdiction proper to a Superior Court Judge. If he is not, the decision is right; if he is, then, with all respect be it said, the decision is wrong. The further question, however, seems to arise whether a proceeding under that Rule in which the plaintiff succeeds, is not really "a trial of the action," for the Rules do not appear to contain any express definition of that phrase, as contained in Rule 541, *supra*.

A. H. F. LEFROY.

SASK.

S. C.

WESTERN TRUST CO v. CITY OF REGINA.

Saskatchewan Supreme Court, Newlands, J. July 24, 1915.

1. MASTER AND SERVANT (§ II C 2—199)—UNPROTECTED FROG—CONTRIBUTORY NEGLIGENCE—UNCOUPLING CARS IN MOTION.

An unprotected frog is not of itself negligence where the deceased met his death in an attempt to uncouple cars while in motion, unless his duties required him to do so.

Statement

ACTION for negligence causing death.

P. M. Anderson, for plaintiff.

G. F. Blair, for defendant.

Newlands, J.

NEWLANDS, J.:—The jury in this case found negligence on the part of both the deceased and the defendant. On the part of the deceased they found that his negligence consisted of attempting to uncouple cars while in motion, and on the part of the defendant that the negligence consisted of an unprotected frog and improper coupling appliance on cars. The cause of the accident, they found, was deceased stepping between the rails on which the cars were in motion, while east of the frog, and his foot being caught in the frog and car no. 103, crushing him. They also found that the evidence was not sufficient to enable the jury to give a definite answer to the question: Could deceased have avoided the accident by the exercise of ordinary care? . . .

The jury have found that he was negligent in trying to uncouple the cars while in motion, and, as in doing this negligent act he stepped on to the unprotected frog and was run over, I do not think the city is liable. There will, therefore, be judgment for defendant with costs. *Judgment for defendant.*

ONT.

S. C.

Re STEWART AND TOWN OF ST. MARY'S.

Ontario Supreme Court, Lennox, J. June 16, 1915.

1. MUNICIPAL CORPORATIONS (§ II C 3—114 B)—REGULATION OF POOL ROOMS—REASONABLENESS.

A by-law limiting the number of billiard and pool-room licenses to one, is a proper exercise of the municipal police power and reasonable, and does not contravene sec. 254 of the Municipal Act, R.S.O. 1914, ch. 192, providing against the creation of monopolies.

[*Re McCracken, etc.*, 23 O.L.R. 81; *Rowland* v. *Town of Collingwood*, 16 O.L.R. 272, distinguished.]

Statement

MOTION to quash by-law.

J. C. Makins, K.C., for applicant.

Lennox, J.

LENNOX, J.:—By-law No. 297 enacts "that the billiard- and pool-room licenses to be issued in the town of St. Mary's for the ensuing license-year beginning on the 1st day

of May, 1915, shall be limited to one," and that for such license the licensee shall pay $72. The population of St. Mary's is about 4,000, and it is not pretended that one license is not sufficient for the requirements of the town, or that the by-law was not passed in good faith. The application was not opposed.

Not because of this, but by reason of the majority decision in *Re McCracken and United Townships of Sherborne et al.* (1911), 23 O.L.R. 81, the point of least resistance would apparently be reached by quashing the by-law. But that case and the cases upon which it was founded were all in respect of by-laws under the Liquor License Acts, and governed by considerations which I do not think arise here, and in all of them, except the *McCracken* case, *supra*, bad faith was distinctly found. In none of them were the reasonable requirements of the municipality as a whole provided for, and the positive law that there shall be licenses to sell liquor, except upon the vote of the people to the contrary, was contravened—in each case it was substantially prohibition without compliance with the provisions of the statutes in that behalf, and sections of the municipality were discriminated against.

The applicant relies upon sec. 254 of the Municipal Act, R.S.O. 1914, ch. 192, providing against the creation of monopolies. The section reads as follows:—

> Subject to section 255, and to section 7 of the Ferries Act and to section 8 of the Ontario Telephone Act, a council shall not confer on any person the exclusive right of exercising, within the municipality, any trade, calling or business, or impose a special tax on any person exercising it, or require a license to be taken for exercising it, unless authorised or required by this or any other Act so to do; but the council may require a fee, not exceeding $1, to be paid to the proper officer for a certificate of compliance with any regulations in regard to the trade, calling or business.

By sub-sec. 2 of sec. 249 of the Municipal Act, "a by-law passed by a council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them." This is a new provision, introduced in 1913 by 3 & 4 Geo. V. ch. 43, sec. 249, sub-sec. (2), and will eliminate the difficulties referred to by Mr. Justice Riddell in the *McCracken* case at pp.

ONT.

S. C.

RE STEWART AND TOWN OF ST. MARY'S.

Lennox, J.

100, 101, arising out of the extensive supervisory powers exercised by English and Canadian Courts—a legislative sanction of the language of my brother Riddell when he says: "I venture to think that those on the spot elected by the people are better judges of what is or is not reasonable than His Majesty's Justices."

Aside from this, it has long been recognised here and in England that by-laws of municipalities ought to be "benevolently interpreted," that "they ought to be supported if possible," and that "the Court ought as far as possible to support by-laws issued by local authorities, unless it could clearly be seen that the by-law was made without jurisdiction or was obviously unreasonable:" *Walker* v. *Stretton* (1896), 12 Times L.R. 363; *Kruse* v. *Johnson*, [1898] 2 Q.B. 91, 14 Times L.R. 416; *Re McCracken and United Townships of Sherborne et al.*, 23 O.L.R. at p. 89; *Merritt* v. *City of Toronto* (1895), 22 A.R. 205, at p. 207.

Section 250 of the Municipal Act, in so far as it enacts that "every council may pass such by-laws and make such regulations for the health, safety, morality, and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act, as may be deemed expedient, and are not contrary to law," also only dates back to the Act of 3 & 4 Geo. V. ch. 43, sec. 250.

Taking into account the very large discretionary powers conferred upon the council by these provisions, and that incidental monopoly even where it is to be enjoyed by one individual or company is not foreign to our statutory municipal law, for instance, for the supply of light, heat, and power to the inhabitants under sec. 399, sub-secs. 17, 50, and 64, and the obvious case of an exclusive franchise to a street railway company, I cannot read sec. 254 as necessarily compelling a municipal council to issue licenses for a multitude of pool-rooms, slaughter-houses, pounds, and livery-stables within the municipality—some of them noxious and offensive, although necessary or proper to a limited degree—beyond the reasonable requirements of the municipality, even if it may be argued that the reasonable and proper limitation fixed by the council may incidentally and unavoidably result in individual monopoly. It may be still monopoly if two or even more licenses are provided for. One license

ONT.

S. C.

RE STEWART AND TOWN OF ST. MARY'S.

LENNOX, J.

for 4,000 people is no more a monopoly than two licenses in a town of 10,000 inhabitants. There is no question of *practical prohibition* here, as in *Rowland* v. *Town of Collingwood* (1908), 16 O.L.R. 272. The people must have hotels until the people say otherwise at the polls—but the council is not bound to provide for pool-rooms; and, having provided for and issued two licenses, can cancel one or both of them. They can regulate charges as they see fit, and by fixing a sufficiently high license fee can prevent unreasonable profit to the licensee and secure revenue for the municipality at the same time.

The motion will be dismissed, and, the council not appearing, there need be no order as to costs. *Motion dismissed.*

MILLER v. HALIFAX POWER CO. Ltd.

N. S.

S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Russell, Longley, and Ritchie, JJ. January 12, 1915.

1. VENDOR AND PURCHASER (§ III—38)—BONA FIDE PURCHASER—PURCHASE OF LANDS FROM AGENT—TRUSTS—KNOWLEDGE.

Where title to land is taken in the name of an agent, although purchased with the funds of the principal and held by the latter for a period sufficient to give him a title by possession independent of the agent's fiduciary relationship, a purchaser of the agent with knowledge of such circumstances does not stand in the position of a *bonâ fide* purchaser as to acquire a title to the land superior to the principal.

2. CONTRACTS (§ I E 4—80)—STATUTE OF FRAUDS—TRUSTS—PURCHASE OF LANDS BY AGENT—EQUITY OF PRINCIPAL.

The trust arising out of a conveyance of land in the name of one occupying the fiduciary position of manager, which was purchased with the funds of the employer, is not within sec. 5 of the Statute of Frauds, R.S.N.S. 1900, ch. 141, as to require a writing, in view of the provision that the statute shall not extend to any trust in land arising or resulting by implication or construction of law.

3. RECORDS AND REGISTRY LAWS (§ III A—10)—TRUSTS — PURCHASE OF LANDS BY AGENT—EQUITY OF PRINCIPAL.

The registry laws giving priority to a later instrument if the former instrument affecting the land has not been registered, have no application to the equity of a principal in the land purchased in the agent's name, which does not admit of registry.

4. RECORDS AND REGISTRY LAWS (§ III B—15)—REGISTRATION OF DEEDS — REQUISITES—CONSIDERATION—FAILURE OF—EFFECT.

In order that a deed may be operative under the Registry Act it must be founded on a valuable consideration; a mere recital of such payment in the deed is not enough, and to overcome it, it is necessary to prove valuable consideration and absence of notice. (R.S.N.S. 1900, ch. 137, sec. 15).

5. ADVERSE POSSESSION (§ I F—25)—TENANTS IN COMMON—POSSESSION AGAINST—RIGHTS OF PURCHASER.

No title as against the co-tenants is acquired by a purchase of lands from a tenant in common who has not the possession of the lands against the co-tenants as required by sec. 14 of the Statute of Limitations (N.S.).

N. S.

S. C.

MILLER v. HALIFAX POWER CO.

6. EMINENT DOMAIN (§ III C 2—150)—PRACTICE — DETERMINATION OF OWNERSHIP—COMPENSATION.

The proper practice in expropriation proceedings is to have the title settled before the assessment of damages so that it will be certain that the arbitrator has the right claimants before him and the compensation may be properly fixed.

7. TRESPASS (§ I C—18)—RECOVERY FOR—EQUITABLE OWNER—RIGHT OF.

Under the Judicature Act (N.S.) recovery for trespass to land may be had upon an equitable title where there is an appropriate prayer for such relief.

Statement

APPEAL from the judgment of Meagher, J., in favour of plaintiff in an action for damages for trespasses and injunction to prevent further trespasses, and an order to restrain defendant from proceeding with proposed expropriation proceedings.

H. Mellish, K.C., and *F. H. Bell*, K.C., for defendant, appellant.

T. S. Rogers, K.C., for plaintiff, respondent.

Sir Charles Townshend, C.J.

SIR CHARLES TOWNSHEND, C.J.:—The learned trial Judge has so thoroughly and exhaustively dealt with all the facts of this case that it becomes wholly unnecessary for me to repeat what he has so well written. After a careful review of the evidence I can find no reason for dissenting from any of his conclusions on question of fact. Moreover, if he is right in these respects I think his legal deductions are correct. One of the chief points of attack was in regard to the land conveyed to the defendant company by Hill. Were they lands which belong to Hill individually or were they purchased by him for Todd and Co., for whom he was manager? I have no hesitation in concluding, from all the circumstances in evidence, that Hill simply carried out an agreement for their purchase made by Todd long before, and that in taking the deed in his own name he only followed up a practice of the firm of Todd and Co., in acquiring all the wood land they could get hold of in that vicinity. It is proved that Todd and Co., logged on them when Hill was there —for their own benefit, and I think sufficiently shews that in the sale to the Youngs he treated these lands as a part of the Todd and Co. property, and it is evident that up to the time he was approached by an agent of the defendant company he had no idea of laying claim to them—in fact had no knowledge that there was any such land there in his name as no doubt he acted in the belief that Todd and Co. owned the whole of them. The

very exception of certain lands in the vicinity which did belong to him mentioned in Todd and Co.'s deed to Young substantiates this conclusion. Much more might be said in support of this view but it is unnecessary. I think then Todd and Co., were in the lawful possession of these lots from the time Hill got his deed and continued in possession such as could be had of wilderness land up to the sale to the Youngs and since by plaintiffs. Twenty years having elapsed since the original purchase, I should think if that were necessary that plaintiffs and those for whom they claim, have gained by possession a good title independently of Hill altogether, and that his deed to defendant conveyed nothing—no legal title.

Apart from these considerations I cannot avoid the conclusion that the defendant company through their agents were well aware that plaintiffs claimed these lands as part of the Todd and Co., lands acquired by them. The learned trial Judge says, and I agree with him:—

> I have no manner of doubt that the defendants had actual notice that the plaintiffs claimed to own these lots before they purchased from Hill. The mere agreement to buy would not protect them if, before they paid for them, they had notice of plaintiffs' claim of ownership, and they certainly had such notice, in my opinion.

The defendants were not therefore *bonâ fide* purchasers without notice, which alone would justify their acts. Mr. Bell, for the defendant company, of course, contended that the defendant had neither actual nor constructive notice. Holding the opinion I have expressed, it is not necessary for me to discuss the authorities cited by him in respect to constructive notice. If plaintiffs title depended on Hill being merely a trustee for Todd and Co., there might be some difficulty in view of the Statute of Frauds. But as I have above intimated, I am of opinion that Todd and Co. had acquired a good title by length of possession, and I further think the deed from Hill to the Todds on a fair construction included the lands in question. Certainly in his dealings with the Youngs, when they were investigating the title to the whole block of lands for which they were negotiating, he included them as part and parcel and he would be estopped from setting up a claim to them or right to dispose of them as he did to the defendant company. Now, as to the other lots of land,

N. S.
S. C.
MILLER
v.
HALIFAX
POWER CO.
Graham, E.J.

inasmuch as I concur in the conclusion of the trial Judge in respect of them and in his reasons for the same, it would be mere reiteration to repeat them here and I refrain from doing so.

I am of opinion that the judgment appealed from was right, and that this appeal should be dismissed with costs.

GRAHAM, E.J.:—This is an appeal from a judgment for the plaintiffs in respect to their different titles in a large block of timber lands, the Covey and Brunswick lots.

1. As late as March 15, 1913, the defendant took from Charles R. Hill a deed of this property. The property happened to be standing in his name, but he did not own it. According to the learned trial Judge's finding of fact, Hill, when he took the deed of it, taken as long ago as September 29, 1889, occupied a fiduciary position to the Todds and was incapacitated from selling it to anyone. He only had a bare legal title. He acquired it for the Todds. The firm of Todd, Polleys and Co., and their successors N. L. Todd and Co., in both of which N. L. Todd was a member, conducted a large timber business at St. Margaret's Bay and owned a large block of timber land, some 70,000 acres. N. L. Todd resided at St. Margaret's Bay for a great many years and until his death which took place in December, 1887. Charles R. Hill, so the Judge finds, was the firm's bookkeeper for several years before Todd's death, and thereafter became the manager, and so continued until Frank Todd sold out to Young Brothers in 1895. He was in a position of trust as the evidence shews.

In respect to the acquisition of this land the learned trial Judge has found, that on or about 1887, Charles Brunswick verbally agreed to sell it to Ninian L. Todd, and gave him possession, under such agreement at once, which possession the firm of Todd and Co. and the successors in their title have held ever since without disturbance or interruption until the acts of the defendants complained of. Already the Todds (June 22nd, 1882), had obtained a deed of an undivided northern half of the Brunswick lot from William Brunswick, F. 18. In 1888, less than a year after N. L. Todd's death, Hill, who was the manager, obtained a deed from Charles Brunswick of this property,

no doubt in pursuance of the agreement to sell, but he took all, not merely the half unconveyed.

Hill's evidence that the amount of the cheque was charged back to him is discredited by the learned trial Judge, so that we have a case where the consideration was paid by the firm. Christie proves that he heard the bargain for the sale made between Todd and Brunswick.

It is quite explainable why the deed was taken in Hill's name. There was no member of the firm then in Nova Scotia and Hill occupied a peculiar relation to the firm. The learned trial Judge says:—

> There is proof that an understanding was reached whereby Hill was or was to become a member, and his name appeared as such in some documents, but apparently his interest was confined to a share in any surplus that might exist when the firm was wound up and all liabilities discharged, and gave him no right or title in the lands of the firm whether actually a member or not is not necessarily material in any event.

Hill himself gave out that he was one of the partners in taking up land at the Crown land office, p. 122. For instance:—

> Inkerman Mills, St. Margaret's Bay, N.S.
>
> Mr. Austin. July 18th, 1892.
>
> Dear Sir,—The names of the firm of N. L. T. and Co., are: Frank Todd, Henry F. Todd, Edwin B. Todd, Mrs. Ada Young, C. R. Hill, Lumbermen, St. Stephen, N.B., St. Margaret's Bay.
>
> It don't make much difference. If you want to you can make the grants in my name. Yours truly,
>
> (Sgd.) N. L. TODD & Co.

This was in Hill's handwriting and the records of the Registry of Deeds office, p. 156, and of the Crown land office 116 to 123, shew that after the death of N. L. Todd, Hill invited conveyances to him in his name of property of the firm. He included his own name as a member of the firm.

Then there is another fact proved (p. 47) that the property now under discussion was logged over by the firm of N. L. Todd and Co. and in Todd's lifetime. Hill sought to explain that by saying that if the company did so they paid him stumpage for it. That statement is contradicted by Christie, p. 48, and Brunswick in effect and the mode of sealing shews its incorrectness and was disbelieved by the trial Judge. The notion of his carrying on business for himself in the acquisition or operating of the land in the midst of the firm's land when it was his duty to acquire land

N. S.

S. C.

MILLER v. HALIFAX POWER CO.

Graham, E.J.

for the firm and to operate it for them, is out of the question. Then when the firm's property was sold to the Youngs in 1895, lists of the deeds of the various properties were produced by Hill and a plan to shew what they were purchasing, and this property was put forward and the title of it by Hill himself.

And in fact these very lots were pointed out to Young when he was purchasing by Christie who was under Hill as part of the Todd lands. Moreover, in the office occupied by Hill during all the years was a map on which the firm's lands including these lots were in red. No one knew it better than Hill.

The learned Judge's finding is wholly supported by the evidence, and he has put his conclusion (in which I concur) as follows:—

I have already stated Todd's verbal purchase for his firm from Charles Brunswick and that they went into possession soon after thereunder with the knowledge and consent of the vendor. Todd did not pay the purchase price at the time; that may have been due to the fact that the vendor owed the firm some money which was intended to be applied towards the price. Hill while managing the business of Todd and Co., and less than a year after Todd's death, obtained a deed from Brunswick of these lots in his own name for the same price at which Todd had bought them and paid for them with a cheque of Todd and Co., and an account due by the vendor to the firm.

It is true he sought to shew that entries were made later in the firm's books which were destroyed years ago by which the payment was debited to himself. He knew, of course, that Todd had bought them for the firm and that it was in possession of them under that purchase. He, as an individual, never went into possession, and never exercised any control over them, and always regarded them as the firm's property.

I have no doubt that when Hill took that deed he intended it for the firm and understood he was giving effect to Todd's purchase, but he had it made to himself as a matter of convenience in the event of the firm selling out. He was then the only person residing in Nova Scotia connected in any wise with the firm. I believe Brunswick's evidence as to this transaction and reject Hill's as not truthful. I say the same as to any matter whereon there is conflict between Hill and Brunswick and Hill and Young or Christie. Hill's conduct in relation to Young's purchase, and later, is reconcilable only to the theory that the conveyance to him was for the firm's use and benefit and in no sense for himself.

If he owned or thought he owned these lots as an individual distinct from the Todd firm he would not have represented them to Young as the property of Todd and Co. Neither would he have lumbered them for Todd and Co., as their own property. He was the trusted servant of Todd and Co. He had no business or enterprise in hand or in course of formation, with which these lots would be useful, and apart from all this, he would be unlikely to buy timber lands within the area which the firm

owned and thus in a limited way put himself in rivalry with the firm in whose employ he was.

A strange thing happened before the sale to the Youngs. After N. L. Todd's death—it was some time in 1893—the Todds took a quit claim deed, F. 36, from Hill of all his interest in the lands of the owners.

There had been some talk of a partnership, and in case any such interest in the land had been acquired by Hill by reason of such a relation it was evidently thought desirable to have that released. So this deed was taken from Hill.

Sell alien release and for ever quit claim unto the said Frank Todd, Henry F. Todd and Edwin B. Todd and Addie Young, their heirs and assigns, all my right, title and interest in and to those certain tracts, lots, pieces or parcels of land situate in the Counties of Halifax, Hants, Kings, and Lunenburg, and elsewhere in the Province of Nova Scotia, standing in the name of Todd, Polleys and Co., or in the name of Ninian L. Todd, or of John Polleys, or in the names of Ninian L. Todd, Frank Todd and John Polleys, either by grants from the Crown or by conveyances from divers persons, and the buildings, heriditaments, easements and appurtenances to the same belonging, and the reversions, remainders, rents and profits thereof, and all the estate, right, title, interest, claim and demand of the said Charles R. Hill, his heirs, executors and administrators of in or to the same, save and except from and out of this conveyance the house in which said Charles R. Hill resides and the lots of land situate on the outer or seaward end of the island on which the mill at St. Margaret's Bay in said County of Halifax is situated.

The exception made was Hill's own private property, a property on Sheeps Island actually standing in the name of Hill. But in respect to this Covey and Brunswick land it was apparently not known, except by Hill, that it stood in the name of Hill, and the description of land standing in the name of the person or persons which it attached to Hill's interest if he was a partner, did not attach to this Covey and Brunswick property, which was not in one of the names mentioned, but was, of course, in Hill's name. So the legal title was not by that deed vested in the proper owners. No doubt the discovery of this fluke years afterwards by the defendants who appear to have searched closely for any flaws in the plaintiffs' titles led them to look up Hill.

Of course Hill was the man whose duty it was to see that the land standing in his name acquired in the continuous absence out of the province of the members of the firm by him as man-

N. S.

S. C.

MILLER v. HALIFAX POWER CO.

Graham, E.J.

ager or *quasi* partner, should have been included in that quit claim deed.

Then the Youngs in March, 1896, acquired the timber lands of the Todds and they subsequently passed to the Dominion Lands Co., and then to the plaintiffs, and the descriptions cover the Covey and Brunswick lots. Hill left the Province some time in 1898 and lived continuously abroad. He sold the Sheeps Island property about that time, and one would suppose he had no further property at St. Margaret's Bay. Then in 1913 after the long rest, a man by the name of Cruik, an agent of this defendant company began to search titles and he found, as he says, that the grant to Hill stopped at Hill. That must have brought him into contact with the deed of March 6, 1893, already mentioned because by that deed Hill transferred his interest if any in so many properties to Todd. And in March, 1893, he inquired where Hill was and one of the persons he inquired of was McF. Hall, an employee of the firm N. L. Todd and Co., not continuously between 1886 and 1895, when they sold out to Todd. He started to Hill's house out of Calais Maine and he approached Hill on the subject of purchase. Why the usual channel of correspondence was not resorted to is not explained. He took a quit claim deed with him. Hill was not clear and he demurred, and a second visit from Nova Scotia became necessary.

The learned trial Judge has found that the defendants, when they took this quit claim deed from Hill, had actual notice that the plaintiffs were claiming this land and I think there is evidence to sustain this finding. I do not propose to refer particularly to it. But of this I am sure that there is abundant evidence to shew that there was constructive notice and that is quite sufficient in a case of this kind which is not a question under the Registry of Deeds Act, but is simply a case of dereliction of duty on the part of a fiduciary in trying to convey his principal's land which had since become that of others.

Mr. McColl, who is also connected with this company, and was concerned with Cruik in acquiring the deed from Hill, had several interviews with McF. Hall as well as Cruik. Now, McF. Hall, who is called as a witness for the defendants, says in cross-examination as follows, page 86:—

Q. Did Mr. McColl ask you who Hill was? A. Yes. Q. Did you tell him who he was? A. I told him who C. R. Hill was. Q. Told him he used to be in business down there with N. L. Todd and Co. A. Yes, manager. Q. And that he had just as much to say about it as N. L. Todd had? A. I would not say he had as much to say about it as the rest of the firm. Q. You told him he was one of the firm? A. No, sir, manager of the firm.

Hall's information pointed directly to the Todds. Hill had never been in actual possession of these lots. Page 180, lines 28-30; and for fifteen years had been out of the country. The lots were in the block of the lands which were occupied first by Todds, then by the Youngs, and the Dominion Lumber Co., and the plaintiff. The acute person who negotiated this quit claim deed from Hill was relying upon the registry law but that law is not applicable to this case at all. They were put on inquiry by various circumstances I have already mentioned. Christie proves that under Hill he had done lumbering for the Todds upon these lots. Then dams and roads had been built upon the property from time to time. Miller, pp. 11 and 12, Boutlier, p. 31, Keans, p. 34, Mason, pp. 37 to 38. Then there were so many people besides Hall that they could have asked if they really wished to ascertain whether it was at all probable that when the block had passed from the Todds part of it was really Hill's. The fact is evident that Hill had to be convinced by looking at his quit claim deed to the Todds that he had not really conveyed these lots with the other property before he would consent to execute the deed to this defendant and bring himself within the terms of the law as to conveying the same property twice. I have said that this question is not within the registry laws. That is a statute giving priority to a later instrument if the former instrument affecting it has not been registered. There are not two instruments here. The plaintiff had but an equity which did not admit of registry under that Act.

Then Mr. Bell relied on the Statute of Frauds, and he argued that if there was a trust relation between Hill the manager and trusted employee of the Todds, there must be a writing. But sec. 5 of the Statute of Frauds, R.S.N.S. 1900, ch. 141, provides that:—

This section shall not extend to any trust in land arising or resulting by implication or construction of law.

N. S.

S. C.

MILLER v. HALIFAX POWER CO.

Graham, E.J.

In Perry on Trusts, sec. 139, it is said:—

> If a person standing in a fiduciary relation . . . purchases other property so immediately connected with the trust estate that it must be used with the trust estate, and the independent ownership of which would seriously affect the use and value of trust property he cannot retain the same for his own benefit but he must hold it upon the resulting trust for his beneficiary.

2. The Harshman lot. The learned trial Judge, with his usual pains, has stated the facts in regard to this lot. It appears that this Harshman lot of 100 acres was in 1847 granted by the Crown to Conrod Harshman, Sen. and his four sons. Some conveyances took place, but in respect to five-tenths of the lot the plaintiffs' title is undisputed. But the remaining five-tenths are disputed. The learned Judge has found in favour of the plaintiffs as to three-tenths and as to two-tenths against them. In respect to the three-tenths it appears that in 1884 N. L. Todd and Co., acquired title by a deed from George Maling, who had purchased from the Harshman's, but the deed from Maling was not registered. The Todds went into possession and they and their successors have been in possession ever since. After George Maling's death his executors, May 13, 1897, conveyed to one George Lapierre all the interest Maling had; Lapierre conveyed to William Davis, and on April 22, 1913, Davis conveyed to the defendants.

The learned trial Judge has found that it is not proved that there was valuable consideration, and therefore the deeds later than Maling's to Todd do not under the terms of the Registry Act cut out that deed. In order to succeed here, the person must prove valuable consideration and absence of notice, R.S. N.S. 1900, ch. 137, sec. 15, and he cites authority that the recital of such payment in the deed is not enough. I accept the learned Judge's judgment.

Then as to the two-tenths, the defendant set up under date of April 4, 1913, a deed from one Isaac Harshman and from one Ebenezer Harshman, and the defendants claim that these were sons of Conrod Harshman, Jun.

The plaintiffs rely upon possession of this undivided share under the Statute of Limitations and it is clear that there was

no possession proved by Conrod Harshman, Jun., or these alleged heirs. Also that the Todds and the successors in title of the remaining shares in the lot were in possession.

As the law was until recently, the defendants could not have purchased from persons out of possession. It would have been the purchase of a pretenced title. But the question of possession, a serious one, has been determined against the plaintiffs by the learned trial Judge. He must have thought, that under section 14 of the Statute of Limitations they had not, as against the other tenants in common, such a possession as to set the statute running against them. I do not propose to disturb the learned Judge's disposition of that question.

3. In respect to the Love and Dean lots the defendants are trying to expropriate them under a statute and they only object that the plaintiff cannot have a declaration that they are the owners, that this must be left to the arbitrators, who award the compensation.

In this country, where our titles are likely far more irregular than in England, there is much to be said in favour of having the title settled before the assessment of damages so that it will be certain that the arbitrator has the right claimants before him and have the compensation properly fixed with the persons entitled before him, and after being heard, and not fix the compensation and find afterwards an insufficient amount to pay the claimants. I think that the judgment should stand.

The defendants raised a question about the pleadings. That there cannot be a recovery in trespass upon an equitable title. But, under the Judicature Act, this is a perfectly good equitable action. There is an appropriate prayer and besides the equitable relief given by a declaration and restraining order, the plaintiffs are entitled to recover damages for the injuries which the Judge has awarded them.

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

RUSSELL, J., and RITCHIE, J., concurred. Russell, J. Ritchie, J.

LONGLEY, J., announced that he had come to the same conclusion. Longley, J.

Appeal dismissed with costs.

ALTA.

S. C.

SHEPARD v. BRUNER.

Alberta Supreme Court, Harvey, C.J., Scott, Beck and Simmons, JJ. June 16, 1915.

1. INFANTS (§ II D2—25)—ASSIGNMENT OF INTEREST IN LAND—RIGHT TO DISAFFIRM—PAROL TRUST—REASONABLE TIME.

An assignment by an infant of his interest in a purchase of land not prejudicial to the infant's interest is merely voidable; but a lapse of three years after his attainment of majority is not a reasonable time for the exercise of his right of avoidance, so as to entitle him to the enforcement of a parol trust founded thereon.

[*Doe dem Bromfield* v. *Smith* (1788), 2 T.R. 436; *Edwards* v. *Brudenell*, [1893] A.C. 360, applied.]

2. EVIDENCE (§ VI I—567)—PAROL EVIDENCE—TRUSTS.

A trust intended by an instrument purporting to be an assignment absolute on its face may be established by parol evidence.

3. TRUSTS (§ I C—15)—PAROL TRUST—STATUTE OF FRAUDS.

The Statute of Frauds does not prevent the establishment of a trust by parol evidence.

[*Rochefoucauld* v. *Boustead*, [1897] 1 Ch. D. 196, applied; *Shepard* v. *Bruner*, 19 D.L.R. 869, reversed.]

Statement

APPEAL from judgment of Stuart, J., 19 D.L.R. 869, in favour of plaintiff in action for declaration of a joint interest in a purchase of land.

C. T. Jones, K.C., for defendant, appellant.

A. H. Clarke, K.C., for plaintiff, respondent.

Harvey, C.J.

HARVEY, C.J.:—I will assume that the learned trial Judge's view is correct that no effect should be given to the order made by him for the purpose of making effective the infant's release. This leaves the transaction one in which an infant is a party and which is therefore either void or voidable. I will also assume that the plaintiff's evidence of the transaction is the true one, viz., that his release was and was intended to be on the conditions specified in the memorandum made by Mr. Reginald Stewart. Pollock on Contracts (8th ed., p. 57), referring to infants' contracts at common law, says:—

> It was once commonly said that an agreement made by an infant, if such that it cannot be for his benefit, is not merely voidable, but absolutely void, though in general his contracts are only voidable at his option. But this distinction is in itself unreasonable and is really unsupported by authority while there is considerable authority against it.

Whether we ought to accept Pollock's view or not, I think it could not be said that this contract was necessarily prejudicial to the infant's interest and if not, it must necessarily be only voidable.

I will assume again that for 3 years, until the plaintiff

reached his majority, he need pay nothing, and the defendant could still not free himself from his claim, at any rate, without legal proceedings. Under these circumstances, on January 25, 1911, when the plaintiff attained his majority he would be entitled on payment of one half of the moneys paid by the defendant on the agreement of purchase to a one-half interest in the land. In Hals., vol. 17, par. 179, it is stated that:—

> A voidable contract can be repudiated by the infant either during infancy or within a reasonable time after he attains full age. . . . But . . . it is binding on him if he takes no steps to repudiate it for a considerable time after he has attained full age.

In *Doe d. Bromfield* v. *Smith* (1788), 2 T.R. 436 (100 E.R. 235), in which the right of election to determine a lease was given to an infant upon his coming of age, it was held that a year after his coming of age was too late to exercise the option.

In *Edwards* v. *Brudenell* [1893] A.C. 360, there was a marriage settlement, in which the husband, an infant, agreed to settle all the property to which he would become entitled under the will of his father. His father dies three and a half years after he came of age. It was held that more than a year after the father's death it was too late for the husband to repudiate the agreement. No intimation of what would be a reasonable time is given, but Lord Halsbury adopts the words of Lindley, L.J., in the Court of Appeal, who says,

> whether the defendant could have repudiated the deal in five or six or nine months after he came of age, I do not care to discuss, but to ask us to hold that he repudiated within a reasonable time is to ask us to hold that which no reasonable man could think of holding.

In the present case the action was brought more than three years after the plaintiff came of age. If there was any prior attempted repudiation which is not clear, it was at the most only two or three months earlier. In my opinion, this was not within a reasonable time. The plaintiff was aware that the defendant was required to make annual payments for one half of which, if the transaction were repudiated, he, the plaintiff would be liable. At the time the plaintiff came of age these payments had already amounted to more than $21,000, and it would be most unfair that the plaintiff should allow these payments to continue and still be permitted to preserve his right to repudiate. What would have been within a reasonable time under the

ALTA.

S. C.

SHEPARD v. BRUNER.

Harvey, C.J.

circumstances is not material though, in my opinion, it would have been very much less than the three years that elapsed. From the fact that, a little more than 6 months after the plaintiff came of age, the defendant made a sale by which he recouped himself all that he had expended up to that time and by which 6 months later he had money in pocket, it is hard to avoid the conclusion that it was the subsequent knowledge of the sale which was the occasion of the plaintiff's determination to seek to restore his former rights, which, from having appeared to be of no value, had now become of substantial worth. This, of course, means that instead of being simply neglectful of his rights he had indeed abandoned all intention of repudiating the transaction. The attempted repudiation then having failed, the plaintiff's right was simply to preserve his half interest in the property upon paying up his half of the instalments in accordance with the arrangement as set out in Mr. Stewart's memorandum. I will assume again that as time was not of the essence of the agreement and as he was an infant, he might when he came of age, upon tendering the half of what had been paid, with interest, have been entitled to a half interest in the property, but his right is in the nature of an option and it would be most unequitable to hold that he might wait for three years, and until he learned that the defendant had received enough money that he would not merely *not* be called on to pay anything, but on the contrary would be entitled to receive a considerable sum, and then claim a half interest, the burden of which has been borne by the defendant for several years and during a time when it seemed doubtful whether it had any real value. For the reasons stated, I am of opinion that the plaintiff had failed to shew that he is entitled to any interest in these lands, and I would allow the appeal with costs and dismiss the action with costs.

Scott, J.

SCOTT, J., concurred with HARVEY, C.J.

Beck, J.

BECK, J.:—At the conclusion of the argument, expecting that I should have no further opportunity of considering or discussing the case before my brother Judges would be ready to give their considered reasons for judgment, I noted my conclusions. I have since had opportunity for further consideration

and discussion, and remaining of the same opinion, I content myself with copying the note I then made with some slight verbal changes and with the addition of a reference to some authorities.

1. I think it is not established that the assignment of January 16, 1908, Shepard to Bruner, was in trust for Shepard. 2. I think that the verbal agreement, noted by Reginald Stewart was nothing more than an offer by Bruner to give Shepard an agreement to that effect, which offer Shepard never accepted, *i.e.*, within a time when it was open to him to accept. If, however, there was then an agreement for the sale by Bruner of a one-half interest in his "equity" in the property. Shepard must under all the circumstances be found to have abandoned the agreement and all interest under it, so that he cannot now have a remedy either by way of specific performance or an account, in effect the only remedies ever open to him and in effect the only remedies he asks these remedies being founded upon the equitable jurisdiction of the Court. Banning on Limitation, 3rd ed., pp. 23 *et seq.*, and the cases there cited. 3. I think nothing now turns upon the question of the validity of the confirming order. The assignment was executed by Shepard in person and was binding—independent of the confirmation—unless, promptly after attaining his majority he disapproved the assignment, a thing he did not do.

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

Simmons, J.

SIMMONS, J.:—The plaintiff sued for a declaration that the defendant held certain property in the city of Calgary as trustee for himself and the defendant.

The defendant had disposed of part of the property subsequent to the date at which the plaintiff alleges the trusteeship began, and the plaintiff asked for an accounting of all moneys received by the defendant in connection with the said property and in the alternative the plaintiff claimed the sum of $6,000 and interest at 6 per cent. per annum from the date of payment of same, which said $6,000 is the amount the plaintiff alleges he contributed upon the purchase price of said property which said property he alleges was purchased by the defendant and himself jointly. In a further alternative the plaintiff asks for a de-

ALTA.
S. C.
SHEPARD v. BRUNER.
Simmons, J.

claration that the defendant holds as trustee for him the southerly 15 feet of another lot, adjacent to the property first mentioned.

The plaintiff obtained judgment holding that the defendant held the first mentioned property as trustee for himself and the plaintiff, but that the defendant was entitled to a lien upon the plaintiff's one-half interest for all moneys paid by the defendant upon the purchase price of the property over and above the defendants one-half contribution toward the purchase price and from this judgment the defendant appeals.

On January 24, 1907, the plaintiff and defendant purchased from Mr. Blaylock, a barrister practising in Calgary, lots 1, 2 and 3 in block 100 according to plan A of the city of Calgary for the sum of $40,000 payable $12,000 in cash, and the balance as follows: $3,000 on January 19, 1908, $5,000 on January 19, 1909; $10,000 on January 19, 1910, and $10,000 on January 19, 1911, with interest at 6 per cent. per annum on unpaid instalments. On January 22, 1907, Blaylock purchased the same property from one Anderson for $3,200, payable $250 cash, $3,750 on February 1, 1907, and the balance on the same terms as to date and amounts corresponding with the last three payments in the agreement between Blaylock as vendor and Shepard and Bruner as purchasers, and on January 19, 1907, Anderson had purchased the said property from one Ferland, the registered owner, for $30,000, and the last three payments corresponded in amounts and dates of payments with those in the aforementioned agreements. Shepard was then an infant 17 years of age, but apparently he was not a novice in the real estate business. He represented to the defendant that he received a commission of $500 from Blaylock for the sale by Blaylock to the plaintiff and defendant, and he paid Bruner $250 as representing the latter's one-half of the commission. Bruner subsequently discovered that Shepard had received a commission of $4,000 from Blaylock, which said $4,000 was applied on the cash payment of $12,000 to Blaylock. In the result Bruner had contributed $6,000 towards this cash payment of $12,000 and Shepard had contributed $2,000, Shepard having paid Bruner

$250 on account of commission, Shepard's actual contribution to the cash payment was $2,250.

A payment of $3,000 on principal and $1,680 interest accrued due on January 19, 1908, and Shepard and Bruner were not able to meet it. There had been a slump in real estate values and although both of them had tried the sell the property they were unable to do so. There is a direct conflict of testimony between the plaintiff and the defendant in regard to negotiations that took testimony, which are rather in favour of Shepard, it was arranged that Shepard should make an assignment to Bruner of Shepard's interest and that a new agreement should be executed by Ferland direct to Bruner which recited the purchase price as $29,680, which was the actual amount then due for principal and interest and upon terms as follows: $1,680 in cash, $1,000 on January 19, 1909; $1,500 on January 19, 1910; $3,000 on January 19, 1911, and $3,000 on January 19, 1912, and $3,500 on January 19, 1913, and $4,000 annually on January 19, 1914, 1915, and 1916.

Shepard says that the assignment from him to Bruner was not signed till February 20, 1908 and Bruner says it was signed on January 16, 1908, the date which appears on the document. Bruner says Shepard signed it in pursuance of an agreement between them to the effect that Shepard should be released from further liability. Shepard says that it was not signed till February 20, 1908, and the Ferland agreement with Bruner had been obtained by that time whereby an extension of time was given and that the reason why the agreement was made direct to Bruner was that Ferland would not enter into a contract with an infant, and that Bruner was a trustee for Shepard's one-half interest. Mr. Pescod, a solicitor, obtained from Mr. Justice Stuart an order authorizing Mr. Pescod to execute the assignment to Bruner on behalf of Shepard, an infant, pursuant to secs. 578-80 of the Judicature Ordinance.

The new Ferland agreement was executed February 20, 1908, and on the same day Shepard authorized a transfer to Bruner of 15 feet of the northerly 75 ft. of lots 39 and 40 block 87, plan A. Calgary in settlement of $1,750 due to Bruner from Shepard on the Blaylock commission. Messrs. Jones & Pescod were

ALTA.

S. C.

SHEPARD v. BRUNER.

Simmons, J.

Bruner's solicitors at the time and Mr. Pescod says he made the application on behalf of Shepard, while Shepard denies that Mr. Pescod acted for him in the transaction.

On the same day Shepard and Bruner went to the office of Reginald Stewart, barrister and Mr. Stewart, under their joint instructions, made a memorandum of an agreement made between them, and which he understood would be incorporated later in a formal agreement. The memorandum is as follows:—

Agreement. Feb. 20th, 1908.

Bruner getting an agreement from Ferland on lots 1, 2 and 3, Plan 100, Calgary.

As soon as he gets same, Bruner will give agreement to Shepard for one half interest in said property on Shepard's paying one-half of $1,680 with interest, such payment to be made within six months from date of Ferland's agreement, and continuing balance of payments equally with Doctor Bruner until property paid for. Rents from date of said agreement with Ferland to be divided equally. R. S.

Bruner releases Shepard from all claims with regard to lots 1, 2 and 3 in block 100 with reference to overpayments made by Bruner to Blaylock on old agreement.

Bruner claims that Shepard divested himself of all interest in the lands in question when he executed the assignment and that Shepard's claim rests on a parol agreement that he would get back his half interest by paying one-half of $1,680 within 6 months, and keeping up one-half of the balance of the payments, and that the Statute of Frauds is a bar to Shepard's claim for specific performance of the parol agreement. Mr. Justice Stuart has accepted Shepard's version as to the date of the assignment and as to the purpose thereof. He has also in effect set aside his own order authorizing the execution by Pescod of the assignment on behalf of Shepard. The consideration recited in the assignment is one dollar, and while the document on the face of it purports to be an absolute assignment, it is open to the plaintiff to shew that the defendant did not take as beneficial owner under the assignment but as trustee for the plaintiff and the statute does not prevent the plaintiff from establishing the trust by parol evidence: *Rochefoucauld* v. *Boustead*, [1897] 1 Ch.D. 196.

In order to support the view of the trial Judge, it is not necessary that his order should set aside notwithstanding the fact that he is of opinion now that if all the facts had been before

him he would not have made it. The order did no more than enable the parties to effect the agreement which the plaintiff says was actually made, namely, that there should be an assignment absolute on face, but that the defendant was in fact a trustee for plaintiff's one-half interest. Accepting then the view of the trial Judge that Bruner was a trustee for Shepard's one-half interest there still remains the difficult question of determining the rights and duties of the respective parties under the trust. The trial Judge held that, Shepard was not in the position of a purchaser seeking performance of an agreement but that the trust never was extinguished and Bruner's only right was a lien upon Shepard's interest for the moneys advanced by Bruner to complete the payments due to Ferland. This in effect would relieve Shepard from charges of delay and laches in so far as these would be a bar to a purchaser seeking specific performance.

Shepard asks for the enforcement of an agreement made by him while an infant, but ratified by him on obtaining his majority. If the agreement in question constituted an absolute trust it might be contended that laches would not be chargeable against him under the circumstances. I am not able, however, to agree with this view of the agreement. The parties bought the property for speculative purposes and hoped to sell at a profit before the deferred instalments came due. They were disappointed in this and were confronted with the probability of losing the investment they had made by defaulting under their agreement. Shepard was confessedly unable to protect his interest by making any payment.

Bruner paid $1,680 and as a result a new agreement was obtained with more favourable terms of payment. I think we may assume that Shepard got the best terms that he was able to obtain from Bruner. He sets up the memorandum of Mr. Stewart as embodying these terms. Taking him at his word he made an agreement while an infant, which was not enforceable against himself on obtaining his majority without confirmation by him. He is not asking relief against the agreement, he is asking for the enforcement of it. It must be assumed then that the agreement was binding upon Bruner on the moment Shepard

ALTA.
S. C.
SHEPARD v. BRUNER.
Simmons, J.

reached his majority, if Shepard elected to confirm without assuming the obligations arising out of the agreement. It is true that no acquiescence in the breach of trust can bind the infant during his minority: *Wilkinson* v. *Parry*, 4 Russ. 272, and laches will not prejudice him: *Olliver* v. *Woodroffe*, 4 M. & W. 650, 653. But upon reaching his majority his rights are no more than would have accrued to him if the contract were executed as of that date.

He was born as he says on January 25, 1890. On January 25, 1911, he acquired the right to ratify an agreement made during infancy. It was not an agreement constituting the defendant an absolute trustee. The trust was conditional upon the *cestui que trust* performing his part of the agreement, namely, to make the payments which were a condition just as binding upon him as the obligations of the defendant to receive these payments, and by the reception of the payments to recognize the interest of the plaintiff. The Court will not step in and make an agreement between the parties: *Knight* v. *Cushing*, 6 D.L.R. 820, 46 Can. S.C.R. 555. From 1911 until 1913 Shepard shewed no sign of any intention to recognize the agreement as still in force unless it is the feeble suggestion which he alleges he made to the defendant in 1912 when the latter visited him at Tacoma. He says he visited the plaintiff in May, 1908, accompanied by a solicitor, Mr. Lathwell, and demanded an agreement. Bruner says he made a demand for one-half of the rents which Bruner had collected in the meantime but he denies Shepard's allegations that he made a demand for an agreement recognizing his rights. Mr. Lathwell is not able to remember what actually took place.

Shepard kept in the background while Bruner made the payments. In the meantime real estate values rose and Bruner disposed of portion of the property at a greater price than the original cost of the whole property.

Shepard then comes forward claiming the enforcement of the agreement. He waited till the circumstances were favourable to him if the contract was enforced. His conduct in the meantime fully supports the view that if the circumstances had turned in the opposite direction he would escape the liability of

making his shares of the future payments. His conduct must not be equivocal but must shew an honest intention to treat the contract as subsisting, and to perform his obligations arising therefrom. In both of these he has failed and I would allow the appeal with costs and dismiss the action with costs.

Appeal allowed.

ALTA.

S. C.

SHEPARD v. BRUNER.

Simmons, J.

GOWLAND v. HAMILTON, GRIMSBY AND BEAMSVILLE ELECTRIC R. CO.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Maclaren, Magee, and Hodgins, JJ.A. March 15, 1915.

1. RAILWAYS (§ III A—49)—ACCIDENTS AT CROSSINGS—PRIVATE DRIVEWAY —COLLISION WITH VEHICLE—EXCESSIVE SPEED—WARNINGS.

The operating of an electric car at an excessive rate of speed and the failure to give proper warnings while approaching a private driveway crossing constitutes negligence at common law which renders the company answerable for injuries to a vehicular traveller resulting from a collision at the crossing.

[*G.T.R. Co.* v. *McKay* (1893), 34 Can. S.C.R. 81; *Bell* v. *G.T.R. Co.* (1913), 15 D.L.R. 874, 48 Can. S.C.R. 561, distinguished.]

2. RAILWAYS (§ II B—18)—HIGHWAY CROSSINGS—WHAT ARE — PRIVATE DRIVEWAY.

A private driveway across a railway used by the public as a means of access to an adjoining farm is not a highway crossing within the meaning of sec. 155 of the Ontario Railway Act, R.S.O. 1914, ch. 185, nor within the purview of sec. 259 of the Railway Act (Can.) 1888, respecting the fencing of and regulation of speed at crossings.

Statement

APPEAL from a judgment of Kelly, J.

D. L. McCarthy, K.C., for appellant.

G. Lynch-Staunton, K.C., for plaintiff, respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 31st December, 1914, which was directed to be entered by Kelly, J., on the findings of the jury at the trial before him at Hamilton on the previous 31st day of October.

The action is brought to recover damages for injuries sustained by the respondent while driving a horse and waggon over a crossing of the appellant's line called "Carpenter's crossing," owing, as is alleged, to the negligence of the appellant; and the negligence charged is, that a car of the appellant which came into collision with the waggon was being driven at an excessive rate of speed, and that no proper warning of the approach of the car was given.

The collision occurred in the afternoon of the 3rd March,

ONT.

S. C.

GOWLAND v. HAMILTON GRIMSBY AND BEAMSVILLE ELECTRIC R. CO.

Meredith, C.J.O.

1914; the respondent, a boy of the age of 17 years at the time of the trial, was engaged in delivering groceries for his employer, whose horse and waggon he was driving. On that day, he had occasion to deliver groceries at the house of Mr. Frank Carpenter, which is reached by a crossing from the highway over the 16 ft. strip of land owned and occupied by the appellant for its railway, and thence by a driveway on Carpenter's own land, and at the place of crossing the tracks were planked over. On both sides of the driveway, Carpenter's grounds are somewhat densely timbered, and the trees extend almost to the tracks and form an obstruction to the view in both directions of a person driving out by the driveway to the highway, until he has almost reached the first line of rails. A car was coming westward, and there was evidence that it gave no warning by bell or whistle of its approach; that it was running at a rate of from 20 to 25 miles an hour; that the respondent stopped his horse when about half-way down the driveway, which was about 50 yards in length, and listened for the sound of an approaching car, and, hearing none, drove on at a trot; that when he had reached the track the car came up and struck the waggon, with the result that the respondent was severely injured; and that the waggon was carried, according to the testimony of one witness, about 75 yards, and of another about 40 yards, before the car was brought to a stop.

The jury, in answer to questions, found:—

(1) That the appellant was guilty of negligence which caused the injury to the respondent.

(2) That the crossing was an unusually dangerous one, that the appellant should use necessary caution in such places and should sound an alarm in such places.

(3) That the respondent was not guilty of contributory negligence.

And, in answer to further questions of the learned Judge, the jury said that the caution that should have been taken was "sounding an alarm" and "by running at a slower rate of speed;" and they added, "Then there were the trees in the way;" and upon these findings the judgment was directed to be entered.

Before considering the questions argued before us, it will be well to ascertain what were the rights of Mr. Frank Carpenter in respect of the crossing over the appellant's tracks leading from his driveway to the highway. A conveyance dated the 31st October, 1895, of a strip of land 314 ft. long and 16 ft. wide, from George W. Cline to the appellant, was put in at the trial, and was shewn to cover the land lying immediately in front of Carpenter's land, and upon it the railway is constructed. What title Cline had to the land was not shewn, nor was it shewn how Carpenter had derived title to his land. The proper inference is, I think, that Cline was the owner of the land which now belongs to Carpenter and of the strip which he conveyed to the appellant; and, if that be the case, as the sale of the strip cut off all access from the remainder of the land to the highway, the owner of the land cut off became entitled to a way of necessity over the strip conveyed, from his land to the highway; and I shall deal with the case on the assumption that the planked crossing was the way agreed upon between the owner of the land and the appellant as the way which was to be used. If, however, the evidence does not furnish the necessary data for determining what the right of Carpenter is, the respondent, if he so desires, should be allowed to prove by affidavit the chain of title and that the land remaining after the conveyance to the appellant was land-locked.

Counsel for the appellant relied upon *Grand Trunk R.W. Co.* v. *McKay*, 34 S.C.R. 81, as authority for the proposition that, apart from statutory restrictions or regulation by the Ontario Railway and Municipal Board, the appellant was entitled to run its cars at any rate of speed that it chose, and was not bound, in operating its railway on its own land, to sound a whistle or ring a gong or do anything else for the purpose of warning persons lawfully crossing the line of the approach of a car, unless the place of crossing was a highway crossing; but the case does not in my opinion, support that contention. In order to understand the meaning and effect of the decision it is necessary to consider the facts to which it was applied.

The accident which led to the bringing of the action occurred in the village of Forest, at a point where a highway called Main

ONT.

S. C.

GOWLAND v. HAMILTON GRIMSBY AND BEAMSVILLE ELECTRIC R. Co.

Meredith, C.J.O.

street was crossed by the defendants' railway, and by the statement of claim statutory negligence in running the train by which the injuries complained of were caused faster than six miles an hour, without proper fencing, was charged, and common law negligence in proceeding at a reckless rate of speed, without warning or precautions against injury to the public, was also charged.

At the trial, questions were put to the jury, and their answers, so far as they bear upon the questions decided by the Court, were as follows:—

Q. (3) Is the Main street crossing at Forest in a thickly populated portion of the village? A. Yes.

Q. (4) At what rate of speed was the engine running at the time it crossed Main street? A. About 20 miles an hour.

Q. (5) Was such a rate of speed, in your opinion, a dangerous rate of speed for such locality? A. Yes.

Q. (6) Was the death of Mrs. McKay and the injury to Joseph McKay caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission, in your opinion, which caused the accident? A. (a) Yes. (b) Neglect in running too fast and for the neglect of a flagman or gates.

Q. (6a.) Was any warning given by Hallisey (a watchman stationed at the crossing by the council of the municipality) to Mrs. McKay of the approach of the engine? A. Not sufficient.

Upon these and the other answers judgment was directed to be entered for the plaintiff, and the judgment was upheld by the Court of Appeal (1903), 5 O.L.R. 313, upon the ground that, as there was no fence across the highway, the defendants, by running the engine which caused the accident at the rate of speed found by the jury, were guilty of a violation of sec. 259 of the Railway Act of 1888 (Canada) which provided that "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village at a speed greater than six miles an hour unless the track is properly fenced in the manner prescribed by this Act.

The Supreme Court of Canada took a different view of the

meaning of sec. 259, and held that in order that the defendants should be exempt from the restriction as to the rate of speed which it imposes it was not necessary that there should be fences across the highway, but that all that was required was that "the fences on both sides of the track should be turned in to the cattle guards so as to allow of the safe passage of trains," as prescribed by sec. 197, as amended by 55 & 56 Vict. ch. 27, sec. 6, and that, as that had been done on Main street, no restriction as to the rate of speed was imposed by sec. 259 on the defendants.

Having come to that conclusion, it was necessary for the Court to consider whether the plaintiff's judgment could be supported upon the ground that, as found by the jury, the train was being run at an excessive and dangerous rate of speed, and in the absence of a flagman or gates at the crossing. The conclusion to which the Court came was that, in the absence of legislation on the subject, "the rate of speed at which the train could run across the level highway crossing was a matter solely for the determination of the Railway Committee" (i.e., the Railway Committee of the Privy Council), "as was also the determination of the kind, character and extent of the protection which, either by gates, watchman or otherwise, should be provided for the travelling public" (p. 101); and that it was not competent for a jury, by holding a company liable in damages for injuries sustained owing to its not having provided safeguards which, in the opinion of the jury, ought to have been provided, in effect to impose upon the company the duty of providing these safeguards. (See also p. 97).

In stating his opinion Sedgewick, J., said: "The question is, whether the common law requires the company to warn travellers of approaching trains by other and more effective means than those the statute requires" (p. 90); and, referring to the care imposed by the common law upon a railway company to avoid a collision with persons using the highway crossing for their vehicles, he said: "But the care imposed upon the company is in operating its trains; in so transacting its business, in the exercise of its right of way, as not to injure others in the exercise of their similar right, provided the latter exercise

ONT.

S. C.

GOWLAND v. HAMILTON GRIMSBY AND BEAMSVILLE ELECTRIC R. CO.

Meredith, C.J.O.

due care on their part. This relates to the mode of operating the trains and all other things done by the company in the transaction of its business. It does not require the company to employ men to keep travellers off the track, nor to serve notices upon them that trains were approaching" (p. 91).

There is nothing in the reasons for judgment or in the decision itself which requires us to hold that, in the circumstances of this case, the appellant was not guilty of actionable negligence in failing to give warning by bell or whistle of the approach of the car which came into collision with the waggon. The car was being run at a speed of about 20 miles an hour. There was nothing unlawful or negligent in that, but the servants of the appellant who were operating the car knew or ought to have known that it would have to pass over the crossing from Carpenter's premises; that persons might be coming out by the driveway with their vehicles; that, owing to the trees, it would be impossible to see any one coming out until the car had almost reached the crossing; and that, travelling at the rate of 20 miles an hour, it would be impracticable to stop the car in time to prevent injury to a person coming out whose vision of the approaching car would be obstructed until he had almost come to the railway and who might have reached the tracks before becoming aware that the car was approaching. To have run the car, in these circumstances, without, as the jury has found, giving any warning by bell or whistle of its approach, warranted the jury in finding that the appellant was guilty of negligence which caused the accident.

It may be that, if the crossing had been a highway crossing, the *McKay* case would have applied, because in the case of such a crossing the Railway Act prescribes what the duty of the railway company as to it is, and the warning which is to be given by approaching trains; and, according to that case, it is not competent for a jury to add to these safeguards others which the jury may think ought to have been provided.

For these reasons, I would dismiss the appeal with costs.

Maclaren, J.A.
Magee, J.A.
Hodgins, J.A.

MACLAREN and MAGEE JJ.A., concurred.

HODGINS, J.A.:—Both the cases of *Grand Trunk R.W. Co.* v. *McKay*, 34 S.C.R. 81, and *Bell* v. *Grand Trunk R.W. Co.*, 15

D.L.R. 874, deal with highway crossings and the legislation applicable thereto, and establish that trains may cross highways properly protected under the statute or pursuant to the orders or directions of the Railway Committee or Railway Board, at a greater rate than 6 miles an hour.

The *Bell* case can only be read as applicable to highway crossings, although what the jury found was excessive speed through a thickly populated district; the Court apparently treating it as a finding referable to sec. 275, sub-sec. 3, although it dealt only with the conditions under sec. 275 (1), regarding unfenced portions of cities, towns, or villages.

Neither of these cases assists in the determination of the question raised here, for the reason that the rule laid down in them is expressly limited to highway crossings as affected by legislation, and because this accident did not happen in a thickly peopled portion of a city, town, or village.

I agree with my Lord the Chief Justice that the appellant company was properly held liable under the circumstances of this case, and concur in dismissing the appeal.

Appeal dismissed.

BLACK v. CITY OF CALGARY.

Alberta Supreme Court, Walsh, J. May 5, 1915.

1. STREET RAILWAYS (§ III C—40)—BOARDING CAR WHILE IN MOTION—WARNINGS AGAINST—CONTRIBUTORY NEGLIGENCE.

Disregard of a warning prominently displayed at the point of entrance to a street car that persons should not get on the car while it is moving, may constitute contributory negligence on the part of the passenger which will prevent his recovering damages for injury to his foot by having it caught in the step riser which was defectively and improperly built, if it appears that the plaintiff's foot could not have slipped into the opening left in the riser had he boarded the car when it was stationary.

[*Newberry* v. *Bristol Tramways*, 107 L.T.R. 800, referred to.]

ACTION for damages.

G. H. Ross, K.C., and *F. Mayhood*, for plaintiff.

C. J. Ford, City Solicitor, for defendant.

WALSH, J.:—The plaintiff while boarding a moving car on the city's street railway system sustained serious fractures of the left leg below the knee. He claims that this accident was caused by the defendant's negligence, hence the action. The evidence is contradictory as to the movements of both the plain-

ALTA.

S. C.

BLACK v. CITY OF CALGARY.

Walsh, J.

tiff and the car, down to the time that he boarded it. I accept unreservedly the plaintiff's version of them.

He travelled to the corner of 12th Ave. and 2nd St. East, on a car which he there left for transfer to a car on what is known as the Blue Line, he having secured a transfer slip for that purpose from the conductor of the car which brought him to that point where he got off this car. He saw that a car of the Blue Line, headed in the direction that he wished to take, was standing on the west side of the street just north of its intersection with the northerly side of the avenue, and he ran across the street until he came to the nearest rail to him of the track on which it was standing and then walked across the track in front of it without signalling the motorman his intention to board it. He then walked back towards the entrance to the car which is at the rear end. When he had covered a distance equal to about one-third of its length it started to move. He stopped and waited for it and by the time that the entrance was opposite him the car had, as he says, gained a little momentum. He grasped with his right hand the upright rail above the car-step, which is there for that purpose and placed his right foot firmly on the step. He says that in raising his left foot for the purpose of placing it on the floor or platform of the vestibule it caught in an opening in what is called the step riser. It was held fast in this opening, but his leg continuing its forward movement came in contact with the projecting floor of the vestibule. The pressure of the leg against the floor with the foot held fast below, resulted in the fracturing of the bones.

This car has but one step between the floor and the ground. It is a little more than four feet long and its tread or depth from front to back is nine and a half inches. It is 17 inches from the ground to the step and 15 inches from the step to the floor. The back of the step joins the back of the tread and rises practically at right angles to it. The back is carried up to within a short distance varying from practically an inch to two inches of the bottom of the beam on which the body of the car rests. The floor of the vestibule projects about ¾ of an inch over the beam. The back of the step and this beam, which together constitute the step riser, are in line with each other under this projecting

floor. The space between the top of the back of the step and the bottom of the beam is not filled in and it was in this space at the point where they are about 1¾ inches apart that the plaintiff's foot was caught.

The plaintiff was a passenger of the defendant. Some doubt is suggested as to his right to transfer to the car on which he was hurt on the strength of the transfer slip which he held. That appears to me to be immaterial. Even if he had had no transfer slip at all his right to get on the car for the purpose of being carried by it was absolute. The question of the sufficiency of the transfer to entitle him to passage without further payment of fare was for the determination of the conductor upon presentation of the slip. If found insufficient it would simply have involved the plaintiff in the necessity of paying his fare again and that would have entitled him to stay on. When he set foot upon the step for the purpose of entering the car and being carried by it either on the strength of his transfer or on payment of his fare he became a passenger. The defendant did not absolutely insure his safety. *East India R. Co.* v. *Kalidas Mukerjee*, [1901] A.C. 396. It undertook to exercise due care and to see that whatever was required for his safe conveyance was in fit and proper order: *Redhead* v. *Midland R. Co.*, L.R. 4 Q.B. 379. That undertaking applied not only to the conduct of servants, but to the character and sufficiency of the car and its freedom from discoverable fault in design and construction. It amounted in effect to an assurance not that the plaintiff would not be hurt whilst on the car, but that if he was, it would be through no fault of the defendant. It failed in that undertaking for the plaintiff was injured and his injury was due to what I must consider in the light of this accident, the faulty design of the step of the car. The defendant meets this with proof of the fact which is uncontradicted, that this step-riser is of standard type. The general manager of the Ottawa Car Manufacturing Co. (the maker of this car) the superintendent of the Montreal Tramways and the superintendent and general foreman of the defendant's system prove that this style of step-riser is in general use on many of the large traction systems of the United

ALTA.

S. C.

BLACK v. CITY OF CALGARY.

Walsh, J.

States and Canada and that this is the first accident attributable to it of which they have ever heard.

The fact that it was capable of doing such an injury was doubtless never present to the mind of any one responsible for its construction or operation, perhaps because of the very immunity from accident which it has always enjoyed. The most recent case that I have been able to find on the subject and at the same time the strongest authority for the view put forward by the defendant is *Newberry* v. *Bristol Tramways*, 107 L.T.R. 801, in which Cozens-Hardy, M.R., in discussing the standard of care required of a carrier of passengers, says at p. 803:—

> It is sufficient that the carrier should adopt the best known apparatus, kept in perfect order, and worked without negligence by the men employed. If he does that, he ought not to be responsible for the consequences of an extremely rare and obscure accident which cannot, in a business sense, be prevented by any known means.

The facts of this case, however, do not bring it within this language. The opening in the riser is not concealed. It is wide open to the view even of passers by on the street. It answers no purpose whatever. No excuse for its existence has been given by any of the experts. The back of the step could very easily have been continued to the bottom of the beam. The saving to the manufacturer of the cost of carrying it the additional inch or two is the only reason for this opening which suggests itself to me. Many of the defendant's other cars have a solid riser with no opening of any kind between the step and the platform and there is no reason in the world why they should not all be so equipped. I must hold the defendant guilty of negligence in operating this car upon its system.

I am reluctantly, however, forced to the conclusion that the plaintiff contributed to this accident by his own negligence. I have with the consent of counsel examined this car and made some experiments in boarding it. I am quite unable to understand how a person getting on it when it is standing still could possibly be hurt as the plaintiff was. With one foot on the step and the other being raised to a point more than 7 inches above the top of this opening and projecting over it ¾ of an inch, it would almost require deliberation on the part of the passenger to get his foot caught in it. Of course, if he scraped the toes of

the foot which he was raising against the riser (a most unlikely thing for him to do) it would touch this opening when it got that high, but even then its tendency would be upward with a slight outward movement to clear the projecting floor instead of that forward movement to the leg and body which would make the breaking of the bones of the leg possible. This may seem inconsistent with my holding that the existence of this opening constitutes negligence on the part of the defendant, but it really is not for, in my view, the defendant's duty to take care is not limited to those careful people who never by any chance do anything but that which is exactly right, but extends to the large class of people using the street car who are by habit or disposition not so prudent as they should be.

My conclusion is that when the plaintiff placed his right foot on the step of this moving car and raised his left foot off the ground, the momentum of the car swung his left foot ahead of him into this opening and held it, while his leg kept on in the same direction. He had a coat and a paper and some books in his left hand so that it was not free to grasp the left hand rail and his body therefore lacked its steadying influence. No other explanation of this accident seems feasible to me and so I adopt it.

This, I think, was negligence on his part. There is painted on the side of the car in large letters right at the entrance, the warning, "You must not get on this car while it is moving," and this part of the car passed right before his eyes immediately before he boarded it. He took upon himself the risk involved in doing this. There was no pressing call for him to catch that car. He no doubt felt the desire that every one does to avoid a wait for the next car and he did what doubtless nearly any other active man would have done, namely, take the chance of getting safely on board the moving car. His was the chance, however, that was being taken and having taken it, and been injured in so doing I think that he must shoulder more of the blame for his accident and so he cannot recover.

In dismissing the action I do so without costs. The law as it now stands in actions such as this is most unsatisfactory and unjust. No matter how great may have been the negligence of a defendant, if the plaintiff has by his own negligence con-

ALTA.

S. C.

BLACK v. CITY OF CALGARY.

Walsh, J.

tributed to the accident, he cannot recover except, of course, in cases where ultimate negligence is brought home to the defendant. The result is, that although the damage done is due to their concurrent negligence the plaintiff alone must bear the whole of the loss.

In Quebec the much more equitable principle prevails of apportioning the damage between the parties. If a man is injured partly by his own fault and partly by that of another it is surely fairer to make each of them pay a part rather than one of them suffer all of the resulting loss, for they are both to blame and without carelessness on the part of each the accident would not have happened. If, as often happens in collision cases both parties suffer injury because of fault on both sides, there surely could be nothing unfair in pooling the damages and apportioning the aggregate loss between them. This, however, is a matter for the legislature and not for the Courts. It is because of what I consider the injustice of the law in this regard that I withhold its costs from the successful defendant so that it may not entirely escape liability for what I have held to be its negligence. Until the law is changed, I will not hesitate in any proper case of this character to follow the precedent which I have thus set for myself.

I assess the plaintiff's general damages at $1,000 and his special damages at $206.25 so that if this judgment should be reversed there may be no difficulty in the entry of the proper judgment for the plaintiff. The sum allowed for special damages covers all of his actual out of pocket loss from this accident. He is the salaried officer of a company and I assume from the lack of evidence on the point, that his salary was not stopped or reduced during his six weeks' absence from his office. The award of $1,000 is, therefore, made for the pain and suffering and inconvenience resulting from the accident and the consequent weakness of the leg and such other items as came exclusively under the head of general damages without reference to any business considerations. *Judgment accordingly.*

BRITISH AMERICAN PAINT COMPANY v. FOGH.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. August 10, 1915.

1. SALE (§ III A—57)—INSTALLATION OF MACHINERY—BREACH OF WARRANTY —ECONOMIC OPERATION OF PLANT—MEASURE OF DAMAGES.

Where, after the installation of a new burning plant, it fails to operate as economically as warranted at the time of the sale, and the work performed proves of no value and less economical than the old equipment, which necessitates the removal of the new plant and the re-installing of the old system, the buyer may rightfully recover all expenses incurred and damages suffered in connection with the construction of the new plant and the re-instatement of the old one, against which no counterclaim for the price is maintainable.

[*Basten* v. *Butter*, 7 East 479, applied.]

2. SALE (§ IA—1)—WHAT CONSTITUTES—INSTALLATION OF MACHINERY—WORK AND LABOUR.

A verbal agreement for the sale and installation of an oil burning plant which involves the work of ripping out an old plant and affixing to the freehold the substituted equipment is a contract for work and labour and not for goods sold and delivered, which is not governed by the provisions of the Sale of Goods Act (B.C.).

[*Lee* v. *Griffin*, 1 B. & S. 272, applied.]

3. SALE (§ II B—30)—SPECIFIC GOODS—WARRANTY AND CONDITION—BREACH —DAMAGES.

Where under sec. 50 of the Sale of Goods Act (ch. 203 R.S.B.C.) acceptance is inferred after the lapse of a reasonable time for the rejection of goods, a breach of condition entitling to the right of repudiation, particularly in a sale of specific goods, may be treated as a breach of warranty under sec. 19, which will entitle the buyer under sec. 67 to further damages in consequence thereof in addition to the extinction or diminution of the price.

[*Poulton* v. *Lattimore* (1829), 9 B. & S. 259, followed; *Wallis* v. *Pratt*, [1910] 2 K.B. 1003, [1911] A.C. 394, referred to.]

Statement

APPEAL from a judgment of a County Court Judge in favour of plaintiff.

W. D. Carter, for appellant.

H. A. Maclean, K.C., for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—The plaintiff company (respondents in this appeal), being minded to change their wood-burning plant into an oil-burning plant, entered, on March 16, 1914, into a verbal contract with the defendant, for the installation by him on their premises of an oil-burning plant, for the sum of $950. The work involved ripping out some of the old plant and affixing to the freehold some of the substituted equipment.

When it was finished in April, and tested during May, June and July, it proved to be more expensive in operation by $4 odd per day than the wood-burning plant which it had superseded.

In August, 1914, the plaintiff company brought an action for a return of all moneys ($1,500) expended by the plaintiff at the request of the defendant for materials, etc., supplied in connec-

B. C.

C. A.

BRITISH AMERICAN PAINT CO. v. FOGH.

Irving, J.A.

tion with the construction of the new plant, and for damages for injury caused by defendant to the old machinery, and for damages to cover the expense of re-installing the old system.

The plaintiff company alleged that the change was made on a warranty by the defendant that the oil-burning plant would be more economical to operate than the old. It was an undertaking of saving.

The defence was that it was a good oil-burning plant and well installed, and that the contract was in writing set out in his letter of March 19; that there was no warranty of more economical operation; and he counterclaimed for $950, the agreed price.

The learned County Court Judge gave judgment for $500 in favour of the plaintiff for damages, and dismissed the counterclaim. There was evidence from which the learned County Court Judge was justified in coming to the conclusion that there was an oral contract agreed to before the defendant went to Vancouver. His letter of April 19, written from that place, cannot control the agreement already entered into. The evidence will support the finding that there was a warranty that the new plant could be operated at a saving of expense to the Paint Company. And there was evidence which would support a finding that the new plant would not fulfil the purpose for which it was intended. It is really impossible to upset these findings, having regard to the correspondence and the learned Judge's note shewing his doubt of the reliability of the plaintiff's testimony. The simplest way to deal with the appeal is to take the appellant's argument and point out where it fails.

Ever since 1794, when *Basten* v. *Butter*, 7 East 479, was decided, a practice—not based on any principle of law—has been generally followed; and that is, where an action is brought for an agreed price of a specific article sold with a warranty, or of work which was to be performed according to contract, the defendant is permitted to shew in defence that the chattel, by reason of the non-compliance with the warranty in the one case and the work in consequence of the non-performance of the contract in the other, are of no value or diminished in value.

This was acted on in the case of *Mondel* v. *Steel* (1841), 8 M. & W. 858, and in *Abell* v. *Church* (1877), 1 Can. S.C.R. 442, where in an action for the price of a water-wheel defendant was

held entitled to shew the article was valueless, or of a less value than the agreed price.

The same matter was discussed in *Bow, McLachlan* v. *"Camosun,"* [1909] A.C. 597, at 610, and following pages.

The learned County Court Judge, acting on this principle, was right in dismissing the counterclaim. The work when completed was not the work stipulated for in the contract: *Forman & Co.* v. *Liddesdale*, [1900] A.C. 190, 69 L.J.P.C. 44. Nothing is gained by the defendant in shewing that the work was completed in April and used during the following months. The company was entitled to a reasonable opportunity of testing the plant to see whether it would satisfactorily do the work: *Hughes* v. *Lenney* (1839), 5 M. & W. 183, 8 L.J.Ex. 177. The fact that the Paint Company had possession of the oil plant in their building does not justify an inference that they had dispensed with the conditions of the special agreement: *Munro* v. *Butt* (1858), 8 El. & Bl. 738, at 752; *Sumpter* v. *Hedges*, [1898] 1 Q.B. 673, 67 L.J. Q.B. 545. In *Lawrence* v. *Lucknow*, cited by Mr. Carter, there was, after the substantial completion of the contract, a dealing between the parties by which the corporation recognized its liability to pay for the work. So again, in *Hamilton* v. *Myles*, 24 U.C.C.P. 309, there was evidence to go to the jury of acceptance of the portable machinery, and the jury found (generally) for the plaintiffs. It was not a case within *Munro* v. *Butt*, *supra*. *Dominion Bank* v. *Bull Produce* is a Quebec case, and I have not been able to get a report of it. The other authorities cited by Mr. Carter are of no assistance on the facts of this case as found by the learned County Court Judge.

It must be remembered that the Paint Company was, while carrying on tests of the new plant's efficiency, complaining to the defendant.

This was a contract for work and labour rather than for goods sold and delivered: *Lee* v. *Griffin* (1861), 1 B. & S. 272, and I don't think we are concerned with the sections of the Sales of Goods Act to which we were referred.

Hamilton Hardware v. *Knight* (1897), 5 B.C.R. 391, was a sale of an engine which the defendants accepted and gave notes for the price, and the sole question involved was, has the Judge jurisdiction to order the defendants to return the property to the plaintiffs, an order he made, as I understand it, to reduce as much

B. C.

C. A.

BRITISH AMERICAN PAINT CO. v. FOGH.

Martin, J.A.

as possible the defendant's losses. The argument of hardship no doubt was pressed upon the learned trial Judge in that case, with disastrous results, as a new assessment of damages was ordered. The allowance of damages, I think, was most moderate.

I would dismiss the appeal.

MARTIN, J.A.:—I do not doubt that this must be regarded as a verbal agreement: the plaintiff's letter of March 19, 1914, is clearly not the contract, so no question of parol variation arises, nor do I doubt that the oil-burning plant which was installed in the plaintiffs' works did not answer the all important representation which was a condition precedent to the defendant being permitted to install it, and so far from being in accordance with that representation it has caused loss to the plaintiff, and is worse than useless to them, as being a detriment to their business and property.

I first take up the question of the counterclaim for the agreed price of the plant, $950, which was dismissed. That, I think, was the only thing that the learned Judge could have done in the face of the clear evidence that it "was worth nothing," as was said by the King's Bench in Term in *Poulton* v. *Lattimore* (1829), 9 B. & C. 259, at 266. The circumstances prevented the return of the goods, and the buyer was entitled to test them and even use them according to the circumstances of the case, *e.g.*, as in *Poulton's* case, wherein the buyer was supplied with inferior seed, and yet it was held, p. 264:—

> He was at liberty to try the seed and to sow it. Probably without sowing it, the fact could not be ascertained whether it would ultimately produce a good crop.
>
> From the nature of the article, and of the contract of warranty, I think the vendee was not bound to return the seed without using it; that by keeping it, he has not precluded himself either from bringing an action for breach of the warranty, or from insisting on such a breach of this action, in order to shew that the seed was of less value than the seller represented it to be.

While definite notice of the result of the test hereinafter referred to might better have been given promptly, yet it was also said in the same case, p. 265, after referring to one where a horse warranted sound had been kept for three months after the discovery of the unsoundness without giving notice thereof:—

> The not giving notice indeed, raises a strong presumption that the article at the time of the sale corresponded with the warranty, and calls for strict proof of breach of the warranty. But if that be clearly established,

the seller will be liable in an action brought for breach of his contract, notwithstanding any length of time which may have elapsed since the sale. And if that be so, it is reasonable and just, when an action is brought by the seller to recover the price or value of the goods, that the buyer should be at liberty to shew the breach of the warranty in defence to the action.

On the evidence above referred to, the necessary facts have been "clearly established" herein, and it follows, therefore, that there has been an "extinction of the price," under sec. 67 (1*a*) of the Sale of Goods Act, ch. 203, as hereinafter mentioned.

Then, as to the plaintiff's claim for the return of the moneys it has expended at defendant's request in the course of installing the new plant, apart from the contract price, and for the cost of removing the useless machinery and of replacing the old wood-burning plant. For this the learned trial Judge has allowed $500, and that is a moderate allowance on the evidence if the plaintiff is entitled to anything, which is disputed on the ground that it must be deemed on the facts to have accepted the goods under sec. 50 of the Sale of Goods Act, as more than a reasonable time for rejection elapsed after the letter of August 1 saying that a test was being conducted, and the defendant would be notified of the result with a promise of definite decision, but nothing was done despite a written request by the defendant on August 12 for information, so the action was begun on August 28. I think it must be considered that the plaintiff did accept the goods, so the breach of condition (as it was here and which originally gave the plaintiff the higher right to repudiate) must now, in view of this acceptance, and that these are "specific goods," be treated as a breach of warranty under sec. 19, and the goods cannot be rejected and the contract treated

as repudiated under (3) unless there be a term of the contract, express or implied, to that effect.

There is no such term or implication here, and therefore the buyer (plaintiff) has to resort to sec. 67 (which is the English sec. 53) as one "compelled to treat (the) breach of condition . . . as a breach of warranty" (1) and may set it up not only in extinction or diminution of the price (*a*) but also for damages (*d*) and "further damages" suffered thereby under sub-sec. (4). Here the damages claimed do, beyond question, "directly and naturally result in the ordinary course of events from the breach," (2) so no difficulty arises on the evidence before us from sustaining the assessment of them made in the Court below, and they con-

B. C.

C. A.

BRITISH AMERICAN PAINT CO. v. FOGH.

Martin, J.A.

stitute the "further damages" that the plaintiff may recover in addition to extinguishing the price under the counterclaim as already disposed of. See the principle set out and change in practice noted in *Mondel* v. *Steel* (1841), 10 L.J.Ex. 426, 8 M. & W. 858, as explained in *Bow, McLachlan & Co.* v. *"Camosun"* (1909), 79 L.J.P.C. 17, and of Addison on Contracts (1911), 629 (*n*).

While this case can be determined solely on the statute, I draw attention to the recent decision of the House of Lords in *Wallis* v. *Pratt*, [1911] A.C. 394 (adopting the opinion of Lord Justice Fletcher Moulton in [1910] 2 K.B. 1003), pointing out the difference between "condition" and "warranty," considering some of the sections I have referred to, and explaining the way in which a condition which has now by statute to be treated as a warranty is to be regarded (though it has not really been "degraded or converted into a warranty") as applied to a case where goods of a different kind from those contracted for had been supplied, and wherein the buyer sued to recover from the seller damages he had to pay on a re-sale thereof (*viz.*, giant sainfoin seed instead of common English sainfoin). The Lord Chief Justice observed, at p. 397:—

> It is impossible for the respondents to contend that when the sellers said that they gave no warranty they meant to say they would not be responsible for any breaches of condition.

And at pp. 398-9:—

> My Lords, I thought it right to add these few words because I think it is very important to bear in mind that the rights of people in regard to these matters depend now upon statute. To a large extent the old law, I will not say has been swept away, but it has become unnecessary to refer to it. Within the four corners of this statute applicable to this contract we see this plain distinction between "condition" and "warranty," which has, I venture to think, been rather overlooked in this case by the majority of the judges in the Court of Appeal.

It follows that the appeal should be dismissed.

Galliher, J.A. (dissented)

GALLIHER, J.A., dissented.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I agree with my brother MARTIN in dismissing the appeal. *Appeal dismissed.*

KLUKAS v. THOMPSON & CO.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J., Scott and Stuart, JJ. May 17, 1915.

1. NEGLIGENCE (§ I C—35)—BUILDING CONTRACTORS—TEMPORARY STAIRWAY—COLLAPSE—INJURY TO EMPLOYEE OF SUB-CONTRACTOR—USE OF BY OTHERS—ASSUMPTION AS TO SAFETY.

Building contractors who allow a temporary stairway to be used by persons working in the building under construction are properly held liable in negligence for personal injuries sustained by an employee of their sub-contractor by the collapse of such stairway when he attempted to pass over it, if no warning had been given or barrier placed to give notice that the stairway was being moved to a different position by the contractor's workmen; the fact that the contractor's workmen had permitted another person to use the stairs just prior to the plaintiff's arrival was sufficient to put the plaintiff off his guard on seeing this and to justify him in assuming that the use of the stairway was permitted as being safe without putting upon the plaintiff the duty of investigating what was being done by the contractor's workmen then and there engaged at work.

[*Klukas* v. *Thompson Co.*, 21 D.L.R. 312, reversed.]

2. JUDGMENT (§ I A—1)—NEGLIGENCE—STATEMENT OF TRIAL JUDGE—INCORPORATED IN FORMAL JUDGMENT—COMPENSATION—ELECTION—BAR TO APPEAL.

Where the trial Judge dismisses a negligence action brought by a workman against his employer and others, but states that the plaintiff would be entitled to compensation under the Workmen's Compensation Act, Alta., it is improper to make a reference to the compensation in the formal decision issued in the negligence action at least where the amount of the compensation has not been fixed; a clause in the formal judgment inserted at the request of the defendants, purporting to declare the plaintiff entitled to compensation under the Act, and to reserve leave to apply to fix the amount should the parties not agree, will not operate in bar of the plaintiff's appeal from the dismissal of the negligence action where the plaintiff had not elected to abandon the common law remedy and to accept compensation under the Act.

[*Isaacson* v. *New Grand Ltd.*, [1903] 1 K.B. 539, applied.]

3. MASTER AND SERVANT (§II A1—35) — INJURY—NOTICE—WORKMEN'S COMPENSATION ACT (ALTA.)—"APPLICATION FOR COMPENSATION"——ELECTION.

The fact that a notice of injury served on the employer is headed as being in the matter of the Workmen's Compensation Act, 1908, Alta., and also with the words "application for compensation" are not sufficient to constitute a definite election on the part of the workman to take his remedy under the Compensation Act alone and to abandon his common law remedy for negligence where no such inference could be drawn from the statements contained in the notice itself apart from the headings.

Statement

APPEAL from a judgment of Ives, J., 21 D.L.R. 312.

Frank Ford, K.C., for plaintiff, appellant.

O. M. Biggar, K.C., and *V. R. Baldwin*, for Thompson & Co., appellants.

H. H. Hyndman, and *H. R. Milner*, for Macdonald & Brewster, respondents.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—This is an appeal by the plaintiff from a judgment of Mr. Justice Ives dismissing the plaintiff's action for damages alleged to have been caused by the negligence of the defendants

ALTA.

S. C.

KLUKAS v. THOMPSON & CO.

Stuart, J.

Read, Macdonald & Brewster, Ltd. There is also an appeal by the defendant, the Alexander Thompson Co., against an award of compensation made, or supposed to have been made, in favour of the plaintiff under the Workmen's Compensation Act.

The defendants Read, Macdonald & Brewster, Ltd., were the general contractors for the construction of an apartment or rooming house in the city of Edmonton, and the defendant, Alexander Thompson Co., had the sub-contract for the plastering. The plaintiff was a plasterer in the employ of the Thompson Company. The building was apparently three storeys high. Between the ground floor and the floor next above, and between the latter floor and another floor above it again, the general contractors, Read, Macdonald & Brewster, Ltd., had erected temporary stairways of boards for the use of the workmen in the building. Each stairway, however, did not go directly from one floor to the other, but between each floor there were practically two half stairways; that is, there was a landing or platform half way up, and on this the person ascending turned to reach the second half of the stairway. On the day previous to the accident the plaintiff had been working on the third floor, and had left his working clothes on the third floor. (This was how he finally told his story, though at first he said something different and never seemed very clear about it.) Just before starting his work the next morning, which was to be then on the second floor, the plaintiff started to go up the first half of the stairway leading to the third floor in order to get his clothes. He had only got part way up this first half of the stairway when it gave way under him, and he, with it, fell upon the stairway below, which gave way under the impact, and the plaintiff fell into the basement below and was injured.

There is no complaint that as originally constructed the stairway was defective. What had happened was this: The stairway had been built close against the wall of the building. The night before, the defendant, Alexander Thompson Company, through one of the firm, had notified the general contractors that the stairway would have to be moved out from the wall a sufficient space to allow the plastering of the wall to be done. In the morning the general contractors had sent two men to make the change, and they were engaged in doing this when the plaintiff came along. The stairway had been loosened and moved outward some 18 inches or so, and the two men were apparently engaged

in fixing it in its new position. The plaintiff, after ascending the first, or lower stairway, had reached the landing on the second floor, and saw ahead of him, going up the first half of the stairway, a man named Pardon, who was carrying a load or hodful of bricks. Pardon had almost reached the midway landing when the plaintiff stepped upon the stairs. Both Pardon and the plaintiff went down, but Pardon escaped with only slight injuries. Pardon, called for the defence, testified that when he reached the stairway which fell he found the two men working, one, named Wenzel, at the bottom kneeling down, and the other, Morrison, at the top. He said: "Morrison was on the top, and there was a rope on the stairs which he was swinging it with, so it certainly didn't look safe." He said that he asked if it was fit to go over, and that somebody said—he was not sure whether it was Wenzel or Morrison—"Yes, you can go." He had, he said, to step over Wenzel's legs. He said, further, that the first step or tread of the stairs had been removed, so that he had to take the double step in one step. He further said that the rope was fixed on the top tread, and Morrison had the other end in his hand. He said, also, that Morrison said to him, "I will move this rope for you, Tom, to get it out of your way;" that Morrison did move the rope, and that he then went on, with the result stated. He said that he did not see Klukas behind him at all, but that he first saw him in the basement.

The plaintiff said that there was nothing wrong with the staircase that he saw, that he did not notice that it was moved out from the wall, that he saw no one there but Pardon, and that he was not told anything about the stairway by anyone.

A witness, Fuller, a lather, said he had seen the stairway earlier in the morning, and had noticed that the top end was fastened by a rope to the joist, and the end of the rope was hanging down; that he was coming up the lower half of the stairway, just behind the plaintiff, and saw both him and Pardon on the stair at the moment that it fell. Although he had seen one of the men working at the bottom of the stair when he first passed, he said nothing about having seen either Wenzel or Morrison just before the accident.

A witness, Green, a plasterer's tender, said that he had gone up the stairway that morning, and was above the stairway when the accident happened, but did not see it happen, that he had not

ALTA.

S. C.

KLUKAS v. THOMPSON & CO.

Stuart, J.

noticed anything wrong with the stairway, and had received no warning not to use it.

Morrison said that they—he and Wenzel—had started to work at seven o'clock, under orders, to move the stairways; that they had already moved one above, and had started about twenty minutes to eight to move the one in question; that he had tied a rope on the upper tread, and then unfastened the stairway from the side wall to which it had been nailed, and then took the rope and moved the stairway outward the necessary distance; that Wenzel was at the bottom; that the side stringers of the stairway had what is called a bird mouth on them, which would catch upon the beam upon which they rested below; that just after they had moved it out Pardon came along with his load of bricks and asked if he could get up, "and some one told him he could." (That "some one" is of course delightful, because it must have been either himself or Wenzel.)

He said he took the rope off the step "so he could get back," and he also said:—

Pardon, he was getting about on the landing when Klukas came on the scene, and I was on my knees at the time that Klukas came along there; seems I never heard him coming up the stairs, never heard him or anything or nothing; seems to me he just came, looked to me as if he stepped pretty high on the stair, took about two steps, if in a hurry or not I couldn't say, it seems just as I was getting up from my knees and I saw him putting his foot on the next and it went down.

He said that the rope was just tied to the step, but not to the joist above. He was also asked:—

Q. Did you see Klukas there? A. I just saw him as if he was putting his foot. Q. Did you speak to him? A. No, I didn't get time to speak. Q. Was there any notice put up there warning other workmen? A. No. Q. Did you say anything to him about not coming on the stairway? A. I didn't get time to say anything to Klukas, I didn't get a chance, he stepped right on to it without warning or in any way. Q. Did Pardon have a hod of bricks? A. Yes. Q. And he went up pretty near to where you were standing? A. Yes, within two steps I think. Q. He had to pass Wenzel did he? A. Yes.

The man Wenzel said he and Morrison had moved the stairway out, and that he was engaged in nailing a piece of 2 x 4 scantling on to the stringer below the lower jaw of the bird mouth so as to strengthen it; that the lower tread of the stairway was off and he was kneeling forward between the two stairway stringers to nail the scantling on; that he saw Pardon going up the stairway, though he didn't remember seeing him pass; that he could not

say that he had heard Pardon speak; that he did not hear Klukas say anything, and indeed did not see him until he was falling; that he himself had taken the first tread off to get more room to do his nailing; that even after the first tread was removed the second tread was only eleven inches above the level of the floor.

A witness, Tran, who had a sub-contract for some of the lathing, said that he had come up the stairs to the floor where Wenzel was working, and had gone past where the stairs were being shifted and into another part of the building, and had gone some 15 or 20 ft. away when the accident happened; that as he was going past the man at the bottom (he knew him as "Frenchy," but it was evidently Wenzel) the latter had told him "not to go up the stairs, as they weren't safe; that they weren't spiked or anything," and he himself had said he didn't need to go up.

The plaintiff, of course, having stated that he had not seen either Wenzel or Morrison, may, no doubt, be taken as stating that he had not heard the conversation between Pardon and "some one" (as Morrison put it), in which Pardon was told to go ahead, although he was not asked directly upon this point. At first the plaintiff swore that no one was at the foot of the stairway at all, but, upon being pressed in cross-examination, he said, "Well, I never seen anybody," although he again added, "I had to see him if he was there, but he wasn't there." He also swore that the first tread was not off, for he would have noticed it if it had been, and he was asked:—

Q. If that had been off you wouldn't have attempted to go over that place? A. I certainly wouldn't if there had been anything wrong with the stairway. Q. Because if there had been anyone at the foot of the stairway working at it it would be unsafe to go up it? A. Sure.

I think I have now stated all the material evidence bearing upon the question of negligence.

The learned trial Judge, after reviewing the evidence and pointing out the contradiction between the plaintiff's testimony and that of the other three men, went on to say:—

Now, I do not think the plaintiff is swearing falsely but that he is quite convinced he saw neither the dangerous condition of the stair or the two carpenters; yet in the face of the evidence of Wenzel and Morrison, corroborated by Pardon, I must find that the conditions were as stated by them. Upon this finding I think the defendants must be exonerated from any charge of negligence and the action for damages dismissed.

This is from the written judgment, but at the close of the argument the learned Judge had given, perhaps, more fully his reason for

ALTA.

S. C.

KLUKAS v. THOMPSON & Co.

Stuart, J

dismissing the action. The following is a quotation from the argument at the close of the trial:—

THE COURT:—It is not conceivable that he did not see him, but it is a matter to consider: in the first place it is rather trivial, simply stepping over a prone man; then considering the accident and what the plaintiff has been through since I would not be a bit surprised if he has forgotten that he saw him, if he did see him.

Mr. Hyndman:—I submit we must get back to the time when he did remember; that is, he must have seen that man there; he has forgotten since; let us take the most charitable view of it.

THE COURT:—Do you think he was required to stop and enquire?

Mr. Hyndman:—Yes, I submit there was (sic), when a man was working at the bottom and at the top. My learned friend suggests there should be a notice, but if the plaintiff as he says did not see that tread off he would not have seen a notice.

THE COURT:—It is a question of whether it was your duty to have one there. [And this further was said:]

THE COURT:—In order to clear matters I am going to dismiss the action in so far as it is based upon the common law right of the plaintiff. He was hurt on this day by the falling of those stairs, which I find were being removed by the general contractors, whose employees were actually there, and being actually there engaged in the work constituted a sufficient notice of the conditions to have rendered this man negligent going upon the stairs and thereby suffering as he has done.

It appears to me at present, however, there is compensation due. I am not going to decide that question.

After considering this evidence carefully, I have come to the conclusion, with much respect, that the learned Judge took finally much too lenient a view of the responsibility of the defendants, Read, Macdonald & Brewster, Ltd. I am not sure that his mind was not rather upon the proper point when during the argument he suggested a duty in these defendants to have some notice of warning. Here was a stairway continually in use by workmen in the building and intended for their use. It was proposed to shift it and to make it temporarily unfit for use. For myself I rather incline to the view that reasonably careful workmen, knowing these circumstances and that men were very likely to come along to use the stair, would have erected a temporary barrier by nailing a board across to indicate that the passage was for the time being closed, and that the defendants' workmen were negligent in not doing that. I should be prepared to take that position if it were necessary, but it seems to me that there is a plainer ground of negligence. Wenzel and Morrison knew men were coming up the lower stairs from below. Wenzel had warned Tran away from the particular stairway in question. Yet Pardon was actually per-

mitted to go upon it, was assured it was safe, certainly by either Wenzel or Morrison, most probably by Morrison. There certainly could have been no possible answer to a charge of negligence by Pardon. Now, it is true that Klukas did not hear this conversation, apparently, but he saw Pardon going on the stairway with a load of brick on his shoulder. Now, either Klukas saw Wenzel and Morrison, or one of them, or he did not. If he did not see them, but saw only Pardon, the defendants can have no answer at all. If he did see them working there, he also saw Pardon being allowed to proceed without interference. Even if he did not hear the assurance given to Pardon, I am unable to see how the defendants can get any advantage from that fact. Their servants clearly allowed the stairway to be used, allowed it to present, by being in actual use, an appearance of safety to anyone coming after Pardon. It is difficult for me to imagine a clearer case of negligence than that. Then, with regard to contributory negligence on the part of the plaintiff, it is clear that the learned trial Judge must have held that the plaintiff did, in fact, see Wenzel and Morrison. I gather this from his remarks at the close of the argument, although in his written judgment he says he thinks the plaintiff, when giving his testimony, honestly believed that he had not seen them. It is obvious that the learned Judge still continued to be of the opinion that what had happened to the plaintiff had probably impaired his memory.

I think, therefore, we cannot assume it to be the fact, and I myself also think it to be most probable that the plaintiff did see the men working, or at least Wenzel. He might easily not have looked up and seen Morrison. The question is, was he negligent in going on when he saw Wenzel working at the foot of the stairs? The defendants' counsel laid great stress upon the plaintiff's affirmative answer to the question, "if there had been anyone at the foot of the stairway working at it it would be unsafe to go up?" But I am unable to draw the inference from that which is sought to be drawn. Obviously, if a man was merely painting the stairway, it would not for that reason be unsafe to go up. The plaintiff, in assenting to the proposition, quite clearly assumed that knowledge on his part of what the man was really doing was being taken as a hypothesis. On that understanding he was, of course, ready to assent to the statement. But he did not admit that he

ALTA.

S. C.

KLUKAS v. THOMPSON & CO.

Stuart, J.

knew what Wenzel was doing. And there is no evidence at all from which it can be inferred that he knew. It may be that if he had seen no one going on ahead of him and he had seen Wenzel working there he might have been expected to hesitate and inquire. It is perhaps useless to speculate as to what would have happened in such a case, although, judging from what did happen to Pardon, it seems to me better for the defendants to avoid the speculation.

In my opinion, if there was any need of caution on the part of the plaintiff, he was quite clearly put off his guard by the act of Morrison and Wenzel in allowing Pardon to use the stairway, and even assuming that he did see Wenzel and Morrison working there, he was entitled, in the absence of any notice or warning such as was given to Tran, to assume that the use of the stairway was permitted as safe. For this reason I think, with much respect, that he cannot be charged with contributory negligence.

There were two objections raised by counsel for the respondents, Read, Macdonald & Brewster, Ltd., to any judgment being now entered against them even if they were originally liable. The first was that the trial Judge had, in his judgment, awarded compensation under the Workmen's Compensation Act, and that this constituted an election which prevented any further proceedings by way of appeal from the judgment dismissing the common law action. This contention was rejected by the Court at the close of the argument, upon the authority of *Isaacson* v. *New Grand*, [1903] 1 K.B. 539, which the Court thought more applicable to the present case than *Neale* v. *Electric and Ordnance Accessories*, [1906] 2 K.B. 558. In his written judgment the learned Judge merely decided that in his opinion the plaintiff was entitled to compensation, but said that if the parties could not agree on the amount he would fix it upon application.

The formal judgment entered after dismissing the action proceeded thus:—

> And this Court doth declare that the plaintiff is entitled to and he is hereby awarded compensation under the Workmen's Compensation Act, together with costs, and doth order that in the event of the parties failing to agree as to the amount of compensation, leave be reserved to apply to determine the amount thereof, etc.

This form of judgment was not settled by the trial Judge, and was entered by the defendants in the face of some objection by the plaintiff's solicitor. In my opinion it was improper to make a reference to the compensation in the formal judgment in the

action, at any rate when the amount had not yet been fixed. No application to fix the amount was made, and there was clearly never any assessment of the compensation within the meaning of sec. 3, sub-sec. 4, of the Act.

But it appears that eight days after the accident, and while the plaintiff was still in the hospital, a communication was sent by Mr. Cowan, a solicitor to the defendant the Alexander Thompson Company, ostensibly on behalf of the plaintiff, which, in the body of it, merely notified the latter of the fact and circumstances of the accident. It did, however, bear the heading, "In the matter of the Workmen's Compensation Act, 1908, and in the matter of an injury sustained by Ludwig Klukas," and also a second heading, "Application for Compensation." No reference to any claim of any kind was made in the body of the document.

The defendants contend that this constituted an election to proceed under the Act, and that the plaintiff thereby lost his right to proceed by common law action.

I am unable to agree with this contention. All that the plaintiff did is set forth in his evidence, as follows:—

Q. You consulted Mr. Hector Cowan about this case before putting it into the hands of Mr. Charleson, did you not? A. I did not, no. Q. Did you have Mr. Cowan notify the Thompsons that you had a claim under the Compensation Act? A. I think that is what my brother done. Q. Who is your brother? A. Joe Klukas. Q. It was done on your behalf? A. Yes. Q. Look at that. You can read? A. I can read, but I never seen that before. Q. I suppose somebody saw Mr. Cowan with your knowledge? A. No—well, with my knowledge, I told my brother to go and see a lawyer about it. Q. Well, look at that. A. It is no use looking at that; I can look at it but I can't read very well; it takes me a long time to read that over. Q. You told your brother to see Mr. Cowan on your behalf? A. Yes. Q. And to make a claim for you? A. Yes.

Q. THE COURT:—What did you tell him? A. To see a lawyer about it; I was so weak that I wasn't able to say much. Q. You told him to see a lawyer and to do what was necessary? A. Yes. Q. Did you say what lawyer? A. I didn't say what lawyer. Q. Did you find out afterwards that he went to see Mr. Cowan? A. Yes, he told me afterwards.

I have very grave doubt whether the notice sent really constituted in its terms a claim for compensation at all, even though it is so headed.

Even when an injured workman intends to fall back on the Act if he fails at common law, it is probably necessary for him to shew that he has given notice of the accident within a reasonable time or that absence of it has not prejudiced the employer. It would be strange if by giving such a notice, even though the

ALTA.

S. C.

KLUKAS v. THOMPSON & Co.

Stuart, J.

heading of it went further than the contents would justify, he should be found to defeat his common law action altogether.

But, in any case, in view of the circumstances shewn in the evidence quoted, I am of opinion that it cannot be said that the plaintiff made any election. His brother certainly had no authority to make an election on his behalf or to bind him in that way. What the brother did was done "on his behalf," no doubt, in the sense that it was done *in his interest*, but certainly the proper elements to constitute a definite election do not exist here. The plaintiff did not know what had been done.

I think, therefore, that the defendants, Read, Macdonald & Brewster, Ltd., are liable to the plaintiff in damages, and it only remains for this Court to fix the amount upon the evidence.

The plaintiff is a man about 45 years of age. In his occupation as a plasterer he said he had been earning about $33 a week; that for a time he had slightly increased this by taking work by contract. His leg had to be amputated just below the knee joint as a consequence of the accident. The hospital bill was $142, the doctor's bills $325, and an artificial limb was said by a doctor to cost about $165. These sums amount to $633. He was, of course, unable to do any work at all up to the date of the trial. He said that even then the wound had not quite healed. There is no doubt that he will not be able to do very much, if any, work as a plasterer, or in any ordinary employment involving physical strength and exertion, although he will clearly be able to do work of superintendence and contracting. He is also entitled to something for his pain and suffering. Taking all these things into consideration, I think $5,500 would be a fair allowance to make for the damages suffered.

The appeal will be allowed with costs, the judgment below set aside, and judgment entered for the plaintiff for that amount, and costs of the action against the defendants Read, Macdonald & Brewster, Ltd. The appeal of the defendants, the Alexander Thompson Co., does not in the result need to be considered. I think the common law action should stand dismissed as against them with costs, but I do not think any order should be made as to their costs of the appeal. *Appeal allowed.*

McPHERSON v. U.S. FIDELITY AND GUARANTY CO.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Hodgins, J.A., Latchford and Kelly, JJ. April 19, 1915.

1. EXECUTION (§ I—9)—SATISFACTION AND DISCHARGE—RE-SALE OF MILL BY VENDOR—RIGHT TO COSTS.

A re-sale by a vendor of a saw-mill and machinery after the recovery of a judgment for the unpaid purchase instalments due thereon, will preclude the vendor, except as to the costs, from proceeding with the enforcement of the judgment even for the balance of the claim after crediting the amount realized upon the re-sale.

[Affirmed by divided Court; *Cameron* v. *Bradbury* (1862), 9 Gr. 67; *Gibbons* v. *Cozens* (1898), 29 O.R. 356, followed; *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, referred to.]

2. CONTRACTS (§ II D 2—170)—CONSTRUCTION—SALE OF SAW-MILL—INTEREST IN LAND.

A sale of a saw-mill and machinery, even if it indicates that it is to be removed from the land, constitutes a contract for the sale of an interest in land.

[Affirmed by divided Court; *Lavery* v. *Purssell* (1888), 39 Ch. D. 508, followed.]

3. BONDS (§ II A—6)—INTERPLEADER BOND—EXECUTIONS—OTHER EXECUTIONS—LIABILITY OF OBLIGORS.

The liability of obligors upon an interpleader bond is not confined to the amount remaining due on the executions, but other creditors having executions in the sheriff's hands are entitled to share in the funds represented by the bond.

Statement

APPEAL from judgment of Middleton, J., in action upon interpleader bond and issue of satisfaction of judgment in *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145, affirmed by divided Court.

The judgment appealed from is as follows.

Middleton, J.

MIDDLETON, J.:—On the 3rd August, 1907, an agreement was made between McPherson and McGuire dealing with many matters. Clause 10 is the only one now of importance. McGuire agreed "to buy the McLean saw-mill and machinery, as it stands to-day, at the sum of $7,500, to be delivered in as good state and condition as at the present, at the end of the present season of sawing."

In April, 1908, a further agreement was arrived at by which the price of the mill was agreed to be paid in three annual instalments, of $2,500 each, with interest, the first instalment to be paid in one year.

In December, 1908, an accounting took place, and an agreement was drawn embodying the result of the accounting.

An action was brought to recover the first instalment of the price of the saw-mill and other moneys alleged to be due to McPherson. In this action judgment in the first instance went

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Middleton, J.

by default; and, upon an application being made, the action was allowed to proceed in order to ascertain the amount due, the judgment in the meantime standing as security to the plaintiff. The result of the litigation was to reduce the amount for which judgment had been signed from $3,961 to $3,232.42; but the execution issued upon the judgment has not been correspondingly amended. It was agreed by all parties that this should now be done. As the result of this litigation, further costs were awarded, and executions have been issued for these, $504.17 and $78.98.

When the second instalment came due, another action was brought. Judgment was recovered in it for $2,590.62 and $135 for costs.

In addition to these executions, two other executions were issued by Booth for $1,007.50, but it is admitted that there is only one debt. This makes a total upon the executions in the sheriff's hands, exclusive of sheriff's fees, of something in the neighbourhood of $9,500, when interest is added.

The sheriff seized certain logs. These were claimed by the Temiskaming Lumber Company Limited. An interpleader issue was directed, and it was provided that upon the lumber company giving to the execution creditors, McPherson and Booth, security for the amount of the appraised value of the goods seized, after deducting the sum of $6,381, the Crown dues, the sheriff would withdraw from possession.

Although all these different writs of execution were in the hands of the sheriff, the interpleader issue referred to McPherson's writ under the first judgment and Booth's writ, by an erroneous date; but the issue was, whether, at the time of the seizure, the goods were the property of the claimant as against the execution creditors.

An interpleader bond was given by the defendant company in the penal sum of $10,000. It recites the recovery of McPherson's first judgment, $3,961, Booth's judgment for $1,007.50, giving the correct date of the execution, the interpleader order, and the terms under which the sheriff was to withdraw from possession; and the condition is then that if, upon the trial or determination of the said issue, the finding is in favour of

ONT.

S. C.

MCPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Middleton, J.

McPherson and Booth, the company shall pay to them $10,000, or a less amount, according to the direction of any order to be made in the matter of the interpleader.

The interpleader issue was finally determined in favour of the execution creditor, upon an appeal to the Privy Council, on the 19th November, 1912: *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145.

The first contention now made arises from the fact that after the recovery of the judgments for the two instalments of the purchase-price of the mill, McPherson sold, not only the land upon which the mill was, but the mill itself. McPherson claims that he did this with the knowledge and approval of McGuire. I do not think he has established any agreement with McGuire authorising the sale. The mill stood upon the land, unused and deteriorating. Insurance and taxes had accumulated against it, amounting to $1,200. It was sold for $1,750. McPherson is ready to allow this sale to wipe out any balance due to him by McGuire, without prejudice to his claim against the defendant company. What is contended is that this resale by the vendor operates, as a matter of law, to wipe out the judgments obtained for the past-due instalments.

Some difficulty exists in determining whether or not any land should pass to McGuire under the purchase of the mill. I think it is clear that the mill was purchased with the idea of removing it from the property and taking it to the timber limits, which were sold contemporaneously, and that it was not the intention of the parties that any land should pass.

The contention of Mr. Kilmer is that, notwithstanding this, the contract is a contract for the sale of land, and that the resale by the plaintiff prevents the further enforcement of the judgment.

In *Lavery* v. *Pursell* (1888), 39 Ch.D. 508, it was held by Mr. Justice Chitty that the sale of the building materials of a house, with the condition that such building should be taken down and the building materials removed from the land, was a contract for sale of an interest in land. I think I should follow this case. It purports to distinguish the sale of materials in an existing building from a case of the sale of growing timber.

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Middleton, J.

The distinction is by no means easy to follow. I do not think that Mr. Justice Chitty is to be taken as dissenting from the view expressed in *Marshall* v. *Green*, but rather as distinguishing the case of a building from the case of a tree growing upon the land. *Marshall* v. *Green* (1875), 1 C.P.D. 35, to which he refers, is cited with unqualified approval in *Kauri Timber Co.* v. *Commissioner of Taxes*, [1913] A.C. 771.

If this building is to be regarded as land, then, according to the decision in *Cameron* v. *Bradbury* (1862), 9 Gr. 67, and *Gibbons* v. *Cozens* (1898), 29 O.R. 356, by reselling the vendor has precluded himself from afterwards proceeding upon his judgments for the balance of the claim.

I do not think that this precludes the enforcing of the judgments for the costs thereby awarded. These costs are not, like interest, accessory to the demand, but are damages awarded to compensate for the trouble and expense to which the plaintiff is put by the litigation. They are a new and independent cause of action.

If I am right in these findings, it follows that the executions in respect of the instalments should be directed to be withdrawn, owing to the resale of the mill by the plaintiff McPherson, and that the executions with respect to costs should be declared to remain in force.

The defendants make a further contention which requires to be carefully examined. At the time the claimant acquired title there were only the earlier executions in the sheriff's hands, and the issue was confined to these executions. I quite agree with Mr. Laidlaw's contention that the interpleader order was intended to be, and is, wide enough to allow other creditors to come in and participate with their executions; but the point is that the judgment of the Judicial Committee ([1913] A.C. 145) merely determines the invalidity of the claimant's title as to the executions in the hands of the sheriff at the time that title was acquired. The head-note states accurately the ground of decision: "Where execution is levied upon timber cut by an assignee of the license under an assignment made subsequently to the issue of the writ, the levy is valid unless it is shewn that the assignee acquired his title in good faith and for valuable

consideration without notice of the execution and has paid his purchase-money." The concluding paragraph of the reasons for judgment (p. 159) is: "In the result, their Lordships are of opinion that the rights of both of the appellants under the three executions referred to fall to be satisfied out of the $10,000 secured by the bond." From this it is argued that the effect of the judgment is to confine the liability of the defendants to the amount remaining due on these three executions.

I cannot assent to this, because it is clear that it is held that the Temiskaming Lumber Company never became in fact a *bonâ fide* purchaser—that its whole claim was fraudulent—and, therefore, I think it should be held that it was invalid as to all the executions which became entitled to share under the interpleader order.

The bond provides for payment of the full $10,000 or a less amount thereof, according to the directions of any order of the Court or Judge to be made in the matter of the interpleader. I drew the attention of counsel to this, and they consented to my dealing with the matter upon the theory that such an application had been made. I think that the amount should be reduced so as to cover the costs due to McPherson and any further balance outside of the instalments of the purchase-money of the mill. As I understand the case, the first judgment covers more than the first instalment.

In the result, I think that the Booth execution and the other executions placed in the sheriff's hands, so far as they are not wiped out by the declaration I have made, are entitled to share. If the parties cannot agree upon the amount, I may be spoken to.

As the defendants did not pay into Court anything upon the bond, I think they should pay the costs of the action, and that McPherson should pay the costs of the issue.

Allan McPherson and William Booth appealed from the part of the judgment of MIDDLETON, J., which adjudged that the sale of the saw-mill by Allan McPherson operated as a matter of law to wipe out the judgments obtained by him for the past-due instalments upon the sale of the saw-mill, and that the executions issued upon the said judgments and delivered to the sheriff should be withdrawn.

ONT

S. C.

MCPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

The United States Fidelity and Guaranty Company and A. McGuire & Co. and Annie McGuire also appealed from the judgment, upon the following grounds: (1) that the Temiskaming Lumber Company, at the time of the transfer from A. McGuire & Co. to them of the timber license, had no notice of the executions of Allan McPherson against A. McGuire & Co. dated the 30th May, 1910, the 30th June, 1910, and the 7th July, 1910; (2) that, as to the execution dated the 7th July, 1910, the debt having been declared satisfied, the costs were also satisfied; and (3) that the land was sold with the mill.

W. Laidlaw, K.C., for appellants.

G. H. Kilmer, K.C., for respondents.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—Appeal by the plaintiffs and cross-appeal by the defendants from the judgment of my brother Middleton, in which the facts are very fully stated.

The learned Judge states the principal point and finds the only fact as follows: "Some difficulty exists in determining whether or not any land should pass to McGuire under the purchase of the mill. I think it is clear that the mill was purchased with the idea of removing it from the property and taking it to the timber limits, which were sold contemporaneously, and that it was not the intention of the parties that any land should pass. The contention of Mr. Kilmer is that, notwithstanding this, the contract is a contract for the sale of land, and that the resale by the plaintiff prevents the further enforcement of the judgment."

He thinks he should follow, and does follow, the case of *Lavery* v. *Pursell*; and the questions for us to decide are: (1) whether it has application to this case and whether we also should follow it; and (2) whether the sale of the saw-mill was a sale of an interest in land.

The case is reported in 39 Ch.D. 508. Pursell sold Lavery by public auction "the valuable building materials of the spacious premises in Milk street, Cheapside . . . the Constitutional Club." The conditions of sale were: (2) Purchase-money to be paid, and contract signed, on the fall of the hammer, and possession given to take down and remove materials, etc. (3) Materials to be cleared away before the *11th January*, 1887.

after which date materials not cleared away *to be forfeited*—and "purchaser's right of access to the ground shall *absolutely cease*." (9) On non-compliance by purchaser, the contract to be annulled, and price absolutely forfeited to the vendor. The plaintiff, by his agent, bought at £565, and signed the contract, subject to the conditions of sale, "which I agree to abide by in every respect," and also, by his agent, deposited £100, and made default; and, on the 17th December, 1887—11 months after the sale—the vendor terminated the contract—"the agreement for the purchase of the building materials must be considered at an end"—and returned the £100 which had been paid as a deposit, and excluded the purchaser from the premises and from the removal of the building materials. The plaintiff then commenced the action, for specific performance and for damages—and failed. The learned Judge (Chitty) holds the contract to be for the sale of an interest in or concerning land within sec. 4 of the Statute of Frauds, and accordingly, from the absence of any sufficient description in the vendor's contract, avoided. He suggests (p. 517) that *Marshall* v. *Green*, 1 C.P.D. 35, "may be open hereafter to further consideration." He distinguishes the latter case as follows: " . . . when the case is examined as a whole it will be seen that the judgment turned upon this, that they considered that as the trees were to be cut down as soon as possible, and were almost immediately cut down, the thing sold was a chattel. . . . The true basis of his (Lord Justice Brett's) judgment is, I think, to be found in the same page, where he says: 'the contract is not for an interest in the land, but relates solely to the thing sold itself.'"

My brother Middleton, thinking that *Lavery* v. *Pursell* is to be followed and the mill regarded as land, holds that, according to the decisions in *Cameron* v. *Bradbury*, 9 Gr. 67, and *Gibbons* v. *Cozens*, 29 O.R. 536, the vendor by reselling has precluded himself from afterwards proceeding upon his judgment for the balance of his claim.

In *Marshall* v. *Green*, 1 C.P.D. 35, it was held that a sale of growing timber, to be taken away as soon as possible by the purchaser, is not a contract of sale of land, or any interest therein, within the 4th section of the Statute of Frauds. Lord Coleridge,

ONT.

S. C.

MCPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Falconbridge, C.J.K.B.

C.J., says, at p. 39: "I find the following statement of the law with regard to this subject, which must be taken to have received the sanction of that learned Judge, Sir Edward Vaughan Williams, in the notes in the last edition of Williams' Saunders upon the case of *Duppa* v. *Mayo*,* p. 395: 'The principle of these decisions appear to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for the goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or *fructus industriales*, etc., the corn and other growth of the earth which are produced not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods.' "

Brett, J., says, at p. 42: "Then there comes the class of cases where the purchaser is to take the thing away himself. In such a case where the things are *fructus industriales*, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section. But if the thing, not being *fructus industrialis*, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive

*(1670) 1 Saund. 275*d*.

no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself."

The only thing sold or intended to be sold in this case was the saw-mill, and the contract is manifest from the agreement to give the chattel mortgage on the saw-mill when moved to the limits. See *Kauri Timber Co.* v. *Commissioner of Taxes*, [1913] A.C. 771, approving the principle, and accepting the note in Saunders, cited in *Marshall* v. *Green*.

In *Walton* v. *Jarvis*, 13 U.C.R. 616, the goods in question—an engine and boiler—had been in a saw-mill which was burned down, and remained there, set in brick and bolted to timbers let into the ground. *Per* Robinson, C.J. (p. 619): "Then it comes to be considered whether, while the things stood there attached to the freehold, it was competent to Fergusson, the owner of the fee, to make a verbal sale of them, or whether the fourth section of the Statute of Frauds would apply. My present impression is, that the fourth section of the Statute of Frauds does not apply to anything of this nature—affixed to the soil, but deriving no nourishment from it, like trees or grass growing; but the sale of such things so situated would in effect amount to nothing more, while they continued so attached, than a license to enter upon the land and detach them from it."

Halsbury, Laws of England, vol. 25, p. 207, para. 357: "Where by the terms of the contract the goods are to be taken by the buyer from the seller's land or premises, the contract of sale by implication confers on the buyer a license by the seller to the buyer to enter upon the land or premises to remove the goods. Such license is irrevocable, at any rate as regards any part of the goods, the property in which has passed to the buyer." Chalmers' Sale of Goods Act, 7th ed., p. 142: " 'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements [industrial growing crops], and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

The Sale of Goods Act is not in force here, but the underlying principle is thus indicated.

ONT.

S. C.

MCPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Falconbridge, C.J.K.B.

Applying these standards, I am of the opinion that this is not a contract for the sale of land, and that the resale by the plaintiff McPherson does not prevent the further enforcement of the judgment.

The rights of the unpaid seller against the goods are discussed in Halsbury, vol. 25, p. 239, pars. 421-2; p. 263, pars. 460-1.

In *Page* v. *Cowasjee Eduljer* (1866), L.R. 1 P.C. 127, Lord Chelmesford, delivering the judgment of the Court, says, at p. 145: "The authorities are uniform on this point, that if before actual delivery the vendor resells the property while the purchaser is in default, the resale will not authorise the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due."

See Blackburn on Sale, 3rd ed., p. 481; at p. 482: "The precise extent of the seller's right between those limits is very much a matter of conjecture. It would seem that, viewing it as a practical question, the most convenient doctrine would be to consider the seller as entitled in all cases to hold the goods as a security for the price, with a power of resale to be exercised, in case the delay of payment was unreasonably long, in such a manner as might be fair and reasonable under all the circumstances. If the resale was conducted by the seller in a fair and reasonable manner, the original buyer who was in default would have no right to complain; if the resale produced a sum greater than the unpaid portion of the price, the buyer would be entitled to the surplus; if there was a deficiency, he would still remain indebted to the seller for that amount. If the buyer, previously to the resale, tendered all that was due, he would be entitled to consider the resale as altogether tortious, and to maintain trover against the seller; but if he did not make that tender his remedy for an abuse of the power of sale would be by an action for that abuse, and not by an action of trover."

If the plaintiff McPherson has been guilty of any abuse of the power of resale, the defendants would then have their remedy by action for such abuse. My recollection of the evidence at the trial of the original action before me is, that McGuire refused to take the mill; but that is not, I think, material.

ONT.

S. C.

MCPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Falconbridge, C.J.K.B.

Latchford, J.

The judgment should be reversed and the amount increased by the addition of the two sums of $2,500 and interest, and the cross-appeal dismissed with costs—no fault can be found with the learned trial Judge's conclusion as to this.

A calculation and statement has been handed in by Mr. Laidlaw since the argument. Counsel may attend before one of the Judges of this Division to settle the judgment.

Costs of the issue and motion to be paid by the United States Fidelity and Guaranty Company.

LATCHFORD, J.:—The main question upon this appeal is whether the plaintiff McPherson, after selling the saw-mill to McGuire & Co. and Devine, obtaining judgments against them for part of the price, and then reselling the mill, can still enforce his judgments otherwise than for costs.

I have had the advantage of reading the careful opinion of my Lord the Chief Justice of the King's Bench, and concur in his judgment that the contract for the sale of the mill to McGuire was not a contract for the sale of an interest in land.

Nothing in the contracts between the parties indicated that any interest in land was the subject-matter of the sale.

In the agreement of the 3rd August, 1907, McGuire & Co. agreed with McPherson to purchase from him "the McLean saw-mill and machinery, as it stands to-day, at the sum of $7,500, to be delivered . . . at the end of the present season of sawing."

This contract, so far as it relates to the saw-mill, appears not to have been carried out. In April, 1908, the same parties and one Andrew Devine signed an agreement in which McGuire & Co. agreed to pay McPherson $7,000 for the saw-mill, secured by a mortgage in the usual form, at the time of the delivery of the mill, which is to be insured and kept insured for the benefit of the vendor "against loss by fire. . . . McPherson, having insured the mill since the date of the agreement on the 3rd August, 1907, is to be allowed to have the use of the saw-mill during the present season, and shall keep it in proper repair."

In their defence to the two actions in which McPherson recovered judgment, McGuire & Co., Annie McGuire, and Devine

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Latchford, J.

make no pretence that the saw-mill is regarded as anything more than a building. The 300 acres which McPherson owned nearby, part of which was used as a piling-ground, is not referred to. McGuire says he thought he could use the piling-ground if he wanted it: evidence, p. 19. "There was no discussion about the land:" p. 17. But that he was to move the mill is quite clear from his evidence: p. 19. McPherson said he understood McGuire was to remove the mill to the timber limits. Had there been any intention in the minds of the parties to deal with anything more than a saw-mill of a type quite common in Northern Ontario, which may be moved from place to place as exigencies require, there would necessarily have been some reference to the lands that were to pass with it. When ultimately the mill was resold by McPherson it was in fact moved off McPherson's lands, and the 300-acre lot was sold to a different purchaser.

If the sale to McGuire & Co. and Devine had been a sale of an interest in land, McPherson would be unable to enforce his judgment except for costs.

In *Jackson* v. *Scott*, 1 O.L.R. 488, Maclennan, J.A., said (p. 493): "As decided in *Cameron* v. *Bradbury*, 9 Gr. 67, the effect of rescission, after a judgment recovered for the purchase-money, or part of it, is that the obligation to pay the purchase-money has been terminated, and so to that extent the judgment cannot be enforced. It is still good at law, but equity will restrain its enforcement, on the ground that, having taken back the land, the vendor ought not to be permitted to recover any more of the purchase-money. That principle, however, does not apply to costs." On the same page, Moss, J.A., after referring to the notice of rescission given by the plaintiffs while their judgment was in force but unpaid, says: 'The plaintiffs could no longer seek to enforce their judgment to any extent beyond recovery of the costs. The judgment would not be set aside and vacated and matters brought back to the same position as if it had never existed, *but it would be deemed satisfied*, except as to costs, so that thereafter in any proceeding taken to enforce it the defendant could set up the rescission as a defence, as in *Cameron* v. *Bradbury*, 9 Gr. 67; *Arnold* v. *Playter* (1892), 22 O.R. 608; and *Fraser* v. *Ryan*, 24 A.R. 441. Or, probably, it

would be open to the defendant, offering proper terms as to costs and otherwise, to move to stay perpetually all further proceedings upon it."

In *Gibbons* v. *Cozens*, 29 O.R. 356, vendors, who had recovered judgment for a balance of purchase-money, gave notice subsequently of rescission, and brought an action for the recovery of the land. It was held that, while their judgment did not affect their right to terminate the contract, "they must of course provide in the judgment that no further proceedings are to be taken to recover the amount of the judgment for the purchase-money unpaid."

To a similar effect is the recent case of *H. H. Vivian Co. Limited* v. *Clergue*, 20 D.L.R. 660, 32 O.L.R. 200.

Nor is the law different in the case of a sale of chattels where the right of resale is expressly reserved to the vendor: *McEntire* v. *Crossley Brothers*, [1895] A.C. 457, 464; *Sawyer* v. *Pringle* (1891), 18 A.R. 218; *Arnold* v. *Playter*, 22 O.R. 608; *Utterson Lumber Co.* v. *H. W. Petrie Limited* (1908), 17 O.L.R. 570.

Where, however, such a right is not reserved, a resale by the vendor on default does not rescind the original sale. The leading distinction is that in such case the vendor in reselling is dealing with property which is no longer his, but his vendee's: Osler, J.A., in *Sawyer* v. *Pringle*, 18 A.R. at p. 230. Benjamin on Sale, 7th ed. (Am.), p. 824, states the law to the same effect, adding that the vendor may refuse to give credit for the proceeds of the resale and claim the whole price, leaving the buyer to a counterclaim for damages for the resale.

The unpaid vendor has a special property in the chattel, analogous to that of a pawnee. To resell the goods on default is, however, a breach of his contract for which the actual damage suffered may be recovered against him.

I, therefore, am of opinion that the judgment appealed from should be set aside so far as it declares that the execution upon the judgments for the instalments on the mill should be withdrawn. The appellants should have their costs of the interpleader issue. In all other respects I would affirm the judgment. The respondents should have the costs of this appeal.

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Hodgins, J.A.

HODGINS, J.A.:—This action is on a bond given by the respondent company to the appellants, conditioned to pay the sum of $10,000, as and for the price and value of logs seized by the sheriff, as mentioned in the bond, or any lesser sum in pursuance of the order of the Court or a Judge to be made in the matter of the interpleader in which the bond was given. The interpleader having been finally decided in favour of the appellants, they sue upon the bond, and the defence now raised is contained in paragraphs 12, 13, and 14 of the statement of defence in this action. They are as follows:—

"12. The plaintiff McPherson never tendered or delivered to the said A. McGuire & Co., Annie McGuire, and Andrew Devine, or any of them, a conveyance of the said saw-mill, and never gave the said parties or any of them possession thereof, but remained in possession thereof up to and including the 19th day of November, 1912.

"13. After the 19th day of November, 1912, the plaintiff McPherson dismantled the said saw-mill and took and carried away the machinery and the building and sold and disposed of the same, and, while the above proceedings were pending, sold and disposed of the land forming the site of the said mill, and received the proceeds thereof, and the plaintiff Allan McPherson is not now in a position to deliver the said mill and machinery or convey the said site thereof to the said A. McGuire & Co., Annie McGuire, and Andrew Devine, or any of them.

"14. The defendant the United States Fidelity and Guaranty Company says that, by reason of the sale and disposition of the said mill and mill-site, or either of them, the plaintiff McPherson is not now entitled to enforce the said executions, or any of them, or any of the said costs of obtaining judgment for the amount thereof, and that, by the acts of the plaintiff McPherson, his said judgments, and each and all of them, have been satisfied, and that the plaintiff McPherson is not now entitled to proceed to enforce the said executions, or any of them, or to enforce payment of the bond in question in this action, given for the value of the saw-logs seized as aforesaid in executing the writs of *fieri facias* issued to enforce the payment of the said judgment. The seizure in question was not made at the instance or under the execution of the plaintiff Booth."

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Hodgins, J.A.

An issue to determine the amount due the appellant McPherson by McGuire *et al.* upon his executions having been directed, it was tried with this action.

The documentary evidence regarding the sale of the saw-mill in question is as follows:—

On the 3rd August, 1907, Allan McPherson and A. McGuire & Co. made an agreement for the purpose of winding up their dealings and transactions, they having been engaged in the buying and selling of timber limits and logs, and the manufacture and sale of lumber under certain agreements.

This agreement dealt with the various timber limits, and provided what should be done with them or with the shares of the parties therein, in each case. Clause 10 is as follows: "A. McGuire & Co. agree to buy the McLean saw-mill and machinery, as it stands to-day, at the sum of $7,500, to be delivered in as good state and condition as at the present, at the end of the present season of sawing." Then follows clause 11: "All the said accounts to be taken together as a series of dealings and transactions between the parties, and the final balances adjusted and settled in accordance therewith."

On the 8th April, 1908, another agreement was come to between the same parties and Andrew Devine, in which it is stated as follows:—

Clause 2: "The accounts of the dealings and transactions under the said agreement of 3rd August, 1907, have been examined and settled, and the balance payable by A. McGuire & Co. to Allan McPherson has been fixed at the sum of $1,812.81, over and above and in addition to the price of the saw-mill hereinafter mentioned."

Clause 4: "And A. McGuire & Co. and Andrew Devine, for themselves and each of them for herself and himself jointly and severally, covenant, promise, and agree with Allan McPherson, his executors, administrators, and assigns: (2) To pay the sum of $7,500, the price of the saw-mill, in three equal annual instalments of $2,500 each, with interest at 6 per cent. per annum on unpaid principal money, payable with each instalment. The first instalment and interest to be paid in one year from this

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Hodgins, J.A.

date, and the said principal money and interest to be secured by a mortgage in the usual form, at the time of the delivery of the saw-mill."

Clause 6: "And it is understood and agreed that the saw-mill shall be insured and kept insured by A. McGuire & Co. and Andrew Devine against loss by fire after the expiration of the present policy for the benefit and protection of Allan McPherson, to an amount equal to the balance of the price payable to him from time to time; and A. McGuire & Co. and Andrew Devine shall pay the premiums and assign the policy and do all such acts and things as may be necessary to give to Allan McPherson the usual protection of a fire insurance policy. Allan McPherson, having insured the mill since the date of the agreement of 3rd August, 1907, and waived any claim for premiums therefor, is to be allowed to have the use of the saw-mill during the present season, and shall keep it in proper repair; such use to cease on 30 days' notice after the 1st day of June next."

The meaning of the word "saw-mill," though probably not ambiguous in itself, is open to explanation if it is doubtful whether it was intended to include the site. In consequence, evidence at the trial was admitted on the subject, and on the question of whether there was an agreement to remove it. McGuire says: "Simply purchased the McLean mill; that was all that was mentioned; of course to operate the mill you would have to have land with it there. . . . The operating of the mill, we discussed about moving it, but I abandoned that very shortly because of the freight rates charged on the road (the Temiskaming and Ontario Railway), and it would not pay to move it up there. . . . There was no discussion about the land, my Lord—it was simply the mill—and the land was not discussed by either party that I remember of; but to manufacture lumber there, you could not manufacture it without the land. . . . Q. When you started, at the beginning you thought of moving the mill up to the limits? A. That was suggested. Q. Did you not think of doing it seriously? A. Yes, I did; that is, if the mill was left in the agreement. . . . Q. Was there any arrangement between you and McPherson; was there any bargain with you that you should move the mill or he should move

it off the site it was on? A. No, there was not anything like that, that ever I remember of; there was not much said about moving the mill; it was simply, I bought the mill, and we thought it might be better to move it up there. It was not long until we found out it would not pay to move it."

McPherson says: "The intention was to move it to cut these limits" (*i.e.*, the Bryce & Beauchamp limits, which under the agreement McGuire was acquiring) . . . "Yes, that is the idea I had . . . Yes, that is the way I understood it; it was understood at the time he was to remove it next spring. . . . It was understood he was to move it because he was getting these limits, and there was no mill up there. . . . I bought the 300 acres with it. Q. That included the mill site? A. Yes, it was on the 300 acres."

In his examination for discovery McPherson says:—

"35. Q. And judgment in that case of the Privy Council was delivered about the 1st of November, 1912? A. Yes.

"36. Q. Up to this time you had been in possession of the McLean saw-mill? A. Yes.

"37. Q. And had you been operating it? A. No, not after the term of our agreement.

"38. Q. The agreement gave you the right to operate it until the 1st day of June, 1909? A. Yes.

"39. Q. And the operation of the mill ceased at that date? A. Yes, it ceased in June, 1909.

"40. Q. And thereafter the mill was idle? A. Yes.

"41. Q. I understand that you sold the site of the mill? A. Yes.

"42. Q. When did you sell that? A. On the 23rd January, 1912. . . .

"46. Q. But you only sold the mill-site? A. No, I sold the whole 300 acres, including the mill-site.

"47. Q. For $3,000. A. Yes.

"48. Q. And you have paid for that site? A. Yes.

"49. Q. The mill then was standing on the site after you sold the site? A. Yes.

"50. Q. What did you do with the mill? A. I left it there.

"51. Q. How long? A. I sold it again in January, 1913.

ONT.

S. C.

MCPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Hodgins, J.A.

"52. Q. To whom did you sell it? A. J. M. Plaunt—he was agent for the Harris Tie and Timber Company of Ottawa. . . .

"56. Q. How much did you get for the mill? A. $1,750.

"57. Q. And has that been paid yet? A. Yes.

"58. Q. Where did you deliver the mill to him? A. Just where it was, he took it where it was.

"61. Q. He took it away himself? A. Yes.

"62. Q. And he took away all the machinery? A. Yes.

"63. Q. And all the timber of the mill? A. Yes."

From the evidence I should infer that the mill alone, and not as well the land on which it stood, was the subject of sale. But I do not find any concluded agreement that it was to be removed, or when. The time of delivery is stated, and then postponed by the second contract. Neither party deposes to any oral bargain, but rather to intention and understanding, both indefinite. It cannot be said that the written agreement provides for severance at once nor at a later date, and but for the loose understanding it might well be that the mill and land went together.

The first agreement provides for the retention by the appellant of the mill till the end of the then sawing season, when it is to be "delivered in as good state and condition as at present." McGuire says that very shortly after the sale he abandoned the idea of moving it, and this probably accounts for the dividing of the purchase-money into three instalments, and the provision for the giving of a mortgage when the mill was "delivered," and its user meantime by the applicant.

It is argued that this agreement must be treated as the sale of a chattel; and that, as the purchaser made default while the chattel remained in the vendor's possession, the latter had a right to sell it and at the same time to recover the unpaid price, or damages equal to the unpaid price. On the other hand, it is contended that the transaction was in regard to an interest in land, and that the subsequent sale by the vendor of the thing sold disabled him from enforcing his judgments, on the principle recently applied in this Court in *H. H. Vivian Co. Limited* v. *Clergue*, 20 D.L.R. 660, 32 O.L.R. 200.

The rule allowing resale by the vendor, in case of chattels,

depends upon the passing of the property to the vendee. The resale is said not to affect the contract, because it has been executed—the vendor having accepted the promise of payment in place of payment itself. Hence the resale is a tortious act, committed against the chattel of the vendee, and only gives rise to an action by him for damages.

While the subject of the sale was the mill alone, it cannot be said that, on the evidence, there is any definite time for severance other than at the end of the season, if delivery means actual removal. It does not necessarily do so. But there is certainly lacking that element in the bargain spoken of by Lord Abinger in *Rodwell* v. *Phillips* (1842), 9 M. & W. 501, at p. 505, namely, that the nature of the contract is such that it must be taken to have been the same as if the parties had contracted for the mill already detached.

The evidence is that this mill is a pretty large one, a stationary one, with a frame structure built solidly there with three boilers and a large engine. This is McGuire's description. The appellant describes it as larger than a portable mill, but easily moved, but he does not contradict McGuire in the details given. The user of the mill *in situ* is provided for, and was continued for a year and three quarters. It was to be kept in repair, and a mortgage, not described as a chattel mortgage, was to be given to secure the purchase-money. The mill was real estate at the time of sale, but there is nothing unusual in selling part of the real estate or an interest in it, such as the coal or minerals therein, or the surface earth, or the buildings upon the land. The agreement for sale of such an interest, which may sever it in the contemplation of the parties, or even its conveyance, does not in itself or necessarily make it a chattel. This is the effect of *Lavery* v. *Pursell*, 39 Ch.D. 508, and *Morgan* v. *Russell & Sons*, [1909] 1 K.B. 357. The support to the opposite theory, drawn from the case of standing timber sold with an agreement to remove, needs to be considered.

In *Marshall* v. *Green*, 1 C.P.D. 35, the trees were to be taken away "as soon as possible;" and Lord Coleridge, C.J., at p. 39, in dealing with the case, says: "Where . . . the parties agree that the thing sold shall be immediately withdrawn from

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Hodgins, J.A.

the land . . . the contract is for goods." Brett, J., says (p. 42): "If they are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section. But if the thing, not being *fructus industrialis*, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself."

In the case of *Kauri Timber Co.* v. *Commissioner of Taxes*, [1913] A.C. 771, Lord Shaw, in dealing with the interest acquired by the Kauri company under their purchases of timber, especially emphasises the necessity of immediate severance in deciding whether the interest is real estate or chattel property. After pointing out that there was no obligation upon the company immediately to cut down and remove the timber, or to do so at any specific date, he says (p. 776): "The case is thus removed, in fact, from any analogy with decisions quoted at their Lordships' Bar, in which a sale of standing timber was coupled with the duty of its instant removal from the ground." After quoting the note in Saunders' Reports, p. 277*c*, he remarks (p. 779): "For the present is a broad case of the natural products of the soil in timber—a crop requiring long-continued possession of land until maturity is reached, and the contract with regard to it in the present case raises none of the difficulties springing out of a covenant for immediate severance and realisation. The judgment of Brett, J., in *Marshall* v. *Green* distinguishes this broad case and properly accepts the note in Saunders' Reports which has just been cited."

What the learned Judge refers to is the passage quoted by him on p. 778—"but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods."

Having regard to the emphasis laid, in these two cases, on

immediate or instant removal, it is interesting to note the various views held in this Province on the effect of a similar contract.

Blake, V.-C., and Spragge, C. in *Summers* v. *Cook* (1880), 28 Gr. 179, hold an agreement for the sale of standing timber to be one for an interest in the land. Blake, V.-C., comments on *Marshall* v. *Green*, which, he says, turned on the condition that the trees were to be got away "as soon as possible," but thought it an unfortunate exception to an intelligible rule, that the question was left to depend upon the length of time for removal, and declined to extend the exception to a case where that time was a possible eight years. Proudfoot, V.-C., dissents from this view, deducing from *Marshall* v. *Green* the rule that, if the trees were purchased for timber as they stood, and not with the intention of allowing them to increase in size and become more valuable, they are to be considered as chattels.

In *McGregor* v. *McNeil* (1882), 32 U.C.C.P. 538, Galt, J., and Wilson, C.J., thought that a contract for pine timber, to be removed inside of two years, was a sale of chattels; while Osler, J., considered it unnecessary to decide the point.

In *Johnston* v. *Shortreed* (1886), 12 O.R. 633, Wilson, C.J., and Armour, J., decided that a sale of trees for the purpose of being cut and removed from the land, and with a condition that they were to be removed within ten years, was a sale of chattels, but that, if the condition was not performed, they revested in the owner of the land. O'Connor, J., did not dissent from the view that the contract was for a sale of chattel property.

In *McNeill* v. *Haines* (1889), 17 O.R. 479, Ferguson, J., and Boyd, C., follow *Summers* v. *Cook, supra;* the former pointing out the difficulty created by the conflicting cases I have mentioned. Proudfoot, J., though adhering to his former opinion expressed in that case, adds that he is now in a hopeless minority.

In *Handy* v. *Carruthers* (1894), 25 O.R. 279, Street, J., states the general rule to be that a contract for the sale of standing timber which is not to be severed immediately is a sale of an interest in land; and, after commenting upon the previous decisions and *Lavery* v. *Pursell*, 39 Ch.D. 508, holds the contract in that case (removal after three years) to be an

ONT.

S. C.

MCPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Hodgins, J.A.

agreement for the sale of an interest in land. He agreed with Blake, V.-C., in *Summers* v. *Cook*, remarking that it is difficult to see why, if a provision for the removal in two years makes the trees chattels, a condition for ten years should leave them as an interest in land.

In *Ford* v. *Hodgson* (1902), 3 O.L.R. 526, an agreement in writing for the sale of timber removable within three years was held to be a contract regarding an interest in land, by Falconbridge, C.J.Q.B., and by a Divisional Court consisting of Boyd, C., and Ferguson, J.

In *Beatty* v. *Mathewson* (1908), 40 S.C.R. 557, Idington, J., who delivered the judgment in which Girouard, J., agreed (Maclennan, J., concurring in dismissal for the reasons given by the Ontario Court of Appeal), speaks of the grant of timber trees there in question as an instrument relating to what has been held to be an interest in land; while Duff and Davies, JJ., treat it as a grant of land. In the Court below, *Mathewson* v. *Beatty* (1907), 15 O.L.R. 557, Meredith, J.A., who dissented, points out the fact that the trees were not bought for early removal.

It appears from these cases that the decision in *Marshall* v. *Green* has been considerably extended in some instances, if that case is to be treated as dependent upon immediate or instant removal, where trees are growing, or upon the process of vegetation being over. It is to be observed that in *Summers* v. *Cook*, *supra*, the trial Judge found that the timber was to be cut and used "as soon as possible," although the contract gave a year for removal. If the decision in *Marshall* v. *Green* is to be treated as it seems to have been in the *Kauri* case, there would appear to be justification for the comments upon decisions professing to be based on it, in some of the cases I have mentioned. I think the weight of opinion is in favour of restricting the effect of *Marshall* v. *Green* to cases of immediate removal; and, in view of the conflict, it is open to this Court to follow the reasoning in *Lavery* v. *Pursell* in preference to that in *Marshall* v. *Green*, if the views of Mr. Justice Chitty commend themselves to it.

The case at bar seems more nearly to resemble one of the

instances put in the note to Williams' Saunders as given in *Marshall* v. *Green*, namely, where the subject-matter of the sale was intended to remain on the land for the advantage of the purchaser. The mill was undoubtedly to remain on the land "until the end of the present season of sawing." That was for the advantage not only of McPherson, but of McGuire as well; because, while being used meanwhile, it was to remain, if McPherson's evidence be accepted, until it was wanted for the Bryce and Beauchamp limits. But, at all events, it was to remain for a time; and, if it was McGuire's property, that was a benefit to him until he wanted to take delivery. The use of it by McPherson was by permission of McGuire, who presumably got or should have got consideration for that user in the agreement; so that the feature of immediate severance is replaced by that of retention, user by permission, and later delivery in good shape notwithstanding the sawing. The subsequent agreement emphasises in many ways this distinction. The use of the words "to be delivered in as good state and condition as at present" indicates that McGuire was to enter and inspect and remove, if indeed anything further is required to explain "delivery" than the words "as it stands to-day," which give the right of entry and inspection then, and also later, to see if the condition had been fulfilled.

In *Marshall* v. *Green*, the fact that the buyer derived no benefit from the land is made by Brett, J., to depend on the fact that the trees were to be removed immediately; and Grove, J., states the test as being whether there is real benefit or merely warehousing. Obviously here the mill was not warehoused—*i.e.*, detached and stored—it was to be used for sawing, and needed the support of the land to which it remained attached.

In *Lavery* v. *Pursell*, the fact that the thing sold was in point of fact then realty, that the right to go in and pull down, though temporary only, was a qualified possession "of the land, tenements, and hereditaments, certainly of the house itself," and that the intention of the parties could not change the nature of the property, form the basis of the decision, and seem to me to include elements entering into this case.

It may be noted that in *Walton* v. *Jarvis*, 13 U.C.R. 616,

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Hodgins, J.A.

Robinson, C.J., speaking for the Court, does not treat the effect of the verbal contract for the sale of the engine and boiler as making them chattels, which description he gives there only upon actual severance. I do not see that the definition in the English Sale of Goods Act, in sec. 62, helps matters. It is not in force here, and cannot change the legal nature of the thing dealt with under a contract in Ontario.

If then the property sold to McGuire is to be treated as real estate or an interest in land, the effect of the sale would be to rescind the contract, thus terminating the obligation to pay the purchase-money, and so the judgments, so far as they were recovered for the instalments of the purchase-money, cannot be enforced: *Jackson* v. *Scott*, 1 O.L.R. 488.

If the appellant McPherson had treated McGuire's default in payment as a repudiation of the whole contract, then he could have resold or done as he liked with the mill, and have sued McGuire for damages, which would have been the difference between the agreed price and that realised by the resale, or the value of the mill as it stood when the contract was repudiated: *Noble* v. *Edwardes* (1877), 5 Ch.D. 378. Instead of doing this, he held McGuire to the contract, sued for the purchase-money, and was endeavouring to enforce his judgments therefor at the time he resold the mill.

If the mill is a chattel, then it may be that the appellant McPherson could not enforce his present judgments unless he could shew that the property had passed to McGuire, and that his resale was merely a tortious act. I am not satisfied, in view of the terms of the agreements providing for delivery and for user and repairs to be done by the appellant McPherson before delivery, that the property in the mill had completely passed, but it is unnecessary to discuss this question, in view of the opinion I have formed as to the effect of the contract in the present case.

Upon the cross-appeal, *i.e.*, as to the additional executions, there is nothing to be added to the reasons given by the learned trial Judge for admitting them to share.

I think the plaintiffs' appeal should be dismissed with costs, and the cross-appeal with costs.

Kelly, J.

KELLY, J.:—The important point in issue in this appeal is, whether the sale of the saw-mill and machinery by the plain-

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Kelly, J.

tiff McPherson to McGuire & Co., in respect of the recovery of a part of the sale-price of which the appellants have sought to recover on a bond given by the defendant company, was a sale of land or of an interest in land. The matter might perhaps be better stated by saying that the real question in issue is, did the appellant McPherson, by reason of his having sold the saw-mill to a third party, preclude himself from recovering the balance of the sale-price on the earlier sale made or agreed to be made to McGuire & Co.?

The difficulty which presents itself is to determine, on a proper interpretation of the documents and on the evidence of what took place, what was the real character of the sale. In a number of cases in which the question now before us, with variations in the facts, has been considered, the Courts have expressed themselves as not being satisfied with just what conditions are necessary to draw a clear distinction between what constitutes a sale of an interest in land, and what amounts to a sale of chattels or of a chattel interest.

Prior to the agreement presently mentioned, McPherson and A. McGuire & Co. had been engaged in the buying and selling of timber limits and logs, and in the manufacture and sale of timber. The inception of the transaction which gave rise to this action was on the 3rd August, 1907, when a written agreement was entered into between them dealing with many matters, the one now of importance being embodied in clause 10 as follows: "A. McGuire & Co. agree to buy the McLean saw-mill and machinery, as it stands to-day, at the sum of $7,500, to be delivered in as good state and condition as at the present, at the end of the present season of sawing."

The mill then stood upon lands which formed a part of a parcel comprising about 300 acres.

On the 8th April, 1908, nothing having been paid on the purchase-price, an agreement was made between these same parties and one Devine, whereby A. McGuire & Co. sold and transferred to Devine an undivided half share and interest "of the estate, right, title and interest of A. McGuire & Co. under the said agreement of 3rd August, 1907," and A. McGuire & Co. and Devine agreed with McPherson, amongst other things, "to

ONT.

S. C.

MCPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Kelly, J.

pay the sum of $7,500, the price of the saw-mill, in three equal annual instalments of $2,500 each, with interest at 6 per cent. per annum on unpaid principal money, payable with each instalment. The first instalment and interest to be paid in one year from this date, and the said principal money and interest to be secured by mortgage in the usual form, at the time of the delivery of the saw-mill."

This agreement contained also this provision: "And it is understood and agreed that the saw-mill shall be insured and kept insured by A. McGuire & Co. and Andrew Devine against loss by fire after the expiration of the present policy for the benefit and protection of Allan McPherson, to an amount equal to the balance of the price payable to him from time to time; and A. McGuire & Co. and Andrew Devine shall pay the premiums and assign the policy and do all such acts and things as may be necessary to give to Allan McPherson the usual protection of a fire insurance policy. Allan McPherson, having insured the mill since the date of the agreement of 3rd August, 1907, and waived any claim for premiums therefor, is to be allowed to have the use of the saw-mill during the present season, and shall keep it in proper repair; such use to cease on 30 days' notice after the 1st day of June next."

The mill and machinery remained unmoved until January, 1913. In the meantime, McPherson had obtained two separate judgments for the first and second instalments of purchase-money respectively—the first judgment including also some other moneys—and attempted to realise by execution, by virtue of which the sheriff seized a quantity of saw-logs. These having been claimed by a third party, an interpleader issue followed, in which the bond of the respondents now sought to be realised upon was given as security. The interpleader issue was finally disposed of by the Privy Council, in favour of the present appellants, on the 19th November, 1912 (*McPherson* v. *Temiskuming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145).

In January, 1912, McPherson sold the 300 acres, including the mill-site, but not the mill itself, nor the machinery. The third instalment of purchase-money matured, and about $1,200 had become due for premiums on insurance on the mill and

machinery; McPherson, in January, 1913, sold the mill and machinery for $1,750.

According to McPherson's evidence, the mill was a stationary one: "It could be moved, too, very easily, but it was more of a stationary mill;" "larger than the ordinary mill." He says he continued in possession of it up to the time of the judgment of the Privy Council (November, 1912), and that he operated it until June, 1909, after which it was idle.

Cornelius McGuire, who acted for McGuire & Co., says it was a "frame, stationary mill, frame structure," which had been there for possibly three or four or five years, "a pretty large mill, frame structure, built solidly there," and "I think that there were three boilers in the mill and a large engine;" that he simply purchased the "Maclean mill," that was all that was mentioned; "of course, to operate the mill you would have to have land with it there." He adds that "we discussed about moving it," "but I abandoned that very shortly because the freight rates changed on the road, and it would not pay to move it up there" (referring to timber limits which he had acquired about 100 miles distant), "and then we thought we would bring the logs down, and he suggested and wanted me to bring the logs down, and manufacture them there." In answer to a question as to what use of the yard he had, or had he the right to use it, he said: "I had the right to it to manufacture anything I wanted there, and he says, 'Why not bring the logs down and manufacture them here?'" This evidently refers to a time subsequent to the making of the original agreement for sale. He also says that McPherson never told him he should move it.

As to the moving, and the purpose for which the mill and machinery were bought, McPherson says: "The intention was to move it to cut these limits" (the limits above referred to); but at no place does he say that there was an agreement to that effect, or that there was anything more than mere intention. Later on, when referring to the intention to remove, he adds, "that is the way he understood it;" "it was understood at the time that he" (McGuire) "was to remove it next spring;" while McGuire says: "I thought when I got it I could go on

ONT.

S. C.

MCPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Kelly, J.

and use it if I wanted it; there was nothing there to use it on, and he" (McPherson) "kept on using it himself."

The learned trial Judge thought that it was clear that the mill was purchased with the idea of removing it from the property and taking it to the timber limits, which were sold contemporaneously, and that it was not the intention of the parties that any land should pass. Admitting that for argument's sake to be so, there are still other considerations to be weighed in determining the matter. The line of demarcation between the two classes of cases is, as has been said, not easily drawn, particularly when there is the apparent vagueness of expression which characterised the dealings between these parties in important details. Coleridge, C.J., in *Marshall* v. *Green*, 1 C.P.D. 35, said (at p. 38) that the words used in the 4th section of the Statute of Frauds in reference to contracts for sale of lands, tenements, or hereditaments, or any interest in or concerning them, have given rise to a great deal of discussion, and that very high authorities have said that it is impossible to reconcile all the decisions on the subject; and he added that he despaired of laying down any rule which could stand the test of every conceivable case.

Most of the leading cases bearing upon the question treat of sales of trees or crops growing on the land, and in such cases it seems to have been recognised that what was stated by Sir E. V. Williams in his note to *Duppa* v. *Mayo*, at p. 395 of his notes to Saunders' Reports, has application. After stating there that the doctrine on the subject had been materially qualified, he proceeds to say that in respect to *fructus industriales* the true question is, whether, in order to effectuate the intention of the parties, it be necessary to give the buyer an interest in the land, or whether an easement of the right to enter the land for the purpose of harvesting and carrying them away is all that was intended to be granted to the buyer. He distinguishes such cases from those that treat of the natural product of the land, such as grass uncut, but which the purchaser is to cut, or growing underwood to be cut by the purchaser—not distinguishable from the land itself, in legal contemplation, until actual severance—in which case, he says, the purchaser takes

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Kelly, J.

an exclusive interest in the land before severance, and therefore the sale is of an interest in the land under the statute. But where the owner of trees growing on his land agrees while they are standing to sell the timber, to be cut by the vendor, at so much per foot, or even when the contract is for the sale of trees with a specific liberty to the purchaser to enter the land and cut them, the sale is of goods and not an interest in land.

In *Marshall* v. *Green*, *supra*, Brett, J., when referring to things not *fructus industriales*, expressed the view that the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining, in which case part of the subject-matter of the contract is the interest in land; but that, if the thing sold, not being *fructus industrialis*, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consquently the contract is not for an interest in the land, but relates solely to the thing sold itself. The importance which he attaches to immediate delivery emphasises the distinction between the two cases.

The facts in evidence in the present case more nearly approach those in *Lavery* v. *Pursell*, 39 Ch.D. 508, on which the learned trial Judge based his conclusions. There a contract was made on the 11th November, 1886, for the sale of the building material of a house—possession of the premises to be given the purchaser for the purpose only of taking down and removing the material—with a condition that the materials were to be taken down and cleared off the ground "on or before the 11th of January next, after which date any materials then not cleared will be deemed a trespass and become forfeited, and the purchaser's right of access to the ground shall absolutely cease" —the pulling down and removal to be done under the direction of the vendor's architects; the vendor reserving the right of access to the premises for himself and his surveyors and workmen. It was held by Chitty, J., that that constituted a contract for sale of an interest in or concerning the land. In arriving at his conclusion, he had before him and discussed fully the

ONT.

S. C.

McPHERSON v. UNITED STATES FIDELITY AND GUARANTY CO.

Kelly, J.

effect of the judgment in *Marshall* v. *Green*, and drew a clear distinction between the two classes of cases. He, too, attached importance to the question of possession, and as to whether, in the case of trees, they were to be severed as soon as possible; and he treated the house in the case before him as being a hereditament.

All these elements are material to be considered, and due weight should be given them in determining the present case.

The transaction starts out with an agreement for sale of a something which at least was an interest in land; an ordinary conveyance of the land on which it stood, without any special reference to the mill itself, would undoubtedly have passed the title in it to the grantee as attached to or forming part of the free hold. Something positive was, therefore, necessary to change its status and deprive it of the character of an interest in land, and make it a chattel or goods; and this would involve some act as to the effect of which there should be no doubt. Can it be said that what happened effected this material change? There was no express agreement for the time of severance or removal, if, indeed, such severance or removal was even contemplated; both the agreement of the 3rd August, 1907, and that of the 8th April, 1908, speak of delivery, but when or by what means they say not. By the earlier agreement the delivery was to be "at the end of the present season of sawing," but no time fixed. The later agreement mentions delivery only in saying that the principal and interest (the purchase-price) are "to be secured by a mortgage" (not expressly a chattel mortgage), "in the usual form, at the time of the delivery of the saw-mill;" and again no time for delivery is otherwise fixed. Nowhere is possession mentioned. Whatever the meaning of either of the contracting parties may have been as to removal, some change of intention evidently took place, and we find the vendor in charge of and using the mill on its original site down to June, 1909, and holding possession without interruption from the time of the contract until November, 1912, and, indeed, until he sold it in January, 1913—the other parties to the agreement not having had possession or use of it in the meantime.

I cannot reach the conclusion that the thing sold changes

its character as an interest in land to that of a chattel by the mere fact of an agreement being made such as we have here, when delivery is mentioned only in an indefinite way, when there is an absence of any provision for possession or use (other than that which it was agreed the vendor should have), or for removal, or that it was the duty of either party to take down, sever, or remove, and no time being definitely fixed for any of these things being done.

Treating what was the subject of the sale as an interest in land, as I feel bound to treat it, the vendor has, by selling, precluded himself from enforcing his judgment for the balance of the purchase-money: *Cameron* v. *Bradbury*, 9 Gr. 67; *Gibbons* v. *Cozens*, 29 O.R. 356; *H. H. Vivian Co. Limited* v. *Clergue*, 20 D.L.R. 660, 32 O.L.R. 200.

In the view that I have taken of the whole matter, both the appeal and the cross-appeal should be dismissed, with costs in each case. *Appeals dismissed with costs.*

NORTH-WEST THEATRE v. MacKINNON.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. May 15, 1915.

1. ASSIGNMENT FOR CREDITORS (§ III B 2—20)—POWERS OF ASSIGNEE—BURDENSOME PROPERTY—LEASE.

An official assignee under the Assignments Act, 1907, Alta., ch. 6, is not bound to accept a term of years to which the assignor was entitled under a lease at the date of the assignment for benefit of creditors, if it may be a charge instead of a benefit to the estate; the operation of the assignment in vesting the term in the assignee is suspended *quâ* the lease until he does some act signifying acceptance.

2. ASSIGNMENT FOR CREDITORS (§ V—42)—TAKING POSSESSION OF GOODS—EFFECT ON LEASE.

The fact that the official assignee for benefit of creditors put a man in possession of the stock in trade on premises leased to the assignor is not necessarily an acceptance of the lease by the assignee, and will *primâ facie* be held to be an entry for the purpose of taking possession of the goods rather than of the land.

Statement

APPEAL from the decision of Ives, J.

O. M. Biggar, K.C., for plaintiff, respondent.

J. F. Lymburn, for defendant, appellant.

The judgment of the Court was delivered by

Beck, J.

BECK, J.:—This is an appeal from the decision of Ives, J., at the trial without a jury whereby he directed judgment to be entered for the plaintiff for $995 with costs. The plaintiff company, by instrument dated November 12, 1913, leased certain

ALTA.

S. C.

NORTH-WEST THEATRE v. MACKINNON.

Beck, J.

premises in Edmonton to one McLachlan, a jeweler, for the term of two years from November 15, 1913, at a monthly rental of $200. McLachlan occupied the premises till August 31, 1914, when he made an assignment for the benefit of his creditors in accordance with the Assignments Act (ch. 6, of 1907) to the defendant, an official assignee.

Sec. 6 of the Act says that such an assignment shall vest in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging at the time of the assignment to the assignor, except such as are by law exempt from seizure or sale under execution or other legal proceedings, subject, however, as regards lands to the provisions of the Land Titles Act.

The question involved in this case is whether the defendant became liable for the rent of the premises for the residue of the term from the date of the assignment, and the answer, it seems, depends upon the effect of the assignment and the conduct of the parties.

What took place immediately after the assignment is indicated by the following correspondence between Messrs. Griesbach, O'Connor & Co., solicitors acting for the plaintiffs, the landlord, and the defendant, the assignee:—

Edmonton, Alta., September 3rd, 1914.

Jas. A. MacKinnon, Esq., Official Assignee,
Tegler Block, Edmonton.

Re C. R. McLachlan.

Dear Sir,—Confirming our conversation with you this morning relative to the rental owing by McLachlan at the premises No. 626 First Street. If you will undertake as assignee in respect to the above estate to secure payment of our rental we will not go to the expense of formality of destraining on behalf of the McLachlan's lessors. Please let us hear from you by return mail. GRIESBACH, O'CONNOR & COMPANY.

Messrs. Griesbach, O'Connor & Co., Edmonton, September 5th, 1914.
Barristers, solicitors, Edmonton.

Re C. R. McLachlan.

Gentlemen,—This is to inform you that as assignee of the C. R. McLachlan estate I will guarantee your client's claim for rent for the premises No. 626 First Street as long as I continue to occupy the building. Trusting that this will be satisfactory, I am, Yours very truly,

(Sgd.) JAMES A. MACKINNON, Official Assignee.

In his evidence the defendant says, and there is no denial of it, as follows:—

Q. When did you first get in touch with the plaintiff company regarding the premises? A. A day or two after the assignment. Q. With whom did you get in touch? A. Mr. Goldman. (Mr. Goldman was a partner in

the firm of Messrs. Griesbach, O'Connor & Co. and a member of the plaintiff company, and personally acted as solicitor for the plaintiff company.) Q. What took place between you? A. Mr. Goldman told me he would have to distrain for rent in order to make his rent claim preferred and I undertook personally to pay the rent as long as the goods were left in the premises.

There was subsequent correspondence between the defendant and Mr. Sherry, chairman of the plaintiff company, as follows:—

Mr. Sherry, Edmonton, November 6th, 1914.

Short, Cross, Biggar, Sherry & Field,
Barristers, solicitors, Edmonton.

Re C. R. McLachlan, Edmonton.

Dear Mr. Sherry,—Please find enclosed my cheque for $600 rent for September, October and November for the premises at 626 First Street, formerly occupied by C. R. McLachlan. Kindly acknowledge receipt of this to me.

Yours very truly,
(Sgd.) JAMES A. MACKINNON, Official Assignee.

This was answered by Mr. Sherry on December 2 by the following letter:—

Edmonton, Alberta, Canada, 2nd December, 1914.

Jas. A. MacKinnon, Esq., Official Assignee,
Tegler Block, Edmonton.

Re C. R. McLachlan.

Dear Sir,—I duly received yours of the 6th of November last enclosing cheque in favour of the Northwest Theatres Limited, for $600 for September, October and November's rent of 626 First Street. I regret that I have so long delayed in acknowledging this remittance. As arranged the acceptance of this cheque is not to prejudice our rights in any way under the lease nor shall it operate to any extent as evidence of a monthly tenancy.

Yours truly,
(Sgd.) J. C. SHERRY.

To which the defendant replied as follows:—

Mr. Sherry, Edmonton, December, 4th, 1914.

Messrs. Short, Cross, Biggar, Sherry & Field,
Barrister, etc., Edmonton, Alberta.

Re C. R. McLachlan Estate.

Dear Sir,—I wish to acknowledge receipt of your letter of December 2nd, acknowledging receipt of rent payment up to November 30th.

I am not going to be responsible for any further rent in connection with the McLachlan estate, so I will be glad to have you take any steps that you think necessary to protect your interests.

Yours truly,
(Sgd.) JAMES A. MACKINNON, Official Assignee.

Mr. Sherry gave evidence as follows:—

Q. The arrangement set out in that letter was not made with you? (The letter of 5th September MacKinnon to Griesbach, O'Connor & Co.) A. No, it was not. . . . Q. Had you any conversation with Mr. MacKinnon along similar lines? A. Similar to what? Q. To the statement in that

ALTA.

S. C.

NORTH-WEST THEATRE v. MACKINNON.

Beck, J.

letter of Mr. MacKinnon? A. Yes, I had. Q. Do you remember when? A. Some time during the latter part of the month of September I think it was.

This terminated his evidence until he was called in rebuttal by way of answering the evidence of the defendant, who in this connection said as follows:—

Q. When did you first have a conversation with Mr. Sherry? A. I am not sure of the exact date, I think from memory it was towards the end of September. A. What was the nature of that conversation? A. Mr. Sherry called me in connection with the rent of the McLachlan premises; I told him as soon as we sold the goods we would pay the rent claim. Q. Did you explain to him exactly what you were doing with the estate? A. Yes, I did. Q. Did you make any arrangement with him at all regarding the premises other than the arrangement embodied in the letter? A. No.

The following was put in from the examination for discovery of Mr. Sherry:—

6. Q. Was there any agreement between you and Mr. MacKinnon that he was to take up the lease? A. No.

Mr. Field: I do not think that is a fair question, I think that is the whole point.

Mr. Lymburn: No, that is a question of fact, whether there was any agreement; if there is any liability it is a legal liability.

Mr. Field: All right, so long as that is understood.

11. Q. There never was any suggestion that Mr. MacKinnon was going to take up that lease unless and in so far as his accepting the assignment was concerned? A. I do not quite understand the question.

12. Q. (Reporter reads last question.)

A. Not excepting for the time that he was in there as tenant.

Mr. Lymburn: That is my case.

(Then Mr. Sherry gave in rebuttal evidence as follows).

Q. When you first spoke to Mr. MacKinnon when the question of distress came up was there anything said by you to him in regard to any claim being made with respect to the plaintiff's lease? A. Yes, I told Mr. MacKinnon I intended to hold him for the full balance of the lease, I told him that every time I spoke to him in connection with the rent.

The matter stood in this position at the time of the commencement of the action, December 18, 1914, which was an action to recover the whole of the rent for the residue of the term after crediting the $600 paid by the defendant for the rent for the months of September, October and November, 1914, that is $2,300 for the rent from December 1, 1914, to the 15th November, 1915. After the action the defendant agreed to the plaintiff company making a lease of the promises at a rental of $110 a month without prejudice to their respective rights beyond the reduction of the defendant's liability in the event of his being held liable.

This had the effect of reducing the $2,300 to $995, for which the learned trial Judge directed judgment for the plaintiff.

The first question obviously is what was the effect of the assignment in view of the provision of the Assignments Act already quoted.

In *Bourdillon* v. *Dalton*, Peake 238, 1 Esp. Ca. 223, which is not accessible, Lord Kenyon appears to have laid it down that an assignee in bankruptcy (independently of statutory enactment affecting the question) was not bound to take what, adopting an expression from the Roman Civil Law relating to succession, he called a *damnosa hæreditas, i.e.*, property which carried with it burdens greater than the benefits. (See *Copeland* v. *Stephens*, 1 B. & Ald. 593; *Turner* v. *Richardson* (1806), 7 East 335; *Cartwright* v. *Clover*, 2 Giff. at p. 627). *Turner* v. *Richardson, supra*, is a direct authority to the same effect, and goes to the further extent that the assignee may take time to make enquiries whether he ought or ought not to accept any particular property included in the assignment to him.

Copeland v. *Stephens, supra*, is to the like effect, though the case is not of value as a direct authority because a statute was in question there which by implication gave the assignees the right not to accept any particular property. 49 Geo. III., ch. 121, sec. 19:—

> In all cases in which . . . such person shall be entitled to any lease or agreement for a lease, and the assignees shall accept the same and the benefit therefrom, as part of the bankrupt's estate and effects.

All the later English cases are made to depend upon the precise words of the statute in question, in the particular case.

In *Lindsay* v. *Limbert* (1826), 2 C. & P. 526, it was held that an assignee under the Insolvent Debtors Act (1 Geo. IV., ch. 119) was entitled to a reasonable time in which to decide whether he will accept the lease or not.

In *Carter* v. *Warne* (1830), 4 Car. & P. 191, it was held that trustees under an assignment for the benefit of creditors are allowed a reasonable time to ascertain whether property held under a lease by the debtor can be made available for the benefit of creditors or not. In *How* v. *Bennett* (1835), 3 A. & E. 659; *Carter* v. *Warne, supra*, is discussed, the members of the Court failing to agree as to the value of the decision.

ALTA.

S. C.

NORTH-WEST THEATRE v. MACKINNON.

Beck, J.

The principle of the decisions in the cases of *Bourdillon* v. *Dalton, supra,* and *Copeland* v. *Stephens, supra,* is put thus in Bacon's Abridgment, vol. 1, tit. "Bankrupt," p. 519.

A term of years in the bankrupt passes under the bargain and sale to the assignees, but as the Commissioners' assignment *is to be construed according to the spirit and intent of the bankrupt laws, viz.,* that of providing for the payment of the creditors; the assignees are not bound to accept a term which may be a charge instead of a benefit to the estate and therefore *the operation of the assignment in vesting the term in the assignees is held to be suspended till they do some act signifying their acceptance of the bankrupt interest.*

Whether or not this reasoning applies to a voluntary assignment for the benefit of creditors to an assignee of the debtor's choice, as *Carter* v. *Warne, supra,* seems to hold, it does, I think, apply to an assignment under the Assignments Act made to an official assignee who cannot refuse to accept the assignment and who, if the assignment *per se* vests the lease in him even against his will, would be made personally liable for the rent for the whole residue of the term whether he has assets sufficient to meet it or not, unless he takes the course of assigning the lease to a man of straw so as to divest himself of the estate only by reason of his holding which he would be liable. It seems to me that it is not the purpose or intent of the Act to impose any such personal liability upon the official assignee in entire disregard of his consent to the vesting of the particular property. If this conclusion is correct then there remains only the question of fact whether what took place subsequently was an acceptance of the term by the defendant or not.

I think it was not. The defendant cannot, properly speaking, be said to have taken possession of the premises—at all events with any intention of subjecting himself to the terms of the lease. He had become assignee of the stock-in-trade which was on the premises. He put a man in possession of the stock, a reasonable act of expediency and one necessitating an entry on the premises, but an entry, *primâ facie,* for the purpose of taking possession of the goods rather than of the land. And what appears *primâ facie* to be the purpose and intent of the entry on the land is confirmed by what subsequently occurred.

There was practically immediate negotiation between the defendant and Mr. Goldman, then acting for the plaintiff com-

ALTA.

S. C.

NORTH-WEST THEATRE v. MACKINNON.

Beck, J.

pany; the defendant said in effect that if a distress for the rent then in arrear was not made he would be personally responsible for the rent so long as he occupied the premises—implying an intention not to assume a responsibility to any greater extent. On the strength of this assurance the distress was not made, and the defendant remained in possession for a time and he ultimately paid the rent for that period. The only reasonable inference is that Mr. Goldman assented to this; and that the defendant understood him to assent to it; and remained in in pursuance of that agreement. If an agreement was then arrived at, as seems clear upon the evidence, then what took place subsequently, when Mr. Sherry intervened and sought to take a different position on behalf of the plaintiff company, is of no importance.

For the reasons indicated I think the plaintiff company was not entitled to succeed in the action and the appeal should be allowed with costs and the plaintiff's action dismissed with costs.

Appeal allowed.

U.S. FIDELITY & GUARANTY CO. v. WEBER.

SASK.

S. C.

Saskatchewan Supreme Court, Brown, J. July 15, 1915.

1. PRINCIPAL AND SURETY (§ II—15)—RIGHTS AND REMEDIES OF SURETY—SHORTAGES—GOOD FAITH OF PRINCIPAL.

A surety is not entitled to recover from the principal for money paid out for shortages in pursuance of the terms of the bond not attributable to the principal's negligence, and where he otherwise faithfully performed his duties.

Statement

ACTION by surety against principal to recover for shortages paid under bond.

Harold F. Thomson, and *E. Laycock*, for plaintiffs.

Russell Hartney, for defendant.

Brown, J.

BROWN, J.:—The defendant, being about to enter the employ of the Saskatchewan Elevator Co. Ltd. (hereinafter called "the employer"), as grain-buyer for them at Revenue, was required to furnish a bond against shortages in cash, grain or other accounts while in their employ. On application of the defendant to the plaintiffs, they issued the bond aforesaid. This bond was given to the employer, and the defendant entered upon his duties in September, 1913, continuing same until May 11, 1914. During this time the defendant purchased on behalf

SASK.
S. C.
U.S.
FIDELITY CO. v. WEBER.
Brown, J.

of the employer a large quantity of grain, consisting of wheat, flax and oats, and from time to time shipped the same out to the employer's order. It appears that there was at the close of the season a shortage as follows: wheat, 422 bus., valued at $340.03; flax, 299 bus., valued at $374.93; oats, 130 bus., valued at $39.33, making a total value of $754.29.

This shortage was arrived at by charging the defendant with the total of the cash ticket and storage tickets issued by him at the Revenue elevator, and crediting him with the total amount as disclosed by the weighmasters' certificates issued at the terminal elevator at Fort William. The defendant during the said time also handled coal for the employer, and at the close of the season the plaintiffs contend there was a shortage in the coal account of 31,484 lbs., valued at $141.70. This was arrived at by charging the defendant with the total amount of coal which the defendant acknowledged receiving, and crediting him with the amount of his reported sales and with the balance found in the coal sheds at the termination of his employment. The bond given by the plaintiffs was amended so as to cover the defendant's agency as such seller of coal. The employer made a claim on the plaintiffs for the amount of this shortage in grain and coal, and some other items of expense which, in the view I take of the case, it is not necessary to refer to. The plaintiffs paid the amount so claimed, and bring this action to recover the same from the defendant. The defendant's defence is practically a denial of the allegations in the claim, and a statement that if there is any shortage it is no fault of his, as he accounted for all the grain and coal he received.

No evidence was offered at the trial that enables me to find, with any degree of certainty or satisfaction, how the shortage occurred. I am satisfied that the defendant was honest and faithful in the performance of all his duties, that so far as he was able he accounted to the employer for all the grain and coal he received, and that so far, at least, as the grain is concerned, it was not until July, 1914, when notified by letter, that he had any suspicion of a shortage at all.

Not being guilty of any wrongdoing, and there being no evidence of negligence against him, is the defendant liable for the amount paid by the plaintiff to the employer?

To answer this question we must look at the provisions of the bond and of the defendant's application for same. The liability of the plaintiff to the employer is determined by the provisions of the bond. So far as the grain is concerned, it provides that the plaintiffs shall be liable for shortages in the grain accounts of the defendant and other similar agents as follows:—

There shall be deducted from the total quantity of grain and dockage represented by tickets issued and reported by any or either of the employees at their respective elevators or warehouses during the currency of their bond hereunder, the amount of grain and dockage on hand, the quantity of screenings and dirt from such grain as has been cleaned at said elevators or warehouses, together with the amount of shipments based upon Government certificates as to weights of grain and dockage received at terminals where the same are obtainable, or in lieu thereof, the amount of such shipments to be based upon weights of such grain and dockage as shewn by the affidavit of the party actually weighing the same at such terminals; and if the result shews a deficit, and the shortage is not caused by the various exceptions hereunder, this proof of loss will be accepted as *primâ facie* evidence of the liability of the employee concerned and the company as surety. In case where screening and dirt are burned at an elevator, they shall be weighed before being burned and the weight reported daily to the employer.

The exceptions referred to in the aforesaid provision are as follows:—

Provided, however, that the company shall not be liable for the grading of grain, loss by heating, drying or leakage of cars or other damage, shortages caused by defective weighing apparatus or appliances; or for shortages in any elevator or elevators caused by the failure of any of the parties mentioned in said schedule to take dockage enough to make good their weights for grain tickets issued, as the employer hereby assumes the risk of its superintendents, travelling men and officers in giving instructions to its receiving agents as to the amount necessary to take to make good the amount of dockage at terminal points ,and the action of receiving agents in taking dockage, the loss by cleaning grain and the ordinary shrinkage arising from dust in handling of said grain in elevators.

And it is further agreed, that the company shall not be liable for errors, or carelessness in weighing of grain, nor for thefts of grain by persons other than those covered by this bond, nor for robbery or thefts of money from the persons so covered where proofs of such errors, carelessness, thefts or robbery are conclusive, as negligence is not covered under this bond.

It is hereby further agreed, that the company shall not be liable for any loss sustained by the employer through fire, mob violence, the act of God or the public enemy.

A number of suggestions were made at the trial as to how the shortage in the grain might be accounted for, namely, by

SASK.
S. C.
U.S. FIDELITY CO. v. WEBER.
Brown, J.

not allowing sufficient dockage at time of purchase, by defective scales at the intaking or Revenue elevator, by shrinkage or drying in the elevator, by leakage in cars while grain was being conveyed to terminal elevator, etc. Under the terms of the bond, as I interpret it, before there is *primâ facie* evidence of liability on the part of the plaintiffs there must not only be a deficit as disclosed by the elevator tickets and certificates, but it must also be shewn that the shortage is not caused by any of the various exceptions referred to. In this case there is no evidence that would exclude these exceptions as the cause of the shortage; on the contrary, the suggestion is to the very opposite effect. Nor was there any such evidence submitted to the plaintiffs before they made payment to the employer. The plaintiffs seem to have been content to make payment on mere proof, from an examination of the tickets and certificates, of a shortage.

There are special provisions as to the coal in an agreement which is attached to and is concurrent with the bond. The shortages are to be determined as follows:—

> There shall be deducted from the total amount of coal received by said employees during the currency of this bond, as established by the books and records of the employer, the amount of coal on hand, together with the total amount of sales by said employees, during said term and a proper allowance for shrinkage and waste; and if the result shews a deficit, and if the shortage is not caused by the exceptions hereunder, this proof of loss will be accepted as *primâ facie* evidence of the liability of the employee concerned and of the company as his surety.

There was no satisfactory explanation as to the cause of the shortage in coal, although I am inclined to the view that it could largely, if not altogether, be accounted for by shrinkage and waste. There was no evidence as to what the waste would be in handling such a large quantity of coal as was handled by the defendant, and although there was an allowance made for shrinkage in the coal left on hand, there was no evidence of what the shrinkage would be in the coal that was retailed or sold by the defendant. In my opinion, therefore, the plaintiffs have made payment to the employer, both as to grain and coal, in the absence of any evidence that would shew that they were liable.

The plaintiffs refer to and lay stress upon a provision con-

tained in the defendant's application for the bond which reads as follows:—

I hereby declare that all the above answers are true; and in consideration of the issue of the indemnity bond or security hereby applied for, and of any further or other bond or security hereafter issued by the said the United States Fidelity and Guaranty Co., in my behalf, in my present or any other position in this service, I hereby agree to protect and immediately indemnify the company against any loss, damage or expense it may sustain, or become liable for, in consequence of this or any such other bond or security granted in my behalf. It is understood by me that the scope of said bond or security hereby applied for is to make good all loss sustained by the employer by reason of shortages in my cash grain or other accounts. Grain and seed shortages to be determined by gross weight at terminals, based upon Government certificates, where the same are obtainable, or in lieu thereof upon the affidavit of the party actually weighing the grain at such terminals. I hereby agree that any proper evidence of payment by the said company, of any such loss, damage or expense, shall be conclusive evidence against me and my estate, of the fact and extent of my liability to the company under this agreement.

It is contended that, as the plaintiffs have made payment, and have furnished proper evidence of such payment, this is conclusive as against the defendant. The expression "such loss" referred to in the clause aforesaid has reference to "any loss, damage or expense it may sustain or become liable for in consequence of this or any such bond or security granted in my behalf." But the plaintiffs have not shewn that they sustained or became liable for any loss *in consequence* of the bond. In my opinion this provision should not be construed any more liberally in favour of the plaintiffs than the language used requires.

It was contended on behalf of the defendant that some of the terminal elevator certificates which were offered in evidence were not properly signed, and consequently could not be received. I am of opinion that there is some force in this objection, but in the view that I have taken of the case it is not necessary to decide the point. If this had been a material factor in the judgment, I would have allowed the plaintiffs to correct the certificates in this respect.

In the result, therefore, there will be judgment for the defendant with costs. *Judgment for defendant.*

ONT.

S. C.

REX EX REL. BOYCE v. ELLIS.

Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford, and Kelly, JJ. March 22, 1915.

1. APPEAL (§ I A—1)—RIGHT TO—MUNICIPAL ELECTIONS—FIATS—ORDERS OF COUNTY COURT.

There is no right of appeal, with or without leave, from an order of the County Court Judge dismissing a motion to set aside fiats granted by him under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, respecting the determination of the validity of an election to municipal offices.

Statement

APPEAL from an order of a County Court Judge.

C. A. Masten, K.C., for the appellant Porter, and *J. D. Bissett*, for appellants Ellis and Nelson.

J. T. White, for the relator, respondent.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B., concurred with Riddell, J.

Riddell, J.

RIDDELL, J.:—At the municipal election of the 4th January, 1915, the appellant Porter was declared elected mayor and the appellants Ellis and Nelson controllers of the city of Ottawa. On the 12th February, Boyce obtained from the Judge of the County Court of the County of Carleton fiats under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, to serve notices of motion for an order that they were not duly elected, etc.

Notices were served accordingly. The appellants Porter and Ellis and Nelson, on the 17th February, 1915, served notices of motion "for an order to set aside the fiat granted in this matter for the issue of the notice of motion and all proceedings founded thereon."

The motions came on before His Honour, and he refused to make the orders asked for, on the ground of want of power to make such orders; his written reasons concluding thus: "The motion must therefore be dismissed, on the ground of the absence of authority in me to grant it. Under these circumstances, it would, I think, be improper for me to express an opinion on the other questions raised on this motion. There will be no costs of the motion, but its disposition is without prejudice to any other application that the parties may be advised to make in reference to these proceedings, if it be determined that I have authority to entertain it. Anything that I can do to facilitate an appeal from this order will be done."

Subsequently, and on the 6th March, formal orders were made allowing the appellants here to appeal.

The appeals have now been argued and fall to be decided.

The main ground of appeal is based upon the provisions of secs. 161 (2) (as amended by 4 Geo. V. ch. 33, sec. 5), 162 (1), and 163 of the Municipal Act.

In the affidavit filed by the relator, under sec. 162 (1), he does not describe his interest, etc., except by reference to the proposed notice of motion—he says only that he "has an interest in the election as an elector."

The fiat is not in general terms, but it simply orders that the relator, upon filing the statutory recognizance, "be at liberty to serve the said notice of motion."

The contention is, that the interest of the relator in the election is not made to appear, as required by sec. 163.

Before the statute, one applying for an information in the nature of a *quo warranto* (which took the place of the ancient writ of *quo warranto*, long obsolete) was required to shew in his application that he was a person properly qualified to be a relator; and he could not subsequently supplement what he shewed on his application. "The rule is that at the time of moving you should give a good relator:" *Regina* v. *Thirlwin* (1864), 10 Jur. N.S. 206, 33 L.J.N.S.Q.B. 171, 9 L.T.N.S. 731.

In like manner, when the practice of granting a writ of summons in the nature of a *quo warranto* was introduced into our municipal system by the Act of 1849, 12 Viet. ch. 81, sec. 146, it was held that, when applying, the proposed relator must on his material establish his right to interpose—at least by alleging facts which would prove his status.

In 1851, the matter came up in *Regina ex rel. Shaw* v. *McKenzie*, 2 C.L. Ch. 36, 1 U.C.L.J. O.S. 50: it was not even suggested that the interest of the applicant need not appear on his material, but Draper, J., held (p. 44) that it was "enough if the interest claimed is substantially that required by the statute, though the precise term . . . is not used."

In *Regina ex rel. Bartliffe* v. *O'Reilly*, 8 U.C.R. 617, an objection was taken that the interest of the relator was not proved, but only alleged in his statement. The Court held that, while the affidavit did not verify the interest, the fact that

ONT.
S. C.
REX EX REL. BOYCE v. ELLIS.
Riddell, J.

"the particular interest had been declared in the statement and in the summons served on the party" was sufficient.

To understand this and similar cases, the Rules passed by the Judges in Michaelmas Term, 14 Vict., under the Act, must be looked at. They will be found in the first (1859) edition of Harrison's Municipal Manual at pp. 697 *sqq*. These provided that the material upon which the motion for a writ should be based should consist of: (1) a "statement" much the same as the present notice of motion; and (2) affidavits setting out "the facts and circumstances which shall support the application."

In *Regina ex rel. Pomeroy* v. *Watson*, 1 U.C.L.J. O.S. 48, Mackenzie, County Judge of Frontenac, held that the interest of the proposed relator need not appear in the affidavits—that it was sufficient if it appeared in the statement, following the *Shaw* case.

In *Regina ex rel. White* v. *Roach*, 18 U.C.R. 226, it was held that it must appear on the material that the relator had voted at the election. This case well illustrates the strictness with which the Rules and statutes have been interpreted. The original Act, by sec. 146, had enabled "a candidate or voter in any election" to apply; in 1858, 22 Vict. ch. 99, sec. 127, changed this to "any candidate at the election or any elector who gave or tendered his vote thereat." In the case in 18 U.C.R. the proposed relator had said that "he protested and voted against Roach's election," but not that he had voted *at the* election. The full Court of Queen's Bench held this insufficient. This case is conclusive of the point now under consideration.

Mr. (afterwards Chief) Justice Hagarty in *Regina ex rel. Ross* v. *Rastal* (1866), 2 U.C.L.J. N.S. 160, speaks of the relator establishing "his right to interpose;" and throughout the cases it is apparent that the relator must in his material establish (in the sense at least of stating facts which, if true, would establish) his right to interpose. The omission of such a statement was fatal, not an irregularity which could be amended: *Regina ex rel. Chauncey* v. *Billings*, 12 P.R. 404. Such a statement was a prerequisite to the granting of the fiat; and, if it were wanting, the fiat and all proceedings based upon it would be

set aside: See especially p. 407; *Regina ex rel. O'Reilly* v. *Charlton* (1874), 10 U.C.L.J. N.S. 105; *Regina ex rel. Percy* v. *Worth* (1893), 23 O.R. 688.

While in the Revised Statutes of 1887 the writ of summons in the nature of a *quo warranto* is still prescribed (R.S.O. 1887, ch. 184, sec. 188), the Judges, under the powers given them by sec. 208 of that Act, made (1888) Rules governing the practice, which substituted a notice of motion for the writ; and this practice has since prevailed, being recognised by statutes 51 Vict. ch. 2, sec. 4, 55 Vict. ch. 42, sec. 188, and subsequent legislation.

The Consolidated Rules of 1888, Nos. 1038 to 1044, substitute a notice of motion for a writ of summons, and direct that in the notice of motion the relator must set out (1) his name in full, (2) his occupation, (3) place of residence, (4) "the interest which he has in the election as candidate or voter," and (5) his grounds of objection. The "statement" directed by the Rules of Michaelmas Term, 14 Vict., must set "forth the interest which the relator has in the election as candidate or voter" and the grounds of objection—equivalent and almost *totidem verbis* with (4) and (5) of the requisites prescribed by Rule 1040. There is no propriety in holding that the "interest" directed by Rule 1040 is any different from that in the former Rule; it must establish a right to interpose. The provisions for the practice in this regard were in 1897 taken into the statutes and left out of the Rules, but there was no change in the effect, nor has there been any change since.

It should, therefore, be held that it is necessary to shew somewhere in the material before the Judge on granting a fiat that the relator has the right to interpose.

The statute, sec. 161 (2), as amended by 4 Geo. V. ch. 33, sec. 5, gives the right to interpose to (1) candidates and (2) electors who gave or tendered their vote. An elector as such has no right to interpose, and "an elector" is all this relator claims to be. While it may not be necessary to establish the status by affidavit (*Regina ex rel. Bartliffe* v. *O'Reilly*, 8 U.C.R. 617), it must appear somewhere in the material. I think, therefore, that the fiats were improperly granted.

ONT.
S. C.
REX EX REL. BOYCE v. ELLIS.
Riddell, J.

The next question is as to the jurisdiction of the County Court Judge to set aside his order. I entertain no doubt that he has such jurisdiction. There was under the former practice much difference of opinion on this matter.

In *Regina ex rel. Grant* v. *Coleman* (1881), 8 P.R. 497, 46 U.C.R. 175, and in *Regina ex rel. O'Dwyer* v. *Lewis* (1881), 32 U.C.C.P. 104, it was held that such power existed and should be exercised, but in *Regina ex rel. Grant* v. *Coleman,* in the Court of Appeal (1882), 7 A.R. 619, it was held differently.

Mr. Justice MacMahon, in the case in 12 P.R., set aside the fiat and all proceedings, while Mr. Justice Street in *Regina ex rel. McFarlane* v. *Coulter,* 4 O.L.R. 520, doubted the existence of the power. (The decision in the case in 12 P.R. does not seem to have been brought to his notice.)

The Rule introduced in 1888 (Con. Rule 536), which is now (substantially) Rule 217, gets rid of all difficulty, when it is remembered that now "the practice and procedure of the Supreme Court" is applicable in every case not provided for by the statute or Rules of Court.

The reasoning of the learned County Court Judge is, to my mind, inconclusive. He says: "The Rule now relied upon as giving jurisdiction on this motion is the Rule of Practice No. 217. This has been the Rule of Practice in both Superior and County Courts in the Province of Ontario since 1888. In my opinion, it does not apply to the present application. Reading Rules 216 and 217 together, it seems to me that they are intended to apply to interlocutory proceedings and to govern the rights of parties in litigation after proceedings have been taken. This Rule has not been invoked or referred to in any of the cases cited to me on the argument. If, however, it does apply, I cannot disregard the established practice under it, which is, that a motion to set aside an *ex parte* order may be answered by shewing that the party is entitled to the order if he can on the return of the motion establish facts which would warrant the making of the order in the first instance."

There is no limitation in the Rule to any particular form of order, and the value of this Rule should not be diminished by judicial construction. In *Barisino* v. *Curtis & Harvey* (*Can-*

ONT.

S. C.

REX EX REL. BOYCE v. ELLIS.

Riddell, J

ada) Limited, 22 D.L.R. 899, decided by us on the 15th February, 1915, the facts were these. An action was begun in the name of Barisino; there being no one of that name, one Bardessano was served with an appointment and subpœna for an examination for discovery. He appeared with a solicitor and swore that he was the plaintiff, and the action proceeded accordingly. He did not appear at the trial, but evidence was given on behalf of the plaintiff. After verdict for the defendants, a fi. fa. for costs was put in the sheriff's hands. On his attempting to seize Bardessano's goods under the execution, Bardessano denied that he was the plaintiff. The District Court Judge made an *ex parte* order directing execution against Bardessano, which he set aside on motion. On appeal to us we held that the Judge should not on the facts have set aside his *ex parte* order, but none of us expressed or had any doubt of his jurisdiction to entertain the motion. There was nothing interlocutory or not final in its nature about the *ex parte* order, but the Judge had undoubted power to deal with it under Rule 217.

Then, while the proposed relator may in his new material establish a right to interpose, the omission is not an irregularity, and, as is shewn by the case in 12 P.R. and the English case cited, it cannot be supplied. We are not considering whether the Judge could have made an order then for a fiat, but could he support the order he had made? It is obvious that the new material could not be filed before the service of the notice of motion, as required by sec. 164 of the Act.

Moreover, the fiat was not general, but an order to serve a particular notice of motion. That notice of motion was fatally defective, and no order should have been made to serve it.

Again I say that we are not considering whether the Judge could have granted a fiat on the new material when it was brought before him. He did not purport to do that, but to support the order already made.

I think, therefore, that the County Court Judge should have set aside the fiat and all proceedings based upon it.

The more difficult question now arises as to our right to entertain the appeal.

The reasoning in *Regina ex rel. Grant* v. *Coleman*, 7 A.R.

ONT.

S. C.

REX EX REL. BOYCE v. ELLIS.

Riddell, J.

619, that the Judge does not act as a Court in such proceedings is equally applicable in the present state of the legislation. "The machinery of the Court is made use of, but except in that particular . . . the proceedings are not to be regarded as an action or as analogous to an action in the Court." The Judge then is not acting as a Court, but is *persona designata*. When the case just referred to was decided, there was no appeal from an order, etc., made by *persona designata;* 56 Vict. ch. 13 was the first general statute—and that (sec. 6) forbade an appeal unless expressly authorised by the statute conferring jurisdiction. It was not till 1900 that a further exception was made and an appeal authorised if leave should be granted by the *persona designata* or a Judge of the Court of Appeal: 63 Vict. ch. 17, sec. 14. In 1909, a Judge of the High Court was substituted for a Judge of the Court of Appeal (9 Edw. VII. ch. 46, sec. 4), and in the Revision of 1914 a Judge of the Supreme Court.

In the present case, leave has been given by the *persona designata*, and I think we should entertain the appeal and allow it with costs.

Of course the appeal given in sec. 179 (1) of the Act is from the ultimate decision of the Judge on the merits: *In re Regina ex rel. Hall* v. *Gowanlock*, 29 O.R. 435, at p. 449: this appeal is to us under the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, sec. 4.

The case of *Re Moore and Township of March*, 20 O.L.R. 67, is in the (former) Divisional Court of the High Court, and is not binding on us here. If anything I said there indicates that an appeal does not lie here, I wholly recant it.

Except as to the costs, the question as to whether an appeal lies is largely academic. The County Court Judge would, no doubt, govern himself by our expressed opinion and decline to give the relator any relief.

Latchford, J.

LATCHFORD, J.:—This is an appeal from an order of the Judge of the County Court of the County of Carleton dismissing an application to set aside a fiat which he had granted permitting the relator to serve notice of a motion to set aside the election of the respondent as mayor of the city of Ottawa.

ONT.

S. C.

REX EX REL. BOYCE v. ELLIS.

Latchford, J.

Leave to appeal against his order was given by the learned Judge.

The ground of the appeal is, that the relator, who was not a candidate at the election, did not state in his notice of motion that he was "an elector who gave or tendered his vote" at the election. The relator had in fact voted at the election. He was what the statute required him to be, but in his notice of motion stated simply that he was an elector. Upon this the learned Judge issued the fiat which he declined to set aside.

Counsel for the relator raises the preliminary objection that no appeal lies to this Court.

The proceedings were instituted under the provisions of Part IV. of the Municipal Act, R.S.O. 1914, ch. 192, secs. 160-186, sec. 161 being amended by 4 Geo. V. ch. 33, sec. 5. Under sec. 179 (1), an appeal lies from the decision of a County Court Judge to a Judge of the Supreme Court. The appeal is from a final order or decision, and no other appeal is granted by the Municipal Act.

It is contended, however, that the County Court Judge acted as *persona designata;* and that, therefore, under the consent which he has given, an appeal lies to this Court under sec. 4 of the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79.

This section provides that there shall be no appeal from an order made by a Judge acting as *persona designata,* "unless an appeal is expressly authorised by the statute giving the jurisdiction or unless" (as in the present case) "special leave is granted by the Judge making the order or by a Judge of the Supreme Court, in which case the appeal shall be to a Divisional Court."

Assuming that the order was made by the Judge as *persona designata* by the Municipal Act, his leave to appeal would, upon the contention based on sec. 4 of ch. 79, give an appeal to a Divisional Court against any order—interlocutory or otherwise—which he might make, while under the Municipal Act itself (sec. 179) the appeal authorised is limited to an appeal from a final order only and is to be made to a single Judge, "whose decision shall be final."

Where a statute under which a Judge acts as *persona*

ONT.
S. C.
REX EX REL. BOYCE v. ELLIS.
Latchford, J.

designata is silent as to appeals from his decision, sec. 4 of ch. 79 applies; and leave granted by the Judge may enable a Divisional Court to entertain an appeal from his decision, though a majority of the Court thought otherwise in *Re Moore and Township of March*, 20 O.L.R. 67. But, in my opinion, ch. 79 has no application to an appeal from a decision made by a Judge acting under the authority conferred upon him by Part IV. of the Municipal Act. If he is a Judge of the Supreme Court, his decision, under sec. 179, is final, and there is no appeal. Yet as Judge of the Supreme Court he is as much *persona designata* under Part IV. as is a Judge of the County Court. If ch. 79 had any application, a Judge of the Supreme Court could, by granting leave under sec. 4, enable a Divisional Court to entertain from his decision an appeal which the Municipal Act expressly prohibits.

I therefore think the preliminary objection holds, and that the appeal should be dismissed.

Kelly, J.

KELLY, J.:—These appeals are from the decision of the Senior Judge of the County Court of the County of Carleton, given on motions before him for orders to set aside fiats (and all proceedings founded thereon), granted in each case on the 12th February, 1915, under sec. 162 of the Municipal Act, R.S.O. 1914, ch. 192, authorising the issue of notices of motion in proceedings to set aside the election of the defendants as members of the Municipal Council of the City of Ottawa, at the election held on the 4th January, 1915.

The substantial ground on which it was sought to set aside the fiats was that it was not shewn on the application itself that the relator was a candidate at the election or an elector who gave or tendered his vote, as required by the procedure laid down by the Act (sec. 161, as amended by 4 Geo. V. ch. 33, sec. 5, and sec. 163).

The learned Judge dismissed the motions, but granted leave to appeal.

Apart from the grounds above stated, a preliminary objection was raised, on behalf of the relator, that no appeal lies to this Court. This should first be disposed of.

The validity of the election of a member of a municipal

council or his right to hold his seat may be tried and determined by a Judge of the Supreme Court, by the Master in Chambers, or by a Judge of the County or District Court of the county or district in which the municipality is situate: Municipal Act, sec. 161 (1).

By sec. 179 (1), the decision of a Judge of the Supreme Court shall be final, but an appeal shall lie from the decision or order of the Master in Chambers or of a Judge of a County or District Court to a Judge of the Supreme Court, whose decisions shall be final. It would seem to have been the intention that the final tribunal should be a Judge of the Supreme Court. But, notwithstanding this, the contention is, that the right to appeal exists under the Judges' Orders Enforcement Act, R.S.O. 1914, ch. 79, sec. 4, by the terms of which, where jurisdiction is given to a Judge as *persona designata*, no appeal lies from his order unless an appeal is expressly authorised by the statute giving the jurisdiction, or unless special leave is granted by the Judge making the order or by a Judge of the Supreme Court, in which case the appeal shall be to a Divisional Court, whose decision shall be final.

Granted for the purpose of the present discussion that these motions came before the County Court Judge as *persona designata*, no appeal being expressly authorised from his decision except to a Judge of the Supreme Court, the only ground on which it can be argued that the appeal lies is that special leave was granted by him.

To hold that ch. 79 can be invoked to support the bringing on of this appeal would be to permit an appeal in cases where it is expressly prohibited by the Municipal Act; especially would this be so where the proceedings are instituted before a Judge of the Supreme Court, whose decision is, by sec. 179 (1), made final, but who would have it in his power, if ch. 79 has application, to defeat the express terms of sec. 179 (1) as to finality, by granting leave to appeal from his own decision.

But it may be argued that the limitation of appeals by sec. 179 (1) applies only to an order or decision finally disposing of the matters in issue, and not to decisions of matters of an interlocutory nature. If that were so, we should have the

ONT.

S. C.

REX EX REL. BOYCE v. ELLIS.

Kelly, J.

anomalous situation of possible appeals to a Divisional Court from interlocutory orders, when no such appeal lies from an order or decision determining the question in issue in the proceedings.

I can find no authority to substantiate the appellants' position on the question of the right to appeal; and I am of opinion that, whatever the merits of their case may otherwise be, there is no authority in this Court to entertain the appeal.

The motions should be dismissed with costs.

In that view it is unnecessary to discuss the question of whether the grounds relied upon by the appellants are such as entitle them to succeed—if the right to appeal were established—beyond expressing the view that the proceedings of the relator have not followed in every necessary particular the procedure laid down by the Municipal Act as amended.

Appeals dismissed; the Court being divided.

MAN.

C. A.

MACK v. LAKE WINNIPEG SHIPPING CO.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. April 19, 1915.

1. NEGLIGENCE (§ I B 2—23)—DANGEROUS AGENCIES—STEAM WAGGON—FRIGHTENING HORSES.

The operating of moving machinery, such as steam waggons or steam rollers, emitting smoke and cinders on a street in close proximity to horses standing thereon and liable to frighten them, without precautions or warnings of their approach, is actionable negligence.

[*Kirk* v. *Toronto*, 8 O.L.R. 730, followed; *Jones* v. *Liverpool*, 14 Q.B.D. 890, distinguished.]

2. MUNICIPAL CORPORATIONS (§ II G 2—222)—NEGLIGENT OPERATION OF MACHINERY—HIRED STEAM WAGGON—FRIGHTENING HORSES—LIABILITY OF MUNICIPALITY.

Damages sustained by the frightening of horses caused by the negligent operation of a steam waggon hired by a municipality having the control and full power of direction over the engineer furnished with it, renders the municipality not the owner liable therefor, particularly where the cause of the accident is not attributable to any defect in the engine, but to the failure of the municipality to take the necessary precautions.

[*Donovan* v. *Laing*, [1893] 1 Q.B. 629, followed.]

Statement

APPEAL from judgment in favour of plaintiff in action for damages caused by negligent frightening of horses.

A. B. Hudson, K.C., for Lake Winnipeg, appellant, defendant.

T. A. Hunt and *J. Preudhomme*, for City of Winnipeg, appellant, defendant.

W. F. Guild and *R. C. Maples*, for respondent, plaintiff.

Howell, C.J.M.

HOWELL, C.J.M.:—The plaintiff's team of horses was frightened by a steam waggon, and ran away and was injured. The

jury gave a verdict for $300 damages against the company and the city, and the defendants appeal.

The plaintiff was in the employ of the city, hauling material with his team, and properly had his team on Ross street, standing there with other teams, while he and other drivers procured tickets from a city office on that street. The steam waggon, also in the employ of the city at that time, came along westerly on Ross street, hauling two trailers or trucks, and emitting smoke.

A great deal of contradictory evidence was given as to the places and position of things when the horses became restive. The engineer on the steam waggon swears he was going about 4½ miles an hour, and that the horses were standing on Tecumseh street, facing north. His helper on the engine says they were facing south, and were on Tecumseh street. They both swear the engine was 30 or 40 yards away when the horses bolted. Tecumseh street crosses Ross street near the city office above referred to. Both these witnesses swear the wind then was blowing easterly, away from the horses. The plaintiff's account of the situation is given as follows:—

Q. Where did you leave the team standing? A. On the north side of Ross. There is a place where the boulevard is; there is stone put there for a team to stand, and then there is a sidewalk and then the office. I put them as near the sidewalk without being on the sidewalk as I could put them. Q. Which way were they facing? A. West. I had come up Tecumseh and turned right in. There is a vacant place going into the hay market that is here and a crossing here. Q. The waggon was immediately behind the team? A. Yes. Q. And the team and waggon were facing in a westerly direction? A. Yes. Q. Immediately opposite the city office? A. The centre of their body was a little past the office. Q. How far is the office from Tecumseh St.? A. It might be twenty-five or thirty feet. Q. And how far was your team from Tecumseh St.? A. Well, they might have been twenty ft. or maybe twenty-five ft. Q. Their heads were just a little to the front of the office? A. Yes. Q. Go on. A. During the time they were standing there an engine unbeknown to me came up blowing a cloud of smoke and cinders or soot from it, and blowing over the corner of the office, and as I noticed this I looked to my horses and noticed they were paying attention to something, and I went to go to them. Before I got to them they bolted, and at the time I went, or the time I got there from where I was standing to where the horses was, there was an engine almost knocking me down. It was so close to me when I bolted for my team—this engine was so close that it almost hit me. I took it by that, that is what the smoke was coming from.

After the engineer and helper had given evidence, the plaintiff was called in rebuttal, and re-affirmed what he had said, and swore his horses were on Ross street and facing west and opposite

MAN.

C. A.

MACK v. LAKE WINNIPEG SHIPPING CO.

Howell, C.J.M.

the city office. A witness, James, swore that he was driving a team on Ross street going west, and that this engine passed him on that street just before reaching the place where the plaintiff's horses were standing. He further states that the engine was then emitting much smoke and sparks, and that his team (a quiet pair) became very restive, and he had great difficulty in controlling them, and they ran up over the curb. The engineer swears he did not notice the trouble with these horses. Very likely the jury believed the plaintiff's story. Several witnesses, including the City Engineer, swore that the city, in the operation of their traction engines, apparently gasoline engines, commonly sent a man ahead where teams were standing to warn teamsters of the approach of the motor, but because of this engine being a steam engine the City Engineer thought this would not be necessary. These horses undoubtedly were frightened by the engine, as a pair a minute or two before were frightened, and it seems to me reasonable to suppose that such an engine emitting smoke and sparks would cause horses to bolt.

The jury found that the defendants were negligent, that the negligence was that of the engineer driving the steam waggon, and that precautions should have been taken by sending a man ahead warning parties of the approach, or by sounding an alarm.

I think there was evidence upon which the jury could so find, and that operating such machinery on the street in close proximity to horses is unusual and liable to frighten them, quite as much as the steam roller in *Kirk* v. *Toronto*, 8 O.L.R. 730. The negligence is, therefore, actionable.

The steam waggon is owned by the defendants, the Lake Winnipeg Shipping Co., Ltd., and the engineer is their employee. The company let the city of Winnipeg have this engine and the engineer upon certain terms of payment, and upon the terms that the engineer was to work the engine when and where the city may require, and upon the terms that if the engineer was required to work more than ten hours per day the city would pay him for this extra work, which, in fact, amounted to from $15 to $20 every fortnight.

The jury were not asked to find any fact upon which the liability of both or either of the defendants may be determined, and apparently the case was tried and judgment entered on the assumption that both defendants were liable for the negligence, if any,

in this matter. The city caused this engine to be operated on their streets, and had the power to direct what precautions should be taken, and of course are liable. If authority is required for this, the case of *Kirk* v. *Toronto*, above referred to, is in point.

The case of *Jones* v. *Liverpool*, 14 Q.B.D. 890, is not applicable to this case. The cart used in that case was not dangerous or likely to frighten horses.

The question of the liability of the company is not so easily disposed of. The terms of the hiring of the engine and engineer are not at all clear. I gather that the company looked after the storing of the engine at night, and furnished the necessary oil, and looked after the cleaning and repairing of it, but the city furnished the coal required, and, as above mentioned, the company furnished the engineer, paying him for ten hours each day, and the city paying for over-time. I gather that the city directed the engineer when and where to work, and I think I should infer that in using this engine to haul the city's trucks on the city streets, necessarily materially blocking ordinary traffic, and emitting volumes of steam, smoke and sparks, the city would make such regulations and give such directions in the operation of these peculiar vehicles as would cause least danger and inconvenience. I would not expect to find the company laying down rules for the operation of the engine on the streets, as they could not know whether the engine would be used to carry loads or to draw trucks, or both, or upon what streets it was to operate. To me it seems apparent that the city would look after the protection of the public in the operation of this engine on the streets, and that any regulation in this respect imposed by the company upon the engineer other than the safety of the engine might interfere with the city's rights under the agreement. If, for instance, it became expedient to send a man in advance to give warning of the approach of the engine, it would be an employee of the city who would be sent.

The cases cited on the argument, and many others, are reviewed in *Jones* v. *Scullard*, [1898] 2 Q.B. 565, and again in *Waldock* v. *Winfield*, [1901] 2 K.B. 596.

I think this case falls within the law laid down in *Donovan* v. *Laing*, [1893] 1 Q.B. 629, where a crane with the operator was let to Jones & Co. to unload a ship. Through the negligence of the operator the plaintiff was injured. It was held that the oper-

MAN.

C. A.

MACK
v.
LAKE WINNIPEG SHIPPING CO.

Howell, C.J.M.

ator was, because of the manner in which the work was to be done, the servant of Jones, and not of the defendant, the owner of the crane. In that case, Lord Esher, at 632, says:—

> For some purposes no doubt the man was the servant of the defendants. Probably if he had let the crane get out of order by his neglect and in consequence any one was injured thereby the defendant might be liable, but the accident in this case did not happen from this cause, but from the manner of working the crane.

The damages were not caused by any defect of the engine, but solely because of it being operated on the streets of the city under the direction of the city. I think the company is not liable.

This point was not taken at the trial, and no questions on this subject were submitted to the jury, and the jury was not charged on this branch of the case. I think justice will be done by granting the appeal in favour of the company, and entering judgment for the defendants, the company, without costs; the judgment against the city to stand, and the appeal of the city is dismissed with costs.

Richards, J.A.
Perdue, J.A.

RICHARDS and PERDUE, JJ.A., concurred with HOWELL, C.J.M.

Cameron, J.A.

CAMERON, J.A.:—It was argued by counsel for the city that the positive findings of negligence must be taken to negative the existence of the other acts of negligence alleged (citing *Phalen* v. *G.T.P.*, 12 D.L.R. 347, 23 Man.L.R. 435, and *Andreas* v. *C.P.R.*, 37 Can. S.C.R. 1), and that there is shewn no direct connection between the injury sustained and the negligence found by the jury: *Thompson* v. *Ontario Sewer Pipe Co.*, 40 Can. S.C.R. 396. But I do not think we should give a narrow construction to the findings of the jury in this case. Clearly these findings imply and are founded on the conclusion that the plaintiff's team sustained injuries as a result of bolting from the place where the plaintiff left them secured, such bolting being due to the approach of the tractor engine (with its attendant smoke and steam and noise) without warning, and that the engineer in charge of the engine could and should have used precautions, such as sounding an alarm, or sending a man ahead, to avoid occurrences of this kind. I think that is a fair and proper reading of the jury's findings. It was argued that the sounding of a horn or whistle might have had the effect of aggravating the noise, but, on the other hand, it might have aroused the attention of the plaintiff

and given him an opportunity of getting to his team in time to hold it, a possibility, no doubt, considered by the jury. And while the plaintiff did not hear the engine himself, he might readily have caught the sound of the whistle. As a matter of fact, he was within an ace of catching the team, as it was. Sending a man ahead would have rendered things safe, and would have been a reasonable precaution to take. In a place such as this, where the city's office was, teams were at times brought together in large numbers, and one would think special pains would be taken to avoid accidents which might result in loss of human life as well as of property. I think there is no difficulty in finding, in the evidence given, support for the findings of the jury.

In view of the degree of control exercised by the city over this engine and its operations, I am of the opinion that no liability attaches to the Lake Winnipeg Shipping Co. I have read the judgment of the Chief Justice, and agree with it.

HAGGART, J.A., concurred with HOWELL, C.J.M. Haggart, J.A.

Appeal dismissed.

RAMSAY v. BOARD OF SCHOOL TRUSTEES.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, and McPhillips, JJ.A. August 10, 1915.

1. CONTRACTS (§ IV D—361)—BUILDING CONTRACT—PERFORMANCE—EXTRA WORK AND VARIATIONS—NEW PLANS — REJECTION — QUANTUM MERUIT.

A condition in a building contract entitling the owner to vary, by way of extra work or omission, from the plans or specifications, justifies the contractor from proceeding with variations or extra work radically different from the original plans, and upon the termination of the contract for such refusal, he will be entitled to recover damages for the breach, or upon a *quantum meruit* for work performed and materials furnished.

[*Rex* v. *Peto* (1826), 1 Y. & J. 37, 52, followed.]

APPEAL from judgment for plaintiff in action on building contracts. Statement

Sir C. H. Tupper, K.C., for appellant.

Craig, for respondent.

MACDONALD, C.J.A.:—The respondent, the contractor, agreed to install a heating and ventilating system in one of the appellant's school houses for the lump sum of $16,973; the contract was entered into in January, and about March 3, the appellant's architect or heating engineer, Sprague, notified the respondent to discontinue the installation as changes in the plans of the Macdonald, C.J.A.

B. C.

C. A.

RAMSAY v. BOARD OF SCHOOL TRUSTEES.

Macdonald, C.J.A.

work were in contemplation. This request was acceded to and respondent was notified to submit a tender based on the new plans, which he did. Nothing, however, came of this, and later on the appellant ordered the respondent to proceed with the work with certain changes specified in a letter (ex. 31). The respondent declined except on conditions which were not acceptable to appellant, and the appellant then took the work out of the hands of the respondent and completed it in another way. The judgment appealed from awards the respondent $1,589.19 by way of damages for breech of contract or *quantum meruit* for the work performed and materials supplied. Condition 12 of the contract between the parties is as follows:—

> The contractor shall, when authorized by the employer and the architect, vary, by way of extra or omission from the drawings or specifications.

The specification contains this clause:—

> CHANGES AND EXTRA WORK.
>
> The Board of Trustees (appellant) reserve the right under this contract to make changes from time to time during the progress of the work, provided that no change shall be made without a written order from the Board of Trustees countersigned by the architect setting forth the nature of the work performed or omitted and the material furnished or omitted.

I think the last mentioned clause was merged in the former which is the one embodied in the formal contract, but in any case both clauses point to the same limitations of the power to vary, namely, *by extra or omission*. This is not the wide condition set out in the form in Hudson on Building Contract, 4th ed., vol. 2, p. 528 (91), it is more like that found in the contract in question in *R.* v. *Peto* (1826), 1 Y. & J. 37, p. 52, which entitled the owner to order:—

> Any extra work to be done or executed besides such as is expressed or shewn in any of the said plans . . . or that any part of the said work . . . shall not be done or executed.

The only verbal difference open to comment between the two conditions is contained in the words "besides such," etc., that difference is more apparent than real as the expression "extra" means in addition to, over and above, or besides the work specified. Some stress has been laid in argument on the word *vary* used in condition 12, but its meaning must be restricted by the controlling words, "by way of extra or omission."

Now, if the extra work and materials which appellant ordered

respondent to do and supply, and which were specified in ex. 31, are not, or are only partially within the right to demand extras or omissions under condition 12, the appeal must fail.

There is some confusion with regard to the changes sought to be made in the plans. The original plans on which the contract was based were made for appellant by Waddington, then engineer; then Turnbull, Waddington's successor, appears to have either materially changed these plans or prepared new ones. Respondent says that he had never been shewn or made aware of Turnbull's plans. Then Sprague succeeded Turnbull, and it was at Sprague's request that the work was suspended pending the preparation of the new plans. Now, it is not clear to my mind that the changes ordered to be made and specified in ex. 31 were the only changes involved in the carrying out of the work to completion. I rather infer that the specified changes are changes, not from the Waddington plan, but from the Turnbull plan, of which respondent had no knowledge. Taking as an example the engine mentioned in ex. 31, I turn to the Waddington specification and find that the engine is not specified as 14 by 7, but as Robb-Armstrong or C. & T. 10 by 12 horizontal engine. It is, therefore, evident that the change ordered by ex. 31 in the engine is not a change from the original specification of Waddington, but a change from some other specification or drawing, presumably Turnbull's. The changes ordered may therefore be much more comprehensive than would appear upon the face of ex. 31, and this must be so if the evidence of the respondent is to be believed.

After being taken by appellant's counsel in cross-examination over the changes specified in ex. 31, the respondent in answer to the question—"We have pretty well covered everything?" answered—"Oh, no, we have not started yet." He then enumerated a large number of other changes and substitutions which would be necessitated by the "new layout" as he called it.

Now, in my opinion, condition 12 does not authorize the appellant to substantially change the character of the work contracted for, and if the clause in the specification under the heading, "Charges and Extra Work" is more comprehensive

B. C.

C. A.

RAMSAY v. BOARD OF SCHOOL TRUSTEES.

Macdonald, C.J.A.

and can now be appealed to, it does not authorize such radical changes in the plan as the respondent was ordered to carry out: *Rex* v. *Peto, supra,* is in point. In that case Bullock, B., said:—

It has been strongly argued that this is an omission, that they omitted one description of work and added another, but that is not a proper construction of the English language.

And again:—

The surveyor also may direct him to do or omit any work, but in fair, legitimate construction it is impossible to construe these words so largely as to give them the sense they have been contended to bear, for the consequence of such construction would be that the contractor might have changed the whole materials and construction of the building.

That these changes disturbed the whole plan of the work is apparent from the fact that Sprague found it necessary to prepare what he called "superseding" plans, which "superseding" plans I infer are the result of Turnbull's work and his own. The increased cost of the work under the new plan further indicates the substantial character of the changes ordered. Respondent's new tender increased the price by nearly $3,000 and the work when finally completed by Sprague cost upwards of $22,000, although before undertaking it, Sprague, in a letter had declared that it could be finished for the amount remaining unpaid under the contract.

I am therefore unable to say that the learned trial Judge came to a wrong conclusion, and I think the appeal should be dismissed.

IRVING, J.A., would dismiss the appeal.

Irving, J.A.

McPhillips, J.A.

MCPHILLIPS, J.A.:—I agree with the Chief Justice and have nothing to add. I would therefore dismiss the appeal.

Appeal dismissed.

LANDES v. KUSCH.

SASK.

S. C.

Saskatchewan Supreme Court, Haultain, C.J., and Newlands, Lamont, and Brown, JJ.

1. VENDOR AND PURCHASER (§ II—30)—REMEDIES OF VENDOR — SPECIFIC PERFORMANCE—ACTION FOR PURCHASE PRICE—PLEADINGS.

The remedies of specific performance of an agreement for the sale of land or an action for the purchase price thereof are both the same; but the latter carries, both as to pleadings and orders, the incidence of an action for specific performance.

[*Groves* v. *Mason*, 2 A.L.R. 181; *Ellis* v. *Rogers*, 50 L.T. 660, applied; *Landes* v. *Kusch*, 19 D.L.R. 520, reversed.

2. PLEADING (§ II G—210)—ACTION FOR PURCHASE PRICE—SALE OF LAND —NECESSARY ALLEGATIONS—TITLE AND POSSESSION.

Possession of title by a vendor suing for the balance of the pur-

chase money of land upon an open contract, and his readiness to convey are something more than conditions precedent within the meaning of Rule 154 (Sask.); they are material facts which go to the root of the action and must be pleaded in order to entitle the vendor to a judgment.

[*Mayberry* v. *Williams*, 3 S.L.R. 350; *Yates* v. *Gardiner*, 20 L.J. Ex. 327, applied.]

Statement

APPEAL from a judgment of Elwood, J., in favour of the plaintiff, 19 D.L.R. 520.

J. F. Frame, K.C., for appellant.

H. V. Bigelow, K.C., for respondent.

The judgment of the Court was delivered by

Lamont, J.

LAMONT, J.:—The plaintiff's statement of claim sets out that on February 10, 1913, by a certain agreement in writing, he agreed to sell to the defendant and the defendant agreed to buy the southwest quarter of 7-37-4, west 3rd, for $20,000, payable $500 on the execution of the agreement, $500 on March 10, 1913, $4,000 on November 10, 1913, and $5,000 on November 10, in each of the years 1914, 1915, and 1916. He also alleges that in the said agreement the defendant covenanted to pay the said sums together with interest thereon on the days and times stipulated therein, and further, that it was covenanted and agreed in said agreement that in case of default in the payment of principal or interest or any part thereof due thereunder, the whole of the purchase-money should become due and payable. He also sets out that the defendant had made default in the payment of the $4,000 due November 10, 1913, and computing the balance of purchase-money and interest due at the sum of $19,886.67. He claims: (a) Payment of the said sum of $19,886.67 and interest thereon. (b) Judgment for the said sum. (c) In default thereof, that the interests of the defendant in the said lands be foreclosed and the defendant required to deliver up possession of the said lands and premises to the plaintiff.

The defendant filed the following statement of defence:—

(1) The defendant admits pars. 1, 2, 3, 4, 5 and 6 of the plaintiff's statement of claim herein, and further says that he is unable to meet the payments set out. (2) The defendant consents to his interest in the lands set out in the plaintiff's statement of claim being foreclosed, and is prepared to deliver up possession of the said lands and premises to the plaintiff herein as the plaintiff claims for.

SASK.

S. C.

LANDES v. KUSCH.

Lamont, J.

The plaintiff then moved for judgment on the pleadings. The defendant admitted his right to a foreclosure order, but contended that, on the statement of claim as it stood, the plaintiff was not entitled to a personal judgment against him. The local Master, before whom the application came, allowed the plaintiff to sign judgment for the amount claimed, and also decreed that in default of payment by October 24, 1914, there would be foreclosure absolute. From this order, by subsequent leave—although there had been several intervening motions—the defendant appealed, contending, first, that on the pleadings there could not be a personal judgment, and second, that there could not be both personal judgment and foreclosure.

The plaintiff, by notice dated June 22, 1914, abandoned that portion of the judgment and order referring to the foreclosure of the defendant's interest in the land, and elected to proceed only on the personal judgment entered against the defendant. The appeal was heard in Chambers before my brother Elwood. It was there contended that before the plaintiff was entitled to sign personal judgment he must allege in his pleadings that he had a good title to the land and that he was ready and willing to execute a conveyance thereof in accordance with the contract. My brother Elwood held that the possession by the plaintiff of a good title and his readiness and willingness to convey were conditions precedent which would be implied under rule 154, and therefore it was not necessary to plead them. From that decision this appeal is taken.

The first question is, are the possession by the plaintiff of a good title and his readiness and willingness to convey conditions precedent within the meaning of rule 154? The agreement for sale was not made part of the material used on the motion, nor does the appeal-book contain any statement as to the terms, if any, set out therein upon which the vendor was to convey. All we know is the statement in the plaintiff's pleading that the plaintiff agreed to sell and the defendant agreed to buy, and the admission by the defendant that such statement is true. We must consider the contract, therefore, as an open one, and deal with the points raised on that basis.

In the edition of the Annual Practice (1915), in a note under

English Rule 210, which is identical with our Rule 154, I find the following:—

> Cases constantly occur, in which, although everything has happened which would at common law *primâ facie* entitle a man to a certain sum of money, or vest in him a certain right of action, there is yet something more which must be done, or something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provisions of some statute, or because the parties have expressly so agreed; this something more is called a condition precedent. It is not of the essence of such a cause of action, but it has been made essential. It is an additional formality superimposed on the common law. . . . But an allegation which is of the essence of the cause of action is not a condition precedent within the meaning of this rule, and must still be pleaded in the statement of the claim.

In *Fruhauf* v. *Grosvenor & Co.* (1892), 61 L.J.Q.B. 717, it was held that to maintain an application for final judgment on a dishonoured cheque against the drawer there must be an allegation that notice of dishonour had been given to the defendant. The reason for this apparently is that notice of dishonour is necessary to affect the drawer with liability, and therefore it is more than a condition precedent; it is a material fact of the very essence of the contract.

Under the English Judicature Act, an assignee of a chose in action may, under certain circumstances, sue in his own name. In these cases the statement of claim must contain averments of all facts necessary to bring the case within the section. It must allege an absolute assignment in writing of the chose in action, and a notice in writing to the defendant of such assignment, otherwise action cannot be maintained: *Seear* v. *Lawson*, 16 Ch.D. 121; *Read* v. *Brown*, 22 Q.B.D. 128. In these cases the assignment and notice thereof are not considered to be conditions precedent which need not be alleged, but are of the essence of the cause of action. In the latter case the question was whether any part of the cause of action arose in the city, and in giving judgment the Master of the Rolls said:—

> What is the real meaning of the phrase, "a cause of action arising in the city?" It has been defined in *Cooke* v. *Gill*, L.R. 8 C.P. 107, to be this: every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

Is the possession of a good title by the plaintiff a material

SASK.
S. C.
LANDES
v.
KUSCH.
Lamont, J.

fact without which he is not entitled to succeed in the action? In *Armstrong* v. *Nason*, 25 Can. S.C.R. 263 at 268, the obligations as to title imposed on a vendor of land under a contract to sell are expressed by Strong, C.J., in these words:—

It is an elementary principle that if a vendor contracts to sell land without any saving condition as to the nature of the title he is to confer upon the purchaser, the law implies that it is incumbent upon him to make out a good title in fee simple.

In Ontario it has long been settled law that where the price of land is payable by instalments, the purchaser has a right to have a good title shewn in the vendor before he can be compelled to pay any part of the purchase-money: *Gamble* v. *Gummerson*, 9 Gr. 193; *Cameron* v. *Carter*, 9 O.R. 426; *Thompson* v. *Bruns-kill*, 7 Gr. 542.

In McCall on Remedies of Vendors and Purchasers, at pp. 11 and 12, the author says:—

Where the price is payable by instalments, it would appear that a right of action arises in respect of each instalment as soon as it becomes due and payable under the terms of the contract. The vendor must, however, in general be able to shew a good title in himself, or that he has the right and is in a position to call in the title if outstanding: in other words, the purchaser cannot be called upon to pay any moneys on the purchase-price unless and until the vendor shews a good title.

The same rule is laid down in Dart on Vendors and Purchasers, at 1002, where the author says:—

On the other hand, the vendor, if he sue merely on the agreement . . . must have shewn a good title and have executed, or been ready and willing to execute, a conveyance in the terms of the contract.

I am therefore of opinion that the possession of title by a vendor suing for the balance of the purchase-money of land upon an open contract, and his readiness to convey, are something more than conditions precedent within the meaning of Rule 154; they are material facts which go to the root of the action and must be pleaded. If, however, the contract is not an open one, but one in which the purchaser expressly agrees to pay the purchase-money on a day certain, irrespective of title or conveyance, no averments as to this are necessary: *Yates* v. *Gardiner*, 20 L.J., Ex. 327.

That the vendor must allege a good title seems to me to be established also by the nature of the action. This action, in so far as the plaintiff seeks to recover the balance of the purchase-

money, is simply a vendor's action for specific performance. In McCall's book above referred to, at p. 9, the author sets out the remedies open to a vendor where a purchaser has made default in the payment of the purchase-money, as follows:—

He may: (1) Sue for the purchase-money. (2) Sue for damages. (3) Enforce his vendor's lien. (4) Sue for specific performance. (5) Rescind the contract. But in order to succeed at law under (1) in an action for the purchase-money he must have conveyed the property to the purchaser. In Bullen & Leake, p. 285, note (*m*), I find the law summarized as follows:—

In order to support a claim for the purchase-price of land sold or assigned, there must have been a conveyance or assignment to the defendant: *East Lambton Union* v. *Metropolitan R.W. Co.*, L.R. 4 Ex. 309. A mere giving of possession is not enough. In the absence of conveyance or assignment the claim must be for specific performance or damages.

The same principle is laid down in 25 Halsbury, 409, as follows:—

Hence the vendor cannot recover the purchase-money, notwithstanding that the purchaser has been let into possession, unless the conveyance has been executed; but, on a resale at a lower price, he can recover the difference in price and the expenses of the resale.

The reason for this is that the vendor cannot, apart from contract to that effect, hold the land and at the same time have the purchase-money.

An action for damages would not give the vendor the purchase-money, but only the difference between the value of the land left on his hands at the date of the breach and the price agreed to be paid. The enforcement of his vendor's lien would secure to him whatever he could realize out of the land, and he might recover the deficiency, should there be any; but to obtain judgment for the purchase-price from the purchaser he must sue for specific performance. It is not, in my opinion, very material whether he ask in the statement of claim expressly for specific performance or merely for the purchase-money, for, as pointed out by Stuart, J., in *Groves* v. *Mason*, 2 A.L.R. 181, these remedies amount in the end to the same thing. It is, however, important to realize that the action, in so far as the claim is to recover the purchase-money, is in reality one for specific performance, and carries with it, both as to pleading and the order to be made, the incidence of an action for specific per-

SASK.
S. C.
LANDES v. KUSCH.
Lamont, J.

formance. As to pleading, there is no doubt as to what must be set up. In 27 Halsbury, 83, the author lays down the law as follows:—

> The plaintiff in an action for specific performance of a contract for the sale of land must plead that he is ready and willing to carry out the contract, and repudiation of the contract by the defendant does not relieve the plaintiff from this obligation.

See also *Ellis* v. *Rogers*, 50 L.T. 660.

In order, therefore, to maintain an action for the purchase-price of land, sold under an open contract, the vendor must allege an ability and willingness on his part to perform the obligations resting on him under the contract, in other words, that he has a good title and is willing to convey upon payment.

Having pleaded title, the vendor must prove it. He must prove it, as a rule, at the hearing if the defendant, in his pleading, questions the validity of his title: if not, it may be proved on a reference, Lord Halsbury, in his Laws of England, vol. 27, at pp. 83 and 84, lays down the law as follows:—

> In actions by a vendor of land to enforce specific performance by a purchaser of the contract for sale, the defendant may succeed at the trial on the ground of a defect in the plaintiff's title, if such defect has been expressly pleaded, or if the objection appears on the evidence at the trial.
>
> Even though no defect in title has been pleaded, the defendant is entitled to have an inquiry directed as to the title of the plaintiff to the land in question. If, however, he has admitted the title of the plaintiff in his pleading, this is an express waiver which excludes the right to a reference of title.

The same principle is stated in almost identical words in Fry on Specific Performance, 4th edition, p. 563.

It is, therefore, only where the defendant admits the plaintiff's title, or has by his contract expressly agreed to pay irrespective of title, that a Court will decree payment by a purchaser without a good title first having been shewn. To do otherwise would be to compel a purchaser to pay the purchase-price and leave him to run the risk of finding, when he had done so, that the vendor had no title; and where, as in the present case, that has been done, the order cannot be upheld. This is practically what was laid down by this Court in *Mayberry* v. *Williams*, 3 S.L.R. 350. In that case, as here, the defendant was sued for the balance of the purchase-money. On behalf of the defendant it was argued that the plaintiff's action must fail

SASK.

S. C.

LANDES v. KUSCH.

Lamont, J.

because he had not before action delivered to the defendant an abstract of title and tendered a conveyance. The trial Judge gave judgment for the plaintiff. On appeal to this Court, it was held that the action did not necessarily fail, although the plaintiff had not delivered to the defendant an abstract of title nor tendered a conveyance before action, but that the defendant was entitled to a reference as to title. The judgment of the trial Judge was set aside, and a reference directed, with leave to the parties to apply after the report on the reference was filed for such judgment as they might be entitled to.

I am therefore of opinion, that the order appealed from cannot be upheld, and must be set aside.

In his statement of claim the plaintiff simply asked for judgment, and in default, foreclosure. For the reasons I have given, he is not entitled to judgment. He was, however, on the defendant's pleading entitled to an order for foreclosure and possession. This he obtained, but subsequently abandoned. He is entitled, on application, to have it restored.

The appeal will therefore be allowed, and the order set aside with costs, both of appeal and in Chambers.

Appeal allowed.

ONT.

S. C.

TP. OF COLCHESTER N. v. TP. OF ANDERDON. TP. OF GOSFIELD N. v. TP. OF ANDERDON.

Ontario Supreme Court, Falconbridge, C.J.K.B., and Riddell, Latchford, and Kelly, JJ. October 4, 1915.

1. MUNICIPAL CORPORATIONS (§ II G—240)—DRAINAGE—NATURAL WATER COURSE—COST OF WORK—INCREASED VALUE OF LAND—PECUNIARY ADVANTAGE TO BE GAINED—REFEREE—JURISDICTION—DISCRETION.

On an appeal under the Municipal Drainage Act (R.S.O. 1914, ch. 198, sec. 67) from the report of an engineer to the Drainage Referee; the Referee has jurisdiction to examine into the cost of the proposed work and the pecuniary advantage to be gained by such work, and where the cost of the work is greatly in excess of the pecuniary advantage to be gained the referee should refuse to allow such work to be carried out.

[*Tp. of Colchester N.* v. *Tp. of Anderdon; Tp. of Gosfield N.* v. *Tp. of Anderdon*, 21 D.L.R. 277, reversed.]

Statement

APPEAL from the judgment of the Drainage Referee, 21 D.L.R. 277.

J. H. Rodd, for Colchester N.

R. L. Brackin, for Gosfield N.

T. G. Meredith, K.C., and *J. M. Pike*, K.C., for Anderdon.

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B., agreed with RIDDELL, J.

ONT.

S. C.

TOWNSHIPS OF COLCHESTER AND GOSFIELD N. v. TOWNSHIP OF ANDERDON.

Riddell, J.

RIDDELL, J.:—In and through the county of Essex runs the River Canard; its waters finally make their way into the Detroit River, but for some considerable distance they are dispersed in what may be called a swamp. In the township of Anderdon the river flows more or less near the middle line of a valley, averaging between 450 and 500 ft. wide, with well-defined walls, up to which the water rises from time to time in flood. The land on the floor of this valley on either side of the stream is fertile, but is rendered comparatively valueless by the occasional overflow of the river.

A petition was presented under the Municipal Drainage Act (now R.S.O. 1914, ch. 198) to the Council of Anderdon, having for its object (in substance) the prevention of this flooding and the utilization of the floor of the valley. This petition was filed April 29, 1912. After a somewhat unusual delay, the engineer, Newman, made a report dated July 21, 1914, and filed August 31, 1914. The report held certain of the townships higher up the river responsible for some of the damage occasioned by overflows, which would be prevented in future by the proposed work (R.S.O., ch. 198, sec. 3 (3)), and saddled them with a considerable sum, which should, it is said, have been termed "injuring liability." These townships appealed to the Drainage Referee, under sec. 67, and the appeals were dismissed. From that decision the present appeals are taken.

Several irregularities, etc., were urged by counsel for the appellants, which I do not think it necessary particularly to notice, as in my view the matter should be decided on a very simple ground.

The work will cost in all over $100,000, of which the appellant, Colchester N., will pay over $50,000; the appellant, Gosfield N., $11,000 odd. By no ingenuity can the pecuniary advantage, direct or indirect, be brought up to $50,000. There is no other kind of advantage suggested, æsthetic, piscatory, or otherwise. It is manifest that such a scheme should never be approved of. It would be throwing away money, never too plentiful in this province, and especially valuable at this most critical time.

It is not as though those who are injured have no remedy; the Courts are open, and full compensation may be had from any offending municipality or person. It would pay these municipalities to consent to a verdict for the full amount by which the

lands would be benefited—and indeed for the full value of the lands—rather than submit to the preposterous scheme proposed.

That it never was intended that this Act should be made a means of throwing away money is at least indicated by the judgment of the Court of Appeal in *McGillivray* v. *Tp. of Lochiel* (1904), 8 O.L.R. 446, at 453, where, referring to the Act now in question, the Court says:—

> The whole stream could be so deepened and enlarged as to afford ample drainage . . . at an expense which, while no doubt considerable, would still be far below its great advantage. . . .

In *Gosfield South* v. *Mersea* (1895), 1 Cl. & Sc. Dr. Cas. 268, Britton, D.R. (now my brother Britton), says (p. 270):—

> Whenever a case occurs where the work to benefit petitioners cannot be done except at a cost far in excess of the benefit directly upon, and by furnishing an improved outlet for, any and all lands assessed, such work ought not to be proceeded with merely for the sake of such benefit.

I entirely agree in this, and would approve the decision in that case.

It was then argued that the Referee, and therefore the Court, could not interfere, that the Council it was, upon whom the responsibility was cast by the Legislature in determining the feasibility and advisability of the proposed work.

My brother Britton says, in the case cited at p. 270:—

> It may be answered that it is a matter of judgment and discretion to be exercised by the council, and if such is within the statute the referee has no jurisdiction to prevent it. I am of opinion that the referee has jurisdiction and should deal with it on appeal by another municipality.

This I think to be law. The grounds of appeal to the Referee, sec. 67 (2), include:—

> (1) That the scheme of the drainage work . . . should be abandoned . . . on grounds to be stated.

On an appeal to the Referee he must consider the objections to the scheme advanced by the appellant, and no stronger ground could be suggested than that the scheme would cost more than it was worth. We should follow and approve this decision—I find nothing in judgments binding on us opposed to it.

We have been specially referred to the *Tp. of Orford and Tp. of Aldborough* (1912), 7 D.L.R. 217; *Huntley* v. *March*, 1 O.W.N. 190. By a reference to the Appeal Book No. 213 N.S., in the Osgoode Hall Library, it will be seen that the engineer gives an estimate of the cost, but nowhere, that I can find, of the total benefit. The point is not mentioned in the judgment of the Referee on appeal; the appellants do not state as a ground of

ONT.

S. C.

TOWNSHIPS OF COLCHESTER AND GOSFIELD N. v. TOWNSHIP OF ANDERDON.

Riddell, J.

appeal that the cost exceeds the benefit. Clause 2, p. 12, says: "The cost of the work is so great in proportion to the benefit to be derived, etc., etc." Even this does not seem to have been argued: 7 D.L.R. 224-5; and the Court, in giving judgment, do not mention the point.

In *Tp. of Huntley* v. *Tp. of March* (1909), 1 O.W.N. 190, Appeal Books, vol. 191 N.S., the appellants did set up as a ground of appeal that the cost would exceed the benefit. This is not admitted in the reasons against appeal, and I find no evidence to support it. No reference is made to this point—one of the greatest importance—in the judgment of the Court of Appeal.

I think the Referee should have allowed the appeals to him, and consequently the appeals to us should be allowed.

The appellants should have their costs throughout.

Latchford, J.

LATCHFORD, J.:—I agree.

Kelly, J.

KELLY, J.:—The one ground on which I rest my conclusion in these cases is that of the relative cost of the work sought to be carried out. Taking the lands intended to be benefited at the highest value which on the evidence they will attain as the result of carrying out this drainage scheme, the estimated cost of the work is more than double that value, and a very substantial part of this estimated cost is charged against lands in the two municipalities now appealing. I cannot bring myself to believe that the object aimed at by the provisions of the Drainage Act contemplated any such result. If this conclusion is wrong, then there is no limit to the expense which may be imposed upon municipalities and property owners in such proceedings to benefit lands of even small value or small area. Unless bound by positive provision of the Legislature or by some authority equally binding, I am not prepared to go so far as respondents contend for; and I have been unable to find anything so binding upon this Court.

Since the argument there has been submitted to us two cases in appeal, *Orford* v. *Aldborough*, 7 D.L.R. 217, and *Huntley* v. *March*, 1 O.W.N. 190, in each of which, it is stated by counsel, the appeal book contains a reference to the inequality between the total cost of the work and the estimated benefit to the lands, and in both the work petitioned for was approved of. The judgments, however, nowhere indicate that this aspect of the matter was there considered. On the other hand, the views of Referees in cases decided a considerable time ago, and which can

be supported on reasonable grounds, are opposed to such excessive expenditure. In 1895 Mr. Justice Britton, who was then Drainage Referee, in *Gosfield South* v. *Mersea*, 1 Cl. & Sc. 268, at 270, said:—

> Whenever a case occurs where the work to benefit petitioners cannot be done except at a cost far in excess of the benefit directly upon, and by furnishing an improved outlet for, any and all lands assessed, such work ought not to be proceeded with merely for the sake of such benefit.

A similar view was entertained by the Referee who in 1891 heard the appeal in *Tp. of Raleigh* v. *Tp. of Harwich*, 1 C. & S. 348, at 349, where he says:—

> Other systems of drainage are put forward by the appellants, but in view of the greater difficulty and expense of their construction, I do not feel warranted in allowing the appeal on that ground, especially when such expense would be largely in excess of the value of the land when relieved and benefited.

This case went to appeal, and is reported in 26 A.R. (Ont.) 313, but this view of the Referee was not disturbed. These opinions are consistent with what is a common-sense view of the situation.

Numerous authorities were cited to us in support of the respondent's position, but these decisions rest on other grounds, quite irrespective of the reasons now urged by the appellants. I am not prepared to take the responsibility of saddling upon the appellants the share allotted to them of the enormous expense of the proposed work, altogether out of proportion as it is, not only to the benefit to accrue to the lands to be benefited, but to the value of the lands themselves.

The appeal in each case should be allowed with costs.

Appeal allowed.

[This case to be taken to the Privy Council.]

BORBRIDGE v. BORLAND.

Saskatchewan Supreme Court, Haultain, C.J., Brown, Elwood, and McKay, JJ. July 15, 1915.

1. LAND TITLES (§ I—10)—DUTIES OF REGISTRAR—CERTIFICATES OF TITLE—EXECUTIONS—FAILURE TO ENDORSE—DISSIMILARITY IN NAMES.

The duties of the Registrar of land titles in matters of registration are not merely ministerial, but are judicial to a limited extent; in the exercise of his discretion as to the identity of persons from a substantial similarity in names he must confine himself to the spirit of the statute in accordance with a reasonable protection of creditors' interests and the fact that a writ of execution is designated by the initial letter of the Christian name and the title registered in the full name, but the surnames and addresses being alike, does not justify an assumption as to a dissimilarity of persons so as to relieve him from liability for his failure to endorse upon a certificate of title a memorandum of the writ.

[*Sievell* v. *Haultain*, 4 S.L.R. 142, distinguished.]

SASK.

S. C.

BORBRIDGE v. BORLAND.

McKAY, J.

APPEAL from a judgment for plaintiff in an action against the Registrar of Land Titles.

Geddes, for appellant.

Squires, for respondent.

The judgment of the Court was delivered by

McKAY, J.:—The following facts are admitted in this case:—The respondent, on May 2, 1913, issued a writ of execution for $513.24, out of the District Court at Saskatoon, against the lands of one L. Arnason, of Leslie, Saskatchewan, and on the same day the sheriff caused a copy of said writ to be filed in the Saskatoon Land Titles Office.

On June 14, 1913, the appellant issued a certificate of title to the south-east quarter of section 21, township 32, in range 12, west of the 2nd meridian, to Larus Arnason, of Leslie, Saskatchewan. The said Larus Arnason continued to be the registered owner of said land until July 12, 1913, when the appellant issued a new certificate of title to Elisha Frederick Hutchings.

The appellant did not endorse upon the certificate of title issued to said Hutchings a memorandum of the respondent's writ of execution against L. Arnason.

The following two questions had to be decided at the trial: (1) Should the appellant have put upon the certificates of title issued to Larus Arnason and said Hutchings a memorandum of the writ of execution issued against the lands of L. Arnason? (2) Did the land in question cease to be the homestead of Larus Arnason before the transfer to said Hutchings?

The judgment of the learned trial Judge is an affirmative answer to both these questions, and the appellant now appeals from his judgment in the first question.

In his reasons for judgment, the learned trial Judge says:—

> It was proved at the trial that the L. Arnason against whom the execution was issued and Larus Arnason, to whom the certificate of title was issued are one and the same person.

Counsel for the appellant contends that the appellant had no notice that "L. Arnason" was or is the same person as "Larus Arnason," and that the appellant was justified in assuming that L. Arnason was the full name of some person; in other words, that the letter "L" stood for a Christian name and not for the initial letter of a Christian name, and he quotes in support of his contention the following authorities:—

> When a party or a third person is designated in a pleading, warrant

or indictment by a surname preceded by one or more capital letters only the Court in the absence of evidence will not presume that he has any Christian name other than such letter or letters. 2nd Ed. A. & E. Encyc. 308-9, 16 A. & E. Encyc. 116.

When in pleading a single vowel precedes a surname the court will understand such vowel to be the Christian name of the party. *Kinnersley* v. *Knott*, 18 L.J.C.P. 281.

I must, however, say that I cannot acquiesce in the distinction referred to in *Lomax* v. *Landells*, 18 L.J.P.C. 88, between the use of a vowel and a consonant. I do not see why a consonant may not be used as a Christian name as well as a vowel. Why not a parent for some reason or other, say that a child shall be called P, T, F, or G? I see no reason why we may not suppose that those letters were the signatures given at baptism just as much as if they had been A or E, or any other vowel. I have just been informed by a gentleman on whose accuracy implicit reliance can be placed that he knows a person who was baptized by the name of T. Lord Campbell, C.J., *Reg.* v. *Dale*, 20 L.J.M.C. 240.

But see 1 A. & E. Encyc., p. 18, where it is stated that

Initials preceding a surname are always understood to be the initials of a name and not the abbreviations of a title unless proved the latter.

It is to be noted that the English authorities above quoted arose out of case decided in Court proceedings on demurrers under the old procedure prior to the introduction of the Judicature Acts.

In *Kennersley* v. *Knott*, *supra*, it was held by Marsh, J., that where the initial was a vowel the Court would understand it as a Christian name, but not so where it was a consonant, as in the case at bar.

In *Reg.* v. *Dale*, *supra*, which was a criminal case, Erle, J., made the following observation:—

The cases referred to are cases of procedure in civil actions, and the objection was taken on special demurrer. I find no authority to support the same objection in respect of procedure under the criminal law.

But I do not think we should follow the foregoing authorities in considering what a Registrar should do in a case of this kind under the Land Titles Act.

The sections of the Act dealing with the duties of the Registrar on receiving a copy of an execution against lands, and the effect of such receipt, are secs. 118 and 119, and read as follows:—

Sec. 118 (2)

Such writ shall bind and form a lien and charge on all the lands of the execution debtor situate within the judicial district of the sheriff who delivers or transmits such copy, as fully and effectually to all intents and purposes as though the said lands were charged in writing by the execution debtor under his hand and seal from and only from the time of the receipt of a certified copy of the said writ by the registrar for the registration district in which such land is situated.

SASK.

S. C.

BORBRIDGE v. BORLAND.

McKay, J.

(3) From and after the receipt by the registrar of such copy no certificate of title shall be granted and no transfer, mortgage, encumbrance, lease or other instrument executed by the execution debtor of such land shall be effectual except subject to the rights of the execution creditor under the writ while the same is legally in force.

(4) The registrar on granting a certificate of title and on registering any transfer, mortgage or other instrument executed by the execution debtor affecting such land shall by memorandum upon the certificate of title in the register and on the duplicate issued by him express that such certificate, transfer, mortgage or other instrument is subject to such rights.

119. The registrar shall keep a book in convenient form in which shall be entered according to the dates when respectively received a record of all copies of writs received by him from the sheriff or other officer; and such book shall be kept indexed showing in alphabetical order the names of the persons whose lands are affected by such writs with the day and hour and minute of such receipt. R.S.S. 1909, ch. 41, sec. 119.

Under the Territories Real Property Act, which preceded the Land Titles Act, the method of charging lands with an execution was to deliver a copy of the writ of execution to the Registrar, "together with a memorandum in writing of the lands to be charged thereby." That is, it was only the lands mentioned in the memorandum that could be affected by the execution, and if the execution debtor was registered owner of other lands, but not mentioned in the memorandum, they would not be affected by such execution. And as it often happened that the execution creditor did not know of any or all the lands which the execution debtor owned, he frequently lost his remedy by way of execution against lands.

It was to remedy this difficulty and to give greater protection to the execution creditor that the more comprehensive method was adopted by the Legislature in the present provisions, which provide that such writ "shall bind and form a lien and charge on all the lands of the execution debtor, etc., from the time of the receipt of a certified copy of the said writ by the Registrar for the registration district in which such land is situated," without mentioning the land.

These sections, therefore, should, in my opinion, be construed as remedial legislation for the protection of execution creditors.

But apart from this, the Interpretation Act, R.S.S., ch. 1, sec. 6, (2), says:—

Every Act and every provision or enactment thereof shall be deemed remedial . . . and 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 the provision or enactment according to the true intent, meaning and spirit thereof.

Clearly the intention of these sections is to bind all the lands of the execution debtor not otherwise exempt which are within the judicial district of the sheriff and the registration district of the Registrar delivering and receiving the copy of execution respectively.

How, then, can the Registrar best carry out "the true intent, meaning and spirit" of these provisions?

It is well known that persons are frequently registered as owners of land sometimes in their full names, as: "John James Smith," and sometimes in some abbreviated form as: "John J. Smith," not through any fault of the Registrar, but because it is a common practice for people to use the initials only of their Christian names instead of their full Christian names.

If we were to follow the above authorities, and the contention of the appellant's counsel, and if "John James Smith, of Regina, Saskatchewan," an execution debtor, were registered as owner of land under the name of "John J. Smith, of Regina, Saskatchewan," and a copy of an execution directed against his lands under the name of "John James Smith, of Regina, Saskatchewan," which would fully and truly set out his full name and address, were delivered to the Registrar, the Registrar would be justified in refusing to register such execution against the lands registered in the name of "John J. Smith," because, according to said authorities, "John James Smith" is a different name from that of "John J. Smith," and yet "John J. Smith" is the execution debtor against whose lands the execution is directed under the name of "John James Smith." Thus the object of these sections would be defeated.

I do not think that the Registrar should construe the Act in this narrow way, but "that the actual practice of the Registrar in assuming an identity of parties, till the contrary is shewn, from a substantial similarity of name or address, is more in accordance with a reasonable protection of the creditor's interests" (Thom. p. 267) and the proper construction of the Act. The duties of the Registrar are judicial to a limited extent.

As stated by the learned trial Judge:—

It must be remembered that the system of registration in this province is a system for the registration of titles and not a mere mechanical system

SASK.

S. C.

BORBRIDGE v. BORLAND.

McKay, J.

for the registration of deeds, the registrar has certain judicial functions to perform.

But, for all that, I am of the opinion that the duties of a registrar in the matter are not merely ministerial in the narrow sense of the word, but also, within certain limits at least judicial. He has a discretion to exercise. Prendergast, J., in *Re International Harvester Co.* v. *Ebbing*, 2 S.L.R. 170.

Under somewhat similar sections of the Transfer of Land Act, (1874), W.A., it was held that

> The Commissioner is an official bound to exercise his intelligence and not a mere machine as the literal force of the words would make him. Lord Hobhouse in *Manning* v. *Commissioner of Titles*, 15 A.C. 195, at 201.

The case at bar is distinguishable from *Sievell* v. *Haultain*, 4 S.L.R. 142, decided by this Court. In the latter case the execution debtor was registered as owner of land under the name and address of "William Angus Matheson, of Westview, Saskatchewan," and the writ of execution was directed against the lands of "W. A. Matheson, of Denver, Colorado." Here was a difference in name and address. In the case at bar the execution debtor was registered as "Larus Arnason, of Leslie, Saskatchewan," and the execution directed against the lands of "L. Arnason, of Leslie, Saskatchewan." We cannot lay down any hard and fast rule for the Registrar to follow in cases of this kind. Each case must depend upon the facts surrounding it. But in the case at bar, I am of the opinion that when the Registrar issued the certificate of title to "Larus Arnason, of Leslie, Saskatchewan," and found that he had a copy of a writ of execution directed against the lands of "L. Arnason, of Leslie, Saskatchewan," and found the similarity of names and the same address, coupled with the practice of using the initial of the Christian name instead of the Christian name, being facts that should have been sufficient notice to him that they might be the same person, he should have exercised his discretion in the matter and taken the precaution of protecting the execution creditor by making inquiries as to whether they were the same person or not, or by indorsing a memorandum of such execution on said certificate, and also on the certificate issued to said Hutchings.

For the above reasons, and for the reasons given in the judgment of the learned trial Judge, I am of the opinion this appeal should be dismissed with costs.

Although I have come to the above conclusion, it is with some hesitation that I do so. The practice of using initials instead

of full Christian names in legal documents or documents of title is not a commendable one, and should be discouraged. While not holding that it is in all cases necessary to do so, I think it would be well that one full Christian name should at least be used as well as the initials of the other Christian names with the surname. In this particular case there might have been no litigation had the respondent given the full Christian name in his execution.

Appeal dismissed.

SASK.

S. C.

BORBRIDGE v. BORLAND.

McKay, J.

PREVOST v. BEDARD.

CAN.

S. C.

Supreme Court of Canada, Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. February 15, 1915.

1. CORPORATIONS AND COMPANIES (§ IV D 1—71)—REAL ESTATE COMPANY—PURCHASE OF LANDS—LOTTERY PURPOSES—ULTRA VIRES—SUBSEQUENT PURCHASERS.

The purchase of land by a real estate company for the purpose of carrying on a lottery scheme is an act *ultra vires* and will be vacated in favour of a purchaser claiming under a subsequent sale from the original vendor.

[*Bédard* v. *Phœnix Land, etc., Co.*, 8 D.L.R. 686, affirmed.]

2. DEEDS (§ I A—1)—EXECUTION OF—VALIDITY—NOTARY OFFICER OF PURCHASING COMPANY.

The execution of a deed before a notary who at the time of its execution is the president of the company assuming to purchase the lands, renders the deed invalid as an authentic conveyance.

[*Bédard* v. *Phœnix Land, etc., Co.*, 8 D.L.R. 686, affirmed.]

Statement

APPEAL from the Superior Court of Quebec, sitting in review, *Bedard* v. *Phoenix*, 8 D.L.R. 686.

Lamarche, K.C., for appellant.

St. Germain, K.C., for respondent.

Fitzpatrick, C.J.

FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs.

Idington, J. (dissented)

IDINGTON, J., dissented.

Duff, J.

DUFF, J.:—I express no opinion upon the question which was discussed whether according to the law of Quebec (art. 989, C.C.), in the circumstances of this case, the respondent was entitled in strict law to the judgment prayed, without regard to possible equities affecting creditors and others interested in the company.

I think the appeal should be dismissed upon the ground that the pretended contract of purchase was in the circumstances *ultra vires* of the company; and that under this pretended contract (the notarial *acte de vente* has, in my opinion, no validity as an authentic deed by reason of the fact that the notary being an

CAN.
S. C.
PREVOST
v.
BEDARD.
Duff, J.

officer of the company purchaser and lacking, therefore, the essential quality of indifference between the parties was incompetent) no right of property passed to the company.

The doctrine of *ultra vires* I have no doubt applies to the contract of the Phœnix Land Improvement Company. That doctrine is not a principle of the English common law and does not rest upon any theory as to the nature of corporations or as to the legal relationship subsisting between a corporation and its governing body. (See the judgments of Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L.R. 7 H.L. 653, of Lord Haldane in *Sinclair* v. *Brougham*, [1914] A.C. 398, and *Bonanza Creek Gold Mining Co.* v. *The King*, 21 D.L.R. 123, 50 Can. S.C.R. 534.) It is a rule resting upon the interpretation of the legislative enactments through which the companies to which it applies derive their corporate existence and capacity. The Phœnix Land Improvement Company, while created through the instrumentality of letters patent, exists as a corporation and enjoys such capacity as it possesses in virtue of the Quebec statute in pursuance of which the letters patent were granted, and I think the reasoning of Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche*, *supra*, applies to that statute.

Anglin, J.

ANGLIN, J.:—I would dismiss this appeal on the ground that the deed from Drolet to the land company was void for illegality and that property transferred for an illicit consideration may be recovered back. Art. 989, C.C.; *Lapointe* v. *Messier*, 17 D.L.R. 347, 49 Can. S.C.R. 271.

Brodeur, J.

BRODEUR, J.:—The contract made between the Phoenix Land Improvement Co. and Drolet on June 28, 1905, was evidently made with the intention of carrying on a lottery. The evidence upon this point is, it is true, somewhat contradictory, but the terms of the letter of defeasance given to Drolet should remove all doubt on the matter.

Moreover, there arises here a question of fact, and the inferior Courts having pronounced upon this point against the contentions of the appellant, he is not entitled to ask us to reverse their opinion.

The lottery could not be easily carried on by this company without the cession of certain lots of land, and so Drolet, who

was a shareholder in the company and familiar with its business, agreed by this deed of June 28, 1905, to transfer to it the title to these lots of land. It was on his part and on the part of the company a participation in an infraction of the law and in a fraud which they intended to practise on a confiding public.

Every consideration for a contract is illegal if prohibited by law or opposed to public order (art. 990 C.C.), and this contract is non-effective (art. 989 C.C.; *St. Jean-Baptiste Assoc.* v. *Brault*, 30 Can. S.C.R. 598).

Sirey (1869-2-53) reports a decision in which it was decided that,

lotteries being prohibited by the law of France, all agreements or obligations respecting their organization are void as being for an unlawful cause and can confer no right of action in the Courts.

There is in France much difference in opinion as to whether or not the person who does something illegal, such as in this case, can recover back the money which he may have paid on execution of this illegal contract. This difference of opinion is manifested principally among the first commentators of the Code Napoleon; but since then there has been some departure from their strict rule and more modern authors are generally of opinion that the action to recover back the money exists.

See Marcade, vol. 4, No. 458; Hue (ed. 1895), vol. 8, No. 392; Demolombe, vol. 24, No. 382; Laurent, vol. 16, No. 164; Colmet de Santerre (ed. 1883), vol. 5, No. 49, bis iv.; Pont, Explications of the Civil Code (ed. 1884), vol. 7, No. 53, under title "Societies"; Guillourd, Societies (ed. 1892), No. 58.

We have in this Court applied the same principle in the case of *LaPointe* v. *Messier*, 17 D.L.R. 347, 49 Can. S.C.R. 271.

It can then be said that the action to recover back the money is in favour of the one who wishes to make use of his own wrongdoing in order to set aside the illegal contract that he has entered into. In the case before us the contract was, moreover, fictitious or simulated.

There never was any intention on the part of the contracting parties that Drolet should cease to be owner of the lots of land in question. The subsequent dealings with prize winners have been of such a nature as to leave this simulation in existence.

CAN
S. C.
PREVOST
v.
BEDARD.
Brodeur, J.

I have then no doubt that this contract is non-effective, and should be declared simulated.

It may be that some creditors have in good faith compounded with the company on the basis of the fact that it was owner of the land in question in this case. The rights of these creditors cannot be effected by the maintenance of the petitory action by the plaintiff, respondent.

The judgment *a quo* should be confirmed with costs.

Appeal dismissed.

N. S.
S. C.

Re MOTT; PAYZANT v. FORREST.

Nova Scotia Supreme Court, Graham, C.J., Russell, Longley, and Ritchie, JJ. May 15, 1915.

1. WILLS (§ III G 8—157)—ANNUITIES—JOINT ESTATE—SURVIVORSHIP.
On a bequest directing the payment of an annuity during the joint life of the legatees and upon the death of either or the last survivor, the like sums to be paid to the children of a certain legatee, the legacy will not cease or revert to the residue upon the death of either of the children, but will go to the survivor of them for life.
[*Grant* v. *Winbolt*, 23 L.J. Ch. 282, distinguished.]

Statement

APPEAL from the judgment of Drysdale, J., relative to the construction of a will.

R. H. Murray, for the administrators of Elizabeth Mott Sutherland and George Sutherland.

H. Mellish, K.C., for Constance Sutherland and Isabella Creighton.

James McDonald, K.C., for the residuary legatees.

W. A. Henry, K.C., for the plaintiffs, trustees.

Graham, C.J.

GRAHAM, C.J.:—This is the clause of the will of the late John P. Mott which we have to construe:—

With respect to the annual payments directed to be made to my sisters Catherine Ann Mott, Elizabeth Jane Mott, and Sarah C. Howe, in my first and second codicils, my wish is that upon the death of either of them the annual sum theretofor payable to her shall thereafter be payable to the two surviving ones during their joint lives, and that upon the death of the next of my said sisters, two-thirds of the annual sum payable to each deceased sister during their joint lives shall be paid to the daughters of my deceased sister Charlotte, in equal shares annually during the life of my said surviving sister, and the remaining one-third to be paid to my surviving sister annually during her life, and at the death of my said surviving sister then that the like sum of money payable to my said sisters during their joint lives shall be payable annually in equal shares to and among the four children of my said deceased sister Charlotte during their lives and thereupon said previous annual payments to said children shall cease.

The question argued before us was principally whether the "like sum of money" was to be paid only to those of the four

N. S.
S. C.
RE MOTT.
Graham, C.J.

children of Charlotte who survived, or did the executors of deceased children take; and, secondly, whether it ceased to be payable on the death of one of the survivors and went into the residue.

I quite agree with the learned Judge that it was only a provision for the lifetime of each child; therefore that survivors only will take upon the death of Charlotte.

Secondly, I think that the legacy will not go into the residue on the death of one of the surviving children of Charlotte.

The learned Judge thought that he was constrained by the case of *Grant* v. *Winbolt*, 23 L.J. Ch. 282, to hold otherwise. I think there is a distinction. There the testator had directed that out of the residue of his estate an annuity of £55 sterling should be purchased for the life of my sisters S. and S., "to be equally divided between them." It was held that that meant an annuity for the joint lives only. The Vice-Chancellor emphasizes these words to the effect that after the death of one it could no longer be equally divided between them. Here it is simply "during their lives." I think it means that the amount is to be paid to them during their respective lives. Why should it be limited to their joint lives? There is no reason why a man anxious to provide for four children apparently during their lives should without more be taken to mean that the whole provision was to stop with the life of the first to die and go into the residue: Jarman on Wills, 1210. It means during their lives and the life of the survivor.

I think to this extent the judgment should be varied; the trustees' costs out of the estate as between solicitor and client; the others to have costs as between party and party out of the estate.

Longley, J.
Ritchie, J.

LONGLEY and RITCHIE, JJ., concurred with GRAHAM, C.J.

Russell, J.

RUSSELL, J.:—In *Grant* v. *Winbolt*, 23 L.J. Ch. 282, the testator directed an annuity of £55 to be purchased for the life of his two sisters, to be equally divided between them. Vice-Chancellor Kindersley held that this was a gift for their joint lives, and ceased on the death of either of them. He had nothing to guide him, apparently, in discovering the intention of the testator, except the words of this clause. I should not hesitate for a moment to grasp at the smallest and most artificial distinction between that case and the present, if it were necessary to do so

N. S.
S. C.
RE MOTT.
Russell, J.

in order to carry out the obvious intentions of the testators. But I think the distinction between the cases is not artificial. In that case the gift was for the life of the two sisters, and was to be equally divided between them. This gift is for the lives of the beneficiaries. If the gift in *Grant* v. *Winbolt*, *supra*, had been for the lives of the two sisters, I am not sure that the decision of the Vice-Chancellor would have been the same as it was, although I fear it would have been because of the direction as to an equal division between them. Happily the expression used in this case is not the life of the beneficiaries, but the lives of the four children referred to.

There is the further circumstance in this case that in the very clause which we are required to construe the testator has shewn that he appreciates the force of the expression, "joint lives." The direction that we are to construe is that "the like sum of money payable to my sisters during their joint lives shall be payable anually in equal shares to and among the four children of my said deceased sister Charlotte during their lives." The sharp distinction here made between the description of the sum payable to his sisters during their joint lives and the same sum as payable to the children of the deceased sister during their lives indicates, to my mind, that there was no intention of restricting the latter gift to the joint lives of the beneficiaries. The gift would not be a gift for the lives of the beneficiaries if it were to cease on the death of any one or of all but one of them. It is to be for the lives of the children; that is, for the life of each child.

Moreover, as it is the whole of the sum payable to the sisters during their joint lives that is eventually to be payable in equal shares among the children of his deceased sister Charlotte during their lives, I think it is clear that on the death of either of the two surviving children the whole bequest goes to the survivor for life.

Judgment varied.

SASK.
S. C.

LEESON v. MOSES.

Saskatchewan Supreme Court, Newlands, Elwood, and McKay, JJ.
July 15, 1915.

1. PARTNERSHIP (§ VII—30)—DISSOLUTION—ACTIONS BY—JOINDER OF RETIRING PARTNER.

An action for the price of goods sold by a partnership is maintainable by the continuing partner after the dissolution of the firm, and it is not necessary to join as a plaintiff the retiring partner against whom the defendant has no claim and who has no beneficial interest in what is sought to be recovered.

SASK.

S. C.

LEESON v. MOSES.

Elwood, J.

APPEAL from judgment for plaintiff in action for goods sold and delivered.

F. L. Bastedo, for appellants.

A. G. MacKinnon, for respondent.

The judgment of the Court was delivered by

ELWOOD, J.:—The statement of claim in this action alleges an indebtedness to the plaintiff by the defendant for goods sold and delivered by the plaintiff to the defendant. The statement of defence denies that the defendants or either of them ordered or received any goods from the plaintiff, states that the defendant did not request the plaintiff to deliver the goods or any of the goods, and that the plaintiff did not deliver any of the goods.

The evidence taken at the trial shews that the goods in question were sold to the defendants by the firm of Alexander & Leeson, and that prior to the commencement of the action the partnership ceased to exist. The evidence also shews that since the dissolution of the partnership, Alexander, the retiring partner, has not been seen or heard of by the plaintiff; that there were a number of debts owing by the partnership at the time of the dissolution which the plaintiff has been liquidating; and that the retiring partner has probably no interest in the partnership assets. At the conclusion of the trial, counsel for the appealing defendant asked for a nonsuit on the ground that there was no assignment or transfer to the plaintiff of the retiring partner's interest, and judgment was given for the plaintiff.

The objections raised on this appeal are, that there was no sale by the plaintiff to the defendants, but by the partnership, and that there was no assignment of the retiring partner's interest in the partnership assets. I am of the opinion that the statement of claim is badly framed, and that it should contain allegations sufficient to shew that the sale of the goods in question was not by the plaintiff, but by the partnership; but I am of the opinion also that no injustice has been done, that the defendant knew of what he was being sued for, and was quite aware that it was for goods sold by the partnership. The non-joinder of parties is not now a ground for defeating an action. (See Rule of Court No. 41.) Section 40 of ch. 143 R.S.S. is as follows:—

> After the dissolution of a partnership, the authority of each partner to bind the firm and the other rights and obligations of the partners continue notwithstanding the dissolution so far as may be necessary to wind

SASK.
S. C.
LEESON
v.
MOSES.
Elwood, J.

up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise

It would seem to me that under that section payment to the plaintiff by the defendants, where the facts have come out as they have in this case, would be a bar to any proceedings by the retiring partner for the same debt; and I am also of the opinion that if the defendant considered that he was prejudiced by the non-joinder of Alexander he should have made an application under r. 41 to have him added as a party defendant if he would not consent to be added as a party plaintiff. See Lindley on Partnership, 7th ed., p. 298. And it seems to me, also, that objection to want of parties should be taken earlier than at the trial: see *Sheehan* v. *G.E.R. Co.*, 16 Ch.D. 59, at 64; *Vallance* v. *Birmingham*, 2 Ch.D. 369, 372. In Lindley on Partnership, 7th ed., at p. 323, I find the following:—

> In one case, indeed, it was held at *Nisi Prius* that where two partners sold goods, and they afterwards dissolved partnership, an action for the price of those goods was sustainable by one partner who continued to carry on the business of the late firm. But the propriety of this decision is more than questionable. Probably it is not now necessary to join as a plaintiff a retiring partner against whom the defendant has no claim, and who has no beneficial interest in what is sought to be recovered.

No authority is cited for the last proposition, but it is a proposition which appeals to one's reason, and seems to me applicable in the present case. There was no suggestion that there was any claim against the retiring partner which could be turned into a defence to the present claim, and the evidence shews that the retiring partner has probably no beneficial interest in what is sought to be recovered. If it were necessary, the retiring partner could be added as a plaintiff to the action, but I think that is not necessary, and in my opinion the appeal should be dismissed with costs.

Appeal dismissed.

ONT.
S. C.

Re SHARP AND VILLAGE OF HOLLAND LANDING.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Magee, J.A., Latchford, and Kelly, JJ. June 18, 1915.

1. INTOXICATING LIQUORS (§ I C—30)—LOCAL OPTION — VALIDITY OF BY-LAWS—POWER OF COURT TO QUASH.

The power of the court as to quashing local option by-laws is, since the addition in 1908 by Act 8 Edw. VII. ch. 54, sec. 11 of sec. 143a to the Liquor License Act, R.S.O. 1897, ch. 245 (R.S.O. 1914, ch. 215), practically vested in the executive of the province; and while the court is still bound to decide according to law and may yet quash a by-law, the effect of its decision is dependent upon the assent of the Minister.

2. INTOXICATING LIQUORS (§ I C—33)—LOCAL OPTION—QUALIFICATIONS OF VOTERS—RESIDENCE.

A voter whose house is in the municipality, but part of the house

being rented and part containing his furniture, must be regarded as a resident in the municipality, and he will not be disqualified from voting at a local option election.

[*Re Schumacher, etc.*, 21 O.L.R. 522; *Re Ellis, etc.*, 21 O.L.R. 74, 23 O.L.R. 427, referred to.]

3. INTOXICATING LIQUORS (§ I C—33)—LOCAL OPTION—VALIDITY OF ELECTION—VOTERS' LIST—PARLIAMENTARY IRREGULARITIES.

A local option by-law will not be quashed because the voters' list used was not that required by the statute but which had no effect upon the result of the vote, or for omitting the description of a voter on the list, or for trivial parliamentary irregularities at the municipal council.

[*Re Ryan, etc.*, 21 O.L.R. 582, 22 O.L.R. 200; *Re Sinclair, etc.*, 13 O.L.R. 447, applied.]

APPEAL from a judgment of Hodgins, J. Statement

The judgment appealed from is as follows.

HODGINS, J.A.:—The power of the Court as to quashing by- Hodgins, J.A.
laws is now, so far as local option by-laws are concerned, practically transferred to the Executive of the Province. This change was introduced in 1908. By sec. 11 of 8 Edw. VII. ch. 54, an Act to amend the Liquor License Act, sec. 143*a* is added, as follows: "143*a*. Where a by-law submitted to the electors under the provisions of sub-section 1 of section 141 of this Act is declared by the Clerk or other Returning Officer to have received the assent of three-fifths of the electors voting thereon, and is after such declaration quashed or set aside, or held to be invalid or illegal, or where such by-law after having been declared not to have received the assent of three-fifths of the electors, is held upon a scrutiny to have received such assent and is subsequently quashed or held to be invalid or illegal, no tavern or shop license shall be issued in the municipality in which the by-law was submitted after the date of such submission and until the first day of May in the year in which a repealing by-law might have been submitted to the electors had the first mentioned by-law been declared valid, without the written consent of the Minister first had and obtained. This section shall apply to all by-laws submitted to the electors since the 31st day of December, 1906." See now sec. 139 of the Liquor License Act, R.S.O. 1914, ch. 215, and while the Court is still bound to decide according to law and may yet quash a by-law, the effect of its decision is dependent on the assent of the Minister. This was a pretty plain intimation of the legislative will. But an amendment to the Municipal Act by 3 & 4 Geo. V. ch. 43, sec. 150 (now R.S.O.

ONT.

S. C.

RE SHARP AND VILLAGE OF HOLLAND LANDING.

Hodgins, J.A.

1914, ch. 192, sec. 150), has, to my mind, made a radical change with regard to the effect of objections to these by-laws.

The former section, known as the curative section, read as follows (1903, 3 Edw. VII. ch. 19, sec. 204): "No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the Schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election. R.S.O. 1897, ch. 223, sec. 204."

The present one is as follows: "150. No election shall be or be declared to be invalid—

"(*a*) For non-compliance with the provisions of this Act as to the taking of the poll or anything preliminary thereto or as to the counting of the votes; or

"(*b*) By reason of mistake in the use of the prescribed forms; or

"(*c*) By reason of any mistake or irregularity in the proceedings at or in relation to the election;

"if it appears to the tribunal by which the validity of the election or any proceeding in relation to it is to be determined that the election was conducted in accordance with the principles laid down in this Act, and it does not appear that such non-compliance, mistake or irregularity affected the result of the election. 3 Edw. VII. ch. 19, sec. 204, amended."

The practical difference in the two enactments is seen in three directions. The former statutory provision applied to the taking of the poll; the present one also includes "anything preliminary thereto." Then, the words "by reason of any irregularity" are replaced by the expression "by reason of any mistake or irregularity in the proceedings at or in relation to" the vote.

The important change, however, is this. Under the previous clause the validity of the by-law was saved if it appeared to the tribunal having cognizance of the question that "such non-com-

pliance, mistake or irregularity did not affect the result." This meant affirmative proof, or conviction from the proved circumstances, that the result was not affected. All the Judges who decided *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317 (except Mulock, C.J., who expressed no opinion on the point), dwell upon the fact that the onus, under the provisions of the statute, was upon the respondent to prove two things—compliance with the principles laid down in the Act, and that the irregularities did not affect the result.

Under the present section it is sufficient to uphold the by-law that there is no proof that the result was affected by the non-compliance, mistake, or irregularity. If the applicant does not prove it and it does not otherwise appear, then, provided the principles of the Act governed the conduct of the vote, the by-law stands. In other words, the onus upon those supporting the by-law is confined to shewing compliance with the principles laid down in the Act, while upon the applicant is laid the burden of shewing that the result was affected by the proved irregularities.

This seems to me to render the task of upsetting a by-law a formidable one. Formerly, proof of irregularities unsettled the basis on which the vote rested, and the Court had to be satisfied in some way that the result was not affected thereby. Now, when irregularities are proved, the Court is not concerned with their effect, subject always to compliance with the principles laid down in the Act, unless and until it is made to appear that those irregularities did in fact affect the result. In my view, the Legislature has at last so provided that the Courts will not in the future have to busy themselves annually in considering the mass of infinitesimal and unimportant suggested improprieties relied on to defeat every local option vote.

From this new standpoint the objections raised in the present application must be considered. I deal only with those actually argued.

Several votes were challenged, but I will first deal with the objection that the voters' list used was not that required by sec. 266, R.S.O. 1914, ch. 192, formerly 3 & 4 Geo. V. ch. 43, sec. 266.

The Liquor License Act, R.S.O. 1914, ch. 215, sec. 137, sub-

ONT.
S. C.
RE SHARP AND VILLAGE OF HOLLAND LANDING.
Hodgins, J.A.

sec. 2, provides: "No person shall vote upon any proposed by-law submitted to the electors under this section who is not at the date of taking the vote and has not been for three months before that date a *bonâ fide* resident of the municipality to which the proposed by-law relates, and as to such persons the certified list mentioned in section 24 of the Ontario Voters' Lists Act shall not be final and conclusive. 1 Geo. V. ch. 64, secs. 21, 23."

The Voters' Lists Act there referred to is R.S.O. 1914, ch. 6, sec. 24, formerly 2 Geo. V. ch. 4, sec. 3. A list prepared in accordance with that Act was signed by the Judge and used in this election.

As the Liquor License Act allows all the electors of the municipality to vote, I should have doubted whether sec. 266 applied, but for its concluding paragraph. But, as neither the voters' list nor the special list is final on the point raised with regard to these votes, I think the use of this list, under the circumstances, comes well within sec. 150 as a matter preliminary to the poll. The intention of the Municipal Act is to provide, for use, a voters' list, founded upon the certified voters' list, and the Liquor License Act also deals with the latter list as binding, except as to those who cannot shew the necessary length of residence before the vote. The objection seems well covered in principle by *Re Ryan and Town of Alliston* (1910), 21 O.L.R. 582, 22 O.L.R. 200, and must be disallowed. Reference may also be made on this point to *Re Sinclair and Town of Owen Sound* (1906), 13 O.L.R. 447.

Nothing appears to indicate the effect this will have upon the result of the vote; and the objection fails as well upon that point.

There are 7 electors in all whose right to vote is questioned as being disqualified in point of residence or length of residence, and one, William McClure, because his description does not appear in the voters' list. The former are Isaac Walters, Abraham Oster, George Oster, Wesley Pegg, Arthur Pegg, Stanley Morning, and John Butterfield. The vote stood 63 for and 39 against, so that 5 votes have to be struck off those in favour of the by-law to destroy the majority. But, if I come to the conclusion that these 7 votes are bad, where does that leave the matter?

I am unable to inquire how these men voted; and the reason underlying the rule of subtraction hitherto followed has, in consequence of the amendment I have mentioned, disappeared. That rule was to deduct them from the votes in favour of the by-law, and the reason was that it could not be made to appear to the Court that the result would not be affected: *Re Leahy and Village of Lakefield* (1906), 8 O.W.R. 743; *Re Gerow and Township of Pickering* (1906), 12 O.L.R. 545; *Re Sinclair and Town of Owen Sound* (1906), 12 O.L.R. 488; *Re Cleary and Township of Nepean* (1907), 14 O.L.R. 392; *Re Ellis and Town of Renfrew* (1910), 21 O.L.R. 74.

Now, it must actually appear that the result was in fact affected; and, if the contentions now made by the applicant are resolved in his favour, there still remains the question, Why should they be deducted from those in favour of the by-law?

While the statute remained as it was, a reason existed, namely, the possibility of the majority in favour being made up of illegal votes. Now, while that possibility still exists, it remains a possibility only, and it cannot be made to appear that the result was really affected. I do not say that, if a class of voters is disfranchised or wrongfully enfranchised, the vote could be said to be conducted according to the principles laid down in the Act: *In re Pounder and Village of Winchester* (1892), 19 A.R. 684. But, if only isolated votes here or there, of a class of voters properly entitled to vote, are tendered by persons on the voters' list, and they are received as prescribed by the Act, then, although the voters are in fact unqualified, and their votes are subject, therefore, to scrutiny and rejection, I cannot think that the whole vote must be set aside as for a departure from the scheme laid down in the Act.

For this reason, I propose to examine, following the precedent set by Mr. Justice Riddell in *Re Ellis and Town of Renfrew*, 21 O.L.R. 74, only three votes, leaving the others to depend on the view I have expressed—that, if held to be invalid, they cannot be said affirmatively to have affected the result of the vote, and that the attacked votes, in number and circumstances, are not sufficient to satisfy me that the principles laid down in the Act have been departed from.

ONT.

S. C.

RE SHARP AND VILLAGE OF HOLLAND LANDING.

Hodgins, J.A.

Isaac Walters' vote is admittedly bad.

William McClure is on the voters' list, but his description is not given. He is named therein, and his vote cannot be allowed: *Re Schumacher and Town of Chesley* (1910), 21 O.L.R. 522; *Re Ellis and Town of Renfrew*, 21 O.L.R. 74; *S.C.* in appeal (1911), 23 O.L.R. 427.

John Butterfield's residence is in Holland Landing, where his house is. Part of it is rented, and part of it contains his furniture. Under these circumstances, it must be held that he is resident.

Objection was made that the by-law was improperly given a third reading on a date less than two weeks from the declaration of the result by the clerk; that the council's power was exhausted by such improper third reading; that the meeting on the 6th February, 1915, was illegal by reason of not being summoned by the clerk; and that the council was not bound to pass the by-law, there being no properly signed petition.

The first point is, I think, covered by authority which is against the objection. The second and third I do not give effect to. They seem to carry their own answer. The last objection I do not consider, as, whether the petition was sufficiently signed or not, the council did pass the by-law. To determine whether it was their duty or not so to do, is not important.

The objections numbered 4, 6, 7, 8, 9, 11, and 12, were not argued.

The result is the dismissal of the application with costs.

The applicant appealed from the order of HODGINS, J.A., dismissing the application.

J. B. Mackenzie, for appellant.

W. E. Raney, K.C., and *E. F. Raney*, for respondent.

The judgment of the Court was delivered by

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—We decided on the argument that the votes of the two Osters were not successfully impeached, and we do not find that there was evidence or any legal ground to kill a sufficient number of other votes, without reference to the fact that it cannot appear how any of them voted.

As to the alleged defect in the third reading, if the council thought a new third reading was necessary, in view of the fact

ONT.

S. C.

RE SHARP AND VILLAGE OF HOLLAND LANDING.

that sufficient time had not been allowed to elapse, it was competent for them to give it.

As to there not having been a separate list of voters, we are of opinion that this was not left undone with a view of preventing any one from voting. The list was the same, and the result could not be in any way affected.

Appeal dismissed with costs.

ALTA.

S. C.

MONTGOMERY v. McQUEEN.

Alberta Supreme Court, Walsh, J. June 25, 1915.

1. CONTRIBUTION (§ I—6)—JOINT LAND ADVENTURE—SHARING PROFITS—LIABILITY ON GUARANTEES.

There is no right to contribution on the liabilities incurred on guarantees assumed by one of the parties without the assent of the other in a joint venture for the sale of lands upon a basis of an equal sharing in the profits.

Statement

ACTION for contribution.

O. M. Biggar, K.C., for plaintiff.

H. H. Parlee, K.C., for defendant.

Walsh, J.

WALSH, J.:—There is no question but that the parties negotiated for and disposed of these lands upon the understanding that they would share equally in the profits. Outside of the guarantees given by the plaintiff there does not appear to have been any possibility of loss in the transaction. They had what was practically an option from Magrath-Holgate Co., Ltd., which was taken up by the contracts of their sub-purchasers, so that they did not involve themselves in any personal liability for the purchase price to the Magrath company. The element of profit-making would appear to be the only one that entered into the transaction at its inception. It is admitted that the profits not only were to be, but that they actually were, equally divided between the plaintiff on the one hand and the defendant, either for himself or his company, Montgomery and McQueen, Ltd., on the other. The question for my determination seems to me, however, to be not whether or not this was a joint adventure, but whether the giving of these guarantees by the plaintiff was an incident of the transaction involving the defendant equally with him in liability under them, or whether it was a liability assumed by the plaintiff alone under circumstances which give him no right to contribution from the defendant.

I apprehend that it is not every expenditure made or liability incurred, in such a transaction as this is, that is of right chargeable

ALTA.
S. C.
MONTGOMERY
v.
McQUEEN.
Walsh, J.

against the joint undertaking. While that is true of many such liabilities, I think it was quite competent for one of the parties to make an expenditure or incur a liability which he alone must bear.

The question here is within which of these categories do the sums which the plaintiff claims fall. These guarantees were not given in the usual and ordinary way of the sale of this land. They constituted a most unusual and extraordinary method of disposing of it. They assured to each of the purchasers the doubling of his cash payment of $2,000 within a year, and a complete indemnity to him in respect of the deferred payments of the purchase money, and interest and taxes. Such an undertaking was clearly not within the scope of the joint adventure. It would not be contended, I imagine, that any liability was imposed by it upon the defendant, unless it was assumed by the plaintiff upon joint account, with the full knowledge and approval of the defendant.

The defendant knew that these guarantees were being given. They were, in fact, prepared in his office, and he witnessed their execution by the plaintiff, and the question of giving them was the subject of discussion between him and the plaintiff. The determination of the disputed question of fact as to the exact undertaking or arrangement under which he so entered into them is one of extreme difficulty, for there are some of the admitted facts which give strength to the plaintiff's contention, and some of them which strongly support the position of the defendant.

My conclusion is, that when the plaintiff on his return from Ontario submitted to the defendant the proposition of selling this land upon the terms of this guarantee, the defendant refused to make himself liable under it, and that the plaintiff thereupon decided to assume this liability himself, and in that spirit and with that intention he signed the guarantees. I think that the evidence as to the negotiations between the parties preponderates in the defendant's favour, even if I disregard, as I do, that of J. J. Montgomery, owing to the flagrant contradiction of it by his unsworn statement to Mr. Biggar a few days before the trial. In addition to this, it seems to me that the other circumstances surrounding the transaction justify this conclusion.

It is quite true that the plaintiff refused to commit himself to these guarantees whilst in Ontario because of his desire to

consult the defendant about it. That was a natural and reasonable course for him to take. It was not to be expected that he would assume to bind his co-adventurer without his consent, and it was to be exp ed that he would attempt to get that consent. One would have cted to find the guarantee entered into in the name of both dies if it was their guarantee. The plaintiff's individual undertaking, in the light of the facts, *primâ facie* imports a sole liability upon him. I do not attach very much importance to the fact that the plaintiff seems to have entered into some sort of writing with some of these purchasers before his return to Edmonton, and that something over $7,000 of the purchase money had actually found its way into the bank account of the parties before these guarantees were given. I think that these writings were tentative agreements, and the money forwarded was in the shape of deposits, and that both were conditional upon the formal agreements with the promised guarantees being forthcoming. The opening of a separate bank account for this deal was a natural thing, in view of the fact that a division of the net proceeds was admittedly to be made between the parties. The subsequent conduct of the parties is more consistent with the view of the matter that the defendant put forward than with that advanced by the plaintiff. The fact that upon the re-sale of one of the properties that was made the full sum received less the defendant's commission was accounted for and paid over to the plaintiff by the defendant and used by him as his own money, is something which strongly supports the defendant's position. I cannot fancy why this should have been done, except upon the theory that, as the plaintiff alone was, by virtue of his guarantee, interested in this purchase money, he alone was entitled to get it. There is not enough in the proven facts as to the efforts put forward by the defendant to make re-sales of this property to remove from my mind the impression made upon it by the other facts of the case. It is very difficult to say from the evidence exactly what the arrangement between the parties was in this respect, but a reasonable view to take of the defendant's efforts in this behalf—although it may lack definite evidence to support it—is that the defendant, having profited as he did to the extent of $8,000 by the guarantees which the plaintiff entered into, felt a moral obligation to do everything that he could to make these guarantees good by selling the property, even if the financial

ALTA.

S. C.

MONTGOMERY v. MCQUEEN.

Walsh, J.

result to him in the way of commissions was much less than that ordinarily looked for in such cases. The fact which really has caused me more doubt as to the correctness of the conclusion which I have reached than any other feature of the case, is this, that the defendant, knowing that these sales would not go through without the guarantee, was content to accept some $8,000 as his profit in the transaction, a profit produced solely by the guarantee which the plaintiff gave. It does seem unfair that he, having profited to this extent by the plaintiff's act, should be able to place upon the plaintiff the entire liability for what followed. But if, as I find to be the case, the plaintiff deliberately undertook this liability, knowing that he alone would have to bear it even though the defendant would profit equally with him out of the giving of the guarantees, he cannot be heard to complain if in the result that liability has to be shouldered by him alone.

I was at first inclined to think that the reason of the case was with the plaintiff, but I am not so sure of that now. It does seem unreasonable that a man, while only receiving one-half of the profits of this venture, should deliberately assume all of the risk of it. I am satisfied, though, that the plaintiff, in his optimism attached but little real risk to his undertaking. Those were the days of the boom time, the spring of 1912, when fortunes were made out of real estate over night, and no one dreamed of the calamitous days that were to follow. I think that the plaintiff, rather than lose the $8,000 which the defendant's refusal to join in the guarantees would have entailed, did not hesitate to give his own undertaking, which probably was nothing more than a form to him in the prosperity of those days. The view which the defendant took of it was consonant with reason and common sense. He did not allow himself to be carried away with the prospect of making this money so easily, or it may be that he took advantage of the plaintiff's determination to carry the scheme through on this footing, and craftily evaded the liability which the plaintiff was evidently quite willing to assume—alone if need be.

I must dismiss the plaintiff's action in so far as it seeks to hold the defendant liable for contribution under the guarantees. The defendant is entitled to his costs if he asks for them. If the plaintiff asks for an accounting with reference to the purchase money received by the defendant on the re-sales, he may have a

reference to the clerk upon filing with the clerk and serving upon the defendant's solicitors a notice of his election therefor by the 15th of September next, and in that event further directions and the question of the costs of the reference will be reserved until after the clerk has made his report. Failing the filing of this notice, the plaintiff's action will stand wholly dismissed. *Action dismissed.*

TRUSTS AND GUARANTEE CO. v. GRAND VALLEY R. CO.

Ontario Supreme Court, Hodgins, J.A. May 4, 1915.

1. RECEIVERS (§ V—42)—COMPENSATION—REPRESENTATION AT HEARING—RIGHTS OF BONDHOLDERS—RE-HEARING.

A receiver appointed on behalf of a mortgagee of the assets and undertakings of a railway company does not constitute a representation of the interests of bondholders upon the passing of accounts and fixing his remuneration; nor is that defect cured by the appointment of a solicitor, who is also a bondholder, to represent their interests where his appointment lapses upon his taking office as judge prior to the hearing, even though the latter procured other counsel to appear for him, and the court, upon a proper certification of the proceedings, will re-open the question at the instance of the bondholders for the purpose of a re-hearing.

2. RECEIVERS (§ I A—1)—NATURE OF OFFICE—REPRESENTATIVE CAPACITY.

A receiver appointed by the court is an officer of the court and represents neither the plaintiff nor the defendant.

[*Moss Steamship Co.* v. *Whinney*, [1912] A.C. 254; *Parsons* v. *Sovereign Bank*, 9 D.L.R. 476, [1913] A.C. 160, referred to.]

Statement

MOTION by holders of bonds to open up the question of remuneration of receiver.

W. S. Brewster, K.C., and *J. H. Fraser*, for applicants.

G. H. Watson, K.C., for receiver.

Grayson Smith, for plaintiffs.

Hodgins, J.A.

HODGINS, J.A.:—Motion on behalf of holders of the bond issue of 1902 and of those exchanged for bonds of the issue of 1907 to open up the question of the remuneration of the receiver of the defendant railway company, fixed on two appointments June-October, 1913, and December, 1914, at which the accounts of the receiver were passed. In the alternative, an order is asked extending the time and granting leave to appeal against the reports of October, 1913, and December, 1914, and against the ruling of the Master in Ordinary on the 21st January, 1915, that he would not re-open the question of remuneration. Numerous affidavits have been filed on this application, and a copy of the notes taken by the clerk of the Master in Ordinary has also been furnished.

ONT.

S. C.

TRUSTS AND GUARANTEE CO. v. GRAND VALLEY R.W. CO.

Hodgins, J.A.

It appears that on the 29th May, 1912, an order was made by Mr. Justice Latchford in this action, of which paragraph 2 is as follows: "This Court doth order that Edward Bentley Stockdale, of the city of Toronto, manager of the plaintiff company, be and he is hereby appointed until further order receiver (he first giving security to the satisfaction of the Master in Ordinary), on behalf of the plaintiffs, as trustees for the holders of mortgage-bonds issued by the defendants, of all the defendants' railways and undertakings and of the revenues, issues, and profits thereof, and all property whatsoever, whether present or future, comprised in or subject to the security created by the said bonds and the bond mortgages made by the defendants to the plaintiffs, dated respectively the 30th day of May, 1902, and the 27th day of August, 1907, with power to manage and operate said railways and undertakings of the defendants, and to pay all outgoings necessary for that purpose."

The receiver, pursuant to that order, managed and operated the defendant railway company until its sale in 1915, and performed various services thereunder, said to be onerous and important. The present complaint is not so much as to the details of his receipts and payments as receiver, as to the amounts allowed to him as his remuneration, which are as follows: in June, 1913, $11,362.85; in November, 1914, $10,911.58.

From the notes of the Master in Ordinary it appears that in 1913 Mr. J. G. Wallace—now His Honour Judge Wallace—appeared for the defendants. In October, 1914, Mr. Wallace was, as appears in the notes, appointed by the Master in Ordinary to represent bondholders, the defendant railway company, and also the Thames Valley and Ingersoll Railway Company. Mr. Wallace having been, before the return of the appointment, appointed Judge of the County Court of the County of Oxford, Mr. Ballantyne, and later Mr. Ritchie, as agents for Mr. Wallace, appeared and took part in the passing of the accounts. Judge Wallace in his affidavit states that he was present also. It would seem that the items of receipts and expenditures were fully gone over by him. Judge Wallace is the holder of $2,000 of the bonds of 1902 and of $6,000 of the bonds of 1907, and says he has since the appointment of the receiver represented

over $100,000 of bonds; and that, while in 1913 he was solicitor for the defendant railway company, he attended "to represent all parties in any way interested in the passing of the accounts and the remuneration to be allowed."

Upon the argument before me, it appearing that the receiver is and was manager of the plaintiff company, the question was raised as to whether the plaintiff company were interested in the remuneration of the receiver, which has apparently been paid over and is included in the accounts, as appears by the Master's notes.

The order of the 29th May, 1912, appoints the manager of the plaintiff company receiver "*on behalf of the plaintiffs, as trustees for the holders of mortgage-bonds* issued by the defendants, of all the defendants' railways and undertakings . . . comprised in or subject to the security created by the said bonds and the bond mortgages made by the defendants to the plaintiffs, dated respectively the 30th day of May, 1902, and the 27th day of August, 1907."

His position, therefore, is analogous to that of a receiver of property and franchises included in the security, appointed by the mortgagee himself, whose appointment is sanctioned by an order of Court authorising him to take possession.

Usually the receiver appointed by the Court is an officer of the Court and represents neither the plaintiff nor the defendant. See *Moss Steamship Co. Limited* v. *Whinney*, [1912] A.C. 254; *Parsons* v. *Sovereign Bank of Canada*, 9 D.L.R. 476, [1913] A.C. 160.

In the order already mentioned, the receiver, while appointed on behalf of the plaintiffs and accountable to them, is also authorised to pay debts which have priority over the bondholders, and the moneys necessary to provide for electric power, as well as to repair and improve the mortgaged property, and it is further provided that he is to be allowed these payments in his account. These are somewhat unusual powers to be given except on notice to the bondholders, who were not represented on the motion for this order. The direction that the payments made in pursuance thereof were to be allowed in the receiver's account gives point to the objection that the bondholders should,

ONT.

S. C.

TRUSTS AND GUARANTEE CO. v. GRAND VALLEY R.W. CO.

Hodgins, J.A.

some time or other, have the right to be present on the passing of the receiver's accounts.

The plaintiffs as mortgagees do not, as between them and their receiver, represent the bondholders, and hence in passing the accounts and fixing remuneration the latter are entitled to be heard. Indeed, this seems to have been recognised in 1914, when the appointment of Mr. Wallace was made as representing the bondholders.

But in 1913 no representation was ordered; and, while Mr. Wallace was no doubt a bondholder, he had no status or authority when appearing for the defendant company to bind his fellow-creditors.

In 1914, his appointment must be taken to have lapsed on his appointment as County Court Judge. A Judge cannot, no matter how well qualified, appear for or represent any litigant in a Court of justice. Judge Wallace's request to other solicitors to appear for him did not cure this defect, but indicates that he properly recognised this inherent disability.

This leaves the bondholders without representation on the two occasions when the accounts were being passed. These included payments authority for which was given by the order, but the amounts and propriety of which were of much interest to those holding securities.

When the receiver's remuneration was being fixed, another consideration was bound to arise, having regard to the terms of the order to which I have referred. The duty of the plaintiff's solicitors in regard to the receiver is very clearly pointed out in the case of *In re Lloyd* (1879), 12 Ch.D. 447, and the rule dates at least from Lord Eldon's time. See *Sykes* v. *Hastings* (1805), 11 Ves. 363. Here, owing to the fact that the receiver was in effect the hand of the mortgagees to enforce their remedies and was their own general manager, that duty could perhaps hardly be expected of their solicitors. It was therefore doubly necessary that some one really interested should be heard on the question of remuneration, especially as that remuneration or part of it might be claimed by the plaintiffs as being received by their manager on their behalf, and the fees and charges of the plaintiffs themselves, as trustees for bond-

holders, must, if not settled in the mortgage-deed, be reduced by the amount of the receiver's remuneration.

For these reasons, I think the objecting bondholders were entitled to be heard before the Master in Ordinary. If authority is needed, the following may be referred to: *Wildridge* v. *McKane* (1827), 2 Moll. 545; *In re Browne's Estate* (1887), 19 L.R. Ir. 183, 423.

I inquired on the motion whether the receiver's remuneration was, in view of his relation to them, claimed by or divided with the plaintiffs, but I was not informed upon the point. I think it is a matter which is open to the bondholders to inquire into, if they desire to do so, as it may affect the quantum, having regard to the mortgage-deed, which no doubt will be before the Master. The amounts allowed for remuneration are large, and the balance to be received by the bondholders will apparently be small; so that the payments by the receiver, while authorised by the order, should be approved by them, or dealt with from their standpoint rather than from that of the defendant company, which has no real interest in the matter.

I give leave to appeal as to the passing of the accounts and fixing the receiver's remuneration in 1913 and 1914, and also from the ruling or decision of the Master in Ordinary in 1915, declining to re-open them; or, if the parties prefer it, these matters may be referred back to the Master in Ordinary, with leave to the bondholders to surcharge or falsify, confined to the payments referred to in paragraph 5 of the order of the 29th May, 1912, and the quantum of remuneration and its propriety, having regard to the provisions of the mortgage-deed and the relations of the plaintiffs and the receiver.

With regard to the ruling or decision of the Master in 1915, declining to re-open, the applicants should have procured and filed his certificate thereof before the motion was heard. They should now do so; and upon that being done the order may issue. Their procedure being defective, I can give them no costs of this application. I do not think the receiver should have opposed the motion, in view of the considerations I have mentioned; so that he should also bear his own costs. No doubt his opposition

ONT.

S. C.

TRUSTS AND GUARANTEE CO. v. GRAND VALLEY R.W. CO.

was prompted by what he thought was an attack on his management; but, if that was intended, it was not pressed. He is, however, an officer of the Court, and the review of the accounts, to the extent I have mentioned, will tend to satisfy those who are chiefly interested in the balance left and avoid any feeling of possible injustice—a consideration which I deem of much importance. *Motion granted.*

ALTA.

S. C.

COLONIAL INVESTMENT & LOAN CO. v. GRADY.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. June 15, 1915.

1. MORTGAGE (§ VI—70)—ENFORCEMENT—PROCEDURE—SPECIAL STATUTE—ACTIONS BEFORE MASTER.

The special procedure provided by sec. 3, ch. 6, of the statutes 1914 (Alta.), that all actions for the enforcement of mortgages or agreements for the sale of land shall be brought before a Master in Chambers in the Supreme Court, does not debar plaintiffs from proceeding under the ordinary procedure.

2. CONSTITUTIONAL LAW (§ I G—140)—POWERS OF PROVINCE—REGULATION OF FORECLOSURE PRACTICE—POWERS OF MASTER—ULTRA VIRES.

A Provincial statute which confers upon a Master the extraordinary powers of a Judge, in respect of actions for the enforcement of mortgages or agreements for the sale of land, is in conflict with the appointive power of sec. 96 of the B.N.A. Act, which provides the appointment of Judges by the Governor-General-in-Council, and is therefore *ultra vires*.

3. MORTGAGE (§ I F—25)—MORTGAGE OF CHURCH—GUARANTY OF DEBT BY TRUSTEES—SCOPE OF GUARANTY.

A covenant by the trustees of a church guaranteeing the payment of the mortgage debt creates a general guaranty as against all the guarantors, notwithstanding a clause that the covenants of the mortgage shall affect and bind only the specific property of the church.

Statement

APPEAL from judgment of Walsh, J., confirming order of Master for dismissal of action for foreclosure.

A. H. Goodall, for plaintiff, appellant.

F. S. Albright, for defendant, respondent.

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—By ch. 6 of the Statutes of 1914, the Legislative Assembly of Alberta provided a special method of procedure for the enforcement of rights under mortgages, encumbrances, and agreements of sale. Section 3 of that Act reads as follows:—

All proceedings to secure or enforce any right, remedy or obligation under a mortgage, encumbrance or agreement for sale, or in respect of the lands, moneys, covenants, conditions, stipulations or agreements described or contained therein *shall be brought before a Master-in-Chambers in the Supreme Court of Alberta under the provisions of this Act, and as nearly as may be in accordance with the practice and procedure of the said Court.*

The plaintiffs are the mortgagees under a mortgage given by the Methodist Church dated May, 1913, covering certain property

in the town of Macleod, and securing the repayment of a loan of $3,000 with interest. The mortgage was signed on behalf of the Methodist Church by C. D. Chown, the General Superintendent, and bore the seal of the corporation. The Methodist Church, as the registered owner, is therefore the mortgagor. The mortgage contained the following clauses:—

In consideration of the mortgagees herein making the aforesaid advance Alfred T. Grady, real estate agent, ; Arthur Young, real estate agent; Thomas C. Bruce, real estate agent; Charles Brewster, farmer; Harry Rands, farmer, Frank T. Davis, C.P.R. employee, and James Hood, architect, all of the town of Macleod, in the Province of Alberta, the trustees for the time being of the Methodist Congregation of the town of Macleod, aforesaid, for themselves as individuals, and for and on behalf of the said congregation hereby guarantee all the covenants set forth and the payments stipulated for herein. Anything herein to the contrary notwithstanding it is expressly understood that any covenant of the Methodist Church herein contained shall affect and bind only the specific property of the said Church hereinbefore described.

The trustees above named signed the mortgage, and are defendants in the present action, which was brought against them under the ordinary procedure of the Court, and not under the procedure provided in the statute mentioned, for recovery of the amount due under the mortgage and under the guarantee given by the defendants.

The plaintiffs, before the Master in Chambers, moved for summary judgment. The defendants opposed the motion, in the first place, upon the ground that the proceedings should have been taken under the special Statute, and asked that the action be dismissed. The Master treated the matter as a motion by the defendants to dismiss the action, and made an order dismissing it. The plaintiffs appealed to Mr. Justice Walsh, in Chambers, who dismissed the appeal. From this order this appeal is now brought to the Appellate Division.

The plaintiff raises two objections to the order made by the Master. He contends, first, that the Master was wrong in holding as he did that, owing to the provisions of the statute, it was not competent to the plaintiffs to bring this action in the ordinary way, but that they should have proceeded under the statute; and, secondly, that if the Master was right and the statute had this effect, then the statute is *ultra vires* of the Provincial Legislature, because it, in effect, makes the Master a Judge of a Superior Court, and this conflicts with sec. 96 of the

ALTA.

S. C.

COLONIAL INVESTMENT & LOAN CO. v. GRADY.

Stuart, J.

B.N.A. Act, which provides that Judges of Superior and County Courts shall be appointed by the Governor General in Council.

The Act has since been repealed, and the repealing Act has confirmed the rights of all parties acquired under orders made under the Act repealed. The plaintiffs could now undoubtedly begin another action, so that the matter is largely academic except with respect to the costs incurred. But the plaintiffs, no doubt, have a right to insist upon their position if it is a correct one.

There is no doubt that the Act still left all proceedings in matters covered by it to be taken in the Supreme Court, but it enacted that a very special procedure should be adopted by which the parties were to appear at once before the Master, and it gave the Master very extraordinary powers. By sec. 4, power was given to the Master to make an order for possession, an order constituting the applicant a receiver of the rents and profits, an order allowing him to lease the property, an order permitting the applicant to sell the lands, an order for the taking of accounts, for foreclosure, or vesting the property in the applicant, an order giving personal judgment against the mortgagor, and, finally, an order directing an issue to be tried or an action to be brought in either the Supreme Court or District Court if it appear to him advisable that "any application should be so tried." And these powers specifically given were not, under the statute, in any way to limit any other rights, remedies or obligations of any interested party under any instrument (sec. 4), while by sec. 3, sub-sec. 2, the Master was to

> have jurisdiction to hear all evidence, adjourn all hearings, grant all orders, pronounce all judgments, and to do all other acts or things that may be necessary in *finally* disposing of such proceedings.

and this subject only to certain conditions of procedure, and certain enactments by way of substantive law, which in no way limited his final and complete jurisdiction.

It is obvious that it was left entirely in the discretion of the Master to decide whether or not he should exercise powers which were undoubtedly as full and complete as those held by a Judge of the Supreme Court. He could, indeed, if he thought best, direct an action to be brought or an issue to be tried, but it was still open to him to hear oral evidence as at a trial, and to give as full and as final a judgment as a Judge of the Court could give, no matter

ONT.

S. C.

COLONIAL INVESTMENT & LOAN CO. v. GRADY.

Stuart, J.

what issue of fact, *e.g.*, fraud or other ground, of defence, might have been raised. He was to do all this "in the Supreme Court." It seems to me that it is impossible to avoid the conclusion that by such legislation the Master was constituted in effect a Judge of the Supreme Court, with a jurisdiction limited, indeed, to its *extent*, but not in its *content*; that is, limited to a certain very important branch of litigation, but practically unlimited within that sphere, and subject only, with respect to his final judgment, to an appeal to the Appellate Division in the same way as a final judgment of any ordinary Judge of the Supreme Court. For this reason I think the legislation was *ultra vires* of a Provincial Legislature, inasmuch as it was inconsistent with the appointing power, expressly given to the Dominion in the B.N.A. Act. This view does not, of course, touch the question of the position of the Masters under the ordinary rules of Court, with regard to which very different consideration would apply.

We were informed that the Attorney General had been notified that the point now decided was to be raised, and that he had intimated that he did not desire to be heard. I think, it, therefore, necessary to deal with the other point raised by the appellant.

It was contended, however, by the respondent, that even if the statute were *ultra vires* and the proceedings properly taken as to form, still the action should be dismissed on the ground that by the special terms of the mortgage, which I have quoted above, the covenant of guarantee of the defendants was limited in the same way as the covenant of the Methodist Church was limited by the last clause. I cannot agree with this contention. The guarantee is obviously a general one by which the defendants guaranteed generally the payment of the mortgage debt.

The appeal will be allowed with costs, and the two orders below set aside, and the original motion should be referred again to the Master to be brought up on notice to the defendants. The appellant should have his costs of the application before the Master and of the appeal to Mr. Justice Walsh.

Appeal allowed.

MAN.

K.B.

RICHARDS & BROWN v. LEONOFF.

Manitoba King's Bench, Galt, J. June 21, 1915.

1. FRAUDULENT CONVEYANCES (§ VI—30)—TRANSACTIONS BETWEEN RELATIVES—CHATTEL MORTGAGE—BONA FIDE ADVANCES.

A chattel mortgage executed by a father to his son for actual *bona fide* money advances, consisting of a present advance and a previous undischarged mortgage, for the purpose of enabling the mortgagor to pay his debts and continue in business, is within the protection of secs. 44 and 47 of the Assignment Act (Man.), and valid against creditors.

2. FRAUDULENT CONVEYANCES (§ III—10)—PREFERENCES—CHATTEL MORTGAGE—INSOLVENCY—WHAT CONSTITUTES.

The insolvency of a debtor is not established where the estimated value of his assets are sufficient, if sold under legal process, to meet all his debts at the time of his execution of a chattel mortgage for money advances, so as to render the transaction an unlawful preference under secs. 40 and 42 of the Assignment Act (Man.).

[*Davidson* v. *Douglas*, 15 Gr. 347; *Rae* v. *McDonald*, 13 O.R. 352; *Clarkson* v. *Sterling*, 14 O.R. 460; *Empire Sash, etc.* v. *Maranda* (1911), 21 Man. L.R. 605; *Bertrand* v. *Canadian Rubber Co.*, 12 Man. L.R. 27, followed.]

3. CHATTEL MORTGAGE (§ II A—5)—VALIDITY—VERBAL AGREEMENT—RIGHT OF SIMPLE CREDITOR.

The validity of a chattel mortgage executed in pursuance of a verbal agreement cannot be attacked by a simple creditor under sec. 8 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1913, ch. 17.

[*Parkes* v. *St. George*, 10 A.R. (Ont.) 496; *Empire Sash, etc.* v. *Maranda* (1911), 21 Man. L.R. 605, followed.]

Statement

ACTION to set aside chattel mortgage.

W. P. Fillmore, for plaintiff.

C. H. Locke, for defendants.

Galt, J.

GALT, J.:—In this action recently tried before me the plaintiff sues on its own behalf as well as on behalf of all other creditors of John Leonoff, to set aside a chattel mortgage given by the defendant John Leonoff, a merchant carrying on business in Winnipeg, to his son the defendant William Leonoff. The plaintiff also asks for judgment against John Leonoff for $709.60 for goods sold and delivered, and further and other relief.

The plaintiff alleges that on January 25, 1915, the defendant John Leonoff, being indebted to the plaintiff in the sum of $709.60, the said defendant did grant unto his co-defendant William Leonoff a chattel mortgage for $1,000, covering all the goods, fixtures, etc., in a certain store in Winnipeg, and that said mortgage was registered on the same date. The plaintiff alleges that the said chattel mortgage was voluntary and made at a time when the said John Leonoff was in insolvent circumstances or on the eve of insolvency, and unable to pay his debts

in full, and with intent to defeat, hinder, delay or prejudice the plaintiff and the other creditors of the said John Leonoff, or one or more of them.

Also that the said chattel mortgage was given with intent to give the said William Leonoff a preference over the other creditors of the said John Leonoff.

Also that the said chattel mortgage was made within sixty days of this action and that the mortgage has had the effect of defeating, delaying, defrauding and prejudicing the plaintiff and other creditors of the said John Leonoff.

The plaintiff further alleges that both defendants were aware that John Leonoff was in insolvent circumstances at the time and that they entered into a fraudulent scheme with intent to defeat, delay, defraud and prejudice the plaintiff or other creditors. The defendant John Leonoff denies the plaintiff's allegations and alleges that the chattel mortgage in question was granted by him to his co-defendant for valuable consideration being for moneys actually advanced by his co-defendant to him.

The defendant William Leonoff files a similar defence to that of his co-defendant, and at the trial obtained leave to amend his defence by adding the following paragraph:—

This defendant alleges that the chattel mortgage dated January 25, 1915, was given by John Leonoff to this defendant as security for present actual *bonâ fide* advances or payments of money made by this defendant to John Leonoff, pursuant to an agreement between the parties prior to such advances, and that such security would be given upon the property in question therefor, and this defendant alleges that the said moneys were advanced by this defendant in the *bonâ fide* belief that the said moneys would enable the said John Leonoff to continue his business and pay his debts in full.

The plaintiff's personal claim for judgment was not disputed at the trial. But a large amount of evidence was given in respect to the claim to set aside the chattel mortgage. It appears that the defendant John Leonoff had for some considerable period carried on business as a retail grocer in Winnipeg, and that he had dealt largely with the plaintiff company in purchasing his goods. He was also the owner of the lands on which his store, dwelling-house, and two cottages were situated, on the corner of McGregor and Boyd streets. On the corner was erected

MAN.

K. B.

RICHARDS & BROWN v. LEONOFF.

Galt, J.

the defendant's store and dwelling-house adjoining it, and next to these buildings were two cottages which the defendant rented to tenants at about $22 per month. The cottages were fairly old buildings, but, taking all the evidence regarding them into consideration, including their rental, they appear to be worth about $1,500. John Leonoff had built the store and residence about three years ago at a cost of $4,500. The whole real estate, including buildings, was assessed at $1,500. The personal estate at the date of the mortgage in question consisted of stock in the store; furniture and fixtures; horse and rig, and book accounts. The real estate was subject to a first mortgage amounting in all to $3,460 and to a second mortgage amounting to $661.11.

Taxes were allowed to accumulate upon this real estate until it was a short time ago sold for taxes. No point was made of this by the plaintiff, except as an indication that John Leonoff had not sufficient funds on hand to prevent the sale. But it was assumed by all parties that the property would be redeemed in due course.

Shortly after the outbreak of the war, John Leonoff found it advisable to raise some money wherewith to pay off current accounts. His son, the defendant William Leonoff, resided with him, and appears to have accumulated considerable money in his business as a tailor. William states that in September, 1914, his father asked him to lend him some money to pay off his creditors. William says he agreed to do so, provided his father would give him security, which he agreed to do upon part of the personal property above mentioned. William further states that he knew his father's business and his financial standing, and that he did not believe his father was or was becoming insolvent. William thereupon consulted his solicitor, who advised him that he might very well take a chattel mortgage for any such advances, and accordingly he advanced $600 to his father and took a chattel mortgage for that amount. This is not the chattel mortgage in question, but it is necessary to refer to it. The document was drawn and executed in duplicate, but owing to some carelessness, the commissioner before whom the affidavit of *bona fides* was made failed to sign his name to the *jurat* of one of the duplicates, and, oddly enough, this particular dupli-

cate was the one which was received by the proper officer and filed. As a matter of law it was an ineffective instrument as regards other creditors.

Later on John Leonoff required further advances and William agreed to supply him therewith, provided he gave a further security. William thereupon advanced $400 more in cash and took from his father the chattel mortgage now in question for $1,000, the intention evidently was to secure both the original $600 and this latter $400. A discharge of the earlier mortgage was prepared and executed, but for some reason was not filed.

The defendant John Leonoff utilized the moneys advanced by his son wholly or almost wholly in paying off various creditors' claims including $600 to the plaintiff company.

As soon as the plaintiff became aware of the second chattel mortgage, it endeavoured, through one of its representatives, to prevail upon John Leonoff to substitute a new chattel mortgage with a consideration of $1,700 instead of $1,000 in favour of William Leonoff and the plaintiff company, but the defendant John Leonoff declined to do this, and hence this action was commenced on February 11, 1915.

The plaintiff relies mainly upon secs. 40 and 42 of the Assignments Act, R.S.M. 1913, ch. 12, which read as follows:—

40. Subject to the provisions of said secs. 44 to 47, every such gift, conveyance, assignment or transfer, delivery over or payment at any time when he is in insolvent circumstances, or is unable to pay his debts in full or knows that he is on the eve of insolvency, and which has the effect of giving such creditor a preference over the other creditors of the debtor, or over one or more of them, shall, in and with respect to any action or proceeding which, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be utterly void as against the creditor or creditors injured, delayed, prejudiced or postponed.

42. A transaction shall be deemed to be one which has the effect of giving a creditor a preference over other creditors within the meaning of the two last preceding sections, if by such transaction a creditor is given or realizes or is placed in a position to realize payment, satisfaction or security for the debtor's indebtedness to him, or a portion thereof, greater proportionately than could be realized by or for the unsecured creditors generally of such debtor, or for the unsecured portion of his liabilities, out of the assets of the debtor left available and subject to judgment, execution, attachment or other process; and such effect shall not be deemed dependent upon the intent or motive of the debtor or upon the transaction being entered into voluntarily or under pressure; and no pressure by a creditor,

MAN.

K. B.

RICHARDS & BROWN v. LEONOFF.

Galt, J.

or want of notice to the creditor alleged to have been so preferred of the debtor's circumstances, inability or knowledge as aforesaid, or of the effect of the transaction, shall avail to protect the transaction, except as provided by sections 44 and 47 hereof.

In one or more paragraphs of the statement of claim the transaction in question is alleged to have been effected with intent to defraud, but this charge was not relied upon by the plaintiff, and I find no evidence whatever which would sustain it. I think the transaction between the father and son was at least honest.

The first question to be dealt with in applying the above sections of the Assignments Act is to ascertain whether at the date of the chattel mortgage in question, namely, on January 25, 1915, John Leonoff was in insolvent circumstances or unable to pay his debts in full or knew that he was on the eve of insolvency.

In a large number of reported cases in Great Britain, the United States and Canada, Judges have widely differed from one another in attempting to define what is meant by "insolvency."

The following definition given by Spragge, V.-C., in *Davidson* v. *Douglas*, 15 Gr. 347, appears to have met with the most general acceptance. He says:—

> In considering the question of the solvency or insolvency of a debtor, I do not think that we can properly look upon his position from a more favourable point of view than this, to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it will bring in the market at a forced sale; or at a sale when the seller cannot await his opportunities, but must sell.

In large commercial centres insolvency is implied when a trader finds himself unable to meet his obligations as they become due. But this test has not been adopted by our legislature. In *Rae* v. *McDonald*, 13 O.R. 352, Rose, J., says, at p. 362:—

> I do not understand that there can be any difference in principle between the solvency of a farmer and a trader when we are considering whether the assets are sufficient to pay the liabilities.

At p. 363, he says:—

> I am of opinion that there was error at the trial . . . in directing the jury as to the difference between a farmer and a trader without guarding such direction by stating that there was no difference in principle when the question to be determined was whether there were assets out of which

the liabilities could be collected, if necessary, by levy and sale under execution.

Cameron, C.J., says, at p. 365:—

What constitutes insolvency, it may not be easy to define satisfactorily. But as the Act is general, applying to all persons and not merely to traders, in respect to whom special insolvency or bankruptcy laws have been enacted, and will probably in the future be re-enacted, the generally accepted and understood meaning of the term insolvent must be taken to be what the Legislature intended by it in ch. 118. In that general sense an insolvent is a debtor unable to pay his debts, and a person in insolvent circumstances is one not having money, goods, or estate sufficient to pay all his debts. Thus the use in the statute of the alternative "or unable to pay his debts in full," was but explanatory of the terms "insolvent circumstances."

In *Clarkson* v. *Sterling*, 14 O.R. 460, at 463, Rose, J., said:—

While I do not desire to depart from the definition given in *Rae* v. *McDonald* of legal insolvency—*i.e.*, a condition in which a debtor is placed when he has not sufficient property subject to execution to pay all his debts if sold under legal process—I would desire to add that such sale must be fair and reasonable. What would be fair and reasonable must be determined on the facts of each case. Property worth to-day double a man's liabilities, and which to-morrow may, for temporary causes, be quite unsaleable, but which, if kept for a short time and judiciously handled, could be sold for more than sufficient to pay all the liabilities, should not, it seems to me, be valued at the price realized by a forced sale under the temporary disadvantages.

One of the latest cases in our own Court upon this subject is *Empire Sash and Door Co.* v. *Maranda*, 21 Man. L.R. 605, in which Robson, J., apparently accepts the definition of insolvency given by Spragge, V.-C., in *Davidson* v. *Douglas*, *supra*, because he says:—

The evidence failed to convince me that these separate properties would bring in the market at a forced sale, when the seller "cannot await his opportunities but must sell," anything like the sums at which their value was estimated.

It is somewhat remarkable that while the authorities speak of the value of property "at a forced sale," none of them, so far as I have been able to ascertain, fix the date of the so-called forced sale. Does it mean a sale on the day the impugned instrument was given? This appears to be a necessary assumption, for it is in reference to the debtor's financial position on that day that the question arises. But is it reasonable to assume an impossibility? To assume that the debtor's goods and lands might be offered for sale under legal process on the date of the impugned instrument is to assume an impossibility. One must

MAN.

K. B.

RICHARDS & BROWN v. LEONOFF.

Galt, J.

consider the procedure which a plaintiff must follow before he can sell a defendant's goods and lands under legal process.

The only case under which all the creditors could have their rights adjudicated upon the same day would be at the suit of an official assignee for the benefit of creditors, but in such case all the property has passed to the assignee, and nothing could be given to a creditor. It is therefore an impossibility that all the creditors of the grantor could be in a position of procuring a forced sale at the date of the impugned instrument.

Under our practice and procedure there cannot be such a thing as a forced sale of all the real and personal property of a debtor on any particular day. The former practice of many years ago was that the sheriff would realize what he could as against the goods, and then, at the expiration of a year or more, he would proceed to advertise and sell the real estate. Under our present procedure no creditor is entitled to sell his debtor's real estate without an order of the Court, and under such an order the sale is referred to the Master, who makes careful inquiry as to encumbrances, and eventually fixes a date for the sale, usually giving at least three weeks. Furthermore, the Master, in order to obviate a sacrifice of the land, fixes a reserve bid, usually amounting to about two-thirds of the sworn value of the land. If this reserve bid be not reached on the day of sale, the sale is abortive and further proceedings have to be taken before the land can be in any way sacrificed. Even when a sale is accomplished, the purchaser is only obliged to pay 10 per cent. in cash, and has a month within which to pay the balance.

I draw attention to these circumstances in order to emphasize the practical difficulty which exists in attempting to fix the value of a debtor's real and personal estate as on the date of the impugned instrument, when such value, according to all the authorities, must be fixed in reference to a supposed sale under legal process.

In *Bertrand* v. *Canadian Rubber Co.*, 12 Man. L.R. 27, Killam, J., whose judgment was affirmed by the Court *en banc*, also adopted the view of Spragge, V.-C., in *Davidson* v. *Douglas*, *supra*, and he adds the following:—

I agree with the opinion of Rose, J., in the *Dominion Bank* v. *Cowan*, 14 O.R. 465, that there is no real distinction between being in insolvent cir-

cumstances and being unable to pay his debts in full, though I can hardly agree with his view that the property of the debtor is to be estimated at what it would bring at a sale under legal process even with the qualification that such sale should be fairly and reasonably conducted. This may frequently involve a sacrifice beyond what the debtor "who cannot await his opportunities, but must sell" is obliged to make.

Suppose the case of a grain dealer whose only assets consist of grain worth at current prices $100,000, but, owing $75,000 to various vendors of the grain, and further debts amounting to $5,000. Suppose the price of grain on the market drops so that the value of his grain is only $75,000 and the same day, under pressure from a creditor, he gives a chattel mortgage on portion of the grain for $1,000. A week later another creditor commences action on behalf of himself and all other creditors of the grain dealer to set aside the chattel mortgage. The price of grain gradually advances, and in the course of a month or two had reached its former level and remains at that level until the trial. Is a Court bound to decide that the chattel mortgage is void as having been given at a time when the grantor was insolvent?

It will be noticed from the reference to our practice above given, that it is impossible in this province for a creditor to seize and sell his debtor's property in a day or a month, and this delay which our law gives and enforces would enable a debtor to seek and often find opportunities for sale at a reasonable price without incurring any great sacrifice. Such considerations are entitled to weight especially in cases where no fraud appears.

In the present case the property is still intact. I shall therefore deal with its value on January 25, 1915—the date of the impugned chattel mortgage—as best I can, having regard to the state of the law above expressed. Fortunately the items, whether of assets or liabilities are not numerous.

According to the plaintiff's estimate, the liabilities of John Leonoff on the day in question were as follows:—

First mortgage on real estate, $3,460; Second mortgage, $661.11; interest to 25th January, $240; Taxes, $100.

Amount required to redeem property sold at tax sale, $236.78; Creditors in general, $1,100; William Leonoff's claim, $1,100; Amount of exemption claimable by defendant if property sold at forced sale, $1,500—Total, $8,437.89.

MAN.

K. B.

RICHARDS & BROWN v. LEONOFF.

Galt, J.

The defendants point out that $2,400, portion of the first mortgage is not yet due, and hence that sum should be deducted from the liabilities. They also argue that the $1,500 exemption should be deducted as John Leonoff would not be obliged to take advantage of this exemption. But the land could not be sold without providing for the full amount of the mortgage, and the defendant might, in the event of a forced sale, change his mind about the exemption. I therefore accept the plaintiff's view in respect of these two items.

Coming now to the plaintiff's estimate of the assets. John Leonoff's real estate, including the buildings thereon, was assessed at $5,100. The plaintiff is willing to accept this as their value. The personal property was as follows:—

The stock in the store was sworn to be worth from $1,200 to $1,300. I will take it at $1,200; The furniture and fixtures were said to be worth, $600; And a horse and rig, $175—Total, $1,975.

The plaintiff, however, contends, and no doubt rightly, that such goods, sold at a forced sale would not bring more than 60c. or 70c. on the dollar. I will assume their value at 60c., which would make the total value of these goods on the date in question $1,185. Adding this to the assessed value of the real estate, gives a total of $6,285. There were also certain book debts amounting to $1,100. These, for the most part, were owing by labouring men who, during the present conditions in Winnipeg are largely out of employment. The plaintiff contends that this item should be rejected as valueless. But John Leonoff has already collected $300 of them, and has applied the money in reduction of William's chattel mortgage. The plaintiff's estimate of assets should therefore be increased to $6,585.

The defendants' estimate of the value of the estate differs widely from that of the plaintiff. John Leonoff says that in the fall of last year an offer was made to him of $10,000 for his real estate, including buildings, and a few days later the offer was increased to $10,500, but he refused to sell as he considered his property to be worth fully $12,000. He did not know the person who approached him and made the above offers, and hence could not call him as a witness.

Theodore Stefanik, a real estate dealer, with five years' ex-

perience, was called as a witness for the defendants. He stated that he owns property in the same immediate neighbourhood as that of John Leonoff. He values Leonoff's real estate, including the buildings, at $9,000 or $10,000. His property is situated on a neighbouring corner of the same street and he states that he was offered $9,500 for it in April, 1914. He furthermore states that he himself has sold lots in the middle of the block at $40 a foot frontage. He values his own property on the corner at $75 a foot, but states that it is 85 feet deep, while Leonoff's is only 60 feet, and that this should make a difference of about $10 a foot in the value.

The defendants shewed that the store and residence at the corner of McGregor and Boyd Sts. cost $4,500 to build 3 years ago; that the two cottages, even under the present depressed financial conditions, are bringing in $22 a month, and that the value of the cottages is fully $1,500.

Upon the above evidence it appears to me that, estimating John Leonoff's assets at such a value as they might well have brought if sold under legal process with the safeguards which our procedure has provided, the following figures are reasonable and moderate: Real estate at say, $55 per foot, $3,300; Store and dwelling-house, $4,500; Two cottages, $1,500; Personal property at 60c. on the dollar, $1,185—Total: $10,485.

The liabilities, even on the plaintiff's estimate, are only $8,137.89; leaving a balance of assets amounting to $2,347.11.

The plaintiff has entirely failed to satisfy me that the defendant John Leonoff was insolvent at the date of the chattel mortgage in question, or that his property was not, or is not, sufficient to pay off every dollar of his debts and leave a substantial surplus. My finding on this preliminary question is sufficient to dispose of the action.

But I would add that, in my opinion, the defendants have also brought themselves within the protection of secs. 44 and 47 of the Assignments Act.

I find that there was a present actual *bonâ fide* payment in money by William Leonoff to John Leonoff; and, having regard to the invalid and discharged chattel mortgage for $600, the

MAN.

K. B.

RICHARDS & BROWN v. LEONOFF.

Galt, J.

moneys paid were full consideration for the mortgage in question.

I further find that the advances were made by the son to the father in the *bonâ fide* belief that they would enable the father to continue his trade or business, and to pay his debts in full. As a matter of fact they have enabled him to continue his business, and nobody except the plaintiff appears to be troubling him.

He says he desisted from paying the plaintiff latterly because he felt he had been insulted by the plaintiff's conduct.

Much reliance was placed by counsel for the plaintiff in argument upon section 8 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1913, ch. 17, which contains the following provision:—

> Every verbal agreement to the effect mentioned in sections 4 to 7 of this Act and not reduced to writing shall be absolutely null and void to all intents and purposes whatsoever as against creditors or subsequent purchasers or mortgagees in good faith for good and valuable consideration.

The defendant William Leonoff stated that, prior to the giving of either of the chattel mortgages he had agreed with his father to advance moneys for the purpose of paying off current accounts, and that the chattel mortgage in question was in truth executed pursuant to the verbal agreement which had originally been made.

Whatever bearing this argument might have upon the case is disposed of by the decision in *Parkes* v. *St. George*, 10 A.R. (Ont.) 496, referred to in *Empire Sash and Door Co.* v. *Maranda*, *supra*, at p. 620, deciding that a simple contract creditor, such as the present plaintiff, cannot make an attack under the Bills of Sale Act.

There will be judgment for the plaintiff for $709.60 and costs. The whole contest at the trial related to the other branches of the case on which the defendants succeed, and they are entitled to the costs of these issues. *Judgment accordingly.*

LIVINGSTONE v. CITY OF EDMONTON.

ALTA.

S. C.

Alberta Supreme Court, Ives, J. June 21, 1915.

1. PARTIES (§ IB—57)—ACTIONS AGAINST MUNICIPALITIES—NECESSARY PARTIES PLAINTIFF—JOINDER OF ATTORNEY-GENERAL.
The Attorney-General is a necessary party only when the public interest in the subject-matter of the action is province-wide in its extent, and not when that interest is confined to a community forming only a part of the province.

2. PARTIES (§ III—122)—ACTIONS AGAINST MUNICIPALITIES—RATEPAYERS—INTERVENTION OF ATTORNEY-GENERAL.
The intervention of the Attorney-General is not necessary in an action by a ratepayer against a municipality for the purpose of setting aside an agreement illegally entered into by the latter and preventing its enforcement.
[*Hope* v. *Hamilton Park Commissioners*, 1 O.L.R. 477, disapproved; *Keay* v. *City of Regina*, 6 D.L.R. 327, distinguished; *MacIlreith* v. *Hart*, 39 Can. S.C.R. 657, approved.]

3. MUNICIPAL CORPORATIONS (§ II D—148)—CONTRACTS WITH UNINCORPORATED ASSOCIATION—EFFECT ON SUBSEQUENT INCORPORATION.
A resolution of a municipal council which authorizes the municipality to enter into an agreement with an unincorporated association has no binding effect on the corporation subsequently formed of the unincorporated body.

4. MUNICIPAL CORPORATIONS (§ II F1—174)—GAS LEASES—POWERS OF MUNICIPAL COUNCIL—ASSENT OF RATEPAYERS.
By virtue of secs. 223 and 227 of the City Charter (Edmonton, Alta.), the municipal council has no power to commit the city on a lease of natural gas rights, unless with the assent of a majority of the burgesses.

Statement

ACTION for a declaration avoiding an agreement because of illegality.

Sinclair, for plaintiff.

J. C. F. Bown, K.C., for the city.

G. B. O'Connor, K.C., for the company.

Ives, J.

IVES, J.:—The plaintiff is a burgess of the city of Edmonton, and brings this action for a declaration avoiding an agreement made between the defendants because of illegality, and for an order restraining the city of Edmonton, and the servants, agents and representatives of the city, from paying over any money out of the city funds or doing any other act under the agreement.

At a meeting of the City Council held on April 28, 1914, the following resolution was passed:—

That the request of the Ad Club to have an agreement drawn whereby it should be allowed to drill for gas be granted, and that, upon gas being found in quantities satisfactory to the council, the same will be taken over at cost, reimbursing the Ad Club what they have put into it, and that the necessary expenditure be authorized to place an expert inspector, on whatever may be deemed necessary by the commissioners on behalf of the city.

The "Ad Club" was an association of citizens not incorporated.

It should be here stated that previous to April 28, the city,

ALTA.

S. C.

LIVINGSTONE v. CITY OF EDMONTON.

Ives, J.

without submitting any by-law to the burgesses therefor, had obtained from the Crown a lease of the natural gas rights in the north-west quarter of section 24, township 48, range 13, west of the 4th meridian.

On August 18, 1914, at about 4 o'clock p.m., some of the members of the Ad Club became incorporated under the provisions of the Companies Ordinance under the name of "The Edmonton Industrial Association Drilling Co., Ltd."

The city solicitor, acting upon the instructions of the commissioners, drafted the agreement complained of, which was considered at a meeting of the commissioners held on August 17, and approved by the commissioners on August 18, at a meeting in the forenoon of that day, and the agreement was on that day duly executed by the defendant city and defendant company. The important recitals in the agreement, I think, are as follows:

Whereas the city of Edmonton has obtained or is about to obtain from the Government of Canada the natural gas rights for the north-west quarter of section 24-48-13, W. 4th.

And whereas, on or about April 28, 1914, the *municipal council* of the city of Edmonton signified its willingness to enter into an agreement *with certain members* of the Edmonton Industrial Association, for the purpose of *permitting them* to *enter* upon said lands and *explore* for natural gas.

And whereas said persons have become incorporated under the name of the Edmonton Industrial Association Drilling Company, Limited.

And whereas it is advisable to enter into a formal agreement *upon the terms* agreed upon by the *said council*.

The underlining is my own. The following paragraphs of the agreement should be considered: Paragraph 1 grants leave to the company

to enter upon the north-west quarter, *etc.*, for the purpose of sinking a well or wells for the purpose of drilling for natural gas.

Paragraph 4:—

In the event of a flow of gas satisfactory to the city council being struck . . . the city shall repay to the company all sums of money which they shall have expended in or about or by reason of the boring of said well, together with the cost of all machinery, pipes and other accessories, all of which and other plant (not the property of the contractors) shall, upon said repayment, become the property of the city.

Paragraph 5:—

For the purpose of this agreement the question of whether the flow of gas is satisfactory or not shall be decided as follows: The well shall have a rock pressure of at least 150 lbs. per square inch after being closed in for 24 hours, and then an open flow capacity of 250,000 cubic feet per 24 hours, all of which shall be decided by tests satisfactory to the city commissioners. The city shall pay the expenses of the said tests, including any penalty payable to the contractors of the company for the interruption of

their work during the said tests, as provided by the contract . . . dated the 5th day of March, 1914. . . .

Paragraph 7:—

In the event of the tests not being satisfactory or not complying with the terms of this agreement, the city may: (1) Abandon the location and field of approximately 250 square miles, in which case the city shall . . . assign its lease of the said quarter section and its leases or rights to other lands, approximately 250 square miles, to the company, in which case nothing shall be paid by the city to it. (2) Or continue the drilling of said well or drill other wells in said field, and, in the event of a flow of gas equal to that already mentioned being struck within four years from the exercising of this option, the city shall repay the company as aforesaid.

Paragraph 11:—

In the event of gas in paying quantities being discovered, the city shall: (*a*) Repay the moneys expended as aforesaid; or (*b*) assign to the company all rights of the city to such gas so discovered, subject to the consent of the Dominion Government.

It might be well to note here that, while the evidence shews that the agreement was prepared from instructions of the commissioners and approved by them, it was not submitted to, considered, or passed upon by the council, and was not executed by the commissioners on behalf of the city, but under the corporate seal of the city by the mayor and city clerk, and it is admitted by the defendants that the only express authority of the council for the agreement is the resolution of April 28.

At the argument, counsel for defendants urged that the action should be dismissed: 1st, because the plaintiff could bring the action only in the name of the Attorney-General; 2nd, that the provisions of sec. 518 of the City Charter had not been complied with, and the action was therefore premature; and, finally, upon the merits of the action.

Upon the first ground a number of cases were cited, and I have had the privilege of reading an exhaustive collection of the decisions in a recent judgment of my brother Stuart, which is not reported. It is the case of *Gallagher* v. *Armstrong and the City of Edmonton* (see 3 A.L.R. 443). From that judgment, and from the decisions and dicta therein collected, I think it may be reasonably concluded that the rule governing the addition of the Attorney-General as a party is not as broad as would appear to have been stated.

My own opinion is that the Attorney-General is a necessary party only when the public interest in the subject matter of the action is province wide in its extent, and not when that interest

ALTA.

S. C.

LIVINGSTONE v. CITY OF EDMONTON.

Ives, J.

is confined to a community forming only a part of the province. The Attorney-General in his department is the representative of all the people of the whole province, not of the people within the boundaries of the city of Edmonton, except as they are a part of the provincial community. Neither the ratepayers nor the inhabitants of the city of Edmonton are the "public," nor are their interests in their municipal affairs "public interests" as that term applies to the public interests of which the Attorney-General is the custodian. I am quite aware that my opinion is opposed to the apparently expressed opinion of learned English and Canadian Judges. One of the strongest judgments against me is that of the Ontario Court of Appeal in the case of *Hope* v. *Hamilton Park Commissioners*, 1 O.L.R. 477. The Court which heard that appeal was composed of an exceedingly strong bench, *viz.*, Armour, C.J.O., Osler, Moss, and Lister, JJ.A., and affirmed the trial judgment of Meredith, J.

This judgment is followed by Wetmore, C.J., in the case of *Keay* v. *City of Regina*, 6 D.L.R. 327, but it might be pointed out that here there was ample room for the contention, because the provisions of the City Act of the Province of Saskatchewan were in question, and that Act governs all the cities of the province, hence it might well be urged that the public interest there was the provincial interest.

But the case above cited of *Hope* v. *Hamilton Park Commissioners* was decided in 1901, and before the judgment of the Supreme Court of Canada in the case of *MacIlreith* v. *Hart*, 39 Can. S.C.R. 657. This case was decided in 1908, and, strangely enough, makes no mention of *Hope* v. *Hamilton Park Commissioners*, which in effect it reverses.

While, therefore, I do not think that the intervention of the Attorney-General is necessary in this action, because the matters complained of and the acts sought to be restrained do not affect the public of whose interests the Attorney-General is the custodian, at the same time a certain class—that is, the inhabitants, or at least the ratepayers, of the city—are affected, and the plaintiff should sue on their as well as his own behalf, and I allow plaintiff's application at the trial for leave to amend to make the necessary formal change in the style of his action.

As to defendants' contention that this action is premature because of the provisions of sec. 518 of the Charter: That section

is not applicable in this case in any event, because the plaintiff does not bring this action by reason of the illegality of a by-law, resolution or order of the council, or anything done under any by-law, order or resolution of the council. This action is brought to set aside an agreement, to restrain acts under that agreement, because he alleges the agreement to be illegal. And he further alleges that the agreement complained of was not authorized by the resolution set up, and is therefore not an act done under the resolution.

It would appear to me obvious, upon comparing the resolution of April with the agreement of August, that the resolution cannot be urged as sufficient authority for the terms of the agreement. In the first place the resolution referred only to the Ad Club, while the agreement is with a different person and that person is a limited liability company. It would require a lengthy stretch of imagination to read into the resolution any such sweeping terms as are contained in the paragraphs of the agreement which I have set out.

Without, therefore, giving further reasons in detail upon this point, I hold that the resolution of April 28 is not an authority sufficient upon which to found the terms of the agreement.

But defendants urge that no authority was necessary apart from the executive jurisdiction conferred upon the Commissioners by the City Charter, that the agreement is purely a matter connected with the duties of the executive officers of the corporation. If this contention is sound, then I am bound to say that there would appear to be absolutely no necessity to consult the burgesses as to acquiring a supply of natural gas for the inhabitants, irrespective of the cost, provided the cost of each step in such acquisition was met out of the current revenue of the year in which it was decided upon. If the commissioners had the authority to commit the city, as in this agreement, the legality of the resolution need not be discussed. But all legislative authority and authority to provide moneys required in respect of matters within the jurisdiction of the commissioners is reserved to the council: sec. 41 of the Charter; that is to say, the council decides upon what undertakings, permitted by the Charter, the city will or will not engage in, and at the proper time provides the money for such undertakings as may have been decided upon.

Now, where will defendants' argument lead us? Let us see.

ALTA.

S. C.

LIVINGSTONE v. CITY OF EDMONTON.

Ives, J.

First, the city, without the assent of the burgesses, acquires a lease of natural gas rights, 50 or 100 miles from the city, at a cost of $160; then the council pass a resolution permitting the Ad Club to drill a well on the leased land; then the city commissioners or the city, if you like, by an agreement with a drilling company, commit the city to pay $30,000 for finding gas on the leased land, without consulting the burgesses. But to be of advantage to the city the gas must be brought to the inhabitants, so the commissioners, or even the council, take the several necessary steps during the next several years, paying for each step in the year taken, until in time there is gas ready to use within the city, at a total cost, we will say, of $300,000, all without the burgesses having one word to say as to whether, in the first place, they wanted to adopt such a gas policy, or, in the next place, to pay the price. This is the logical conclusion of defendants' argument, and if they are right I can only say that I doubt if the Legislature ever had such a result in mind in conferring the powers claimed.

But in my view of the sections of the city charter I think it is sufficiently clear that it is only with the assent of the burgesses that the city may acquire gas. Section 3 is the interpretation section, and sub-sec. 12 defines what is included in the word "land," that is to say, the word "land" includes

lands, tenements and hereditaments and any estate or interest therein or right or easement affecting the same and also includes [paragraph (c)] Mines, minerals, gas, oil, etc. . . . in and under land.

Section 223:—

The council may, by by-law, assented to by a majority of the burgesses, voting thereon from time to time, contract debts for acquiring, for any purposes whatsoever, such lands as the council shall deem it expedient to acquire.

Section 227:—

Every by-law for . . . acquiring sufficient land for the convenient carrying on of brick works, . . . gas or electric light or power works . . . . or other public work or enterprise, where it is not intended that the cost shall be borne out of the municipal revenues for the then current year . . . shall . . . receive the assent of . . . a majority of the burgesses so voting.

But, say the defendants, sec. 223 is the *contracting of a debt* to acquire land, and sec. 227 is the case of acquiring land which it is *not* proposed to pay for out of current revenues. We did not contract any debt, but only a contingency, which the authorities say does not come within the meaning of "debt" as used in sec. 223, and if we did contract a debt, no assent of the burgesses was

ALTA.

S. C.

LIVINGSTONE v. CITY OF EDMONTON.

Ives, J.

necessary, because there is nothing to shew that the council did not intend to pay it out of current revenue.

As to an intention of paying out of current revenue, there is none such stated or to be gathered from either the resolution or the agreement. Further, the evidence of Mr. Barnhouse, the city's treasurer, is that items of estimated expenditure for the current year are sent to the council by the commissioners early in the year before the tax rate is struck, and that in 1914 no item was suggested as an expenditure for that year in connection with the resolution or the agreement. And he further states that there was no fund during that year out of which any such expenditure could have been properly made. Hence, it would appear that there was no intention on the part of the council or the commissioners that any payments under the agreement or the resolution should be borne out of the municipal revenues of 1914.

As to the agreement not creating a debt but only a contingency, that could be met in the current year in which the debt emerged, it should be noted that no such intention of the council can be gathered from the evidence, and, further, that the moment the contingency became a due debt, its payment, in order to get any benefit for the money, would impose further unestimated expenditures to complete the acquisition by the city of gas (land) which the council might or might not be able to pay out of current revenues.

Other sections of the charter were cited as authority for the contention that the assent of the burgesses was not necessary, but, in the view I take of the matter, I think the sections I have referred to dispose of the question at issue, and the result is that the plaintiff is entitled to the declaration and restraining order claimed. The city should pay the plaintiff's costs and the costs of the defendant company. *Judgment for plaintiff.*

The KING v. BORDEN; Ex parte KINNIE.

N. B.

S. C.

New Brunswick Supreme Court, McLeod, C.J., White, and Grimmer, JJ. May 6, 1915.

1. ATTACHMENT (§ III A—45)—APPLICATION—NON-PAYMENT OF COSTS — AFFIDAVIT—REQUISITES OF.

On an application for an attachment for non-payment of costs, an affidavit may be read if it is entitled in the court and cause, although it is not entitled the same as the rule under which it is made.

2. ATTACHMENT (§ III A—45)—COSTS—NON-PAYMENT OF—RULE SERVED—ENDORSEMENTS.

In an application for an attachment for non-payment of costs, it is

N. B.

S. C.

THE KING v. BORDEN.

unnecessary that the rule served should be endorsed as required by order 41, r. 5.

[*In re Deakin, Ex parte Cathcart*, [1900] 2 Q.B. 478, applied.]

3. COSTS (§ II—20)—PAYMENT OF—DEMAND FOR BY ATTORNEY—SPECIFIC POWER OF ATTORNEY NECESSARY.

No proper demand of payment of costs can be made by an attorney unless he has the authority of a specific power of attorney, and a rule of court ordering payment of the costs and not stating to whom they are to be paid is vague and uncertain.

4. ATTACHMENT (§ I—1)—APPLICATION FOR — ALL OTHER MEANS EXHAUSTED.

An application for an attachment should not be made until and unless all other means, provided by law for the recovery of the money have been exhausted.

Statement

APPLICATION for attachment for non-payment of costs.

M. B. Dixon, K.C., for applicant.

M. G. Teed, K.C., *contra*.

McLeod, C.J.

MCLEOD, C.J.:—In this case an application is made for a writ of attachment against one Ezra Stiles for non-payment of costs of appeal pursuant to a rule of this Court. The case originated in a magistrate's Court, and was an action brought by one Kinnie against Ezra Stiles in which a verdict was entered for the plaintiff. This verdict was set aside by Judge Borden, Judge of the County Court of Westmorland, on review, and a verdict ordered for the defendant. Mr. Justice Barry granted an order absolute for a *certiorari* to remove and an order *nisi* to quash Judge Borden's order, and on the return of the order *nisi* before himself quashed Judge Borden's order, and restored the verdict for the plaintiff in the magistrate's Court. An appeal was taken to this Court from the order of Mr. Justice Barry on the ground that he had no jurisdiction as a Judge of the King's Bench Division to grant a *certiorari*. This appeal was dismissed with costs, and the costs were taxed and allowed at $100.55 by the registrar in October last. Mr. Dixon, who acted as counsel for Kinnie before the magistrate and on the applications before Judge Borden and Mr. Justice Barry on January 28, 1915, demanded the costs from Stiles who refused to pay, and on the same day, he, Dixon, gave Stiles notice that he would apply for an attachment.

The first objection to the application taken on behalf of Stiles is that the affidavit upon which the application is made is not properly entitled in that it does not follow the entitling of the rule. The affidavit is entitled as follows:—

In the Supreme Court.

On appeal from a rule absolute of His Honour Mr. Justice Barry, of the King's Bench Division, in The King against R. A. Borden, Esquire, Judge of the Westmorland County Court,

Ex parte Edmund Kinnie between Ezra Stiles, appellant, and Edmund Kinnie, respondent.

The rule as taken out was indorsed as follows:—

In the Supreme Court.

The King against R. A. Borden, Judge of the Westmorland County Court, *Ex parte* Edmund Kinnie.

I think that technically the affidavit and other papers should have been entitled the same as the rule, but they are entitled in the Court and in the cause, which is sufficient to entitle them to be read.

The second objection is that the rule should have been endorsed as is required by Order 41, r. 5. Rule 5 is as follows:—

Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be endorsed a memorandum in the words or to the effect following, viz.: If you, the within-named A. B., neglect to obey this judgment (or order), by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order).

This rule, however, does not apply to such an order as this. *In re Deakin, ex parte Cathcart*, [1900] 2 Q.B. 478, is a case very similar to this. It was an application for a writ of sequestration to enforce payment of costs. The rule had not been endorsed as required by Order 41, r. 5, and the Court held that in such case it was not necessary. The headnote is:—

In the case of a writ of sequestration issued by leave of a Judge to enforce payment of costs under Order 43, rule 7, the provisions of Order 41, rule 5, and Order 43, rule 6, are inapplicable. Therefore, in such a case it is not necessary that the Order for payment of costs should limit the time for payment or should bear the endorsement mentioned in Order 41, rule 5.

Nor, it is said, is personal service of it essential.

With reference to the service of the rule it was held in that case that it was sufficient if it came actually to the notice of the party. There is no question of service in this case because there was a personal service.

It was further claimed that Mr. Dixon should have been

N. B.

S. C.

THE KING v. BORDEN.

McLeod, C.J.

authorized by power of attorney from Kinnie to demand the costs. I think this objection is well taken. The costs were really payable to Kinnie, and although Mr. Dixon tried the case for Kinnie before the magistrate, and appeared for him before Judge Borden, and Mr. Justice Barry and before this Court on the appeal, he was not attorney for Kinnie in the sense that he had a right to demand and receive the costs, and before an attachment should issue for non-payment it should appear that he had actual authority to demand payment and give a legal discharge. In addition to this it is not shewn that any attempt was made to collect them by execution. It simply appears that on January 28, 1915, the costs were demanded by Mr. Dixon, and on payment being refused he immediately gave notice of this motion. An execution could have issued, or if the practice requires it an order could have been obtained from a Judge for leave to issue an execution for the recovery of the costs, and I think that would have been a proper course to have pursued. Of course, if it was made to appear that the party liable had property from which the costs might have been satisfied and disposed of or concealed the property to avoid payment, or had property which could not be reached by execution, the Court could and probably would grant an attachment. Imprisonment for debt having been abolished by act of the legislature, speaking for myself, I would not be disposed to grant an attachment against the person for non-payment of costs, unless satisfied that the party ordered to pay had the ability to do so or wilfully deprived himself of the means of payment.

For these reasons the application must be refused, but under the circumstances, without costs.

Grimmer, J.

GRIMMER, J.:—This is an application for a rule absolute for a writ of attachment against one Ezra Stiles for failure to obey an order of this Court made on the eighteenth day of September last, dismissing an appeal from an order of Barry, J., quashing an order on review under *certiorari*, and adjudging costs on the appeal.

The order dismissing the appeal and affidavit of service of notice of motion were read in support of this application.

On behalf of the defendant it was objected:—

1. That the affidavit was not properly entitled in the cause or according to the rule. 2. That the rule requiring the defendant to pay costs, should have been endorsed with the notice required by O. 5, r. 41. 3. That the demand of payment should have been authorized by a specific power of attorney. 4. That the rule of Court ordering payment of costs does not state to whom the same are to be paid, and is vague and uncertain. 5. That the costs were demanded and the rule served the same day the notice of motion was served and was thus premature.

In my opinion, there is nothing in the first of these objections, and as to the second it has been held that O. 41, r. 5, only applies to a judgment, or order to do an act, and that an ordinary order to pay costs, without limiting a time for payment, is not an order "requiring any person to do an act," and need not be indorsed or personally served under this rule: *Re Deakin*, [1900] 2 Q.B. 478; *In re Lumley*, [1894] 2 Ch. 271.

As to the third objection, under the circumstances surrounding this case, I am of opinion no proper demand of payment of costs (if such demand be necessary) could be made by an attorney representing the applicant, unless the same was made under the authority of a specific power of attorney. I am also of the opinion, the rule of Court ordering payment of the costs, in not stating to whom the same are to be paid, is vague and uncertain.

I desire further, to say, in my opinion, this application should not have been made until and unless all other means provided by law for the recovery of the money had been exhausted, and the Court fully informed of what efforts had been made to enforce its order.

Under the provisions of sec. 43 of ch. 130, Con. Stat. 1903, any person who is entitled to apply for an attachment, may, without a demand of the money ordered to be paid, on application, obtain an order of the Court or a Judge, for the issue of an execution out of the Court, against the goods and chattels, lands and tenements of the party against whom the attachment is sought, and the same thereupon issues without any other formality.

This provision undoubtedly was made to protect the applicant and secure payment under the order, in view of the fact

N. B.

S. C.

THE KING v. BORDEN.

Grimmer, J.

that a person arrested or imprisoned under an attachment, by the provisions of sec. 42, sub-secs. 1 and 2, of ch. 130, Con. Stat. 1903, may, on due notice, be examined on oath, for the purpose of making a disclosure of the state of his affairs and obtaining his discharge from arrest and imprisonment.

The applicant in this case, not having availed himself of the privilege of procuring an execution and proceeding thereunder, should not be granted the attachment in the first instance.

Rule 17 of O. 42 also provides that a person to whom costs are payable under an order of the Court may, as soon as the same are payable, sue out a writ of *fieri facias* to enforce payment thereof, from which it also appears it is the intention of the law, that an execution shall be resorted to in order to enforce the order, before any other means is used.

The application must be refused, but, under the circumstances, without costs.

White, J.

WHITE, J., agreed with MCLEOD, C.J.

Application refused without costs.

B. C.

C. A.

GILBERT v. SOUTHGATE LOGGING CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. August 10, 1915.

1. NEGLIGENCE (§ IC 2—50)—LOGGING OPERATIONS—LIABILITY FOR INJURIES —TRESPASSERS.

There is no liability on the part of a company conducting logging operations for injuries to a trespasser thereby occasioned.

[*Lowery* v. *Walker*, [1910] 1 K.B. 173, [1911] A.C. 10, followed.

Statement

APPEAL from judgment of Macdonald, J., in favour of defendant in an action for negligence.

S. S. Taylor, K.C., for appellant.

Craig, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I would dismiss the appeal.

Irving, J.A.

IRVING, J.A.:—I would dismiss this appeal. The trial Judge has found that under all the circumstances it was not an act of negligence on the part of the company to conduct its operations in the way it did. Further, he came to the conclusion that the plaintiff was a trespasser on the premises over which the defendants had a right to exercise their operations. There must be grave reasons for interfering with the inferences drawn by the trial Judge, and the reasons which have been advanced on the appellant's behalf do not, in my opinion, justify us in interfering.

B. C.

C. A.

GILBERT v. SOUTHGATE LOGGING CO.

Irving, J.A.

The case of *Lowery* v. *Walker*, [1910] 1 K.B. 173, 79 L.J.K.B. 297, as dealt with by the Court of Appeal, was the case of trespasser. In the judgment of Buckley, L.J., we are told that this class of case does not fall within *Bird* v. *Holbrook* (1828), 4 Bing. 628, 6 L.J. (O.S.) C.P. 146, and those cases where there was an intent to injure.

There is a class of case which may, I think, be properly referred to as applicable to this case: *Sharp* v. *Powell*, L.R. 7 C.P. 253, 41 L.J.C.P. 95, is the leading case. It could hardly be expected that a man would be on the (apparently) only open space when the chain "flew." Nevertheless, it is to be observed that this was the case of a person using a dangerous instrument and requiring consummate caution. Had the Judge found the other way, I should have followed his decision.

Galliher, J.A.

GALLIHER, J.A.:—I agree with the trial Judge, and would dismiss the appeal.

Martin, J.A. (dissented)

MARTIN J.A., dissented.

McPhillips, J.A. (dissenting)

McPHILLIPS, J.A. (dissenting):—In my opinion the appeal of the plaintiff should be allowed. The evidence, being carefully perused and weighed, overwhelmingly establishes, to my mind, the case of the plaintiff that the accident occurred at a point upon a road—or more properly, as described in this country, trail—which had been for years—six years at least—used by the public. The fact that at the particular point of accident the trail had been planked over—being used at one time as a place for piling lumber—matters not, in my opinion, the planked way forming part of the travelled way. That the public generally, and the residents in the neighbourhood in particular, were accustomed to and did use this trail, was amply proved, and to the knowledge of the respondents. It is true that there is some evidence that when the lumber was piled on the planked way it must necessarily have impeded travel, yet the evidence is that the travel was continuous, and along the tramway which ended at the planked way. The lumber which had been piled on the planked way had been removed sometime previous to the accident, and the rails taken up from off the right-of-way of the tramway, which right-of-way also would appear to have been in use by the public as a travelled way. That which gave rise to the accident was the mode adopted by the respondents in taking possession of the steel cable they had purchased from Trites & Co., who had been engaged in logging and lumbering

B. C.

C. A.

GILBERT v. SOUTHGATE LOGGING CO.

McPhillips, J.A. (dissenting)

operations at and about the scene of the accident, and Trites & Co. were the owners of the land at the point where the accident took place. The respondents proceeded to wind the steel cable upon a drum situate at the water's edge, the power used being a donkey engine. The cable had to be drawn over a distance of three miles, the cable being some six miles in length, and in so doing the cable had to cross roads, trails and path-ways in general use by the public. The cable was an inch wire cable, doubled, lying alongside of the tramway track. It was separated at the upper end previous to being hauled down, thus dividing it into two cables; and it was when the second cable was being hauled down that the accident to the plaintiff took place. There is some evidence that pegs were used to in some way control the cable, *i.e.*, prevent it flying up, but it is evident, upon the evidence, that this was insufficient, it being even admitted that it was inevitable that the cable would fly off the roadbed when being hauled down. The respondents in no way satisfactorily met the evidence as led by the plaintiff, and, with the greatest of deference, I cannot at all agree with the learned trial Judge's view of the evidence. Everything points to the grossest carelessness upon the part of the respondents, and the respondents could only escape liability by the stretching of the law to a degree which is not permissible upon the plea that the plaintiff was a trespasser and the respondents owed no duty to him to take reasonable or proper care. The argument as addressed to us by counsel for the respondents was that the plaintiff upon the facts was a trespasser, and no duty was imposed upon them to take care for his protection. It was further strongly urged by counsel for the respondents that the facts of the present case were such as entitled effect being given to the decision of the Court of Appeal in *Lowery* v. *Walker* [1910], 1 K.B. (C.A.) 173, and no liability existed, the plaintiff being a trespasser; that although the House of Lords reversed the Court of Appeal ([1911], A.C. 10), it was only because of the fact that it was held that the appellant was in the field with the permission of the respondent, which is not the case here. I cannot agree with this contention, nor can I view the facts in the way they are attempted to be looked at to support the argument advanced. Upon the facts, in my opinion, the plaintiff was not a trespasser, and if it can be said that the place of accident was not a highway established by the province or by the municipality upon which

the plaintiff was proceeding—and I will concede that it was not proved to be such, yet the land was not that of the respondents—and upon the facts the respondents were merely in temporary occupation thereof—and the evidence is clear enough that to the knowledge of the owners of the land—Trites & Co.—and to the knowledge of the respondents—the public used the trail and passed over the land at the point where the accident occurred—that it was an habitual user, and no steps were taken to prevent this user, and permission can well be inferred. Further, when the conditions existent in so many parts of this province are considered, and in particular in the neighbourhood and point in question, the land being heavily timbered, it may be said that trails passing along where lumbering operations have taken place are the only rights of way available in passing to and from the sea shore, and judicial notice may be taken of this, and it is the custom and practice for the public to go to and fro as the plaintiff did. Now the question arises, did the respondents owe to the public any duty to take care for their protection from the risk of being injured during the course of the operation in hauling over a distance of three miles some six miles of wire cable? In my opinion the respondents were in law under an obligation to take care, and it is patent that the hauling down of the wire cable in the manner in which it was done was the grossest kind of negligence, and done with the knowledge of the attendant danger, yet apparently recklessly pursued.

In my opinion the evidence establishes the absence of the exercise of due and proper care and no proper precaution to persons crossing over the ground throughout a distance of three miles. Apparently no precautions were taken beyond at some points where roads crossed, but not at the point where the accident took place or upon the trail the plaintiff was proceeding over. The duty that rested upon the respondents was to at least have adopted some method of hauling down the cable which would have prevented its flying up as it did, and which they knew it would, because with this peril always present there was no time at which the public were safe. It meant that during the whole time of the operation in hauling down the cable the public could not with safety be in the neighbourhood of the cable, or go to and fro in accordance with previous custom and, no doubt, necessity; and there is no evidence whatever that any notice was given of this

B. C.

C. A.

GILBERT v. SOUTHGATE LOGGING CO

McPhillips, J.A. (dissenting)

class of danger. The public were entitled to assume, even with the notice given, that there would be the exercise of reasonable and proper care, and not constitute the wire cable into even a greater danger than a boa constrictor would be. I would refer to what Vaughan Williams, L.J., in *Lowery* v. *Walker*, *supra*, said at p. 186:—

> I do not say that they take upon themselves the risk of finding a tiger in the field, but they take upon themselves, in my opinion, the risk of any danger there may be in the field if used in the way such a field is ordinarily used.

It cannot be that the respondents are to be admitted to say that they were entitled to haul down the cable in a manner wholly careless of life. Apart from the fact that it was known that the public were passing and repassing, the danger to animal life was extreme, and that injury should ensue and not be compensated for, under the circumstances, in my opinion would be the denial of natural justice. In *Latham* v. *Johnson & Nephew Lim.* (1913), 82 L.J.K.B. 258, Hamilton, L.J., (now Lord Sumner), at p. 264, said:—

> The rule as to trespassers is most recently indicated in *Lowery* v. *Walker* (80 L.J.K.B. 138 [1911] A.C. 10), *per* Lord Halsbury, and is stated and discussed in *Grand Trunk Railway of Canada* v. *Barnett* (80 L.J.P.C. 117, 121). The owner of the property is under a duty not to injure the trespassers wilfully, "not to do" a wilful act of reckless disregard of ordinary humanity towards him, but otherwise a man "trespasses at his own risk."

In the present case the facts demonstrate such recklessness that it must be held to be actionable negligence and liability must follow, and I am of the opinion that, even if it can be said upon the evidence that the plaintiff was a trespasser, yet there is liability upon the respondents upon the particular facts.

In *Cooke* v. *Midland Great Western Railway of Ireland* (1909), 78 L.J.P.C. 76, the Lord Chancellor (Lord Loreburn), at p. 83, was moved to say:—

> I am content to act upon the opinion of my noble friend, Lord Macnaghten, having regard to the peculiar circumstances—namely, that this place, on which the defendants had a machine dangerous unless protected, was to the defendants' knowledge an habitual resort of children, as well as attractive to the youthful mind, and that the defendants took no steps either to prevent the children's presence or to prevent their playing on the machine or to lock the machine so as to avoid accidents, though such locking was usual. I must add that I think this case is near the line. The evidence is very weak, though I cannot say there was none. It is the combination of circumstances to which I have referred which alone enables me to acquiesce in the judgment proposed by Lord Macnaghten.

It may be said, in the language of the Lord Chancellor, that the present case "is near the line," yet the "peculiar circumstances" are most striking, and exhibit such want of care and recklessness, that it would seem to be incontrovertible that in law there is here proved that which constitutes actionable negligence. It is true that Lord Atkinson, in *Cooke* v. *Midland G.W. Ry. of Ireland*, *supra*, had particularly children in mind in the language he used at p. 81, but I consider that it is a general exposition of the law which is apposite here. He said:—

> The origin of the legal right to be in the particular place in which the boy or child comes in contact with the vehicle or machine, or the mode in which that legal right has been acquired, is, in my view, irrelevant. It may be only the restricted right of a bare licensee or it may be the more extended right of a person invited. The principle that the owner of land upon which a licensee enters on his own business or for his own amusement is only responsible for injuries caused to the latter by hidden dangers, of which the former knew, but of which the licensee was ignorant, and which the latter could not by reasonable care and observation have detected, must, in any given case, be applied with a reasonable regard to the physical powers and mental faculties which the owner, at the time he gave the license, knew, or ought to have known, the licensee possessed.

Now, upon the facts of the present case, it might well be said that the appellant could not say that he was unaware that the cable was being removed from off the land; but can it be reasonably said that he was or should have been aware of the fact that it was being removed in such a way that at no time and at no place throughout the whole distance of three miles would it be safe to pass over the cable? It cannot reasonably be said that the appellant must be imputed to have had any such knowledge; rather, that he was ignorant of any such danger, and was entitled to rely upon it that the cable would be withdrawn in a manner which would give reasonable safety and proper protection to the public; and the fact was that the respondents, upon their part, knew of the danger, and quite expected the cable to fly up—a menace and danger terrible in its possible results; and the respondents owed to the plaintiff a duty to take reasonable precautions against accident and the flying up of the cable, a duty plainly left undischarged, and knowingly left undischarged; and the omission to discharge that duty was the *causa causans* of the accident. There can be no question, upon the evidence, that the respondents ought reasonably to have anticipated such an occurrence as that which did happen.

The Lord Chancellor of Ireland (the Right Honourable

B. C.

C. A.

GILBERT v. SOUTHGATE LOGGING CO.

McPhillips, J.A. (dissenting)

Redmond J. Barry), in *Coffee* v. *McEvoy* [1912], 2 Ir. 290, at 302, said:—

> I am fully aware that the law cannot be regarded as settled in a full sense on the question of the owner's liability for injuries received by mere trespassers upon his property. The subject was expressly reserved by the learned Lords who made the decision in *Lowery* v. *Walker* [1911], A.C. 10. Lord Atkinson, in his judgment in *Cooke's Case* [1909], A.C. 229, on p. 239, also reserved the question in relation to trespassers, in particular circumstances stated by him in the passage to which I refer. In the case of *The Grand Trunk Ry. of Canada* v. *Barnett* [1911], A.C. 361, Lord Robson, delivering the judgment of the Privy Council, on p. 369, dealing with the plaintiff on the footing that he was a trespasser, discussed the question of what his rights were in the circumstances against the appellant company. In the course of the passage in his judgment, he says:—"The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled unnecessarily and knowingly to increase the normal risk by placing unexpected dangers in his way." . . .

Also he added, on p. 370:—

> Again, if he be a trespasser, a question may arise as to whether or not the injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care. After mentioning *Lowery* v. *Walker* [1911], A.C. 10, he said: "In cases of that character there is a wilful, reckless disregard of ordinary humanity rather than mere absence of reasonable care."

In my opinion the evidence in the present case demonstrates in the language of Lord Robson, "a wilful, reckless disregard of ordinary humanity rather than mere absence of reasonable care," and, whether the plaintiff be licensee or trespasser, in my opinion the appellant has established actionable negligence against the respondents.

I would, therefore, allow the appeal, and enter judgment for the plaintiff for $2,500, the amount the learned trial Judge would have allowed if of the opinion that liability rested upon the defendants, or, if thought necessary, the action may again be remitted to the learned trial Judge for the assessment of damages.

Appeal dismissed.

QUE.

K. B.

VIOLA v. MACKENZIE, MANN & CO.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J. Trenholme, Lavergne, Cross and Carroll, JJ. January 21, 1915.

1. ALIENS (§ III—19)—ALIEN ENEMY—CIVIL RIGHTS—ENJOYMENT OF—INTERNATIONAL RIGHTS.

   An alien, resident of Quebec, although born in a country at war with the British Empire, is not necessarily an enemy.

   [See Annotation on Aliens, 23 D.L.R., p. 375.]

2. ALIENS (§ III—15)—RESIDENT IN CANADA—RIGHTS AND PRIVILEGES—ROYAL PROCLAMATION.

   Aliens residing in Canada, but who are subjects of countries at war with the British Empire, are granted, by the Royal Proclamations

(September 12 and 29, 1914) the protection of our laws, and, unless they are guilty of hostile acts, are to be left in the enjoyment of their rights and privileges, and the person alleging an act of hostility must prove it.

APPEAL from judgment of Bruneau, J.

Statement

The action was brought under the law respecting accidents to workmen. The appellant alleges that on January 29, 1914, when he was in the employ of the respondent, he was seriously injured, having had his thigh bone broken; that in consequence of this accident he was rendered incapable of working for 6 months; that he will permanently suffer from a diminution of capacity of at least 15%, and that his income was equivalent to $702 per year.

The respondents filed an exception to the form, alleging, in substance, that the plaintiff is an alien subject of Austria-Hungary, which is now at war with our country; that he is an enemy and has no right to enforce his rights in our Courts.

The Superior Court maintained the exception to the form considering that a foreign enemy cannot maintain any action in our Courts, even in the case where the right arose before the commencement of hostilities, though such right is not destroyed but only suspended during the war. In consequence, the Court suspended the proceedings in the cause for so long as the war shall last, relying upon Henriques' Law of Nations and Naturalization, p. 76.

The Court of Appeal has reversed this judgment.

Goldstein, Beullac & Engel, for appellant.

Cook & Magee, for respondent.

LAVERGNE, J.:—As to the facts, they are established by the two sworn depositions of the appellant in support of his proceedings and his admission that he was born in Austria and has not been naturalized. The designation of the appellant in the writ of summons is "Angelo Viola, of the City of Montreal, workman."

Lavergne, J.

The first question which is presented in this case is whether or not the appellant is a foreign enemy. If this is resolved in the negative, there is no reason for going further, as it decides the whole case. [The learned Judge here cited arts. 25 and 985 C.C.]

Art. 986 enumerates the persons who are incapable of entering into a contract. But this enumeration does not comprise

QUE.

K. B.

VIOLA
v.
MACKENZIE, MANN & CO.

Lavergne, J.

aliens or foreigners. The general rule, then, is that aliens and foreigners have the right to contract.

Under international law the rights of foreign enemies are subject to different restrictions. If the foreign enemy is sued, he has a right to defend himself. If he wishes himself to sue, his rights are nearly *nil*, but this only applies to the alien enemies.

The respondents have cited several authorities and referred to the jurisprudence which relate only to the alien enemy. It is wrong to apply this rule to all aliens. Even in time of war the alien who resides in this country is not necessarily an enemy merely because he was born in a country that is at war with us. The appellant resided in our country a long time before the declaration of war, and his right of action arose in January, 1914. Why is it said that he is an alien enemy simply because he was born in Austria? It is, in my opinion, an insufficient ground, and the respondents must invoke something else in support of their claim.

All the authorities and the jurisprudence are nearly unanimous in the opinion that the alien should be considered a foreign or alien friend, unless other reasons are given for the contrary than the place of his birth. It is known that all foreigners, especially among the class of workmen, have been invited and brought here by ourselves, by our laws, by our statutes; that we have even spent considerable sums to induce them to establish themselves here. That is a matter of public history, notorious and found in our statutes. It is not necessary to demonstrate it further. It is repugnant for us to believe that in this country, under the rule of our laws and of those of the British Empire, that a stranger should be refused the right to demand payment of a just debt.

The Royal Proclamation published in the Official Gazette on September 12, 1914, defines the word "enemy" as follows—the expression (enemy) is defined as meaning

> any person or body of persons, of whatever nationality, residing or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country.

It is not sufficient, then, to say that one was born in Austria to constitute an enemy. The proclamation of August 15, 1914, published the 29th of the same month, reads as follows:—

That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations, be allowed to continue to enjoy the protection of the law, and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with unless there is a reasonable ground to believe that they are engaged in espionage or engaging or attempting to give information to the enemy or unless they otherwise contravene any law, Order in Council or proclamation.

It does not appear to me that this proclamation governs the question in litigation unless acts of hostility are alleged and proved against the appellant. He cannot be considered a foreign enemy and he has a right to enjoy here the same protection by the law that he had before the war.

The respondents apparently claim that it is the appellant who must allege and prove that he is not a spy and has not committed acts of hostility, etc.

The exception should be invoked by the one who relies upon it. I believe that it would lessen the dignity of the law to maintain such a claim. What the respondents are urging to-day, they do by virtue of the judgment rendered in Ontario which they cite.

As I have said, the facts are those alleged by the appellant and supported by his affidavit to the two different defences and nowhere contradicted. The appellant has been crippled and has had his leg broken while in the employ of the respondents. He is now entirely incapable of working, is poor, and has a large family to maintain. He invokes the justice of the country in which he has chosen to reside upon its invitation. These are not acts of hostility. Upon this point I refer also to the authorities cited by the appellant, which appear to me "*ad rem.*"

For these reasons I believe that the judgment of the Superior Court should be reversed, and that it should proceed with the demand of the appellant according to the ordinary course of law.

CARROLL, J.:—The reason which leads me to reverse the judgment is that the appellant, according to the principles of international law and the declaration of the sovereign authority, is not an alien enemy in the legal sense of that expression.

His action is based upon a contract between him and his employers. He gives his work to the employers, who give him its equivalent, namely, wages. Moreover, if he is injured in the course of his work, his employers are under a legal obligation

QUE.

K. B.

VIOLA v. MACKENZIE, MANN & CO

Carroll, J.

to indemnify him. This action was an action *ex contractu*. The appellant resided at Montreal when hostilities commenced.

By the proclamation published in the Official Gazette on September 12, 1914, there is defined what the sovereign authority means by the word "enemy" (the text is cited above). And by the proclamation of August 15, 1914, it was declared that all subjects of German or Austro-Hungarian nationality would have the protection of the laws so long as they peaceably pursued their occupation.

I adopt the opinion of Kent, C.J., when he declared, in the case of *Clark* v. *Morey*, 10 Johnston's Report 68, that, to succeed, the defendant must allege and prove, not only that the plaintiff was a foreigner, but that he was giving assistance to the enemy. In this judgment it is said that the result would be otherwise if the foreigner resided in the enemy country. The reason of this rule is founded upon this, that our Courts, in time of war, cannot enforce the execution of contracts, the effect of which would be to aid the enemy.

Thus an enemy residing in an enemy country sues here for a debt. If the judgment condemns the British citizen to pay it, there is a presumption that this sum will aid the enemy. But this presumption does not exist in the case of a foreigner dwelling in our country; there would then be a presumption that the sum recovered would aid our own country.

The respondents attach great importance to the decision of the House of Lords in *Janson* v. *Driefontein Consolidated Mines Ltd.* [1902] A.C. 484, where Lord Davey declares that the action of the alien enemy is suspended during the war. This dictum applies to the case which was submitted. The plaintiff was a company incorporated under the laws of the Transvaal, a country then at war with Great Britain; it was subject to the laws of the Transvaal and its head office was in that state. The dictum properly applies to this particular case.

The judgment of Bailhache, J., deals with a defendant company whose main office was in an enemy country. The Court declares that this company could not cause the action to be suspended, because that would be to injure the rights of the plaintiff, a British subject. The Judge says that an alien enemy cannot sue during a state of war, and he cites the opinion of Lord Davey and of Lord Lindley in the case above-mentioned.

But we have seen that these *obiter dicta* relate to an alien residing in the enemy country (citation).

The restriction of the right to sue according to the majority of writers who have dealt with the matter does not result from the capacity of the foreigner, but from the fact that the enemy country will profit by executing a judgment in his favour. There exists, on the contrary, a presumption, as I have said, that the execution of contracts between an alien residing here and a British subject will be to the advantage of our country.

There is no text of the law which governs these matters. The principles enunciated are the result of the evolution of opinion among the most civilized people, and I do not believe that in time of war these questions can be decided according to the principles of our code.

It would be an improper state of affairs if peaceable foreigners, enjoying the protection of our laws and contributing on their part to the progress of our country, would not have the right to recover what was due to them, pending a period, let us say, of two years, for the reason merely that they were subjects of a state at war with us. If they injure us, if they wish to aid the enemy state, financially or otherwise, our laws offer all needed protection against them. If they do not injure us, they should have the benefit of our law, the same as others.

SIR HORACE ARCHAMBEAULT, C.J.:—I consider the question as not appertaining to international law, but dependent on our national law. That is what was decided in the case of *Donegani* v. *Donegani*, 3 Knapp 63, by the Privy Council in 1882.

Considering that the appellant is not an alien enemy according to our law; considering that, after the publication of the Royal Proclamation in the Official Gazette of Canada on September 12, 1914, and after the publication of the Royal Proclamation in the Official Gazette of Canada, August 29, 1914, the appellant still enjoys the rights that he possessed before the existence of the state of war between the United Kingdom of Great Britain and Ireland and the monarchy of Austria-Hungary; considering that the appellant has a right to acquire and to convey by title, gratuitous or onerous, any movable and immovable property within the province, just as British subjects have; considering that the appellant has the right to enter into contracts and to proceed in the Courts of justice to enforce his rights; considering that there is error in the judgment rendered by the Superior

N. B.

S. C.

CRAWFORD v. CLOWES.

New Brunswick Supreme Court, McLeod, C.J., Grimmer and White, JJ. February 19, 1915.

1. TRESPASS (§ I A—10)—LESSEE IN POSSESSION—TRESPASS—NO PERMANENT INJURY TO REVERSION—RIGHT OF REVERSIONER TO BRING ACTION.

A lessee in possession is the proper person to maintain an action for trespass and the landlord has no right to maintain such action where the injury is of a temporary character, and there is no permanent injury to the property.

Statement

ACTION for trespass.

P. J. Hughes, for appellant.

C. D. Richards, for respondent.

McLeod, C.J.

MCLEOD, C.J.:—This is an action of trespass, in which the plaintiff sought to recover damages from the defendant, claiming that he had trespassed on land owned by the plaintiff by cutting trees and lumber from it, and also that he tore down fences on it. The action was tried at Sunbury County, before Mr. Justice Crocket and a jury, in October last past, when, on answer to questions submitted to the jury, a verdict was entered for the plaintiff.

Shortly stated, the facts are as follows: The plaintiff is the owner of a lot of land in the parish of Burton, in the County of Sunbury, situate on what is known as the Saint John road, the old road leading from Oromocto to Saint John, and it adjoins a lot of land owned by the rector, churchwardens and vestry of St. John's Church, in the parish of Burton, which was granted them for the purpose of a glebe. I will hereafter allude to it as the glebe. The glebe lot appears by the evidence to be practically a lumber lot, and the defendant purchased from the rector, churchwardens and vestry of St. John's Church all the lumber that was on it, and, by an oral contract with one Charles W. Cochrane, Cochrane agreed to cut the lumber and haul it to the brows for $5.50 a thousand. The plaintiff's lot of land at the time this contract was made, and at the time the alleged trespasses were committed, was under lease to the said Charles W. Cochrane. The plaintiff, in his statement of claim, described his lot by metes and bounds, and alleged that the defendant, in the months of January and February, 1914, broke and entered the said lands, and cut down trees, logs, and sleepers of the plaintiff, at that time standing and being, and cut roads over and across the said land, and removed the trees, etc. He further claimed that, in the said months of January and February, the defendant broke and entered the lands of the plaintiff described in his statement of claim, and removed, tore up,

crushed down and prostrated certain fences of the plaintiff thereon being. The defendant denied committing any of the trespasses. There was a dispute as to what was the dividing line between the glebe and the plaintiff's lot. The jury, however, found against the plaintiff's contention where the line was, and found that the lumber that was cut was all on the glebe, and none of it on the plaintiff's lot, and the plaintiff therefore failed in that branch of his claim. Cochrane, however, in hauling the logs, had hauled them across the plaintiff's lot, which at that time was under lease, as I have said, to himself. In doing that he let down the fences; one, being a wire fence, he simply removed the panel. The others were ordinary pole fences, and he let them down and hauled the logs to the brow. (At the time this was done there was snow on the ground), and the jury found on that branch of the case in favour of the plaintiff. The questions submitted to them on that branch were as follows: "Did the defendant's servants remove, tear up or throw down any of the plaintiff's fences within the limits of the lot described in the plaintiff's deed?" In answer to that they say, "Yes." Another question was: "Was Charles Cochrane, in hauling the logs over the plaintiff's land, acting as an independent contractor under the defendant?" In answer to that they say, "No." The damage to the plaintiff's fences was assessed at $5, and a verdict was entered for the plaintiff for that amount. The defendant now moves to have the verdict set aside, and a verdict entered for the defendant. Among other objections, it is claimed that there was misdirection by the learned Judge. The learned Judge, in charging the jury with reference to the damage to the fences, said as follows:—

> And so far as the defendant in the action is concerned, my direction will be that the defendant will be liable if any damage were done to any of these fences within the plaintiff's clearing by Mr. Cochrane, employed in getting out these logs, or in hauling these logs over that property for the defendant. The defendant, would, I think, under the evidence as it has been given here, be liable for any damage committed to the fences by Mr. Cochrane hauling the logs over the clearance while engaged in a lumber operation which he was conducting for the defendant, having regard to the defendant's evidence that he visited the ground several times while the cutting was being done, and that he visited the ground also while the hauling was being done, and knew the hauling was being done in the way that it was.

In my opinion that is a misdirection. The plaintiff could not recover any damages whilst the land was under lease to Cochrane, save such damages as were done to the reversion. There is in this

N. B.

S. C.

CRAWFORD v. CLOWES.

McLeod, C.J.

case no damage to the reversion, and no injury to the land. The fences had been taken down, but they could easily have been put up.

In 27 Hals'. Laws of England, p. 855, it is said as follows:—

If land is in the possession of a tenant, the tenant is the proper plaintiff to sue for trespass committed in respect of the land, but where the trespass is not merely of a temporary nature, but is injurious to the reversion, the reversioner, although he cannot sue in trespass, may sue for the injury done to his interest.

See *Cooper* v. *Crabtree* (1882), 20 Ch. Div. 589; and numerous other cases may be cited.

It was claimed, on argument, that this point was not raised in the Court below. I do not know what arguments were used before the learned Judge, because the arguments are not in the return, but this direction of the learned Judge is distinctly wrong, and therefore the verdict cannot stand. I also think, under the evidence, notwithstanding the finding of the jury, that the defendant was in no way liable for Cochrane's act in hauling the logs across the land, he being an independent contractor. There is no dispute about the contract. It was simply a contract whereby the defendant agreed to pay Cochrane $5.50 per thousand to cut the lumber on the glebe lot, and place it on the brows. The defendant had no control over him as to the hauling or as to the cutting. Cochrane hired his own men, and carried on the work himself. Therefore, on that ground also, I think the defendant is not liable.

The motion must be allowed, and the verdict entered for the defendant, with costs.

Grimmer, J.

GRIMMER, J.:—This is an action for trespass, which was tried before Mr. Justice Crocket and a jury, in the County of Sunbury.

The plaintiff alleges he is the owner of certain lands in County of Sunbury which appear to begin at the Sullivan road, so called, and run up along the St. John road to a tamarack tree, and thence square across said lot to lands at present owned by the "Church," and thence along the "Church" line to said Sullivan road, and thence along said road to the place of beginning; that the defendant entered upon the lands and cut down trees and logs, cut roadways over the lot, and hauled away the lumber; also that he cut down certain shade trees about a spring, thereby spoiling it, and that he also removed, tore up, etc., certain fences on the said

lot. All of which so-called acts of trespass the defendant specifically denies.

Upon a question submitted to them, the jury found the defendant's servants did not cut any trees, logs, sleepers or lumber within the limits of the lot described in the statement of claim, and that it was in fact upon lands known as the "Church" land, the right to cut which had been purchased by the defendant from the corporation of St. John's Church, the owners of the land, and the action for the improper cutting of logs and lumber thus fails.

The only question in the case is in respect to the alleged improper removal or tearing up of certain portions of fences on plaintiff's land over which the logs were hauled, involved in the following question submitted by the learned Judge to the jury: Did the defendant's servants remove, tear up or throw down any of the plaintiff's fences within the limits of the lot described in the plaintiff's deed? To which the jury answered, "Yes," and assessed the damages for such at $5.

Upon this a verdict was entered for the plaintiff, which the defendant now seeks to set aside and have a verdict entered for him, or failing that, for a new trial.

The facts as they appear from the evidence are that the defendant obtained from the church corporation named the right to cut lumber on land owned by them immediately adjacent to land of the plaintiff, and entered into a contract with one Cochrane to cut, haul and brow the lumber. At this time Cochrane was a tenant of the plaintiff of the land described in the statement of claim, and, in carrying out his contract with the defendant, hauled the logs across the land he had so under lease from the plaintiff. In doing this he opened the fence between plaintiff's land and the Church land, apparently doing little or no damage thereto, and hauled the logs and lumber upon the snow, thus doing no damage to the land traversed over.

I am unable to see how this action on the part of Cochrane, being an ordinary tenant of the land in possession, bound by no special restrictions, could impose any liability upon the defendant, particularly when no permanent injury was done to the reversion.

In my opinion the learned Judge was in error in directing the jury

that so far as the defendant is concerned, he would be liable if any damage was done to any of the fences within the plaintiff's clearing by Cochrane

N. B.
S. C.
CRAWFORD v. CLOWES.
Grimmer, J.

while employed in getting out the logs, or in hauling them over the property for the defendant,

and this charge may have been, and doubtless was, largely responsible for the answer the jury gave to question 3 as submitted to them, wherein they found that Cochrane was not an independent contractor.

As lessee, Cochrane had the right to use the land for his own purposes, so long as he did not commit waste thereon or thereto, and from the evidence he does not appear to have acted under any instructions from the defendant in hauling the logs across the lot. He was required by his contract to haul the logs to the brow, and apparently provided his own way to reach there, and it may readily be inferred he was influenced in entering into the contract by the very fact he was in possession of an easy way to haul the logs out. The opening of the fence by him under these circumstances would not be an improper act, in that the fence was only temporarily opened, and could readily be restored, and so would not give the plaintiff any claim or right of action against the man for whom he was hauling the logs, the defendant in this action.

The rights of a reversioner are clearly defined and established in the authorities, and all agree that a reversioner cannot sue for anything as an injury to his reversion unless it permanently injures his estate or operates as a denial of his right, even though he may have suffered injury thereby: Clark's Landlord and Tenant, p. 810; *Mumford* v. *Oxford, etc., R. Co.* (1856), 1 H. & N. 34; *Dobson* v. *Blackmore*, 9 Q.B.D. 991.

In Addison on Torts, 6th ed., p. 430, it is stated that

when land has been devised to a lessee who has entered thereon, and is clothed with the possessory interest, the lessee, and not the landlord, is the proper party to sue for trespass upon the property, unless the wrongful act complained of imports a damage to the reversionary estate; also, that the reversioner cannot maintain an action against a stranger for entering upon his land in the occupation of the lessee, and with carts and horses tramping down the soil and grass, though the entry is made in the exercise of an alleged right of way, as the act is not attended with any permanent injury to the reversioner.

A test might have been made in this case by an application on the part of the plaintiff for an injunction to prevent the lessee from hauling the logs across the leased land, which I have no doubt would have been promptly refused, as when the injury complained of is of a temporary nature, not likely to last long nor

to deteriorate the marketable value of the property, the reversioner has no claim to the interference of the Court.

In my opinion there is no evidence to support the finding of the jury that Cochrane was not an independent contractor, and that the learned Judge on the trial was in error in directing the jury as hereinbefore stated, and that a verdict should be entered for the defendant, with costs.

Grimmer, J.

WHITE, J.:—I agree that the verdict for the plaintiff should be set aside and a verdict entered for the defendant.

White, J.

Judgment for defendant.

DAMPHOUSSE v. VALIQUETTE.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. January 28, 1915.

1. DAMAGES (§ III A—42*a*)—BUILDING CONTRACT—CONTRACT TO COMPLETE WITHIN CERTAIN TIME—EXTRAS—DELAY—DAMAGES.

A contractor who undertakes to complete a building within a certain time and in default to pay a liquidated amount as damages for each day's delay, will be held liable under the penal clause for this amount, even although the owner has suffered no prejudice on account of the delay, and has given supplementary contracts, which have caused the work to be delayed as the contractor, although free to accept such supplementary contracts, was not bound to do so.

[*McDonald* v. *Hutchins*, Q.R. 12 K.B. 499, followed.]

APPEAL from judgment of Archer, J.

Statement

The appellant undertook to construct a house for the respondent for the sum of $16,670, and sued the latter claiming the sum of $679.91, balance due on the execution of the contract. The respondent, by a cross-demand, claimed $990 under a penal clause in the contract obliging the latter to finish the work before February 1, 1913, or, on default, to pay $10 a day for the delay.

The Superior Court (Mr. Justice Archer), on June 29, 1914, maintained the main action for the sum of $1,438.39 and the cross-demand for $780, leaving in favour of the appellant a balance of $658.39, that the defendant was condemned to pay.

The appellant took an appeal from the judgment on the cross-demand, alleging, principally, that, if there was delay, it should be imputed to the respondent.

Monty & Duranleau, for appellant.

Desaulniers & Vallee, for respondent.

CARROLL, J.:—The contract contains the following clause:—

Carroll, J.

Work will begin on or before August 12, 1912, and will be finished on or before January 10, 1913, for the façade and the interior. The remainder will be finished on February 1, next, failing which, the contractor shall pay to the owner $10 for each day's delay. There will not be allowed

QUE.

K. B.

DAMPHOUSSE v. VALIQUETTE.

Carroll, J.

to the contractor anything for extra work or any increase of price unless there is a writing, signed by the owner, to that effect.

The works were only terminated about the middle of May, 1913, but the owner took possession of an apartment in the last days of April. The judgment declares that there were 99 days' delay in the delivery over of the building, but that there should be deducted therefrom 21 days, as the owner had himself contributed in that proportion to the delay. The contractors have, therefore, been condemned to pay $780, representing 78 days of delay at $10 per day. The judgment declares, also, that the contractors had suffered delay from August 15 to 27, from being unable to procure the permission of the city of Montreal, and that they also suffered delay because the owner had caused the work to be suspended in order to make arrangements with one Lacasse, and had given them on December 5, 1912, a supplementary contract for $166, and also had caused them to do extra work after the date when the building should have been finished. These extra works were ordered March 29, April 18, and May 17, and represented altogether the sum of $441.

The judgment declares that the fact that the owner had given a contract for extras on December 5 did not discharge the contractors from the obligation to deliver over the building on the date specified in the original contract. And this judgment is based upon the case of *McDonald* v. *Hutchins*, Q.R. 12 K.B. 499, where Judge Hall laid down the principle that contractors are free to accept supplementary contracts, but are not bound to do so, and that the extra works do not discharge them from performance of the conditions in the original contract.

There was in the present case an additional reason for applying this principle; that is, that on September 24, 1912, more than 3 months before the date on which the building should have been handed over, the architect put the contractors *en demeure* in order to have the work proceed more speedily. The contractors, being thus put on their guard, should not have accepted the extra work without obliging the owner to abandon the penal clause which made them liable to liquidated damages.

As to the delay in obtaining the permission of the city of Montreal, the contractors have not proved *force majeure* which prevented them from obtaining it. They tell us that when they solicited this permission, and the witness Vincent, an employee

QUE.

K. B.

DAMPHOUSSE v. VALIQUETTE.

Carroll, J.

of the city, declares that they had too much work in their office to send any one to make the measurements, but it is not proved that the contractors were absolutely unable to procure the license before August 27.

As to the subsequent work, it should not be forgotten that on January 20 and also on the 27th the owner gave to the contractor another *mise en demeure* to have the works finished. Then it was after these dates that the contractors agreed to do the extra work. They had only to refuse it, for they knew very well that the owner would not abandon the penal clause in the contract. These contracts, like all others, should be interpreted according to the intention of the contracting parties. The parties, instead of waiting until the works were finished to have the amount of damages settled by experts, determined them in advance by a penal clause, and this stipulation should have effect, even though the owner has suffered no prejudice.

Then what was the intention of the parties here? It was that the contractor should have a delay from August 12, 1912, to January 10, 1913, to finish the façade and all the interior of the house, and up to February 1 to finish the rest. Now the works were only completed about the middle of May, 1913, and the architect imputes to the owner but 30 days of this delay.

As the Court of first instance did not allow the 9 days of delay occasioned by the sub-contract of December 5, 1912, there are only 21 days of delay which should be imputed to the owner. In these circumstances, in view of the protests, which clearly indicate the intention of the owner not to abandon the penal clause, it cannot be said that there was any abandonment in ordering the contractor to do work which was not specified in the original contract and which they were free to do or not. For this last reason the judgment is affirmed.

Cross, J.

Cross, J. (after stating the facts):—The additional works are a very small percentage of the whole contract. The appellant failed to prove that the difficulties about the city permit and the end wall, though they were of a nature to cause loss of a few days' time, prevented the work from being completed on or before the indicated dates, and, therefore, failed to make proof of any cause which prevented the charge of $10 per day from accruing against her from and after January 10 or February 1, 1913.

QUE.

K.B.

DAMPHOUSSE v. VALIQUETTE.

Trenholme, J. (dissented)

The onus lies on the contractor to prove that the delay was in fact caused by some act or omission of the employer: Hals. vol. 3, par. 509.

It is a mistake to look upon the $10 per day as a penalty. The Superior Court was right in holding the sum to represent damages computed in advance.

TRENHOLME, J., dissented. *Appeal dismissed.*

SASK

S. C.

ANGLO-AMERICAN TRUST CO. v. LONGWORTH.

Saskatchewan Supreme Court, Elwood, J. July 10, 1915.

1. VENDOR AND PURCHASER (§ II—33)—VENDOR'S LIEN—ENFORCEMENT OF —DEFICIENCY JUDGMENT—PRAYERS FOR.

Where in an action for specific performance of an agreement for the sale of land there is no express prayer for a declaration of a lien, the prayer for an order of sale in effect entitles the vendor to a decree for a lien and sale thereunder, and to a judgment for any deficiency under the sale.

Statement

APPEAL from order of Local Master in action for the enforcement of an agreement for sale of land.

Tindall, for plaintiff.

No one *contra.*

Elwood, J.

ELWOOD, J.:—This action is brought by the plaintiff to recover from the defendant under an agreement of sale of certain lands.

The plaintiff alleges that default has been made in the payment of the purchase price; that it is the registered owner of the land; has always been and is now ready and willing and able to convey the same free of encumbrances to the defendant in accordance with the terms of the agreement of sale sued on. It claims: (*a*) Payment of amount alleged to be due, with interest to payment or judgment, and the costs of the action. (*b*) In default of payment that the land be put up for sale, and the proceeds of the sale be applied in payment of the costs of sale and of the action and of the plaintiff's claim. (*c*) That in the event of no offer being received to purchase the lands sufficient to pay off the claim and costs, the agreement be foreclosed and that, in the event of foreclosure, plaintiff have possession of the lands. (*e*) The costs of the action. (*g*) Such further and other relief as the nature of the case may require.

The defendant delivered a defence admitting the allegations of the statement of claim, stating that he is unable to meet the payments, and consenting to the land being sold and the pro-

ceeds being applied in payment of the costs of the sale and of the action, and of the plaintiff's claim, and further consenting that, in the event of no sufficient offer being received, that the defendant's interest in the land be foreclosed.

Plaintiff applied to the Local Master in Chambers for judgment on the admissions in the pleadings, and claimed to be entitled to an order for payment of the money, and, in default of payment, sale and a judgment for any deficiency on the sale. The Local Master refused the application, holding that plaintiff was not, under the pleadings, entitled to a sale and a judgment for the deficiency.

I am of the opinion that the prayer for relief sufficiently asks for a personal judgment against the defendants. See the forms set forth in the Appendix to Annual Practice.

The statement of claim in this action, in my opinion, practically asks for specific performance of the agreement; while there is no express request for a declaration that the plaintiff is entitled to a lien on the land, yet the request for an order for sale of the land, in my opinion, in effect is sufficient, and entitles the plaintiff to a decree that it is entitled to a lien and a sale under the lien.

The remedies of a vendor are set forth in McCaul, Vendors and Purchasers, p. 30 and 31, in which he says as follows:—

> If on the date fixed, the defendant makes default in payment, the following courses are open to the plaintiff: (*a*) He can issue ordinary execution. (*d*) He can have an order for sale to realize his lien followed by a judgment in case of deficiency against the defendant.
>
> Numbers "d" and "e" are appropriate to enforce the vendor's lien, and it would seem will only be granted where the plaintiff has asked for enforcement of a lien and the decree declared the plaintiff entitled to it.

The facts in the statement of claim clearly shew, in my opinion, that the plaintiff is entitled to a lien on the land; as I said above, the request for a sale although not expressly stated to be under the lien, yet, in my opinion, should be taken to be by virtue of the lien.

In my opinion, therefore, the appeal should be allowed, and there should be an order declaring to be due from the defendant to the plaintiff, under the agreement sued upon, the moneys claimed in the statement of claim, and directing the defendant within 6 months from this date to pay into Court to the credit of

SASK.

S. C.

ANGLO-AMERICAN TRUST CO. v. LONGWORTH.

Elwood, J.

this cause the money so found due; together with interest on the sum of $2,808, at the rate of 8 per cent. per annum and costs of this action, and that, in default thereof there be the usual order for the sale of the land in question and proceeds of the sale to be applied. 1. In payment of the costs of such sale and of confirming the same. 2. On account of the money so ordered to be paid to the plaintiff and costs and interest, and the balance, if any, to be paid into Court to the credit of this cause.

In the event of the proceeds of the sale not being sufficient to pay the full amount of the plaintiff's claim and costs, the plaintiff to have judgment and execution for any such deficiency. The plaintiff will have its costs of the application and of this appeal, and will have leave to apply for further directions.

Appeal allowed.

QUE.

K. B.

FRIEDMAN v MAGEAU.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. February 25, 1915.

1. VENDOR AND PURCHASER (§ I D—22)—DESCRIPTION OF LAND—SUFFICIENCY OF—SALE "EN BLOC"—WHAT CONSTITUTES.

An agreement for sale describing the property as "Nos. 763-765 Mount Royal Avenue, measuring twenty-five by one hundred feet," is a sale *en bloc*, and falls under art. 1503 and not art. 1501 C.C.

2. VENDOR AND PURCHASER (§ I E—25)—MISTAKE IN QUANTITY OF LAND—VENDOR OFFERING TO RESCIND—PURCHASER'S REFUSAL—ACTION FOR REDUCTION IN PRICE—RIGHTS OF PARTIES.

Where the vendor of property has made an error in the description in good faith and upon discovering it offers to rescind the contract, the purchaser is not entitled to refuse this offer and ask for a reduction in the price.

Statement

APPEAL from judgment of the Court of Review.

The Superior Court (Mr. Justice Monet) maintained the action on May 27, 1913. The Court of Review (Archibald, Mercier and Beaudin, JJ.), on June 6, 1914, reversed this judgment. The Court of Appeal confirmed the decision of the Court of Review.

Jacobs, Hall, Couture & Fitch, for appellant.

J. A. Pilon, for respondent.

The judgment of the Court was delivered by

Carroll, J.

CARROLL, J.:—By writing *sous seing prive*, Mageau promised to sell to Friedman a property described as follows:—

I hereby sell my property, Nos. 763, 765 Mount Royal Ave. East, measuring twenty-five feet by one hundred feet for the sum of $9,000, including all buildings erected thereon on following conditions: (The conditions follow).

This document was drawn up after Mageau had read to Friedman the description of his property as given in his deed of sale. Some days afterwards Mageau recollected that, 5 or 6 years before, the city of Montreal had expropriated 5 feet of land to make a sidewalk, and he went with his attorney to Friedman to inform him of the error that had been made in respect to the quantity of land sold. He offered to take back the property and to pay back the $100 that he had received on account. Friedman refused to annul the contract and intimated that he would demand a reduction in the price. Mageau protested that he had sold his property *en bloc* and not by measurement.

Subsequently Friedman, through Mr. Walsh, a notary, insisted that Mageau deliver to him the contents indicated in the writing, namely, 25 feet by 100 feet, and presented to him a contract by which Mageau would have recognized the sale of the whole cadastral lot, containing 25 feet by 100 feet.

If Mageau had signed this contract, it appears to me that he would have been bound to deliver what he had sold, that is to say, the property designated by its cadastral number and containing 25 feet by 100 feet, but it should be remembered that Mageau had not promised to sell the property as described by its cadastral number, but the property bearing the civic numbers 763, 765.

Now, Friedman knew this property well, as he had visited it. It was bounded in front by the street, and the lines on each side were plainly visible.

[The learned Judge here cited arts. 1501 and 1503 C.C.]

If by the terms of the contract and by the description of the land there could be any doubt in the present case whether the sale was *en bloc* or by measurement, it could not be said that the vendor was in good faith and intended to sell his property *en bloc* and not by measurement. There would then have been an error on his part upon an essential element of the contract, and that is why, on perceiving his error, he offered to rescind the sale. Friedman did not consent to that. It is evident that the honesty of Mageau, in notifying Friedman of his error, has subjected him to this suit.

If Friedman was not satisfied on learning of the error of Mageau, he had only to give back the property. He preferred

QUE.

K. B.

FRIEDMAN v. MAGEAU.

Carroll, J.

to keep it, and, moreover, he attempted to make a profit by the discovery that he had made.

The Court of Review, in my opinion, has properly appreciated the facts, and the law and its judgment should be confirmed.

Appeal dismissed.

ALTA.

S. C.

QUAKER OATS CO. v. DENIS.

Alberta Supreme Court, Harvey, C.J., Scott and Stuart, JJ. June 12, 1915.

1. CONFLICT OF LAWS (§II—154)—PERSONAL ACTIONS—STATUTE OF LIMITATIONS—LEX FORI.

In matters of limitations of personal actions the *lex fori* prevails, except where the debt has been absolutely extinguished by the Statute of Limitations of the *locus contractus*.

[*Rutledge* v. *U.S. Savings & Loan Co.*, (1906) 37 Can. S.C.R. 546, applied.]

2. LIMITATION OF ACTIONS (§IVC—166)—INTERRUPTION OF STATUTE—PAYMENT OF DIVIDEND BY ASSIGNEE OR CURATOR.

The payment of a dividend by a curator or assignee for creditors does not imply a new promise by the debtor so as to raise a new obligation to pay a debt barred by limitations.

[*Birkett* v. *Bisonette*, (1907) 15 O.L.R. 93, applied.]

3. LIMITATION OF ACTIONS (§ IVC—167)—ACKNOWLEDGMENT OF DEBT—CONDITIONAL PROMISE TO PAY—EFFECT.

A promise to pay conditional upon the promisor's ability to do so does not operate as an absolute acknowledgment of a debt barred by limitations.

4. PARTNERSHIP (§VI—25)—DISSOLUTION BY INSOLVENCY—EFFECT—POWER TO ACKNOWLEDGE DEBT BARRED BY LIMITATIONS.

A partner has no implied authority to acknowledge a debt barred by limitations after the dissolution of the partnership by insolvency proceedings.

Statement

Appeal from judgment of Beck, J., 19 D.L.R. 327.

A. H. Gibson, for plaintiffs.

John Cormack, for defendants.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—The plaintiffs' claim is on an account for goods supplied in January, February and March, 1906, to the defendants, who were carrying on business in partnership in Quebec. In March, 1906, they made an assignment of all their property for the benefit of their creditors, and ceased to do business, and on November 11, 1907, the assignee, who is called a curator, paid the plaintiffs a dividend.

This action was begun on June 5, 1912, but not against the present defendants, but on November 8, 1912, an Order was obtained giving leave to add Mrs. Denis, and changing the name of the other defendant from E. B. Racicot to Bernard Racicot. It does not appear whether these two names represent the same person, but I presume they do. The leave granted appears to

have been acted on by the Statement of Claim, which is dated November 15, 1912, which is apparently the time when proceedings were started against Mrs. Denis.

By the law of Quebec the debt would be extinguished in 5 years after the cause of action arose, and by our law the right of action would be barred in 6 years. But the evidence shews that by the Quebec law the payment of a dividend by a curator interrupts prescription. By the Quebec law, then, the debt would have been actually extinguished on November 11, 1912, unless proceedings were taken before that date or unless the prescription were interrupted by any other act. The evidence shews that this may take place by the acknowledgment of the creditor's right.

Two letters of the defendant Racicot are put in evidence to establish an acknowledgment, either for the purpose of the Quebec law or our law.

The first letter is dated December 21, 1909. In this letter, which is a reply to one from the plaintiffs, the writer, after explaining his movements, his difficulties, his lack of means, and his family's needs, writes:—

What can I do to pay you, tell me. There is no ill will on my part, and if you will give me the time you will see later that I want to settle my accounts, but for the present I regret it very much, but I can do nothing. I have confidence that this locality will be a good one later on, and if I can obtain an extension of time, I will be enabled by my work to recover my position. I am leading a very moderate life, and that in order to assist me in recovering my position and make payment later.

I hope that you will understand my position and that you will be good enough not to take advantage of my poverty and throw me into misery. My children are getting big and all together we work in order later to do honour to our name; as this failure at St. Hyacinthe has caused me more humiliation than anything in the world.

In hope of receiving a favourable reply, I remain.

The other letter is dated November 22, 1911. It begins:—

I have received your letter, dated 13th, yesterday, and in answer I will tell you that nobody is more sorry than me to be unable to pay you.

It then explains some of the difficulties encountered, and continues:—

I am now as poor, if not poorer, than when I came here, but I am full of hope to make some money soon and if I succeed, you will be paid for my share.

After explaining how he hopes to make money, it ends:—

If I can have the land, I will be O.K., and in position to pay for my share of your account. Hoping that you will wait another letter from me, I remain.

ALTA.

S. C.

QUAKER OATS v. DENIS.

Harvey, C.J.

It is contended, first, that by the Quebec law the payment by the curator on November 11, 1907, makes a new starting point for the debt, and that, assuming that it was not extinguished before the action was brought, our 6 years' limitation had not run. One difficulty about this contention is that the evidence does not warrant the conclusion that that is the effect of the Quebec law. Unless the effect of the payment is to create a new promise or other obligation upon which the action could be based, the action must rest on the original account, and our limitation would run from the date of the original account.

It is quite clear that under our law such a payment would not imply a new promise so as to raise a new obligation. The authorities on this point are exhaustively considered by Riddell, J., in *Birkett* v. *Bisonette*, 15 O.L.R. 93. The evidence of the Quebec law on this point is simply that the payment "interrupts the prescription." The action is not based on a cause of action arising out of or by reason of that payment, but in terms is based on the original account. In *Rutledge* v. *U.S. Savgs. & Loan Co.*, 37 Can. S.C.R. 546, Girouard, J., says:—

I think it is a well settled rule of English Law, whatever may be the law on continent or in Quebec, that in matters of limitations of personal actions the *lex fori* must prevail, except where the debt has been absolutely extinguished by the Statute of Limitations of the *locus contractus*.

On these considerations I think it is quite clear that the payment by the curator can have no effect with reference to our law of limitations, and that, therefore, the right of action was barred early in 1912, unless the letters of the defendant Racicot prevented that result. In Banning on Limitation (3rd ed.), at p. 42, it is stated that

Wigram, V.C., in the case of *Phillips* v. *Phillips* (3 Ha. 281) correctly stated the law as follows: The legal effect of the acknowledgment of a debt barred by 21 Jac. 1 ch. 16, sec. 3, is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law, and the old debt may be said to be revived; but it is revived only as the consideration for the new promise and the new promise (and not the old debt) is the measure of the creditor's new right,—that is to say, if a debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than that promise gives him.

Banning also says, on p. 41:—

In all cases of acknowledgment it is necessary to bear in mind that for a sufficient acknowledgment the terms must be certain and unambiguous, (and again in p. 43) where the defendant annexes to his admission or acknowledgment some qualification or condition, the acknowledgment is only

ALTA.

S. C.

QUAKER OATS v. DENIS.

Harvey, C.J.

sufficient upon proof of the performance of the qualification or condition . . . and if, *e.g.* he promises to pay when he is able, proof of the defendant's ability is required because a promise to pay in a particular manner will not revive the debt generally.

It appears quite impossible to infer from the defendant Racicot's letters any promise to pay by his co-defendant, because, the partnership having been long discontinued, he had no implied authority to bind her (see Smith's Mercantile Law, 11th ed., p. 51), and there is no suggestion of any express authority, and it seems almost as hard to infer any absolute promise on his own part. The most in the plaintiffs' favour that could be inferred, it appears to me, is that, if he succeeds and has the ability, he will pay his liabilities. That does not imply an unconditional promise to pay, and there is no evidence of his ability. There is a further difficulty, too, that his liability would only be for his share of the firm liability, and the second letter expressly refers to that. There is no evidence to indicate what that share is. It might be a half or it might be much less or even more.

I think, therefore, that the judgment of my brother Beck in dismissing the action was right, and I would dismiss the appeal with costs. *Appeal dismissed.*

FINDLAY v. HOWARD.

QUE.

K. B.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. February 19, 1915.

1. STAY OF PROCEEDINGS (§ I—5)—CREDITOR—ABANDONMENT OF BENEFIT OF SEIZURE—DEPRIVATION OF RIGHT TO.

The formal abandonment by a creditor of the benefit of seizure, deprives him of the right, in an action brought against him, to a stay of proceedings in order that he may seize and sell the property of the original debtor as provided by art. 177 C.P.Q., par. 5.

2. STAY OF PROCEEDINGS (§ I—5)—PARTNERSHIP—DISSOLUTION—ONE PARTY GUARANTEEING DEBT DUE TO CO-PARTNER—SURETY—PRINCIPAL DEBTOR DEFAULTING—RIGHT TO STAY.

If on dissolution of a partnership one partner guarantees a debt due to his co-partner, he becomes a surety for the debtor, and if he is sued by his co-partner he has a right to a stay of proceedings by dilatory exception in order that he may summon the principal debtor in warranty.

Statement

APPEAL from judgment of Martineau, J.

The appellant and the respondent, having dissolved their partnership as real estate agents, divided the property which it possessed. A sum of $50,000 due by the Carsley syndicate formed part of the respondent's share. The appellant agreed to the following:—

The said Findlay, hereby guarantees that the said $50,000 will be paid to the said Howard on or before June 11, 1914, it being understood and agreed

QUE.

K. B.

FINDLAY v. HOWARD.

Statement

that in the event of the said sum not being so paid to the said Howard by the said syndicate, or for their account, the said Findlay undertakes to pay the said amount, and interest to the said Howard on or before June 14, 1914; and in the event of the said Findlay failing to make such payment, the said Howard shall be entitled to immediately demand and recover the said amount and interest from the said Findlay, the said Findlay hereby waiving the benefit of discussion.

The syndicate not having paid its debt to the respondent, the latter brought action against the appellant to recover the amount from him. The appellant, by dilatory exception, demanded that the proceedings be stayed to enable him to summon in warranty the syndicate, the principal debtor.

The Superior Court refused this demand. It is from that interlocutory judgment that the appeal was taken. The Court of Appeal reverses it and maintains the dilatory exception.

Brown, Montgomery & McMichael, for appellant.

Cooke & Magee, for respondent.

The judgment of the Court was delivered by

Archambeault, C.J.

SIR HORACE ARCHAMBEAULT, C.J.:—Defendant claims that his abandonment of the right to seize the property of members of the Carsley syndicate does not take away his right to call in these persons in warranty.

Art. 177, C.P.Q., permits a defendant to have proceedings stayed by dilatory exception in cases provided, among others:—Par. 4. If the defendant has the right to recourse in warranty against a third party; 5. When he has the right to demand the seizure of the goods of the principal or original debtor.

There is no doubt that the respondent could not invoke par. 5 to have the proceedings stayed. His formal abandonment of the benefit of seizure deprives him of this right. But has he the right to call in the members of the Carsley syndicate in warranty?

The *considérants* of the judgment *a quo* which raises this question reads as follows:—

> Considering that the action which defendant may take against the members of the syndicate in default of payment to the plaintiff of the sum of $50,000, is not a remedy in warranty in the sense of par. 4, but is only for recovery of a personal debt, properly due to him under the deed of partition agreed to between the parties.

The stipulation in the partition deed as to the debt due by the Carsley syndicate is in the following terms. [Cited above.]

This agreement is nothing more than an act of suretyship:—

Suretyship is an act by which a person undertakes to carry out the obligation of another in the case where the latter fails to do so. Art. 29, C.C.

That is exactly the present case. The obligation of the Carsley syndicate is attributed to the respondent, who thus becomes the sole creditor at least between him and the appellant; and the appellant undertakes himself to fulfil this obligation if the syndicate fails to do so.

It is only under this agreement of suretyship that the appellant is under an obligation towards the respondent. In paying the latter, he discharges the debt of a third party and not his personal debt. He is then merely a surety.

Now a surety sued by the creditor has a remedy in warranty against the principal debtor:—

The simple warranty is that which exists against those who are bound to relieve a person of some debt or personal action, such as that by the surety against the debtor who has been secured, to oblige the latter to guarantee him against proceedings by the creditor for the benefit of the one who has become surety, Pigeau, vol 1, p. 184.

And, at p. 185, Pigeau adds:—

Simple warranty is established not to relieve the person secured from the action, but to oblige the surety to prevent the exercise of it.

See also *Simard* v. *Simard*, 9 R. de P. 172.

If the Carsley syndicate had paid the respondent or the firm of Findlay and Howard the amount which it owed, the respondent would have had no recourse against the appellant. But the respondent claims that he has not been paid, and the appellant is, in consequence, sued for this debt. He has the right to call in the syndicate in warranty, so that the latter may intervene in the action if it sees fit, and, in any case, he cannot claim later that he had a good defence to the plaintiff's claim if the action was brought against him. Thus what would be the recourse of the appellant against the syndicate if the debt of the respondent against it had been discharged, in whole or in part, by compensation or by any other mode for discharging obligations?

For these reasons I am of opinion that the judgment of the Court of first instance is not well founded, and that it should be reversed.

Appeal allowed.

ALTA.

S. C.

KAYE v. BURNSLAND ADDITION, LTD.

Alberta Supreme Court, Harvey C.J., Scott and Beck, JJ. June 25, 1915.

1. DEPOSITIONS (§ II—5)—FOREIGN COMMISSIONS—ABSENCE BECAUSE OF WAR—ACTION FOR CANCELLATION.

In an action for the cancellation of shares on the ground of misrepresentations, the evidence of plaintiffs unable to be present at the trial because engaged in the country's war may be taken on commission, particularly where the proposed evidence is within the defendant's knowledge and which may be met by his fullest preparation.

[*Park* v *Schneider*, 6 D.L.R. 451, distinguished.]

Statement

APPEAL from judgment of Stuart, J., confirming a Master's Order for taking testimony on commission.

L. H. Fenerty, for appellant.

O. M. Biggar, K.C., for respondent.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—There are nine plaintiffs, each of whom is asking for a cancellation of shares and a return of the price paid on the ground of misrepresentation. They all live in England.

On motion for directions, the plaintiffs asked to have the evidence taken on commission. They were given leave to file affidavits, which affidavits shew that seven of them are directors in two woollen manufacturing companies, at present carrying on business at high tension in order to supply the Government of England and its allies in the present European war with needed clothing and other supplies, and that they have already lost many of their staff, who have gone to serve their country, and that their presence is indispensable to the carrying on of their business. They also shew that the evidence on part of all of his co-plaintiffs is required by each plaintiff to prove his case.

The other two plaintiffs are engaged, one in manufacturing and the other in school teaching, and the latter states that it would be difficult to obtain leave of absence because some of his colleagues are serving in the war. The Master directed the evidence of the plaintiffs to be taken on commission. On appeal to my brother Stuart, he confirmed this direction, and the defendants now appeal to this Court.

There is in the Appeal Book an affidavit of one of the defendants, who is also a director of the defendant company. It is not referred to in the Order of the Master and is sworn the day after the date of that Order. It is not mentioned in the notice of appeal to the Judge, which is dated the day after it was sworn, nor is it mentioned in his Order, but it is the only statement of

fact on behalf of the defendant, and it was referred to in the argument before us without objection.

From it, it appears that the defendants propose to call evidence to shew the untruth of the allegations of the statements of claim, thus making a direct conflict of testimony if the plaintiffs give evidence in support of such allegations. It states that the deponent's belief that thus "the outcome of the action will wholly depend upon the question of the credibility and veracity of the plaintiffs and their witnesses, as well as of the defendants."

If that view is correct, it would, of course, be much more satisfactory to the trial Judge to have all the witnesses before him, but who will be likely to be the greater sufferers if the plaintiffs' witnesses cannot be present? Surely the plaintiffs, because they can, by commission only, give part of their evidence, their manner of giving the evidence, which is often of great value, being wanting. Moreover, they cannot, in rebuttal, answer any evidence which the defendants may give. The defendants, on the other hand, before the trial know exactly what case they have to meet and can make the fullest preparation for it. If they deny the evidence of the plaintiffs and satisfy the trial Judge by their words and manner that they are telling the truth, the plaintiffs must necessarily fail.

This case is absolutely different in principle from *Park* v. *Schneider*, 6 D.L.R. 451, in which this Court refused the plaintiffs the right to have his evidence given on commission. In that case the evidence which the plaintiff purposed to give to make out his case was something not within the defendants' knowledge, and which, therefore, the defendants could not contradict, and, in the opinion of the Court upon the law in force, if the plaintiff made the statement in the absence of the trial Judge, it must be accepted as true, his demeanour being the only evidence by which the defendants could contradict his words.

That was much the situation in *Berdan* v. *Greenwood*, 20 Ch. D. 767*a*, the strong English case referred to in that case. The evidence the plaintiff proposed to give was of something not within the knowledge of the defendants, and which they, therefore, could have no means whatever of contradicting. They were both cases where there could not be a conflict of testimony, and it was for that reason that the Court thought justice could

ALTA.
S. C.
KAYE
v.
BURNSLAND ADDITION.
Harvey, C.J.

not be done the defendant if the plaintiffs gave their evidence away from the trial Court. These cases, therefore, are no authority for the appellants' contention here.

In addition to the facts already mentioned, I think the Court ought not to disregard the conditions arising out of the war to which inference is made in the affidavits, by reason of which the plaintiffs could not, consistently with their duty to their country, leave their business for the length of time that would be necessary to come out and give evidence, which would probably be 6 weeks at the shortest.

The appeal is dismissed with costs. *Appeal dismissed.*

N. B.
S. C.

ROSS v. NEW BRUNSWICK CONSTRUCTION CO.

New Brunswick Supreme Court, McLeod, C.J., Grimmer and White, JJ. May 6, 1915.

1. MISTAKE (§ VII A—160)—ACCOUNT DUE—KNOWLEDGE TO WHOM PAYABLE—PAYMENT TO THIRD PARTY THROUGH ERROR—SATISFACTION OF CLAIM.

A husband having conveyed his business to his wife and after working for her for a certain time as an employee, the husband and wife have separated and are living apart, and the husband has ceased to have anything to do with the business and the defendant knew of this change and intended to deal with the wife, but through error a cheque was made payable to the husband, who appropriated the money to his own use, the payment to the husband cannot be considered a valid payment of the debt as the wife was in no way to blame for the error.

Statement

APPEAL from a judgment of Forbes, J.

Hon. J. B. M. Baxter, A.G., for plaintiff, appellant.

W. H. Harrison, for defendant, respondent.

McLeod, C.J.

McLEOD, C.J.:—This case was tried before the Judge of the St. John County Court, without a jury, and a verdict entered for the defendant. The defendant is a dredging company and own and operate a dredge or dredges in the city of St. John, and the goods for which this action was brought were supplied to the defendant company's dredges. Mr. Frank R. Fairweather was secretary-treasurer of the defendant company, and signed its cheques.

The plaintiff is a married woman, and at the time the action was brought was living apart from her husband. She carried on business in that part of St. John known as the North End. The business had formerly belonged to her husband, but it had been transferred to the plaintiff some time in November, 1912, and from that time the plaintiff continued the business herself

under the sign of the Ross Meat Store. The plaintiff's husband, Robert Ross, prior to November 13, 1913, worked about the store for her, for which she paid him, he says, five dollars a week. She says he had no authority to collect moneys for her.

The goods for which this action was brought were goods that were supplied to the defendant company's dredges between September 5 and November 6, 1913. I think from the evidence that there is no doubt that the defendant company ordered the goods from Mrs. Ross. One order for goods was put in evidence, dated October 25, 1913. It is addressed Mrs. Ross, and is as follows: "Please send on the Oconee to-night to dredge No. 1, one barrel of apples, one tub good butter, five dozen eggs," and it is initialed by the steward of the dredge, who was John A. Kershaw.

The plaintiff, on November 10, 1913, rendered her bill, amounting to $103.14, to Mr. Frank R. Fairweather, and in the bill so rendered are the goods ordered by the note of November 25, 1913. On May 20 of the same year Mr. Fairweather signed a cheque in blank, and handed it to Miss Williamson, his clerk, and asked her to fill it out for the amount. The bill, as rendered, was to Ross' meat store. Mr. Fairweather did not mention any name to be filled in, and Miss Williamson looked in the directory, got the name of Robert Ross, and filled out the cheque payable to Robert Ross, and this cheque was mailed to Robert Ross, and he endorsed it and took the money. At the time this was done Ross was not living with his wife, but it was said during the argument that when he received the cheque he was in the store. The evidence, however, does not disclose that. It does disclose that the cheque was made payable to his order and was mailed to him.

The defendant contends that this is a payment to the plaintiff; that Ross being in the store, the defendant company had a right to assume that he, Ross, was entitled to receive the money. This contention, however, cannot prevail. The defendant company admittedly owed the plaintiff this $103.14, and it was the defendant company's duty to pay her. The defendant company did not pay her, and didn't attempt to pay her. The cheque was made out in favour of Robert Ross, and if it had been handed to Mrs. Ross she could not have used it. It was,

N. B.

S. C.

ROSS v. N. B. CONSTRUCTION CO.

McLeod, C.J.

however, as I have said, mailed direct to Robert Ross. It was the duty of Mr. Fairweather, the secretary-treasurer, of the company, to see that the cheque was properly filled out to Mrs. Ross, if he proposed to pay by cheque. He took no precautions to see that that was done. It was left to Miss Williamson without any instructions, and she simply looked in a directory, and, finding the name of Robert Ross, filled out the cheque payable to him.

The case does not stand in the same position as if the defendant company had taken the money over to the store, and, finding Ross in charge, handed the money to him. Then it might be, if the company had good reason to believe that Ross had a right to receive the money for the plaintiff, it would have been relieved, but in this case the company did not do that; it made the cheque payable directly to Ross, and mailed it to him. It was not a payment to the plaintiff, and it was not an attempt to pay her. It was a payment made directly to Robert Ross by cheque. Justice and equity require that the verdict should be entered for the plaintiff, and the facts of the case warrant it. The appeal must be allowed, and a verdict entered for the plaintiff for $103.14, with costs here and costs in the Court below.

Grimmer, J.

GRIMMER, J.:—This action, which was tried in the St. John County Court, before Forbes, J., without a jury, on July 10, 1914, was brought to recover $103.14, the price of certain supplies claimed by the plaintiff to have been furnished by her to the defendant company, and a judgment was entered for the defendant company.

From this verdict the plaintiff appeals on the following grounds: 1. Verdict against evidence. 2. The payment to Robert Ross was wholly an error of defendant company, for which the plaintiff is not responsible.

The plaintiff, it appears, is a married woman, who resided with her husband, Robert Ross, at Indiantown, so called, in the city of St. John. They lived together until November 13, 1913, when plaintiff says her husband deserted her. Robert Ross formerly carried on a meat business at Indiantown, but in 1912 the plaintiff obtained the same from him by bill of sale, executed in November, since which time she claims the business carried on under the name of Ross's Meat Store was solely and abso-

lutely hers, and her husband had no interest therein. She says previous to November 13, 1913, her husband resided with her under her roof, and was her hired man, and doubtless in this capacity acted as a clerk in the shop in the selling of supplies and receiving money therefor and in sending out accounts. She further says the business was always hers, and that her husband's name was taken off the window long before the bill sued for was contracted. Also that the supplies sued for were furnished by her to the defendant company, and that she never authorized her husband to collect any money for her.

On the part of the defence Robert Ross says he was running the business before he transferred it, and that he received the cheque sent by the defendant company, in settlement of the account sued, and cashed it, but apparently did not give plaintiff the money, though at this time he stated he was working for plaintiff, who was allowing him $5 per week to support him and his child. He also appears to have been doing some business on his own account, as he states the defendant company, at the time of the trial, owed him some $95. John A. Kershaw stated he used to get goods for the defendant company at Ross's meat store, getting supplies from the plaintiff and her husband, and sometimes paying one and then the other, and that he knew Ross had made the business over to his wife. Agnes Williamson states she had made out the cheque to Robert Ross from looking in the directory, apparently having no instruction from any one, and not knowing to whom to make payment, the bill being made to Ross's meat store.

Frank R. Fairweather, the manager of the defendant company, stated he had never issued any cheques to any one except the plaintiff, and, while he had nothing specially in his dealings with the Ross's, he always did business with Robert Ross.

Several exhibits were received in evidence, the first of which is dated October 25, without giving the year, and is an order from the defendant company, signed "Steward, J. A. K." with instruction to charge same to N. B. Construction Co., Ltd., signed by Frank R. Fairweather, sec.-treas. It may be assumed this order was given in October, 1912, as the second exhibit is a cheque for $44.28, dated May 20, 1913, and marked "Paid, Robert Ross," the same being made out in the name of Ross's meat store. Exhibit No. 4 is a bill, dated May 1, 1913, on a

N. B.

S. C.

ROSS v. N. B. CONSTRUCTION CO.

Grimmer, J.

bill head with the name of Robert Ross printed thereon, against the defendant company for supplies, which is marked, "Received payment in full, May 21, 1913, Mrs. Sarah F. Ross," and No. 5 is the cheque which was received by Robert Ross for the claim sued upon, which bears date November 17, 1913.

From these exhibits it seems clearly evident the defendant company knew and recognized the plaintiff as the person with whom they were doing business, and from whom they were getting the supplies charged to them, and who was entitled to be paid therefor. This, together with the evidence for the defence, that the husband was working under pay for the plaintiff when he received the cheque; that the steward of the defendant company knew the business had been transferred to the plaintiff; that the secretary-treasurer and manager of the company had issued cheques in payment of accounts of plaintiff, but had never issued any except to the plaintiff herself, is convincing evidence of the validity of the plaintiff's claim, and of the defendant company's knowledge that the business was hers, and she was alone entitled to be paid for supplies purchased, and the learned Judge was in error in finding the defendant company had no notice of any change in the business relations existing between Ross and his wife, and the payment to Robert Ross was a discharge of the debt.

It was the duty of the defendant company to make the payment to the person entitled thereto, and the drawing of the cheque in the name of Robert Ross, instead of the plaintiff, was carelessness on their part, for which they must take the responsibility, and the plaintiff should not be deprived of a just claim through or by reason of an error or carelessness of the defendant company for which she was in no way responsible.

In my opinion, the verdict should be entered for the plaintiff with costs.

White, J.

WHITE, J.:—I agree. *Appeal allowed.*

ALTA.

S. C.

DOUGLAS v. LOCKE.

Alberta Supreme Court, Stuart, J. September 15, 1915.

1. TRADE NAME (§ I—9)—CUT RATE SHOE STORE—INFRINGEMENT—COMMON TERM.

A firm name of "Cut Rate Store," as applied to a retail shoe business, is a mere descriptive term of common use, which will not be enjoined by the court against a person subsequently using that term to a similar business adjacently located.

ALTA.

S. C.

DOUGLAS v. LOCKE.

Stuart, J.

MOTION to continue injunction against infringement of a trade name.

J. Shaw, for plaintiff.

A. H. Goodall, for defendant.

STUART, J.:—This is a motion to continue an interim injunction.

In his statement of claim the plaintiff alleges that he is a merchant carrying on business as a retail boot and shoe seller at 234 8th Ave. West, in the city of Calgary, that the defendant was employed until recently as a clerk in his shop, that since about September 22, 1914, the plaintiff has carried on his business under the name and style of "Cut Rate American Boot Shop," that he had on October 22, 1914, registered as a partnership under that name and that he has under that name established a business and reputation of great extent and value. He further alleges that the defendant fraudulently and with the intent to interfere with the business of the plaintiff and to attract it, did, on August 22, 1915, and thereafter, set up a retail boot and shoe business at 228 8th Ave. West, in Calgary, immediately adjacent to the plaintiff's premises and adopted and used the name, "Cut Rate Shoe Store"; that this enabled the defendant to appropriate a substantial portion of the plaintiff's business by misleading the purchasing public into supposing that they were dealing with the plaintiff.

The facts are in general verified by affidavit, except that it appears from the affidavit that the name being used by the defendant is "New Cut Rate Shoe Store." The plaintiff does not furnish to the Court any information as to the origin or meaning of the term "Cut Rate." He does not attempt to inform the Court whether that term is a fancy and invented name or a mere descriptive word. This is partially, if not entirely, a question of fact. One would have thought that the plaintiff when seeking the extraordinary remedy of an injunction would have gone so far as to inform the Court whether he had invented the term out of his own mind or had adopted it as already used in business conversation and dealings. This meagreness of information is in itself a fairly good reason for refusing to continue the injunction. However, the defendant has presented in his affidavit

ALTA.

S. C.

DOUGLAS v. LOCKE.

Stuart, J.

an explanation of the meaning of the term. He says that it refers to dealing in shoes "at cut rates—that is, underselling the current market prices." He also says that the use of the phrase "cut rate" is common in various lines of business to indicate the same thing and that there are stores advertised as cut rate stores in other lines of business in the city of Calgary. This is not denied by the plaintiff. Having now spoken of the information furnished in the affidavits one may perhaps venture to use one's own knowledge of the phrase "cut rate" to supplement that information. . . .

It is difficult to apply the principles laid down in most of the cases cited to me to such a case as this. In most of these cases there was a question of some particular kind of article being manufactured by the plaintiff to which a special name had been given. Here the term in question has no reference to any particular kind of goods at all, but merely to a particular method of selling goods, indeed, to a particular method of fixing the price. It would be strange indeed if a word merely descriptive of such a method of selling or fixing the price could be appropriated and monopolized by one man. If a retail dealer were to announce his business under the name "The One Year Credit Shoe Store," intending to intimate that his method of doing business was to give all his customers one year's credit on their accounts, surely it could not be said that he could monopolize that merely descriptive term and prevent any other dealer from announcing that his store was also a "One Year Credit Store." The same might be said of other phrases that readily occur to one, e.g., "the *Spot Cash* Store" or the "*Long Credit* Store."

It, therefore, seems to me that the term in question is purely descriptive, that it is a term in common use and that this application is an attempt by the plaintiff to monopolize the use of a well-known phrase which is widely used to indicate that the dealer is selling below the regular rates. This, I think, he is not entitled to do and the injunction will be dissolved. The costs will be costs in the cause. *Injunction dissolved.*

IMPERIAL CANADIAN TRUST CO. v. WOOD VALLANCE.

ALTA.

S. C.

Alberta Supreme Court, Simmons, J. September 14, 1915.

1. BILLS OF SALE (§ II A—5)—REGISTRATION—STATUTORY PERIOD—NON-COMPLIANCE—ATTACK BY LIQUIDATOR.

A chattel mortgage of a corporation, invalid against creditors under the Bills of Sale Ordinance (Alta.) for non-registration within the statutory period, may be attacked by the liquidator of the corporation as representing the creditors.

[*Nat. Trust* v. *Trusts & Guaranty*, 5 D.L.R. 459, followed.]

Statement

ACTION by liquidator to set aside a chattel mortgage.

J. Muir, K.C., for execution creditors.

G. A. Trainer, for liquidators.

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

Simmons, J.

SIMMONS, J.:—The Taber Hardware Co., Ltd., was incorporated under the Companies' Ordinance, ch. 61, N.W.T., with head office at Taber, in the Judicial District of Lethbridge. There were only 3 shareholders, and of these 3 original incorporators one George Wright obtained a controlling interest.

In the spring of 1914 the defendants advanced the Taber Hardware Co., Ltd., $1,500, for the purpose of enabling the company to pay off an indebtedness owing the J. H. Ashdown Co., Ltd. The defendants, at that time, were given some security by way of a second mortgage on a house and lot in Taber, owned by Mrs. George Wright, and George Wright verbally promised to give them a mortgage on the stock-in-trade and fixtures at any time the defendants should request it. Pursuant to a request to fulfil this verbal promise, the company gave the defendants a chattel mortgage on October 6, 1914, on the stock-in-trade and fixtures, to secure payment of $4,132.42, with interest at 7% per annum, due and payable in 7 months.

The chattel mortgage was not filed in the Taber registration district within 30 days from the date of execution. The affidavit of the attesting witness is not sworn. No resolution was passed by the company authorizing the mortgage. On December, 1914, liquidation proceedings commenced under the Winding-up Act, R.S.C., ch. 144. Executions against the Taber Hardware Co., Ltd., were entered. . . .

On December 8 the sheriff entered into possession of the goods and chattels of the company, and was still in possession on December 14, when an order issued for the winding-up of the company. The liquidator thereupon entered into possession, and gave the sheriff an undertaking to pay the costs of the execu-

ALTA.

S. C.

IMPERIAL CANADIAN TRUST CO. v. WOOD VALLANCE.

Simmons, J.

tions then in his hand. The defendants filed a claim that their mortgage was a preferred claim, and the liquidator contests the validity of their claim to priority under the mortgage.

The plaintiffs attack the mortgage on the following grounds:—(*a*) Failure to register in the Taber registration district within 30 days and incompleteness of the affidavit of the attesting witness and insufficiency of the affidavit of *bonâ fides*. (*b*) The company was insolvent at the date of execution of the mortgage or on the eve of insolvency, and the said mortgage was given for the purpose of delaying and prejudicing creditors of the company and giving the defendants a preference over the other creditors, and the defendants were aware of the insolvency of the company. (*c*) Absence of authority by George Wright to execute the mortgage for the company.

The defendants claim that the mortgage, notwithstanding the fact of non-compliance with the Bills of Sale Ordinance, was an effective instrument as between the company and the defendants, and created a charge against the property enforceable in priority to the claims of the execution creditors, and, further, that it was not given for the purpose of giving the defendants a preference.

I find it necessary to deal only with the question of invalidity of the mortgage due to lack of registration within the statutory period.

Sec. 11 of the Bills of Sale Ordinance provides that in such case the instrument shall be absolutely void as against creditors of the bargainor.

It is admitted that if the instrument was intended to be a chattel mortgage within the meaning of the Bills of Sale Ordinance, that at the moment prior to the commencement of winding-up proceedings the mortgage was absolutely void as against the execution creditors. The fact that all parties to the instrument considered it such an instrument hardly admits of question.

There was, on the first instance, the verbal assurance to give security when asked for it. Then came the request and the execution of an instrument in the usual form of a chattel mortgage. The defendants treated it as such, and, in error, registered in the Calgary registration district. When the error was detected, they applied and obtained leave, in January, 1915, to register

in the proper registration district, pursuant to sec. 23 of the Bills of Sale Ordinance, which registration was subject to the rights of third persons accrued in the meantime.

Sec. 98 of the Company Ordinance prescribes the borrowing powers of a company. The company may

> hypothecate, pledge or mortgage their real and personal property, issue debentures secured by mortgage *or otherwise*, sign bills, notes, contracts and other evidence of or securities for money borrowed or to be borrowed by them for the purposes aforesaid; and to pledge the indebtedness as securities for loans.

It is quite clear that the company, in the above sections, is given the right to charge its property for advances, and that such charges may not be

> a mortgage or conveyance intended to operate as a mortgage of goods and chattels.

and would, therefore, not come within the Bills of Sale Ordinance and registration thereunder would not be required.

This is the case in *Johnston* v. *Wade*, 17 O.L.R. 372, 373, where a company may create an equitable charge by the issue of bonds or debentures, which, in the words of Lord Macnaghten, in *Government Stock, etc., Co.* v. *Manila R. Co.*, [1897] A.C. 81, "may create a floating charge."

The defendants cannot, however, bring themselves within this class, as the intention of the parties was to give security in the form of a mortgage of chattels within the meaning of the Act.

In *National Trusts* v. *Trusts and Guarantee Co., Ltd.*, 5 D.L.R. 459, Teetzel, J., held such an instrument to be a chattel mortgage within the Ontario Act, although it contained a provision that it should not be registered as a bill of sale or chattel mortgage, and that all machinery, plant and personal property of the mortgagor were to be considered as fixtures to the realty, and Teetzel, J., held that failure of registration made it absolutely void as against creditors of the mortgagor under sec. 5 of the Ontario Act, and that the liquidator, as representing the creditors, is entitled to contest the validity of the mortgage.

The plaintiffs are entitled to the declaration asked for—namely, that the said mortgage does not constitute any charge or lien against the said chattels or a preferred claim against the proceeds of the same. Plaintiff to have costs.

Judgment for plaintiff.

MAN.

K. B.

BROWN v. BROUGHTON.

Manitoba King's Bench, Curran, J. June 17, 1915.

1. LAND TITLES (§ V—50)—CERTIFICATE OF TITLE—FORGED TRANSFER—CANCELLATION.

A certificate of title procured upon a forged transfer, although *prima facie* valid, may be set aside under sec. 58 of the Real Property Act (Man.) and a new certificate issued to the true owner.

2. LAND TITLES (§ III—30)—MORTGAGE—FORGED TRANSFER—RIGHTS OF OWNER—ASSURANCE FUND.

A mortgage taken in good faith and for value from a registered owner upon a forged transfer constitutes a valid charge on the land which will not be set aside at the instance of the true owner in prejudice of the rights of the mortgagee; the remedy of the former is in compensation from the assurance fund under the Act for a sum sufficient to discharge the mortgage.

[*Gibbs* v. *Messer*, [1891] A.C. 248; *Assets Co.* v. *Mere Roihi*, [1905] A.C. 176, considered; *Re Adams &c.*, 20 D.L.R. 293, distinguished.]

Statement

ACTION to set aside transfer under the Real Property Act.

W. H. Hastings, for plaintiff.

L. McMeans, K.C., for Sovereign Life Assurance Co.

Isaac Pitblado, K.C., for District Registrar.

Curran, J.

CURRAN, J.:—The plaintiff brings this action against James William Broughton, the Sovereign Life Assurance Co. of Canada, and the District Registrar of the Land Titles District of Winnipeg, to set aside a transfer under the Real Property Act, nominally from the plaintiff to the defendant Broughton, of the lands mentioned in the Statement of Claim, and certificate of title issued thereon to the defendant Broughton, and for removal from the registry of the Winnipeg Land Titles Office of a mortgage of said lands under said Act from the defendant Broughton to the defendant the Sovereign Life Assurance Co., for $1,000, upon the ground that the aforesaid transfer was and is a forgery and was incompetent to support the certificate of title issued thereon and the consequent mortgage before referred to.

The plaintiff asks for an order directing the defendant, the District Registrar of the Winnipeg Land Titles Office to cancel the existing certificate of title issued to the defendant Broughton, and to issue a new certificate of title for the said lands to the plaintiff, free from the defendant company's mortgage and all other encumbrances.

Interlocutory judgment has been signed against the defendant Broughton, and no one appeared for him at the trial. The other defendants were represented at the trial by counsel, and the following facts elicited, concerning which there is no controversy.

The plaintiff became the registered owner of the lands in question on October 21, 1910, under certificate of title of the Winnipeg Land Titles Office, no. 152,341, subject only to encumbrance by way of mortgage to the B.C. Permanent Mortgage Co. for $900, and a by-law of the city of Winnipeg, which, however, affects only the westerly 8 feet of the lot, and need not be further considered. This mortgage was duly discharged on May 7, 1913, the plaintiff having paid the same in full, and obtained a discharge thereof from the mortgage company. The defendant Broughton, who is a son-in-law of the plaintiff, and at the time lived with him in Winnipeg, persuaded the plaintiff to entrust him with the custody of the discharge of mortgage and the duplicate mortgage so discharged, for the purpose of having such discharge registered. By this means the defendant Broughton was enabled, on registering the discharge of mortgage, to obtain possession of the duplicate certificate of title, which was, of course, impounded in the Land Titles Office, owing to the land being encumbered. Having registered the discharge of this mortgage, the duplicate certificate of title was delivered out to the defendant Broughton in the ordinary course, and, upon the pretext of keeping this certificate of title in his office safe, the defendant Broughton induced the plaintiff to leave it in his, Broughton's, custody.

It may here be observed that the westerly 8 feet of the lot had been taken by the city of Winnipeg for a lane, pursuant to a by-law registered against the original certificate of title on August 19, 1910, and no assertion of title to this 8 feet is made by the plaintiff.

On June 11, 1913, a transfer of the lot, less this 8 feet, purporting to be made by the plaintiff to the defendant Broughton, and purporting to be duly executed and attested, was tendered for registration in the Winnipeg Land Titles Office by the defendant Broughton, accompanied by the duplicate certificate of title, and accepted for registration purposes under the Act and duly registered; in pursuance of which a new certificate of title for the lot, except the said 8 feet, was issued to the defendant Broughton, clear of encumbrance, dated June 11, 1913, as no. 214,105. The transfer aforesaid was accepted by the officials at the Land Titles Office as genuine. It was apparently made in conformity with the provisions of the Act, was seemingly

MAN.

K. B.

BROWN v. BROUGHTON.

Curran, J.

properly attested by an affidavit of an attesting witness, and by the usual affidavit of identity and ownership of the transferor. As a matter of fact, this transfer was a forgery *in toto*. The plaintiff did not sign it or authorize it to be signed for him by the defendant Broughton. The affidavit of identity and ownership, as well as the affidavit of execution, were both forgeries. The transfer, on its face, appeared to be genuine, and the officials of the Land Titles Office were in no way to blame for giving credence to it, as all the formal proofs required by the Act were ostensibly present, and the duplicate certificate of title, which was, of course, genuine, was produced, as required by the Act, when the transfer was tendered for registration.

Having now become the registered owner of the lot on the strength of this forged transfer, the defendant Broughton applied to the defendant company for a loan of $1,000 upon mortgage of this land. The loan was granted, and the mortgage to the company, exhibit 4, dated July 4, 1913, was accordingly executed by the defendant Broughton, and duly registered in the aforesaid Land Titles Office on said last-mentioned date. This mortgage, of course, appears upon the new certificate of title issued to the defendant Broughton. The money was actually advanced by the defendant company to the defendant Broughton in good faith upon the security of this mortgage, which is still in force and undischarged. The new certificate of title is now impounded in the Winnipeg Land Titles Office, in consequence of the registration of this mortgage.

I cannot find that the plaintiff was negligent or in any way to blame for the unfortunate position in which he now finds himself

Upon the foregoing facts, I find that the transfer in question was and is a forgery, and that the defendant company was and is a *bonâ fide* mortgagee of the lot for value without any notice or knowledge of the fraud perpetrated by the defendant Broughton on the plaintiff, or of any defect in the title of the defendant Broughton to the lot in question.

I understand that such a case as this has never yet come before the Courts of this province, and that no judicial construction has as yet been placed upon the clauses of the Real Property Act under which these registrations were effected in a plain case of forgery.

There are two questions for me to decide: First, is the existing certificate of title valid? And, second, is the mortgage to the defendant company a valid security and a legal charge upon the land in question?

As to the first question, I have no difficulty in holding that, although *primâ facie* a valid certificate of title, upon the evidence before me, it cannot stand, and must be set aside and cancelled, and a new certificate of title issued to the plaintiff for the land, which is unquestionably his.

The other question involves the real issue to be decided, and the one upon which I understand the District Registrar wishes a judicial determination, as there seems to be some difference of opinion in the legal profession as to the effect of a registered dealing based upon a certificate of title which has been procured by means of a forged transfer; the trend of opinion, on the one hand, being that such a dealing must share the fate of the certificate of title so fraudulently obtained, and the other opinion, for which the District Registrar contends, being that such a registered dealing constitutes a good root of title, and that the rights of innocent third parties dependent upon it will prevail as against the deprived owner; which simply means, in the case under consideration, that the defendant company's mortgage must be upheld, although, under the circumstances, the certificate of title can be cancelled.

I have no doubt at all that the latter is the correct view, and so hold for the following reasons and upon the following authorities.

Sec. 58 of the Real Property Act confers jurisdiction upon a Judge of the Court of King's Bench in any proceeding respecting land, or in respect of any transaction or contract relating thereto or in respect of any instrument, caveat, memorial or other entry affecting land by decree or order to direct the District Registrar to cancel, correct, substitute or issue any certificate of title or make any endorsement or entry on any instrument or otherwise to do every such act and make every such entry as may be necessary to give effect to the judgment, decree or order of the Court. Under this section I have power to restore this land to the plaintiff, who, I find, to be rightfully entitled to it, and to direct the District Registrar of the Winnipeg Land Titles Office to cancel the existing certificate of title so fraudu-

MAN.

K. B.

BROWN v. BROUGHTON.

Curran, J.

lently obtained by the defendant Broughton, and to issue to the plaintiff a new certificate of title, and I so order and direct.

The plaintiff, in the relief claimed in his statement of claim, does not ask for redress against the assurance fund, but for a voidance of the defendant company's mortgage as a charge upon his land. Sec. 154 of the Real Property Act prescribes how compensation from the assurance fund may be obtained, and if, as I think is the case here, the defendant company's mortgage must be recognized as a valid charge upon the land, it seems to me there could be no clearer case than this where compensation from this fund to the plaintiff ought to be made, on its being established that the plaintiff's loss, occasioned by the registration of the mortgage in question, cannot be recovered from the defendant Broughton.

Counsel for the District Registrar contends that the system of registration provided by our Real Property Act is one of guaranteed title, and that where a *bonâ fide* purchaser, which, of course, would include an innocent registered mortgagee for value, gets title under the Act, he is protected, and the party deprived must look to the assurance fund for redress and compensation.

The following sections of the Act may be referred to: 79, 84, 84 (*c*), 98 and 99.

Sec. 79 provides that every certificate of title shall, so long as the same remains in force and uncancelled, be conclusive evidence at law and in equity as against His Majesty and all persons whomsoever that the person named in such certificate is entitled to the land described therein for the estate or interest therein specified, subject to the right of any person to shew that the land is subject to any of the exceptions or reservations mentioned in secs. 78 or 82, or to shew fraud wherein the registered owner, mortgagee or encumbrancer has participated or colluded and as against such registered owner, mortgagee or encumbrancee. The exceptions and reservations mentioned in secs. 78 and 82 do not affect this case. The question of fraud certainly affects the defendant Broughton as the present registered owner, and can be set up by the plaintiff as against him, so that his certificate of title is not conclusive as against such defendant.

The *bonâ fides* of the defendant company's mortgage is not questioned, that is, there was no fraud or collusion on the part

of the defendant company in connection with such mortgage, so this ground of objection cannot, under this section, be urged against the defendant company or its security.

The provisions of secs. 84 and 84 (*c*) are significant. Sec. 84 says that no action of ejectment or other action for the recovery of any land under the new system shall lie or be sustained against the registered owner for the estate or interest in respect to which he is so registered except in the following cases, amongst which only that named in sub-sec. (*c*) need be considered. This sub-section says

> except in the case of a person deprived of any land by fraud as against the person registered as owner through fraud, or as against a person deriving his right or title *otherwise* than *bonâ fide* for value from or through a person so registered through fraud

That is to say, the prohibition does not extend to an action by a person who has been deprived of his land against the person registered as owner through fraud (in this case the defendant Broughton) or to an action by such a person against one deriving his title otherwise than *bonâ fide* for value from or through a person so registered through fraud, which in the present case would be the defendant company if its title as mortgagee had been derived otherwise than *bonâ fide* and for value, but if derived *bonâ fide* and for value even from a person (the defendant Broughton in this case) so registered as owner through fraud, its title cannot be impeached.

This seems to me a clear expression of the principle under the statute that a good and indefeasible title can be transmitted to an innocent party by one whose registered title has been acquired through fraud or even upon a forged instrument.

Sec. 98 provides that unregistered instruments under the Act confer a right of registration, and sec. 99 that, except in the case of fraud on the part of such person, no person contracting or dealing with, or taking, or proposing to take an instrument from a registered owner, shall be required, or in any manner concerned, to inquire into or ascertain the circumstances under or the consideration for which such owner, or any previous owner, is or was registered or to see to the application of the purchase money or of any part thereof, nor shall any person be affected by notice, direct, implied or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary

MAN.

K. B.

BROWN v. BROUGHTON.

Curran, J.

notwithstanding, and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

Hogg on the Australian Torrens System, at p. 821, on the chapter dealing with remedies for wrongful registration, says:—

However improperly it may have come on the register any certificate of title which is actually registered is (subject to the exception referred to in the Australian statute) capable of becoming a good root of title in the hands of a *bonâ fide* purchaser.

In *Katene Te Whakaruru* v. *Public Trustee*, 12 N.Z.L.R. 661, Richmond, J., said, at p. 661:—

I am not prepared to say that the registration of a void instrument will in a case like the present, (registration of a void lease) be effectual to create in favour of the person who immediately claims under it and on whose behalf it has been presented for registration, the estate which it purports to create or transfer.

It has been decided by the Privy Council in *Gibbs* v. *Messer*, [1891] A.C. 248, as it had previously been decided in this colony, that the immediate transferee under a forged instrument has no title against the true registered owner. . . . But the case of a *bonâ fide* transferee from a person placed on the register under a void or voidable instrument does undoubtedly constitute a special case of exception, in which the security of the true owner in his holding is sacrificed to the object of facilitating transfer.

This case, it is true, seems to have hinged upon the provisions of sec. 170 of the New Zealand statute, of which our Act contains no counterpart, but which section, I think, is very analogous in principle to secs. 84 and 84 (*c*) of our statute. If anything, the provisions of our statute, as a whole, bearing upon this question are stronger in favour of upholding such a title than are those of the New Zealand statute.

The leading case on forged titles is *Gibbs* v. *Messer*, [1891] A.C. 248, referred to in the foregoing quotation. It arose under the transfer of land statute of the Colony of Victoria. The facts in that case were almost identical with the facts here, save in this very important particular, that the transfer in that case was not only forged, but was made to a non-existent person under a fictitious name, and such fictitious name was substituted in the register for that of the true owner, and a forged mortgage from such fictitious person given to a registered mortgagee, who had *bonâ fide* advanced money on the security of such land, while here the transferee in the forged transfer is a real person, who himself, as registered owner, executes the mortgage to the defendant company, who thereupon became registered as encumbrancers on the land. It was held by the Privy

Council in this case that the plaintiff, the true owner, must be restored to the register, but that the mortgage was invalid, and did not, in favour of the mortgagee, constitute an encumbrance on the plaintiff's title, though under the Act it would have had that effect in favour of a *bonâ fide* registered assignee thereof.

I quote from the judgment at p. 254:—

The main object of the Act, and the legislative scheme for the attainment of that object appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in *bonâ fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title. In the present case, if Hugh Cameron (the fictitious transferee) had been a real person whose name was fraudulently registered by Creswell, his certificate of title, so long as he remained undivested by the issue of new certificates to a *bonâ fide* transferee, would have been liable to cancellaion at the instance of Mrs. Messer; but a mortgage executed by Cameron himself, in the knowledge of Cresswell's fraud, would have constituted a valid incumbrance in favour of a *bonâ fide* mortgagee.

And at p. 255:—

The difficulty which the mortgagees in this case have to encounter arises from the circumstances that Hugh Cameron was, as Mr. Justice Webb aptly describes him, a "myth." His was the only name on the register, and, having no existence, he could neither execute a transfer nor a mortgage.

Now, the Victorian statute is very similar to ours. Compare sec. 69 of that statute with sec. 79 of our Act, and it will be seen that the legal effect to be given to certificates of title under both Acts is practically identical. Sec. 99 of our Act finds its counterpart in sec. 140 of the Victorian Act. Sec. 84 of our Act seems designed in part to afford the same protection to registered owners *bonâ fide* and for value as sec. 208 of the Victorian statute affords to registered purchasers *bonâ fide* for valuable consideration. Cases, therefore, decided upon the Victorian statute may well be looked at and may form precedents to guide one in construing similar provisions in our own statute.

In *Assets Company* v. *Mere Roihi*, [1905] A.C. 176, Lord Lindley, at 204, commenting on the decision in *Gibbs* v. *Messer*, *supra*, says:—

Lord Watson in his observations on the protection given to *bonâ fide* purchasers points out that a *bonâ fide* purchaser from a registered owner is in a better position than a first registered owner whose title may be im-

MAN.

K. B.

BROWN v. BROUGHTON

Curran, J.

peached for fraud, but there is nothing in his judgment in favour of the view that an original registered owner claiming through a real person does not get a good title against everyone except in those cases specially mentioned in the Act, fraud being one of them.

And upon the question of fraud, see p. 210 of Lord Lindley's judgment, where he says:—

> Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents.

Here there is no suggestion of any fraud or fraudulent knowledge affecting the defendant company in the matter of the title of their mortgagor, the defendant Broughton, or of the mortgage loan which was negotiated to him. "'Registered owner,' under the Act, includes and means any person or body corporate registered under the Act as owner of any estate or interest in land or of any mortgage or encumbrancers thereon," so that a mortgagee for value without notice and who has not been guilty of any fraud is afforded the same protection as a registered owner of the land itself, who became so registered under like innocent conditions.

In effect, I hold that our statute gives full and complete protection to a *bonâ fide* purchaser or mortgagee for value if he deals with the registered owner, and produces and relies upon a document of title signed by that registered owner.

Reference may be made to the following cases as instructive on the points under consideration here. *Hassett* v. *Colonial Bank of Australia*, 7 V.L.R. at p. 386, where Stawell, C.J., said:—

> In considering this statute, it is necessary to bear in mind that the intention of the Act is to make a certificate of title conclusive evidence of the right of the person to whom it is issued. The legislature foresaw that that effect might in some instances occasion hardship, and so provided for cases of fraud, error or misdescription giving a right of action in the event of persons being injured, either against the person causing the injury or against the registrar as the representative of the assurance fund.

And see *Re Adams and McFarland*, 20 D.L.R. 293. This latter case was decided upon the Alberta Land Titles Act, and is, I think, clearly distinguishable from the case at bar. The learned Judge says, at p. 295-6:—

> I am not considering the question as to whether or not such a document (a forged transfer) may become the root of a good title in one who in good faith, and for valuable consideration buys from the registered transferee under it, for that question does not arise here.

The judgment merely decides that the transferee named in a forged document (transfer), who, in good faith and without knowledge of the forgery, succeeds in having himself registered the owner of the land and one who takes from him with knowledge of the facts, does not acquire, as against the former registered owner who has been wrongfully deprived of the land, an indefeasible title to it. I think the decision is right and one which would probably be followed in our own Courts upon our own statute on similar facts, because, so long as such a purchaser's title remained undivested by the issue of a new certificate to some *bonâ fide* transferee for value, it would be subject to attack by the true owner on the ground that it rested upon a forgery.

The judgment in *Gibbs* v. *Messer*, *supra*, at p. 255, seems to make the reason for this distinction clear. It says:—

> The protection which the statute gives to persons transacting on the faith of the register is by its terms limited to those who actually deal with and derive rights from a proprietor whose name is upon the register. Those who deal not with the registered proprietor, but with a forger, and who use his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.

I think, therefore, that the plaintiff is entitled to have the existing certificate of title standing in the name of the defendant Broughton set aside and cancelled, and to have a new certificate of title issued to him revesting the land in him as of his former estate, but subject, however, to the mortgage of the defendant company, which I hold to be a good and valid encumbrance upon the land therein mentioned.

The plaintiff will be entitled to costs as against the defendant Broughton. Had he asked for damages I would have awarded them to him, but he has not asked for any.

As to the defendant company, the plaintiff's action must be dismissed, but without costs. In this respect, and for the same reasons, I follow the course taken by the trial Judge in *Williams* v. *Box*, 19 Man. L.R. 560, where, at p. 568, he says:—

> So far as I am aware this is the first time the point in question in this suit has come before the Courts of Manitoba for decision. For that reason the action will be dismissed without costs.

No case against the District Registrar has been made out for penalizing him in costs. He and his officials are entirely

MAN.

K. B.

BROWN v. BROUGHTON.

Curran, J.

free from blame in any respect; but he was a necessary party to the action to secure the relief by way of cancellation of the fraudulent certificate of title, and the issuance to the plaintiff of a new certificate, and for this reason the action will, of course, not be dismissed as against this particular defendant, but no costs whatever will be awarded against him, nor will he be entitled to any costs against the plaintiff.

It is to be hoped that the District Registrar will, on the strength of my findings of fact, be able to recommend to the proper authorities prompt payment to the plaintiff out of the assurance fund not only of a sum sufficient to discharge the defendant company's mortgage, but also all costs and disbursements to which the plaintiff has been put and which he has properly incurred in bringing this action, and so as to fully indemnify the plaintiff under the circumstances without the necessity of the plaintiff bringing a fresh action against the District Registrar for redress from the assurance fund; this course being dependent upon proper evidence being submitted to the District Registrar that any verdict for damages against the defendant Broughton could not be recovered to comply with the provisions of the section of the Act providing for relief against the assurance fund of the province. *Judgment accordingly.*

ONT.

S. C

HULL v. SENECA SUPERIOR SILVER MINES.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. April 19, 1915.

1. MASTER AND SERVANT (§ II A 4—75)—WORK IN MINES—INEXPERIENCED EMPLOYEE—WANT OF GUIDE—NEGLIGENCE CAUSING DEATH.

Permitting an inexperienced employee to work alone at night on a dimly lighted deck of a mine, which required the taking of cars loaded with ore from the cage of a hoist, without having an experienced man to guide him in the work, affords reasonable grounds for a jury's finding, where the employee is later found dead below the deck even where nobody saw him fall, that the death was caused by the negligence and breach of statutory duty of the master.

2. MASTER AND SERVANT (§ II A 4—75)—WORK IN MINES—STATUTORY REGULATIONS—DUTY OF MASTER AS TO SAFETY.

Sec. 164, rule 45, of the Mining Act R.S.O. 1914, ch. 32, prescribes the code of signals for raising or lowering a cage in the shaft of a mine, and rule 98 provides that the owner of a mine shall enforce and observe such care and precaution for the avoidance of accident or injury to any person in or about the mine as the particular circumstances of the case require, and that the machinery, plant, appliances, and equipment, and the manner of carrying on operations, shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety.

3. MASTER AND SERVANT (§ II A 4—75)—WORK IN MINES—DUTY AS TO SAFETY—STATUTORY REQUIREMENTS—NEGLIGENCE OF FELLOW-SERVANT—LIABILITY OF MASTER.

Failure of a mine-owner to maintain the mine in a condition suitable for carrying on the work with reasonable safety is followed by liability, even though the act which caused the injury may have been attributable to neglect of duty of a fellow-employee, and even though the owner employed competent officials for the superintendence of the mine, and required the statutory directions to be observed.

[*Grant* v. *Acadia Coal Co.* (1902), 32 Can. S.C.R. 427; *G.T.R. Co.* v. *Griffith* (1911), 45 Can. S.C.R. 380, applied]

4. MASTER AND SERVANT (§ II A 4—70)—DANGEROUS MACHINERY—INCOMPETENT MANAGEMENT—WANT OF SUPERVISION—NEGLIGENCE.

It is negligence on the part of employers to omit providing a proper system by which the dangerous character of the employment might be lessened, and in putting an incompetent man in charge of a dangerous machine, and keeping him there for part of the day and the whole of the night, without supervision or instruction.

[*Choate* v. *Ontario Rolling Mill Co.*, 27 A.R. (Ont.) 155; *Jones* v. *C.P.R. Co.*, 5 D.L.R. 332, 13 D.L.R. 900, applied.]

Statement

APPEAL from judgment of Lennox, J., in favour of plaintiff in action by widow under the Fatal Accidents Act to recover for death caused to deceased while working in a mine. Affirmed.

H. E. Rose, K.C., and *R. S. Robertson*, for appellants.

A. G. Slaght, for plaintiff, respondent.

Latchford, J.

LATCHFORD, J.:—On the night of the accident, the plaintiff's husband was working out his first shift on the top deck of the shaft-house at the defendants' mine near Cobalt. There, at an elevation of 40 feet above the natural surface of the ground, he was performing alone the triple functions of deck-man, cage-tender, and trammer—too much work, according to one of the witnesses, for one man to do. Every three or four minutes, the cage was hoisted to the dimly-lighted deck, with a ton-laden car of rock or ore. Hull had to lift the gate at the shaft-head, see that the cage was raised a few inches above a point where the two steel bars called "chairs" could be thrown in by a lever to intercept the descent of the cage, place the chairs in position, signal for the cage to be lowered upon the chairs, align the rails outside the cage with the rails within it, on which the loaded car rested, pull that car out of the cage and along the rails past a switch, where stood a car which he had emptied, push the empty car into the cage still resting on the chairs, signal to lower the cage to the working level, pull the lever withdrawing the chairs, drop the gate at the shaft-

ONT.

S. C.

HULL v. SENECA SUPERIOR SILVER MINES LIMITED.

Latchford, J.

head, return to the laden car and push it to the proper bin if it contained ore, or out 100 or 150 feet along the rails if it contained "muck," dump the car, and then return with it to find the cage raised to the deck once more with a loaded car, when, *da capo*, his round of duties had to be quickly repeated.

He had so worked alone from midnight until the time of the accident—about 2.30 a.m.; but, from 7 or 7.30 on the previous evening until midnight, a man named Leclair was with him "to shew him what to do." There is no evidence that Leclair—a labourer of the same class as Hull, and receiving the same wages—gave any instructions whatever to Hull. Certainly none were given by the mine captain, Dunnigan, or by any other person in authority.

The cage was raised and lowered by a cable passing over a sheave near the roof of the shaft-head, and thence to a hoisting engine in an adjacent building. The hoist, as it is called in the evidence, was in charge of one Davis, who had been at work, except for a brief interval, from 1 p.m. of the previous day. He was on his second shift on his first day, but had worked in a similar capacity for the defendants on smaller hoists, and was considered by Dunnigan, the shift-boss, to be a good hoist-man.

After the accident, the cage was found suspended with its floor 4 feet 10 inches above the level of the top deck—an unnecessary and dangerous position, according to the witness Enright, who was asked (evidence, pp. 18, 33): "What would you expect to happen if the hoist-man put it (the cage) up that far in that room, right as it was? A. I would not expect anything only to fall down the shaft."

Hull did fall down the shaft. No eye witnessed his fall. A car, with Hull's body jammed between it and the side of the shaft, was found about 60 feet below the top deck. There is not the slightest foundation for the suggestion made by the defendants that the car which fell with Hull was not an empty car. Had it been full, Murphy and the men working below with him would have had reason to remember the circumstances. Moreover, it appears from Davis's evidence that he had hoisted the cage from below—laden, of course, with a car

ONT.

S. C.

HULL v. SENECA SUPERIOR SILVER MINES LIMITED.

Latchford, J.

of ore or rock—to above the deck level, and then, as he says, upon signal from Hull, had let it back on the chairs, where it rested for a time. It would then be Hull's duty to take out the laden car and replace it with an emptied one. During both operations, the gate at the shaft-head would necessarily be open, as the outer gate of an ordinary passenger elevator is necessarily open during exit or entrance. I mention this because of the argument addressed to the Court that, owing to the protection afforded by the gate, Hull must have put himself in a position of danger. It was manifestly impossible, had the floor of the cage been at the deck level, for Hull to have fallen down the shaft.

The story told by Davis is, that he was given a signal to raise the cage. He "eased" it off the chairs, that they might be withdrawn by Hull, as was usual. Then, intending that the cage should fall to the mining level, he let it drop, but it was stopped by the chairs, which had not been moved. Afterwards, he was given another signal to raise the cage, and again "eased" it 5 or 6 inches. Then again one bell—the proper signal to raise—was given him, and he went on hoisting the cage until he thought it was getting close to the roof, when he stopped the hoist without further signal. The cage remained in the same position until after the accident, at a height sufficient to permit the empty car to pass under it. Hull, in the ordinary course of his duty, would push—not pull—the car into the cage if on a level with the deck. After the accident, the chairs were "out," that is, they were not in position to intercept the cage. They had either been pushed out by the falling car or thrown out in the usual way by Hull. There is no finding by the jury on the point, or as to how the accident happened.

The jury find that there was no negligence on Hull's part, thus negativing the contentions of the defence as to carelessness or suicide. How the accident happened is obvious. In the interval between Hull's removal of a loaded car from the hoisted cage and his return with an empty one, the cage was hoisted without his knowledge, and he shoved the empty car into the opening, not clearly discernible in the dim light, where he had

ONT.
S. C.
HULL
v.
SENECA SUPERIOR SILVER MINES LIMITED.
Latchford, J.

left the cage, and still expected it to be, and was dragged down to his death.

As against the defendants, two grounds of negligence causing the accident are found: not having an experienced man to shew Hull the regular way of performing his duty; and not leaving an experienced man with Davis until Davis well understood the hoist, which, in the opinion of the jury, he did not understand.

It may be doubtful whether the finding that the absence of instruction contributed to the accident is warranted by the evidence. Much stronger inferences against the defendants were, I think, open to the jury, upon the facts established before them. However this may be, the second finding of negligence is, in my opinion, of itself sufficient to support the judgment appealed from.

Mining is dangerous work. There was danger on the top deck, as well as down in the workings, though doubtless, as the mine captain says, there was greater danger below. There is a necessity for much greater care than mining companies, in their anxiety to win ore as cheaply as possible and increase either their profits or the market value of their shares, would ordinarily exercise without compulsion. Hence the obligations imposed by statute in all mining countries. The Mining Act of Ontario, R.S.O. 1914, ch. 32, sec. 164, rule 45, prescribes the code of signals for raising or lowering a cage, and, by rule 98, requires, *inter alia*, that "the manner of carrying on operations shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety."

Having regard to the finding that there was no contributory negligence, the immediate cause of the accident was some negligence on the part of the hoist-man, Davis. There is evidence that Davis was incompetent. Davis and Dunnigan, on one hand, and Enright, on the other, are in conflict as to the signals employed at the mine when the cage was to be lowered from the top deck. Enright says that the signal in use while he worked on the deck was two bells. Dunnigan and Davis say that the statutory signals were used—one bell to lift the case off the chairs, then two to let it drop. The findings, such as

they are, seem to me of necessity to imply condemnation of the system in use—that the manner of carrying on operations according to the particular circumstances, that is, the novel, onerous, and dangerous work the deceased was performing, uninstructed, and the inexperience and incompetence of Davis, subject to no proper supervision, did not conform, as the statute required them to conform, to the strictest considerations of safety.

Such being the statutory obligation cast upon the defendants, and not discharged, they cannot escape liability on the plea that Davis was a fellow-servant of Hull. As in *Choate* v. *Ontario Rolling Mill Co. Limited*, 27 A.R. 155, the negligence was really that of the employers, in omitting to provide a proper system by which the dangerous character of the employment might be lessened, and in putting in charge of a dangerous machine, and keeping there for part of the day and the whole of the night, without supervision and instruction, a man incompetent to manage the hoist. They were thus, like the defendants in *Jones* v. *Canadian Pacific R.W. Co.*, 13 D.L.R. 900, "either the sole effective cause of the accident or a cause materially contributing to it."

I think the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B.:—I agree.

KELLY, J.:—The plaintiff is the widow of Regis Hull, who met his death on the 4th April, 1914, while in the employ of the defendants at their mine in the township of Coleman. She sues not only for her own benefit, but also on behalf of her three infant children, the eldest of whom was about 4 years of age at the time of her husband's death.

The deceased commenced to work for the defendants at 7 o'clock on the evening of the 3rd April. He was employed at the top of a shaft through which cars of ore, earth, or rock were hoisted in a cage from the bottom of the mine; the deck or place on which he was working was about 40 or 42 feet above the ground level, and the shaft was so built as to permit of the cage being elevated to a distance of about 8 feet above the deck. The process of hoisting was, that a small car containing the material, and weighing together about a ton, was

ONT.
S. C.
HULL
v.
SENECA SUPERIOR SILVER MINES LIMITED.
Kelly, J.

placed in the cage at the bottom of the mine, the cage being then hoisted in the shaft until its floor reached the level of the deck on which the deceased was working. On reaching that level, contrivances known as "chairs" were, by means of a lever, made to project beneath the cage so as to hold it in place while the car was being run from the cage on to the deck. The opening of the shaft to the deck was protected by a gate which, on the arrival of the cage at the deck level, was raised so as to permit of the car being taken out. It was the duty of the deceased, when the cage arrived at the deck level, to operate the lever drawing the chairs beneath the cage, open the gate, run the car from the cage on to the deck for a distance of several feet, run an empty car into the cage, and signal to the person operating the engine in the hoist-room to lower the cage, first withdrawing the chairs from beneath the cage. His duties then required him to run the loaded car, if it contained earth, to the dump, a distance of about 100 feet, the shift-boss says (another witness puts it at about 150 feet), from the shaft, but, if loaded with rock, then to the ore-bins close to the shaft. The deck and the entrance to the shaft were lighted by one electric lamp of not more than 16 candle power.

The deceased worked from 7 p.m. until midnight; and was then off duty for about an hour, returning at about 1 o'clock; and at about 2.30 a.m. his dead body and a car were found wedged in the shaft at a point about 16 feet below the ground-level.

He had been working alone; no person was within sight of him, and no one has been able to say just how he came to be in the shaft. On an examination made soon after the discovery of his dead body, the cage was found stationary at 4 feet and 10 inches above the deck—the gate leading from the deck into the shaft being raised to the same height, and the chairs being out of use.

The evidence shews that at times the cage with a loaded car thereon arrived at the deck-level at a rate of once in three minutes. No one was assigned to help the deceased in the performance of his many duties, but there is some evidence, to which I shall refer later, of another man having been sent to instruct him in the earlier hours of his night's work.

ONT.

S. C.

HULL v. SENECA SUPERIOR SILVER MINES LIMITED.

Kelly, J.

In answer to questions submitted, the jury found negligence by the defendants, causing the death, and negatived contributory negligence. The defendants' negligence found by the jury, in answer to the second question, consisted in their not having an experienced man to shew Hull the regular way of performing his duty, for at least the first shift; and, secondly, that the defendants should have had an experienced man with Davis till he well understood the hoist, "which we consider he did not." Davis was the man in charge of operating the engine which raised and lowered the cage. His position in the hoist-house was such that he could not see the cage in the shaft, or Hull's movements; he worked the engine in response to signals. The signals from the deck where the deceased was working were to be given by him. This further question was submitted: "How did Regis Hull come to his death?" To which was given the same answer as to the second question. The jury then added that they disposed of Davis's evidence. On their being asked by the learned trial Judge what they meant by "disposed," the following explanation was given:—

"The foreman: We consider, your Lordship, that the evidence that he gave did not appear to be satisfactory somehow. We could not get to the point as to how he could get a bell from Mr. Hull, as he was busy going on with his work.

"His Lordship: Do you mean by that that you do not give full credence to his evidence?

"The foreman: Yes, sir.

"His Lordship: And is that what you all mean, that you do not give full credence to his evidence?

"The foreman: Yes, sir.

"His Lordship: We will leave it that way.

"Mr. Slaght: Do all the jury assent to that?

"His Lordship: Do you all assent to my interpretation of that?

"The foreman: Yes, sir."

The provisions of the Mining Act, R.S.O. 1914, ch. 32, are invoked by the plaintiff.

Rule 44 of sec. 164 requires that every working shaft which exceeds 50 feet in depth, unless otherwise permitted in writ-

ONT.

S. C.

HULL v. SENECA SUPERIOR SILVER MINES LIMITED.

Kelly, J.

ing by the Inspector, shall be provided with some suitable means of communicating by distinct and definite signals from the bottom of the shaft and from every level for the time being in work between the surface and the bottom of the shaft, to the hoist-room.

By rule 45, a code of signals is prescribed.

Rule 46 is as follows: "No person but the cage-tender shall ring the signal-bell, and the signal to move the cage, skip or bucket shall be given only when the same is at the level from which the signal is to be given."

Section 164 aims at ensuring a very high degree of safety for those engaged in operating mines. Many requirements to that end are therein specifically imposed, following which is rule 98, in these general terms: "There shall always be enforced and observed by the owner and the agent of a mine, and by every manager, superintendent, contractor, captain, foreman, workman and other person engaged in or about the mine, such care and precaution for the avoidance of accident or injury to any person in or about the mine as the particular circumstances of the case require; and the machinery, plant, appliances and equipment and the manner of carrying on operations shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety."

The deceased was not familiar with the work he started in to perform; the operations which he was engaged in were by no means free from danger, and the danger incident to the work was increased by the condition of dim lighting, and the necessity of activity in handling the large number of cars carried up by the cage, which required his prompt attention on their arrival at the deck. All these conditions made it the more necessary that he, an untried man, new to the work and unaccustomed to the surroundings in which he was placed, should have been so instructed as to reduce to a minimum the danger inherent in that employment. There is evidence of something having been done in the way of instructing him. Dunnigan, the shift-boss on duty that night, says he had general orders to instruct any one who needed instruction, and that he sent a man, LeClair, from 7 p.m. to 12, "to shew Hull what to do." LeClair was in the

ONT.

S. C.

HULL v. SENECA SUPERIOR SILVER MINES LIMITED.

Kelly, J.

same grade of employment and earning the same wages as Hull. His evidence, had it been procured, might have thrown some additional light on what happened. He was not, however, called as a witness; the defendants offered no evidence; and the jury were left to draw what inference they thought proper from the evidence submitted for the plaintiff; and, in arriving at whether there was proper or sufficient instruction, they were entitled to give consideration to the inefficient lighting of the deck and the other conditions under which Hull's many duties had to be performed.

The jury believed that Davis, who operated the hoist, did not properly understand it, and that his efficiency would have been increased had he been further instructed. The evidence as to his understanding of and response to the signals was not altogether satisfactory. He had been on duty almost continuously from 1 o'clock in the previous afternoon. His version of what took place is that, in response to signals, he raised the cage a few inches off the chairs to enable them to be withdrawn, and then lowered the cage, which, however, again rested on the chairs; following which, two further signals having been received, he raised the cage slowly until he thought it was close to the shaft-wheel—the position in which he found it after the accident, and which, another witness, Enright, says, would be dangerous to a man handling the car. Enright performed in the day-time the same duties as the deceased was engaged in on the night of the accident, and spoke with a knowledge so acquired. In answer to a question suggested by the learned trial Judge, he said that, the hoist being up to that height, he "would not expect anything to happen, only to fall down the shaft." But the jury were not satisfied with Davis's evidence.

It is argued that, no one having seen how the accident happened, it was not open to the jury to find as they did; that, on the evidence, the death could as readily be attributed to mere accident, or, for that matter, that it might have been the result of a suicidal act. The jury, however, have expressly negatived contributory negligence. There is no evidence that there was any interruption in Hull's work down to the time of the accident; the finding of his dead body, jammed with the car against

ONT.
S. C.
HULL
v.
SENECA SUPERIOR SILVER MINES LIMITED.
Kelly, J.

the wall of the shaft, indicates that he and the car went down together, the gate into the shaft being open, and the cage being in a position (4 feet and 10 inches above the deck) which permitted of his entering the shaft, with the car—it may well be assumed in the course of his duty—and thus falling to his death. It is not an unreasonable assumption that he expected the cage to be in its accustomed place, or that in the dimly-lighted surroundings, with his attention directed to his work, he could not or did not observe the danger which resulted so fatally. The defendants' obligation to conform to the strictest considerations of safety can hardly be said to have been fulfilled towards an employee working under the conditions in which the deceased was placed. The system provided can, without distorting the evidence, be said to have been devised rather with regard to economy in its operation than to that strict consideration of safety required by the statute. Something was said in evidence of Davis's lack of knowledge of the signals, and of the interpretation he put upon them in regard to what was proper when about to lower the cage. The jury may well have inferred that further instructions both to Hull and Davis would have been conducive to ensuring the degree of safety the statute contemplated.

If what is laid down in *Grant* v. *Acadia Coal Co.* (1902), 32 S.C.R. 427, is to be followed, failure of a company to maintain the mine in a condition suitable for carrying on the work with reasonable safety is followed by liability, even though the act which caused the injury may have been attributable to neglect of duty of a fellow-employee, and even though the defendant company employed competent officials for the superintendence of their mine, and required the statutory directions to be observed.

The effect of the statutory duties imposed upon a mine-owner is also dealt with in *Danis* v. *Hudson Bay Mines Limited*, 23 D.L.R. 455.

In *Britannic Merthyr Coal Co. Limited* v. *David*, [1910] A.C. 74, it was held that upon the question whether the mine-authorities had done their duty in taking proper care of the safety of the miners the burden of proof did not lie upon the plaintiff.

ONT.

S.C.

HULL v. SENECA SUPERIOR SILVER MINES LIMITED.

Kelly, J.

But the argument goes so far as to contend that, admitting all this to be so, the case is still wanting in evidence properly submissible to the jury connecting Hull's death with any act or omission of the defendants. Slight though it may be, there is still some evidence of Davis's failure fully to understand the signals, and this, with the evidence as to his response to the signals at the time the cage was hoisted to the top of the shaft, was quite proper for the jury's consideration. There being a finding against contributory negligence, it was open to the jury to reach the conclusion on the evidence before them that Hull's death was not accidental, but was attributable to the conditions of employment in which the defendants placed him.

The case is easily brought within the conclusion definitely stated in *Grand Trunk R.W. Co.* v. *Griffith* (1911), 45 S.C.R. 380, where Duff, J. (at pp. 386, 387), lays it down that a plaintiff is entitled to succeed if he convinces the jury, on facts reasonably leading to that conclusion, that the defendants' negligence has materially contributed to the mishap, and if at the same time the jury may reasonably find, and do find, that the defendants have failed to discharge the onus placed upon them of shewing that there has been contributory negligence; and where he quotes from *Richard Evans & Co. Limited* 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."

I am of opinion that there was evidence before the jury from which they could have reasonably drawn the conclusion at which they arrived; that the case could not properly have been withdrawn from them; and that, therefore, the appeal should be dismissed with costs.

RIDDELL, J., dissented. *Appeal dismissed.*

Riddell, J. (dissenting).

QUE.

K. B.

HAMILTON v. CHURCH.

Quebec Court of King's Bench, Appeal Side, Trenholme, Lavergne, Cross, Carroll, and Archibald, JJ.

1. CONFLICT OF LAWS (§ I C—65)—ALIMONY—LAW GOVERNING—DOMICILE.

The payment of alimony is a personal obligation and the law governing the demand for it is that of the actual domicile of the consorts at the time of the demand, although the law of the domicile at the time of the marriage governs the effect of such marriage.

[*Church* v. *Hamilton*, 20 D.L.R. 639, varied.]

2. DIVORCE AND SEPARATION (§ V A—46)—JUDGMENT EN SEPARATION DE CORPS—ADULTERY OF WIFE—RIGHT OF WIFE TO ALIMONY.

Even though the husband has obtained, on the ground of adultery on the part of the wife, a judgment *en séparation de corps*, the wife, according to the law of Quebec, is entitled to a decree for alimony, but the court should consider the means of the husband and the conduct of the wife in fixing the amount.

Statement

APPEAL from the judgment of McCorkill, J., 20 D.L.R. 639.

Choquette & Galipeault, for appellant.

Casgrain & Lavery, for respondent.

The judgment of the Court was delivered by

Carroll, J.

CARROLL, J.:—The appellant Hamilton contracted marriage with the respondent at Ottawa, Ont., June 5, 1895, and it is admitted that the parties had their matrimonial domicile there. Later Hamilton was named agent of the Bank of Commerce at Portage la Prairie, Manitoba. Later he was appointed agent of the same bank at Quebec. He brought an action here against his wife for a *séparation de corps*, which has been maintained. The wife, on her part, brought, in Quebec, an action for alimony against her husband.

By par. 3 of this plea, Hamilton sets up the judgment which he obtained against his wife, and adds:—

That it was established in the said cause and is true that although the consorts were domiciled at Portage La Prairie, the present plaintiff was unfaithful to her duties as a wife, was guilty of adultery, and had abandoned her husband and children, and gone to live with a stranger.

Then, in par. 7, he says:—

As well under the law of Ontario where the marriage was contracted, as under that of Manitoba where the consorts were domiciled, at the time of the facts set out in paragraph 3, the present plaintiff on account of her said conduct, has lost all right of recourse against the defendant for alimony.

The respondent inscribed *en droit* against these two paragraphs, and claims that the effect of the *séparation de corps* pronounced by a Court in the Province of Quebec cannot be governed by any other law than that of this province; that the appellant cannot be relieved from the payment of the alimony claim, whatever was the cause of the separation; that it is the law of Quebec

which governs the obligation of the appellant towards the respondent for alimony.

The *inscription en droit* has been maintained. The Court of first instance has declared that it is the law of the Province of Quebec which applies, and that pars. 3 and 7 of the pleading should be struck out.

I will first discuss the judgment as it affects par. 7, and, in the second place, as it affects par. 3.

Is it the law of the Province of Quebec, the actual domicile of the consorts, which applies to this case, or is it the law of the matrimonial domicile? The appellant claims that it is the law of the matrimonial domicile, because the matrimonial contract is governed by the law of the place where it was entered into, and that it is this law which determines the effect of the marriage upon the property of the consort and the rights that they acquire in the property of each other by the marriage; that there arises a contractual obligation as a result of the marriage which gives to each of the consorts a claim upon the property of the other.

If the right to alimony could be ranged among the obligations of the consorts as to their property, the claim of the appellant would be well founded (citation from Fœlix). But it does not arise from the relations of the consort in respect to the property when one of them claims alimony.

Pigeau expresses it thus:—

> Maintenance is a debt arising from the marriage which imposes upon the two consorts a duty to help each other in case of need and which the separation, whatever it may be, can never take away.

It is also the principle embodied in art. 213, C.C. Under our law, whether the husband or the wife is guilty of adultery, he or she can claim maintenance if in need of it.

The marriage tie is not broken by the *séparation de corps*, which does not relieve the consorts of this duty: Toullier, cited by Mr. Justice Bruneau in *Duval* v. *Joubert*, 42 Que. S.C. 208, 213.

The obligation for maintenance is a personal obligation and not one as to property. Dalloz. Rep.vo. Lois No. 392 places this obligation under the title, *Droits des famille*.—

> If it is a case of family rights which do not depend on a question of capacity or incapacity, for example, from the obligation for maintenance existing between relations.

QUE.

K. B.

HAMILTON v. CHURCH.

Carroll, J

And he declares that for this claim it is necessary to apply the personal law.

If it is the case of a personal law, it is art. 6, par. 3, of our code which applies:—

The laws of lower Canada relative to persons are applicable to all those who reside there even to those who are not domiciled.

In the case of the *Duke of Brunswick* v. *Dame De Civry*, Cass. Sirey, 1866, p. 157, this woman claimed a pension for maintenance as the natural daughter of the Duke of Brunswick. The latter declined the jurisdiction of the French Courts, because, he said, filiation is the first source of the right that the child has to claim maintenance from his father and that the plaintiff was born in a foreign country.

The plaintiff's claim was not entertained, and the reporter gives us the reasons of the Court as follows:—

Filiation is, without doubt, the primary source of the law that an infant can claim maintenance from his father, but this right is only inchoate so long as the child is not in need, and it is only at the moment that the latter establishes that maintenance is necessary to him that the right is complete and that consequently the obligation of the father becomes effective. At the time then that the claim for maintenance is made by a person originally a foreigner, but who has become French before the claim was made it necessarily rests upon an obligation arising after the acquisition of the French nationality by this person.

I cite this judgment to demonstrate that the obligation for maintenance did not arise in the Province of Ontario, but in the Province of Quebec, where the wife found herself in need of it.

Now, the appellant has obtained from the Superior Court of this district a judgment *en séparation de corps*. This judgment has produced certain effects, but the appellant retains his title of husband, the marriage tie is not broken, and it is in this capacity of husband that he is liable for this alimony. In other words, it arises from an obligation which principally affects his person and not his property, and it is the law of his new domicile which should be applied.

The *inscription en droit* has, then, been properly maintained upon this point.

As to par. 3. Under art. 213, C.C., the alimentary allowance should be governed by the condition, the means, and other circumstances of the parties. Now, the appellant alleges that his wife was guilty of adultery. The Court, in fixing the amount of the alimony, should take this fact into account. No doubt

QUE.

K. B.

HAMILTON v. CHURCH.

Carroll, J.

a wife without any cause for reproach should receive an allowance more generous than the guilty wife, taking account always of the means of the one who should pay the alimony.

The Court in Lyons, in the case of *Dargere*, awarded alimony to the wife convicted of adultery, and the judgment is based upon the following grounds:—

Seeing that the *séparation de corps* does not dissolve the marriage: that the consorts owe each other mutual fidelity, care and assistance; that it evidently follows from these two principles that the consort against whom the *séparation de corps* is pronounced has the right when he is in need of it to obtain aid from the other if the latter is able to furnish it; seeing in this case that in order to fix the amount of this aid, it is proper to take into consideration the grave wrong committed by the wife of Dargere, the evil consequences which have resulted from it, the fortune of the husband and, lastly, the latter's position (cited by Judge Bruneau in *Duval* v. *Joubert*, 12 Que. S.C. 208.

In accordance with the principles which I have set out, I am of the opinion that the *inscription en droit* should be maintained as to par. 7 and rejected as to par. 3. *Judgment varied.*

TORONTO SUBURBAN R. CO. v. CORPORATION OF THE CITY OF TORONTO.

IMP.

P. C.

Judicial Committee of the Privy Council, Viscount Haldane, L.C., Lord Dunedin, Lord Parker of Waddington, Lord Sumner, and Sir Joshua Williams, January 20, 1915.

1. STREET RAILWAYS (§ I—3)—AGREEMENT WITH MUNICIPALITY—REPAIR OF ROADWAY—"TRACKS"—POWERS OF RAILWAY BOARD.

The obligation imposed upon a street railway company by its agreement with a municipality, that the former should "keep clean and in proper repair that portion of the travelled road between the rails, and for eighteen inches on either side thereof," does not extend to the doing of works which would give the roadway between the rails a new character, and the word "tracks" in sec. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, does not include the roadway between the rails, under which the Board has no jurisdiction to order the street railway company to pave that part of a road used by the railway.

Statement.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Ontario, 13 D.L.R. 674.

Clauson, K.C., *Tyrrell Paine*, and *R. B. Henderson*, for the appellants.

Sir R. Finlay, K.C., and *I. S. Fairty*, for the respondents.

The judgment of the Board was delivered by

Viscount Haldane, L.C.

VISCOUNT HALDANE, L.C.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario affirming, with a variation on a minor point, an order of the Ontario Railway and Municipal Board. The question in the

IMP.

P. C.

TORONTO SUBURBAN R. CO. v. CITY OF TORONTO.

Viscount Haldane, L.C.

case which presents real difficulty arises on the construction of an agreement made on September 4, 1899, and confirmed by the Toronto Suburban Street Railway Company Act, 1900. This agreement was made between the corporation of the township of York, within the limits of which was at that time the land on which part of the railway was situate, and the railway company. In 1909 this land was included within the municipal limits of the respondents, who succeeded to the rights and obligations of the other corporation. Under the agreement referred to the railway company was given the right to construct, maintain, and operate "an iron or steel rail or tramway, single and double tracks," subject to certain conditions, along certain roads and streets, including portions of Bathurst Street and Davenport Road, within the land referred to, the motive power to be either electrical or horse power, unless the corporation should consent to some other power. The township engineer and the town council were to prescribe the location of the tracks. These tracks, when laid on any portion of the travelled road, were, so far as practicable, to conform to the street or road, and were to be laid flush with the streets, so as to cause the least possible impediment to traffic. Clause 6 was in these terms:—

> The company shall, where the rails are laid upon the travelled portion of the road, keep clean and in proper repair that portion of the travelled road between the rails and for 18 inches on each side of the rail or rails lying on or being next to the travelled road, and in default the township may cause the same to be done at the expense and proper cost of the company.

By clause 20 all persons using the street were to be at liberty to travel upon any part of the roadway occupied by the railway and in the same manner as upon other portions of the highway. The agreement also enabled the corporation to take up any part of the street or road along which the railway was constructed for the purpose of altering the street or road grade, and for other purposes, which were to include all those which were within the province and privileges of a municipal corporation. There was also a clause enabling the corporation, in case the company should neglect to keep their track or roadway in good condition, according to the terms of the agreement, or to have the prescribed repairs made, to give notice to the company, and, in default of the latter executing the repairs, to effect them, and recover the cost from the company, and to determine their rights under the agreement. The rights and privileges of the

IMP.

P. C.

TORONTO SUBURBAN R. CO. v. CITY OF TORONTO.

Viscount Haldane, L.C.

railway company under the agreement were to endure for 20 years.

In April, 1912, the respondents applied to the Ontario Railway and Municipal Board, which had power and authority to deal with such matters vested in it under the Ontario Railway and Municipal Board Act, 1906, for an order directing the appellant company to

reconstruct and put in a proper and sufficient state of repair its tracks and sub-structures in Bathurst Street and Davenport Road in the city of Toronto, and 18 inches on each side thereof.

The controversy which arose on this application was substantially as follows. The roads in which the rails had been originally laid were at that time mud roads, or at all events unpaved. The respondents, at the date of the application, desired that these roads should be reconstructed, and to that end dug out and paved with blocks. The appellants did not contest their liability to keep the portion of the roads between the rails and for 18 inches on each side of them in repair, but they maintained that they were under no obligation to reconstruct this space so as to make it a roadway of an improved character, such as the respondents were designing for the rest of the roadway on each side.

In support of their case the respondents relied not only on the agreement itself, but on the Ontario Railway and Municipal Board Amendment Act, 1910. This Act, by sec. 3, provided that

whenever in the opinion of the Board, repairs or improvements to or changes in any tracks, switches, terminals or terminal facilities, motive power or any other property or device used by any railway company in or in connection with the transportation of passengers, freight or property ought reasonably to be made thereto in order to promote the security or convenience of the public, or of the employees of the company, or to secure adequate services or facilities for the transportation of passengers, freight, or property, the Board, after a hearing had either upon its own motion or after complaint, shall make and serve an order directing such repairs, improvements, changes, or additions to be made within a reasonable time, and in a manner to be specified therein. . . .

As the result of the application the Board made an order directing the appellants to put in a proper and sufficient state of repair its tracks and sub-structures in Bathurst Street and Davenport Road, and to dig out and pave that part of the roadway used for railway purposes and 18 inches on either side thereof, the applicants being ordered to pave the remaining parts, the

IMP.

P. C.

TORONTO SUBURBAN R. CO. v. CITY OF TORONTO.

Viscount Haldane, L.C.

Board's engineer to supervise and direct the carrying out of the order, and, in case of difference, to determine the kind of pavement to be put down.

On appeal by the appellants to the Supreme Court, it was declared that the Board had jurisdiction to make the order, and that the word "tracks" in sec. 3 of the Ontario Railway and Municipal Board Amendment Act, 1910, included all that part of any roadway occupied by the railway. The portion of the order of the Board appointing the engineer to determine the kind of pavement to be used was, however, varied, on the ground that it did not, as it should, in the view of the Court, have done, prescribe the kind of pavement which the appellants were to lay, and it was remitted to the Board to itself determine what the kind of pavement should be.

The decision of the Supreme Court was based not merely on the terms of the agreement, but also, as a separate ground of judgment, on the language of the section of the Act of 1910 already quoted. With the construction placed by the Court on this section their Lordships find themselves unable to agree. They cannot give to the word "tracks" used in the context in which it occurs in the section the wide interpretation placed on it by the Court, which extends it not only to the rails, but to the ground occupied not only between the rails, but up to 18 inches on each side. They think that the words in the section "in or in connection with the transportation of passengers, freight or property," indicate an interpretation of a more restricted and literal kind, and exclude from the power given by the section the general roadway itself as distinguished from the rails, etc., laid upon it.

In the opinion of their Lordships, the other question, which arises on the interpretation of clause 6 of the agreement of 1899, presents greater difficulty, and it is only after much consideration that they have arrived at a conclusion on this point. It is argued that the obligation of the railway company extends to the portion of the travelled road which the company occupy, in whatever improved condition that portion may have been put, the purpose of the section being to secure that the entire roadway shall be in the same condition throughout its entire breadth . This argument does not, however, suffice to determine the question at issue. It may well be that if the roadway has been improved by the

IMP.
P. C.
TORONTO SUBURBAN R. CO. v. CITY OF TORONTO.
Viscount Haldane, L.C.

respondents, the standard of repair is what is contended for. But assuming this to be so, the conclusion does not warrant the further inference that the company have bound themselves to change the condition of the portion of the roadway assigned to them by paving it and so raise the standard of their obligation. It is one thing to undertake to keep what is handed over in proper repair on the footing of maintaining it in the state into which it has been put, and quite a different thing to interpret an agreement "to keep clean and in proper repair" as imposing an obligation to lay a new pavement of a kind which did not exist and was not provided for when the agreement was originally entered into, merely because the municipal authorities have themselves thought it right to improve the remainder of the roadway. Authorities were cited, in the course of the argument, in support of the different view of the operation of the words of the agreement which was taken by the Supreme Court of Ontario. But, in construing a document such as that before them, their Lordships do not think that decisions in other cases on the construction of provisions analogous to that before them are of much assistance in a question of this kind. Much turns in each case on the context. The document to be construed must be read as a whole, and, in interpreting particular words, these cannot be read without reference to what comes before and after. For example, the American case of *Mayor of New York* v. *Harlem Bridge R. Co.*, 186 N.Y. 304, was much relied on in the judgment of the Court below in the present appeal. But there the law of the State appears to have imposed a duty to keep

> the surface of the street inside the rails, and for one foot outside thereof, in good and proper order and repair, and conform the tracks to the grades of the streets or avenues as they now are or may hereafter be changed by the authorities of the aforesaid towns.

It was held that:—

> When the proper authorities, in view of the condition of the street as shown to exist, decided that a granite block pavement should be laid . . . the requirement for repairing and keeping in good order compelled the defendant to co-operate with the city and put the space between its rails in the same condition as the rest of the street, even though that necessitated the laying of a new pavement.

It is no part of their Lordships' duty to say whether, if they had to construe a statute containing these words, they would have arrived at the same conclusion as the American Court of Appeals. It is sufficient to observe that the language in the

IMP.

P. C.

TORONTO SUBURBAN R. CO. v. CITY OF TORONTO.

Viscount Haldane, L.C.

present case differs materially from what the Court of Appeals had to construe. Here the obligation in clause 6 of the agreement is: "where the rails are laid upon the travelled portion of the road" to "keep clean and in proper repair that portion of the travelled road between the rails and for 18 inches on each side." The tracks are, by clause 5, to conform to the street or road and to be laid flush with the streets. It may well be that, if the respondents desire to pave the whole of the travelled road, they may do so at their own expense, using the powers conferred on them by clause 17 to take up the street or road for any purposes within the province and privileges of a municipal corporation. But the restricted language of clause 6, which imposes an obligation on the appellants, appears to their Lordships, on consideration, *primâ facie* to confine that obligation to keeping in proper repair what is already there, and not to extend it to the doing of works which would give the portion of the road between and beside the rails a new character.

For these reasons their Lordships are of opinion that the Railway and Municipal Board had no jurisdiction to make the order appealed from, and that the Supreme Court of Ontario was wrong in affirming that order. They will, therefore, humbly advise His Majesty that this appeal should be allowed and the orders in question should be discharged. The respondents must pay the costs of this appeal and of the appeal to the Supreme Court of Ontario. *Appeal allowed.*

ALTA.

S. C.

ROBERTSON v. WILSON.

Alberta Supreme Court, Beck, J. July 6, 1915.

1. PLEADING (§ I N—112)—AMENDMENT—NEW CAUSE—EFFECT ON COLLATERAL PROCEEDINGS.

A right arising since the commencement of the action may by leave of Court, be set up by way of amendment of the statement of claim, particularly where it makes it necessary to continue interim or collateral proceedings, such as the continuance of an injunction growing out of the action.

2. PLEADING (§ I N—112)—AMENDMENT—NEW CAUSE—CHANGE OF STATUS OF SURETY.

A statement of claim in an action to set aside a fraudulent conveyance commenced by a principal and surety may be amended as shewing the change of status of the surety after the commencement of the action.

[*Stone* v. *Theatre Am. Co.*, 14 D.L.R. 62, applied.]

3. FRAUDULENT CONVEYANCES (§ VII—41)—REMEDIES—TO WHOM AVAILABLE—SURETY.

A surety is within the category of creditors within the purview of the Statute of 13 Elizabeth and the Assignment Act 1907 (Alta.), ch. 6, sec. 44, in actions to set aside fraudulent conveyances.

ALTA.

S. C.

ROBERTSON v. WILSON.

Beck, J.

MOTION for leave to amend statement of claim.

A. C. Grant, for plaintiff.

C. C. McCaul, K.C., for defendant.

BECK, J.:—This is a motion for leave to amend the statement of claim. The statement of claim, as it now stands, sets out, in effect: (1) That the plaintiff is liable to the Imperial Bank, as guarantor for the defendant J. K. Wilson, for $1,377; (2) that in August, 1914, J. K. Wilson transferred to the defendant Emma Wilson, his wife, the southerly 60 ft. of lots 15 and 16 in block 165; (3) that the plaintiff and the bank, having demanded security for the debt, J. K. Wilson, in August, 1914, procured his wife to execute a transfer to the bank of the southerly 72 ft. of lots 1 and 2 in block 159, and that the bank holds the transfer unregistered; (4) that the plaintiff and the bank, having demanded further security, J. K. Wilson procured a transfer from his wife of the first mentioned lands (those he had transferred to her), and the bank holds the transfer unregistered; (5) that J. K. Wilson and his wife represented that the lands transferred were free of incumbrances, except a mortgage for $814; (5) that, after these transactions, J. K. Wilson registered a mortgage to the defendant Robert Wilson for $6,000 upon the first-mentioned lands, which had been made by Emma Wilson before the transfer to the bank; (7) that the transfer from J. K. Wilson to his wife was without consideration and made when he was insolvent, with intent to defraud, etc.; (8) that Emma Wilson "assumed the liability" of J. K. Wilson prior to or at the time of the second transfer to the bank; (9) that the mortgage, Emma Wilson to Robert Wilson, was without consideration and made when she was insolvent and with intent to defraud, etc. The claim is for a declaration that the bank is equitable mortgagee and that the mortgage to Robert Wilson is void; and for an injunction. The amendment asked is the addition of paragraphs to the following effect: (10) That since the pronouncement of the action the plaintiff has paid the bank; (11) that, on payment, the bank endorsed to the plaintiff the joint and several promissory notes of J. K. Wilson and Emma Wilson, amounting to $1,380.79; (12) that nothing has been paid; (13) that the bank has transferred the securities to the plaintiff; (14) that on August 15, 1914, J. K. Wilson transferred to Emma Wilson "all his right, title and interest" in and to the northerly

ALTA.

S. C.

ROBERTSON v. WILSON.

Beck, J.

60 ft. of lots 15 and 16 in block 165, the southerly 72 ft. of lots 1 and 2 in block 159; and also lots 13 in block 155 and 3 in block 159; (15) that the transfer was made when J. K. Wilson was insolvent and with intent to defraud.

To permit the amendment in the form in which it is asked would confuse the issues to be tried more than they are at present; for I think the statement of claim, as it now stands, is at least embarrassing. Nevertheless, I think I should allow an amendment on the general lines of the amendment asked. The plaintiff has an injunction which he wants continued. The position taken in opposition to the motion is, in substance, that the action, as it now stands, is not maintainable, because the plaintiff's status is alleged as that of a surety only, and that to permit the amendment would be to permit one which sets up a cause of action—and that the sole cause of action—arising since the commencement of the action, and that in any case the injunction must go.

Though there are Ontario decisions to the contrary, I should be inclined to think that a surety comes within the words of 13 Eliz., "Creditors and others" (see May on Fraud. Con., 3rd ed., p. 102), and that the interpretation of the word "Creditor" as given by the Assignments Act (ch. 6 of 1907), sec. 44, so as expressly to include a surety, applies, by implication, to the word "Creditor" in sec. 39 (Fraudulent Conveyances), although it is expressed to apply only to that word in secs. 40, 41, 42 and 43.

In either case the proper practice is said to be to sue on behalf of one's self and all other creditors. I doubt if this is now so in this jurisdiction in any case (see *Albertson* v. *Secord*, 1 D.L.R. 804, but, if it is, an amendment to correct the omission ought in all cases to be allowed at any stage without terms (see *Stone* v. *Theatre Am. Co.*, 14 D.L.R. 62).

At all events, whether or not the claim, as it now stands, discloses a good cause of action as against the objection that the plaintiff, when the action was commenced, had no *locus standi* or otherwise; and whether or not if, in allowing him to amend, I allow him to set up a cause of action which had not arisen at the time of the commencement of the action, I still think I should give the plaintiff leave to amend.

There are, it is true, English decisions (*Atty.-Gen.* v. *Avon Corp.* (1863), 3 De G. J. and S. 637; *Evans* v. *Bagshaw* (1870), L.R. 5 Ch. 340; *Tottenham Local Board* v. *Lea Conservancy* (1886), 2 Times L.R. 410), in which it is said that, if a plaintiff was without title at the commencement of the action or suit, he cannot by amendment set up a title subsequently acquired. I cannot, however, find any satisfactory reasoning for these decisions, and in the Annual Practice, 1915, pp. 475-6, it is said, "It is submitted that it can"—that is, that by leave an amendment can be made to a statement of claim setting up a cause of action which accrued to the plaintiff since the action was commenced. "By leave of the Court you can do anything" (*per* Jessel, M.R., in *Original Hartlepool Co.* v. *Gibb*, 5 Ch.D. 719). In this jurisdiction, at all events where an action is commenced not by a writ of summons, but by a statement of claim, I think it should be taken as a rule of practice that a right arising since the commencement of the action may, by leave, be set up by way of amendment of the statement of claim. The advantages of such a rule are that the costs will be somewhat less than if the plaintiff were compelled to commence proceedings anew, and that where there is an injunction, as in the present case, or other interim or collateral proceeding, such as a receiver order, garnishee summons or replevin order, the plaintiff may in a proper case retain the benefit of such interim or collateral proceeding.

In Kerr on Injunctions, 5th ed., p. 679, it is said:—

> The plaintiff may, after obtaining an injunction, obtain an order to amend without prejudice to the injunction; and the injunction, even if not expressly saved, will be unaffected unless the record is changed or the equity on which the injunction was obtained is displaced or materially altered by the amendment.

This proposition is explained in *McDonell* v. *McKay*, 12 Gr. 414.

I will give leave to the plaintiff to file an amended statement of claim, without prejudice to the injunction, for the purpose of setting up in proper form what the proposed amendment, in conjunction with the statement of claim, as it now stands, indicates to be his present cause of action. On these lines he may amend as he may be advised. I suggest that some care and skill should be exercised in framing the amended statement of claim, and point out that, though the amended statement of claim will be filed pursuant to leave, it will, nevertheless, be

ALTA.

S. C.

ROBERTSON v. WILSON.

Beck, J.

subject to be struck out or compulsorily amended if embarrassing or bad in law. The plaintiff will have ten days in which to take advantage of this order. The defendant will have the costs of this application and all costs thrown away by reason of the amendment in any event of the action. *Motion granted.*

QUE.

K. B.

MONTREAL TRAMWAYS CO. v. LEFEBVRE.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. February 26, 1915.

1. STREET RAILWAYS (§ III B—25)—INJURY TO PASSENGER—EXTENDING ARM THROUGH WINDOW—LIABILITY.

Unless a tramway company has been guilty of negligence in some other respect, a passenger who puts his arm on the sill of the car window in such a way that it projects beyond the side of the car, and is struck by a car going in the opposite direction, cannot recover damages for such injuries.

Statement

APPEAL from judgment of Weir, J.

Meredith & McPherson, for appellant.

A. P. Mathieu, for respondent.

Carroll, J.

CARROLL, J.:—This is an appeal from a judgment which condemned the appellant to pay to the respondent $909 on account of an accident which happened under the following circumstances: Lefebvre was a passenger in one of the cars of the appellant company. This car was going towards the east upon the street Des Commissaires. He was seated on the south side, on a bench running lengthwise, his bent knee upon the bench and his elbow projecting three or four inches beyond the window. He had been engaged for some five minutes in reading the "Gazette" when his elbow came in contact with a drum used to hold the electric wires. This drum was seven or eight inches away from the car.

The respondent charges negligence on the part of the company in that no notice was given putting the passengers on guard against the danger of taking such a position as he had taken, and in that the conductor and the motorman knew that the drum was thus placed in proximity to the passing car and should have taken additional precaution. It is also charged against the appellant that it should have provided the windows with iron bars in order to avoid all danger.

The accident happened in broad daylight. The respondent is a clerk, 48 years old. He should have known that there was danger in taking the unusual position that he did. He should

have known that the seats in the cars are to sit upon and that the windows are intended to furnish air and light. He could have taken a more comfortable position on his seat and he should not have made use of the window as a seat.

There is no doubt that if the respondent had not been guilty of this negligence, the accident would not have happened.

The Court of first instance supports its judgment upon two cases: *Carriere* v. *Montreal Street R. Co.*, 2 Que. K.B. 399, and *Jago* v. *Montreal Street R. Co.*, 35 Que. S.C. 109.

In the first of these cases the accident happened to a passenger who was going from one seat to another along the footboard, which ran along the length of the car. The car coming in the opposite direction struck this passenger. It was proved that the passengers had been permitted to be upon the footboard and even been invited when the seats were occupied, and the injured person might have believed that there was no danger since this course had been habitually practised with the assent of the employees of the company.

In the second case the verdict of the jury was given with a majority of nine against three. It was not proved that the passenger had projected his elbow beyond the window, but he was seated at the end of a cross seat, his left arm placed on the outside of the car and reading his paper. Contrary to the rules of the company, two cars were meeting at a curve where there was not sufficient space, and the passenger was struck on the elbow. The Honourable Judge Pagnuelo, who delivered the judgment, put this question: Was the plaintiff guilty of negligence in placing his elbow on the outside? Nine of the jurors have found that he was not in fault. This is certainly not an unreasonable decision.

As we see, the facts were very different in these two cases.

Let us take an example. A passenger hires a place in a car; he so places his arm that it projects outside of the car, and another car, coming along, strikes his arm; will he have in that case a right of action for damages if the owner of the second car is not guilty of negligence? I believe it is necessary to answer this question in the negative, and to say that, if the accident happened by the mere presence of the arm outside of the car, the victim should take it to be his own negligence.

QUE.

K. B.

MONTREAL TRAMWAYS v. LEFEBVRE.

Cross, J.

In this case the accident happened entirely by the act of the respondent, and I do not see how the company can be obliged to take elementary precautions against a danger that the passenger should know as well as the employees.

CROSS, J.:—The defendant has brought up this appeal, and contends that the respondent's mishap and injuries are directly attributable to his having negligently exposed his arm outside of the car.

It appears in evidence that the window space on the right-hand side of the car was traversed horizontally by three metal rods. The space between the rods was sufficient to admit of a man's arm being passed through. On the opposite (the left-side of the car), there were six rods across the window openings, so that the space between the rods was much less. The left-hand side would be that next to the track on which cars would be running in the opposite direction. The respondent's arm was resting on the lower of the three rods—in other words, was projecting through the space between the middle rod and the lower rod. That is his account of the position. Another witness testified that the arm rested on the sill under the bottom rod. The motorman, on the occasion in question, stopped or slowed down the car on coming to the drum, but, on concluding that there was room to pass, went forward. There was, in fact, space sufficient for the car, but not enough for respondent's elbow.

In this state of facts I consider that responsibility does not attach to the appellant. The object of having the rods across the window-spaces must have been obvious to any person of intelligence. To such a person the fact that the cars circulate on streets in which vehicles of all sorts have free course must make it clear that, from time to time, vehicles or other objects will be brought into close proximity to the sides of the tramcars. Common prudence requires that passengers shall not expose their arms or heads outside of the cars. Motormen are justified in taking it for granted that passengers will so conduct themselves. There is sound sense in the observation of the Chief Justice in the United States case of *Morre* v. *Edison Electric Illuminating Co.*, 9 So. Rep. (La. 1891), where, speaking of the passenger, it was said:—

> His negligence consists in putting his limbs where they ought not to be and exposing them to be broken without his ability to know whether there is or not danger approaching.

It has actually been argued in this case—and apparently with some success—that, inasmuch as there were twice as many guard-rods across the window spaces on the other side of the car and inasmuch as the respondent, had he been seated on that side, would have been unable to put his elbow through between the rods, that it is negligence on appellant's part not to have had a larger number of rods and smaller spaces between them on the right-hand side also.

Curious processes of reasoning occasionally pass muster in law Courts, but I would expect that they would not go the length of asserting that it is negligence on the part of a tramway company not to provide a grille or netting to prevent its patrons from injuring themselves. There may be an increased duty of care required in the interest of children, but the respondent was an adult. In the mere statement of his own case he convicts himself of negligence. I would maintain the appeal and dismiss the action.

TRENHOLME, J., dissented. *Appeal allowed.*

Trenholme, J. (dissented)

TURNBULL v. RUR. MUN. OF PIPESTONE.

Manitoba King's Bench, Curran, J. June 17, 1915.

1. ARBITRATION (§ II—10)—ARBITRATORS—RESIDENCE OF—APPOINTMENT BY LIEUTENANT-GOVERNOR—STATUTORY POWERS.
Sec. 699 of the Municipal Act (Man.) empowering the Lieutenant-Governor-in-Council in expropriation proceedings to nominate an arbitrator resident without the limits of any municipality interested, to act for the party failing to appoint, is imperative and not directory, and the appointment of one resident within the municipality is a contravention of the statute and will affect the validity of the award.
[*Re Smith & Corporation of Plympton*, 12 O.R. 20, applied.]

2. ARBITRATION (§ II—10)—ARBITRATORS—QUALIFICATIONS—RELATIONSHIP.
The fact that an arbitrator is related to an owner interested in the proceedings will disqualify him from acting therein notwithstanding the absence of any overt act or conduct indicating prejudice or partiality.
[*Corp. of Burford* v. *Chambers*, 25 O.R. 663; *Vineberg* v. *Guardian Fire & Life Ass. Co.*, 19 A.R. (Ont.) 293; *Reg.* v. *Rand*, (1866) L.R. 1 Q.B. 230; *The King* v. *Sunderland Justices*, [1901] 2 K.B. 357, 364; *The King* v. *Justices*, (1908) 2 Ir. Rep. 293, applied.]

3. ARBITRATION (§ III—16)—VALIDITY OF PROCEEDINGS—DISQUALIFICATION OF ARBITRATORS—OBJECTIONS—WAIVER.
The remaining and taking part in arbitration proceedings does not constitute a waiver of an objection to the proceedings because of the disqualification of the arbitrators.
[*Hamlyn* v. *Betteley*, 6 Q.B.D. 65, applied.]

Statement

MOTION to set aside an award.

J. H. Chalmers, for plaintiff.

H. E. Henderson, K.C., for defendant municipality.

MAN.

K. B.

TURNBULL v. RUR. MUN. OF PIPESTONE.

CURRAN, J.

CURRAN, J.:—This matter came before me at the non-jury sittings of the Court, holden at the city of Brandon, on May 5 last, by way of motion under sec. 13 of the Arbitration Act, ch. 9, R.S.M., 1913, to set aside an award of arbitrators made under the provisions of the Arbitration and Expropriation Clauses of the Municipal Act, between the above parties, and in favour of Ellen Turnbull, dated March 25, 1915, by which the sum of $750 was awarded to the said Ellen Turnbull

in the full and final settlement of all claims whatsoever arising out of the expropriation of her land by the municipality for road purposes, whether for the land actually taken, interference with easy access to the running water, damage to possible building site or any other cause.

The hearing of the motion was adjourned until May 13 following, when it was proceeded with upon affidavit, as well as oral evidence. I reserved judgment, to more fully consider the questions raised and the authorities cited.

Some eleven grounds of objection to the validity of the award are taken in the notice of motion, but only the first, second, third, seventh and ninth were seriously pressed.

The facts are briefly as follows: The municipality of Pipestone desired to open up and establish a public road over a portion of the north-west quarter of section 4, in township 9, in range 28, west, within the municipality, owned by Ellen Turnbull, whereupon by-law no. 491 of the municipality for this purpose was enacted. Owing to some misunderstanding between the parties interested as to the owner, Ellen Turnbull, having agreed to sell and convey to the municipality the required land for such road, which she subsequently refused to do, it was found impossible to expropriate under this by-law, and another by-law of the municipality, no. 541, was accordingly enacted on February 9, 1914. This latter by-law, with road plan attached, was put in at the hearing as ex. 2, and under it one and three one-hundredths of an acre of land was taken for the road in question, which seemingly had been actually constructed under the former by-law. The effect of the new road, it is contended, is to shut out the owner, Ellen Turnbull, from access to the waters of Pipestone Creek and otherwise to injure or depreciate her property. The amount of compensation could not be mutually agreed upon, so it became necessary to arbitrate.

Ellen Turnbull appointed one Walter Gahan, her brother,

to act as her arbitrator, and the municipality having neglected to appoint an arbitrator on its behalf, the Lieutenant-Governor-in-Council, on the application of Ellen Turnbull, by Order-in-Council, dated March 22, 1915, appointed one Peter McDonald, therein described as of Virden, an arbitrator on behalf of the municipality; such appointment to take effect on March 8, 1915. On March 10, 1915, the said Peter McDonald and the said Walter Gahan assumed, by writing under their hands, to appoint one John Turnbull, of Cromer, as third arbitrator. On March 16, 1915, these arbitrators gave notice, in writing, ex. 4, to the municipality and to Ellen Turnbull that they had appointed the Orange Hall, Cromer, Man., on Thursday, March 25, 1915, at the hour of 1 o'clock, as the time and place to proceed with the arbitration, at which time and place the arbitrators met and proceeded with the arbitration. Evidence was adduced, and the award which is called in question made.

The award itself and notes of the evidence heard by the arbitrators are attached as exhibits to the affidavit of Arthur Parry Power, secretary-treasurer of the municipality, filed on the motion.

An affidavit made by E. M. Wood, Deputy Municipal Commissioner, filed by Ellen Turnbull, states that Peter McDonald was chosen as second arbitrator to represent the municipality from a list of names furnished him by Mr. Donald, reeve of the municipality, and, on his, Wood's, recommendation, appointed by Order-in-Council as before stated. This appointment was made under authority of sec. 699 of the Municipal Act, which provides that, in case of failure to appoint and give notice of appointment of an arbitrator within the time as prescribed by secs. 696 and 697 of the Municipal Act, *etc.*, the Lieutenant-Governor-in-Council, on the application of any party, shall nominate as an arbitrator a fit person resident without the limits of any municipality interested to act for the party failing to appoint, *etc.* It seems that the appointment of McDonald was made primarily upon the application of Ellen Turnbull, although the municipality appear to have co-operated in the matter through the reeve, as disclosed in Mr. Wood's affidavit.

The municipality were not represented by counsel at the arbitration proceedings, but the reeve and secretary-treasurer

MAN.

K. B.

TURNBULL v. RUR. MUN. OF PIPESTONE.

CURRAN, J.

attended, pursuant to the notice, ex. 4, and lodged a protest against Walter Gahan acting as an arbitrator, "as he was too closely interested in the matter," and an objection was also registered by the municipal officers against Peter McDonald acting as arbitrator, "if his appointment had not yet been formally made by Order-in-Council." An objection was also made by the same parties to the chairman, John Turnbull, "as his authority was derived from the other two mentioned." I quote from the written memorandum of the arbitration proceedings.

Mr. Power, secretary-treasurer of the municipality, was examined *viva voce* before me, upon oath, and stated that he attended the arbitration and offered some documentary evidence only; that he objected to Gahan acting as an arbitrator, because he was an interested party, being a brother of Mrs. Turnbull; that he also objected to Peter McDonald, on the ground that he had not then received his appointment. He stated that his objections were considered by the arbitrators, who, nevertheless, decided to go on, whereupon he thought he had no right to object any further.

I did not go into the question of the reasonableness or otherwise of the amount of the award, because the parties, and particularly counsel for Mrs. Turnbull, intimated that, if the award should then be set aside, they were not ready with evidence upon the question of compensation.

Mrs. Turnbull swore that her brother, Walter Gahan, had no interest personally in the matter of compensation. Power testified that Gahan, at the arbitration, seemed to take part against the other two arbitrators in certain things, and, on the whole, thought he acted partially, but could not give any particular instances. He seemed, he said, to differ from the others at times; that Peter McDonald, at times, put in remarks in favour of the municipality, and Mr. Gahan did the same in favour of Mrs. Turnbull. I cannot find that there is any evidence to shew that Gahan did act with partiality or displayed partiality in his conduct as an arbitrator. This might, however, be inferred from the amount awarded, should it appear that this was excessive, or it might be presumed from his near kindred to the respondent, Ellen Turnbull.

It is admitted that Peter McDonald was then and now is a resident of the municipality of Pipestone, whereas sec. 699 of

the Municipal Act requires that the person nominated by the Lieutenant-Governor-in-Council shall be resident without the limits of any municipality interested. The appointment, therefore, of McDonald was clearly *primâ facie* a contravention of the statute. It was not explained how this man's name came to be included in the list of names supplied by the reeve to Mr. Wood; but the fact that it was so included is not denied. Counsel for Mrs. Turnbull admitted—at least, so I understood—that if the provisions of sec. 699 are imperative the objection that McDonald was a resident of the municipality interested might be fatal to the award. He contended, however, that this section was not imperative, but merely directory, and that a failure to comply with its provisions was merely an irregularity and not necessarily fatal to the award. I cannot concur in this argument. I think the section in question is imperative and not directory only.

While it is true that either party was free to appoint as her or its arbitrator a resident of the municipality, yet, in cases where the Lieutenant-Governor-in-Council is authorized to appoint, no such liberty of action is given. The Lieutenant Governor-in-Council could have no power of appointment at all except under the authority conferred by the statute, and it seems to me the proviso that any person so appointed shall be a "fit person resident without the municipality" was designedly inserted to insure the appointment under such statutory authority of a person who stood indifferent between the parties. If this is not so, I fail to see any reason for the restriction contained in the section of the Act referred to.

A somewhat similar point was considered in the Ontario Courts in the case of *Re Smith and Corporation of Plympton*, 12 O.R. 20, where it was held that the provision in a statute that arbitrators must hold their first meeting within 20 days from the appointment of the last arbitrator is not imperative but directory merely, but that the time within which an award must be made under such statute was imperative, and, therefore, an omission to hold such first meeting within the specified 20 days did not invalidate an award made within the month, as required by the Act. Cameron, C.J., said, at p. 34:—

> The object of the legislature in making the several limitations of time, was doubtless to secure promptness and expedition in the decision of the questions submitted to arbitration.

MAN.

K. B.

TURNBULL v. RUR. MUN. OF PIPESTONE.

Curran, J.

And, again, at p. 35:—

If the time for making the award must be regarded as imperative so as to make an award made after the expiration of the month from the time on which the arbitrators enter upon the reference, it is difficult to say that the time for commencing the proceedings must not also be regarded as imperative. I am inclined, however, to think, as it is purely a matter of formal procedure, it should be regarded as directory; and the omission to hold the first meeting within 20 days would not make an award made within the month invalid. The time for making the award within a month is not put under the head of "procedure," while the time for holding the first meeting is, which may support an argument that the former is imperative and the latter directory.

The sections of the Ontario Act here considered are almost identical with the sections of our Act. Sec. 699 of our Act is not placed under the heading of procedure, but appears before it under the heading, "Appointment of Arbitrators," which embraces secs. 692 to 700, both inclusive. Then follows the heading, "Procedure in Arbitrations," secs. 701 *et seq.* It seems to me, then, that sec. 699 does not deal with a mere matter of procedure, but is fundamental, going to the very constitution of the tribunal itself, and so ought to be strictly construed.

Maxwell on Statutes, at p. 599, lays down this proposition:—

In the first place a strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred; and it is therefore probable that such was the intention of the legislature. But when a public duty is imposed and the statute requires that it shall be performed in a certain manner or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.

This statement of the law applied to the section of the Act referred to would seem to me to make it clear that it fell within the former and not the latter category, and that its provisions are imperative and not directory.

I hold, therefore, that the second ground of objection to the award must be upheld, and that the appointment of Peter McDonald as an arbitrator was in contravention of sec. 699 and wholly void.

It follows, therefore, that the appointment of the third arbitrator, John Turnbull, which depended upon Peter McDonald's

concurrence, was and is illegal and void also, and, therefore, the third ground of objection must be supported.

The ninth objection would also seem to me to be well taken, because on the date, March 10, 1915, when McDonald and Gahan assumed to appoint John Turnbull as third arbitrator, McDonald himself had not been appointed an arbitrator. His appointment was not made until March 22, 1915, although the Order-in-Council purported to direct that his appointment should take effect as of March 8, 1915, which I very much doubt was within the power or authority conferred upon the Lieutenant-Governor-in-Council by the statute. However, it is not necessary for me to decide this point, and I refrain from so doing in view of the conclusions I have reached on other grounds of objection.

As to the first ground of objection, though, strictly speaking, it is not necessary either for me to pass upon it, I think it is one that in principle calls for decision, and I will, therefore, deal with it. As before stated, no actual bias has been established against Walter Gahan in his conduct as one of the arbitrators, but the objection is that, being a brother of Ellen Turnbull, he is liable to be biased in her favour.

In *Reg.* v. *Rand* (1866), L.R. 1 Q.B. 230, Blackburn, J., says, at 232:—

> But the only way in which the facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees, and that is an objection, not in the nature of interest, but of a challenge to the favour.

And at p. 233:—

> Whenever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong for him to act, and we are not to be understood to say that where there is a real bias of this sort this court would not interfere.

In *The King* v. *Justices of Sunderland*, [1901] 2 K.B. 357, A. L. Smith, M.R., said, at 364:—

> It appears to me that in cases where the decision of justices is impeached on the ground of a bias such as is suggested in the present case the decision must really turn on the question of fact whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the justices alleged to have been so biased. If there is such a likelihood then it is clearly in accordance with natural justice and common sense that the justices likely to be so baised should be incapacitated from sitting.

In *The King* v. *Justices of Queen's County*, [1908] 2 Ir. Rep. 285, Lord O'Brien said, at 294:—

> By "bias" I understand a real likelihood of an operative prejudice whether conscious or unconscious.

MAN.

K. B.

TURNBULL v. RUB. MUN. OF PIPESTONE.

Curran, J.

In *Vineberg* v. *Guardian Fire and Life Assurance Co.*, 19 A.R. (Ont.) 293, the Court held void an award made by arbitrators, one of whom was at the time of the arbitration sub-agent for an agent of the defendants in obtaining insurance risks, though he had acted as such to only a very small extent. At p. 297 the Court said:—

> It is not enough merely to be satisfied that it is or may be a just decision, but as Sir William Erle said, it is of the essence of these transactions that the parties should be satisfied that they come before an impartial tribunal.

Upon the question of bias, see also *Corporation of Burford* v. *Chambers*, 25 O.R. 663.

Counsel for Mrs. Turnbull contended that, as no actual bias was shown against Gahan, that is, that he had been guilty of partiality towards Mrs. Turnbull in his conduct as one of the arbitrators, no objection could be taken to his appointment; that the mere fact of the relationship of brother and sister did not disqualify him in the absence of some proof of conduct indicating bias or non-indifference. I think the cases I have referred to sufficiently answer this contention, and that the fact of mere relationship between Gahan and Mrs. Turnbull constituted a real likelihood that he would be biased in favour of his relative; that there was a real likelihood of an operative prejudice in her favour, whether conscious or unconscious, on the part of her arbitrator. It is not necessary, I think, under these circumstances, to prove any overt act or conduct indicating prejudice, partiality or unfairness. The fact of the close relationship existing between Gahan and Mrs. Turnbull was enough, in my opinion, to render it almost humanly impossible for Gahan to be perfectly indifferent between the parties. I think, therefore, that this ground of objection is well founded.

But Mr. Chalmers contends that this objection, even if well founded, has been waived, and that the municipality ought not to have waited till the board of arbitration convened to raise the objection, but should have taken active steps to prevent Gahan from acting at all. I cannot agree with this contention. I think the municipality did all that was reasonably required of it in formally objecting to Mr. Gahan when it did, through Mr. Power, its secretary-treasurer, as before stated. The objection was considered by the arbitrators and overruled or disregarded. Mr. Power and the reeve, being without legal advice,

thought they could not object any further, so remained and took part in the subsequent proceedings. I do not think this conduct constituted a waiver in law of this objection. See *Davies* v. *Price* (1865), 34 L.J.Q.B. 8, and also *Hamlyn* v. *Betteley*, 6 Q.B.D. 63, 65, where Lord Selborne said:—

> Even in arbitrations where a protest is made against jurisdiction the party protesting is not bound to retire; he may go through the whole case subject to the protest he has made.

For the foregoing reasons, therefore, I have reached the conclusion that the award in question must be set aside and the order setting it aside will go accordingly, with cost to the applicant.

Sec. 706 of the Municipal Act gives me power, in addition to setting aside the award, to remit the matters referred or any of them to the consideration and determination of the said arbitrators or to any other persons whom the Court may appoint, and fix the time within which such further or new award shall be made, or the Court may itself increase or diminish the amount awarded or otherwise modify the award as the justice of the case may seem to require. Under the circumstances of this case it will be impossible to remit the matters referred to the same arbitrators, and I understood at the hearing of the motion that the parties would be willing for me to consider, in the event of the award being set aside, the amount of compensation which ought to be awarded to Mrs. Turnbull. I am willing to do this, and, if the parties desire it, will give them a date for the purpose of hearing evidence upon this point. *Motion granted.*

Re COTTER.

ONT
S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. April 26, 1915.

1. WILLS (§ III G 6—145)—EXECUTORY DEVISE—LIMITATION AS TO AGE—ATTAINMENT OF—ABSOLUTE ESTATE.

Upon a devise of land in trust for a grandchild until he attains the age of twenty-six, followed by a gift over to persons who are to share in the residue in the event that he does not live to that age, there is an implication, that the devisee, on attaining the stated age, should become entitled to the whole interest in the property absolutely. [*Corpton* v. *Davis* (1869), L.R. 4 C.P. 159; *Wilks* v. *Williams* (1861), 2 J. & H. 125, followed.]

2. WILLS (§ III L—191)—TRUSTS — LAPSING — DEATH OF TRUSTEE — EFFECT ON CESTUIS QUE TRUST—CLASS BENEFICIARIES.

The death of a trustee named in a will before the testatrix has the effect, if the trustee is not of a class with the other beneficiaries, of lapsing the gift to the trustee's share in the estate, but will not

ONT.
S. C.
RE COTTER.

affect residuary interests of grandchildren intended by the terms of the trust, and in carrying out its object, the Court will divide the subject of the gift equally between the grandchildren.

APPEAL from the judgment of Lennox, J., in an action for construction of will.

G. N. Shaver, for appellant.

D. Urquhart, for Honora Ann Welsh.

E. C. Cattanach, for Official Guardian.

G. D. Conant, for Trusts and Guarantee Company.

The judgment of the Court was delivered by

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by Robert Henry Johnston from the judgment of Lennox, J., dated the 5th March, 1915, whereby he declared that, according to the true construction of the will of Elizabeth Cotter, (1) the appellant, having attained the age of twenty-six years, took no estate or interest in the house and lot on the west side of Simcoe street, in the town of Oshawa, other than as a grandchild and under the last clause of the will, and (2) that the residuary estate is to be divided equally among the grandchildren alive at the date of the death of the testatrix.

The will is dated the 22nd April, 1901; and by it the testatrix appointed her daughter Margaret Brimacombe sole executrix and trustee of the will; by the 2nd paragraph, she gave, devised, and bequeathed to her trustee the house and lot in Oshawa "to be held by my said trustee in trust for my grandson Harry Johnston" (the appellant) "until he arrives at the age of twenty-six years, but in case he should die before arriving at that age, then my said trustee shall dispose of said property as she is hereinafter directed to dispose of the residue of my estate;" by the 3rd paragraph, the testatrix bequeathed to her daughter Honora Ann Welsh all the moneys the testatrix should have at the time of her decease deposited in the York County Savings Company; and by the 4th paragraph the testatrix gave, devised, and bequeathed to her daughter Margaret Brimacombe "all the rest residue and remainder of" her estate, real and personal, of whatsoever kind or nature or wheresoever situate, "in trust to pay firstly all my just debts funeral and testamentary expenses as soon as convenient and to divide the balance

ONT.

S. C.

RE COTTER.

Meredith, C.J.O.

between herself and my grandchildren in such shares and in such manner as to her shall seem best."

Margaret Brimacombe died on the 13th February, 1906, and the testatrix died on the 22nd March in the following year.

The first question is as to the effect of the devise of the Oshawa lot to the appellant.

It is contended by the appellant that, as he attained the age of twenty-six years, he has become absolutely entitled to the lot; that he takes it by implication in the event that has happened of his not having died under that age.

In *Corpton* v. *Davis* (1869), L.R. 4 C.P. 159, the testator by his will, dated the 17th February, 1855, devised three freehold houses in trust, as to the first two to receive the rents and pay them to his wife during life or widowhood and after her decease or second marriage as to the first upon trust to convey it to his daughter Elizabeth Annie, her heirs and assigns forever, as to the second on similar terms to his daughter Caroline Rogers, and as to the third "upon trust to apply the rents for the advancement and benefit of my granddaughter Mary Annie Clarke until she attains the age of twenty-one years; but, in case my said granddaughter should die under that age, then I devise the said dwelling-house and furniture to my daughters Elizabeth Annie Martin and Caroline Rogers Martin, their heirs and assigns, as tenants in common." The testator appointed his son Henry Martin and his daughters Mary Clarke and Annie Cropton executor and executrices of his will, and bequeathed to them all the residue of his real and personal estate of whatsoever kind or description and not before specifically bequeathed, as tenants in common. The granddaughter Mary Annie Clarke attained the age of twenty-one years, and after the death of the testator's widow she claimed to be entitled to the freehold house, the rents of which the testator directed to be applied for her advancement and benefit until she should attain the age of twenty-one years, and it was held that she was so entitled, the Court being of opinion that it manifestly appeared "to have been the testator's intention to give the whole interest in the house, . . . to his granddaughter, to go over to his daughters Elizabeth Annie Martin and Caroline Rogers Martin only in a case which has

ONT.
S. C.
RE COTTER.
Meredith, C.J.O.

not happened, viz., in case his granddaughter Mary Annie Clarke should die under twenty-one years of age" (p. 167); and Brett, J., who delivered the judgment of the Court, pointed out that, if this were not so, the strange consequence would follow, that, if the granddaughter died under twenty-one, the estate would go over to the daughters Elizabeth Annie Martin and Caroline Rogers Martin; whereas, if the granddaughter attained the age of twenty-one, it would go over to the residuary legatees, who are other persons, and added: "Such an intent cannot, we think, be presumed from the structure and language of the will."

Such a result would not follow from the construction which my brother Lennox gave to the will in question, because the persons to take in both events are the same.

I do not understand, however, that the decision of the Court in *Corpton* v. *Davis* depended upon the circumstances to which Brett, J., referred, but that it was one of the circumstances which led the Court to the conclusion to which it came.

The principle of the decision is, I think, stated in the concluding words of the judgment, and is, that words such as those used by the testator in his devise in that case are sufficient to pass the whole interest, if, "looking to the language and to all the dispositions of the will, and the circumstances, there is an irresistible inference in favour of implying such a gift"—quoting from *Fitzhenry* v. *Bonner* (1853), 2 Drew. 36.

The principle upon which a gift of the whole interest in the subject of it is to be implied in such cases is more broadly stated by Vice-Chancellor Sir W. Page Wood in *Wilks* v. *Williams* (1861), 2 J. & H. 125, where he says (p. 128): "There is another class of cases, of which no one, I apprehend, will be disposed to disapprove, where it has been held, that, upon a devise or bequest, whether of real or personal estate, upon trust for the child or children of any person, until they attain twenty-one, followed by a gift over to a third person, in case the children do not live to attain twenty-one, there is a clear implication, that, if the children live to attain twenty-one, they are to take absolutely. With that class of authorities, whatever may be said of cases like *Newland* v. *Shephard* (1723), 2 P. Wms. 194, no one, I imagine, will be disposed to quarrel."

The leading text-writers, although they question the cases such as *Newland* v. *Shephard* in which it has been held that, even where there is no gift over, the devisee, on attaining the stated age, becomes entitled to the whole interest in the property, treat the law as being as stated by Page Wood, V.-C., and as applied by the Court of Common Pleas in *Corpton* v. *Davis;* and we should, I think, decide this case in accordance with it.

It was suggested during the argument that there is in the will in question no devise over in the event of the appellant dying before attaining the age of twenty-six years, but there is no foundation for the suggestion. The provision that in case he should die before arriving at that age the trustee shall dispose of the lot "as she is hereinafter directed to dispose of the residue of my estate," is clearly a gift over of the beneficial interest in the lot to the persons who are to share in the distribution of the residuary estate.

I would, therefore, substitute for the declaration which has been made a declaration that, in the events that have happened, the appellant is entitled to the whole estate and interest of the testatrix in the house and lot mentioned in the 2nd paragraph of the will.

The appellant also contends that, owing to the death of Margaret Brimacombe in the lifetime of the testatrix, the gift to her in trust contained in the last paragraph of the will has lapsed, and that there is an intestacy as to it; but that is clearly not so.

Where a devisor appoints a trustee, who dies in the testator's lifetime, the trust is not thereby defeated, but fastens on the conscience of the person upon whom the legal estate has devolved; and, in the case of an imperative power, which partakes of the nature of a trust, the Court protects a *cestui que trust* from the failure of the donee of the power, as it would do from the failure of any other trustee: Lewin on Trusts, 12th ed., pp. 1073-4; *Brown* v. *Higgs* (1803), 8 Ves. 561, 574; *Attorney-General* v. *Lady Downing* (1767), Wilmot 1, 23.

"When there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the Court will

ONT.
S. C.
RE COTTER.
Meredith, C.J.O.

carry into effect the general intention in favour of the class:" *per* Lord Cottenham in *Burrough* v. *Philcox* (1840), 5 Myl. & Cr. 72, 92.

Where, as in this case, it has become impossible, owing to the death of the trustee in the lifetime of the testatrix, to make the division of the residue as the testatrix by the 4th paragraph of the will directs, the Court divides the subject of the gift equally between the *cestuis que trust* or the objects of the power: Jarman on Wills, 6th ed., p. 613.

As Margaret Brimacombe died in the lifetime of the testatrix, the gift to her of a share of the residue lapsed; she and the grandchildren of the testatrix did not form a class: *Kingsbury* v. *Walter*, [1901] A.C. 187; *In re Venn*, [1904] 2 Ch. 52. In the earlier of these cases the trust was for Elizabeth Jane Fowler, a niece of the testator, and the child or children of a sister of the testator named Emily Walter, who should attain the age of twenty-one years, in equal shares, and it was held that the testator intended to make one class of nephews and nieces, and that consequently there was no lapse by reason of the death, in the lifetime of the testator, of Elizabeth Jane Fowler, and that the other nephews and nieces took the whole. While that conclusion was reached on the special circumstances of the case, Lord Davey said (p. 193): "A gift to A. and all the children of B. is, in my opinion, *primâ facie* not a class gift, and I think that has been so decided and rightly decided, in the case *In re Chaplin's Trusts* (1863), 33 L.J. Ch. 183 . . . and also in a case before Sir George Jessel of *In re Allen, Wilson* v. *Atter* (1881), 29 W.R. 480, 44 L.T.N.S. 240." See also *In re Featherstone's Trusts* (1882), 22 Ch. D. 111, 120.

My conclusion on this branch of the case is, that the residue is divisible equally between the grandchildren of the testatrix who survived her and Margaret Brimacombe, and that there is an intestacy as to the latter's share.

The order appealed from provides that the costs of all parties "be paid out of the funds of the estate"—which means, I take it, that the burden of them is to fall on the residuary legatees.

As the main contention has been as to the effect of the devise to the appellant, the costs throughout should fall upon him and

ONT.

S. C.

RE COTTER.

Meredith, C.J.O.

the property devised to him, and I would substitute for the order that has been made as to costs an order so providing. The appellant has failed in his contention that the residuary bequest has lapsed, although he has succeeded to the extent that it will be declared that the bequest of a share of it to Margaret Brimacombe has lapsed, and there is no injustice in leaving him and the property which he takes under the provisions of the 2nd paragraph of the will to bear the costs of the litigation. The administratrix and the Official Guardian will, of course, have their costs between solicitor and client. *Appeal allowed in part.*

CANADIAN NORTHERN ONTARIO R. CO. v. PERRAULT.

QUE.

K. B.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. January 21, 1915.

1. DAMAGES (§ III L 2—240)—EXPROPRIATION OF LAND—COMPENSATION—MODE OF ESTIMATION—VALUES.
In expropriation proceedings the arbitrators should take into consideration any special advantages, such as position or location, and should award the value of the land with all its present or future advantages, but must consider the actual and not any uncertain for hypothetical values.

Statement

APPEAL from an arbitrator's award made under the Federal Railway Act. The majority of the arbitrators have granted the owner $1,525, being $100 an acre. The Court of Appeal, taking a different view of the evidence, has reduced the award to $614.60 —that is, $35 an acre, with interest from the date of the award.

Perron & Taschereau, for appellant.

Roland Millar, for respondent.

The judgment of the Court was delivered by

Cross, J.

CROSS, J. (after reviewing the evidence):—The arbitrators could competently apply their own knowledge of values in arriving at decisions, and that makes it the more difficult for an appellant Court to say that they erred.

As regards valuation, it has been laid down that: "The value to be paid for is the value to the owner as it existed at the date of the taking—not the value to the taker," and that: "The value to the owner consists in all advantages which the land possesses, present and future, but it is the present value alone of such advantages that falls to be determined:" *Cedar Rapids Co. v. Lacoste*, 16 D.L.R. 168, 30 T.L.R. 293.

The land here in question is a mile and a quarter from Portage du Fort, a village of 300 inhabitants. The village and the Ottawa

QUE.
K. B.
C.N. ONT. RY CO. v. PERRAULT.
Cross, J.

River are south of the railway. The respondent's land is north of it. Urban settlement will be on the south side—at least in the beginning. The appellant argues that it is proved that houses would not be built on the north side of the railway. That seems probable, but cannot be said to be certain.

From what the record discloses, I have come to the conclusion that the arbitrators erred in fixing the compensation at $100 per acre. They had heard testimony to the effect that, for building lots, the land was worth that price. They appear to have concluded that, had the appellant not taken the land, the respondents could probably, if not certainly, have gotten $100 an acre for it, and not merely for the lots which could have been made out of it, but for the whole surface, street sites and all.

Now, it is certain that there was neither certainty nor probability that the respondents could have sold this land for building sites in the near future, but, as the land adjoined railway-station grounds, there was reason to say that it had a special site-value, a value for piling ground or any of the obvious uses open to land in such a situation. That was an "advantage" which the land possessed. The respondents were, therefore, entitled to be paid the present value attributable to that fact.

The appellant has not allowed for that and its offers are not sufficient. It may be added that the taking of this land renders more difficult the access to the residue of the Perrault land from the public road at the west side.

The arbitrators, consequently, had to allow the present value arising from that availability or advantage, on the footing that the land might or might not happen, in fact, to be applied to that use. Instead, I consider that they valued the land on the footing of its being certain that it would be so utilized or would be marketable for such use. They made the mistake of treating an advantage consisting in a chance as if it were a certainty, or of considering that an hypothetical purchaser would be sure to be a purchaser in fact.

I, therefore, conclude that the awards cannot stand. What, then, should be the decision? There is an absence of direct evidence of what is the value of these parcels of land in view of their proximity to the station grounds and of their availability in the ways above indicated in consequence of such situation.

QUE.

K. B.

C.N. ONT. RY CO. v. PERRAULT.

Cross, J.

In strictness, the cases should be sent back to the arbitrators to be proceeded with upon a correct view of the measure of compensation to be applied, but that would greatly increase the cost of what has already been an expensive affair. I note the record of an arbitrator's minute to the effect that "the fees of the arbitrators, advocates, clerks of the arbitrators to be counted as if the two cases were heard separately," and I observe that the arbitrators leased a Court house, engaged a secretary, a messenger and a stenographer, and held ten meetings. If the evidence of record enables us to fix the compensation, we ought to go as far as a Court can to do so.

I would maintain the appeal with costs, and vary the awards accordingly, and, speaking in this particular for myself, I express my disapproval of the superfluous arbitration expenses above referred to. *Appeal allowed.*

ATTORNEY GENERAL v. KELLY.

MAN.

K. B.

Manitoba King's Bench, George Patterson, K.C., Referee. September 26, 1915.

1. PLEADING (§ I—I—65)—PARTICULARS—OVER-PAYMENTS—FRAUD.

In an action by a Provincial Government for the recovery of over-payments under contracts for the construction of a new Parliament building, also charging fraud and conspiracy, the defendant is entitled to particulars of the amounts claimed to be over-paid, and of the fraudulent representations charged, particularly where they are not within the defendant's knowledge and there is nothing to shew that the plaintiff cannot set out what they are.

[*Sims* v. *Slater*, 10 C.L.T. 227; *Whyte* v. *Ahrens*, 26 Ch. D. 717; *Leitch* v. *Abbott*, 31 Ch. Div. 374; *Sachs* v. *Speilman*, 37 Ch. D. 295, applied].

Statement

APPLICATION for particulars of statement of claim.

H. J. Symington, for the Crown.

W. A. T. Sweatman, for defendants.

The Referee.

THE REFEREE:—This is an application for particulars of the plaintiff's Statement of Claim. The action is brought having for its main object the recovery of large sums of money alleged to have been over-paid by His Majesty, in the right of the Province of Manitoba, to the defendants under a number of contracts for construction work in connection with the new parliament buildings at Winnipeg. The defendants are charged with fraud and fraudulent representations, and with having conspired with officers and employees of the government in order to procure such large over-payments.

In so far as the charges of fraud, collusion and conspiracy are concerned, I think the cases of *Sims* v. *Slater*, 10 C.L.T. 227;

MAN.

K. B.

ATTORNEY GENERAL v. KELLY.

The Referee.

Whyte v. *Ahrens*, 26 Ch. Div. 717; *Leitch* v. *Abbott*, 31 Ch. Div. 374; *Sachs* v. *Speilman*, 37 Ch. Div. 295, and other cases cited to me in the argument, establish the principle that, where the circumstances lie in the knowledge of the defendant rather than the plaintiff, the latter should not be called upon for particulars of the alleged fraud, collusion and conspiracy before examining the defendants for discovery. I think that the circumstances in this case are such as to call for the application of that principle. I, therefore, refuse, at this stage, to order particulars asked for in connection with the charges of collusion, conspiracy and fraud generally.

As I understand the practice, however, where it is sought to recover moneys alleged to have been over-paid in connection with a contract, particulars of such over-payments should be given, and it is also a general rule laid down in Bullen & Leake, 6th ed., that, where fraud or fraudulent representations are alleged, particulars should be given, subject to the exception above noted, when the circumstances lie in the knowledge of the defendant rather than the plaintiff. The Statement of Claim gives full particulars of the various payments made to the defendants, but does not anywhere shew what the amounts over-paid were, and no material has been filed to shew that the plaintiffs cannot furnish particulars of these over-payments. Again, if the defendants made the fraudulent misrepresentations, false applications and false statements charged against them, there is nothing to shew that the plaintiffs cannot set forth what they were, and I cannot see that the circumstances indicate that these would lie in the knowledge of the defendants rather than the plaintiff.

Applying these circumstances, I, therefore, think that the plaintiff should furnish the particulars.

The Order should also extend the time for filing the statement of defence until these particulars are furnished. Costs of the applications to be costs in the cause. *Application granted.*

CAN.

S. C.

McKNIGHT CONSTRUCTION CO. v. VANSICKLER.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur. JJ. May 4, 1915.

1. CORPORATIONS AND COMPANIES (§ IV D 3—85)—SALE OF BUSINESS PREMISES —FORMAL REQUISITES—SEAL.

A sale of its business premises by an industrial company, unless forbidden by its charter, is valid though not under the corporate seal.

2. CORPORATIONS AND COMPANIES (§ IV D 1—66)—POWER OF CONTRACT —OSTENSIBLE AUTHORITY OF OFFICER.

It is not necessary for any person dealing with an officer of a corporation to ascertain the proper steps taken to clothe him with the authority, where it is apparent that he is the agent of the corporation to transact the particular business.

[*Vansickler* v. *McKnight Construction Co.*, 19 D.L.R. 505, affirmed.]

CAN.

S. C.

MCKNIGHT CONSTRUCTION v. VANSICKLER

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 19 D.L.R. 505, affirming the judgment at the trial in favour of the plaintiffs.

Statement

The action was for specific performance of a contract by which the appellants had agreed to sell to respondents their business premises which were not large enough for their requirements. Two main questions raised on the appeal were—Was the contract void because the seal of the company was not affixed thereto? Had Douglas, who signed the contract for the company as secretary-treasurer, authority to do so? Both questions were decided against the company in the Courts below.

Hellmuth, K.C., and *R. S. Robertson*, for appellants.

McKay, K.C., for respondents.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs.

Sir Charles Fitzpatrick, C.J.

DAVIES, J.:—I concur with Anglin, J.

Davies, J.

DUFF, J.:—I concur in the judgment of the Appellate Division delivered by Clute, J. It is not necessary to add anything whatever to the very complete discussion of the points raised which is to be found in that judgment. Contentions were advanced, however, on part of the appellant which raised two questions of general importance in respect of which it is perhaps desirable to express one's views of the principle involved.

Duff, J.

The first point is as to the authority of the secretary-treasurer. This point, although apparently taken in the Court of Appeal, was not taken in the appellant's factum, and was, I think, advanced during the oral argument here on the invitation of the Bench. I am not surprised at this, because, on examining the record, there appears to be ample evidence that the secretary-treasurer was the apparent agent of the company for the transaction of the kind of business he undertook to do. That being so, the case is within the principle very satisfactorily stated in Palmer's Company Law, 9th ed., 1911, p. 44, in the following words:—

CAN.

S. C.

McKNIGHT CONSTRUCTION v. VANSICKLER

Duff, J.

This rule is that where a company is regulated by an Act of Parliament general or special, or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith; but they are not bound to do more; they need not inquire into the regularity of the internal proceedings —what Lord Hatheley called " the indoor management." They are entitled to assume that all is being done regularly. See also *Mahony* v. *East Holyford Mining Co.*, L.R. 7 H.L. 869; *Bargate* v. *Shortridge*, 5 H.L. Cas. 297, at p. 318; *Re Land Credit Co. of Ireland*, 4 Ch. App. 460; *Re County Life Assurance Co.*, 5 Ch. App. 288; *Premier Industrial Bank* v. *Carlton Man. Co.*, [1909] 1 K.B. 106, is not easily reconcilable with the rule.

This rule is based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed.

The next point turns upon the absence of the company's seal. This question may be disposed of by a reference to the decisions of the Court of Exchequer and the Exchequer Chamber in *South of Ireland Colliery Co.* v. *Waddle*, L.R. 3 C.P. 463, 4 C.P. 617. The following passage from the judgment of Bovill, C.J., at p. 469, is cited by Sir Frederick Pollock (Contracts, 8th ed., p. 156), as stating the law upon the point. And it may be observed that the judgment of Bovill, C.J., had the express approval of the Exchequer Chamber in the same case (at p. 618), where Cockburn, C.J., said, speaking for the Court (of which Willes, J., was a member): —

It is unnecessary to say more than that we entirely concur in the reasoning and the authority of the cases referred to in the judgment of Bovill, C.J. which seems to exhaust the subject.

The passage in the judgment of Bovill, C.J., which seems to me to conclude argument upon this point is as follows:—

These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents, managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain the argument.

I may add that the decision in *Waddle's* case, L.R. 4 C.P. 617, is over fifty years old, and it is, of course, perfectly well known that the business of trading companies has now for many years been conducted on the assumption (based upon the observations of the learned Judges who decided that case) that

such corporations may express their consent in a binding manner to contracts within the scope of their business in the same way as an individual may do, provided that no statutory provision or regulation affecting them is infringed or departed from.

To break in upon this rule at this date by accepting the contentions advanced on behalf of the appellant would be, as Cockburn, C.J., says, to give life to a relic of barbarity, and, so far as I can see, with no other effect than to put unnecessary obstacles in the way of the transacting of ordinary business.

The appeal should be dismissed with costs.

ANGLIN, J.:—With Riddell, J., who tried this action,

> I do not find anything . . . in the documents which necessitates the payment by the plaintiffs of the amount ($1,400) until such time as the sale was completed.

I have no doubt that by the completion of the sale was meant the delivery of a conveyance and transfer of possession of the property. The evidence establishes that the defendants made default both as to the conveyance and as to possession. They acknowledged their inability to give possession when the plaintiffs, shortly after the date fixed by the agreement for completion, offered to pay the $1,400 if given possession and to accept a solicitor's undertaking for the subsequent delivery of a deed. The evidence lends some support to the view that the plaintiffs knew before they made the agreement that there would probably be delay in the execution of the conveyance, and they, therefore, may have contemplated payment of the $1,400 on the date named for completion of the sale, although the vendors might not then be able to deliver a deed of the property. But there is not a tittle of evidence to warrant a suggestion that they had agreed to pay the $1,400, although the vendors should be unable to deliver possession of the premises.

While I think the defendants have failed, on the admissible evidence, to prove an agreement by the plaintiffs to pay the $1,400 before receiving a deed, the evidence of Mr. Dods makes it quite clear that the real cause of the delay in the completion of the sale was not that the plaintiffs were insisting on delivery of a deed contemporaneously with their payment of the $1,400, but that the defendants were not ready to transfer possession of the property. That certainly was the situation from March 20 until May 20, when for the first time the defendants sought

CAN.
S. C.
McKNIGHT CONSTRUCTION v. VANSICKLER.
Anglin, J.

to escape from their contract on the pretext of delay on the part of the plaintiffs in the payment of the $1,400, although, as Mr. Dods' uncontradicted evidence shews, he had informed the defendants of his client's readiness to pay this money on March 20, and the subsequent delay had been at the instance of the defendants' own solicitor. Assuming a contract binding on the defendants, I have no hesitation in affirming the holding that the default in carrying it out was entirely theirs, and that the plaintiffs are entitled to the relief of specific performance.

The defendants, however, maintain that there was not a contract binding upon them—(*a*) because the assistant general manager, Douglas, who, on their behalf, signed the acceptance of the plaintiffs' offer to purchase, did so without authority; and (*b*), because the seal of the company was not affixed to the document.

(*a*) There can be no question of the company's right to hold and to dispose of this real estate (2 Geo. V. ch. 31, sec. 23, and sec. 24 (*b*)), nor is there room for doubt as to the power of the directors to make a contract such as that in question. (*Ibid.*, sec. 82.) The property had been acquired for and used as the business premises of the company. It had become too small for their needs, and it had been decided to dispose of it in order to permit of more suitable premises being purchased. The sale was, therefore, arranged for in the course of the management of the company's affairs. By sec. 87 (*e*) of the statute, directors are empowered to pass by-laws providing for the conduct of the affairs of the company, and, by sec. 86, to elect a president and vice-president and to appoint all officers of the company. Under these statutory provisions by-laws were passed by this company as follows:—

20. The directors may from time to time appoint one of their body to be managing director of the company.

22. The directors may from time to time entrust to and confer upon the managing director such of the powers exercisable under these by-laws by the directors as they may think fit.

34. In case of the absence of any officer of the company the Board of Directors or President may delegate his powers or duties to any other officer or to any director for the time being.

The election of Mr. McKnight as president and his appointment as general manager and that of Mr. Douglas as assistant general manager are duly proven. I attach no importance to

the fact that in the resolution for the appointment of Mr. McKnight he is styled general manager instead of managing director. the appointment was, undoubtedly, intended to be made under by-law No. 20.

On the evidence it is quite clear that the sale to the plaintiffs was arranged by them with Mr. McKnight and was discussed by him with his co-directors, who approved of it at least informally. Being obliged to leave the city, Mr. McKnight, as president, delegated to Mr. Douglas authority to carry out the transaction and to prepare and execute a contract of sale with the plaintiffs. With the trial Judge, I think

that Douglas did draw up a document which was precisely what had been arranged by the parties and that document was one, therefore, which he had the right and the power to draw and afterwards to sign.

For any lack of formality in the steps leading to the authorization of Douglas, the plaintiffs should not suffer. They were not called upon to ascertain that proper steps had been taken to clothe him with authority to execute the contract with them on behalf of the company. They acted with perfect good faith. The power which Douglas purported to exercise was such as, under the constitution of the company, he might possess, and "that is enough for a person dealing with him *bonâ fide*." *Biggerstaff* v. *Rowatt's Wharf*, [1896] 2 Ch. 93, at 102; *Premier Industrial Bank* v. *Carlton Man. Co.*, [1909] 1 K.B. 106, at 113-14. On the evidence I incline to think that the proper inference is that Douglas was in fact clothed with authority to bind the company by an agreement such as he made; but, if not, it is clear that under the statutory powers of the directors and the by-laws of the company provision was made for vesting such authority in an officer holding his position, and, as against third parties dealing with such an officer in good faith in regard to a matter in respect of which authority could be so conferred upon him, the company cannot be heard to deny his power to bind it: *Totterdell* v. *Fareham Blue Brick and Tile Co.*, L.R. 1 C.P. 674. (*b*) Nor does the absence of its corporate seal afford a defence to the company.

I am, with respect, unable to accept the view which prevailed in the Appellate Division that sec. 139 of the Ontario Companies Act (2 Geo. V. ch. 31) applies to the execution of contracts or other instruments. It deals only with the "authen-

CAN.

S.C.

McKNIGHT CONSTRUCTION v. VANSICKLER.

Anglin, J.

tication" of documents, not with formalities of execution. The substitution, in revision, of the more compendious word "document" for the particular words "writ, notice, order," formerly used, did not change the character of that for which the section provides, namely, authentication as distinguished from execution. The word "authentication" has the same meaning in the revised Act which it bore in the former Companies Act—the same meaning which it has in the corresponding section of the English Companies Consolidation Act of 1908—8 Edw. VII. ch. 69, sec. 117.

But the defendant company is a trading company.

"The general result of those cases," says Wightman, J., in *Henderson* v. *Australian Royal Mail Steam Navigation Co.*, 5 E. & B. 409, at p. 415,

seems to me to be that, whenever a contract is made with reference to the purposes of the incorporation, it may, if the corporation be a trading one, be enforced, though not under seal.

As put by Bovill, C.J., in *South of Ireland Colliery Co.* v. *Waddle*, L.R. 3 C.P. 463, 469.

Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants, and the like. But, in progress of time as new descriptions of corporations came into existence, the courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first, there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions which, if inconsistent with them, must I think be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited,to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument.

The contract there in question was for the purchase of machinery required for the company's undertaking. Here the contract is for the sale of unsuitable business premises in order to enable the company to acquire premises more commodious and better adapted for its purposes. Adopting the language of Erle,

J., in the *Henderson case*, 5 E. & B. 409, 415, "the contract was made for a purpose directly connected with the object of the incorporation." That able Judge added: "I think, myself, that it is most inexpedient that corporations should be able to hold out to persons dealing with them the semblance of a contract, and then repudiate it because not under seal."

The decision of the Court of Common Pleas, in the *South of Ireland Colliery Co.* v. *Waddle*, was affirmed in the Exchequer Chamber, L.R. 4 C.P. 617, where Cockburn, C.J., said that the Court had been "invited to re-introduce a relic of barbarous antiquity," and the reasoning of Bovill, C.J., was unqualifiedly approved. An observation of Chatterton, V.-C., in *Holmes* v. *Trench*, [1898] 1 Ir. Rep. 319, at p. 333, cited by Clute, J.:—

> It is true that a corporation may contract without seal for the purchase or sale of property necessary for carrying on the business for which the corporation was created.

is directly in point, and, although merely a dictum, is in accord with the tendency of modern decisions relating to the contracts of trading corporations and within the principle on which those decisions rest.

The defences set up in this action are purely technical and devoid of merit. It is gratifying to find that the law warrants our sustaining a conclusion which is in accord with the demands of substantial justice.

I would dismiss the appeal with costs.

Brodeur, J.

BRODEUR, J.:—I concur with my brother Duff.

Idington, J. (dissented)

IDINGTON, J., dissented. *Appeal dismissed.*

JOHNSON v. ROCHE.

N. S.
S. C.

Nova Scotia Supreme Court, Sir Charles Townshend, C.J., Graham, E.J., Russell, Longley and Drysdale, JJ. March 9, 1915.

1. DAMAGES (§ III A1—140)—MEASURE OF—BREACH OF CONTRACT FOR SALE OF COMPANY SHARES—ESTIMATION OF VALUE.

Where no proof is available as to whether company shares have a market value, the damages for breach of a contract to deliver such shares may be assessed by reference to their intrinsic value ascertained from the value of the corporate assets and the amount of the company's liability.

[*Crichfield* v. *Julia*, 147 Fed. Rep. (U.S.) 65, referred to.]

Statement

APPEAL from judgment of Ritchie, J.

H. Mellish, K.C., and *E. P. Allison*, K.C., for plaintiff, appellant.

J. L. Ralston, K.C., for defendant, respondent.

N. S.

S. C.

JOHNSON v. ROCHE.

Graham, E.J.

SIR CHARLES TOWNSHEND, C.J., concurred with GRAHAM, E.J.

GRAHAM, E.J.:—This is an action for damages for breach of a contract made between the plaintiff's husband, William H. Johnson, and the defendant, afterwards acquired by the plaintiff. This is the agreement:—

It is hereby agreed by and between William H. Johnson, of Halifax, in the county of Halifax, of the first part, and William Roche, of Halifax aforesaid, of the second part: That the party of the first part agrees to sell and the party of the second part agrees to purchase four square miles of coal lands at Chimney Corner, in the county of Inverness, Nova Scotia now held by the party of the first part under leases numbers 222, 223, 224, and 225, from the Government of Nova Scotia, and which were recently under option of purchase to Mr. E. L. Thorne, and in part held by the party of the first part, under option of purchase from S. George Cook, at present of Sydney, for the price of $11,000 in cash and $17,000 of common stock of the Margaree Coal and Railway Co., Ltd., said stock to be delivered within six months from the date hereof. The cash to be paid on the delivery of the good and sufficient transfers for said coal areas and leases from the party of the first part and his co-owner, S. G. Cook, to the party of the second part.

The cash part of the consideration was paid to William H. Johnson when the four leases were transferred by him to the defendant at the time of the contract.

Three thousand dollars of the shares were assigned by Johnson to one Cook, and the balance alone of the shares forms the subject of this action.

The learned Judge has found that there was a breach of the contract by the defendant, and he gave a judgment for the plaintiff, but, when he came to assess the damages, he assessed them at the sum of one dollar, and his reasons for that are as follows:—

The remaining question is as to damages, and here the burden is on the plaintiff to satisfy me as to what his damages are. This has not been done. I am not satisfied from the evidence that the plaintiff has sustained any damages by the non-delivery of the stock other than nominal damages. The damages to which the plaintiff is entitled depend upon the value of the common stock of the company, which has never been organized and in which no stock has been issued. I must find out the value of the shares before I can assess damages, and it is impossible, so far as I can see, for me to ascertain whether the value of the shares when issued would be *nil* or par or above or below par. . . . I do not give the plaintiff damages because I do not know upon what principle I can assess them, and I am not justified in making the defendant pay damages unless I do it upon some definite principle. It has been held that a Judge, in some cases, may make a guess at the damages, but I have no material upon which I could make a reasonable guess. The plaintiff will have judgment for one dollar by way of nominal damages and his costs.

Now, in my opinion, and with the greatest deference, if, in summing up to a jury the question of damages in this action, any such language had been used, it would have constituted misdirection, and, as he was trying it without a jury, he misdirected himself.

And, first, I am going to cite a few cases in which the difficulties for want of rules or principles to guide a Judge in assessing damages were really very considerable, far beyond the difficulties we have here.

I cite those cases to shew that the common law Judges have not hesitated merely because there were difficulties to assess damages or to help juries to assess damages and not because they are cases about shares not then issued or were ever offered in a market.

In *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, the difficulty of assessing damages in the case was dealt with. The head note is as follows:—

> Where by contract a man has a right to belong to a limited class of competitors for a prize, a breach of that contract by reason of which he is prevented from continuing a member of the class, and is thereby deprived of all chance of obtaining the prize, is a breach in respect to which he may be entitled to recover substantial and not merely nominal damages. The existence of a contingency which is dependent on the volition of a third person does not necessarily render the damages for a breach of contract incapable of assessment.

I may add there were 50 persons in all from which the selection was to be made and 12 prizes, but graded and different in value.

Vaughan Williams, L.J., at p. 792, after pointing out that at first no rules were laid down by the Courts to guide juries in the assessment of damages for breach of contract, but, during the period between the reigns of Queen Elizabeth and Queen Victoria, rule after rule was suggested by way of advice to juries, says:—

> But from first to last there were, as there are now, many cases in which it was difficult to apply definite rules. In the case of a breach of contract for the delivery of goods, the damages are usually supplied by there being a market. . . . Sometimes, however, there is no market for the particular class of goods, but no one has ever suggested that, because there is no market, there are no damages. In such case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract. . . . It is true that no market can be said to exist. None of the 50 competitors could have gone into the

N. S.

S. C.

JOHNSON v. ROCHE.

Graham, E.J.

market and sold her right. Her right was a personal right and incapable of transfer. But a jury might well take the view that such a right, if it could have been transferred, would have been of such a value that everyone would recognize that a good price could have been obtained for it.

Fletcher Moulton, L.J., as he then was, says (794):—

The common law courts never enforced contracts specifically as was done in equity. If a contract was broken, the common law held that an adequate solution was to be found in a pecuniary sum, that is, in the damages assessed by a jury. But there is no other universal principle as to the amount of damages than that it is the aim of the law to ensure that a person whose contract has been broken shall be placed as near as possible in the same position as if it had not. The assessment is some times a matter of great difficulty. . . . Then the learned counsel takes up a more hopeful position. He says the damages are difficult to assess because it is impossible to say that the plaintiff would have obtained any prize. . . . Is expulsion from a limited class of competitors an injury? To my mind there can only be one answer to that question: It is an injury, and may be a very substantial one. Therefore, the plaintiff starts with an unchallengeable case of injury, and the damages given in respect of it should be equivalent to the loss. But it is said the damages cannot be arrived at because it is impossible to estimate the quantum of the reasonable probability of the plaintiff's being a prize winner. I think that when it is clear that there has been actual loss resulting from the breach of contract which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case. [Then he refers to markets.] But in most cases it may be said that there is no recognized measure of damages, and the jury must give what they think to be an adequate solatium under all the circumstances of the case. Is there any such rule as that, where the result of a contract depends on the volition of an independent party, the law shuts its eyes to the wrong and says that there are no damages. Such a rule, if it existed, would work great wrong.

The difficulty of estimating damages in the case of *Dominion Iron and Steel Co.* v. *Dominion Coal Co.*, 43 N.S.R. 77, was shewn by Russell, J., at 142-145.

That was a contract to furnish coal to the steel company suitable for the purposes mentioned in the contract, extending over a period of 99 years, and only a very short period had run. There was a provision at the end of every 5 years the rates might be revised by means of an arbitration. There was provision for a contingency, namely, that after 4 years the Coal company might supply slack coal of the same specification. Russell, J., thought that the difficulties in the way of assessing the damages for the future were insuperable, and he thought that a decree for specific performance was justified. But in the Privy Council this view was not upheld and a reference was ordered to ascertain the damages.

Another decision of our own Court deals with this subject: *Sweet* v. *Archibald*, 11 D.L.R. 570, 47 N.S.R. 35. It was the case of a person who had agreed with another to finance a milk company with a bank, and both of the latter were in rather critical circumstances. On a pay day for materials a number of cheques came in, and they were refused payment because the guarantor had suddenly recalled his cheque given by him to supply funds for this very purpose, and there was an insolvency brought about. On the strength of the case, *Chaplin* v. *Hicks*, already cited, the trial Judge assessed the damages at $4,000, and it was upheld by the Court. . . .

In my opinion, the damages for the breach of contract can be ascertained by a process of estimation and calculation, and it does not require, in order to estimate the actual value of those 2,877 shares, market quotations, for instance, or even the issue of the shares. That the actual or intrinsic value of the shares may be estimated by reference to the assets of the company and the surrounding circumstances.

In the case of *Moffitt* v. *Hereford*, 136 Mo. App. Rep. 573, the Court said:—

If the stock has not ascertainable market value, then the actual or intrinsic value must be taken as the basis. This value may depend on many facts and circumstances, such as the value of the property and assets owned; the dividends paid; the character and permanency of the business; the control of the stock, the management, the markets for articles produced, if a manufacturing concern, and other facts. The evidence would necessarily take a broad range, and would properly be admissible to prove any fact calculated to affect the value.

In *Crichfield* v. *Julia*, 147 Fed. Rep. 65, the Court said:—

The general rule, as stated by the Court below, is that the plaintiff is entitled to recover what would have been the market value of such preference stock if it had been issued. If there be no market value, then the question is as to what would have been its actual value. The question, therefore, for the jury to determine here was what would have been the real or intrinsic value of this stock in view of the proved assets of the corporation. If the property to be delivered has no market value, its real value is to be ascertained by such elements of value as are attainable. Where no proof is available as to whether stock has market value, intrinsic value ascertained from value of corporate assets and amount of liabilities may be taken as the basis for the assessment of damages. In such a case it is perfectly competent to resort to other modes of proof to establish its actual value, and this may very properly be done by proof of its dividend earning capacity, the value of the assets of the corporation . . . in the absence of actual sales, the market value is presumptively the par value (case cited). In the absence of better evidence, the market value

N. S.

S. C.

JOHNSON v. ROCHE.

Graham, E.J.

of all property of the company may be shewn with the view to arriving at the proportionate value of the shares in controversy.

I shall refer to this case again. I also refer to *Storrow* v. *Texas Co.*, 87 Fed. Rep. 616; *Henry* v. *North American R. Con. Co.*, 158 Fed. Rep. 81; *Murray* v. *Stanton*, 99 Mass. 349; *Dyer* v. *Rich*, 1 Met. 192; *Industrial Co.* v. *Todd*, 150 N.J. 232; and the case of *Peek* v. *Derry*, 37 Ch.D. at 541, Cotton, L.J.

I think, in this country, it is not difficult to estimate the par value of these 48 coal areas, called the Chimney Corner mine.

An expert was examined for the plaintiff, who says he found two seams—one total 6 feet 1 inch of coal in thickness, another total of about 5.11 or 6 feet of coal. Another smaller one not taken into the estimate as not workable.

When the defendant spoke of the quality of the 1,000 tons of coal taken from the large seam as the very best of coal, I think there could not be a higher testimonial, because of all practical extensive coal dealers in the country I would select him as the best judge.

There is evidence of Mr. McColl, the engineer, who had sold areas belonging to his father's estate in that locality to the Inverness Railway and Coal Co. in the year 1899, pointed out by him on the plan, and he says:—

Q. What was the value of the areas in that vicinity at that time, 1899? A. I would say about $5,000 or $6,000 per mile at the time we sold. I am referring largely of what I adjudged at the time. The value of an area at that time would vary from 50 to 100% difference. Q. Judging from your knowledge of the sales in this locality, what value per square mile of areas in this locality shewn on this plan. A. I would say $5,000 to $6,000.

Two of them were submarine areas. At that time there was not the railway that now exists to a port of shipment, which was built in 1901 to 1903, the Inverness Railway. And he says, and in this matter he would be an expert, that it would increase the value of the areas. He knew the areas 225 and 224. His valuation appeared to be estimated on single areas, but control of a group of areas on a seam or seams constituting a workable mine would be much more valuable.

I understand from the evidence that the cash which the group were asking for their property was the sum of $209,000 in cash and the 40,000 shares at £1. And I think that their property would be reasonably represented by that cash and those shares at their face value.

They were to receive paid-up shares, and the presumption would be that they would not be paying up in a property that was not reasonably worth the equivalent in money.

The transaction had to undergo the scrutiny of the people who would be taking shares, and, besides, the defendant was participating in the transactions, and he at least *primâ facie* was acting fairly with the proposed company and its future shareholders.

Take the coal areas alone, $209,000 in cash and 40,000 shares at the rate of £1 for 2,777 shares seems an inadequate price.

Then the business which it was proposed to do and the outlay necessary to bring the coal to market has to be considered. Already there had been expenditure in connection with the mine represented in the letter of January 12, 1911, and of November 1, 1911. This had increased the price they were asking to £64,000, instead of the $209,000 in cash.

Of course, the railway would be a large item. About 50 miles of railway would be necessary—46 miles and 4½ miles. But there were valuable concessions to the company in this respect. The Dominion Government was to give them $64,000 and the Provincial Government $4,000 per mile. The county of Richmond $1,000 per mile, in lieu of right of way through that county, and the county of Richmond had agreed to give them a free right of way in that county and land for terminals at Carribou Cove. About $10,000 had been spent on clearing the right of way and this was already borrowed.

I think, in estimating the prospects of this company, it would have been important to have ascertained the amount which the capitalists in England were offering. They did not conclude the negotiations, but they did make an offer, and for some reason the evidence was ruled out.

However, there was contained in the evidence a great deal of material from which an estimate could legitimately be made. The people were not very far apart, and there were very good prospects of its being floated. The defendant knew what he was speaking of. He had been in London, largely in connection with the business, between January and the latter part of March, 1910.

The defendant himself seems to have thought that the matter

N. S.
S. C.
JOHNSON
v.
ROCHE.
Graham, E.J.

was closed, for in a letter of February 22, 1912, addressed to the plaintiff's solicitor, he says:—

Dear Sir,—With respect to the shares for Mr. Johnson and another, the company offered to give him the amount of stock coming to him. He preferred to wait until the company formally issued the stock. The company is now floated and the stock will be issued at once.

But, as a fact, the shares were never issued. And the action was then brought June 20, 1912.

I must deal with the bonds. The company had power to borrow to the extent of £600,000, and, of course, there was a great deal of reference on the argument to that fact depreciating the value of the shares. In respect to that, in *Crichfield* v. *Julia*, 147 Fed. Reps., at p. 70, on the motion for the new trial, the Court said (the contract was for preferred stock) :—

Had the preferred stock been issued, it would have ranked below the $500,000 of bonds, but that $500,000 was all put into the property in building railroads, etc. Since the asphalt deposit, when developed, turned out to be a valuable one and the company a going concern, there is no reason to infer that the proceeds of the bonds was lost or seriously depreciated when invested there.

This company had not reached the stage when that could be predicated of it, but coal and a coal mine and a railway for it are well-known things in this country, and the circumstances here would put the project in such a position that a loan would be justified for building this railway and getting the coal to market. How much of a loan it will require and bear is for the prudent man to judge. Juries frequently hear that formula. How much of an investment can be made on the property.

There is an expression used in this case that I would refer to, and that is that the Margaree Co. was never organized. If that means it had no officers and the meaning of organization as applied to companies is that it has officers, I do not agree with the statement of the case. It had provisional directors, with president and secretary with ample powers "to transact such business as shall be necessary," as provided by sec. 3 of the special Act. It was, indeed, highly organized to do all that was necessary to acquire the property and issue the shares whenever they were subscribed. The defendant at least does not say it was not organized.

But if it means that the shares had not been subscribed, that is the only point, and one I am endeavouring to meet. The company was well enough organized to issue some shares to pay

preliminary expenses, to obtain valuable concessions from the government and legislature, and to do work so that its act and its concessions might not expire. And Mr. Morrison went across prepared to execute the bonds. It is not likely that, after its capital was raised, the same officers would remain, but that is a different thing.

Graham, E.J.

In my opinion, there was, when the shares had to be delivered to Johnson under the contract, and there still is, a reasonable probability that the property will be acquired; therefore, that the shares will be subscribed and also that they will be of substantial value. I think that, under the case of *Chaplin* v. *Hicks*, [1911] 2 K.B. 786, from which I have quoted, that this is all that it is necessary to shew to take it out of the category of cases in which there can only be nominal damages.

I have referred to some of the circumstances, but, on referring to the defendant's position in considering the probablities, he has more interest in the consummation of the project than all the others. He has not only a large interest in the mine, but he has advanced a large sum of money on the strength of that consummation. He controls the matter, although not a member of the company now. He does not surely mean that the members of this group, 28 of them his co-owners, as well as himself, are to have for their coal areas a price the stock proportion of which, 40,000 shares, is only to be of nominal value, or at the rate of a dollar to 2,877 shares. He is surely blowing hot on the other side of the Atlantic and cold on this side and in this case only.

In my opinion, the defendant's appeal should be allowed, the dollar damages struck out, and a reference to a referee ordered, as was done by the Judicial Committee in the *Dominion Steel Co.* case, already mentioned, to assess the damages, and as is done frequently by the Judges in this Court.

Russell, J.
Longley, J.

RUSSELL and LONGLEY, JJ., concurred.

Drysdale, J.

DRYSDALE, J.:—This is an appeal from the judgment of Ritchie, J., awarding plaintiff nominal damages only in respect to a breach of contract for the sale of certain coal areas in the county of Inverness. The contract was for the sale of four square miles of coal areas at Chimney Corner, for the price or sum of $11,000 in cash and $17,000 of the common stock of the

N. S.

S. C.

JOHNSON v. ROCHE.

Drysdale, J.

Margaree Coal and R. Co., Ltd., the stock to be delivered within 6 months from the date of the contract, the cash to be paid on delivery of transfers of the areas. The money was paid and transfers made, but no stock was or could be delivered by reason of the fact that the Margaree Co. was never organized. The contract was between plaintiff's husband and the defendant, both of whom were at the time interested in promoting the said company. The defendant, no doubt, did his best to promote and organize such a company, but time passed, and the result of persistent attempts to float and organize the intended company was a failure. The contract is a plain one, on its face, for the payment of so much money and the delivery of $17,000 of the common stock of the company that never came into existence. The trial Judge found a breach in the non-delivery of any such stock, but, for want of evidence as to the value of any such stock, felt obliged to award merely nominal damages. The plaintiff asserted an appeal on the question of damages, and claims an amount based on the par value of such stock. In support of this contention, counsel referred us to a number of American cases, which he kindly furnished by way of typewritten copies, reliance being placed on cases not in the library. I have examined these cases in detail, and I am obliged to say they do not support counsel's proposition or contention. The more attention I give to the American decisions on the question of the measure of damages for the refusal or failure to deliver corporate stocks or bonds, the nearer I am to agreement with an American writer who says that "The cases on this subject are in dire confusion." One general rule, however, runs through all the cases, namely, that the measure of damages is the actual value of the stock at some time, that is to say, either at the time it should have been delivered or the value of the stock at the time of demand or the highest value of the stock between the refusal to deliver and the time of trial. To recover an assessed damage for the failure to deliver such stock as was contracted for here, there must surely be some evidence touching value. I am contented to be guided by the English rule as to the measure of damages in such cases. It is stated in Mayne on Damages as follows:—

> Where there has been a contract to deliver fully paid-up shares, the damages will be the market value of the shares at the time at which they ought to have been delivered.

No attempt was made to place a value upon such stock and probably for a very good reason. The learned trial Judge thought that, in the absence of any evidence touching such value, he was obliged to treat it as merely nominal. In this I am of opinion he was right. I am asked, on this appeal, to assume the shares contracted for had some value and to assess such value. For aught I know from the case presented, they may be utterly valueless, and the burden was on plaintiff to establish value. This was not done and I refuse to speculate. I defer to the majority of my brethren as to the proper order to be made at this stage. It seems equitable that further evidence should be taken on the question of value, and I agree to a reference for the further taking of evidence and a further hearing on the point and a finding therein. *Appeal allowed.*

LOSIER v. MALLAY.

New Brunswick Supreme Court, McLeod, C.J., White and Grimmer, JJ. June 18, 1915.

1. SALE (§ I B—9)—SALE OF BOAT—SUFFICIENCY OF DELIVERY.
Upon the sale of a boat, delivery thereof is inferred immediately upon payment of part of the purchase price, particularly where the buyer is permitted to use the boat without any objection by the seller.

2. SALE (§ III A—57)—SALE OF BOAT—MISREPRESENTATION OF AGE—EFFECT ON NOTE FOR PRICE.
Representing a boat to be only 8 years old, where it, in fact, appears to be 14 years old, does not establish fraud or misrepresentation in defence of an action on a promissory note given as part of the purchase price thereof.

Statement

APPEAL from judgment of McLatchy, J., in favour of plaintiff in an action on a promissory note. Affirmed.

Peter J. Hughes, for defendant, appellant.

J. Paul Byrne, for plaintiff, respondent.

The judgment of the Court was delivered by

Grimmer, J.

GRIMMER, J.:—This action was tried at the Gloucester County Court in November last before McLatchy, J., without a jury, and was brought to recover the principal and interest due on a promissory note made July 2, 1912, by the defendant in favour of the plaintiff, and judgment was given for the plaintiff. From this judgment the defendant now appeals and moves to have a verdict entered for the defendant or for a new trial, on the grounds that the note was given without consideration, and was also obtained by fraud and misrepresentation.

The facts are not involved and are substantially as follows:

N. B.

S. C.

LOSIER v. MALLAY.

Grimmer, J.

The plaintiff was the owner of a fishing boat equipped with sails and nets, which he wished to sell. Being informed the defendant wished to purchase a boat, he got into communication with him, and finally by arrangement took the boat to a wharf near the defendant's residence where it could be seen by the defendant. The price asked for the boat and its outfit was $75, and after the defendant and his son had viewed and examined it, and every reasonable opportunity appears to have been given for this purpose, he, the defendant, bought it, paying the plaintiff $29 in cash, and giving the note sued for ($46) to complete the purchase, and thereupon took delivery and possession of the boat and outfit. The following day, or soon after the purchase, the defendant took the plaintiff to his home, which was some thirty miles away, using the boat for the purpose, and thus had an opportunity of thoroughly trying it out, as it is stated there was a heavy wind blowing at the time. The date of the sale and the making of the note in action was July 2, 1912, and the note was made payable thirteen months after date. The first ground of appeal, as it was of defence on the trial, is want of consideration for the making of the note.

Upon this ground the defendant cannot succeed, as there can be no doubt of his purchase of the boat, of the delivery of the same to him, and further that without any objection or protest he used the boat in his business for more than two years before action brought, and at time of trial still owned it. It therefore cannot be successfully contended there was no consideration for the note: *McGregor* v. *Harris* (1891), 30 N.B.R. 456.

The second ground of appeal is that the note was obtained by fraud and misrepresentation. It is alleged on the part of the defendant that the plaintiff represented the boat to be only eight years old, and that it was agreed between the parties, in case it was found to be more than 8 years old, the plaintiff should allow the defendant $10 off the price of same for each year it was over that age. This the plaintiff distinctly and positively denies, though it was found by the trial Judge the boat was about 14 years old at the time of sale, and that the plaintiff had stated it was 8 years old, but that the defendant did not rely upon this statement in making the purchase, in that he sought to protect himself by the agreement referred to against the age of the boat. He also found upon the evidence produced before him that the

N. B.

S. C.

LOSIER v. MALLAY.

Grimmer, J.

defence of fraud and misrepresentation had not been established, and accordingly having decided that the sale was not fraudulent the plaintiff is entitled to maintain his verdict, and it must not be disturbed, the defendant's only remedy (if any) being by action for breach of agreement: *Little* v. *Johnson* (1842), 3 N.B.R. 496; *Clark* v. *Lazarus* (1840), 2 M. & G. 167; *Trickey* v. *Larne* (1840), 6 M. & W. 278; *Warwick* v. *Nairn* (1855), 10 Ex. 762; *Horsfall* v. *Thomas* (1862), 31 L.J., Ex. 322. *Appeal dismissed,*

COFFIN v. GILLIES.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. June 24, 1915.

1. SALE (§ II C—37)—SALE OF ANIMALS—STIPULATION AS TO BREED—MIXED BREEDS.

An agreement stipulating the sale of foxes "purchased by the vendor from C. Dalton and W. R. Oulton in 1911," does not entitle the buyer to demand the delivery of foxes of the Dalton breed alone.

[*Coffin v. Gillies*, 7 O.W.N. 354, reversing 6 O.W.N. 643, affirmed.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 7 O.W.N. 354, reversing the judgment at the trial in favour of the plaintiff, 6 O.W.N. 643.

This action was brought by the plaintiff for damages for breach of an agreement to deliver two silver-black fox whelps of the litter of 1913, the offspring of Dalton and Oulton stock owned by the defendant. The agreement was reduced to writing, and the material parts are as follows:—

The vendor (defendant) agrees to sell to the vendee (plaintiff), and the vendee agrees to purchase from the vendor (2) black foxes—silver tips—male and female whelps in 1913 on the ranch of the vendor in the Township of Fitzroy, County of Carleton, in Ontario, near the Town of Arnprior—the said foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair selected by the vendor at or for the price or sum of $12,000, and on the terms and conditions hereinafter contained.

The agreement also further provided that 10% of the purchase price was to be paid on the execution of the agreement, and the balance on or before the 10th September, 1913, delivery f.o.b. Arnprior, title and ownership to remain in the vendor until the whole of the purchase money is fully paid. Clause 4 was as follows:—

In case the vendor shall be unable by reason of any unforeseen occurrence or accident to deliver the said foxes at the time hereinbefore mentioned, deposit of 10% of the purchase money shall be returned forthwith upon said occurrence or accident rendering the vendor unable to make delivery as aforesaid to the vendee, and this agreement shall *ipso facto* be cancelled and rendered null and void.

CAN.
S. C.
COFFIN
v.
GILLIES.
Statement

At the time of entering into this agreement the vendor had a pair of black foxes, silver tips, purchased from Charles Dalton in 1911, which he had interbred, and which had a litter of four or five pups, and also a pair purchased in the same year from W. R. Oulton, which he had interbred, and which had a litter at this time of six—five males and one female. The defendant says that he selected the female of the Oulton and one of the Dalton males to answer the plaintiff's contract. All the Oulton litter died, but there was a pair, male and female, of the Dalton litter which the plaintiff was willing to take in performance of the contract. The defendant refused to deliver this pair under the contract, at first placing his refusal upon the ground that the plaintiff had only a third option, and that one J. W. Jones had the first right to a pair from the litters. The contract is silent as to options. The defendant finally took the position, by letter of July 9, 1913, probably after having had legal advice, a position which has been maintained ever since, that the agreement intended that the pair should be selected one from each litter, and, as the Oulton litter had all died, he was relieved from his contract under clause 4 thereof. The plaintiff, on the other hand, contended that a pair from one litter or from each litter would satisfy the contract, and that he was willing to take the Dalton pair, that the defendant had broken his contract in refusing to deliver this pair, that the intention in inserting the two strains was for the sake of protecting himself from being supplied with inferior stock, Dalton and Oulton being well-known on Prince Edward Island as pioneers in the fox industry, and had practised selective breeding to improve the type for a longer period than any other breeder, and their breeds of foxes were much sought after and had the highest value.

The case came on for trial before Latchford, J., without a jury, at Toronto, on June 26, 1914, when he gave judgment for the plaintiff for $1,750, with costs. The defendant thereupon appealed to the Appellate Division of the Supreme Court of Ontario (Mulock, C.J., Clute, Riddell, and Sutherland, JJ.), and judgment was given on the appeal on October 28, 1914, unanimously allowing it with costs and dismissing the action with costs.

From the judgment the plaintiff appealed to the Supreme Court of Canada.

CAN.

S. C.

COFFIN v. GILLIES.

D. C. Ross for the appellant.

W. M. Douglas, K.C., and *J. E. Thompson*, for the respondent.

SIR CHARLES FITZPATRICK, C.J.:—I would dismiss this appeal.

Idington, J.

IDINGTON, J.:—The determining question raised herein must turn upon and be answered by the construction given that which forms the material part of a contract between the parties hereto, and is as follows:—

> Witnesseth that the vendor agrees to sell to the vendee and the vendee agrees to purchase fron the vendor two (2) black foxes—silver tips—male and female, whelped in 1913 on the ranch of the vendor in the Township of Fitzroy in the County of Carleton and Province aforesaid, near the said Town of Arnprior, the said young foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair, selected by the vendor at or for the price or sum of twelve thousand dollars, and on the terms and conditions hereinafter contained, that is to say:—

It appears to me that, having regard to what the parties were concerned about in framing the contract and the plain meaning of the language used, that

> the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton,

did not exist when the time came for fulfilment of the contract. It is not denied that the offspring of the Oulton litter died. It is neither alleged nor proven that the offspring of the Dalton litter could be described truthfully as in any way issue of the Oulton purchase specified.

The contract provided for the event of the deaths which took place and thereby relieved the vendor.

The Appellate Division of the Supreme Court of Ontario has correctly construed the contract and this appeal should be dismissed with costs.

Anglin, J.

ANGLIN, J.:—The description of the pair of foxes sold, in my opinion, could be satisfied either by two foxes each having one parent of the Dalton strain and the other of the Oulton strain, or by two foxes one having parents both of the Dalton strain and the other parents both of the Oulton strain. But it could not be satisfied by the delivery of two Dalton foxes without any Oulton blood in either. Counsel for the plaintiff stated, on his behalf, at the opening of the trial, that cross-breeding of the defendant's foxes of the Dalton strain with his foxes of the Oulton strain had not been contemplated by the parties. No doubt it

CAN.
S. C.
COFFIN
v.
GILLIES.
Anglin, J.

was because this admission was made that evidence was not given to shew that the defendant's pair of Dalton foxes had already been bred together and that his pair of Oulton foxes had likewise been so bred, as the facts were, and that these facts were known to the purchaser. At all events, it would seem to follow from the admission made by counsel that the construction put upon the contract by the Appellate Division was the only one of which it was, under the circumstances, susceptible.

The appeal fails and should be dismissed with costs.

Davies, J.
Duff, J. (dissenting)

DAVIES and DUFF, JJ., dissented. *Appeal dismissed.*

N. B.
S. C.

FLOYD v. HANSON.

New Brunswick Supreme Court, Chancery Division, White, J. May 25, 1915.

1. SPECIFIC PERFORMANCE (§ I E1—30)—CONTRACT FOR SALE OF LAND—MISDESCRIPTION OF QUANTUM—EFFECT ON REMEDY.
A contract of sale which describes the land as having a "frontage of approximately 73 feet on Queen Street," which, in fact, only had a frontage of 70 feet, constitutes a misdescription materially affecting the value of the subject matter, of which the Court will not decree specific performance.

2. VENDOR AND PURCHASER (§ I C—12)—POSSESSORY TITLE—WHAT IS.
A documentary title dating from a quit claim deed made in 1842, the land having been granted in 1784, without any documentary title connecting the original owner with the grantor in the deed of 1872, does not establish a possessory title within the meaning of a contract providing "a title by possession shall not be deemed a satisfactory title unless the purchaser so elects."

Statement

ACTION for specific performance of contract for sale of land. Decree refused.

E. T. C. Knowles, for plaintiff.

E. P. Raymond, for defendant.

White, J.

WHITE, J.:—This action is brought to obtain the specific performance of contract for the sale of a lot of land situate on the north-east corner formed by the intersection of Queen and Carmarthen streets in the city of St. John.

The contract sought to be enforced bears date May 16, 1914, is under seal, and is therein expressed to be made by the plaintiff as vendor and by the defendant as purchaser. It sets forth that the vendor agrees to sell and the purchaser agrees to buy—all that certain freehold property situate on the north-east corner of Queen and Carmarthen Sts. and having a frontage on Queen St. of approximately seventy-three (73) feet, extending at right angles along Carmarthen St. for a distance of about 60 ft., together with all buildings and improvements thereon, for the price or sum of $7,375, to be paid in the manner following, that is to say: $350 before the delivery of this agreement, $2,525 in cash on delivery of the deed of said property as hereinafter provided; $4,500

by taking the said property subject to the following mortgages, which are now liens thereon—mortgage for $3,500, due 5 years from September 28, 1912, interest at 7 per cent.; mortgage for $1,000, due 4 years, dated March 15, 1913, interest at 7 per cent.. payment of which the purchaser shall assume when the deed is delivered.

The contract further contains *inter alia* the following provisions:—

(*b*) The deed shall be prepared by the vendor and at his expense in form satisfactory to the purchaser or her solicitor and shall be duly executed by the vendor and acknowledged so as to convey to the purchaser the fee simple of said premises free of all incumbrances except as herein stated, said deed shall be delivered by the vendor to the purchaser upon receipt of said payments at the office of Allison & Thomas at .....o'clock on .....191... (*e*) Within 20 days from the date hereof the purchaser or her solicitor shall furnish in writing any objections she may have to the title of said property and the vendor shall then have a further period of 10 days to remove same, and if the vendor is unable or unwilling to remove any valid objection to the title within said time the purchaser may, at her option, accept the title and specifically enforce this contract or not, in which last-mentioned case the vendor shall repay to the purchaser all moneys paid hereunder and all parties shall be relieved from all liability hereunder. (*f*) For the purposes of this agreement a title by possession shall not be deemed a satisfactory title unless the purchaser so elects.

The defendant by her pleadings sets up a number of defences, and upon the trial of the cause by amendment added as an additional defence that the defendant was induced to enter into the contract by a material misrepresentation of the vendor that the lot in question has a frontage on Queen street of 73 feet, whereas the plaintiff owns and is entitled to convey at most only a lot with a frontage of 70 feet on said Queen street.

From the evidence it appears that the plaintiff in the spring of 1914 listed the property in question for sale with Allison & Thomas, a firm of real estate brokers in St. John. A card setting forth particulars as to the location, size and character of the property to be sold was prepared, and upon this was endorsed the following agreement, which was signed by the plaintiff:—

In consideration of the listing for sale of my property described hereon, I hereby grant unto Allison & Thomas the exclusive right to offer, sell and contract for the usual conveyances of said property on the terms and conditions stated hereon, or that may hereafter be assented to by me. I further agree to contribute my efforts to induce such sale, and if a sale of it or any portion thereof is contracted or subsequently made through information obtained in any way through said agencies, I agree to pay Allison & Thomas a commission of 5 per cent. I, however, reserve the right to withdraw said property by giving 10 days' notice in writing to Allison & Thomas. (Signed) H. M. FLOYD,
Address, Fredericton Jct.

N. B.

S. C.

FLOYD v. HANSON.

White, J.

On the reverse side of the card among other particulars as to the lot, the size thereof is given in these words: "Size lot, 73 Queen street, 60." Subsequently a second card was signed by the plaintiff in which the price at which Allison & Thomas were authorized to sell was reduced from $7.150 net to $7,100. No other change was by this second card made in the description and particulars contained in the card first mentioned.

The defendant, during her negotiations with Allison & Thomas for the purchase of the land in question, and prior to signing the agreement for purchase, was given by them for her information a document partly printed and partly in writing (that is to say, a printed form with blanks filled in by handwriting) setting forth particulars of the property. In this last-mentioned document the size of the lot is specified in these words: "Size of lot 73 Queen X 60."

It appears that upon the land in question there is a building having a frontage extending along the north side of Queen street eastwardly 69 feet 6 inches, from the corner at the intersection of Queen by Carmarthen street. Between the eastern end of this building and the building on the next adjoining lot to the east is an open strip of ground about 3 feet 3 inches wide, running back the whole width of the plaintiff's building. The defendant testifies that when she signed the agreement to purchase she understood and believed that this strip formed part of the land she was purchasing, and that had she known it did not form part of the land she would not have signed the agreement. She says that the representation made to her by Allison & Thomas on the part of the plaintiff, and her consequent belief that this strip of land was an alleyway forming part of the lot, was one of the inducements which led her to purchase; and that she considered this strip of land to be important because its possession would enable her to light two small tenements which she contemplated constructing in the eastern end of the building; moreover, it would enable the owner of the lot to erect staging there to enable repairs to be made when necessary on that end of the building. It would also afford access to the rear of the vacant part of that portion of the land lying north of the building and fronting on Carmarthen street.

It is not claimed by the plaintiff that his land extends along Queen street beyond 70 feet. The registered deed from C. Ernest

Wilson to the plaintiff, dated May 23, 1912, under which the plaintiff acquired title to the land in question, described the land thereby conveyed as

> Beginning at the south-east corner of Queen and Carmarthen Streets, thence eastwardly along the northern line of Queen Street 70 feet more or less to the western line of property owned by the estate of U. S. Normansell, deceased.

The deeds which the plaintiff tendered to the defendant as being in fulfillment of his contract follow this description.

Although the evidence of the plaintiff was in some degree at variance with that of Mr. Allison (of Allison & Thomas), as to the conversation which passed between them prior to his signing the contract, there is no such conflict in the testimony of these two witnesses as would lead me to find otherwise than that the defendant was mislead by the information she received from Allison & Thomas as to the length of frontage which the lot had on Queen street. The listing card signed by the plaintiff and filed with Allison & Thomas, as stated, and the document mentioned as handed by that firm to the defendant, giving her particulars as to the property, both state that the Queen street frontage of the lot is 73 feet. While I do not find there was any fraud on the part of the plaintiff or his agents, I cannot but find upon the evidence that there was a mis-description, materially affecting the value of the subject matter of the contract, by which the defendant was mislead and induced to enter into the agreement to purchase. Indeed, I think the statement in the contract itself that the lot to be conveyed has a frontage on Queen street of approximately 73 feet is one that is liable to mislead. "Approximately," is defined in the Century dictionary as "nearly approaching accuracy or correctness; nearly precise, perfect, or complete." The description of a frontage of 70 feet as one of 73 feet can hardly be deemed approximately correct within that definition.

For these reasons I do not think that specific performance of the contract should be decreed. For the same reasons, I think that the counterclaim put in by the defendant to recover the $350 paid on account of the purchase money should be allowed; it being admitted by the pleadings that that sum was paid by the defendant to Allison & Thomas at, or prior to, the execution of the contract, as a first instalment on the purchase price.

Having reached these conclusions, it is unnecessary for me to

N. B.

S. C.

FLOYD v. HANSON.

White, J.

discuss the other defences set up by the defendant, save in so far as is requisite to explain why I make no order allowing the defendant her costs of suit. The defendant, in addition to other defences, some of which she failed to establish, pleaded that "the plaintiff's title to the said property agreed to be sold is a title by possession only." In order to meet this defence the plaintiff was forced to procure and put in evidence certified copies of a number of registered deeds and of other instruments. By means of these certified copies and other testimony adduced he established a chain of documentary title back to 1842. The first link in this chain is a quit claim deed dated April 22, 1842, and registered August 4, 1851, from Robert McKelvey to Charles Whitney, conveying, or at least purporting to convey, the land in question. It was proved by the plaintiffs that lots nos. 968 and 969, of which the land in question forms part, were granted by the Crown in 1784. But there are no links in the chain of documentary title connecting the grantees of the Crown with Robert McKelvey, the grantor in the deed of 1842.

Upon this evidence which I have referred to the defendant founds her contention that the title shewn by the plaintiff is one of possession only, within the clause of the contract which provides that a title by possession should not be deemed to be a satisfactory title.

I do not agree with that contention. I do not think that a documentary title which is traced back to a recorded deed made over seventy years ago can be deemed to be merely a "title by possession" within the meaning of those words as used in the contract. At common law prior to the English statute, 3 and 4 William IV. ch. 27, as pointed out in Sugden on Vendors, a purchaser had the right to require title commencing at least 60 years previously to the time of his purchase. After the passage of that statute, it was contended in *Cooper* v. *Emery*, 1 Phil. 388, that, inasmuch as this new statute of Limitations shortened the period requisite to acquire title by possession, the sixty-year period required to establish the vendor's title should be correspondingly shortened. But the Court held that the statute did not introduce any new rule in that respect; that the rule rested upon other grounds as well as upon the Statute of Limitations. Subsequently, by statute 37 and 38 Vict. ch. 78 (the Vendor and Purchaser Act, Eng.), this sixty-year period was reduced to forty

years. That the rule requiring title to be traced back forty years does not apply where, by the contract of sale, the vendor is not bound to shew any title beyond that of adverse possession, appears, I think, from *Games* v. *Bonnor*, 54 L.J.Ch. 517. I quote from the headnote of that case, which I think correctly epitomizes the judgment of the Court of Appeal:—

A vendor at the date of the contract relied on a title under a deed, which was subsequently shewn to be no title at all. After the date of the contract a twelve years' possessory title under the Statute of Limitations accrued. The Court, holding such title sufficiently made out or admitted by the purchaser, forced it upon the purchaser.

It is against being required to accept such a title by mere adverse possession that I think the clause in the agreement providing that a title by possession shall not be deemed satisfactory, is directed. But even if I am wrong in my interpretation of the contract upon this point, it would not affect the fact that, in my judgment, the defendant, if she intended to rely upon the misrepresentation set up by her as a defence at the trial, should have given the plaintiff notice of that fact as soon as she became aware of the misrepresentation. Had she done so, it is not only possible, but, assuming the plaintiff to be well advised, I think it very probable that he would not have brought this case to trial. She could not plead this defence in her statement of defence because she says that she did not discover that she had been mislead until after the suit was brought. But when she did make that discovery she should not have waited till the trial before informing the plaintiff that she refused to complete the purchase on that ground. The only reason she gave the plaintiff, prior to the trial, for so refusing, was that the plaintiff's title was only possessory.

It is only upon the defence raised by the defendant for the first time at the trial, that she has succeeded; and I therefore think there should be no costs of suit to either party.

Having stated that the plaintiff traced a documentary title back to 1842, I ought, perhaps, to add this further observation. It appears that the title to an undivided portion of the property in question became vested in Sally F. Whitney. The plaintiff sought to shew that this title passed to one of his predecessors in title by the last will of Sally F. Whitney. To prove such last will Mr. McInerney, the Registrar of Probates, was called, and produced the will of Sally F. Whitney, with the record of probate

N. B.

S. C.

FLOYD v. HANSON.

White, J.

of the same, and copies of the will and probate were put in evidence and are exhibits in the case. Objection was made that the will, having been proved in common form only, could not in this action, which involves the title to land, be established by the proof given. But Mr. Raymond admitted that if the plaintiff had gone a step further, and put on record in the office of the Registrar of Deeds a certified copy as provided by the Evidence Act, sec. 65, then a certified copy of that registry would be admissible here. So much being conceded, it follows, of course, that if time were given to the plaintiff to register a certified copy of the will under that section, he could have proved what he sought to establish by a certified copy of such registry.

Under the authorities I think I could, if necessary, have power to direct a reference as to the plaintiff's title, thus affording the plaintiff opportunity to make good the defect, if such it be, in his evidence of title from Sally F. Whitney.

Under these circumstances I accepted the proof of the will made, as sufficient for the purposes of this suit, where the question is whether or not the plaintiff could shew a sufficient title to entitle him to the decree asked for.

I therefore adjudge and order that specific performance by the defendant of the contract for sale ought not to be, and will not be, granted to the plaintiff; and I further adjudge and order that the plaintiff do forthwith upon the settlement and entry of the claim herein repay to the defendant or to her solicitor the sum of $350 paid by the defendant as a first instalment on the purchase price of said lot. There will be no costs to either party.

Decree refused.

ONT.

S. C.

ROSE v. MAHONEY.

Ontario Supreme Court, Appellate Division, Falconbridge, C.J.K.B., Magee, J.A., and Latchford and Kelly JJ. July 2, 1915.

1. BROKERS (§ II B 1—10)—REAL ESTATE AGENT—EMPLOYMENT BY SOLICITOR —RIGHT TO COMMISSIONS—PROMISE BY PRINCIPAL—MISTAKE.

A solicitor, with whom land is placed for sale, has no implied authority to employ a broker to effect the sale, and, if acting under the solicitor's directions, the principal is led to sign a contract of sale containing a promise by the principal to pay the broker his commissions on the sale, without having his attention directed to it, the principal will not be bound by such promise.

[*Foster* v. *Mackinnon*, L.R. 4 C.P. 704; *Lewis* v. *Clay*, 67 L.J.Q.B. 224; *Carlisle &c. Co.* v. *Bragg* [1911], 1 K.B. 489, followed].

APPEAL from the judgment of the Senior Judge of the County of York in favour of the plaintiff in an action to recover a commission on the sale of land. Reversed.

Edward Meek, K.C., for appellants.

E. R. Sugarman, for plaintiff, respondent.

KELLY, J.:—Appeal from the judgment of the Senior Judge of the County Court of the County of York in favour of the plaintiff for $406.25 and costs, in an action for commission on a sale of real estate.

Unless the signing of the acceptance of the offer, in which was inserted the name of the plaintiff as the defendants' agent, and the promise to pay commission contained in the acceptance, preclude the defendants from denying liability, there is no ground upon which the judgment can be sustained. One cannot read the evidence without being convinced that the relationship which existed between the plaintiff and the defendants' solicitor, who drew the contract, was such that the solicitor was to share in the commission; or, rather, that any right the plaintiff might have to a commission or to share in it (apart from anything that may be deduced from the mention of the plaintiff's name in the offer and acceptance) is against the solicitor, and not against the defendants. There is no evidence that the defendants employed the plaintiff, or that their solicitor had any authority to appoint him as their agent, or to delegate to him or to any other person the authority given the solicitor to sell. There is positive evidence to the contrary. The trial Judge has found against the solicitor's statement that he had a half interest in the commission, and accepts the plaintiff's denial of that statement. He appears, however, to have overlooked the fact that, on the plaintiff's own evidence, he had in mind some possible right in the solicitor, when he says: "As Mr. Slattery gave me the offer of the deal, I suppose I would have given him something if I thought he was entitled to it." I think there is sufficient to indicate that the solicitor was interested in the commission.

But a more important element is that relating to the form of the offer and acceptance, in which are found the plaintiff's name as the agent and a promise by the defendants to pay him commission. I appreciate fully the importance to be attached

ONT.
S. C.
ROSE
v.
MAHONEY.
Kelly, J.

to the defendants having executed the document in that form, and the difficulty that confronts them when they seek to avoid the consequences of that act; but the conditions surrounding this transaction, and which are not to be regarded lightly, distinguish the present from those cases in which it is held that those signing cannot be relieved from liability.

The defendants had gone to their solicitor's office, where they discussed with him the proposed sale of their property and the price and terms on which they were willing to sell. The solicitor, not then having a contract prepared for their signature, promised to prepare it and send it to them for that purpose. No mention whatever was made of paying a commission, or that any agent was intervening, though the defendants admit that they were willing to pay a commission to the solicitor. They knew nothing of the plaintiff, and had no reason to believe or suspect that he or any person other than the solicitor would have anything to do with the transaction. Such a proposal was never brought to, and never entered, their minds. The solicitor prepared the offer and acceptance in the form in which they now appear; and, the purchaser having signed the offer, it was taken by the solicitor's clerk to the defendants' residence, where, their uncontradicted evidence is, the clerk made no mention whatever of the introduction into the document of the plaintiff's name, or that there was any understanding or suggestion for the payment of commission, or that the terms embodied in the documents were otherwise than as agreed upon with the solicitor, and which they expected to sign; and they then signed the acceptance. With respect to the recognition of the plaintiff as their agent and the promise to pay commission, their minds never went with their act; when they signed, they believed that they were signing what it had been arranged that they should sign and what they expected and had reason to expect the solicitor would send them for their signature, namely, an acceptance of an offer to purchase made by an intending purchaser on terms discussed and agreed upon with the solicitor and which he was instructed to embody in the contract or the offer. In the circumstances in which their signatures were procured, the defendants cannot be said to have been negligent,

ONT.

S. C.

ROSE v. MAHONEY.

Kelly, J.

if negligence were here material, which I very much doubt in view of what is laid down in *Carlisle and Cumberland Banking Co.* v. *Bragg*, [1911] 1 K.B. 489; and they clearly cannot be said to have intended to execute a document having any reference to payment of commission. It is a case of being misled as to the nature and character of what they were signing, in so far as it related to any recognition of the plaintiff as their agent or the assuming of a liability for payment of commission.

That they are not to be held liable under the conditions which present themselves is quite supported by authority: *Foster* v. *Mackinnon* (1869), L.R. 4 C.P. 704; *Lewis* v. *Clay* (1897), 67 L.J.Q.B. 224; *Carlisle and Cumberland Banking Co.* v. *Bragg*, cited above.

In my opinion, the appeal should be allowed and the trial judgment set aside, and judgment entered dismissing the action, with costs here and below.

Falconbridge, C.J.K.B., and Magee, J.A., concurred.

Falconbridge, C.J.K.B.
Magee, J.A.

Latchford, J.

LATCHFORD, J.:—There is no evidence, apart from the written agreement, of any employment of the plaintiff by the defendants. It is also clear that they gave no authority whatever to Mr. Slattery to employ him.

The agreement was presented to the defendants for signature by a clerk of their solicitor. The evidence is conclusive that it was not read or explained to them. They did, however, understand it to be an agreement for the sale of their property for a price which they were willing to accept; and they are bound by it as an agreement of sale. They were not informed that it provided for payment of a commission to the plaintiff, of whose existence even they had no knowledge. They trusted their solicitor; and he, through his agent and associate, the plaintiff, abused their confidence.

The judgment should be set aside with costs and judgment entered dismissing the action with costs.

Appeal allowed.

ALTA.

S. C.

RUDYK v. SHANDRO.

Alberta Supreme Court, Harvey C.J., Stuart and Beck, JJ. June 12, 1915.

1. MALICIOUS PROSECUTION (§ II A—10)—FORGERY—WANT OF PROBABLE CAUSE—PROSECUTION BY RIVAL CANDIDATE AT ELECTION.

A letter purporting to be written by the Attorney-General voicing the sentiment of a political party in indorsement of the candidature of the addressee at an election, the writing of which is denied by the alleged author, does not establish reasonable and probable cause for the belief that such letter had been forged by the addressee, in defence of an action for malicious prosecution for the forgery by a rival candidate.

2. MALICIOUS PROSECUTION (§ II A—10)—PROBABLE CAUSE—BELIEF.

Mere belief in a person's guilt, without ascertaining any reasonable grounds for its probabilities, does not justify a prosecution for the arrest of the accused person.

[*Hicks* v. *Faulkner*, 46 L.T. 127; Annotation in 1 D.L.R. 56, referred to.]

3. MALICIOUS PROSECUTION (§ II A—10)—MALICE—HOW INFERRED—IMPRISONMENT OF RIVAL CANDIDATE.

Where the principal object of a prosecution for forgery is to secure the imprisonment of the accused so as to prevent his participation at an election in which he is a rival candidate, malice will be inferred.

[*Wright* v. *Greenwood*, 1 W.R. 393, applied.]

4. TRIAL (§ II C 5—91*a*)—MALICIOUS PROSECUTION—PROBABLE CAUSE—QUESTIONS OF LAW AND FACT.

The question of reasonable and probable cause is one of law for the Court, but in order to decide that question the Court may properly ask the jury to decide the fact whether the defendant made reasonably careful enquiry.

[*Abrath* v. *North East R. Co.*, 11 App. Cas. 247, followed.]

5. DAMAGES (§ III G—152)—MALICIOUS PROSECUTION—RIVAL CANDIDATES AT ELECTION—EXCESSIVENESS.

An award of $1,200 damages in an action for malicious prosecution of a candidate for election to the Legislature, on a charge of forgery, prosecuted by a rival candidate, is not excessive.

Statement

APPEAL by defendant from judgment of Scott, J., 18 D.L.R. 641.

Frank Ford, K.C., for appellant.

A. F. Ewing, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J.:—On April 6, 1913, the defendant laid an information against the plaintiff in the following words:—

Who saith that Paul Rudyk, of Edmonton, Alberta, on or about April 13, 1913, at Edward, in the said province, did unlawfully forge a letter signed "C. W. Cross, Attorney-General of Alberta," or did have a letter in his possession alleged to have been signed by C. W. Cross, said letter if signed by C. W. Cross is a forgery, said C. W. Cross stating so; said C. W. Cross stated letter never signed by him.

On this information, the Justice of the Peace before whom it was sworn issued a warrant to apprehend and also a warrant to search for the letter "concealed on person of Paul Rudyk, at Whitford constituency . . . and to bring the same before me or some other Justice." On these warrants the plaintiff was arrested, and the letter was taken from him and he was taken

ALTA.

S. C.

RUDYK v. SHANDRO

Harvey, C.J.

before a Justice of the Peace at 3 o'clock in the morning and admitted to bail. The matter came before a Justice of the Peace two or three times, and finally the charge was dismissed, no one appearing at any time on behalf of the informant.

The plaintiff then brought this action, claiming damages for malicious prosecution. The trial came on before my brother Scott, who gave judgment in the plaintiff's favour for $1,200 damages. On this appeal, the defendant contends that he had reasonable and probable cause for the prosecution, and that, in any event, the damages are excessive.

The plaintiff and defendant were rival candidates for election to the legislature, though not of opposing political parties. The election was held on April 17, the day after the information and arrest, and the defendant was elected. The letter referred to in the information was dated March 25, and obtained by the plaintiff from the post-office on April 10, and its contents communicated to a meeting held the same day. The defendant learned of this the next day, but did not see the letter till the 13th, when it was read at a meeting at which he was present. The letter is addressed to the plaintiff and is marked "personal." It informs the plaintiff that, if he desires to have any appointments of Justices, notaries or commissioners made during the election, they will be attended to on receipt of a telegram, and wishes the plaintiff every success in the coming election.

The defendant was the regular convention candidate, while the plaintiff was an independent, and the former, therefore, was at a loss to understand why such a letter should be sent to his rival. The fact is, however, that the convention was not held till after the date of the letter. On the 15th the letter was again used by the plaintiff to shew that he had the support of the party in power, and the defendant believed it was likely to injure him in his candidacy. On the next day he telephoned to Mr. Cross, the Attorney-General. Mr. Cross, in his evidence, says that the defendant told him that the plaintiff had read a letter indorsing his candidature, and that he was certain at the time that he had not written to the plaintiff at all.

The defendant says that he explained to Mr. Cross what the letter stated and how it was used, and that Mr. Cross told him plaintiff had no such letter and that he had not written a letter of any kind to plaintiff in several years.

ALTA.
S. C.
RUDYK
v.
SHANDRO
Harvey, C.J.

On this information the defendant decided to arrest the plaintiff. The learned trial Judge finds that the defendant only described this letter to Mr. Cross as a letter endorsing the plaintiff's candidature, and that he ought to have more clearly explained it, and that he was not, therefore, entitled to rely on Mr. Cross's denial of its authority, because, if more fully described, Mr. Cross might have given a different answer.

I find it difficult to agree with the trial Judge in this. I think the letter was, in fact, correctly described, because its effect was clearly that of endorsing the plaintiff's candidature, but, apart from that, when the Attorney-General of the province told a candidate for election in support of the Attorney-General's party, that he had written no letter of any kind to the plaintiff, the defendant could not be expected, as a reasonable man, to doubt the Attorney-General's word, but, on the other hand, he was entitled to accept it, and, in consequence, would be justified in the belief that the letter was forged. But, even though the defendant had reasonable grounds for believing the letter was forged, unless he believed that the plaintiff himself forged the letter, they would not be probable grounds for a prosecution for forgery. The long-established rule has been that, to justify a prosecution, the prosecutor must have reasonable and probable cause.

As I look at it, that means that he must take the steps a reasonable man would take to ascertain the facts, and that then it must appear to him probable that the accused party is guilty. It is quite evident that, no matter how conclusive the evidence against the accused party might seem to another person, if the prosecutor himself knows that he himself or some other person is the guilty party, it cannot appear probable to him that the accused party is the guilty one. Similarly, if, for any other reason, he does not believe in the guilt of the accused, he has no probable cause for prosecuting him. It is, no doubt, in this view that it has been clearly laid down that a person who does not believe in the guilt of an innocent person has not reasonable and probable cause for his prosecution.

In addition to the authorities given by my brother Beck, his reasons in the case and there referred to in the annotation in 1 D.L.R. 56, I may refer to the case of *Shrosbery* v. *Osmaston*

(1877), 37 L.T. 792, in which this was distinctly held. In that case it is pointed out by Lindley, J. (p. 795), that if an officer, in the discharge of his duty, though not believing in the guilt of the accused, yet considers that, under the circumstances, he ought to prosecute, while not having reasonable and probable cause for his prosecution, he would still not be liable to an action for malicious prosecution, because of the absence of malice.

Whether the change from the expression "reasonable and probable grounds" to "reasonable or probable grounds," as now given in our Code, sec. 654, would have any effect, in any other respect, is not, I am of opinion, that it has none in this, because there would be a want of reasonable as well as probable cause in charging a person who was not believed to be guilty. The trial Judge makes no finding as to the belief of the defendant in the plaintiff's guilt. He says: "It may be that the defendant believed that the plaintiff had forged the letter, but that is not material." I gather from this that he does not intend to express any opinion as to the defendant's actual belief, but merely to state that, having found that there was not reasonable cause for the prosecution, then, no matter what the defendant believed, it would not strengthen his position. As in the view I have expressed his belief becomes a material fact, it is necessary to consider the evidence with respect to it.

In the examination-in-chief, defendant was asked by his own counsel:—Q. "Now, what belief had you as to Rudyk's guilt or innocence of the charge against him?" to which he answered, "I had full belief that I was right in laying the charge," and, in re-examination, he was asked, "When Mr. Cross told you that he had not written Rudyk a letter, what did you think as to the genuineness of the letter which Mr. Rudyk was using?" to which he answered, "I thought the way he spoke—I thought it was a forged letter or fixed up by somebody else."

His failure to answer the first plain question directly and the second answer leave much room to doubt his belief that the plaintiff had forged the letter. I was at first disposed to think that the second part of the information, though alleging no offence, was intended to allege the offence of uttering, but from the fact that a search warrant was desired and was obtained for the purpose of getting possession of the letter, I have come to the conclusion that that was the only purpose of the second

ALTA.

S. C.

RUDYK
v.
SHANDRO

Harvey, C.J.

part of the information, and that, therefore, for our present purpose, it charges forgery only. On cross-examination of the defendant, the following evidence appears:—

Q. If there had been any easier way of stopping him from using that letter, you would not have arrested him, would you? A. No sir. . . . Q. Now, you say you were figuring out how you could stop Rudyk from using that letter what other way did you figure out of trying to stop him? A. by having a search warrant and taking it away from him. Q. That was the only way that you thought you could stop him from using this letter? A. Yes. Q. And your object in having these warrants issued was to stop him from using that letter? A. Search warrants, yes. Q. Your object in laying this information, I suppose, was to stop him from using that letter? A. Yes. Q. The way in which he was using it? A. Yes. . . . Q. When he said he got it from the post office, did you doubt that? A. No, I did not doubt that, but we had friends here (*i.e.* in Edmonton) who could have sent it to him. Q. Did you think at the time that some friend of his sent that letter to Mr. Paul Rudyk and you thought that it was not a genuine letter, you thought that, did you? A. Yes. Q. What? A. I thought that was not a genuine letter and that it was not the genuine signature at the time he shewed it. Q. I am speaking now before you had the telephone conversation, had you any reasonable doubt but what this was a genuine letter? A. When I first saw it, I kind of thought it could have been—that is, I did not understand how he got it, how he came to have it, but I had nothing else to think, seeing he had the letter. I thought that the letter was all right as far as I knew.

Prior to this, in his examination-in-chief, he had been asked:—

Q. Who suggested forgery in this case; when did forgery first enter your mind? A. After I got the telephone.

The fair inference, I think, from this evidence is that the defendant, while being mystified at the plaintiff having such a letter, did not suspect its genuineness until April 16, when he telephoned Mr. Cross, and it is, therefore, to that time only that his statement that he believed the plaintiff when he told him he got it from the post-office, but thought he had friends in Edmonton who could have sent it to him, can be applicable. This seems to make it clear that on the day when he laid the information he did not believe that the plaintiff had himself forged the letter, to say nothing of the time and place mentioned in the charge. This conclusion is also supported by the fact that the plaintiff, besides being, like himself, a candidate for a high office, was, to the knowledge of the defendant, a person possessed of considerable reason and not likely to commit such a serious crime. It is also borne out by the fact that the defendant did nothing whatever to press the prosecution, and that he did not even know of the different adjournments, and in-

vited the plaintiff out to dinner at his house on the day on which, later, the complaint was dismissed. I conclude, therefore, that, when the defendant laid the charge, though he may have believed he was justified, he did not believe the plaintiff was guilty of forgery, and he was not, therefore, in fact justified.

Harvey, C.J.

There is ample evidence of malice, some of which appears in the defendant's evidence above quoted. The constable who arrested the plaintiff says the defendant told him to arrest him and keep him shut up over election day. This is denied by the defendant, but it was quite competent to the trial Judge to believe it if he saw fit. There is other evidence also to which I need not refer. The damages for such an arrest on such a charge, of a person in the plaintiff's position under the circumstances, are, I think, very moderate indeed. I would, therefore, dismiss the appeal with costs.

Stuart, J.

STUART, J.:—I think the appeal should be dismissed. The question as it chiefly appeals to me is really one of fact and not of law. In *Abrath* v. *North Eastern R. Co.*, 11 App. Cas. 247, one of the questions of fact submitted to the jury was whether the defendant had made reasonable careful inquiries before instituting criminal proceedings. We have the same inquiry here, and, in deciding it, it must be remembered that the Court cannot lay down any rule as a rule of law which would be binding upon a jury in a future case. The question of reasonable and probable cause is, of course, one of law for the Court, but it is quite settled that, in order to decide that question of law, the Court may properly ask the jury to decide the fact whether the defendant made reasonably careful inquiries.

Sitting here, then, as a Judge of fact and practically as a juryman, I am bound to say that I cannot answer that question in the affirmative. The defendant accused the plaintiff of forging a letter in the name of Mr. Cross, the Attorney-General. The parties were rival candidates at a provincial election. The defendant was the regular nominee of the party to which Mr. Cross belonged, and the plaintiff announced himself as an independent candidate, with leanings towards the same party. He produced and read at some public meeting a letter from Mr. Cross, in which the latter wished him success and offered to appoint commissioners for taking affidavits on the plaintiff's nomination. This was done, no doubt, by the plaintiff, in order to leave the

ALTA.

S. C.

RUDYK v. SHANDRO

Stuart, J.

impression on the electors that he had the good wishes of Mr. Cross and was, in fact, a government candidate. The defendant saw the letter and read it carefully. It was typewritten on notepaper with the stamp of the Attorney-General's Department at the top. The defendant telephoned by long distance to Mr. Cross, and stated the contents of the letter pretty fully to Mr. Cross, and was told by the latter that he had never written such a letter or any letter of any kind to the plaintiff in the last seven years. Relying on this and with the malicious purpose of getting the plaintiff arrested and kept out of the election contest, the defendant laid an information against the plaintiff on a charge of forgery.

I do not think the defendant was reasonably careful. He did not mention to Mr. Cross the stamp or die at the top of the letter nor did he mention his intention of relying on the information received to the extent of taking criminal proceedings. There was no honest reason for haste; and, unless there is such, acting hastily cannot be said to be acting carefully. Any reasonably careful man of the defendant's intelligence and standing would not, according to the standard of carefulness which I, as a juryman, feel disposed to set up in such a case, proceed to lay so grave a charge without a personal interview with the person whose name he suggested was forged and without telling him that he proposed to lay a criminal charge in reliance upon information received. A careful man, in such circumstances, will see to it that the information he relies upon is carefully given, and the best way to insure that would be to tell his informant, particularly when the informant happens to be the chief law officer of the Crown and himself responsible for the administration of the criminal law, that he purposes to set the criminal law in motion. I think the defendant should have gone to Mr. Cross and told him what he had seen, including the nature of the letterhead, the purpose of his inquiry and his intention to lay a criminal information. He was, he said, very intimate with Mr. Cross, and there was no difficulty on that score. Of course, it was not possible to shew the document to Mr. Cross, but that only made it the more necessary to be careful—in other words, it raised the standard of reasonable care which I should be disposed to apply.

Having come to the conclusion, as a matter of fact, that the defendant did not in the circumstances make the inquiries which

ALTA.

S. C.

RUDYK v. SHANDRO

Stuart, J.

Beck, J.

a reasonably careful and prudent man should make, it follows as a matter of law that he did not have reasonable and probable cause for laying the information.

I agree also for the reasons given by the Chief Justice and my brother Beck that the evidence shews that the defendant did not honestly believe the plaintiff guilty, and that this also is fatal to defendant's plea of reasonable and probable cause.

BECK, J.:—This is an appeal from the judgment of Scott, J., at the trial without a jury. The action is one for malicious prosecution. Judgment was given for the plaintiff.

The plaintiff and defendant were both candidates at a provincial election. The charge laid by the defendant against the plaintiff was, in substance, forgery, or, alternatively, uttering a forged document knowing it to be forged.

It is impossible to contend that there was not malice. The only question for consideration is: Was there an absence of reasonable and probable cause? The learned trial Judge discusses this question in his reasons for judgment and finds in the affirmative. I agree with his conclusion and with his reasoning, with a limitation. He says:—

> It may be that the defendant believed that the plaintiff forged the letter, but that is not material. The important question is whether he had reasonable grounds for so believing, that is, whether the information he had at the time he instituted the proceedings was such as would lead a reasonably cautious man to entertain that belief. I am inclined to the view that if the defendant entertained that belief, it was due to the fact that his judgment was warped by his desire to put the plaintiff out of the way during the election.

This, taken as a whole, though quite susceptible of interpretation in accordance with the law, is, it seems to me, ambiguous, for the belief of the defendant in the plaintiff's guilt, though there may be facts which would otherwise establish reasonable and probable cause, is essential. That is to say, belief in the plaintiff's guilt, unless based upon such facts and circumstances as would constitute reasonable and probable cause, is insufficient to excuse the defendant, and, on the other hand, proof of such facts and circumstances as would otherwise constitute reasonable and probable cause, if, nevertheless, the defendant did not believe the plaintiff guilty is also insufficient to excuse the defendant. In *Hicks* v. *Faulkner*, 46 L.T. 127, Hawkins, J., said:—

> Now, I would define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded

ALTA.

S. C.

RUDYK v. SHANDRO

Beck, J.

upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guilty of the crime imputed. There must be first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly mentioned belief must be based upon reasonable grounds. By this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused.

In *Abrath* v. *North-Eastern R. Co.* (1886), 11 App. Cas. 247, the trial Judge left to the jury the two questions of fact. They found, first, that proper care had been used by the prosecution to inform themselves of the facts; and, secondly, that the prosecutors honestly believed the case which they laid before the magistrates. The House of Lords held that the trial Judge was right in leaving these questions to the jury, and, in effect, that an honest belief in the guilt of the plaintiff was required to excuse the defendant.

Now, in the present case, the learned trial Judge expresses at the least a very strong doubt of the defendant's belief in the plaintiff's guilt.

As I have said, the evidence of malice is so strong that it is impossible to contend against it. Now, though from malice want of reasonable and probable cause cannot be inferred, it seems to me that it is impossible to shut out all the evidence which goes to establish malice, when considering the question of the defendant's honest belief. In *Wright* v. *Greenwood*, 1 W.R. 393, the Court, consisting of Pollock, C.B., and Alderson, Platt and Martin, B.B., held that, although want of reasonable and probable cause cannot be inferred from proof of malice, yet, where the accused acted on the information of another and the charge was highly improbable, the jury might infer from the proof of malice that he did not believe the statement to be true.

From a consideration of the whole evidence, most of the salient points of which are noted to me by the learned trial Judge in his reasons for judgment, I am satisfied the defendant had not an honest belief that the plaintiff was guilty of forgery or uttering a forged document knowing it to be forged. I think he did not take proper care in investigating the facts and circum-

stances on which he laid the charge, and I think the reason he refrained from further investigation was his wish to have the plaintiff in custody on the day of the election.

I would dismiss the appeal with costs. *Appeal dismissed.*

[See valuable note by C.B. Labatt, on "Reasonable and probable cause," 35 C.L.J. 545.]

ST. JOHN & QUEBEC R. CO. v. FRASER Ltd.

New Brunswick Supreme Court, McLeod, C.J., White and Grimmer, JJ. June 29, 1915.

1. DAMAGES (§ III L 2—240)—EXPROPRIATION OF LAND—MEASURE OF COMPENSATION—VALUATION.
The principle upon which compensation and damages should be awarded upon an expropriation of land is the market value, including the potential value of the land taken, at the time of the filing of the plans, without taking into consideration the values and elements of compensation incident to the property at the time of the award.

2. APPEAL (§ VII L 4—510) — ARBITRATOR'S AWARD — HOW REVIEWED—REASONS NOT APPARENT OF RECORD.
The reasons or principles which guided arbitrators in making an award not contained in the award or supplemented therewith, will not be reviewed on appeal.

Statement

APPEAL from an arbitrators' award in an expropriation of land by a railway company. Reversed.

A. J. Gregory, K.C., and *M. G. Teed*, K.C., for appellant.

R. B. Hanson and *F. B. Carvell*, K.C., for respondent.

The judgment of the Court was delivered by

McLeod, C.J.

McLEOD, C.J.:—This is an appeal from part of an award made by arbitrators under the provisions of the New Brunswick Railway Act, C.S., 1903, ch. 91, sub-sec. 20 of sec. 17, as amended by the Act 4 Geo. V. ch. 32 (1914).

The St. John and Quebec R. Co., in the year 1912, and prior thereto, were building a railway from Grand Falls to the city of St. John, having the power to expropriate lands for the right-of-way under the provisions of the Railway Act. In that year a company, known as the Scott Lumber Co., owned a quantity of lumber lands situate in York county, called in the award lots 192, 201, 205, 245 and 252, and also a mill site situate in the city of Fredericton, York county, which is called in the award number 45, which I will hereafter speak of as the Victoria Mills property, and also a mill site situate at Springhill, York county, called lot 27.

The lumber lands owned by the Scott Lumber Co. comprise an area of about 27,000 or 29,000 acres, and also licenses covering

N. B.

S. C.

ST. JOHN R. CO. v. FRASER.

McLeod, C.J.

about nine and a half miles of Crown lands. The appellants' railway was located through these lumber lands, and also through lot 27 and the Victoria Mills property, taking from the Victoria Mills property about two and a half acres. The Victoria Mills property is a property situate within the limits of the city of Fredericton, and fronts on the St. John river, and lies between the track of the C.P.R. and the St. John river. The appellants located and staked their railway through all this property in January, 1912, and on July 5 in that year deposited with the Commissioner of Public Works and with the Clerk of the Peace for the county of York, a map or plan and book of reference as required by sec. 8 of the Railway Act, and notice of such deposit was published in a daily newspaper published in the city of Fredericton on July 6, 9 and 10, 1912, as required by the Act. The appellants commenced building their railway through the Victoria Mills property some time in July, 1912. The respondents purchased all the holdings of the Scott Lumber Co., including the Victoria Mills property, late in the year 1912, and after the road had been located and the plans filed as aforesaid. The respondents obtained the title by deed dated December 16, 1912, and they paid $87,000 for the whole of the property.

The Victoria Mills property contained about thirteen and a half acres of land. The Scott Lumber Co. and the railway company had not agreed on the compensation to be paid for the right-of-way through the various properties before the sale to the respondents, and the appellants and the respondents were unable to agree on the compensation to be paid, and arbitrators were appointed under the provisions of the Railway Act. The arbitrators so appointed were John M. Stevens of Edmundston, named on behalf of the respondents, George J. Colter of York county, named on behalf of the appellants, and they two not being able to agree on a third arbitrator, John P. Burchill of Nelson, New Brunswick, was appointed by the Judge of the York County Court.

There was, at the time of the purchase of the property by the respondents, a mill on the Victoria Mills property which I gather from the evidence was not considered by the respondents of very great value. They spent a large amount of money in remodelling it entirely, and put in practically all new machinery and added a great deal of machinery to it in the way of shingle mills and lath

mills, and so forth. The mill had been idle prior to the purchase by the respondents between one or two years. When it was in operation I gather that its capacity was about eight to ten millions a year. The respondents increased the capacity of the mill to about fifteen millions a year. After the arbitrators were appointed and before the hearing, the appellants and respondents agreed on two items of damages, one with reference to the value of the buildings which were on the Victoria Mills property and were removed by the appellants, and they agreed that the damages for that should be $2,505. They also agreed that the damages for locating the railway through the lumber lands, which are mentioned in the award as lots numbers 192, 201, 205, 245 and 252, were $900. This left the arbitrators to assess the damages only for locating the railway through the Victoria Mills property and the Springhill mill site, being lot No. 27. The damages to the latter were assessed by the arbitrators at $550, and from this amount there was no appeal taken.

The respondents filed a claim for damages to the Victoria Mills property before the arbitrators for $77,687.90, made up as follows: $29,000 for the land taken, which amount is made up of the following items: $2,000 they claim for land it is alleged they had to buy to make up for the piling ground they lost in consequence of this two and a half acres being taken away. Then they claim damage for the severance of the yard, $5,000, and they claim that they were obliged to haul the lumber at a greater distance to this new piling ground, and they estimate it will cost them $1,100 a year more, and they capitalize that at five per cent. and make it $22,000. These three items make up the $29,000 they claim as damages. They claim $1,567.90 in consequence of the strip of land that is left between the two railways, that is between the railway the appellants were building, and the C.P.R., which they say contains 15,679 square feet, and they value it at 10 cents a square foot, making $1,567.90. They claim $1,120 as damage to another portion of the land that they say is injured by reason of this railway passing through this property. They further say that owing to the remaining portion of the yard being made low by the height of the railway embankment, they will have to spend $10,000 to build it up, or suffer a loss of $500 a year, which they capitalize at 5 per cent. and claim $10,000 damage for that. In consequence of crossing the railway the appellants are building,

N. B.

S. C.

ST. JOHN R. CO. v. FRASER.

McLeod, C.J.

they claim they would have to keep a flagman for 200 days in the year at $1.75 a day, that is, $350 a year, and they capitalize that at 5 per cent., making $7,000. They further allege that there would be delays in crossing the track of the railway the appellants are building, and they estimate the damage for that at $250 a year, which they capitalize at 5 per cent. and make $5,000. There is a spur line of railway running from the C.P.R. down to the respondent's mill, and they claim that the injury to them in the use of that spur would be $7,500. They claim the increase of the insurance on their mill would be $200 a year; they capitalize that at 5 per cent., and claim a damage of $4,000. They claim that the increased insurance on the lumber they would be carrying would be $625 a year, and they capitalize that at five per cent., and make it $12,500; making the claim, as I have said, $77,687.90.

The appellants allege that the respondents are basing their claim for damages to the property as it was at the time of the hearing, with the large extensions and additions to the mill that had been made by the respondents after the purchase of the property, and after the railway was put through it, and the large stock of lumber they would have from time to time on hand, and they claim that the compensation should be just such compensation as the Scott Lumber Co. would have been entitled to have claimed on July 5, 1912, the day the map and plan were filed.

The arbitrators did not agree on the award; but two of them, Mr. Burchill and Mr. Stevens, made an award, giving $16,500 for damage to the Victoria Mill property, and $550 for damages to lot no. 27, which is known as the Springhill property. From the latter award there is no appeal, and the other items included in the award were, as I have said, already agreed upon. The appeal in this case, therefore, is only taken from the award of $16,500 damages to the Victoria Mills property.

First, as to the principle on which the award should be made up. There is no doubt, and on the argument, it was admitted, that it should be made up as of July 5, 1912, when the lands were in fact taken by the filing of the map or plan and the book of reference as required by sec. 8 of the Railway Act, and the award should represent the damage that was done to the Scott Lumber Co., that is, the depreciation of the value of the land

to that company by taking this right-of-way through this property. The arbitrators gave no reason for their award. I observed in the transcript that at the close of the argument Mr. Teed on behalf of the appellants asked that the arbitrators give the reasons for their award, because he claimed that the parties differed materially as to the principle that should govern in assessing the damages, but Mr. Carvell on behalf of the respondents objected, and said the matter should be left to the arbitrators.

The arbitrators, therefore, have given their award without giving any reason for coming to the conclusion they do.

It may be taken, I think, to be the rule that where arbitrators in assessing damages in a case such as the present, have not proceeded on a wrong principle, and where the award is not so excessive or so small as to shew that due regard has not been paid to the evidence, the Court will not interfere. In other words, the parties are entitled to have the fair judgment of the arbitrators themselves on the case, but if it appears that the arbitrators have proceeded on a wrong principle or that the award is unreasonably excessive or unreasonably small, the Court does have power to interfere with it and will interfere with it. In this case I have examined the evidence very carefully, and it appears to me that the opposing parties in this matter have contended for two opposite modes of assessing the damages. The respondents have nowhere given the value of the Victoria Mills property prior to the railway being located through it. Mr. Fraser, in his cross-examination, says in answer to the following question:—

Was the Victoria Mills property bought as a separate parcel from the rest of the property? A. No, there was no specific valuation on it. Q. Did you at that time in making up the amount of your purchase attribute a value to that property, and if so, what? A. We attributed some value. Q. What amount? A. I forget what the amount was. Q. Could you not recall approximately the amount? A. I cannot recall the approximate amount.

The evidence given by the respondents appears to have been entirely confined to what was done on the property by them after the property was purchased, and how the respondents themselves had been affected by it. The appellants called witnesses, who gave their estimate of the value of the property prior to the railway being located through it, and claim to have given evidence of the damage that the Scott Lumber Co. suffered in consequence of said location. I will refer briefly to the evidence as given by the different parties.

N. B.

S. C.

ST. JOHN R. CO. v. FRASER.

McLeod, C.J.

The first witness called by the respondents was Mr. W. B. Snowball, a large lumber operator who carries on business at Chatham, N.B. He first saw the premises in the fall of 1913, a year after the respondents had purchased it and when they were making their additions to and changes in the mill. He says he considers the damage to the property $51,000. He knows nothing and gave no evidence as to the condition of the property and what it was worth when the land was taken, and he says, speaking of the value of the land itself that was taken, that is, the two and a half acres, that it was worth $10,000 to such an industry as the respondents are conducting there.

Another witness, Mr. Alexander McLaurin, a large lumber operator from Quebec, says he only saw the property the morning he gave evidence, and speaking of the respondents' business he says the putting of the railway through would be a damage to them of $4,000 to $5,000 a year, and then he says that he would say the damage to the property by reason of the railway would be $50,000.

Mr. C. E. Oak was called. He has charge of the New Brunswick railway lands, and said he had been in the lumber business for a number of years. He only saw the property about 6 weeks before he was examined as a witness. He does not estimate the damage to it, although he claims the property would be very much injured.

Mr. Archibald Fraser, of the respondent company, was called and gave the damages that he claimed in the way I have stated. As I have said, the whole of the property formerly owned by the Scott Lumber Co. was purchased by the respondents for $87,000, and Mr. Fraser admitted on his cross-examination that even if the railway had not gone through this Victoria Mills property the respondents would have been obliged to buy additional piling ground because the land there was not sufficient to accommodate the 15,000,000 feet they proposed to manufacture.

Mr. Angus McLean, who is the manager of the Bathurst Lumber Company in Gloucester county, was called, and he estimates the damage at $50,000 or $5,000 a year, and he made his estimate on the basis of the mill being there ten years. He also, however, said that if the railway were not there it would cost $10,000 to properly fit up the yard for piling.

Mr. William Matheson, an employee of the respondent, was called, and he gave the damage as far as I can make out at about $57,000. Some of his figures were exactly as those given by Mr. Fraser, but as I have said, none of the witnesses called by the respondent give the value of the mill property, that is the mill site itself, prior to the time the railway was located through it. Some other witnesses were called, but these were the principal witnesses as to the damages done the property.

Several witnesses were called on behalf of the appellants. The first was Mr. J. Fraser Gregory, a leading lumberman carrying on business in the city of St. John, who was familiar with the property. He said the property, prior to the locating of the railway through it, was not worth over $10,000, giving his reasons for it, and he did not think that the mill site was sufficient to accommodate the manufacture of 15,000,000 feet a year with due regard to fire risk, etc.

Mr. A. R. Gould put the value at $10,000, but Mr. Gould is the man who is really constructing the railway, so that I do not attach so much importance to his evidence, though I believe he was giving his own honest opinion. I should say that prior to the purchase of this property by the respondents it had been on the market for two or three years. The Scott Lumber Co. had got into financial difficulties and had conveyed it to the Bank of Nova Scotia as collateral security for the amount which was owing the bank, and company and the bank had been endeavouring to sell it. They had offered it first for $150,000, but could get no offers. They gave an option to the respondents for $115,000, but they declined to take it at that. Some other parties had been looking at it with a view to purchasing it, among them Mr. Frank E. Haines from Portland, in the State of Maine. He was engaged in the lumber business. He says that he and some parties with whom he was connected were offered the whole property for $100,000, but they did not take it, and he says at the same time he was offered the property save and except this Victoria Mills property for $90,000, shewing that at that time the bank and the Scott Lumber Co. valued the Victoria Mills property at $10,000.

A Mr. W. J. Murphy was examined. He was from Bangor, Maine, and was engaged in the lumber business. He had examined the property the Saturday before he was examined. He did it at the request of the officials of the appellant company.

N. B.
S. C.
ST. JOHN R. CO. v. FRASER.
McLeod, C.J.

He valued it at from $10,000 to $15,000. His estimate standing alone I would not think would be very valuable.

Mr. John B. Gregory, who is the manager of the York and Sunbury Milling Co., whose mill is on the opposite side of the St. John river from Fredericton, was examined. He examined the mill. At first he thought of renting it to cut some lumber that he was unable to cut in the mill he was operating, but I gather from his evidence that it could not be rented. He says he afterwards took his millwright and examined the mill. He did not consider it worth over $7,000, and he puts a full value on the property, including the buildings, at $10,000. He also says that the piling ground was not capable of being utilized without a great deal of expenditure. And with reference to the piling ground, it appears by the evidence generally that without the railway being there at all a good deal of it was unfit for piling unless a considerable amount was expended on it.

Having examined the evidence carefully, I think the arbitrators have proceeded on a wrong principle. They appear to have rather inquired into the damage that the respondents claim that they suffered in consequence of the railway having been located through this lot instead of inquiring, and simply inquiring, into the damage that was done to the Scott Lumber Co., who were the owners of the property at the time the railway was located through it. The real question for the arbitrators to have determined was how much the Scott Lumber Co. suffered in consequence of the road having been so located; that is, how much less was this property worth to them in consequence of the railroad having been located through it. It seems to me to be quite evident from the evidence that that was not done. The whole evidence given by the respondents was as to how much damage was done to the business that they then carried on. The respondents purchased the property after the location of the railway. They knew that the railway had been located through the property, and according to the evidence of Mr. Fraser the fact that the railway was located through the property was not taken into consideration at all. In giving this evidence, Mr. Fraser, in answer to the following question by Mr. Stevens, one of the arbitrators, said:—

In arriving at the price which was actually paid, which was less than the option price (the respondents had previously had an option on this

property for $115,000, which they did not take up), was it taken into consideration by you or by the bank or by any party interested, the Scott Lumber Co. for instance, the fact that this railway was going through there? A. Not as far as I know. Q. Then nothing was said by the bank people or by the Scott Lumber Co. in regard to the railway going through there to affect the price one way or the other? A. No.

And to the following question by Mr. Gregory he answered as follows:—

Q. Were you here at the time the deal was closed or had you looked over the Victoria Mills property before the deal was closed? A. Yes, I looked it over. Q. You were aware that the railway company was actually working upon the property before the deal was closed? A. Yes. Q. Did the fact that the railway company were going through the property influence the price you paid for it, or would have paid for it to get it? A. Not that I am aware of.

In my opinion the respondents could not deal with this property after the road had been located through it so as to increase the compensation to be paid.

In view of this evidence given by Mr. Fraser, it certainly is rather startling to find the respondents putting in a claim for damages for that railway amounting to over $77,000 or within $10,000 of the price they paid for the whole property, lumber lands and all, and the two arbitrators who signed this award must have been somewhat impressed by that fact, seeing that the award they gave was not for one-quarter of the amount of the damages claimed by the respondents and less than one-third of the amount of the damages sworn to by the respondent's witnesses, and yet the award as given by the two arbitrators is more than $6,000 above the value of this whole property before the road was located through it (as sworn by the witnesses called on behalf of the appellants).

Having, as I have said, examined the case carefully, I think the award cannot stand. The evidence should have been given as to what the Scott Lumber Co. itself suffered in consequence of the railway being located through these lands; that is, how much it was worth after the road was located. Instead of that it seems to have been based entirely on what the respondents claimed they suffered. It then becomes the duty of this Court to say what amount should be awarded. I wish that it were possible to refer the case back to the arbitrators with instructions to confine themselves entirely to the damage that was done to the Scott Lumber Co. itself by the location of the railway, but under

N. B.

S. C.

ST. JOHN R. CO. v. FRASER.

McLeod, C.J.

the Act the Court itself is obliged to decide the matter. Under sec. 17 of the Act, sub-sec. 20, the appeal is provided for, and it is said as follows:—

> And upon the hearing of the appeal, the Court shall, if the same is a question of fact, decide the same upon the evidence taken before the arbitrators as in case of original jurisdiction.

This, of course, does not mean that the Court must entirely disregard the judgment of the arbitrators, but it gives the Court power to reform the award in case they have decided it on a wrong principle or taken an erroneous view of the evidence. In this case, as I have said, they appear really to have acted on a wrong principle in assessing the damages. The Court must, therefore, examine the evidence and ascertain as well as it can the damages that were suffered by the Scott Lumber Co. The respondents, as I have said, appear to have given no evidence as to the value of this property prior to the location of the railway. All the evidence we have as to the value of the property is that given by the appellants, and none of the witnesses there place the whole value of the Victoria Mills property beyond $10,000 save and except one witness, Mr. Murphy, who says from $10,000 to $15,000. He, however, had only examined it a few days before giving his evidence. These witnesses place the damage to the property in consequence of the location of the railway at from fifteen per cent. to twenty-five per cent. of its value, or $1,500 to $2,500.

It also appears in evidence that the Scott Lumber Co. and the bank were willing to accept $5,000 as the damage to the whole of the property in consequence of the location of that railway, that is to the lumber land, to the property at Springhill, that is lot no. 27, and the Victoria Mills property. This was prior to the option given to the respondents for purchase. The offer was not accepted by the appellants, they at that time thinking it too high.

The damages, I think, on the compulsory taking of the property should be liberal, and the Court must, as well as it can, act as though it were assessing these damages prior to the purchase by the respondents, and ascertain what damage was done to the Scott Lumber Co. by the location of this road through this property, and it seems to me if we take $5,000 as the damage done to this property, which is all that was claimed by the Lumber Co. and by the bank for the location through the whole of the

property owned by the Scott Lumber Co., and add thereto ten per cent. for compulsory taking, we would be doing justice to the Scott Lumber Co., and in doing justice to the Scott Lumber Co. we would be doing then what is right for the respondents.

The award therefore will be reduced by $11,000, and will be entered for $5,500. The respondents must pay the costs of this appeal. *Appeal allowed.*

N. B.

S. C.

ST. JOHN R. CO. v. FRASER.

McLeod, C.J.

MONTREAL STREET R. CO. v. CHEVANDIER.

QUE.

K. B.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. January 28, 1915.

1. CARRIERS (§ II L—240)—TRAM PASSENGERS—CONVENIENT MODE OF DESCENT—NEGLIGENCE OF TRAMWAY CO.—NEGLIGENCE OF PASSENGER.
A tramway company is bound to procure for its passengers a convenient mode of descent, and if it has no station should provide some easy means of descending and indicate to passengers where they should descend, and the negligence of the passenger does not excuse the torts of the carrier.

2. DEATH (§ VI—35)—INJURY—ACTION COMMENCED FOR DAMAGES—DEATH PENDING ACTION—RIGHT OF HEIRS TO CONTINUE.
Where a person has been injured and has commenced an action for damages, but dies pending the action, his claim becomes an asset, transmissible by succession, and his heirs have a right to continue the action.

APPEAL from the judgment of Demers, J. Statement

The plaintiff is the mother of the respondents by *reprise d'instance*, who are her sole heirs. On August 14, 1909, she was on one of the street cars in Montreal. On arriving at Villeray the car stopped, but, as the platform was not long enough, the front of the car passed beyond it. The plaintiff, who was upon one of the front seats, arose and alighted from the car. The distance between the last step and the ground was two feet and a half. The conductor gave her no warning of the danger which this elevation might incur, and did not assist her in descending. The plaintiff, in trying to alight, fell and fractured the lower part of her thigh. She brought this action for $1,500 damages.

The plaintiff alleges that the accident happened through the fault of the appellant and its employees, because the car should not have passed the station and the platform constructed there to enable passengers to alight, and because the land beyond this platform was not convenient for the descent of passengers; that since the date of the accident she has always been ill and unable to walk and to work; that before the accident she worked as a seamstress and supplied all her wants by her labour. She claims also

QUE.

K. B.

MONTREAL STREET RY. v. CHEVANDIER.

the expenses that the accident has caused to her, and the moneys that she owes both to the doctor and to the druggist, and the persons who have provided for and taken care of her.

The appellant contested the action, and denied all liability. The Superior Court awarded $1,200 damages.

Meredith & McPherson, for appellant.

Descarries & Descarries, for respondent.

Lavergne, J.

LAVERGNE, J.:—The plaintiff died eighteen months after the accident, and, according to the uncontradicted evidence of the doctors, the accident had a great deal to do with her death. She had always been sick since, has done no more work at all, she could only walk with the aid of a crutch and of a cane, and she has been attacked even after the reduction of the fracture of her leg by various maladies resulting from her state of feebleness and as a consequence also of the accident. This is what results from the undisputed medical evidence.

The appellant claims that it was not in fault; that the plaintiff should not have alighted at the place where she did; that she should have walked some steps to the back of the car, where she would have been opposite the platform.

People who travel in the open cars, according to the uncontradicted evidence of the witness, are in the habit of alighting from the foot-board at the place nearest their seats. And I consider that the company was in fault; that the employees who saw her should have prevented her descent if there was danger in making it at that place, they being in a better position to know the nature of the ground at the places where they stopped to let off passengers. The evidence shews, also, there were many passengers in the car, and it would not have been easy for the plaintiff to get to the rear in order to alight. Everybody knows that the cars do not stop long at each place, and that the passengers must hurry to alight. The plaintiff is an old woman, she could not calculate properly the height between the foot-board and the ground, and she did not have time to examine the ground, which, according to the evidence, descended on a slope.

I should say, in passing, that this ground has since been partially filled up and the road levelled. And the witnesses for the appellant are in error when they say that the land was not raised. They have made their measurements since it was repaired.

The appellant particularly relies upon a judgment rendered by the Supreme Court in the case of *Quebec Central R. Co.* v. *Lortie*, 22 Can. S.C.R. 336. There is no doubt that there is much resemblance between the two cases; this one, however, differs in this respect, that the imprudence of Lortie was much greater than that of the plaintiff in this case. Lortie descended from his car at a place where there was no platform nearly the same height from the ground as the plaintiff, but Lortie had an overcoat on his arm and carried a suit-case in the other hand. There is no doubt that he took much greater risk than the plaintiff did. However, in the Superior Court he obtained the damages which he claimed, because, immediately after the fracture of his leg, amputation became necessary. This judgment of the Superior Court was unanimously confirmed by the Court of Appeal. In the Supreme Court one of the Judges dissented, namely, the Hon. Judge Fournier.

The report of the Supreme Court is composed almost entirely, apart from the statement of the facts, of the notes of Judge Fournier, who reproduced also the greater part of the notes of Sir Alexandre Lacoste in the Court of Appeal. The Supreme Court, by a majority, decided to maintain the appeal, and one Judge, Mr. Justice Gwynne, gives in eight lines his reasons therefor. Judge Fournier, on the contrary, developed at length his views and the rules of law upon which he bases them.

The principles (said he) which should govern the liability of carriers are those of the French law, and especially of the Civil Code of Quebec. The rule as to the liability of carriers is that enunciated in arts. 1673 and 1675 of our Code. This rule applies as well to the carriage of freight as passengers. The carrier is bound to use the greatest vigilance to protect his passengers as well as the effects which he is carrying. He will be liable for any accident which may happen unless he proves that the passenger acted with inexcusable carelessness.

A tramway company is bound to procure for its passengers a convenient mode of descent. If it has not a station, it should provide some easy means of descending, and indicate to passengers where they could descend if the car had passed the platform. Under the French law the liability of the company apparently would not be doubtful, since there the negligence of the passenger himself does not excuse the torts of the carrier.

The articles which I have cited, 1673 and 1675, only limit the liability of carriers in case of accidents caused by fortuitous events

QUE.

K. B.

MONTREAL STREET RY. v. CHEVANDIER.

Lavergne, J.

or *force majeure*. That is the doctrine which was followed in appeal in *Lortie* v. *Quebec Central*, already cited.

In this case there is only a mere question of fact, and we have in the *Lortie* case the judgment of the Superior Court unanimously confirmed by the Court of Appeal. I do not believe that I am wrong in saying that since 1893 the Supreme Court has, in nearly every case that came before it, refused to reverse the judgments of inferior Courts, especially the unanimous decisions of the Superior Court and the Court of Appeal, as was the case in *Lortie* v. *Quebec Central*, 22 Can. S.C.R. 336.

I find that there was no error in the judgment in first instance in the present case; that the judgment is founded upon our law—the French law which governs us in such matters, and not the English law—and I believe that there is no reason why we should interfere.

At the time the plaintiff took her action she was still under medical treatment, and could not tell what the damages would be; however, she has estimated that these damages would amount to at least $1,500; she has only obtained $1,200, and at the time of her death her expenses for doctors, druggists, nurses and board would increase by more than one-half the sum of $1,200 which she has obtained. The damages, then are not excessive. If it were modified, and the costs of the appeal given against the respondents, as they should be in case of modification, they would not recover even the expenses of the plaintiff's illness. For these reasons, again, I believe that we should not interfere, and I would confirm the judgment appealed against and dismiss the appeal with costs.

Cross, J.

CROSS, J.:—The right of the respondents to continue the suit is disputed, and it is also complained that the amount of the judgment is excessive. If the plaintiff had not died, I would say that the amount of the judgment ought not be varied. Does it make a difference that the plaintiff died before trial and that the award of damages is to her heirs-at-law?

The appellant argues that the damage claim was not transmitted by inheritance, but died with the plaintiff. That is going too far. Where a party injured in his person by commission of a tort has died without having taken suit in damages, there may be cases in which the heirs cannot sue. But I consider that the commencement of an action makes a difference. The idea appears

to be that if the injured party has not claimed reparation he is considered to have forgiven the injury, but if, on the contrary, he has taken action and afterwards dies, he has made his claim an asset transmissible by succession.

The respondents, therefore, had a right to continue the suit. But how do they stand with regard to the measure of the damages? The plaintiff, had she not died, might have been adjudged damages for pain and suffering. I consider, however, that the ground for awarding that kind of solace or reparation disappeared when the plaintiff died.

The accident happened on August 14, 1909. Suit was taken on December 3, 1909. The plaintiff died on February 23, 1911. The trial took place in 1912.

The fact of the plaintiff's death before trial of the action relieved the Court from the difficult question of determining what damages should be allowed for future effects of the injury. All the facts had been reduced to precision. Evidence in support of the claim for damages was put in to the effect following: Dr. Mireau's bill is $25; Dr. Jarry's bill is $40; Dr. Lafortune's bill (of which items for $130 date before commencement of suit) is $475; Mr. Paquin, the pharmacist's, bill is $24; total, $564.

No payment of any of these sums had been made at the date of trial—that is, nearly three years after the accident. After the accident, the plaintiff, instead of being taken home, was taken to Larose's house, and kept there for 35 days. The Larose bill, still unpaid, is $87.50. She was afterwards lodged and cared for by Mme. Galipeau, one of the respondents, who charges $1.50 per day for attendance and $1.50 per day for board and lodging

The facts warrant the conclusion that the case was exploited for the working up of bills to figure as damages in case of a favourable judgment. I consider that there was not evidence upon which the sum of $1,200 could be adjudged in favour of the plaintiffs in continuance of suit. I consider that there was negligence on the part of the appellant in that the conductor did not warn the plaintiff (whom he saw alighting) that she was stepping off beyond the end of the platform. But the plaintiff was herself negligent in climbing down backwards and without looking where she was going.

I would reduce the amount of the judgment to $500. This

QUE.

MONTREAL STREET RY. v. CHEVANDIER.

view is not taken by the other Judges, and, as in the result it comes to be a question of amount, I do not dissent from the judgment now being pronounced. *Appeal dismissed.*

N.B.

S. C.

RECEIVER-GEN'L OF NEW BRUNSWICK v. ROSBOROUGH.

New Brunswick Supreme Court, McLeod, C.J., White and Grimmer, JJ. May 6, 1915.

1. TAXES (§ V A—180)—SUCCESSION DUTIES—PROPERTY IN ONE PROVINCE—DOMICILE OF TESTATOR IN ANOTHER—SPECIALTY DEBTS—LIABILITY FOR.
A testator having his domicile in one province and having in his possession at the time of his death debts secured by mortgages of real estate, situate in another province, where the mortagors have their domicile, such debts are specialty debts, and are liable to duty under the Succession Duty Act, C.S.N.B., 1903, ch. 17.

2. TAXES (§ V C—198)—DEBENTURE STOCK—SITUS—SUCCESSION DUTY—LIABILITY.
Debenture stock is not a specialty debt and where such stock is of a city in another province from that in which the testator had his domicile, and can only be transferred at the office of the treasurer of that city, it is not subject to succession duty in the province where the testator had his domicile.

3. TAXES (§ V C—198)—MONEY IN BANK IN OTHER PROVINCE—LIABILITY FOR SUCCESSION DUTY.
Money on deposit in a bank situate in another province from that in which the testator had his domicile at the time of his death, is not liable to succession duty in the province where the testator was domiciled at the time of his death.

4. TAXES (§ V A—183*a*)—SUCCESSION DUTY—RATE OF TAXATION—AGGREGATE VALUE OF ESTATE.
The aggregate value of all the estate owned by the deceased at the time of his death is the basis on which the rate of taxation is to be computed and fixed under clause (*a*) sec. 5 of the Succession Duty Act, and not the aggregate value of the property liable to succession duty.

Statement

ACTION to determine amount of succession duty payable.

Hon. J. B. M. Baxter, A.-G., for plaintiff.

W. A. Ewing, K.C., for defendant.

McLeod, C.J.

MCLEOD, C.J.:—This is an action brought against the defendant, as executor of the last will and testament of James Walker, deceased, claiming that succession duty is payable on certain property left by the deceased. The parties agreed on a special case, and submitted certain questions for answer. James Walker resided in the parish of Lancaster, in the city and county of Saint John, and died there on January 14, 1914, having first made and executed a will. Letters testamentary of the will and codicil were granted to the defendant on January 30, 1914, and ancillary probate of the will and codical was granted at Halifax, N.S., to the defendant on February 9, 1914.

James Walker left considerable property, and the defendant paid succession duties on part of it, but there was some property

N. B.

S. C.

RECEIVER-GENERAL OF NEW BRUNSWICK v. ROSBOROUGH.

McLeod, C.J.

that the defendant claimed was really situate in the province of Nova Scotia, and was not liable to succession duty in New Brunswick. That property was as follows:—He had some debts owing him that were secured by mortgages on real estate situate in the city of Halifax, in the province of Nova Scotia, the mortgagors being domiciled there. The mortgages themselves were in the possession of the testator at the time of his death. He also possessed a certificate for shares in debenture stock of the city of Halifax, which debenture stock was issued under an Act of Nova Scotia, ch. 51 of the Acts of Nova Scotia of 1905, which Act provided that certificates entitling the holders thereof to a share of said stock might be issued by the treasurer of the city, and that each certificate should be for the sum of $100, or some multiple of $100, and should be signed by the mayor and treasurer, and sealed with the city seal, and countersigned by the city clerk, and gave the form in which the certificate should be. It further provided how any transfer of the shares should be made, which was to be done in the office of the treasurer. It further provided that any person registered as the holder of any share of the said stock should be deemed *prima facie* to be the creditor of the city to the amount of said share. The form of the certificate was as follows:—

DOMINION OF CANADA.

Number PROVINCE OF NOVA SCOTIA. *Shares*

CITY OF HALIFAX CONSOLIDATED FUND. 1905.

This is to certify that at the date hereof is the registered owner in the books of the City of Halifax of shares, of one hundred dollars each, of the Consolidated Fund of the City of Halifax, 1905, established under the authority of an Act of the Legislature of Nova Scotia, passed on the seventh day of April, A.D. 1905, to establish a Consolidated Fund for the City of Halifax. Upon the amount of the shares of said Consolidated Fund standing enregistered to the credit of the owner thereof in the books of the City of Halifax, as aforesaid, the City of Halifax will pay interest at the rate of per cent. per annum, payable semi-annually on first day of January and July in each year. The said shares will be redeemed by payment at the office of the treasurer of the city, on the day of 19 .

SEALED with the seal of the City of Halifax, signed by the mayor and treasurer, and countersigned by the city clerk, and enregistered in the books of said city by the city treasurer, this day of 19 .

These shares are transferable at the office of the city treasurer, in the City of Halifax and not elsewhere; and this certificate must then be given up to be cancelled or its loss accounted for.

Registered on book page City Clerk.

Mayor.

Shares $100. each. Treasurer.

N. B.

S. C.

RECEIVER-GENERAL OF NEW BRUNSWICK v. ROSBOROUGH.

McLeod, C.J.

The certificates held by the test or were at the time of his death in his possession at his reside He, further, had in the Royal Bank at Halifax two sums of ey—one was on special deposit and one on current account. The deposit receipt was as follows:—

THE ROYAL BANK OF CANADA, HALIFAX, N.S., October 12, 1911.
Incorporated 1869.
No. A—113409.

RECEIVED from Dr. James Walker, the sum of dollars, which amount will be accounted for to him by this bank and will bear interest at the rate of three per cent. per annum, until further notice, fifteen days' notice of withdrawal to be given and this receipt to be surrendered before repayment of either principal or interest is made.

No interest will be allowed unless the money remains in the bank one month. This receipt is not negotiable. Manager.
For THE ROYAL BANK OF CANADA. Accountant.

That receipt was in the possession of the testator at the time of his death. For the current account he held a pass book, and that pass book was in the testator's possession at the time of his death at his residence.

The defendant claims that succession duties are not payable on any of this property; the Crown, on the contrary, claim that it is a subject of succession duties. The questions submitted for the opinion of this Court are as follows:—

1. Is the plaintiff entitled to succession duty, under the Succession Duty Act, in respect of the said debts secured by mortgages on real estate in the city of Halifax? 2. Is the plaintiff entitled to succession duty, under the Succession Duty Act, in respect of the said debenture stock of the said city of Halifax? 3. Is the plaintiff entitled to succession duty, under the Succession Duty Act, on the money deposited in the Royal Bank of Canada, in the city of Halifax, and hereinbefore mentioned in par. 5? 4. Is the plaintiff entitled to succession duty, under the Succession Duty Act, on the money deposited in the Royal Bank of Canada, at the city of Halifax, above mentioned in par. 6?

The Succession Duty Act, being ch. 17 of the C.S., 1903, undoubtedly in its terms is wide enough to cover all property owned by the testator, whether in the province of New Brunswick or out of it, save and except property in the United Kingdom of Great Britain and Ireland. It professes to tax as follows:—

All property whether situate in this province or elsewhere, other than property being in the United Kingdom of Great Britain and Ireland, and

subject to duty whether the deceased person owning or entitled thereto had a fixed place of abode in or without the province at the time of his death passing either by will or intestacy.

Then provision is made for property that is voluntarily transferred for the purpose of evading succession duty; then the Act reads as follows:—

Shall be subject to a succession duty to be paid for the use of the province over and above the fees provided by the chapter of these Consolidated Statutes relating to Probate Courts.

and the amount of the duty is then fixed, which varies according to the aggregate of the property and the relationship of the successors to the deceased.

By sec. 2, sub-sec. 1, of the Act, property is declared to include

real and personal property of every description, and every estate or interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives.

But, notwithstanding this general definition and the wide provisions of sec. 5, it cannot be held to include property situate outside of New Brunswick.

Sec. 92, sub-sec. 2, of the B.N.A. Act gives the province power to raise a revenue by direct taxation within the province. The words of the section are as follows:—

In each province the legislature may exclusively make laws in relation to matters coming within the class of subjects next hereinafter enumerated, that is to say (sub-sec. 2), direct taxation within the province in order to the raising of a revenue for provincial purposes.

If, therefore, the *situs* of the property is not in New Brunswick, the legislature cannot tax it. Two questions, therefore, are to be considered: Is the tax a direct tax, and where is the *situs* of the property? The tax, it will be seen, is directly on the property; it is not on an individual. It is on all the property that is situate in the province. There follows in the Act provisions as to the amount of taxation, regulated by the amount of property left, and also by the relation of the parties receiving it to the deceased, and also provisions for ascertaining the amount of the property left. By sec. 6 of the Act it is the duty of the executor or administrator, upon obtaining letters testamentary, or letters of administration or ancillary, to the estate of a deceased person, within 30 days after the issue of such letters to make and file with the Registrar of Probate a full, true and complete statement under oath, shewing all the property the

N. B.

S. C.

RECEIVER-GENERAL OF NEW BRUNSWICK v. ROSBOROUGH.

McLeod, C.J.

deceased had and the market value and the persons to whom the same would pass under the will or intestacy, and provision is made for a direct tax on that property. In my opinion it is a direct tax.

The next question is, where is the *situs* of the property? The debts secured by mortgage are specialty debts. There appears to be a distinction between a debt by simple contract and a specialty debt. It is said by Lord Field, in *The Commissioner of Stamps* v. *Hope*, [1891] A.C. 476 at 481:—

> It has been long established in the Courts of this country, and is a well settled rule governing all questions as to which Court can confer the required authority, that a debt does possess an attribute of locality arising from and according to its nature, and the distinction drawn and well settled has been and is whether it was a debt by contract or a debt by specialty. In the former case the debt being merely a chose in action (money to be recovered from the debtor, and nothing more), could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be *bona notabilia* within the area of the local jurisdiction within which he resided.

And further on, in speaking of specialty debt, he says:—

> is one of a higher nature than one by contract. It was settled in very early days that such a debt was *bona notabilia* where it was "conspicuous," that is within the jurisdiction within which the specialty was found at the time of death,

and this appears to have been acted on in *Payne* v. *The King*, [1902] A.C. 552. In that case the testator was domiciled in Victoria, and died there, having a debt owing him which was secured by mortgage on a property situate in New South Wales, and it was held there that it was liable to duty in Victoria. In my opinion, therefore, the debts secured by mortgage are liable to the succession duty.

The second question refers to the debenture stock of the city of Halifax. I do not think that the question as to that differs very much from the money in the bank. The stock is issued by the city; it can only be transferred in Halifax; the payment by the contract is to be made at the office of the treasurer in Halifax. It is not a specialty debt; it is really a promise to pay, and comes entirely within what is said by Lord Field in *The Commissioner of Stamps* v. *Hope*, *supra*, where he says

> the debt being merely a chose in action (money to be recovered from the debtor, and nothing more), could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be.

In this case the assets to satisfy the debt are in Halifax and the

party must go there to get payment. I think the *situs* of the stock is in Halifax.

Then as to questions 3 and 4, the money deposited in the Royal Bank of Canada. It is claimed by the Crown that, that being personal property, the maxim "*mobilia sequuntur personam*" applies to it. The only difference between the two amounts is that one is deposited in the bank at interest, and the evidence of it is the deposit receipt; the other is an open account, the evidence of which is a pass book. In *The King* v. *Lovitt*, [1912] A.C. 212, it was held that money deposited in the bank in St. John by a testator domiciled in Nova Scotia was liable to succession duties here, on the ground that the *situs* of the property was here. According to that judgment then, the *situs* of these two sums of money would be in Nova Scotia, and, therefore, they would not be liable to succession duties. I, therefore, answer the questions as follows:—To the first question I say "Yes." To the questions 2, 3 and 4 I say "No."

At the argument it was agreed that there should be added to the case a statement that the aggregate value of the estate, including property everywhere, exceeds $200,000, but that if the Nova Scotia property is excluded it will be under $200,000. The object, I believe, was to obtain the judgment of the Court upon the question of computing the value of the estate under clause (*a*) of sec. 5, and to ascertain whether there should be included in such computation the full value of the estate or only so much thereof as is liable to duty. I have had an opportunity to read the judgment prepared by my brother White, J., and I agree with the conclusion he has arrived at on that question.

As both parties have in part succeeded, there will be no costs.

WHITE, J.:—The questions raised in this case turn upon the true construction to be given to sec. 5 of the Succession Duty Act so far as it affects the property specified in the several questions submitted to the Court. It is contended on behalf of the legatees that the property referred to, being locally situate without the province, is not subject to taxation under New Brunswick legislation. White, J.

The Crown, on the other hand, contends, first, that the property in question is such, that, under the circumstances set forth in the stated case, it must be regarded at common law as

N. B.

S. C.

RECEIVER-GENERAL OF NEW BRUNSWICK v. ROSBOROUGH.

White, J.

situate within the province; and, secondly, that, inasmuch as the deceased was domiciled within the province at death, all of his personal property passing under the will is subject to the duty imposed by the statute, regardless of whether such personal property is locally situate within or without the province. In support of this latter contention, the principle expressed in the maxim *mobilia sequuntur personam* is relied on.

It will be convenient, therefore, first to determine how far, if at all, the legatees' contention that the property in question is situate without the province, is well founded.

From the stated case it appears

that the testator, James Walker, at the time of his death, was possessed of or entitled unto several specialty debts, secured by mortgages on real estate situate in the city of Halifax, in the province of Nova Scotia. These mortgages were at the time of his death in the possession of the said James Walker at his residence in the parish of Lancaster aforesaid.

The testator's will, as set forth in the stated case, contains the following as one of its clauses:—

I give, devise and bequeath to Robert S. Rosborough, of No. 279 North street, in the said city of Halifax, all mortgages which I hold on property in the said city of Halifax, and the lands and premises thereby conveyed, and moneys, both principal and interest, thereby secured, absolutely, subject to the proviso for payment in such mortgages contained.

Question No. 1 submitted to the Court reads as follows:—"Is the plaintiff entitled to succession duty under the Succession Duty Act in respect of the said debts secured by mortgages on real estate in the city of Halifax?"

In *The Commissioner of Stamps* v. *Hope*, (1891), 60 L.J.P.C. 44, Lord Field, delivering the judgment of their Lordships, at p. 46, says:—

Now a debt, *per se*, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence, but it has been long established in the courts of this country and is a well-settled rule governing all questions as to which court can confer the required authority, that a debt does possess an attribute of locality arising from and according to its nature, and the distinction drawn, and well settled, has been and is, whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a *chose in action*—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be; and it was held, therefore, to be *bona notabilia* within the area of the local jurisdiction within which he resided; but this residence is, of course, of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty has a species of corporal existence by which its

locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bona notabilia* where it was "conspicuous"—that is, within the jurisdiction within which the specialty was found at the time of death.

See Wentworth on the Office of Executors (ed. 1763), pp. 45, 47, 60.

The principle thus stated by Lord Field, so far at least as it refers to simple contract debts, was acted upon in *Rex* v. *Lovitt* [1912] A.C. 212.

The fact that specialty debts are, by English law, deemed to be locally situate where the instrument under seal embodying the same is to be found, is a principle which would seem to have been recognized in the (Imp.) Act. 25 and 26 Vict., sec. 39, which enacts that

> for the purposes of the stamp duties on probates of will and letters of administration, debts and sums of money due and owing from persons in the United Kingdom to any deceased person at the time of his death, on obligation or other specialty, shall be estate and effects of the deceased within the jurisdiction of Her Majesty's Court of Probate in England or Ireland, as the case may be, in which the same would be if they were debts owing to the deceased upon simple contract, without regard to the place where the obligation or specialty shall be at the time of the death of the deceased.

And as the sealed instruments embodying, or evidencing the specialty debts in question were within this province in the custody of the testator at the time of his death, it is clear that, under the authority of the cases to which I have referred, these specialty debts, at common law, must be regarded as assets within the province, unless the fact that they are secured by mortgages upon real estate in Nova Scotia requires that they shall be deemed to be locally situate where the land upon which they are secured lies. I think it quite clear that it is the locus of the debt, and not that of the security which must govern.

Indeed, it might well have happened that the mortgage given as security for the specialty debt had covered not only land in Nova Scotia, but likewise land located, say, in Prince Edward Island. It is manifest that, in such case, the specialty debt could not have been regarded as locally situate, at one and the same instant, in both Nova Scotia and Prince Edward Island. It is because equity regards the debt secured by the mortgage as the principal, and the land as security only, that mortgages pass as personal assets to the administrators of a deceased intestate mortgagee. See Robins' Law of Mortgages, at p. 844, and

N. B.

S. C.

RECEIVER-GENERAL OF NEW BRUNSWICK v. ROSBOROUGH.

White, J.

cases therein cited. Also *Lawson* v. *Inland Revenue Com.*, [1896] 2 Ir.R. 418.

But the question is, I think, concluded by the judgment of the Privy Council in *Payne* v. *Regem*, [1902] A.C. 552. It was there held that duty was payable under the Victorian administration and Probate Act upon a debt secured by a mortgage of land in New South Wales, where the debt, though a specialty debt by the laws of the latter state, was regarded by the laws of Victoria as a simple contract debt, and both testator and debtor were domiciled within Victoria.

For these reasons, I think the objection that these mortgage debts are not liable to taxation, because they are situate without the province, must fail.

Question No. 2 which we are called upon to answer reads as follows:—"Is the plaintiff entitled to succession duty under the Succession Duty Act in respect to the said debenture stock of the said city of Halifax?" The stock referred to in this question is that specified in par. 4 of the stated case, where a copy of the certificate in question is set forth, together with all relevant particulars.

In Hanson's Death Duties, 4th ed., p. 240, it is said:—

> In the *A.G.* v. *Dimond* it was decided that French rents and American stock are part of the national debt of France and America respectively, and transferable there, and simple contract debts due from persons in America were not assets locally situate in this country. On the other hand, bonds of foreign governments which at the time of the death are situate in this country, and are capable of being sold and transferred here have been held as being of the nature of saleable chattels, to be situate here for the purposes of probate duty. *Attorney General* v. *Bouwens* (1838) 4 M. & W., 171, and so also certificates of shares in foreign company which are marketable in this country, and are operative by delivery: *Stern* v. *The Queen* [1896] 1 Q.B. 211. The rule as to the locality of such assets to be gathered from these cases seems to be that they are situate within the jurisdiction where they are found, unless they are incapable of realization without the doing of some act outside that jurisdiction, in which latter case they will be held to be situate within the jurisdiction where such act has to be done.

As this debenture stock is, by its terms, transferable at Halifax, and not elsewhere, and only upon production and delivery there of the certificate, I think that, under the law as stated—and I think correctly stated—by Mr. Hanson in the passage I have quoted, the said debenture stock must be deemed to be locally situate in Halifax and not within this province.

The Crown, however, contends that, even if this stock is to be regarded as having its *situs* in Halifax, yet, because the testator, at the time of his death, was domiciled within this province, and the law of New Brunswick must, therefore, under the principle designated by the maxim *mobilia sequuntur personam*, govern succession to his personal property wheresoever situate, it follows that, by virtue of the same maxim, the province has power to tax all the testator's personalty.

It is seldom safe to accept a legal maxim as being either a full, or a literally correct, statement of the law. Its function is more to afford a concise means of reference to the legal principle which it designates than to serve as an exposition of the law to which it refers. The maxim *mobilia sequuntur personam* does not mean that personal property is to be regarded for all purposes as being subject to the law of its owner's domicile. Much less does it mean that in contemplation of law property is deemed to be locally situate where its owner has his domicile or residence. In *Blackwood* v. *Reg.* (1882), 8 App. Cas. 82, 92, 52 L.J.P.C. 10, 13, Sir Arthur Hobhouse, in delivering the judgment of the Privy Council, says:—

> In the first place the statement that personal estate is governed by the law of its owner's domicile must be taken with material qualifications. To say nothing of other limitations it is limited just at the point which is material for the present purpose. The grant of probate does not of its own force carry the power of dealing with goods beyond the jurisdiction of the court which grants it, though that may be the court of the testator's domicile. At most it gives to the executor a generally recognized claim to be appointed by the foreign country or jurisdiction. Even that privilege is not necessarily extended to all legal personal representatives, as for instance when a creditor gets letters of administration in the court of the domicile, and when the legal personal representative has been constituted in the foreign country, whether he be the executor of the domicile or another, the administration of assets must take place in the foreign country, with the effect of giving the foreign creditors priority as regards the foreign assets, as is shown by the cases of *Preston* v. *Melville* (1840) 8 Cl. and F.1. *Cook* v. *Gregson* (1856) 25 L.J., Ch. 706. For the purpose of succession and enjoyment the law of the domicile governs the foreign personal assets. For the purpose of legal representation, of collection, and of administration, as distinguished from distribution among the successors, they are governed not by the law of the owner's domicile, but by the law of their own locality.

All, therefore, that is meant by the maxim *mobilia sequuntur personam* is that for certain purposes personalty is held to be subject to the law of its owner's domicile. The principle that the maxim embodies, after long struggling for recognition, was,

N. B.

S. C.

RECEIVER-GENERAL OF NEW BRUNSWICK v. ROSBOROUGH.

White, J.

as pointed out by Chan. Kent in his Commentories, vol. 2, p. 430, adopted as that which, on the whole, is the most convenient and workable one to apply to the passing of personal property by will or intestacy. But, although to that extent, and for that reason and purpose, the principle covered by the maxim has received wide international adoption, yet, for many other purposes, personal property remains subject to the legislative authority and jurisdiction of the state wherein it is locally situate. That the latter state may impose taxes upon such property is settled in *Rex* v. *Lovitt*, [1912] A.C. 212. On the other hand, as pointed out by Lord Moulton, in delivering the judgment in *Cotton* v. *Reg.*, 15 D.L.R. 283,

> there is no accepted principle in international law to the effect that nations shall recognize or enforce the fiscal laws of foreign countries.

It will not be contended that any state would permit foreign process to run within its borders for the purpose of enforcing payment of a tax imposed by a foreign power on property there situate. It is true that the Legacy Act, 42 George III. ch. 99, as interpreted by the Court in *Re Ewing* (1830), 1 C. & J. 151, cited with approval in *Thomson* v. *The Advocate General*, (1842), 12 Cl. & F. 1, imposes a tax on personal property passing by will of a testator domiciled within Great Britain, regardless of whether the property so passing be situate within Great Britain or elsewhere; and in *Wallace* v. *The Attorney-General* (1866), 35 L.J.Ch. 124, it was held that a like construction was to be given to the Succession Duty Act (1853, Eng.).

But, while the effect of these Acts, thus construed, is to regulate the duty to be paid in respect of personal property locally situate in a foreign state, when such property was owned at death by a person domiciled in England, yet neither of the Acts attempts to provide for the enforcement or collection of such tax by proceedings *in rem* against the property taxed, where the same is situate outside of Great Britain. What these Acts do, is to make the estate of the testator liable for the tax, and to impose upon the executor the duty of paying the same out of the estate in his hands. That is to say, the tax, so far as it is imposed in respect of personal property locally situate abroad, is an indirect tax, or must be so regarded under the judgment given in *Cotton* v. *Reg.*, 15 D.L.R. 283.

Under the plenary powers possessed by the Imperial Parlia-

ment, no question can arise as to its authority to impose such an indirect tax. But the case is otherwise with respect to the provincial legislature. Under the provisions of the B.N.A. Act sec. 92, sub-sec. 2, the legislature can only impose "direct taxation within the province in order to the raising of a revenue for provincial purposes." Two things, therefore, are requisite to the validity of a provincial tax. It must be direct, and the subject-matter of the tax must be within the province. If such subject-matter is not within the province, it will hardly be contended that the legislature could acquire jurisdiction over it by merely declaring such property to be deemed to be within the province for the purpose of taxation.

A tax may be imposed upon property, or it may be imposed upon the person in respect of property he owns. Where the property is made chargeable with the duty so that the tax is enforceable by proceedings *in rem* against the specific property taxed, the duty is to be regarded as imposed upon the property itself, rather than upon the owner. Where the owner is taxed, either *per caput*, or in respect of the property he owns, the tax may be, and usually is, made enforceable by process against the person or against his property generally.

I think that the true construction of sec. 5 is that the tax thereby imposed is to be regarded as imposed upon the property taxed, rather than upon the person owning or acquiring such property.

As I have already pointed out, that was the construction given to the section in *Rex* v. *Lovitt*, *supra*. It is true that the definition of "property," as given in sec. 2 (1) of the statute, and the provisions of sub-sec. 2 of sec. 5, would seem to indicate an intention on the part of the legislature to impose a tax upon property outside of the province, passing by will or intestacy to a person domiciled within the province, as well as to impose a tax upon property without the province passing by the will or intestacy of a person dying domiciled within the province. But, even as to such property outside of the province, the aim of the statute, so far as it is directly expressed, is to tax the property passing, as distinguished from the person to whom it passes.

In sec. 5 of the Act what is declared to be taxable is

all property, whether situate in this province or elsewhere . . . whether the deceased person owning or entitled thereto had a fixed place of abode

N. B.

S. C.

RECEIVER-GENERAL OF NEW BRUNSWICK v. ROSBOROUGH.

White, J.

in or without this province at the time of his death, passing either by will or intestacy, etc.

Other sections of the Act, I think indicate that the intention was to tax the property rather than the person. Sec. 13 provides

> that the duties imposed . . . shall be and remain a lien upon the property in respect of which they are payable until the same be paid.

In case of *Re Botsford* (1895), 33 N.B.R. 55, it was held that the duty imposed by this Act is payable out of the specific legacies passing, and not out of the estate as a whole. Sec. 15 provides that the executor or administrator shall collect the duty from the estate, legacy or property subject to such duty in his hands, and shall not deliver it over to any person until he had collected the duty thereon.

Sec. 20, it is true, enacts,

> that if it appears to the Judge of Probate that any duty accruing under this chapter has not been paid according to law, he shall make an order directing the persons interested in the property, liable to the duty, to appear before the Court on a day certain, to be named therein, and show cause why said duty should not be paid.

But, although this section aims to provide a means of enforcing the duty directly against the person to whom the property passes, it is, I think, to be interpreted as designed to provide machinery for the collection of the tax imposed upon the property itself, and not as indicating an intention to impose a tax directly upon the person in respect of such property. Taxation must be imposed by clear and unambiguous language.

For the reasons stated, I do not think the Crown can sustain its claim to tax this debenture stock upon either of the two grounds I have discussed. But a third ground is relied upon, namely, that as this stock, under the provisions of the will, passes to Mrs. Baker, as residuary legatee, and she is domiciled within New Brunswick, it is thus brought within the Act and becomes liable to duty. But it is, I think, very clear that the mere vesting of title to this property in Mrs. Baker cannot change its *situs*. Even if, instead of being a chose in action, this stock had been personalty, having a corporal form and bodily substance, such, for example, as a library, to use the illustration employed by Barker, J., in the *Botsford* will case, and it were moved by the legatee from its present *situs* in Nova Scotia to some place within this province, that would not render it taxable as *property passing under the will*. For, as I have already pointed out, the tax is

imposed upon "property passing by will or intestacy," and not upon property transported into the province. The property's liability to duty must be determined by the condition existing at the time of its passing, that is to say, at the death of the testator. When the property passed to Mrs. Baker it was in Nova Scotia, and, therefore, beyond the jurisdiction of the New Brunswick Legislature. Question 2 must, therefore, be answered in the negative.

Question 3 reads: "Is the plaintiff entitled to succession duty under the Succession Duty Act on the money deposited in the Royal Bank of Canada, in the city of Halifax, and hereinbefore mentioned in par. 5 ?"

As to this question the decision in *Rex* v. *Lovitt*, [1912] A.C. 212, is directly in point, and shews that the money deposited constitutes property the *situs* of which is deemed by law to be at Halifax, hence this question must likewise be answered in the negative.

Question 4 is as follows: "Is the plaintiff entitled to succession duty, under the Succession Duty Act, on the money deposited in the Royal Bank of Canada, at the city of Halifax, above mentioned in par. 6 ?"

The distinction between this money referred to in this question and that alluded to in question 3 is that in the case covered by question 3 this money was deposited at interest under a deposit receipt; while in the case of question 4 it was deposited on current account evidenced by a pass book. This distinction does not affect the *situs* of the property, which being "a mere chose in action—money to be recovered from the debtor and nothing more," to quote the language of Lord Field in *The Commissioner of Stamps* v. *Hope*, [1891] A.C. 476, must, under that decision, be deemed to be locally situate at Halifax, and so beyond the jurisdiction of our legislature to tax directly. Question 4 must, therefore, be answered in the negative.

At the argument it was agreed to add to the stated case, as originally printed, a statement that the aggregate value of the estate, including property everywhere, exceeds $200,000, but if the Nova Scotia property is exluded it will be under $200,000. This was done, as I understand it, with the view to obtain the judgment of this Court upon the question whether, in com-

N. B.

S. C.

RECEIVER-GENERAL OF NEW BRUNSWICK v. ROSBOROUGH.

White, J.

puting the aggregate value of the estate, under clause (*a*) and following clauses of sec. 5, all the property owned by deceased at his death is to be included in such aggregate value, or only so much thereof as is liable to duty.

I think it quite clear that, in such computation, all the property owned by the deceased is to be included. While the legislature can only tax property situate within the province, it can fix the rate of any tax which it is empowered to impose on any basis or at any figure it may see fit. In interpreting the clause in question, we are bound to have regard to the definition of "property" as given in sec. 2 (1) of the Act. As I read clause (*a*) of 5 and succeeding clauses, they appear to me to indicate a clear intention on the part of the legislature to make the aggregate value of all the estate owned by the deceased, at the time of his death, the basis on which the rate of taxation is to be computed and fixed.

There is one further observation which, perhaps, I should make. Reading sec. 5, and construing the word "property" according to the definition given in sec. 2 of the Act, it would seem that the legislature, while seeking to tax property undoubtedly within its jurisdiction, sought also to impose taxation upon property beyond its powers. It was not claimed in this case, nor do I think it could be successfully claimed, that, because the legislature was without power to impose some of the taxation which the Act claims to levy, that, therefore, the whole legislation is bad. What is *ultra vires* is easily separable from what is good; and I, therefore, think we ought to give effect to the provisions of the statute so far as these fall within the powers of the legislature.

As both parties succeed in part and fail in part, there should, I think, be no costs to either side.

Grimmer, J.

GRIMMER, J., agreed with WHITE, J. *Judgment accordingly.*

B. C.

C. A.

McCRIMMON v. B.C. ELECTRIC R. CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and McPhillips, JJ.A. August 10, 1915.

1. WATERS (§ II C—84)—NATURAL WATERCOURSE—DRAINAGE—DEFECTIVE CULVERT—OBSTRUCTION OF FLOW—LIABILITY FOR FLOODING LANDS.

The construction of a culvert by a power company in a negligent manner, whereby it interferes with the flow of a natural watercourse, giving rise to the flooding of the abutting lands, will render the company liable for damages occasioned thereby.

[*L'Esperance* v. *G.W.R. Co.*, 14 U.C.Q.B. 173, distinguished].

2. LIMITATION OF ACTIONS (§II G—66)—FLOODING OF LANDS—DEFECTIVE CULVERT—CONTINUATION OF DAMAGE.

The negligent construction of a culvert obstructing the flow of a natural watercourse and causing the flooding of lands is a continuation of damage, and the limitations under sec. 267 of the Railway Act (B.C.) 1911, ch. 44, will not begin to run until after one year after the doing or committing of such damage ceases.

[*McGillivray* v. *G.T.P.R. Co.*, 25 U.C.Q.B. 69, followed.]

3. INJUNCTION (§ I F—59*a*)—WATER RIGHTS—DEFECTIVE DRAINAGE.

The provisions of sec. 166 of the Railway Act (B.C.) 1911, ch. 44, authorizing the Minister of Railways to make orders in cases of defective drainage do not deprive the Courts of jurisdiction in a proper case to grant an injunction. (*Dictum* of Irving, J.A.)

B. C.

C. A.

McCRIMMON v. B.C. ELECTRIC R. CO.

APPEAL from judgment of Macdonald, J., 20 D.L.R. 834, in favour of plaintiff in action for damage to land caused by flooding. Statement

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

W. J. Whiteside, K.C., for respondent.

MACDONALD, C.J.A.:—I concur with IRVING, J., in dismissing this appeal. Macdonald, C.J.A.

IRVING, J.A.:—The defendants, who are identified with the Vancouver Power Co., defend this action under the powers given to the latter company. The power company was incorporated under the Water Clauses Consolidation Act. R.S. (1897) ch. 190, which provided for the incorporation of power companies by charter (Part IV.) instead of by private bill, and authorises the company (sec. 96) to construct and operate a tramway, and for that purpose expropriate lands (sec. 100). By sec. 94 the privileges and powers granted are subject to certain restrictions, in particular the company "shall not do any unnecessary damage." By sec. 124 a limitation clause is given. By sec. 125 the powers granted are subject to future legislation. By sec. 126 certain clauses of the B.C. Railway Act are made applicable to power companies incorporated for the purpose of constructing and operating railways. None of these applied sections deal with watercourses. Irving, J.A.

The power company constructed its roadbed in 1908-9, through the plaintiff's farm, and before doing so bought the right-of-way from the plaintiff. In 1912 she brought this action against it for trespassing, claiming damages and an injunction. There is no allegation of negligence. The statement of claim sets forth several matters, which were all, with one exception, disposed of by the trial Judge to the satisfaction of the parties, but as to one an appeal has been taken.

The complaint in par. 8 is that, in the course of construction of the roadbed, the power company

B. C.
C. A.
McCRIMMON v. B.C. ELECTRIC R. CO.
Irving, J.A.

Constructed a culvert on the plaintiff's land and constructed it in such a negligent manner that the plaintiff's lands were flooded by reason of such negligence; the culvert being constructed too high, thereby causing an overflow, and serious damage to the plaintiff's said lands.

In respect of this the trial Judge gave judgment for the plaintiffs, and the defendants now appeal.

The roadbed, in going through what was the plaintiff's and is now the defendant's land, passes from one gravel ridge to another. Between these two ridges the ground is soft and wet. To carry the railway across this soft land it became necessary to build up an embankment of gravel, and this embankment contained a culvert, but, as the embankment grew in height and weight, it crushed the culvert out of shape, and a new one had to be substituted and a new culvert put in some 58 ft. to the north, to which point the stream was diverted. It is in respect of the inefficiency of this new culvert that this action is brought. The complaint is that it fails to carry the water which is on the east side of the embankment to the west side, where it would make its escape down a ditch which the power company built (p. 60), and then into a creek which runs off to the west: The result is some 20 or 30 acres on the east side of the railway remain wet and sodden. Witnesses speak of it as muck land (p. 78). The defendant's contention fails when once it is settled that this is a natural watercourse. Purchase by the company of the strip of land would not give it the right to close that, and therefore the argument that the plaintiff should have stipulated for its being kept open when she sold goes for nothing. The company in making the first culvert did what was their duty, but they did it badly, negligently, and the second culvert, which was put in some time after the first culvert was built, was also a negligent piece of work in that it was not as deep as it ought to be to carry off the waters. As to the contention that the second culvert would be valueless unless the ditch connecting it with the creek bed was lowered, it seems to me that when the company undertake to change the bed of the natural watercourse from one place to another they must make it complete. The defendant's duty in substituting one watercourse for another was to make the substituted course as good as the other, both in the matter of depth of the culvert itself and in the matter of providing a full and sufficient drain to carry off the water from the new culvert to the

old creek bed. A municipal road runs on the east of and parallel to the railway, but that is carried on a bridge over the wet part.

The plaintiff's husband says this piece was not flooded before the railway went there; that there used to be a creek there (45), and the first culvert was about where the old creek outlet was (80). The new culvert which is further to the north is not in the sold land, but in the northerly ridge of gravel, and as it is not sufficiently low to take care of the water (p. 80), the complaint seems to be that they have really closed a natural watercourse and not provided a new outlet. The case of *L'Esperance* v. *G.W.R. Co.*, 14 U.C.Q.B. 173, was a case of an artificial drain, not a natural watercourse. Otherwise it is a very like case to this. I do not think we can draw an inference different from that found by the trial Judge that there was negligence in the construction of the two culverts. The first was placed on insufficient foundations, the second was not deep enough.

As to the Statute of Limitations, it is not very clear when this new culvert was substituted—in 1909 I think. The action was not commenced until October, 1911. The statute under which the company was incorporated, 1897, ch. 190, sec. 124, allowed 12 months. By ch. 44 of 1911, the B.C. Railway Act, sec. 267, the same period is given. In both sections provision is made if "there is a continuance of damage," or if there is "a continuation of damage," by which the action may be brought within one year next after the doing or committing of such damage ceases. Continuance of damage means continuance of legal injury, and not merely continuance of the injurious effects of the legal injury: 19 Hals. 178. The question arises, what was the cause of action? From the case of *McGillivray* v. *G.T.P. R. Co.*, 25 U.C.Q.B. 69, where the facts of the construction of a second culvert to cure the defects in the first are very like the present case, it would appear that the cause of action is not the construction of the embankment but the negligent construction, or the inefficient working, of the second culvert—as shewn by the injury done from time to time—in fine, a continuing cause of action arising from time to time as damage is done.

The provisions of sec. 166 of the B.C. Railway Act (ch. 44 of 1911) authorise the Minister of Railways to make orders in case of defective drainage, but do not, in my opinion, as at present advised, deprive this Court of its jurisdiction in a proper case to

B. C.
C. A.
McCRIMMON v. B.C. ELECTRIC R. Co.
McPhillips, J.A.

grant an injunction, but as no authorities were cited on this point I shall not express a final opinion. The notice of appeal is silent as to this objection. I would dismiss the appeal.

McPHILLIPS, J.A.:—The statement of claim in the action would appear to have alleged that the cause of action was the construction of a culvert in a negligent manner, thereby giving rise to the flooding of the land. The evidence, however, would appear to disclose that the appellant interfered with a natural watercourse and constructed this culvert to carry off the water which previously flowed in the natural watercourse, as well as other water which might accumulate, and the trial would appear to have proceeded with this being the evidence. If there was negligence upon the part of the appellant in the construction of its undertaking as authorized by statute, there arises a cause of action in favour of anyone whose land is damnified in the construction of the works. Upon the question of fact the trial Judge has found negligence, and there was evidence upon which he could reasonably so find; therefore it is not a case for interference by the Court of Appeal. It is, though, with some considerable hesitation that I have arrived at the conclusion that the special period of limitation for the bringing of actions against the appellant is not effective. In arriving at the conclusion that the plea is ineffective I have relied upon the following authorities, dealing with when the cause of action arises and what constitutes "continuance of damage": *Backhouse* v. *Bonomi*, 34 L.J.Q.B. 181; *Hole* v. *Chard Union*, 63 L.J.Ch. 469 at p. 470; *Harrington (Earl)* v. *Denby*, 74 L.J.Ch. 219, 230; *Hague* v. *Doncaster Rural District Council*, 100 L.T. 121. It may be said that the cause of action continues so long as the culvert is maintained in its present, held to be, negligent condition, and means a new damage at each time that the overflow takes place consequent upon the negligence in interfering with the watercourse and improper and insufficient culvert provided, *i.e.*, the channel thereof not carried to a sufficient depth, which is understandable when the peculiar formation of the ground at the *locus in quo* is considered.

However, my hesitation does not carry me to the length of disagreeing with my brothers, who are satisfied that upon the facts of the present case it is one of "continuance of damage." I therefore agree that the appeal should be dismissed.

Appeal dismissed.

DORCHESTER ELECTRIC CO. v. KING. DORCHESTER ELECTRIC CO. v. THOMSON. DORCHESTER ELECTRIC CO. v. INDUSTRIAL SECURITIES CO.

QUE.
S.C.

Quebec Superior Court, Lane, J. June 8, 1915.

1. SPECIFIC PERFORMANCE (§ I D—26)—AGREEMENT FOR SUBSCRIPTION OF BONDS—RIGHT TO REMEDY.

An underwriting agreement providing for subscriptions to an issue of debentures, whereby subscribers agree to give money by instalments or otherwise in exchange for debentures or bonds is tantamount to an agreement to borrow and loan money, and hence is not susceptible of specific performance.

2. CORPORATIONS AND COMPANIES (§ V A—168)—BONUS STOCK—ILLEGAL ISSUE—EFFECT ON BOND SUBSCRIPTION.

Where a company as a special inducement to subscribers for its debentures offers a bonus of common stock such inducement is an essential and important consideration of the contract; and therefore if such issue of stock is null and illegal the underwriting agreement itself becomes void.

3. CORPORATIONS AND COMPANIES (§ V B 2—180)—ISSUE OF STOCK BEFORE PAYMENT—WATERED STOCK—ILLEGALITY.

Under the Quebec Companies Act, stock issued direct from the treasury of a company without being paid for in cash is watered stock and therefore illegally issued and void, even though it be claimed that such stock represents the increased value of the company's property.

4. CORPORATIONS AND COMPANIES (§ V B 2—180)—ISSUE OF STOCK—MODE OF PAYMENT—STATUTORY REQUIREMENTS.

Under the Quebec Companies Act no issue of stock not paid for in cash is legal unless a contract be filed with the Provincial Secretary at or before the issue thereof shewing that payment in a form other than cash had been sanctioned.

Statement

ACTIONS on contract for subscription of bonds.

These were actions brought by the Dorchester Electric Co. against the three defendants who had subscribed to bonds of the company for amounts respectively of $25,000, $15,000 and $60,000, the clause in the agreement reading as follows:—

The undersigned hereby subscribe for and agree to purchase the amount set opposite their respective signatures of the Five Per Cent Gold Bonds due in 1951, of La Compagnie Electrique Dorchester as more fully described and subject to the conditions contained in and more fully specified in the Deed of Trust by said company in favour of the Royal Trust Co. as trustee for the bondholders, dated 16th May, 1911, and agree to pay for said bonds at the rate of $85 for each $100 of bonds, payable at par in the City of Quebec. . . . The present subscription for said bonds is made on the understanding that each subscriber hereto shall receive a bonus in common stock of said company equal to one hundred per cent of the par value of his subscription for said bonds, said bonus for common stock to be delivered to each subscriber at the same time and in the same proportion as each subscriber shall take delivery of said bonds. . . . In witness whereof, etc.

QUE.

S. C.

DORCHESTER ELECTRIC CO. v. KING.

Statement

The plaintiff company was a Quebec corporation under Letters Patent of May, 1909.

Defendants pleaded, *inter alia*, that the underwriting agreement was of its very essence a contract of loan not susceptible of specific performance; breach of the terms thereof could only give rise to an action in damages. Moreover, the bonus stock was an essential consideration of the agreement. This stock, on investigation, turned out to be watered stock, issued without any cash consideration and without the authorization of the Provincial Secretary. (R.S.Q. 1909, art. 6063.)

L. A. Cannon, K.C., and *Gregor Barclay*, for plaintiff.

G. C. Papineau-Couture, for defendant, King.

J. DeWitt, for defendant, Thomson.

F. J. Laverty, K.C., for defendant, Industrial Securities.

Lane, J.

LANE, J.:—Considering that the defendant admits signing the underwriting agreement of date February 21, 1912. . . .

Considering that the aforesaid agreement is tantamount to an agreement to lend money to the plaintiff at a certain rate of interest and to receive as security for the payment of said loans, bonds or debentures of the company plaintiff, and as an essential and important consideration of said agreement and inducement for its so doing, the defendant was to receive an amount of common stock of the company plaintiff as a bonus equal to one hundred per cent. of the par value of his subscriptions for said bonds;

Considering that plaintiff's action is for specific performance of said underwriting agreement;

Considering that even if the said agreement gave rise to an action for specific performance, plaintiff would not be entitled to succeed;

Considering that the acquisition of bonus stock of the company plaintiff was an important and essential part of the consideration of the said agreement and a serious inducement to defendant to enter into same, and if said issue of said alleged bonus stock is illegal and null and void, it would render said agreement between plaintiff and defendant null and void and of no effect;

Considering that the said common stock which defendant

was to receive as a bonus was not fully paid up, or paid up to any extent whatever, but was watered stock;

Considering that said stock was not paid up in cash and no contract was filed with the Provincial Secretary at or before the issue of said shares of stock, shewing that payment in some other manner than in cash had been agreed upon;

Considering that even if said stock represented an increased value of plaintiff's property, which does not appear, it would not legalize the issue of the same;

Considering that for the foregoing reasons the said stock was illegally issued, without following the requirements of the law, and the said issue of the said alleged stock is null and void;

Considering that the agreement in question implies that the bonus stock which the defendant was to receive thereunder was a genuine bonus of legally issued stock paid for in cash, and in any event, if otherwise paid for, that the contract respecting same would be filed with the Provincial Secretary, as aforesaid; that defendant was entitled to rely on the above being the case, and was not presumed to know that said stock was null and void, but the reverse;

Considering that defendant has established the essential allegations of his defence, as aforesaid,

Considering that plaintiff's action is unfounded and should be dismissed;

Doth maintain defendant's defence, for the reasons aforesaid;

Doth declare the underwriting agreement of date February 21, 1912, null and void and of no effect, in so far as the defendant is concerned and doth dismiss plaintiff's action with costs.

Authorities of plaintiff: *Rascony Woollen & Cotton Mfg. Co.* v. *Desmarais*, 2 M.L.R. 381, Cyc. vol. 10, Vo. Corporation, pp. 380, 449, 541.

Authorities cited by defendants: *South African Territories* v. *Wallington*, [1898] A.C. 309; Simonson on Debentures, 3rd ed., pp. 66, 70, 71; White, Company Law, pp. 74-75-375; *Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125; Palmer, Part I., pp. 50 & 63; *Morris* v. *Union Bank*, 31 Can. S.C.R. 594; *North*

QUE.
S. C.
DORCHESTER ELECTRIC CO. v. KING.

Western Electric Co. v. *Walsh*, 29 Can. S.C.R. 33; Manson on Debentures, p. 112; *Bahamas* v. *Griffin*, 14 T.L.R. 139; Palmer, Part II., p. 160; Masten, p. 165; *Dunsmuir* v. *Colonist*, 32 Can. S.C.R. 679, 688. *Actions dismissed.*

[N.B.—The plaintiff inscribed in Review from these judgments but desisted therefrom with costs before hearing.]

Annotation

Annotation—Debentures and specific performance.

Etymologically it is nothing more than Latin word "debentur." The word was the first in the form of acknowledgment used by the Crown in old days, and given by it to creditors of the Crown, to soldiers and to the King's servants for payment of their wages. (Parliamentary Rolls, 3 Henry V. 1415.)

The word is used in the same sense in the Pasten Letters in 1455: "debentur made to the said Falstaff with him remaining." The word was employed to describe an instrument under seal evidencing a debt.

The essence of a debenture was an admission of indebtedness, and this is still its essential characteristic.

Edmonds v. *Blaina Company* (1887), 36 Ch.D. 219, gives this definition: "The term itself imports a debt—an acknowledgment of a debt—and speaking of the numerous and various forms of instruments which have been called debentures, without anyone being able to say that the term is incorrectly used, I find that generally—if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day, accompanied by some charge or security."

The authorities appear to agree in the view that any instrument other than a covering deed, which either creates or agrees to create a debt in favour of one person or corporation, or several persons or corporations, or acknowledges such debt, is a debenture.

"Debenture stock," says Lord Lindley, at p. 195, "is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of a large loan."

The contract to take up debentures or debenture stock is usually made by application followed by allotment. When a subscriber for debentures makes default in paying up any instalments, he cannot be compelled specifically to perform a contract by paying up the instalments, for the Court will not grant specific performance in such a case. (Palmer's Company Precedents, 8th ed., part 3, p. 151.) The company's remedy is to sue for damages for breach of contract and such damage has been held to be the difference between the rate of interest payable by the company to the allottee of the debentures, and the rate of interest which the company would have to pay in order to put the company in the same position as if the contract had been performed. *Bahamas Sisal Plantation, Ltd.* v. *Griffin*, 14 T.L.R. 139.

If the sole reason why the company is unable to raise money, or is compelled to raise money on onerous terms, is that it has fallen into disrepute and bad financial odour, the company will not be entitled to recover

QUE.

Annotation

Annotation (*continued*)—**Debentures and specific performance.**

damages from a defaulting subscriber to debentures or debenture stock. (Simonson, 3rd ed., p. 66.)

The leading case on this question is *South African Territories Limited* v. *Wallington* (1 Q.B. 692, [1898] A.C. 309). In this case the applicant for debentures sent his cheque for £80, being a deposit of £5 per debenture on 16 debentures of the company, and required it to allot him that number of debentures, and agreed to pay the instalments due in accordance with the terms of the prospectus. The debentures were duly allotted. The defendant never paid any further instalments. The company sued for specific performance of the contract and the balance of price of the debentures. The Court of Appeal dismissed the action holding that no action for specific performance would lie, or to compel the lending of the money contracted for. The House of Lords confirmed this judgment, and Halsbury, L.C., stated:—

"The forms which have been contrived for the business of Joint Stock Companies, and which, when applied to their proper purpose, are convenient, are somewhat calculated to mislead when their mere language is recorded. The application for debentures on the face of the instrument, asks to pay something. But the real nature of the whole transaction is an agreement of the applicant to lend money at a certain interest, and the action in this case was, in truth, mainly, if not altogether, instituted to compel the intending lender to perform his contract to lend, which, doubtless, he had refused and neglected to do. With respect to the claim for specific performance, a long and varied course of decisions has prevented the application of any such remedy, and I do not think that any Court or any member of any Court has entertained a doubt but that the refusal of the learned Judge to grant a decree for specific performance was perfectly right." ([1898] A.C. 312.)

See, to the same effect, *West Waggon Company* v. *West* ([1892] 1 Ch. 271); Parker & Clarke, Company Law, p. 119; Mulvey, p. 94; Masten, p. 165.

Art. 1065 of the Civil Code, Que., lays down a similar rule: "Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor's expense, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages."

It has always been properly held that a plaintiff cannot come into Court for the purpose of having the defendant constituted his creditor, and this is virtually what a demand to enforce specific performance of a contract of loan amounts to. The only remedy, under Quebec law, is an action in damages, because, in that event, the plaintiff is properly bringing his claim as creditor of the defendant, who, by his breach of covenant, has become liable in damages, if any result, and therefore has become the debtor of the plaintiff.

In England, following the Wallington decision of the House of Lords, the law was amended, specifically giving companies the right to enforce specific performance of subscriptions for debentures. At the present day

QUE.

Annotation

Annotation (*continued*)—**Debentures and specific performance.**

an action of the nature of the case just reported would lie, but, as the law has not been changed in Canada, or in the Province of Quebec, such an action cannot be recognized.

It may be noted that the different Companies' Acts in this country provide for the specific performance of the contract whereby a subscribing shareholder agrees to take stock in the company.

ISSUE OF BONUS STOCK.

The provisions of the Quebec Companies Act are much more drastic than those of the Federal Act.

Art. 6036 R.S.Q. 1909, enacts as follows: "The capital stock of the company shall consist of that portion of the amount authorized by the charter, which shall have been *bonâ fide* subscribed for and allotted, and shall be paid in cash, unless payment therefor in some other manner has been agreed upon by a contract filed with the Provincial Secretary at or before the issue of such shares. . . .

No stock shall be issued to represent the increased value of any property. Any such issue shall be null and void.

The practice commonly known as watering of stock, is prohibited, and all stock so issued shall be null and void.

The capitalization of surplus earnings, and the issue of stock to represent such capitalized surplus are also prohibited, and all stock so issued shall be null and void, and the directors consenting to such issue of stock shall be jointly and severally liable to the holders thereof for the reimbursement of the amount paid for such stock.

Every form and manner of fictitious capitalization of stock in a company, or the issuing of stock which is not represented by a legitimate and necessary expenditure in the interest of such company, and not represented, with the exception mentioned in paragraph 1 of this article, by an amount in cash paid into the treasury of the company, which has been expended for the promotion of the objects of the company, is prohibited, and all such stock shall be null and void."

This legislation is in line with leading English decisions. It is universally conceded that shares cannot be issued at a discount. Under the Federal Act they may be paid for either in cash or the equivalent of cash, but, under the Quebec Act, any payment in manner other than cash, requires to be evidenced by contract filed with the Provincial Secretary, at or prior to the issue of the shares.

In *North-Western Electric Co.* v. *Walsh*, 29 Can. S.C.R., Sedgewick, J., p. 46, lays down the general rule, basing himself on the *Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125, as follows: "It is elementary law that no joint stock company can issue stock below par, unless authorized to do so by the legislature under whose authority it was created."

The principle laid down by sec. 6036 R.S.Q., has been approved by the Supreme Court in *Morris* v. *Union Bank*, 31 Can. S.C.R. 594.

"It is impossible," said the Chief Justice, "in the teeth of the statute which requires that when shares are contracted to be paid for, not in money, but in money's worth, there must be an agreement in writing, to otherwise dismiss this appeal."

QUE.

Annotation

Annotation (*continued*)—**Debentures and specific performance.**

The issue of bonus stock by companies has been condemned in many decisions: *Eddystone Marine Ins. Co.*, [1893] 3 Ch. 9. See also *Bury* v. *Famatina Development Corp.*, [1910] A.C. 439.

"The public are sometimes induced to take debentures of a company, by an offer on the part of the directors to give to the person advancing money on such securities, one or more fully paid up shares in the company, by way of bonus, for every debenture which he takes. The holders of shares so allotted as fully paid up, will, on the company being wound up, be placed on the list of contributories for the full amount of their shares, for the company cannot so allot shares as fully paid up by way of bonus." (Simonson on Debentures, 3rd ed., p. 90.)

Palmer, 7th ed., part 1, p. 808, states that formerly it was not uncommon to offer debentures for subscription on the footing that the company would give to the subscribers not only debentures for the amount advanced, but paid up shares of the company by way of bonus; but as this in effect amounts to issuing shares at a discount, it is *ultra vires*.

In *Railway Time Tables Publishing Co.*, [1895] 1 Ch. 255, the holder of such shares was held liable on winding up. See also *Almada* v. *Tirito Co.* (1888), 38 Ch.D. 415, and *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66; *Re Veuve Monnier et Fils, Ltd.*, [1896] 2 Ch. 525.

In *Mosely* v. *Koffyfontein Mines*, [1904] 2 Ch. 108, it was held that bonus certificates issued with debentures and made payable out of profits only, could not be made the consideration for the issue of paid up shares.

Apart from the liability of the shareholders who have accepted such bonus stock, as paid up, when, as a matter of fact, no valid consideration has been given whatever, to be placed upon the list of contributories in the event of winding up, the directors who are party to the allotment of the bonus shares may be liable to contribute to the assets of the company by way of compensation in respect of their breach of trust.

In *Hirsche* v. *Sims*, [1894] A.C. 654, where the directors improperly issued shares at a discount, it was held that they were answerable to the company for the discount allowed, but that they were not liable beyond the discount, in the absence of proof of fraud or of further resulting damage.

In *Re Wiarton Beet Sugar Co.* (1906), 12 O.L.R. 149, a director, party to the allotment of bonus shares, was held liable to contribute by way of compensation for his breach of trust.

The usual course adopted by careful directors, or financial agents who obtain subscriptions for debentures, consists in their obtaining for these, from the company, in return and in consideration for their promotion services, a certain amount of shares of the company, issued to them as fully paid up and non-assessable, in accordance with the memorandum of agreement and the powers conferred upon the company by the charter. Then, in order to facilitate the placing of the bonds, holders of these promotion shares, legally issued, give and transfer to the subscribers to the bonds, a certain quantity of these shares, proportionate to the amount of the subscription. And in this case the holder of the debenture or debenture stock becomes, at the same time, a shareholder of the company without being in any way liable for calls.

G. C. PAPINEAU-COUTURE.

ALTA.

S. C.

JACKSON v. CANADIAN PACIFIC R. CO.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. June 25, 1915.

1. DAMAGES (§ III I 4—192)—INJURY TO RAILWAY ENGINEER—PERMANENT INCAPACITY—PAIN AND SUFFERING.

An award of $27,000 to a railway engineer aged 32 and earning a yearly income of $2,122 for personal injuries incapacitating him for life, such award being based on the pain and suffering and the pecuniary loss for the duration of life, was held by a divided court to be a fair compensation under the circumstances.

[*Phillips* v. *L. & S.W. R. Co.*, 5 Q.B.D. 78, 5 C.P.D. 280; *Johnston* v. *Great Western R. Co.*, [1904] 2 K.B. 250; *Rowley* v. *L. & N.W. R. Co.*, L.R. 8 Ex. Ch. 221, applied.]

Statement

APPEAL from judgment of McCarthy, J.

O. M. Biggar, K.C., for appellant.

Frank Ford, K.C., for respondent.

Harvey, C.J.

HARVEY, C.J.:—The calculations and computations made by my brother Beck appear to me to furnish satisfying reasons why the verdict in this case should not be disturbed. If I were sitting as a juror I would not be disposed to take exception to the result he reaches as to what would be a fair allowance for the pecuniary loss, but sitting as a Judge I feel quite unable to say that six reasonable men might not fairly be much more liberal.

It is a case where the damage is substantial and the amount to be awarded must, therefore, be substantial. I cannot say that six reasonable men might not quite properly say that with the plaintiff's mental as well as his physical powers impaired, he ought to have sufficient money to bring him in a fair compensation for the remuneration which he will, by reason of the accident, be unable to earn, and that it should be of such an amount that he could invest it where it would be absolutely safe without the supervision which he is probably incapacitated from exercising which might be required in the case of mortgages. If he ought to be given the right to purchase an annuity, then he must purchase it from those who will sell, and he will have to pay the price they charge, which is based on the rate of interest which they, as reasonable business men in safeguarding their own interests, think proper.

In *Johnston* v. *G.W. R. Co.*, [1904] 2 K.B. 250 at 257, Vaughan Williams, L.J., points out the ground on justifying the setting aside of a verdict. He states that the grounds would be

ALTA.

S. C.

JACKSON v. C.P.R.

Harvey, C.J.

circumstances satisfying the Court that the jury had taken into consideration topics which they ought not to have considered, or applied a wrong measure of damage, and it could come to that conclusion if it found

> that the amount of the verdict, after deducting all special damage and all damages given for personal pain and suffering was a sum which equalled or exceeded the sum which would purchase a life annuity for a person of the plaintiff's age equal to the difference

between his prospective earnings before and after the injury.

No exception was taken to the Judge's charge to the jury at the trial or in the notice of appeal, and it appears to me that it presents the case to the jury in quite the proper light and protects the defendant in every proper way. Its conciseness in certain respects appears to me one of its admirable qualities, as being less likely to confuse the jury than more elaboration might do. If I am right in this there is nothing but the amount of the verdict from which we can gather that the jury considered something it should not, or adopted a wrong measure. It cannot be said that the jury might not have thought from the evidence and their general knowledge that the plaintiff's prospects would have been for continued increasing earning power, which might have been quite sufficient to offset the ordinary accidents of life. If they did, and I feel difficulty in saying that they could not justly do so, and if they might have given a sum based on the cost of an annuity as Vaughan Williams, L.J., suggests, then a very much larger verdict could have been supported by the evidence, and that for pecuniary loss alone without regard to any other consideration. The pain and suffering and inconvenience both past and to come during the remainder of the plaintiff's life, and which are not merely physical, cannot be considered trivial, and there is no measure by which they can be ascertained, but the common sense, of reasonable men. If it were a Superior Court Judge who lost a leg which would in no way interfere with his performance of his regular duties and whose pecuniary loss would, therefore, be insignificant, I think that we at least would consider a verdict of $10,000 or $15,000 to err if at all on the side of being too small. It would not be surprising if laymen jurors might consider this pain and suffering of equal worth to that of Judges, and so long as we recognize the right of juries

ALTA.

S. C.

JACKSON v. C.P.R.

Harvey, C.J.

to determine damage we must attribute to them as much as to Judges the characteristics of reasonable men.

For the reasons stated, while considering the sum awarded by the jury very liberal, I cannot come to the conclusion that it is based on any wrong consideration or measure, or that it is such that a jury of reasonable men could not give, and I would, therefore, dismiss the appeal with costs.

SCOTT, J.:—The damages awarded to the plaintiff by the jury are, in my opinion, unreasonably large. I would, therefore, allow the appeal with costs and remit the case to the Court below for a new assessment of damages.

The injuries which the plaintiff sustained were undoubtedly of a serious nature and such as to render him incapable of resuming his occupation of a locomotive engineer, but the evidence is not by any means conclusive that he will be incapable of earning an income in some other employment.

The plaintiff is entitled to compensation for his pain and bodily suffering and a fair compensation for his pecuniary loss. He is not entitled to a perfect compensation for the latter, not a sum sufficient to maintain him for life. The jury should not consider the value of existence "as if they were bargaining with an annuity office:" *Rowley* v. *L. & N.W. R. Co.*, L.R. 8 Ex. Ch. at 230, 231.

The income of the plaintiff for the year preceding the accident was $2,122. At that rate the income he lost between that time and the trial amounted to $1,685 and the expenses incurred by him by reason of the accident to $82, making a total of $1,767. The $27,000 which the jury awarded him, if invested by him in easily procurable first class securities at the usual rate of interest upon such securities, would yield him an annual income for the remainder of his life in excess of that which he was in receipt of up to the time of the accident and leave the principal intact at his death. A reasonable view of the effect of the verdict is that, irrespective of whether the plaintiff may recover from his injuries and become capable of earning an income by other means, the defendant company is called upon to pay him a sufficient sum to enable him to live in idleness for the rest of his life and to yield him at his death a sum exceeding $25,000 by way of

ALTA.

S. C.

JACKSON v. C.P.R.

Scott, J.

compensation for the pain and bodily suffering resulting from his injuries. Such being the effect I cannot avoid the conclusion that the amount awarded him is greatly in excess of what he was entitled to recover.

In *Phillips* v. *L. & S.W. R. Co.*, 5 Q.B.D. 78, 5 C.P.D. 280, referred to by my brother Beck in his judgment, the plaintiff was a physician in receipt of an income of £5,000 from his profession. The injuries he sustained were such as to render his life a burthen, his condition was hopeless, the probabilities being that he would never recover. At the first trial the jury awarded him £7,000. A new trial was directed on the ground that that amount was insufficient. On the second trial he was awarded £16,000. The defendants moved against this verdict on the ground that the amount was excessive, but the Court of Appeal refused a new trial, holding that the amount was not excessive, Lord Bramwell expressing a doubt as to whether it was not less than the plaintiff was entitled to. He appears to have concluded that the jury awarded him £1,000 for bodily suffering and £15,000 for three years' loss of income.

Taking as a basis of comparison the income of the plaintiff in that case and that of the plaintiff in this case which is, in my view, a reasonable basis, a proportionate award in that case would have been about $65,000. I doubt very much whether Lord Bramwell would have considered that such an award would not be excessive.

STUART, J., concurred with HARVEY, C.J.

Stuart, J.

BECK, J.:—This is an appeal from the verdict of the jury at a trial of the action and from the judgment of McCarthy, J., the presiding Judge, asking for a dismissal of the action or a new trial.

Beck, J.

No exception is taken to the Judge's charge to the jury; and on the argument before us the question of the jury's finding of negligence was not pressed, leaving as the only grounds of appeal, three: 1. That the evidence on behalf of the plaintiff of the expectation of life was improperly admitted. 2. That the evidence of the cost of purchasing annuities of different amounts was improperly admitted. 3. That the damages are excessive.

The accident occurred on March 14, 1914. The action was

ALTA.

S. C.

JACKSON v. C.P.R.

Beck, J.

tried on February 1, 1915. The defendant was 32 years of age on June 18, 1914. He was a locomotive engineer; had been since 1906; previous to that he had for three years been a fireman. He was injured, while running his train, by being struck on the forehead by the lock of a mail bag suspended from a mail crane. The wound was a compound fracture extending into the hair 3 or 4 inches. He was promptly taken to a hospital and placed under the care of Dr. Gershaw, the defendant company's divisional surgeon. The doctor's evidence is to the following effect. He was lying in bed, his condition seemed quite serious, he was completely unconscious, his limbs were flaccid, if one took them up they would drop—dead weight; the brain was not controlling the limbs; there was a large injury where the skin was torn over the forehead—a compound fracture of the skull; the skin was broken. His pulse was very slow; his breathing was irregular; it was noisy, stertorous, his color very poor. He had all the symptoms of a man suffering from compression of the brain. The doctor proceeded to operate. He enlarged the injury to get a clear view of the injury, raised the depressed and fractured parts of bone and removed them. When the depressed parts of the bone were raised it was seen that a portion of the man's cap had been forced down into the brain substance. This was raised; the sharp edges of the bone were removed; and it was seen that the brain itself was depressed—the delicate covering of the brain (the dura) was also depressed and torn in one place.

The plaintiff remained in an unconscious condition for a long time; it was about two months before he became at all natural.

The doctor described the plaintiff's condition at the time of the trial. He has double vision; there is a weakness in the left side; the strength of the left side is less than it should be. There was during the course of illness marked evidence of sensory disturbance; this has improved. His right arm is unsteady, particularly at times; it had a regular muscular twitching. This is more marked sometimes. His present condition is not normal. The doctor had known the plaintiff for two years or more. He says the plaintiff was, before the accident, a very strong man, above the average, and very bright mentally. Since the acci-

dent his memory is not good; he remembers nothing of the accident or the events immediately preceding the accident, his mental processes are slow and there is a certain amount of confusion. The plaintiff's condition generally has improved, but the improvement was more noticeable during the first six months. In the doctor's opinion he will never be able to do work that will require quick thinking or automatic action; he will not be able to resume his work as an engineer. The doctor is unable to say whether or not serious mental weakness may develop. At the present time he is unable to do any work; he can walk around a little. With some training he could learn to make himself of some use. He has learned to write a little with his left hand.

Dr. Smythe, another medical practitioner called on the plaintiff's behalf, does not take as favourable a view of the plaintiff's condition and thinks it likely that he will become worse.

A witness, Hector Lang, was called. He was an agent for the Manufacturers' Life Ass. Co., which sells annuities and was formerly a teacher of mathematics and principal of the Normal School at Regina, but was not certificated in any way as an actuary nor did he profess to be one.

He produced a set of tables supplied to him by the assurance company purporting to give the "Tables of Mortality" of the "Institute of Actuaries" shewing the expectancy of life at different ages and the price charged by the company for annuities based upon these tables and investment at interest at the rate of 3½%. The witness also made his own calculations of the cost on this basis, assuming the correctness of the "Tables of Mortality." This evidence was taken subject to objection.

In dealing with the question of law involved, one of the most important cases requiring consideration is *Phillips* v. *L. & S.W. R. Co.*, in which there were two trials, 5 Q.B.D. 78, 41 L.T. 121, 28 W.R. 10; and after a new trial, 5 C.P.D. 280, 49 L.J.C.P. 233, 42 L.T. 6, 44 J.P. 217. The charge to the jury by the trial Judges are important as they were both approved as substantially correct. That of Field, J., on the first trial is to be found in 5 Q.B.D. at page 78 *et seq.*, in the report of the case on appeal, the motion for a new trial being in the preceding volume. The

ALTA.

S. C.

JACKSON v. C.P.R.

Beck, J.

charge of Coleridge, C.J., on the second trial is reported at much greater length than elsewhere in the Law Times Report.

I find that to discuss at length these decisions bearing upon the questions of law involved in the appeal before us would require many pages and I, therefore, content myself for the most part with stating what in my opinion the authorities established.

First as to the admissibility of the evidence as to the expectancy of and the cost of purchasing annuities.

The cost of an annuity depends, of course, upon the probable duration of the life; and the probable duration of the life is commonly taken from tables compiled by persons or institutions of more or less standing based upon statistics drawn from various sources more or less reliable. It is impossible to prove to any tribunal the truth or correctness of any such tables; and it seems to me that in no case has the attempt been made; but the only use made of them was shewn that life insurance companies made use of the particular tables in question as the basis upon which they did business in selling life annuities. In this view the correctness of the tables is a matter of indifference; the important fact is that the assurance companies, the institutions which make a business of selling annuities, accept them as correct for business purposes and base their prices upon them. So that the evidence of Mr. Lang so far as it was founded upon the Mortuary Tables to which he referred amounted only to this: The Manufacturers' Life Ass. Co., which I represent, sells life annuities. It takes the age of the "life" and accepts as his expectancy of life what a book entitled "Mortuary Tables of the Institute of Actuaries" says that expectancy is. It then calculates the price on the basis of being able to invest the amount or the residue and it is reduced by periodical payments, at 3½ per cent. per annum. It is clear that the correctness of the tables is not in question. The use of such tables to this extent, at least, is clearly admissible: *Rowley* v. *London & N.W. R. Co.*, L.R. 8 Ex. 221; *Vicksburg, etc. R. Co.* v. *Putman*, 118 U.S. (11 Davis) 545; *District of Columbia*, 136 U.S. (29 Davis) 450. Furthermore it seems to me that quite apart from any such tables being before the Court, it is surely open to the Judge and

jury to form by means of their own ordinary experience and the general knowledge which they may be assumed to have, though it may in fact be necessary to refresh one's memory by reference to works dealing with matters of general knowledge, a sufficiently accurate estimate of the probable life of a healthy person of a designated age, and may by applying their experience and general knowledge in conjunction with evidence respecting the age, health and social condition, habits and pursuits of the plaintiff make a sufficiently accurate estimate of his probable life. The matter is dealt with as a matter of general knowledge, *e.g.*, in the Encyc. Brit., 11th ed., title "Insurance," pp. 665 *et seq.* See Shearman & Redfield on Negligence, 6th ed., 776, n. 359; White's Personal Injuries on Railroads, vol. 1, 192, and cases there cited.

In the *Rowley* case, *supra*, it was held that evidence directed to the cost of an annuity, involving as it did, the acceptance by the jury of some period as the probable duration of life as the basis of the cost, was relevant and admissible.

Then comes the question of whether the damages are excessive, and this calls for a consideration of the elements of damage which are open for the consideration of the jury.

First, it is important to remember, especially in considering, if one wishes to do so, the amounts of verdict, that under what is called Lord Campbell's Act (C.O., 1898, ch. 48, an ordinance respecting compensation to the families of persons killed by accident) and the damages awarded must be limited to the pecuniary loss sustained by the beneficiaries under the Act: *Blake* v. *Midland R. Co.*, 18 Q.B. 93, 21 L.J.Q.B. 233; *Rowley* v. *London & N.W. R. Co.*, *supra*.

2. In the cases of personal injuries occasioned by negligence, exemplary, vindictive, retributory, or punitive damages cannot be recovered unless there was such entire want of care as to raise a presumption that the defendant was conscious of the probable consequences of his carelessness and was indifferent, or worse, to the danger of the injury to other persons: Shearman & Redfield, para. 748; White, para. 173 *et seq.*; Mayne on Damages, 7th ed., pp. 46, 47, 48, 448; *Emblen* v. *Meyers*, 6 H. & N. 54, 30 L.J. Ex. 71; *Phillips* v. *London & N.W. R. Co.*, *supra*. And where such

ALTA.

S. C.

JACKSON v. C.P.R.

Beck, J.

damages of this kind cannot be recovered, neither the wealth of the defendant nor the poverty of the plaintiff is to be taken into account in assessing the damages: Shearman & Redfield, 762; White, 180. There is no suggestion that the present case is one for damages of this sort.

3. Subject to what is said above the plaintiff is entitled by way of damages to the following.

(1) The expenses reasonably incurred, not necessarily paid in consequence of his injuries. (2) The value of his time in whole or in part, as the case may be, up to the time of trial, lost by reason of his injuries. This is usually a mere mathematical calculation of the plaintiff's wages, salary, or ascertained past income for a certain period, but as Brett, L.J., points out in *Phillips* v. *London & L.W. R. Co.*, 5 C.P.D. 280 at 291, circumstances may have existed which would have prevented the plaintiff earning the same salary, wages or income during the time he was disabled.

> If (he says) the plaintiff had resided in Lancashire and had earned his livelihood by working at the mills there, and if all the mills in Lancashire had been closed from the time of the accident the jury would have to weigh that fact and consider whether he could have continued to earn his ordinary wages.

(3) A fair compensation for reduction of his probable future earnings. (4) A reasonable sum by way of some compensation for his bodily and mental suffering caused by the injury and the continuous inconvenience arising from the injury: See Shearman & Redfield, paras. 758 *et seq.*; White, para. 183; Mayne, pp. 488 *et seq.*, and cases there cited.

No difficulty can arise under the first two heads. There has been much discussion with reference to the last two. To take up the third item: "A fair compensation for the reduction of his probable future earnings."

As I have already pointed out, it is proper to take into account the probable duration of the plaintiff's life and the cost of an annuity having regards to his probable earnings, but in doing so it is to be remembered with regard to the probable duration of life that tables are, at least those in question here were, for the expectancy of an ordinarily healthy man. The particular man's health, his habits and his occupation must,

ALTA.
S. C.
JACKSON
v.
C.P.R.
Beck, J.

therefore, be considered. Then with regard to his earnings, it is to be remembered that in most cases his earning power is seldom as great in the later years of his life, even if he continues to work and that for one reason or another he may voluntarily retire from his occupation or be compelled to do so from sickness, temporary or permanent, or inability to obtain employment owing to change in methods by reason of which he may no longer be considered an expert in his occupation. If the plaintiff were in business, there is the possibility of insolvency or great reduction of profits on account, for instance, of "hard times." The value of an annuity for the whole of the plaintiff's life must not be given. All such contingencies, "the changes and chances of this mortal life," as can be properly suggested with respect to the particular plaintiff must be taken into account both in regard to his expectancy of life and with regard to his earning capacity, and a jury should be cautioned to this effect. I should myself feel bound to caution them strongly with suggestions for the purpose of bringing clearly to their minds the contingencies not unlikely to arise in the particular case, and I confess to some fear that although I think that the learned trial Judge's charge in this particular case was literally correct, yet it was in this respect so succinct as to have failed to arouse the minds of the jury to a full consideration of all the circumstances to be taken into account in reducing, they were bound to reduce them greatly, the figures which were presented to them in reference to the cost of an annuity.

This, I think, is to the effect of the decisions with reference to the question of the pecuniary loss suffered by the plaintiff. I make some extracts from the case of *Phillips* v. *L. & S.W.R. Co.*, in appeal.

James, L.J., says in the course of the judgment of the Court:

(Counsel for the plaintiff) principally go upon the ground that there is in the summing up an uncertainty which would have the effect of a misdirection, and that the attention of the jury was not sufficiently drawn to the distinction between damages for personal injuries *apart from pecuniary loss* and damages for pecuniary loss actually resulting from the injuries.

Counsel for the plaintiff in argument had said:—

It no doubt is the rule that a jury must not attempt to give a man a full compensation for bodily injury; if they were to do so there would be

ALTA.

S. C.

JACKSON
v.
C.P.R.

Beck, J.

no limit to the amount of damages, for no sum would be an equivalent for the loss of a man's eyes; but full compensation is to be made for pecuniary loss.

James, L.J., interjected:—

The proper direction to the jury as it seems to me would have been to tell them to calculate the value of the income as a life annuity and then (to) make an allowance for it being subject to the contingencies of the plaintiff failing in his practice, and so forth.

Counsel later said:—

What, however, the plaintiff mainly relies on is that the jury ought to have been distinctly told that, although as regards bodily injury apart from pecuniary loss, they can go no further than to give what they think reasonable, without attempting to make full compensation, yet as to pecuniary loss, whatever difficulty there may be in ascertaining it, when it is ascertained the jury must give the full amount of it, without regard to the question whether it is of so large an amount as to make it extremely inconvenient to the defendant to pay it. The Judge has mixed the two things together in such a way as to lead the jury to treat the whole matter according to the rule applicable only to bodily injury and to consider that they were not to give full compensation for the pecuniary loss.

In the considered judgment of the Court, James, L.J., goes on to say:—

Now, on (this) the first point, taking the whole of the summing up together it seems to me that the case was put to the jury in the way in which the plaintiff's counsel contends that it ought to be put.

Mr. Justice Field says:—

An accident might have taken the plaintiff off within a year. He might have lived on the other hand for the next twenty years, and yet many things might have happened to prevent his continuing his practice. If it had been a question of trade or business, bankruptcy might have supervened, that does not come into account here, and I only give it by way of illustration of what must pass through your minds for the purpose of seeing what sum is to be given. It is given, recollect, once for all, and only once; you must not forget that; and it must be given in the fairest estimate you can make of what the probable continuance of the plaintiff's professional income would have been. That comes to this, you are to consider what his income would probably have been, how long that income would probably have lasted, and you are to take into consideration all the other contingencies to which a practice is liable. I do not know how otherwise the case would be put. (Again he says:) The damages to which a man is entitled are the consequences of the wrongful act by which he suffers. The consequences of the wrongful act here are undoubtedly that Dr. Phillips has been and is prevented from earning such a sum of money as you think he would have been likely to earn if this accident had not happened.

The case would not have been put more favourably for the plaintiff than it was thus put up by Field, J.

In the same case in 5 C.P.D. 280, Brett, L.J., said:—

With regard to subsequent time, if no accident had happened, nevertheless many circumstances might have happened to prevent the plaintiff from earning his previous income; he may be disabled by illness, he is subject to the ordinary accident and vicissitudes of life; and if all these circumstances, of which no evidence can be given, are looked at, it will be impossible to exactly estimate them; yet, if the jury wholly pass them over they will go wrong, because these accidents and vicissitudes ought to be taken into account. It is true that the chances of life cannot be accurately calculated, but the Judge must tell the jury to consider that in order that they may give a fair and reasonable compensation. It has been objected that the direction was wrong, because Lord Coleridge told the jury that *the* proved income was to be taken as the basis of compensation. If he had told them that this was the only basis, the direction would have been wrong; but Lord Coleridge merely said that the income was *a* basis, not *the* basis, of compensation. It is one circumstance, and to my mind the chief circumstance, to be taken into account in estimating the pecuniary loss.

It was shewn that the plaintiff at the time of the accident was earning on the average $178.57 per month, or $2,142.84 a year. Among the figures given by the witness Lang is $19,541.20 as the sum required to buy an annuity of $1,000 for 33 years on the basis of 3½%.

According to the Tables of Mortality produced, the expectancy of life of a healthy person of the plaintiff's age is 33.21 years. It is impossible, of course, to tell how the jury looked at the question. For myself I should think that considering the character of the plaintiff's occupation and assuming that he lived for 33 years or more, making him about 66 years, he would have to abandon that occupation some years before reaching that age, and take up something which would bring him in much less than he was earning at the time of the accident; that the risk of his being incapacitated by disease or that of his meeting with a pure accident were more than the ordinary risk. Occasional sickness or periods of idleness from indisposition, choice or strikes should also be contemplated. Then, it seems to me that the cost of an annuity is not necessarily the basis upon which an estimate of the plaintiff's pecuniary loss should be based. It seems to me that the conditions existing in this country and likely to continue for many years are so different

ALTA.
S. C.
JACKSON
v.
C.P.R.
Beck, J.

from the average conditions on which the assurance companies take the rate of 3½% as the basis of their calculations that that rate is too small, so small that I fancy these companies sell few if any annuities in this part of Canada and that the plaintiff would not be well advised so to invest the damages that he recovers in this action, but would be well advised to invest a large part of it in mortgages, on which he could no doubt obtain interest, at not less than 8%. If in future years rates of interest which have obtained for years past become less, a concurrent reduction of the cost of living or a depreciation of the value of money would, it seems to me, result.

As to the fourth item: "A reasonable sum by way of compensation for his bodily and mental suffering caused by the accident and the continuous inconvenience arising out of the injury." It is impossible to lay down any fixed rule to guide juries in assessing damages under this head, and no Court has attempted to do so. At best they have indicated certain observations which ought to be made to juries both with respect to damages for pecuniary loss and especially in respect to attempted compensation for pain and suffering. What was said by Parke, B., in *Ainsworth* v. *C.E. R. Co.*, 11 Jur. 758, though that was a case under Lord Campbell's Act, in which nothing could properly be given for "consolation," seems especially applicable to the case where damages for pain and suffering are in question.

> No sum of money could compensate a child for the loss of its parent, and it would be most unjust if whenever an accident occurs juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done.

In *Phillips* v. *London S.W. R. Co.*, 5 Q.B.D. 79, Field, J., said "perfect compensation is hardly possible and would be unjust;" of this and like remarks of Field, J., James, L.J., in the same case, 4 Q.B.D. 84, said:—

> I think that what Field, J., means to say was, so far as the injury results in pecuniary loss you must give the plaintiff full compensation for that loss but so far as he is entitled to damages for the suffering of being made a helpless cripple, you cannot proceed on the principle of making full compensation.

In the same case Cockburn, C.J. (4 Q.B.D. 407), said:—

> But there are personal injuries for which no amount of pecuniary damage would afford adequate compensation, while, on the other hand, the

attempt to award full compensation on damages might be attended with ruinous consequences to the defendants, who cannot always, even by the utmost care, protect themselves against carelessness of persons in their employ.

In *Spawlding* v. *Pennsylvania Co.*, 12 L.R.A. 698 (a decision of the Supreme Court of Pennsylvania on Appeal), it is said:—

> The true rule is that in addition to the loss of time and expenses actually incurred by the plaintiff by reason of the injury (meaning as I think in addition to the pecuniary loss) the jury may consider also the nature of the injury (and) the pain and inconvenience resulting from it; and make such allowance therefor as in view of all the attending circumstances may seem to be just and reasonable.

(1) The plaintiff claims in his statement of claim loss of wages from March 14, 1914, to September 1, 1914—6 months at $200 a month. The evidence shews that his average earnings for three years previous to the accident were $178.54 a month. He would seem to be entitled to this amount per month from March 14, 1914, to February 1, 1915, the date of the trial, say $1,875. (2) Expenses, $86.25. (3) Pecuniary loss; $15,000 invested at 8% would give the plaintiff $100 a month. $12,000 would give $80 a month, leaving the principal intact. It seems to me that even the latter sum ought to be considered ample under this head. These three items amount to $13,961.25, leaving approximately under heading. (4) Fair compensation for past and future pain and suffering and inconvenience, $13,000.

In this view the question is, is this latter sum so large in view of the circumstances proved as to lead this Court to the conclusion that the jury applied a wrong measure of damages, but in this is involved the correctness of the estimate of $12,000. In the absence of any different criterion the answer is difficult and will probably be answered differently by different persons. For my own part I am convinced that it is more than I should myself have allowed. I have already stated my fear that owing to the conciseness of the Judge's charge, the jury may not have taken into account all the contingencies which they ought to have considered in estimating the pecuniary loss. I think, too, that it is altogether probable that they looked at that item of damage exclusively from the point of view of the costs of an annuity. I fear, too, that they were influenced by the wealth of the defendants. In this way I am led to the conclusion that

ALTA.

S. C.

JACKSON v. C.P.R.

Beck, J.

in their estimate they did not allow so large a sum as $13,000 under this head, but allowed an excessive sum for pecuniary loss.

It seems to me that an income of approximately $80 a month for life, with the principal sum of $12,000 or thereabouts to represent his probable accumulations at his death is, as I have said, ample for pecuniary loss to a man in the plaintiff's circumstances and that more would be unreasonably large. In the considerable number of cases which I have perused it seems to me remarkable what little consideration is given, in considering the amount of verdicts, to an allowance for pain and suffering. They seem to carry with them the idea that pain and suffering have no measure in money and that not much more can be allowed than such a sum as will provide the necessary expense for the alleviation of suffering by means, for instance, of medical attendance, medicine, surgical appliances, nursing assistance and care, so that a sum of $10,000, for instance, might well be awarded exclusively under this head to an injured person of like condition of life as the plaintiff who had become so crippled as to require a constant attendant. The plaintiff seems, notwithstanding the seriousness of his accident, to have suffered no great pain and to have no need of any further attention. I judge that he will be able to go about amongst his friends and enjoy such amusements as he was accustomed to, and even to do light work of some kind, at least by way of distraction and probably so as to add to his income. It must not be overlooked that whatsoever sum is awarded to the plaintiff for pain and suffering, etc., will be at his disposal for investment in addition to the amount awarded for pecuniary loss, thus very considerably increasing his permanent income as well as his capital. Under these circumstances I should think there would be a considerable reduction on the verdict. In my opinion, there is sufficient ground on which to base the inference so as to bring the case within *Johnston* v. *G.W. R. Co.*, [1904] 2 K.B. 250, that the jury in estimating the damages took into consideration matters which they ought not to have considered or failed to take into consideration matters which they ought to have considered.

ALTA.

S. C.

JACKSON v. C.P.R.

Beck, J.

We have no power to make the reduction and the question can only be settled by another assessment.

With a good deal of hesitation, I come to the conclusion that the appeal should be allowed and that the case be directed to be set down for a new assessment of damages. I would give the defendants the costs of the appeal.

Appeal dismissed, Court divided.

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S. C.

BALFOUR v. BELL TELEPHONE CO. OF CANADA.

Ontario Supreme Court, Riddell, Latchford, Kelly and Lennox, JJ. June 1, 1915.

1. MASTER AND SERVANT (§ III A 2—290)—LIABILITY OF MASTER FOR ACTS OF SERVANT—RECKLESS DRIVING—HIRED TEAM.

A driver furnished by a livery man with the hiring of a team who assists in the work of the hirer and operates, except as to driving, under the latter's directions, will, in the event of an accident resulting from reckless driving, render the liveryman, not the hirer, liable for damages resulting therefrom.

[*Consolidated Plate Glass Co.* v. *Caston*, 29 Can. S.C.R. 624, followed.]

Statement

APPEAL from the judgment of the Senior Judge of the County of Wentworth.

H. A. Burbidge, for appellants.

C. W. Bell, for plaintiff, respondent.

Latchford, J.

LATCHFORD, J.:—The defendants appeal on the ground that, as between the plaintiff and the defendants, the judgment of His Honour Judge Snider is not warranted by the evidence.

The third party was not represented in the appeal.

The finding that the horse which caused the accident to the plaintiff was driven recklessly is not disputed. But the appellants contend that there is no evidence to warrant the conclusion that the driver was so under their control as to make them responsible in law for his negligence.

The finding on the point is as follows: "The man Spera, who was driving at the time of the accident, was sent with the horse, and employed with the horse and rig to work for the telephone company. The man was hired by Temple, and Temple, the liveryman, owned the rig, and he sent Spera with the rig each morning to be under the supervision and command of the Bell Telephone Company's foreman. While there, it was his duty to do just what the foreman might tell him to do as to driving the horse, to go where he told him to drive, to load on what he hap-

ONT.

S. C.

BALFOUR v. BELL TELEPHONE CO. OF CANADA.

Latchford, J.

pened to be wanting to put in, and to stop when he said to stop, *and it would have been his duty to stop driving furiously if the foreman had seen fit to tell him to do so when he sat beside him, before this injury occurred.* It is also clear from the evidence that his duty was not limited to driving the horse. When the horse was standing idle, while work was being done along the street in stringing wires or carrying wires into a house, it was the duty of this man Spera to make himself useful at the company's work in such way as the foreman might direct him to do. He helped to string the wires, to hold the ladders, helped to load and helped to unload, just as the foreman might order him to do, all through the day, and when the horse was standing at any point on the street, and it was necessary to move him up to another point, if this man Spera happened to be engaged on other work under the foreman, other members of the gang, the telephone company's servants, moved the horse up as it might be required; so that it seems, as far as could be so, after he arrived at seven o'clock in the morning at the spot where they were to go to work, he became to a large extent the general servant of the company, under the direction and control absolutely of the telephone company's foreman, as much so as any man they had employed; and it was while so working, and with the foreman sitting beside him, to whose command he was bound to conform, as is admitted by all, that he did this reckless driving, taking the gang and their ladders and so on back to the telephone company's yard. He undoubtedly would have been bound to stop anywhere the foreman had told him to do, because it is said by all that he was under the orders and control of the foreman from the time he reached their work in the morning until he left them again. . . . The driver was not master of his own movements at all. He was not left to act upon his own judgment. During the working hours he had not control over the movements of the horse and waggon, nor even over his own movements; and certainly Temple, the liveryman, was not in control of him. The foreman of the defendant company not only exercised the power of control over the driver and horse, but he had the right to exercise this power of control; the driver was to be in his hands, to the knowledge of both the defendant company and of Temple, for that very purpose; and, at the time when

ONT.
S. C.
BALFOUR v. BELL TELEPHONE CO. OF CANADA.
Latchford, J.

the injury was done to the plaintiff's automobile, the defendant company's foreman sat beside the driver on the seat, and said nothing to stop the recklessness that I am quite certain was taking place. It was well understood by both the defendant company and the third party that the defendant company's foreman should have entire control of Spera while working for him; from the time he arrived on the job each morning and began the day's work under this foreman, Spera became, I think, a servant of the defendant company."

There is evidence that, under the arrangement made between Temple and the defendants, by which he furnished them with the horse, waggon, and driver at $3 per day, Spera, like other drivers so furnished, was to obey the orders of the defendants' foreman, and make himself, as well as his horse and waggon, useful to the defendants.

Temple's evidence on the crucial point of the control exercised by the defendants over Spera's management of the horse he was driving at the time of the accident, is clear and uncontradicted. He was asked (p. 84):—

"Q. His (Spera's) wages were not to be paid by the telephone company—you paid his wages? A. I paid his wages.

"Q. The telephone company had nothing to say as to how he should manage his horses, or feed them or drive them or harness them, or anything of that kind? A. *No, I don't know as they had.*

"Q. He was a competent driver and knew all about the care of horses? A. *I never had considered my horses subject to their control.*

"Q. When you say 'subject to their control,' the only control was to tell him where he was to drive to? A. Yes, and what he was to do.

"Q. When he was not driving? A. When he was not driving, he was working for them.

"Q. Tell him where he was to go?

"His Honour: Q. Where he was to take them? A. Yes.

"Q. And what he was to do for them when he was not driving? A. Yes.

"Q. But as to the conduct or management of the horse, the

ONT.
S. C.
BALFOUR v. BELL TELEPHONE CO. OF CANADA.
Latchford, J.

actual driving of the horse, the telephone company had nothing to do with? A. *No, they had nothing to do with the actual driving of the horses.*"

I may add that the defendants had no control over the hiring of Spera, and could not dismiss him.

Spera was to stop the horse when and where he was told to stop it by the defendants' foremen, and one of such foremen was seated beside him at the time of the accident. From these facts the learned Judge infers — against the positive evidence of Temple — that the defendants could have controlled the driving of the horse, and, not having controlled it, that they are therefore liable for Spera's negligence.

In *Jones* v. *Scullard*, [1898] 2 Q.B. 565, in which the leading decisions on the point involved here are reviewed by Lord Russell, C.J., it is stated (p. 574) that "the principle . . . to be extracted from the cases is that, if the hirer simply applies to the livery-stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver."

In one of the cases cited by Lord Russell, *Donovan* v. *Laing Wharton and Down Construction Syndicate Limited*, [1893] 1 Q.B. 629, Bowen, L.J., said (p. 634): "If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven."

In *Consolidated Plate Glass Co. of Canada* v. *Caston*, 29 Can. S.C.R. 624, Sir Henry Strong, C.J., said, in delivering the judgment of the Court (p. 627): "A fair and reasonable test to apply is this: Could the hirer have himself taken absolute control of the vehicle, horse and harness, taking it altogether out of the possession of the driver?"

In a recent case in the Supreme Court of the United States —*Standard Oil Co.* v. *Anderson*, 212 U.S. 215, Moody, J., in delivering the judgment of the Court says (p. 222), referring to cases where horses and a driver are furnished by a liveryman: "In such cases the hirer, though he suggests the course of the journey and in a certain sense directs it, still does not become the

master of the driver and responsible for his negligence, unless he specifically directs or brings about the negligent act."

A case very like the present case is *Driscoll* v. *Towle*, 181 Mass. 416, in which the defendant furnished a horse, waggon, and driver to the Boston Electric Light Company, and was held liable for the driver's negligence while the driver was carrying out orders received from the company.

Had Spera caused the accident while making himself useful to the defendant in stringing wires, holding ladders, or loading or unloading the waggon—while he was their servant and subject to their control—the defendants would, I think, be liable for his negligence. But, in driving the horse as he was driving it at the time of the accident, he was the servant, not of the defendants, but of Temple.

I therefore think the appeal should be allowed with costs, and the action dismissed with costs, exclusive of the costs of bringing in the third party.

Latchford, J.

RIDDELL, J.:—I agree.

Riddell, J.

KELLY, J.:—The conditions under which Temple's horse, waggon, and driver were engaged and used by the defendants were such as to bring this case within the authority of *Consolidated Plate Glass Co. of Canada* v. *Caston*, 29 Can. S.C.R. 624, where the principle on which that Court decided that liability is to be determined was laid down.

Kelly, J.

The evidence is sufficiently clear that, beyond the right to tell the driver what to do and where to drive during the working hours, the defendants had no right to direct how he should manage the horse or drive it, and had no such power or control over the driver as gave them the right to discharge him. Temple himself says that he never considered his horses subject to the defendants' control.

I am of opinion that the appeal should be allowed, and the action dismissed, with costs, except such as have been occasioned by bringing in the third party.

LENNOX, J., concurred. *Appeal allowed.*

Lennox, J.

B. C.

C. A.

ATKINSON v. PACIFIC STEVEDORING AND CONTRACTING CO.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Galliher, and McPhillips, JJ.A. August 10, 1915.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—AWARDS —THIRD PARTIES—INDEMNITY—CONSENT.
An award for a lump sum under the Workmen's Compensation Act (B.C.) cannot be made under sec. 10, without the acquiescence of all parties in the character of compensation and no award for indemnity against a third party in respect of the liability may therefore be made without the latter's consent.

2. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—POWER TO AWARD—VOLUNTARY ADMISSION OF PARTIES.
Unless the employment is within the purview of the Workmen's Compensation Act (B.C.), and properly established, the Court has no jurisdiction under the Act to award compensation merely upon the voluntary admission of the parties to such award in an action for negligence.

3. MASTER AND SERVANT (§V—340)—WORKMEN'S COMPENSATION—INDEMNITY FOR—HOW ESTABLISHED.
In order to succeed upon a claim for indemnity against an award under the Workmen's Compensation Act, it must be established that the damages are paid by reason of and for the liabilities enumerated in the Act.

Statement

APPEAL from judgment of Gregory, J., for indemnity under an award for workmen's compensation.

Cassidy, K.C., for appellant.

E. C. Mayers, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The defendant, respondent, was under contract with the third party, appellant, to lighter the appellant's ship, and the plaintiff, who is not a party to this appeal, was employed by the respondent in the work of lightering the ship.

The plaintiff was injured in the said work, and brought this action against the respondent, and the respondent brought in the third party by notice, and claimed indemnity under the contract aforesaid, one of the terms of which was that the appellant was to give the respondent the use of the ship's gear, which included a derrick, in the use of which the accident to the plaintiff happened.

The jury answered questions, and, on these answers, the Judge dismissed the action, but, on being requested to award compensation under the provisions of the Workmen's Compensation Act, he proceeded to do so.

There is a good deal of confusion in what was then done. The appellant was represented by senior and junior counsel. Senior counsel, very properly, I think, declined to make any admission concerning the applicability of the Workmen's Compensation Act to the employment in which the plaintiff had been

injured. His junior, however, insisted upon making that admission, and, as respondent had brought $1,500 into Court, and pleaded that that sum was sufficient to satisfy any claim which plaintiff might have under the Workmen's Compensation Act; the Judge awarded that sum as compensation, and ordered the appellant to indemnify respondent against that liability.

I am bound to say that, in my opinion, the course pursued was irregular, and one not to be encouraged. The proceedings under the Workmen's Compensation Act are no part of the action. To begin with, it was improper to plead the bringing into Court of the $1,500. The paying into Court of a sum of money in satisfaction of the cause of action is quite proper, but it is not so to pay in and plead it in satisfaction of a right or claim not sued for.

Now, the defendant was sued at common law and under the Employers' Liability Act. Those were the causes of action with which he had to do in his pleadings. Then, again, the Judge had no jurisdiction under the Workmen's Compensation Act, unless the employment was within the purview of that Act, and he seems to have been of the opinion that the Act did not apply to the plaintiff's employment, and, without finally adopting that opinion, I am inclined to agree with it.

If that view be the right one, the award of compensation was not made pursuant to the Act, but was the voluntary submission of the parties founded on the agreement of the plaintiff, the respondent's counsel, and that of the appellant's junior counsel, but against the protest of his leader. In such a situation I must accept the attitude of the leader as representing the true attitude of the client, and hold that the third party did not acquiesce in and, hence, is not bound by the award, if that award depends for its sanction upon the agreement aforesaid and not upon the Act.

If, on the other hand, the employment was within the scope of the Workmen's Compensation Act, the question is, had the Judge power to make an award against the third party, the appellant, that it should indemnify the respondent against the payment of compensation. It is to be noted, first, that the Judge could not award a lump sum of $1,500 without the consent of the parties. The Act provides for an award of weekly

B. C.

C. A.

ATKINSON v. PACIFIC STEVEDORING CO.

Macdonald, C.J.A.

payments and not for a lump sum, and, hence, without the consent of the third party to that character of compensation, assuming for the moment power to make an order against it at all, the award of $1,500 could not stand.

But the objection to the judgment as entered against the appellant goes deeper even than that. I find only one section in the Act which enables a Judge to make an order under the Act against a third party, *viz.*, sec. 10. That section deals with a case where the employer, being bankrupt, is entitled to a sum from insurers; the section has no possible application to the case at bar.

Sec. 11 was referred to by Mr. Cassidy as indicating that there was no authority given the Judge to make the order against the appellant, and I agree with his submission in respect to this section. It has nothing to do with indemnity, but provides simply for a case where the injured workman is entitled to sue a third person for damages as well as to claim compensation from his employer. In such case he may elect to sue the third person for damages or to proceed against the employer for compensation.

The appeal should, therefore, be allowed, and the judgment appealed from varied by striking out para. 4 thereof. Costs here and below will follow the event as provided by statute.

Irving, J.A.

IRVING, J.A.:—I would allow the appeal.

After the plaintiff failed at the trial, the Judge, in my opinion, should have dismissed the case against the third party with costs.

The third party was brought in to have their liability determined in the event of the plaintiff succeeding against the defendants. Note the recital contained in the third party notice. That recital, in my opinion, controls the whole of the notice of claim for indemnity. Had the third parties not appeared, they would have been in no different position.

I do not think the third parties' conduct in appearing at the arbitration and consenting (as I think, having regard to the recital in the order of January 25, 1915, we must hold that they did consent, notwithstanding the attitude of the leading counsel at the argument) that the injured man was entitled to recover under the statute, and that $1,500 would be a fair settlement in lieu of the allowance contemplated by the statute, is a bar

to this appeal. That consent might preclude them in an action properly framed on the indemnity, but not from appealing in this action.

GALLIHER, J.A.:—I agree with the Chief Justice in allowing the appeal.

MCPHILLIPS, J.A.:—I agree with the Chief Justice in allowing this appeal. I merely wish to add that, as the judgment entered by the trial Judge upon the answers of the jury was a judgment that the defendants were not guilty of negligence, *i.e.*, whatever neglect of duty there was, was not the *causa causans* accounting for the accident (and I may observe that, upon the answers as made by the jury, it was quite arguable that negligence was sufficiently found), and that judgment not being appealed against it is hopeless, quite apart from all the other insuperable difficulties in the way, for the judgment as entered under the Workmen's Compensation Act against the appellants, the third party, to stand. In this appeal it has to be admitted that no negligence was found as against the respondent; that being so, it involves this, that the shackle was good and sufficient for the purposes intended and the use to which it was put, and this would satisfy any warranty, express or implied. That being so, in what way can liability be fixed upon the appellant? It would seem to me that the mere statement of this concludes the matter. The liability under the Workmen's Compensation Act arises apart from negligence; it arises in cases of "personal injury by accident arising out of and in the course of the employment" (sec. 6 (1), ch. 244, R.S.B.C. 1911); in fact, the workmen may be contravening orders and doing his work in the wrong way; still, if he was not doing something beyond the sphere of his employment, there is the right to compensation. See *Blair & Co.* v. *Chilton* (1915), 31 T.L.R. 437.

The respondents could only succeed upon a claim for indemnity against the appellant, in my opinion, for any damages paid by reason of the Workmen's Compensation Act, if they could invoke an express contract entered into by the appellant, to be liable therefor, the evidence not establishing that the recovery under the Workmen's Compensation Act was because of any fault of the ship's officers, crew or equipment, nor by reason of any defective tackle supplied, or by reason of any act or de-

B. C

ATKINSON v. PACIFIC STEVEDORING CO.

fault of the appellant; the injury by accident to the plaintiff arose out of the employment; and that alone constituted statutory liability upon the respondent, the employer, but not upon the appellant. *Appeal allowed.*

ALTA.

S. C.

Rex ex rel. LA FLECHE v. SHEPPARD.

Alberta Supreme Court, Scott, Stuart, Beck and Walsh, JJ. June 18, 1915.

1. OFFICERS (§ I A 2—10)—ALDERMEN—DISQUALIFICATIONS—INTEREST IN MUNICIPAL CONTRACTS—GAS WORKS—SHAREHOLDER.

A contributor to the funds of an association interested in gas contracts with a municipality, to whom shares are allotted to the extent of the amount of his contribution out of the stock of the company formed out of the association, without his knowledge or approval, does not necessarily prove him a shareholder and hence a party interested in a contract with the municipality so as to disqualify him from the office of alderman, under sec. 22(1) of the Edmonton Charter, 1913, ch. 23.

[*Re Empire, etc., Somerville's Case*, L.R. 6 Ch. 266, applied; *R. ex rel. Coleman* v. *O'Hare*, 2 P.R. (Ont.) 18, referred to.]

2. OFFICERS (§ I A 2—10)—ALDERMEN—DISQUALIFICATIONS—INDEBTEDNESS TO MUNICIPALITY—TAXES.

Sec. 22(1) of the Edmonton Charter, 1913, ch. 23, disqualifying any person for the office of mayor or alderman if such person is indebted to the municipality, is intended to apply only to an ordinary indebtedness, but not to a debt for taxes, though declared to be a statutory debt by sec. 369.

3. OFFICERS (§ I A 2—14)—ALDERMEN—DISQUALIFICATIONS—TIME OF DETERMINATION.

The disqualifications against the holding of office of mayor or alderman prescribed by sec. 22 of the Edmonton Charter, 1913, ch. 23, are limited to the date of election and are not intended to apply to disqualifications from sittings.

4. MUNICIPAL CORPORATIONS (§ II F 1—174)—WORKS AND UTILITIES—GAS WORKS—INTERESTED PARTIES—MEMBERS OF COUNCIL.

Gas works are not the "works" or "utilities" covered by the Edmonton Charter, and therefore not within the purview of sec. 470, which prohibits any member of council or commissioner from being interested in any contract in connection with the works under the charter.

5. MUNICIPAL CORPORATIONS (§ II D—143)—CONTRACTS—WHAT CONSTITUTES—RESOLUTION OF COUNCIL—GAS WORKS.

A resolution by a municipal council authorizing a contract with a corporation for gas drilling operations, which, if satisfactory, are later to be taken over by the municipality, is a mere expression of willingness, but not necessarily in itself a contract.

Statement

APPEAL from judgment of Harvey, C.J., refusing to oust respondent from office as alderman upon an application in the nature of a writ of *quo warranto*. Affirmed.

A. M. Sinclair, for appellant.

E. B. Edwards, K.C., for respondent.

Stuart, J.

STUART, J.:—In this case, I feel disposed to follow the line of least resistance. I think the appeal should be dismissed for

ALTA.

S. C.

LA FLECHE v. SHEPPARD.

Stuart, J.

the reasons given by my brother Walsh. I am clearly of the opinion that the conversation related by the witness, Milne, which was given with the qualifications, as I remember the conversation," and "so far as I remember," contained nothing which ought to be treated as an admission by the respondent that he was a shareholder. He seems to have said "that any interest he *might* have in the project he was willing and ready to donate to any charity institution at any time." Assuming this to be a correct report of which was said, it surely cannot mean anything more than this, "*if* I have any interest, etc." That is very far from an admission that he had an interest or was a shareholder.

With respect to the questions of the proper interpretation of the Edmonton charter and of the propriety of the legislation as interpreted, I do not feel it necessary to express an opinion.

Beck, J.

BECK, J.:—This is an appeal from the decision of Harvey, C.J., on an application in the nature of a *quo warranto*, by which he refused to oust the respondent from his office as an alderman of the city of Edmonton.

The grounds upon which it was sought to have the respondent declared to be disqualified were: (1) That he was a member of an unincorporated association called the Ad. Club and later called the Edmonton Industrial Assoc., and that this association had a contract with the city. (2) That he was a member of an incorporated company, the Edmonton Industrial Drilling Co., Ltd., formed by and succeeding to the unincorporated association, and by reason thereof interested in the same contract with the city, it being contended that if this is so, he is not saved from the effect of sub-sec. 1 of sec. 22 of the Edmonton Charter, ch. 23 of 1913, by the force of sub-sec. 2, because it is evident that the latter sub-section applies only to the time of the election.

I agree with the Chief Justice that disqualification has not been established, but I take a somewhat different view of the proper interpretation of the sections of the charter which are in question. The principal sections calling for interpretation are as follows:—

21. No person shall be eligible for election as mayor or alderman, unless he is a natural born or naturalized subject of His Majesty, is a male

ALTA.

S. C.

LA FLECHE v. SHEPPARD.

Beck, J.

of the full age of 21 years, is able to read and write the English language, is not subject to any disqualification under this Act, is resident within the city, and is at the time of the nomination owner of a freehold estate within the city of the value of $500 over and above charges, liens and encumbrances affecting the same, and has his name on the last revised assessment roll.

22. No Judge of any Court of civil jurisdiction, no sheriff, no deputy sheriff, no gaoler, or keeper of any house of correction, no constable, assessor, auditor or other paid official of the city, no bailiff, no inspector of licenses, *no person having by himself or his partner an interest in any contract with or on behalf of the city, or being indebted to the city,* no surety for any officer or employee of the city, and no person who has been convicted of treason or felony, or who is at the time of the nomination, bankrupt or insolvent within the meaning of any Insolvency Act in force in the province, shall be qualified to be a member of the council.

(2) No person shall be disqualified from being elected a member of the council by reason of his having a contract for the publication of any advertisement for the city in any public newspaper, *or by reason of his being a shareholder in any incorporated company having dealings or contracts with the city; . . .* but no such leaseholder shall vote in the council on any question effecting any lease from the city, and no such shareholder on any question affecting such company.

In my opinion, sub-sec. 1 of the sec. 22, equally with sec. 21 and sub-sec. 2 of sec. 22, is directed to the question of qualification or disqualification *for election*. In other words, that the words "eligible for election" (sec. 21) "qualified to be a member" (sec. 22, sub-sec. 1) and "(not) disqualified from being elected a member" (sec. 22, sub-sec. 2) are used equivalently.

Whether or not it is a principle of law that qualification required for election must persist throughout the term of office, it is clear, it seems to me, that effect is given to this principle by other provisions of the charter.

Sec. 24 provides for resignation. Sec. 25 provides for the summary ousting of a member in certain cases by the council itself, and cases designated as cases or "*forfeiture.*" Sec. 25 provides for the case of forfeiture by a member of his office, or "if his *becoming* disqualified to hold his seat or of his seat *becoming* vacant by disqualification or otherwise." In these cases, the member is to resign and on default "proceedings may be taken to unseat him as hereinafter provided," that is, by proceedings in the nature of *quo warranto*: sec. 191 *et seq.*

From this it is clear, it seems to me, that although secs. 21 and 22 are directed to disqualifications or disqualification for

election, a member becomes disqualified to continue to hold the office if the conditions of qualification for election do not continue.

An apparent difficulty is created by the words of sec. 22, "no person . . . being indebted to the city . . . shall be qualified to be a member of the council." If this is applied to an indebtedness for taxes owing to the city, then every member of the council would become disqualified instantly that his taxes become a debt. This result, itself, suggests the solution of the apparent difficulty.

It is true that sec. 369 makes it quite clear that taxes due are a debt and the section also declares that they constitute "a special lien upon the land." But they are a debt solely by force of the statute, a fictitious debt, for which no ratepayer, which includes every person eligible for election as a member of the council, can avoid becoming a debtor; a debt, an obligation to pay which is common to all ratepayers. From these considerations, there seems to me to be no difficulty in holding that such an indebtedness is not intended to be included in the indebtedness referred to in sub-sec. 1 of sec. 22, which, therefore, I think, is intended to signify only an ordinary indebtedness incurred by the particular individual.

Another difficulty is suggested, namely, that sec. 470 provides that no member of the council and no commissioner shall personally have or hold any contract in connection with any works authorized by or executed under the charter or be directly or indirectly interested in the same or any of them and that if my interpretation of secs. 21 and 22 is correct, this provision is surplusage. This creates no difficulty in my mind. The Chief Justice gives the history of Part IX. of the charter, of which the sub-title is "Municipal Utilities," and which begins at sec. 417.

The words referred to in sec. 470 are, as is made clear by sec. 482, "tramways" (sec. 417 *et seq.*), "waterworks and sewers" (sec. 433 *et seq.*), "highway heating and power works" (sec. 451 *et seq.*), and "all other municipal revenue bearing works or utilities, including the municipal telephone system of the city" (sec. 482).

Part IX. is in my opinion a special code respecting such

ALTA.

S. C.

LA FLECHE v. SHEPPARD.

Beck, J.

"works" or "utilities" and in respect thereto modifies as special legislation, the general provisions of secs. 21 and 22. Sec. 470 maintains the general disqualification of persons having or holding any contract in connection with such works or being directly or indirectly interested therein.

These general words cover the case of a shareholder in a company having such a contract or interest: *R. ex rel. Coleman* v. *O'Hare*, 2 P.R. (Ont.) 18, and the exemption by sec. 22, subsec. 2, is not applicable in the case of contracts relating to such "works" or "utilities." The contract, if there was one, in question here, is not a contract of this sort.

On the facts of the present case, the Chief Justice has found that the respondent was not a member of the unincorporated association. I see no reason to differ from his finding. Whether or not the respondent was a shareholder in the incorporated company is immaterial on my interpretation of the provisions of the charter; for sec. 2 of sub-sec. 22 expressly declares that no person shall be disqualified by reason of his being a shareholder in any incorporated company having dealings or contracts with the city, but prohibits him from voting in the council on any question affecting such company. For the reasons indicated, I would dismiss the appeal with costs.

Walsh, J.

WALSH, J.:—The relator in this *quo warranto* application appeals from the judgment of the Chief Justice dismissing his application which was to remove the respondent from his office of alderman of the city of Edmonton. The grounds of disqualification urged before us were that the respondent since his election has become interested in (*a*) a contract entered into between the city and the Edmonton Ad. Club or the Edmonton Industrial Assoc., and (*b*) a contract entered into between the city and the Edmonton Industrial Assoc. Drilling Co., Ltd.

The Chief Justice had found, and I thoroughly agree with his finding, that the respondent never was a member of the Edmonton Ad. Club or the Edmonton Industrial Assoc. by which name the Ad. Club was eventually known. He was a subscriber to its funds and nothing more. In addition I am satisfied that there was not between this club or association and the city anything that could be called a contract. What is relied upon and

ALTA.

S. C.

LA FLECHE v. SHEPPARD.

Walsh, J.

the only thing that is relied upon as such is the following resolution of the city council:—

That the request of the Ad.Club to have an agreement drawn whereby it should be allowed to drill for gas be granted, and that upon gas being found in quantities satisfactory to the council, the same will be taken over at cost, reimbursing the Ad. Club what they have put into it and that the necessary expenditure be authorized to place an expert inspector or whatever may be deemed necessary by the commissioners on behalf of the city.

The request mentioned in the resolution was a verbal one, of which no record is before us. In my opinion the city did not by this resolution bind itself to anything. It amounted to nothing more than an expression of the willingness of the members of the council to enter into an agreement with the club upon the question with which it deals. It clearly contemplated a formal agreement to carry into effect the proposal submitted to the council, for it not only expressly says so, but it is so bare of detail as to make one absolutely necessary. The same condition has often been met in specific performance actions brought upon correspondence or informal agreements from which it appears that the execution of a more formal contract was intended. While that mere fact will not prevent a document which contains all of the terms from being a contract, still,

whenever the concluded nature of the arrangement does not evidently appear on the writings, the fact that a subsequent and more formal contract was entered into will be strong evidence that the previous negotiations were not intended to amount to a contract. Fry, 5th ed., p. 260.

The agreement of August 18, 1914 is the contract which grew out of this resolution. It contains terms and conditions and stipulations which are not even suggested in the resolution. It is to me inconceivable, especially in the light of the concluded agreement, that so bald a thing as this resolution could have been regarded by any one as a contract, or that the officers of the Ad. Club could have thought for a moment that if the council had afterwards refused to have anything to do with the proposition an action based upon it either for specific performance or for damages would lie against the city. The respondent is, therefore, in my opinion, under no disqualification because of this resolution.

The contract of August 18, 1914, is that upon which the

ALTA.

S. C.

LA FLECHE v. SHEPPARD.

Walsh, J.

second ground of disqualification rests. It is between the city and the Edmonton Industrial Assoc. Drilling Co., Ltd., and it had its origin in the above quoted resolution. The Chief Justice has found that the respondent is a shareholder in this company. This, however, is not a finding based upon contradictory evidence, but is an inference or rather, perhaps, a conclusion of law drawn from undisputed facts, and I feel free, therefore, to give expression to the opinion which I have formed with respect to it. With great deference, I find it impossible to reach the conclusion which the Chief Justice reached upon this point. This company was an outgrowth of the Ad. Club. The respondent was not a member of that club. He was only a contributor to its funds to the extent of $200. Upon what terms and under what circumstances and conditions he contributed does not appear. The simple fact appears that he not being a member did so contribute. Then the company was formed apparently for the purpose of entering into the contract contemplated by the above quoted resolution. It is not even suggested that the respondent was one of the incorporators and it is proved that he never applied for any shares in it. A few days after the incorporation, the directors passed a resolution "to allot shares in the proportion of one share to each dollar paid in." Acting upon this the secretary allotted 200 shares to the respondent to represent the $200 which he, 6 months before, had contributed to the funds of the Ad. Club and he prepared a certificate of the same. This was not done under the respondent's instructions nor so far as the evidence discloses with his knowledge or consent. This certificate was never issued and the respondent has never asked for it. The secretary says that instructions were given to send notice of this allotment of shares under this resolution to every one who was entitled to the same, but he "could not say that Mr. Sheppard's was sent" and that is all of the evidence of it that there is. The only thing there is in the evidence at all suggestive of knowledge of this allotment on the part of the respondent is the conversation between him and the secretary of the company when in discussing the proceedings for the disqualification of the mayor and another alderman, based upon their interest in this same contract he said that "he understood that he was the next

victim, but that any interest he might have in the project he was ready and willing to donate to any charity institution at any time." That, to my mind, falls far short of proving knowledge on his part that he was a shareholder in this company. He may have felt that his contribution of $200 gave him some interest in the gas project, but it by no means follows that he was, therefore, aware of and acquiesced in the action of the directors of the company in converting him from a mere contributor to the funds of the Ad. Club into a member of the Edmonton Industrial Assoc. Drilling Co., Ltd. *Re Empire, etc., Somerville's Case*, L.R. 6 Ch. 266, was a winding up matter. Somerville had one hundred shares in the city and county company which entered into an agreement with the Empire Company for the transfer of its business and assets to the Empire Company upon the conditions *inter alia* that its shareholders should be allotted two shares in the Empire for every share in the city and county. Certificates for 200 shares in the Empire and a receipt for them for signature by him were sent to him accompanied by a letter informing him that these shares had been allotted to him and asking him to sign and return the receipt. He received this letter with its enclosures and retained the certificates, but neither signed nor returned the receipt. He attended one meeting of the Empire. He was held not liable as a contributory. Hatherley, L.C., at p. 271, says:—

> If he had returned the receipt, then the receipt alone would be a sufficient recognition of the engagement being entered into by him. I must take him to have known that an arrangement had been come to between the companies, under which he would have been entitled to take these shares, had he thought fit. But though he had them sent to him, there was no acceptance by him, and I cannot find a contract by him in any way. The mere circumstances of a person's name being written down on the register has never been held to bind him, if he has never taken any step which authorized the insertion of his name on the register.
>
> Somerville had not authorized anybody to put his name down to anything except the city and county company. He knew that he had an opportunity of taking shares in the Empire if he thought fit. But he did nothing; he remained silent, and did not accept the bargain. He was simply told that his name was written down, taking it for granted that he had assented to the bargain. But no authority can be found for holding that a person, by simply doing nothing, may be rendered liable. The mere fact of standing by and being told there is something done which you have not authorized cannot fix you with the heavy liabilities which shares in a

ALTA.

S. C.

LA FLECHE v. SHEPPARD.

Walsh, J.

joint stock company would create. We are all subject to have things sent to us at our houses by persons with whom we have nothing whatever to do, and I think that the mere writing to this gentleman, telling him that something had been done, was not enough to fix him.

In Hals., vol. 5, p. 146, it is said:—

> In the absence of any written or verbal contract. . . . Although a person's name is entered in the register as the holder of shares allotted to him, no agreement will be implied by reason only of his receiving notice of the allotment if he has not acted as the holder of the shares or otherwise accepted them.

And many authorities, including *Somerville's Case, supra*, are cited in support of this statement of the law. In Lindley's "Companies," 6th ed., p. 64, it is said:—

> Persons cannot be made members without their consent and if a company or some other person has placed shares in a person's name and complied with all the formalities necessary to make him a member, he will nevertheless not be a member unless he has by agreement or otherwise authorized the acts in question or ratified them and thereby assented to take the shares.

The case for membership was much stronger in *Simpson's Case* than in this, and if upon the facts there proved Simpson was rightly held not to be a member of that company, *a fortiori* must the relator's attempt to attach membership in this company to the respondent fail. In my opinion the relator has not established that the respondent has any interest in any contract entered into with the city and as that is the only ground of attack his effort to unseat the respondent must fail.

In view of the conclusion which I have thus reached, I have not considered at all the ground upon which the Chief Justice really rested his judgment, namely, that the disqualifying section of the Edmonton Charter "is limited to the date of election and is not intended to apply to disqualification from sitting." I venture, therefore, no opinion upon this question. I must say, though, that it is very startling to know that the Edmonton Charter is open to this construction. It means that a man who at the time of his election as an alderman is a contractor with the city under a contract involving, say $100, is thereby disqualified from being a member of the council while one, who at the time of his election is free from such disqualification, may on the day following his election enter into a contract with the city except of a certain expressly prohibited kind, for something

involving the city in a liability to him of $100,000 without thereby forfeiting his right to sit in the council. If that is the proper reading of the charter, and I am not presuming to say that it is not, it is high time that it was amended. I would dismiss the appeal with costs.

SCOTT, J., concurred. *Appeal dismissed.*

DALE v. TORONTO R. CO.

Ontario Supreme Court, Appellate Division, Riddell, Latchford, Middleton and Kelly, JJ. May 18, 1915.

1. NEW TRIAL (§ I—2)—RIGHT TO—UNFAIR REMARK OF COUNSEL.
Unfair and inflammatory language employed by counsel in the present action of a case for the plaintiff in an action against a street railway for injuries to a woman passenger, unless objected to by counsel or stopped by the trial judge, is not of itself ground for a new trial. [*Sornberger* v. *C.P.R. Co.*, 24 A.R. (Ont.) 263, referred to.]

2. TRIAL (§ I D—15)—STATEMENTS AND ARGUMENTS OF COUNSEL—INFLAMMATORY LANGUAGE.
The mischievous practice of employing inflammatory language in addressing juries, is an abuse of privilege of counsel, and if persisted in, a contempt of court.

Statement

APPEAL from the judgment of Denton, Jun. Co. C.J.

D. L. McCarthy, K.C., for appellants.

V. F. Davidson, K.C., for plaintiff, respondent.

Riddell, J.

RIDDELL, J.:—The plaintiff was seriously injured by being thrown down on the pavement from a car of the Toronto Railway Co. Her story, which is accepted by the jury, is, that the car was negligently started "with a jerk" as she was in the act of alighting—the jury have also found that there was no contributory negligence on her part. Damages were assessed at $925—a somewhat large sum, but not excessive in view of the serious nature of the plaintiff's injuries.

The defendants admit that they would have no hope of succeeding in the appeal if the case had been properly conducted at the trial. But they say that the whole address of the plaintiff's counsel "consisted of an impassioned abuse of the defendant company and its treatment of the public, in addition to a reference to the house of the Baron on the hill;" that he "entirely confined himself to an appeal to the sympathy of the jury on behalf of 'this poor unfortunate plaintiff,' picturing her on the one side and this wealthy octopus corporation on the other." So says the claims-agent of the railway company, in

ONT.

S. C.

DALE v. TORONTO R. CO.

Riddell, J.

his affidavit. A student-at-law swears that counsel "on behalf of the plaintiff referred to the defendants as a huge octopus having a stranglehold on the people, spreading its tentacles over the city, gathering in the nickels from the poor working people," etc., etc.

The plaintiff files a number of affidavits: the allegation that the defendants were referred to as "a wealthy octopus corporation" is specifically denied; and several deponents, including the counsel himself, consider the address a fair one. The use of the words "octopus and strangle-hold" is admitted: and this is what is said by counsel himself:—

"12. In the introduction to my address, I had in mind that the company's explanation of the accident was more remarkable than a fairy story.

"13. I accordingly, at the very beginning, before going into the evidence, outlined an imaginary fairy story of a giant named "Stranglehold," who had his castle on a hill, to whom his subjects had to pay a silver toll for being carried through the city, and that his tentacles were spread over the city, and that one day a woman travelling in one of the carriages was frightened by the apparition of the giant and threw herself off the carriage, but the giant, repenting, held her up as she fell so that her hands were not bruised and she fell straight out from the carriage.

"14. It was in this portion of my address that the words "octopus" and "stranglehold" were used, and I say that during this portion of my address jurymen were smiling, and I was glad when I could get through what I was compelled to finish because I had started it, and I was able to proceed to the serious examination of the evidence."

He does not say that he had not in mind when telling this "fairy story" the Toronto Railway Company and a gentleman very generally identified with it, who has his residence "on the hill," nor does he say that he did not intend and expect that the Toronto Railway Company and that well-known gentleman would at once be recognised under the allegory. Probably he would agree that it would shew quite too much *naiveté*—guilelessness—for any one who lives in Toronto or its vicinity, or

even who reads the Toronto newspapers, not at once to identify that "Giant named 'Stranglehold' . . . to whom his subjects had to pay a silver toll for being carried through the city."

The trial Judge found no difficulty in doing so: in his charge he says: (Counsel) "has made a very impassioned appeal to you on behalf of this woman, and I would be sorry to say anything that would detract from the effect of that appeal; but, gentlemen, you must bear in mind that you have in these cases to go by the weight of the evidence you hear. If the truth be on this evidence that this woman stepped off that car before it came to a standstill, when it was in motion, it does not make a particle of difference whether the street railway company is an octopus or stranglehold or anything of that sort; does not make a bit of difference what they are if, in fact, the truth be on the evidence that she stepped off in that way."

But the learned Judge does not at all support the allegations of the defendants' deponents that the evidence was not discussed: he says in his charge (to which no objection was taken): "Now then, what is the truth about it? I am not going to refer to this evidence in any detail at all; counsel for the plaintiff has gone into that in detail."

No objection was taken by the defendants to the address of counsel (in this regard): the trial Judge was not asked to interfere; and the first time any point is sought to be made of the alleged misconduct of counsel is on this appeal.

The facts then, as I see them, are that counsel for the plaintiff (1) "made a very impassioned appeal . . . on behalf of" his client, (2) and referred in an allegorical but unmistakable way to the defendant railway company as a "Giant called Stranglehold . . . whose subjects had to pay him a silver toll" and whose "tentacles were spread over the city;" that (3) no objection was taken to these remarks; (4) the counsel discussed the evidence fully and in such a way that the trial Judge did not find it necessary to refer to it in any detail; (5) the verdict is not unsatisfactory.

As to the first: counsel has the right to make an impassioned address on behalf of his client—nay, in no few cases it may be

ONT.
S. C.
DALE
v.
TORONTO
R. CO.
Riddell, J.

a duty to make an impassioned address—mere earnestness, fervour or even passion, is not in itself objectionable—so long as counsel does not transgress the decorum which should be observed in His Majesty's Court and does not offend in other respects—and Courts do and must give considerable latitude even to extravagant declamation.

That the plaintiff was (if she was) described as a "poor unfortunate" person, and sympathy claimed for her as such, is one of the commonest tricks of advocacy, in bad taste perhaps, but not ground for a new trial if standing by itself: *Dowdell* v. *Wilcox* (1884), 64 Iowa 721, 724; *Baker* v. *City of Madison* (1885), 62 Wis. 137, 147. The trial Judge should stop this kind of thing when carried too far: but a jury trial is a fight and not an afternoon tea.

"To rigidly require counsel to confine themselves directly to the evidence would be a delicate task, both for the trial and the appellate courts, and it is far better to commit something to the discretion of the trial court than to attempt to lay down or enforce a general rule defining the precise limits of the argument. If counsel make material statements outside of the evidence which are likely to do" the opposite party "injury, it should be deemed an abuse of discretion . . .; but where the statement is . . . of a character not likely to prejudice the cause . . . in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal:" *Combs* v. *The State* (1881), 75 Ind. 215.

The allegorical statements are wholly objectionable from any point of view, taste (although indeed *de gustibus non est disputandum*), ethics, law. The trial Judge, if he thought proper, would have been justified, *proprio motu*, in stopping counsel and administering a stern rebuke. This course, however, or any other must, within reasonably wide limits, be in the discretion of the trial Judge: he sees the jury, sees and hears the counsel, is fully cognizant of the whole atmosphere of the case—all, advantages we do not enjoy. But counsel for the opposite party has also a duty—he should, if he thinks the remarks injurious

to his client, object openly and at once. He may think that what is said, designed as it is to hurt his client, is really having a contrary effect—and in many (I believe most) cases he will be right in so thinking—jurymen are not the compounds of ignorance, weakness and prejudice they are sometimes supposed to be; and in many cases in my own observation, I am confident that unfair argument and "mud-slinging" hurt rather than helped those who indulged in them. If counsel says nothing, but allows the objectionable address to proceed without interruption, he should *primâ facie* be considered as waiving all objection and taking his chances of a favourable verdict—so that it will be too late to raise the objection as a ground of a motion for a new trial. This is in substance what was said in the Court of Appeal in *Sornberger* v. *Canadian Pacific R.W. Co.* (1897), 24 A.R. 263, after a very able and complete argument.

I do not at all say that cases may not arise in which, notwithstanding the omission of counsel to object, an appellate Court will grant a new trial—but these cases must be exceptional, and some injustice must be either apparent or strongly suspected. Nothing of that kind is present here: the evidence was fully discussed, and there does not seem to be any reason for suspecting injustice.

We should, I think, dismiss this appeal: but, to shew our disapprobation of the language employed by the plaintiff's counsel, refuse costs.

I should add a general observation:—the mischievous practice of some counsel—few in number as I hope and believe they are—of employing inflammatory language in addressing juries, should be checked—it is an abuse of the privileges of counsel, and, if persisted in, a contempt of Court. More than one Judge has, in such cases, discharged the jury and dealt with the case alone. This course is in many cases eminently advisable: and, if it were unflinchingly and pitilessly followed, it would be effective in putting an end, in most instances, to the impropriety—if counsel knew that an unfair presentation to the jury would prevent the jury being allowed to pass upon his case, he would be careful not to transgress—unless he were a fool: there is no known cure for that.

ONT.
S. C.
DALE
v.
TORONTO R. CO.

I am not to be taken as disapproving the conduct of the trial Judge here: no doubt, he did not consider that the rhetoric of counsel had any evil influence on the jury.

LATCHFORD, MIDDLETON, and KELLY, JJ., agreed in the result.

Appeal dismissed without costs.

ALTA.
S. C.

KENNERLEY v. HEXTALL.

Alberta Supreme Court, Harvey, C.J., Scott, Beck and Walsh, JJ. June 15. 1915.

1. BROKERS (§ II B 1—13*a*)—REAL ESTATE AGENCY—STIPULATED COMMISSIONS—SUBDIVISION LANDS—SALE EN BLOC BY PRINCIPAL—RIGHTS OF AGENT.

Where an agency agreement stipulates that the agent is to receive his commissions from the sales of all lands within a subdivision, whether sold by the agent, the owner, or any other person, a transfer of the unsold residue of the subdivision *en bloc* by the owner in consideration of shares of stock, though constituting a sale, is not such a sale as contemplated in the agreement to entitle the agent to the stipulated commissions, but the remedy of the agent is to damages for breach of an implied obligation on the part of the principal to do nothing to prevent the agent from earning his commissions.

[*Burchell* v. *Gowrie & Co.*, [1910] A.C. 614; *Inchbald* v. *Western etc. Co.* (1864), 34 L.J.C.P. 15, followed; *Kennerley* v. *Hextall*, 18 D.L.R. 375 varied.]

Statement

APPEAL from judgment of Hyndman, J., 18 D.L.R. 375.

Lougheed, Bennett & Co., and *W. P. Taylor*, for respondent, plaintiff.

A. H. Clarke, K.C., and *C. T. Jones*, K.C., for defendant, appellant.

Beck, J.

BECK, J.:—This is an appeal from the decision of Hyndman, J., 18 D.L.R. 375, at the trial without a jury.

The action is one for commissions on sales of land founded upon a special agreement under seal, dated April 21, 1911, between the plaintiff and John Hextall, the original defendant, who has died since the commencement of the action and who is now represented by an administrator *ad litem*.

One of the clauses in the agreement which is referred to as the "agency agreement" is as follows:—

5. The owner (Hextall) will pay the agent (Kennerley) as and for commission and compensation to the agent for his services, time, expenses and outlay, ten per cent. of the gross selling price of all lands which are sold within the subdivision of Bowness aforesaid during the continuance of this contract whether the same be sold by the agent, by the owner or any other person, and such payments shall be made out of the first instalment of purchase price when and as the same is received by the owner.

The lands comprised in this agreement were listed in a schedule, describing them as portions of certain sections and making a total of 1,613.67 acres; the defendant reserving, however, the right to withdraw from the operation of the agreement portions of the lands for certain purposes limiting as far as I can calculate the quantity to about 320 acres.

The agreement expressly contemplated the subdivision of the lands into lots and blocks. This was done and a plan of subdivision was registered in the land titles office.

Certain sales were made by the defendant previously to the completion of the sale to a company which I am about to discuss. On these sales it cannot be contended, and, in fact, it is not now contended that the plaintiff is not entitled to his full commission. These instances are dealt with by the trial Judge and I shall, at the conclusion of what I have now to say, make a calculation of what the plaintiff is entitled to in respect of these sales.

But the only question really in dispute between the parties on this appeal is whether a considerable number of lots and blocks having been sold in respect of which the agent is admittedly entitled to a commission of 10%, he is entitled to the like commission as being fixed by the contract or only to damages for being prevented from earning his commission, in consequence of Hextall transferring the whole residue of the lands to a joint stock company in which he retained a large proportion of the shares.

The story of this latter transaction is given at length by the trial Judge. Briefly, Hextall, through the intervention of the Canadian Securities, Ltd., transferred the whole residue of the land comprised in the agency agreement together with 480 acres in addition to the Bowness Estates, Ltd., a joint stock company incorporated under the Imperial Companies Act for £260,000, to be paid as £130,000, by the allotment to Hextall of 130,000 fully paid up shares in the capital stock of the Bowness Estates, Ltd., of £1 each and the balance at the option of the directors of the latter company either in cash or by allotment to Hextall of fully paid up shares or partly in cash and partly in shares. Both these companies were organized at the instance of Hextall. In

ALTA.

S. C.

KENNERLEY v. HEXTALL.

Beck, J.

the result Hextall received £15,000 in cash and shares in Bowness Estates, Ltd., to the amount of £245,000.

This transaction was undoubtedly a sale. The question remains, was it a sale within the purpose and intent, that is, within the meaning of the agency agreement. If it was, the plaintiff would appear to be entitled to a commission of 10% upon such portion of the nominal purchase price of £260,000, as is not represented by the additional 480 acres. If it was not, the plaintiff would appear to be entitled not to commission, but to damages resulting from the plaintiff, by putting the property out of his sole control, preventing or hindering the plaintiff from earning the commission.

It is true that both the Canadian Securities, Ltd., and the Bowness Estates, Ltd., undertook to carry out the agency agreement, but the plaintiff declined to accept either of them as the party with whom he was to deal instead of the defendant, and it is admitted that he had a right to do so. The agreement is somewhat lengthy and no portion of it seems to be important in deciding the question before us.

After careful consideration I have come to the conclusion that the sale to the company of the then unsold residue of the property *en bloc* was not such a sale as was contemplated by the agency agreement. Briefly the agreement provides as follows.

1. A subdivision into lots and blocks had already been made and Hextall was to have the plan approved by the Department of Public Works and furnish Kennerley with blue print copies of the plan within 30 days in such quantities as Kennerley should require (par. 2). 2. Hextall was to furnish Kennerley with "a schedule of prices for the lots to be sold and as might be required by him to furnish his selling price for any land in the sub-division as to which inquiry might be made" (par. 2); and to furnish 1,500 to 2,000 descriptive pamphlets advertising the property for sale to others as might be agreed (par. 3). 3. Hextall was to approve a form or forms of agreement for sale. 4. If the prices placed by Hextall on any portion of the property from time to time were so high that the property would not sell in sufficient quantities and with sufficient rapidity to pay the agent $1,000 per month in commission, provision was made for

ALTA.

S. C.

KENNERLEY v. HEXTALL.

Beck, J.

the agent determining the agreement. If "the sale of lands was adversely affected not by the price as scheduled by the owner, but by the financial condition of the country or city or crop failure or such like condition" provision was made for the suspension of the agreement. 5. Kennerley on his part agreed that he would "at his own expense establish and maintain in Calgary a suitable office with a sufficient staff to handle the business of obtaining purchasers and endeavouring to sell the lands, and at his own expense devote an automobile to shewing of lands to prospective purchasers and at his expense advertise the property for sale, etc. (par. 1). He was not to conclude any sale, but to take written applications from the intending purchasers, so that sales were to be subject to the owner's approval (par. 1). 6. The clause (par. 5) for the agent's compensation has already been set out. 7. The agreement is declared to be binding upon the owner, his executors and administrators, and not to be terminated by the death of the owner nor by any incapacity of the owner and should only be terminated by the death or incapacity of the agent or in the manner provided by this agreement.

To my mind all the various terms of the agreement clearly shews that what was and the only thing in the contemplation of each of them was the selling of the lands by lots and blocks, an undertaking which unlike a sale *en bloc* would in the ordinary course of things require Kennerley's entire time and services and a very considerable outlay for expenses on his part for a period of several years and both these things are expressly contemplated in the agreement and the paragraph which I have numbered 7 emphasizes this view.

I think that it is evident that this manner of selling so exclusively occupied the minds of both as to have excluded from their minds and to exclude from the written instrument of agreement a sale *en bloc* of the whole or any considerable residue.

It is not an uncommon thing that agreements fail to meet all conditions which subsequently arise and in the event something which was not contemplated by the parties and, therefore, not provided for occurring or being done by one of the parties, the question then arises whether an obligation is raised by implication. Illustrations of this are to be found in such cases as *Inch-*

ALTA.
S. C.
KENNERLEY v. HEXTALL.
Beck, J.

bald v. *Western Neilgherry C.P. Co.* (1864), 34 L.J.C.P. 15; *Re Patent Floorcloth Co., Dean* v. *Gilbert's Claim*, 41 L.J. Ch. 475. In the present case I think there was an implied obligation on the part of Hextall and by the terms of the agreement on the part of his executors or administrators to do nothing to prevent the agent from earning his commission. I think there would be a breach of this implied obligation if, for instance, Hextall had leased lots or blocks for long terms of years or his executors or administrators in order to wind up the estate had distributed the residue of the lots and blocks *in specie* among the beneficiaries.

I think that the sale by Hextall to the company was a breach of an implied term of the agreement and that, therefore, the plaintiff is entitled to damages.

Obviously there is a difference between a fixed commission actually earned and the compensation to be given by way of damages for preventing the earning of the commission. In the present case the difference must be very great. Actually to gain the commission would necessitate the agent keeping an office and a staff and devoting his whole time with considerable outlay for a number of years, receiving his commission in comparatively small sums from time to time. In estimating damages for preventing the earnings of such commissions all these considerations and perhaps others must, of course, be taken into account.

The case of *Burchell* v. *Gowrie, etc., Collieries, Ltd.*, [1910] A.C. 614, to which we were referred was the case of a single sale of property as a totality. The plaintiff was held entitled to recover in respect of a sale made by his principals behind his back to a company in which the moving spirit was one whom the plaintiff had brought into negotiation with the principal who sold to the company on terms which the plaintiff was not authorized to accept and which he recommended should not be accepted. What he was held to be entitled to was "damages." The finding of the referee awarding the plaintiff the full stipulated commission was sustained on the ground that under the circumstances of the case, it was quite open to the referee to fix *as the measure of damages*, what would have been Burchell's commission at the stipulated rate.

ALTA.

S. C.

KENNERLEY v. HEXTALL.

Beck, J.

I quote from the judgment, p. 626:—

The secret sale deprived him of the benefit of that contract. He lost his chance of earning this commission. In *Inchbald* v. *Western Neilgherry C.P. Co.*, *supra*, Willis, J., thus lays down the rule applicable to such cases. I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it. The negotiations for sale carried on by Burchell extended over two years. From the correspondence, it is clear that they cost him much in time and labour and something in money. It was quite open to the referee to take as the measure of damages what would have been Burchell's commission at the stipulated rate, 10%, on the consideration actually received for the sale. This is what he apparently did. In their Lordships' view, therefore, the conclusion at which the referee arrived on the nature and limit of the appellant's employment, as well as on the amount of damages to be awarded, are not only sustainable upon the evidence, but are in themselves right.

The plaintiff does not sue for damages, but there is no reason why they should not be ascertained in this action. What damages are proper to be allowed plaintiff in respect of this portion of his claim, we cannot fix on the material before us.

The sales upon which the plaintiff is entitled to his commission of 10% seem to be as follows: (1) Sale March 14, 1912, 93.96 acres for $125,000, commission, $12,500. (2) Other sales aggregating $4,980, commission, $498; total, $12,998.

My opinion, therefore, is that the plaintiff is entitled to judgment for $12,998 with interest at the rate of 5% per annum, and I think the date from which this interest should be calculated is March 14, 1912—that is the only date which appears to be fixed and it applies to the $12,500 and may be applied without injustice, I should judge, to the residue of $498.

The plaintiff is also entitled to damages in respect of the sale of the residue of the property. I think the most satisfactory way of providing for the ascertaining of the amount of these damages is to direct that they be ascertained as on a trial by a Judge with or without a jury as a Judge may direct. If the parties fail to agree I think the plaintiff is entitled to the costs of the trial which has already been had.

As the defendant succeeded, in my view, on the most substantial question involved in the appeal. I would give them the costs of the appeal.

ALTA.

KENNERLEY v. HEXTALL.

SCOTT and WALSH, JJ., concurred with BECK, J.

HARVEY, C.J., dissented. *Judgment varied.*

CAN.

S. C.

QUEBEC, JACQUES-CARTIER ELECTRIC CO. v. THE KING.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. June 24, 1915.

1. INTEREST (§ I D—36)—EXPROPRIATION PROCEEDINGS—ABANDONMENT.
There can be no allowance of interest under sub-sec. 4 of sec. 23 of the Expropriation Act, R.S.C. 1906, ch. 143, either upon the estimated value of the lands or upon the amount tendered therefor by the government, where before the ascertainment of the indemnity the proceedings were abandoned and no special damages sustained.

2. COSTS (§ I—8)—SOLICITOR AND CLIENT—EXPROPRIATION PROCEEDINGS.
In case of an abandonment of expropriation proceedings the owners are entitled to be fully indemnified for their costs as between solicitor and client and for all legitimate and reasonable charges and disbursements in consequence of the proceedings.

Statement

APPEALS by defendants from judgments of the Exchequer Court of Canada.

E. A. D. Morgan, for appellants.

Newcombe, K.C., Deputy-Minister of Justice, for respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J., agreed in the judgments dismissing the appeals.

Davies, J.

DAVIES, J.:—These two appeals from the Exchequer Court of Canada raise for determination the same questions and were argued together.

The questions arise out of proceedings having been taken on behalf of the Crown for the expropriation of lands of the respective defendants and the rights and liabilities of the parties—the defendants and the Crown—under those proceedings are to be determined by the provisions of the Expropriation Act.

A plan and description of the lands intended to be taken under sec. 8 of the Act were duly filed. Subsequently and before compensation was agreed upon or paid the Crown, under sec. 23, gave notice to the appellants that their lands were not required and were abandoned by the Crown.

The appellants thereupon filed, to the information of the Attorney-General claiming a declaration that the amount tendered by the Crown was sufficient, a new defence claiming to recover interest at 5% upon the sum which should have been awarded them for damages in case the Crown had not aban-

doned. In the alternative they claimed interest upon the sum the Crown had tendered as the value of the lands taken.

In my opinion, the section of the Act relating to interest being allowed has reference only to cases where the Crown has retained the lands taken and does not extend to or cover cases where, after filing notice of intention to take lands, the Crown has subsequently "abandoned" the lands to the owners under the provisions of the Act. Sub-sec. 4 of sec. 23 makes special provision for the assessment of damages in the latter case.

The trial Judge acting under this sub-section found, as the appellants had always retained "the unlimited user of the lands taken" which were enclosed with fences, that they had not sustained any special damage, but, under the circumstances, determined that they should be allowed the costs of their action to be taxed as between attorney and client so as to cover "all the legitimate and reasonable charges and disbursements under the circumstances."

Counsel for the appellants admit that no special damages were sustained by his clients, but contends that they were entitled as of right to interest, as previously stated, whether they have sustained special damage or not.

I cannot for the reasons I have stated accept this contention and am of the opinion that the finding of fact of the learned Judge as to the actual user and possession of the land, which was fenced in, having continued with the appellants and never having been interfered with, their rights are confined to the damages which might be awarded them under sub-sec. 4 of sec. 23. That sub-section directs "the fact of the abandonment or revesting shall be taken into account, in connection with all the circumstances of the case," in assessing the damages to be awarded. This the Judge has done and he has in excluding the claim for interest, in my opinion, acted properly.

No doubt, in the taxation of costs, the registrar will follow the directions of the Judge as to the basis upon which allowance should be made, and the formal judgment so interpreted will fully protect the appellants.

The appeals, therefore, fail and must be dismissed with costs.

IDINGTON, J. (after stating the facts):—These appellants

CAN.
S. C.
QUEBEC, JACQUES-CARTIER ELECTRIC CO. v. THE KING.
Idington, J.

each claim to be entitled to interest upon at least the amount tendered as compensation.

There seems to be rather a curious misconception of legal rights arising out of such proceedings.

The statute under which the respective proceedings were taken rendered that done legal and furnishes the only remedy the appellant can have. It entitled the respondent to withdraw when so advised but provides for the assessment of any damages sustained in consequences of the proceedings.

The trial Judge has found there were no damages suffered save the costs duly awarded.

Each of these appellants, however, contends that it is entitled to interest; though frankly admitting there were no damages suffered and no change of actual possession.

The statute provides for interest being awarded in the case of the proceedings being so continued as to determine a sum due for compensation, but makes no provision for interest upon any imaginary undetermined sum. There is neither contractual nor statutory basis upon which to award interest.

The references to the Code and to the condition of things arising between an ordinary vendor and purchaser are all beside the question. These would not help appellants much even if applicable when he, parting with his ownership in the property, had not been deprived of the fruits thereof, but remained in undisturbed possession thereof.

Cases may arise where the party whose property has been claimed in way of expropriation has by reason of its being tied up suffered material damages, but this is not that case.

The appeal as to costs seems hopeless in view of the costs awarded. I agree that the opinion judgment of Mr. Justice Audette should be read to interpret the formal judgment issued.

These appeals should be dismissed with costs.

Duff, J.

DUFF, J.:—The trial Judge has found first, that the appellants retained possession, and secondly, that they had suffered no loss in consequence of the expropriation proceedings apart from the expenses of preparation for trial thrown away.

These findings are fatal to the claim for interest although it is

better to say nothing on the point which might have arisen had possession been taken by the Crown.

The appellants are entitled, however, and I think the learned Judge so held, to be indemnified fully in respect of their costs as between solicitor and client and all costs, charges and expenses properly incurred in preparation for the trial. The formal judgment does not sufficiently provide for that. As the judgment now stands the registrar, bound as he is to follow the terms of the formal judgment, is required by law to tax the costs as between solicitor and client according to the well settled rule, and that will be far indeed from affording the appellants the indemnity to which they are justly entitled.

The law requires the registrar to follow the formal judgment and it is not open to him to correct it to make it accord with his interpretation of the learned trial Judge's reasons; and as the judgment is perfectly plain and unambiguous in its terms there is no room for interpretation. Expressions of opinion by Judges of this Court can add nothing to the powers of the registrar who is bound by law to act upon the judgment as framed construed as the law requires it to be.

These expressions may, however, remove the reluctance the learned Judge would probably have felt otherwise in correcting the formal judgment (after appeal to the Court) and making it conform to the judgment he in fact pronounced.

The judgment ought to have been formally altered by this Court; but nevertheless I think the learned trial Judge in the circumstances would be acting within his jurisdiction in making the correction this Court ought to have made. See *Prevost* v. *Bedard*, 51 Can. S.C.R. 629.

ANGLIN and BRODEUR, JJ., concurred with Davies, J.

Anglin, J.
Brodeur, J.

Appeals dismissed.

PEDLAR v. RYDER

Saskatchewan Supreme Court, Lamont, J. April 15, 1915.

1. VENDOR AND PURCHASER (§ I B—5)—SALE OF LAND—JUDGMENT DIRECTING PAYMENT—VENDOR MUST FIRST ESTABLISH TITLE TO SATISFACTION OF COURT.

A vendor under an agreement of sale of land is not entitled to judgment directing the purchaser to pay the purchase-money or any instalment thereof until he establishes to the satisfaction of the court that he has a good title to the premises sold.

[*Cameron* v. *Carter*, 9 O.R. 426, applied.]

SASK.

S. C.

PEDLAR v. RYDER.

Lamont, J.

APPEAL from a Master's decision.

T. J. Blain, for plaintiff.

H. Ward, for defendant.

LAMONT, J.:—This is an appeal from the decision of the Master in Chambers dismissing the plaintiff's application for judgment on admissions made by the defendant Murphy. The plaintiff sued for the balance due and owing under an agreement for the sale of land. The defendant Murphy filed a statement of defence denying the making of the agreement, the alleged default, and any covenant on his part to pay. Subsequently he admitted that there was a balance of $4,534.51 remaining unpaid under the agreement. On this admission the plaintiff moved for judgment. The application was refused on the ground that there was "nothing whatever in the material to shew what title, if any, the plaintiff had to the premises in question, neither was there any allegation in the pleadings that he can obtain a good title." From the Master's decision the plaintiff now appeals.

In my opinion the application was properly dismissed. A vendor under an agreement of sale of land is not entitled to an order directing the purchaser to pay the purchase-money or any instalment thereof until he establishes to the satisfaction of the Court that he has a good title to the premises sold: *Landes* v. *Kusch*, 24 D.L.R. 136; *Cameron* v. *Carter*, 9 O.R. 426; McCall, Remedies of Vendors & Purchasers, 2nd ed., 23. If the question of title is raised in the statement of defence, title should, strictly speaking, be established at the hearing, although for convenience the question of title is frequently made the subject of a reference. If the defendant in his pleading does not raise any question of title, a reference as to title should still be directed before an order against the purchaser is made: Fry on Specific Performance, 4th ed., 563; 27 Hals., 83 and 84. Had the plaintiff applied for leave to amend his pleading and for a reference as to title, his application would in all probability have been granted. This he did not do, but instead he claimed to be entitled to judgment on the material as it stood.

The appeal will be dismissed, with costs.

Appeal dismissed.

Re LAND REGISTRY ACT AND SHAW.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips JJ.A. August 10, 1915.

1. LAND TITLES (§ I—10)—DUTIES OF REGISTRAR—DISCRETION—LEGALITY OF INSTRUMENTS—APPARENT TITLE.

The statutory duty of the Registrar of Titles in respect of registration of instruments is not merely ministerial but carries with it a certain amount of discretion which he may exercise in order to ascertain the legality of instruments, and the apparent right or title of parties seeking their registration.

[*Manning* v. *Commissioner, etc.*, 15 App. Cas. 195, followed.]

2. LAND TITLES (§ III—30)—TRANSFER OF MORTGAGE—APPARENT TITLE — POWER OF ATTORNEY.

An assignment of a mortgage to himself by the donee of a power of attorney, without proof of acquiescence by the donor, does not establish a *primâ facie* title, and the registrar of titles will be justified in not receiving such instrument for registration.

3. POWERS (§ II—5)—POWER OF ATTORNEY—SALE AND ASSIGNMENT—EXECUTION TO DONEE OF POWER.

A power of attorney to sell or assign a mortgage does not authorize the donee of the power to exercise that power in favour of himself.

Statement

APPEAL from judgment of Gregory, J.

H. C. Hanington, for appellant.

E. C. Mayers, for respondent.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—In my opinion it cannot be said that the registrar was wrong in refusing to register the instrument in question without proof of the acquiescence of the donor in the transfer of the mortgage by the donee of the power of attorney to himself. The registrar has to be "satisfied after examination of the title deeds produced that a *primâ facie* title has been established by the applicant" (R.S. ch. 127, sec. 29). Now, one of such title deeds is the power of attorney in question. It empowers the donee to sell and assign the mortgage in question but not to himself, that is to say, it contains no term authorizing him to sell to himself.

It would have to be conceded that if the power of attorney had in express terms prohibited the donee from selling and transferring the mortgage to himself, the registrar ought to refuse registration of the transfer. Now, though the power of attorney contains no such express prohibition, the law supplies it: Williams on Vendors and Purchasers, 2nd ed., p. 986; and in equity such a transfer could not be upheld except by evidence of full disclosure, fair consideration and good faith on the part of the donee, the burden of proving which would be upon him: *Dunne*

B. C.

C. A.

RE LAND REGISTRY ACT AND SHAW.

Macdonald, C.J.A.

v. *English*, L.R. 18 Eq. 524. Without such proof the presumption must be against the validity of the transfer.

The judgment below however is founded on the view that it is not for the registrar to try the question whether the act of the agent was valid or not. That view, I think, would be quite right if it were not for the fact that the invalidity of the transfer, or perhaps more correctly, the voidability of the transfer, appears on the face of the documents.

As was pointed out by their Lordships in *Manning* v. *Commissioner of Titles*, 15 App. Cas. 195, an officer in a position corresponding to that of the District Registrar is not to be deemed a mere machine for making registration even though the strict literal construction of the statute in the case before them would appear if strictly construed to make him such. I would allow the appeal.

Irving, J.A. (dissenting)

IRVING, J.A., dissented.

Martin, J.A.

MARTIN, J.A.:—Under sec. 29 of the Land Registry Act the respondent applied for registration of a title to a charge, *viz.*, the assignment to himself of a registered mortgage for $2,300 given by one Annie McKay to his father Harry T. Shaw. Though in this case the title which is sought to be registered relates only to the question of the validity of the assignment of this encumbrance on the property yet it must be borne in mind that a question of general and far-reaching importance respecting titles to land is thus raised as appears by the following definition of "charge" given in sec. 2:—

> "Charge" means and shall include any less estate than an absolute fee, or any equitable interest whatever in real estate, and shall include any incumbrance, Crown debt, judgment, mortgage, or claim to or upon any real estate.

The class of title that an applicant for a charge must establish before the title thereto can be registered is a *primâ facie* title and the duty of the registrar is, after receiving the application in Form D., thus set out, section 29:—

> The registrar shall upon being satisfied after examination of the title deeds or other evidence (if any) produced that a *primâ facie* title has been established by the applicant, register the title of such applicant by making a memorandum thereof on the register, etc., etc.

I pause here to note that this requirement is the same as it

B. C.
C. A.
RE LAND REGISTRY ACT AND SHAW.
Martin, J.A.

was in the corresponding sec. 20 of the original Land Registry Ordinance, 1870, with the exception that the registrar must now not only in "satisfying" himself take cognizance of the title deeds produced by the applicant but also the "other evidence, if any," produced to him, which is an amplification of the original sec. 20. And it is also to be noted that by that original section the same standard of *primâ facie* title was required, both as to charges and fees simple (under sec. 19). At present, in applications for titles to fees absolute and indefeasible (as defined by the interpretation sec. 2), under secs. 14 and 16, the registrar is to satisfy himself "that a good, safe-holding and marketable title" has been established, which indeed is the definition given of an "indefeasible fee" in an estate in fee simple so held. But, strangely enough, in neither of these sections is there a reference to the production of "other evidence" than that which would appear from the "deposit with the registrar (of) all title deeds in his (applicant's) custody, possession or power." Whatever may be thought to be the difference (if any) theoretically between a "*primâ facie*" title and a "good, safe-holding and marketable one" in the investigation under secs. 14 and 29, there is none in the final result and in practice because under 23:—

> The registered owner of an absolute fee shall be deemed *primâ facie* to be the owner of the land described or referred to in the register for such an estate of freehold as he legally possesses therein, subject only to such registered charges as appear existing thereon and to the right of the Crown.

And by sec. 25 the certificate of title that he gets is "received as *primâ facie* evidence in all Courts of justice in the province of the particulars therein set forth, *etc.*" The effect of a certificate of indefeasible title is set out in sec. 22. So it follows, as shewn by the test of sufficiency when the title to an absolute fee is challenged in Court, that there is no real or practical distinction in the class of title that is acquired under the one section (29) or the other (14), whatever, if any, there may be in the words describing them, and it is therefore the duty of the registrar to be as careful in "satisfying" himself "after examination" that the title has been well "established" in the one case as in the other. I have used the words "after examination" as though they occurred in this dual relation, but

B. C.
C. A.
RE LAND REGISTRY ACT AND SHAW.
Martin, J.A.

in fact, and strangely, they occur only in sec. 29 and not in 14 or 16, which accentuates the obvious fact that the "satisfaction" under 29 is no mere casual one, but that there is a judicial as well as a ministerial duty imposed on him to "examine" both the documentary and "other evidence produced" to him—*cf. Ex parte Bond* (1880), 1 Hunter's Tor. Tit. Ca. 257; *Johnson* v. *Kirk*, 30 Can. S.C.R. 344, 350. So the same care should be exercised and the same standard required by the examiner in passing upon the title to a charge, say mortgage for $500, or a lease for 100 years, under sec. 29, as the title to a fee under sec. 14.

There have been some judicial expressions on the term "*primâ facie*" title in our Courts and others. Thus Crease, J., *Re Shotbolt* (1888), 1 B.C.R. Pt. II., 337, in an instructive judgment on the origin and operation of the statute, points out at p. 341, that "clearly the intention of the Act (is) in gradually perfecting titles by registration," and says, p. 341:—

> The ordinary certificate merely shews that the person registered under it is the *primâ facie* owner of the land subject to be defeated or otherwise disturbed in the possession of it by any claimant who can shew a somewhat better title, or in any of the ways in which such ownership may be legally divested in favour of some other person, such as informality, error or omission in registration, conflicting estate or interest. Both kinds of certificates are subject to all registered charges and the rights of the Crown, but these do not affect the title itself.

In *Hudson's Bay Co.* v. *Kearns* (1894), 3 B.C.R. 330, McCreight, J., said, p. 343:—

> A *primâ facie* title can only mean a good title till there is evidence to displace it.

And Drake, J., said, p. 345:—

> The registrar, even when a charge is intended to be registered, must satisfy himself, after examination of the title deeds produced, of a *primâ facie* title. If there are no deeds produced, the registrar has to satisfy himself of the reasons of the non-production.

And *cf. Re Trimble*, 1 B.C.R. Pt. II., 321, and *Re Vancouver Improvement Co.* (1893), 3 B.C.R. 601.

In *Kirk* v. *Kirkland*, 7 B.C.R. 12, a conflict between two certificates if title for absolute fees to the same property, the latter being derived under a tax sale deed, Mr. Justice Walkem said, p. 17:—

> As might be expected, counsel are agreed as to the proper meaning of the term "*primâ facie*" as used in the above sections; but it may not be

amiss to quote the following from *Starkie* (Ev. vol. 1, 544): "*Primâ facie* evidence is evidence which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if it be accredited unless it be rebutted or the contrary proved."

And Drake, J., said, p. 23:—

The certificate of title is not a title deed, but it is evidence of a *primâ facie* title existing, and the alleged owner may be called upon to establish his title in proceedings properly instituted.

And at p. 27 gave certain extracts on the point from judgments therein mentioned.

In the same case the Supreme Court of Canada, *sub nom. Johnson* v. *Kirk, supra,* considered the point at pp. 351 and 356, and held that the second certificate, issued during the existence of the first, was null and void, saying, p. 356:—

In fine the whole proceeding in the present case presents so many features of the utter absence of *bona fides* as to remove all *primâ facie* evidence of title which the certificate given by the registrar afforded if it afforded any.

Later in *Carroll* v. *City of Vancouver,* 10 B.C.R. 179, it was held that the holder of a certificate of title derived under a tax sale deed has "a good *primâ facie* case as against the defendant (the former owner) until the latter shews a better title," which he had failed to do either by production of his prior certificate or otherwise.

Recently in *Howard* v. *Miller,* 22 D.L.R. 75, [1915] A.C. 318, their Lordships of the Privy Council, at p. 81, consider the question in relation to a certain deed which was not, and to certain admissions which were held "sufficient to rebut the *primâ facie* title conferred by registration."

In *Pritchard* v. *Hanover* (1884), 1 Man. L.R. 72, 79, it was decided that a patent from the Crown establishes a *primâ facie* title which will prevail unless displaced, and *Stevenson* v. *Traynor* (1886), 12 O.R. 804, is to the same effect.

In proceeding to apply the foregoing observations to the case at bar we find that the regular documentary evidence discloses on its face the fact that the applicant had under a power of attorney from his father (who resided in England) to himself assigned to himself the mortgage that his father held from Annie McKay. The question therefore is, was the registrar right in

B. C.

C. A.

RE LAND REGISTRY ACT AND SHAW.

Martin, J.A.

holding that a title depending merely upon such an act and instrument could be deemed to be a judicial "establishment" of a "*primâ facie*" title?

I shall cite some authorities on the subject in general and then apply them to the particular case. First there is the apt citation from Bythewood & Jarman given by the registrar in support of his ruling, and alternative requisition for ratification, and in *Crowe* v. *Ballard* (1790), 3 Bro. C.C. 117, 118, therein referred to, Lord Chancellor Thurlow said:—

> Ballard undertakes to sell the legacy . . . then he buys it himself. That is alone sufficient to set aside the transaction. It is impossible, at any rate, that the person employed to sell can be permitted to buy.

The matter is very clearly put in Williams on Vendor and Purchaser (1911), vol. 2, p. 983, dealing with the capacity to exercise powers, which is the specific question in this case and is the third class the author is there considering, *viz.*:—

> Where a man's title to sell or buy some particular piece of land is derived, not from his own beneficial ownership of the land or the money to be employed in the purchase, but from an authority in that behalf given to him either by the act of the beneficial owner of the land or money or by statute on such owner's behalf, then he cannot well exercise the authority by selling to or buying from himself, either directly or indirectly, unless the instrument or statute conferring the authority otherwise provide. And if such instrument or statute allow of no exception in his favour, and in the transaction in which he purports to exercise such an authority to sell or buy he be himself the purchaser or the vendor, either directly or through the mediation of an agent, trustee or nominee for himself, or even (in the case of sale) by sub-purchase from a stranger, the sale or purchase is voidable in equity at the instance of the beneficial owner of the land sold or money paid in purchase. The transaction is, moreover, so voidable on the mere proof that the vendor or purchaser was acting in exercise of such an authority and in effect sold to or bought from himself; and it is immaterial whether the terms of the bargain so purported to be made were otherwise fair or were actually advantageous to the parties who seek to set it aside.

The special point about that statement of the general rule as applied to this case is contained in the latter portion of it respecting the "mere proof" and the "immateriality" of fair terms which otherwise would sustain the transaction: in other words it turns upon the defective way in which the authority is exercised, as, in the case at bar, a personal incapacity or disqualification *ad hoc*. The same author goes on at pp. 985-6 to explain the rule thus:—

It appears to rest at bottom on the principle that an authority given must be strictly pursued. Where a man is invested with an authority to sell or buy, the mandate is that he shall enter into a contract of sale or purchase; that is, a transaction implying a bargain between the person authorized and some other person acting independently of him, the result of which is, that each incurs obligations to the other. Now, at law, a man cannot make a contract with himself, either alone or jointly with others, if he purport to do so, the transaction is absolutely void as regards him. It is impossible, therefore, for a man to sell to or purchase from himself at law.

And he proceeds to point out that while he may at law evade the consequences by employing another as his trustee, yet—

In equity, however, the substance of the transaction is regarded; and if a man exercising an authority to sell or purchase, in effect sell to or buy from himself, the transaction is not considered to be a sale at all, and is therefore an improper exercise of the authority.

And again, at p. 988:—

A trustee for sale is no more competent to purchase the trust property as agent for a stranger to the trust than he is to buy it for himself. For to act as agent on behalf of a purchaser would obviously be in direct conflict with his duty as a trustee for sale; and, as we have seen, an authority to sell is not well exercised unless the vendor contract with some other person acting independently of him.

And at p. 991:—

The rules governing the case of a trustee for sale or purchase are equally applicable in every instance in which a person exercising an authority to sell or purchase stands in a fiduciary relation to the person by or on whose behalf the authority was conferred; although the former may not be a trustee under a formally constituted trust. Thus, an agent employed to sell or purchase land such as an auctioneer, an estate agent, or a solicitor, cannot buy the principal's land from himself for his own use or purchase his own land from himself for the principal.

And at p. 992:—

Even in these cases, however, the rule appears to rest, at bottom, on the ground that a sale or purchase by the authorized person to or from himself is no contract at all, and is therefore no proper exercise of the authority. Expressed in this form, the rule is equally applicable where the person exercising the authority does not stand in a fiduciary relation to those by whom or on whose behalf the authority was conferred.

And after remarking on p. 993 that where an authority cannot be well exercised in favour of the person possessing it, "so also he cannot well exercise it in favour of any agent employed by him to conduct or act in the sale," and illustrating the case of a solicitor or auctioneer employed to conduct a sale of land, who "cannot become the purchaser thereof," he refers on p. 995 to the exception to the rule:—

B. C.
C. A.
RE LAND REGISTRY ACT AND SHAW.
Martin, J.A.

If the instrument creating an authority to sell or purchase expressly or impliedly permit the person, to whom the authority is given, to be himself the purchaser or vendor, the case is taken out of the general rule; and he may well sell to or buy from himself in exercise of the power . . . (and) But, of course, in every case in which a person invested with an authority to sell or purchase is specially empowered to be himself the purchaser or vendor, the terms of the special power must be strictly observed; if not, the general rule will prevail.

The consequences are thus treated at p. 997:—

Where one invested with an authority to sell or purchase in effect sells to or buys from himself, the persons by or on whose behalf the authority was conferred have the option of affirming or avoiding the transaction; and if they elect to affirm it, the person authorized is firmly bound and cannot maintain, as against them, that the purported exercise of his authority was void.

And after pointing out that there can be no election without notice or knowledge of the facts giving that right, he proceeds to discuss and illustrate the different remedies open to the injured party in case of avoidance. The practical result and effect of such transactions upon an investigation of title and the duty of a solicitor thereon are thus stated on pp. 1006-7:—

Where, on a sale of land, the purchaser has notice from the abstract or otherwise, that the vendor derives title through a sale or other conveyance made in favour of one occupying a position, from which undue influence would be implied, or made of a *cestui-que-trust's* interest in the trust property to his trustee, the purchaser's advisers should point out the consequent objection to the title and require the vendor to furnish evidence that the circumstances and terms of the apparently objectionable transaction were such as to render it perfectly valid. If the vendor can produce such evidence, the purchaser will have to accept the title on that point; for when such an objection has been so removed, the Court does not consider the title too doubtful to be forced upon an unwilling purchaser, notwithstanding that the evidence offered do not include any testimony given by or conclusively binding the persons, who would be entitled to set the transaction aside.

And then a case like the present is dealt with:—

If, however, a vendor's title be derived through a sale made by a person, exercising an authority to sell, in his own favour, the nature of the objection to the title is entirely different; as in equity the exercise of the authority is void, and the equitable estate authorized to be conveyed has never passed away from the persons by whom and on whose behalf the authority was conferred. In this case, therefore, the purchaser cannot be obliged to accept the title, without the concurrence of those persons or their successors in estate, all being *sui juris*.

So far back as 1800 in *Campbell* v. *Walker*, 5 Ves. 678, where a trustee bought at public auction and for a fair price the Master

of the Rolls, after pointing out that the only way a purchasing trustee can protect himself is by obtaining the consent of the Court to become a purchaser, said, p. 680:—

> The Court would divest him of the character of trustee; and prevent all the consequences of his acting both for himself and for the *cestui que trust;* for the reason of the rule is, that no man shall sell to himself; a case in which it is impossible for the Court to know, that he did not do all he ought to have done. These infants had not the guard they ought to have had; that the trustee should not act for his own benefit, and the two characters should not be united.

Coles v. *Trecothick* (1804), 9 Ves. 234, was relied upon to the contrary, but an examination of the case shews that it supports *Campbell's Case* because at p. 247 there is pointed out the necessity of "proving that the *cestui que trust* intended the trustee should buy" in order to escape from the rule.

In *Lewis* v. *Hillman*, 3 H.L. Cas. 607, at 629-30, it was said by Cottenham, L.C.:—

> I have been surprised, I confess, at this matter being pursued, when the rules of equity are so clear. No man in a Court of equity is allowed himself to buy and sell the same property. He cannot sell to himself. Even in the case of a fair trustee, he cannot sell to himself. If he has the power or the trust to sell, he must have some one to deal with. Courts of equity do not allow a man to assume the double character of seller and purchaser; and it is necessary, in order to preserve the interests of persons entitled beneficially to property, to maintain that rule. But here is a case which goes infinitely beyond that; I should lay it down as a rule, my Lords, that ought never to be departed from, that if an attorney or agent can shew he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, no such purchase as that can stand for a single moment.

This shews two things, the general rule that a man cannot sell to himself even in a representative capacity, and that even where he has received authority to purchase openly, yet if he purchases secretly in the name of another the purchase cannot stand.

In *McPherson* v. *Watt*, 3 App. Cas. 254 at 266, Lord O'Hagan said:—

> An attorney (at law) is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril.

And then he goes on to point out what the attorney "must be prepared to shew" to justify the transaction, and concludes:—

B. C.
C. A.
RE LAND REGISTRY ACT AND SHAW.
Martin, J.A.

And, although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns and invalidates it utterly.

This is a good illustration of how a title derived through a purchase by an attorney from his client might be justified, yet if during the investigation of it the fact should be disclosed that the attorney had "made the purchase covertly in the name of another" then the title could not be established at all because, *ex facie*, it was rooted in a transaction which "the law condemns and invalidates utterly."

The latest illustration of the obstacles to self-contracting that I have found is in *Napier* v. *Williams*, [1911] 1 Ch. 361, where it was held that covenants in a lease made by one person with himself and others are void.

I have not overlooked *Furnivall* v. *Hudson*, [1893] 1 Ch. 335, which was cited to us. I merely note that it was a case of express authority to do the particular act and therefore has no application to the present question.

Many examples might be given of instruments which are valid on their face but really void because of incapacity, and so soon as the hidden incapacity is detected by the examiner the *primâ facie* title becomes a bad one. For example a title founded upon a power of attorney given by one discovered to be an infant, *Zouch* v. *Parsons* (1765), 3 Burr. 1794, at 1804; *Combes Case*, 5 Coke, 135, p. 140, Pt. IX. 766, 77a; a mortgage given by an infant contrary to the Infants Relief Act of 1874: *Re Nottingham Permanent Building Soc.* v. *Thurstan*, [1903] A.C. 6: a lease given by one purporting to act as an agent for an infant: *Doe d. Thomas* v. *Roberts* (1847), 16 M. & W. 778. Nor can a mortgagee buy lands put up for sale under his mortgage—*Hodson* v. *Deans*, [1903] 2 Ch. 647, where it is said at p. 652 (citing Lindley, L.J., in *Farrar* v. *Farrars' Ltd.*, 40 Ch.D. 395, 409):—

It is perfectly well settled that a mortgagee with a power of sale cannot sell to himself either alone or with others, nor to a trustee for himself . . . nor to anyone employed by him to conduct the sale. . . . A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it

at a price fixed by himself, even although such price be the full value of the property. Such a transaction is not an exercise of the power.

And a landlord may not buy the goods of his tenant sold under his distress as "mischief arises . . . by the landlord being both buyer and seller:" *Moore* v. *Singer Mfg. Co.*, [1904] 1 K.B. 820, 826.

Finally, I refer to *Williams* v. *Scott*, [1900] A.C. 499, a decision of their Lordships of the Privy Council. That is a case of much assistance in determining the present point because as the report shews, p. 499:—

> The question decided was whether the mortgagor's title was a good and marketable one, he having derived it by purchase from himself as trustee for sale.

The mortgagee, the respondent, had, under the power of sale, agreed to sell the lands to the appellant who resisted an action for specific performance on the ground that the mortgagor's title was bad because he had purchased the property from his mother's estate for which he was a trustee for the sale thereof. Their Lordships say, p. 503:—

> It is clear, undisputed law that a trustee for the sale of property cannot himself be the purchaser of it, no man can at the same time fill the two opposite characters of vendor and purchaser.

And as this fact had become apparent during the investigation of the title, specific performance was refused, even though efforts had been made to overcome the objection by adducing evidence to shew that all the beneficiaries had agreed in the sale with full knowledge of all the circumstances and an alleged release was submitted as purporting to shew their approval and acquiescence. It was urged that in the absence of evidence to the contrary, the Court must assume that the release was a proper one and that the *cestuis que trust* were informed of all necessary matters. But it was said, p. 508:—

> Their Lordships are unable to agree in this view. The conveyance itself is incapable of any interpretation but one, and that is unfavourable to the title. A trustee for sale of trust property cannot sell to himself. If, notwithstanding the form of the conveyance, the trustee (or any person claiming under him) seeks to justify the transaction as being really a purchase from the *cestuis que trust*, it is important to remember upon whom the onus of proof falls. It ought not to be assumed, in the absence of evidence to the contrary, that the transaction was a proper one, and that the *cestuis que trust* were informed of all necessary matters. The burthen of proof that the transaction was a righteous one rests upon the trustee, who

B. C.
C. A.
RE LAND REGISTRY ACT AND SHAW.
Martin, J.A.

is bound to produce clear affirmative proof that the parties were at arm's length; that the *cestuis que trust* had the fullest information upon all material facts; and that, having this information, they agreed to and adopted what was done. . . . Under these circumstances, it would be inequitable to force such a title as this upon the appellant. It is not merely that the purchaser would be running the risk of proceedings being taken by the *cestuis que trust* to re-open the transaction. The purchaser would be saddled with a property which he would be unable for many years to put upon the market, unless recourse was had to some special restrictive condition which might seriously reduce the price a purchaser would be willing to pay for it.

I make this citation also in support of the action taken by the registrar in calling upon the applicant for a ratification from his father before the title could be accepted. But the applicant rejected this opportunity "to justify the transaction" in this manner and stood his ground upon his bare right to sell to himself as establishing a *primâ facie* title. In *Delves* v. *Gray*, [1902] 2 Ch. 606, *Williams* v. *Scott*, *supra*, was applied and specific performance was refused because the vendor was "not able to confer upon (the purchaser) a marketable title" (p. 611), owing to the fact that a trustee for sale had re-purchased the property from his own vendee, the Court observing that "Delves (the trustee) was incapable of purchasing under the circumstances." And *cf.* also *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296, at 313-4.

In the light of the foregoing authorities I am of the opinion that when an applicant wishes to "satisfy" an examiner that he has a *primâ facie* title he must produce one which does not require further evidence, documentary or otherwise, to complete it to the full extent of the interest sought to be registered. If what is produced is only sufficient to shew the examiner that something more is wanted to prevent its being defeated, or avoided, either by the exercise of an election in its favour, or for any cause, then it has not been "established." It will be presumed in favour of it that, *e.g.*, all documents executed and attested as required by the Act are valid and that persons who have executed them have done so in the professed capacity which is essential to due execution, and also that there has been no fraud in transactions which are ostensibly *bonâ fide* according to the documents produced. But where, *e.g.*, said evidence

discloses the fact that the apparently lawful capacity in which a vendor or purchaser acted is a prohibited one to attain the desired object then there is impressed upon the title such a "palpable blot" (*Williams* v. *Scott, supra,* p. 507), that it could not be forced upon a purchaser nor passed by the examiner as *primâ facie*. So soon as it appears, in the course of the examination, that a transaction which is presumably legally effective is not so, then the whole aspect of the matter changes. If the situation disclosed is such that it is inevitable that the document relied upon must be supplemented by another or receive some further ratification or approval to make it effective, or that some active step must be taken to justify it, then there is no *primâ facie* title. As the point is not easy to define precisely and as the subject is one of such great public importance I shall attempt to elucidate my meaning by giving some illustrations:—

1. Where a title turns upon a duly executed lease or conveyance from Doe, the registered owner in fee, to Roe, the applicant, the title is *primâ facie* established in the latter and should be registered. There is no presumption that the transaction, legal on its face, may have been the result of duress or is otherwise liable to be avoided: on the contrary it is presumed to be valid. 2. But if the evidence disclosed the fact that Roe was a solicitor and had covertly bought the land from one of his clients, then it would not be *primâ facie* because such a transaction could not in any circumstances stand, and it would be necessary for the applicant to take some active step to cure the defect by getting a further conveyance from the client or formal ratification after full disclosure. 3. Or if it appeared that Roe was really a trustee who had sold trust property to himself, his title would likewise fail and his grantees with it. 4. If it appeared that a power of attorney, ostensibly valid, under which a lease had been granted had actually been given by an infant, the title which was up to that discovery *primâ facie*, would be bad, because an infant cannot give letters of attorney. 5. The same would happen in the case of a lease granted by an agent who was discovered to be the agent of an infant. 6. Likewise also in the case of a mortgage given by an infant under the Infants' Relief Act. 7. Likewise the same result in the event of a similar

B. C.

C. A.

RE LAND REGISTRY ACT AND SHAW.

Martin, J.A.

discovery in the case of a conveyance by a ward to his guardian because that is a void act.

In the case at bar we have an illustration of the same person attempting to exercise two capacities at the one time *i.e.*, the buyer and the seller of a mortgage covenanting with himself. The moment that fact disclosed itself in evidence (here as it happens by the production of the power of attorney already registered) it was shewn that the assignee could not buy from himself as he was in a prohibited capacity, according to the general principle which I am of the opinion extends to this and similar cases and therefore the instrument was either void or (what in this case has the same effect) of such a nature as to be inevitably voidable unless approved of by the assignor and such a state of circumstances required the applicant to become the actor in obtaining the approval of the donor of his authority, otherwise no title could be established.

I am unable to see any distinction in principle between this case and several of those cited, *e.g.*, *Williams* v. *Scott*, *supra*, and *Delves* v. *Gray*, *supra*, and, in my opinion, the documents and evidence produced to the registrar have failed to establish either a "*primâ facie*" or a "good, safe-holding and marketable title," because of the said "palpable blot upon the face of the title" which no examiner of titles could safely pass over in the discharge of his duty which is well defined in the extract from Williams hereinbefore cited.

It follows that the appeal should be allowed.

Galliher, J.A.

GALLIHER, J.A.:—The document presented for registration was, on its face, contrary to law. That point is covered by the cases cited to us by Mr. Hanington.

The respondent's contention is that it is no part of the duty of the registrar to inquire into the legality or illegality of the instrument, but his duty is to register same if it conforms to the provisions of the Land Registry Act. I cannot take this view. I think the registrar's duties are not those of a mere automaton and the more so in a case like the present where the instrument on its face is contrary to law. The appeal should be allowed.

McPHILLIPS, J.A.:—I am in entire agreement with my brother Martin, and I do not propose to add anything further, other than to say that I concur in allowing the appeal.

Appeal allowed.

B. C.

RE LAND REGISTRY ACT AND SHAW.

Re A SOLICITOR.

ALTA.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. November 6, 1915.

S. C.

1. SOLICITORS (§ I B—14)—MISAPPROPRIATION OF FUNDS—STRIKING FROM ROLLS—SUSPENSION UPON PAYMENT—COMPROMISE.
A compromise with his clients on a percentage basis is a sufficient compliance with an order of court suspending the disenrollment of a solicitor upon his payment of the claims misappropriated in another jurisdiction.

2. SOLICITORS (§ I B—12)—STRIKING OFF ROLLS—PROVINCE OF COURT.
A court in dealing with the moral fitness of solicitors to retain them on the Roll is merely a court of discipline specially charged with the duty of guarding the honour of the legal profession and judging, not the legal rights, but the moral character of the individual, and is not bound by previous decisions.
[*Re Knox*, 20 D.L.R. 546, referred to.]

Statement

APPLICATION to strike a solicitor off the rolls, see 20 D.L.R. 546.

Charles F. Adams, for the Law Society.

Alex. Stuart, K.C., for the applicant.

Stuart, J.

STUART, J.:—I concur in the views expressed in this matter by my brother Beck.

I think it proper, however, and indeed my duty as a visitor of the Law Society, to take this opportunity of repeating and emphasizing the views I expressed on the original application. When Knox's defalcations in Aberdeen were reported to the Law Society by two solicitors practising in the same small town as he on their own account and not as representing the persons injured as their clients, the course adopted while undoubtedly conscientious and in discharge of what was conceived to be a grave, if disagreeable duty was, in my opinion, a mistaken one. It was, or ought easily to have been, within the knowledge of the discipline committee that Knox had come from Aberdeen to practise his profession in Alberta and had practised it without any impropriety for 2 or 3 years. One of the solicitors reporting him, had in fact done his best to discover delinquincies here and had failed. Whether, however, the committee should be charged with knowledge of this or not may be a question. But

ALTA.
S. C.
RE
A SOLICITOR.
Stuart, J.

it was easily within their knowledge that he had gained the confidence of at least a large portion of the community and had been elected mayor of his town. In these circumstances I think the better and the proper course (I do not mean legally proper but proper as in the exercise of a discretionary power in the matter of discipline) would have been to call Knox before the committee as is done in some cases both in Ontario and in England (I have no knowledge of the other provinces) and then to say to the solicitor: "Now, Mr. Knox, you have come to Alberta and entered this profession, you have practised so far as we can ascertain with propriety and honesty for two or three years, you have apparently gained the confidence of the community in which you live to the extent of being elected mayor of your town. But we have been given information of certain delinquencies of yours some years ago in Aberdeen, Scotland. These delinquencies seem to have been very serious. Therefore, while we do not feel disposed in these circumstances to launch an application against you now, after your course here to have you struck off the Rolls and cast out as a pariah, we must insist that you give further evidence of your confirmed intention to act with honour as becomes one of this profession by repairing the wrongs you committed in Aberdeen, even though the people injured have not themselves followed you out here and proceeded against you, which, for many reasons, they may not have been able to do. The amount of your defalcations there is not a very large sum and you ought, with your apparent success to be easily able if you are not interfered with publicly to make everything good. This you must do and we must insist that you shew us that you are making the promptest and best efforts you can to do so. We must require you therefore to report to us soon and continuously as to what you have done and can do in this regard. On this condition we shall let the matter rest in the meantime."

This would not have been acting as a collecting agency because the persons injured had not complained. It would have been exhibiting some slight indication of humanity and Christian charity. Whether such considerations are entitled to even a small place in such matters may be a question, but, for my pur-

pose, it is indifferent what answer is given, whether the answer is "yes" or "no," the reader may make his choice. Even in a criminal Court after a verdict of guilty, these considerations do find a place when the punishment is to be considered. My sincere hope is that no one of us will be driven to ask in vain of a judge of righteousness to be given a second chance, or rather that he will not, after securing a second chance and using it well, find it snatched from him after all because his personal enemies have discovered and reported that he misused the first.

The course I suggest would have had at least this advantage that Knox would have been left in a far better position to repair the wrongs he committed by the absence of interference with his ability to earn the money to pay his obligations than he was put in by the course which has been pursued. Of course, if the possibility of reparation of the wrong is of vastly less importance in these proceedings than the fact that they had been committed what I say will be proportionately discounted. I quite agree that the important thing is not the reparation of the money but the character of the man and the safety of the public. But I am convinced that the course I suggest would have been ample for the latter purpose in the special circumstances of this case.

Of course if it be the case that the acts committed by Knox in Aberdeen fix absolutely and permanently his moral character and predestine him to repetition, there is little more to be said. But I think such a view of the matter reveals a grave misconception of the springs of moral conduct, and the psychology of wrong-doing. It leaves out altogether the question of surroundings and takes no account of the possible effect of a change to a new work where renewed hope and opportunity exist. And then what are we to say of the case of Laurie who was reinstated, or of that of Harris? I am quite conscious that the probability is that the Law Society thinks that those decisions were wrong, but, after all, I feel sure that the time will certainly come, if it is not already here, when very few will be found to express regret that some leniency was there exercised. And the case of repeated acts of wrong-doing in this province

ALTA.

S. C.

RE A SOLICITOR.

Stuart, J.

under the very eyes of the Court is to be distinguished from the circumstances of the case of Knox, to which I have referred.

I have referred to the cases of Laurie and Harris with hesitation because the reference to some extent violates a principle to which, in these matters of discipline, I think we should adhere, *viz.*, that previous decisions should not be viewed as binding precedents creating an inexorable rule of law as in the case of decisions in Court actions on contested claims regarding property and civil rights. The Court in dealing with these matters is merely a Court of discipline specially charged with the duty of guarding the honour of the legal profession, and in doing so, of judging not of legal rights but of the moral character of an individual. To allow Court decisions in these matters to assume the same position as judgments on matters of law is to misconceive the whole situation. This tendency is natural where lawyers are dealing with the matter and where the decisions find a place in the Law Reports. I doubt, however, if they should be inserted there for this very reason, and incline to the view that a more proper and sufficient record of them would consist in placing them among the documents of the Law Society. But I do not emphasize this. I have reason to believe that the Law Society is disappointed at the course of the decision in these matters and with the divergent views that seem to obtain. But in view of the established practice in this province there need be no surprise. In my view the trouble exists just because of the apparent absence of the possibility, according to the present practice, of adopting in proper cases the course I suggest should have been adopted in the case of Knox. My view is that a preliminary discretionary supervision should be exercised by the discipline committee, and if there is such now, that it should go farther than it apparently does. I am led to make this observation partly on account of the statement made by counsel for the Law Society, on the original application, that he received his final instructions to launch that application simply from one member of the committee. In my view, there should be a winnowing of the cases in the first instance by the discipline committee *and in some cases*, of which the present is an example, an exercise of disciplinary power in a milder form before resort

is had to the Court. There would then be far more chance of unanimity in the Court. It is natural and easier, of course, to throw the burden of decision at once upon the Court, but they do take this trouble elsewhere and I see no reason why the trouble should not be taken here. Of course there is also a natural craving for a rule and perhaps also a fear of the possibility of the suggestion of unfair discrimination or secret influence in the exercise of such a power by the committee, but the possibility of suggestion exists in any case and can easily be faced by honourable men conscious of the rectitude of their intentions; while the desire for an easy rule tending to become a rule of thumb whose application might be unfair in the circumstances of an individual case is just exactly what I desire to reject. The argument as to a collecting agency to which I have referred is an example of this.

The solicitor Knox is, no doubt, no paragon of virtue, but I only know and ought only to know what is of record here against him, while, if my knowledge of things obtained in the course of litigation in the Courts reveals other things, all I can say is, that we excuse even a dog for snapping back viciously at those of his own kind who pursue him.

I conclude by repeating and emphasizing again my conviction that the events in Wetaskiwin antecedent and leading up to the original application were and are quite proper to be regarded either by the discipline committee or by this Court in considering the particular circumstances of Knox's case.

I add an observation which I intended to make in the beginning. If we remember that the order made was the most that a majority of the Court thought should be made (without assuming that it was right, as to which there was a divergence of opinion), then that order simply did what I suggest the discipline committee ought to have done in the first instance, and then with much greater probability of efficacy as to the result.

Beck, J.

BECK, J.:—At a sitting of the Court at which I was not present, an application to suspend or disqualify the solicitor was made. Written reasons for the decision arrived at were given. No formal Order was taken out but the terms of the Order were settled between counsel for the Law Society and for

ALTA.
S. C.
RE
A SOLICITOR.
Beck, J.

the solicitor. They agreed that the Order should be in a form which I quote as far as it is material: "This Court doth further order and adjudge that the said application to suspend and disqualify the said solicitor, Alexander Knox, be not now granted but that the said solicitor do appear before this Court and satisfy it on or before July 1, 1915, that he has settled or has done or is doing what is reasonably within his ability to satisfy the claims of (1) Joseph Stuart," *etc.*, setting out some details. "(2) The North of Scotland Town and County Bank, Ltd., *etc.*, and (3) The British Linen Bank, *etc.*; and in default of the said solicitor settling the said claims or satisfying this Court as to his efforts or in default of his applying for and obtaining an extension of time for the said purpose within the time above limited, then this Court doth order and adjudge that the name of the said solicitor, Alexander Knox, be struck from off the roll of barristers and solicitors of the Law Society of Alberta and of the Province of Alberta."

The solicitor has now shewn to the Court that he has settled the three claims against him by arranging with the respective claimants a compromise whereby, in consideration of the payment in cash by trustees for his wife of an amount in cash and the giving of his own promissory note for sufficient to represent a total of 5 shillings on the pound of the claims they discharged him.

Personally I should have been much better pleased if the solicitor had made no attempt to compromise the claims, so as to relieve himself as a matter of legal liability in respect of such portion of the claims as he found himself unable to pay, inasmuch as the moneys in question were received by him in trust and his position as a solicitor imposed upon him obligations of the highest order. I should have been better pleased with the evidence of the solicitor's full recognition of his moral obligation to make good as soon as reasonably possible the whole amount in respect of which he was in default, accompanied, by no matter how small a payment on account, according to his financial ability, than the compromise which he made.

I think, however, that the terms of the order as settled between his counsel and counsel for the Law Society as being their

interpretation of what the written reasons for the Court's decision meant, led the solicitor and his counsel to suppose that such a settlement of his claims as was in fact made, is that the Court expected of him. The very terms of the order seem to me to indicate that at the time both counsel held this view, and I think we should not now hold the solicitor himself to anything better, though I should be much pleased if at some later date the solicitor voluntarily came before the Court and shewed us that notwithstanding the compromise he had finally discharged the moral obligation which still remains upon him of paying the residue of the claims.

I would therefore for my part hold that the solicitor has complied with the requirements of the order of the Court and that the application against him should be dismissed; but under the circumstances I think he should pay the costs of the application.

In dealing thus with the application I am influenced by several circumstances to which I will advert. First, the application is not based upon any misconduct of the solicitor committed while he has been a member of the Bar of this Province. During that time he has so far as the Court is aware, in no way misconducted himself. No doubt this Court may properly disenroll a solicitor for misconduct committed in another jurisdiction and before admission to this Bar, but I think it should be chary of doing so where, as here, he has been in active practice for a considerable number of years, and his conduct during that period has not been impeached; for it seems to be recognized that even with reference to misconduct within the jurisdiction, honest conduct for a long time is ground for reinstatement. Not only has this solicitor's conduct during his residence in this province not been impeached but it has been shewn to this Court that he has gained the respect of a great many of the business men of the community in which he resides, so much so that three or four years ago he was elected the mayor of Wetaskiwin, the place in which he has continuously practised his profession. Another circumstance is this: the application against the solicitor was undoubtedly set on foot at the instance of a rival practitioner who was evidently actuated by no high motives

ALTA.

S. C.

RE A SOLICITOR.

Beck, J.

of righting a wrong but by the strongest feelings of personal enmity to the solicitor.

Previously to this none of the creditors had so far as appears sought any remedy against or punishment of the solicitor.

I am convinced that the solicitor will not again offend by such default as the application is grounded upon, and in my opinion, he will have been sufficiently punished for his past transgressions in this respect by the publicity of this application which has been so long drawn out and the large costs to which he, himself, has been put and the costs which he is now ordered to pay in connection with the application.

Scott, J.

SCOTT, J., concurred.

Harvey, C.J. (dissenting)

HARVEY, C.J., dissented. *Application dismissed.*

B. C.

C. A.

GALE v. POWLEY.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. August 10, 1915.

1. WRIT AND PROCESS (§ II D 2—45)—SOLDIERS — STATUTORY PRELIMINARIES—AFFIDAVIT—ACTIONS IN REM.

Sec. 144 of the Imperial Army Act 1881, ch. 58, as applied to Canada by the Militia Act, ch. 41, R.S.C., sec. 74, which provides that no process may issue against a soldier without the preliminary filing of an affidavit under sub-sec. 4, applies only to proceedings taken against the person of the soldier, but not to an action for the foreclosure of an agreement for the purchase of lands, in which case it may be done by a notice in writing.

2. VENDOR AND PURCHASER (§ II—30)—FORECLOSURE BY VENDOR—NECESSARY ALLEGATIONS—TITLE—POSSESSION.

In an action for the foreclosure of a contract for the purchase of land, the court will not order the recovery of the possession of the land and the cancellation of the agreement of sale in the absence of any allegations that possession of the land was given to the purchaser, or that the agreement of sale, or the vendor's title, had been registered.

3. VENDOR AND PURCHASER (§ II—30)—REMEDIES OF VENDOR—PURCHASE MONEY—FORECLOSURE OF PURCHASER'S INTERESTS.

An unpaid vendor cannot have the land and the instalments of the purchase money; he must elect either remedy.

[*Vancouver Land* v. *Pillsbury, etc. Co.*, 15 D.L.R. 775, referred to.]

4. PARTIES (§ II A 8—105)—SALE OF LAND — FORECLOSURE ACTION — NECESSARY PARTIES DEFENDANT—ASSIGNEE OF PURCHASER.

An assignee of a purchaser to whom the purchaser's interest under the contract had been assigned is a necessary party defendant to an action for the foreclosure of the contract for the purchase of the land, and his non-joinder will affect the judgment rendered in the action.

5. PLEADING (§ I N—119)—AMENDMENT—NON-JOINDER OF PARTY — ASSIGNEES.

The non-joinder of an assignee of a purchaser as a party defendant to an action for foreclosure of the contract may be cured by amendment.

[*King* v. *Wilson* (1904), 11 B.C.R. 109, applied.]

B. C.

C. A.

GALE v. POWLEY.

Statement

APPEAL from judgment of Lampman, Co.J.

The facts of this case are as follows. The defendant, on February 8, 1913, purchased, under an agreement for sale, the property in question from one Kenning, and has filed an affidavit saying that on the same day he assigned all his right, title and interest therein to one Leonore Nicol.

The plaintiff on February 26, 1913, obtained from Kenning, the vendor, an assignment of all his right, title and interest in the agreement, and in the property in question, and all moneys then owing, accruing due, and unpaid under the said agreement. The defendant was a party to the assignment of February 26, 1913, and therein covenanted to pay to the plaintiff said moneys and perform all covenants in the agreement of February 8, 1913, contained.

In the agreement of February 8, the defendant covenanted to pay $660 down and four instalments of which the first two have been paid and the other two, *viz.*, two sums of $317, and $317 payable on February 8, 1914, and August 8, 1914, respectively, have not been paid.

On December 16, 1914, the plaintiff brought this action for $589.18—an action for cancellation of the contract, as it is sometimes called in England: see *Lysaght* v. *Edwards*, 2 Ch.D. 409, 506, seeking to recover the two instalments with interest, and in default of payment for an order declaring the agreement of sale cancelled, and foreclosing the defendant's right thereunder, and for possession and forfeiture of the moneys paid.

The defendant did not file a dispute note but, on the return of a notice of motion for an order for cancellation and foreclosure, *etc.*, counsel, instructed by him, did appear and took the ground that as the defendant was an officer in the 30th Battalion C.E.F., and might at any time be called upon to leave for the front, the proceedings were void or ought to be set aside for non-compliance with sec. 144 (4) of the Imperial Army Act, 1881, 44-45 Vict. ch. 58, brought into force by the Militia Act, 1906, ch. 41, sec. 74.

E. C. Mayers, for appellant.

F. J. McDougall, for respondent.

B. C.
C. A.
GALE
v.
POWLEY.
Martin, J.A.

MACDONALD, C.J.A.:—I concur with MARTIN, J., in allowing this appeal.

MARTIN, J.A.:—With respect to the first point, that under sec. 144 of the Imperial Army Act 1881, ch. 58 (applied to Canada by the Militia Act, ch. 41, R.S.C. sec. 74) no process can issue against a soldier without the filing of an affidavit under sub-sec. (4) as a preliminary step and condition precedent, I am of the opinion that such requirement relates only to proceedings taken against the person of the soldier, and that the case at bar is governed by the proviso to said section which only requires "due notice in writing" to be given to the soldier in causes of action where execution against his person is not sought.

Then, as to the judgment that was pronounced. It is objected that the vendor's only remedy under this agreement is a sale of the property and a judgment against the purchaser for the balance, if any, due the vendor after the result of the sale is known (*cf. Robinson* v. *Starr*, 14 D.L.R. 767), and that the practice that has existed for some time in this province of granting foreclosure (see, *e.g., Bourne* v. *Phillips*, 13 D.L.R. 944, and *Essen* v. *Cook*, 18 D.L.R. 51, 20 B.C.R. 213; *Davis* v. *Alvensleben*, 20 D.L.R. 112, 20 B.C.R. 74), is unwarranted in law. But it is clear that there are other remedies, and one of them is a right to have the agreement cancelled in an action which in some, although not all respects, is in the nature of specific performance, and in others akin to one for foreclosure of a mortgage, and to possession of the property, retaining the sums already paid, pursuant to the stipulation for forfeiture thereof—for which the following cases are ample authority: *Hudsons Bay Co.* v. *Macdonald*, 4 Man. L.R. 237, 480; *Jackson* v. *Scott*, 1 O.L.R. 498, see English cases cited by Moss, J.A., on cancellation and possession, and by Maclennan, J.A., on forfeiture of payments; *West* v. *Lynch*, 5 Man. L.R. 167; *Schurman* v. *Ewing* (1908), 7 W.L.R. 610; *Canadian Fairbanks Co.* v. *Johnston*, 18 Man. L.R. 589, 601 (considered in *Whitla* v. *Riverview Realty Co.*, 19 Man. L.R. 746, 772, 775, 777); *Pentland* v. *McKissock*, 9 D.L.R. 572, and the recent decision of the Manitoba Court of Appeal in *Tytler* v. *Genung*, 16 D.L.R. 581. At the same time an opportunity will be given to the purchaser to redeem within

the time to be fixed by the Court, Cameron, J., remarking in the *Canadian Fairbanks Co. Case*, at p. 602:—

> I know that if this agreement were before me in an action to determine it, or to enforce specific performance of it, I would give the defendant an opportunity to remedy her default before her rights were foreclosed. If the action were only to have it declared that a notice of cancellation of the agreement, properly framed and served, was operative and effective, and she left the action undefended, I believe the Court would give her an opportunity to redeem in that case also.

This view was followed in the same Court in *Pentland* v. *McKissock, supra,* and, finally, it has lately been decided by this Court that where the purchaser has abandoned the contract it will be cancelled and his payments forfeited: *Vanc. Land & Inv. Co.* v. *Pillsbury Milling Co.*, 19 B.C.R. 40, 15 D.L.R. 775.

But I am further of the opinion that there is sufficient authority to justify the making of an order for foreclosure herein based upon these cases: *Hudson's Bay Co.* v. *Macdonald*, and *West* v. *Lynch*, above quoted; *Great West Lumber Co.* v. *Wilkins*, 7 W.L.R. 166, 175, a decision of the Supreme Court of Alberta, following the same; *Steele* v. *McCarthy*, 7 W.L.R. 902, 911, a decision of the full Court of Saskatchewan, also following the same; *Tytler* v. *Genung*, 16 D.L.R. 581, 586, a decision of the Court of Appeal of Manitoba (wherein it is said that this "very common form of action . . . is founded upon the analogy between the position, of an unpaid vendor. Where the purchase money is payable by instalments extending over a period of time, and that of the mortgagee," though "the analogy is not in all respects complete," p. 338): *Landes* v. *Kusch*, 19 D.L.R. 520, [see *Landes* v. *Kusch*, 24 D.L.R. 136], and lastly by the recent decision of the full Court of Saskatchewan in *Hargreaves* v. *Security Investment Co.*, 19 D.L.R. 677, wherein *Jackson* v. *Scott, supra,* was considered, and it was unanimously held that cancellation and foreclosure could be granted but not an order for personal judgment as well, and that the plaintiff must make his election, and an order for foreclosure was made, to take effect in default of payment within 6 months, the agreement being declared void and at the end, possession to be given to the plaintiff, and the registration vacated.

In *Attorney-General* v. *Sittingbourne, etc. R. Co.*, L.R. 1 Eq.

B. C.
C. A.
GALE
v.
POWLEY.
Martin, J.A.

636, Lord Romilly, M.R., held that proper steps had not been taken in the Court to establish the lien (p. 639) and (p. 640):—

That if the Court is to go beyond that, he (petitioner) must file a bill in the usual way to enforce the lien and get the benefit of it,

but at the same time he pointed out (p. 639) the remedy of a vendor for his lien thus:—

It is true that a purchaser (note: obviously meaning vendor) has a lien for his unpaid purchase money, but he cannot, if he require the aid of the Court, act differently from a mortgagee or any other person claiming a lien; he must institute a suit and get that lien declared against all the persons interested in the estate, or at least all those who are subsequent to him in date, and who are foreclosed by his decree.

I note that it was held by the Chancellor of Upper Canada in *McMaster* v. *Noble*, 6 Gr. 581, that a judgment creditor was there entitled to a decree of foreclosure or a sale of the lands of his debtor to satisfy his registered judgment, under the Canadian statute, and that course had become an established practice: *Glass* v. *Freckelton* (1886), 8 Gr. 522. And *cf. Rolleston* v. *Morton*, 1 Dr. & War. 171, at 195.

But it is further objected that the action fails for want of parties because the defendant, the purchaser, had, by writing, assigned all his interest in the property to one Leonore Nicol on February 8, 1913, the same day upon which he entered into the agreement to purchase from Kenning, and Kenning and his assignee, the present plaintiffs, had notice of defendant's assignment to Nicol at the time Kenning assigned his agreement to the plaintiffs on February 26, 1913, and yet, notwithstanding this notice, Nicol has not been made a party to the proceedings, nor has even any provision been made in the judgment for foreclosure to bring her before the Court in any way, or to give her an opportunity to protect her rights. Though, as has been seen, this case is not in all respects the same as one between mortgagor and mortgagee, yet, as regards encumbrancers who are sought to be foreclosed, the principle is the same, and it is clear, to my mind, that this objection is well taken on the following authorities: *Rolleston* v. *Morton*, 1 Dr. & War. 171, 193; *Adams* v. *Paynter*, 1 Coll. C.C. 530, 532; *Burgess* v. *Sturges* (1851), 14 Beav. 440; *Vankleek* v. *Tyrrell*, 8 Gr. 321; Fisher on Mortgages (1910), par. 1670. And I note that in *West* v. *Lynch*, *supra*,

a case very like this, the assignee (Hoare) of the purchaser was a party.

If application has been made to the Judge below under O. ii., rr. 12, 13, this objection would have been met by amendment, but no application to amend was made before him or before us.

And, furthermore, and apart from other things, the form of the judgment is open to objection because it orders the recovery of possession of the lands and cancellation of the registration of the agreement for sale in the absence of any allegation in the plaint that possession was given to or taken by the purchaser or that the agreement for sale, or even the vendor's title had been registered; those remedies are asked for in the prayer of the plaint without any facts being alleged to support them.

The appeal should be allowed and the judgment set aside, but as said r. 12 directs that "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties" I think we should give leave to amend as we did in *King* v. *Wilson* (1904), 11 B.C.R. 109, and that the plaintiff be allowed to do so within one week and that the costs of and consequent upon said amendment and of the motion and judgment below be allowed to the defendant in any event, otherwise the action will be dismissed.

GALLIHER, J.A.:—I agree with Martin, J.A., in allowing the appeal. Galliher, J.A.

McPHILLIPS, J.A.:—My opinion is that the defendant being an officer is not within the meaning of sec. 144 of the Imperial Army Act, 1881, ch. 58—an examination of the decisions proved this without a question of a doubt—therefore there was no necessity for the filing of an affidavit under sub-sec. (4). McPhillips, J.A.

I am, however, of the opinion that the judgment is wrong and cannot be supported. Firstly, because of want of parties —*i.e.*, the defendant had before action assigned the agreement of sale and the assignee thereof was a necessary party to the action. Secondly, the judgment is wrong in form, in my opinion, in that the allegations as contained in the plaint do not support the judgment, and I agree with what my brother Martin states

B. C.
C. A.
GALE
v.
POWLEY.
McPhillips, J.A.

in this regard, but I do not wish to be understood as agreeing that foreclosure and forfeiture of instalments of purchase money can be decreed, not that it is necessary in the present case to so decide; I am rather inclined as at present advised to hold to the contrary, the plaintiff cannot have the land and the instalments of purchase money, the forefeiture should be relieved against, a power which the Court has and, in my opinion, one that should be exercised, see *Kilmer* v. *B.C. Orchard Lands*, 10 D.L.R. 172, [1913] A.C. 319; *Snell* v. *Brickles*, 20 D.L.R. 209, 49 Can. S.C.R. 360; *Bark Fong* v. *Cooper*, 16 D.L.R. 299, 49 Can. S.C.R. 14; *Vancouver Land Etc. Co. Ltd.* v. *Pillsbury Milling Co.*, 15 D.L.R. 775, 19 B.C.R. 40. If the plaintiff should elect to accept a decree for sale, then in the result the instalments would be eliminated unless the sale was at a profit and if such should be the case the assignee of the agreement of sale would be entitled to such profit, the plaintiff will otherwise possibly only be entitled to the land subject to the lien thereon in favour of the assignee of the agreement of sale—for the instalments of purchase money—see *Rose* v. *Watson* (1864), 33 L.J. Ch. 385; but see *Whitebrew* v. *Watt* (1902), 71 L.J. (C.A.) 424, 425, also the authorities previously referred to. However, these are questions which will no doubt have the careful consideration of the Court below and the law will be applied to the particular facts as adduced at the trial—the judgment as entered cannot stand. In the result, in my opinion, the appeal should be allowed and the judgment set aside—this will admit of all proper parties being added and amendments made—as may be advised.

Irving, J.A. (dissenting)

IRVING, J.A., dissented. *Appeal allowed.*

CHAPIN v. MATTHEWS.

ALTA.
S. C.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Beck, JJ. November 4, 1915.

1. SALE (§ III—57)—BREACH OF WARRANTY—DEFECTIVE TRACTION ENGINE —LIMITATION OF LIABILITY—SECRET DEFECTS.

In an action by the seller for the price of a traction engine the buyer is entitled to counterclaim for all damages resulting from a failure of the engine to fulfil the purpose for which it is to be used, and such right is not affected by a condition in the contract against liability for secret defects.

[*Chapin* v. *Matthews*, 22 D.L.R. 95, reversed.]

2. DAMAGES (§ III A 4—83)—BREACH OF WARRANTY—DEFECTIVE TRACTION ENGINE—COSTS OF REPAIRS—EXCESSIVE CONSUMPTION OF FUEL—COST OF PLOUGHING.

Amounts paid to experts in an endeavour to make a traction engine work properly and for extra oil and gasoline consumed by the engine above the normal consumption, as well as the cost of securing the ploughing to be done by some one else owing to its defective working, are recoverable by way of damages for a breach of warranty of the fitness of the engine.

[*Walton* v. *Ferguson*, 19 D.L.R. 816, followed; *Hadley* v. *Baxendale*, 23 L.J. Ex. 179, applied.]

3. STATUTES (§ II D—125)—FARM MACHINERY ACT—RETROACTIVE OPERATION.

The Farm Machinery Act (Alta.), 1913, ch. 15, is of retroactive operation and applies to agreements entered into before the passage of the Act.

[*Benson* v. *International Harvester Co.*, 16 D.L.R. 350, not followed; *West* v. *Gwynne*, [1911] 2 Ch. 1, followed.]

Statement

APPEAL from judgment of Hyndman, J., 22 D.L.R. 95.

James Muir, for appellants.

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

The judgment of the Court was delivered by

Stuart, J.

STUART, J.:—The plaintiffs sued the defendant for the price of certain repairs and supplies furnished to the defendant for use in connection with a gasoline traction engine known as a Hart-Parr Gas Tractor, which had been sold by the plaintiffs to the defendant. The defendant had paid in full for the engine but had refused to pay for the repairs and supplies. When sued for the price of these the defendant counterclaimed for damages arising from certain alleged defects in the engine.

The contract of purchase was signed on May 30, 1910, although an order had been given the previous fall. The engine was delivered shortly after the date mentioned. The damages claimed may be divided broadly into three heads. (1) Damages suffered during the season of 1910; (2) Damages suffered during the season of 1912, and thereafter; (3) Damages due to a

ALTA.
S. C.
CHAPIN
v.
MATTHEWS
Stuart, J.

refusal by the plaintiffs to sell certain repairs and supplies to the defendant until those already obtained, being those for the price of which the action was brought were paid for.

In my opinion, the claim for damages under the second and third heads may be very shortly disposed of. During the difficulties encountered in the operation of the engine in the season of 1910, as to which more extended examination of the matter is necessary, it appears that it was discovered that a certain bolt, called a connecting rod bolt, had been bent. It was impossible to secure a new one immediately, and an expert of the plaintiffs who was endeavouring to put the machine in successful operation, advised that the only thing to do was to take the bent bolt to a blacksmith and get it straightened. The defendant, as he himself said, told the expert that he did not think this was a very safe thing to do. Nevertheless, it was done and the bolt did the work required of it. Other difficulties did arise but, so far as this bolt was concerned, there was no further trouble that year nor during the whole season of 1911, when all the other difficulties having then been removed, the engine worked with complete satisfaction. The defendant, however, was supplied with a new bolt by the plaintiffs before the close of the season of 1910. But, although he had been suspicious of the wisdom of using the bolt which had been bent and repaired, and although he had been supplied with a new one he omitted to remove the old one and put on the new one. The old one was used all through the season of 1911, during which no trouble occurred. At the beginning of the work in the spring of 1912, however, a serious break in the engine occurred, which, as the defendant contended, was due to the old bolt which had been bent and repaired. Even when beginning work in the third season the defendant, though he had the new bolt in his possession, did not bethink himself of using it. In these circumstances it is quite impossible, in my opinion, to lay the blame for the breakage upon the plaintiffs. If the break was due to the mended bolt, then the defendant himself and no one else was to blame for its continued use.

With regard to the refusal of the plaintiffs to sell repairs to the defendant, it need only be said that no contract or under-

taking on the part of the plaintiffs to sell these repairs to the defendant was shewn in the evidence. The refusal complained of was not given until the middle of the season of 1911, after the engine had been working satisfactorily for some time, and long after any obligation on the part of the plaintiffs under their contract to furnish repairs free, had expired. There was no breach of any obligation or duty in this respect by the plaintiffs and the claim for damages under this head can therefore, in my opinion, not be sustained.

The contract price for the engine was $3,000, payable $800 in cash and $2,200 on November 1, 1910, but there was a provision for a discount of $250 if full payment was made within 15 days. The machine was delivered about June 1. The plaintiffs agreed verbally through their agent, though there was nothing about this in the contract itself, to send out an expert with the machine and to give the defendant three days' instruction in working it. The plaintiffs sent one Stone out with the machine to the defendant's farm and he began operations. Stone operated the machine one day only. During that day the machine did not work satisfactorily. Stone said to the defendant, but not in evidence, because he was not called as a witness, that the machine was not oiling properly and there was something he could not understand. There were frequent stops on this first day. At the close of the day Stone gave the defendant some instructions about oiling, telling him to pour every half day a bucket of oil into the crank case or pit. There was, of course, another method of oiling the machine. This was an oil tank from which, by a regular system of automatic pumps, the oil was forced through pipes to the proper parts of the machinery. The defendant stated that he and his assistants were not at first aware of the proper use of this oiling machinery. Stone did not work any longer than the first day. A snowstorm came on which rendered the soil unfit for ploughing for some days. Stone stayed over 3 days and then on the fourth, a Sunday, returned to Calgary and never came back. It was more than a week before the soil was in fit condition and then the defendant, or rather his son and hired man, began to work the engine themselves. Some complaint was made by the defendant at the trial

ALTA.

S. C.

CHAPIN v. MATTHEWS.

Stuart, J.

because he had not received the three days' instruction as agreed. But it is rather doubtful how far this failure will assist the defendant. The fact that he made this agreement reveals some consciousness on his part that he did not know very well how to operate the machine. Yet, although he had not received the 3 days' instruction and although even the 1 day's operation by Stone had not been a successful one, the defendant neither insisted on receiving the full instruction nor looked elsewhere for an expert to instruct him. If there was a legal liability for failure to give the 3 days' instruction, the measure of damages would certainly be the cost of securing another competent instructor, and for any delay incurred in securing one. But the defendant did not take that course, nor did he shew that it was impossible to get another expert promptly. He proceeded to put the machine in the hands of his son and his hired man for operation. In these circumstances it would seem clear, that the omission to furnish the full instruction agreed on can have no further bearing on the matter except to render necessary a consideration of the question whether any trouble which subsequently occurred may not have been due to some extent to the inexperience of the defendant's operators.

The first serious trouble occurred after defendant had plowed about 60 acres which would be only a few days' work. It was then found that one of the main bearings of the crank shaft had burnt out and the defendant went to plaintiff's office in Calgary and got new bearings. He asked Mr. Martin, a leading employee of the plaintiffs, what the cause of the burning was and was told that it must be due to the engineer in charge not attending to his oiling properly. There is some uncertainty as to the date of this interview. The invoice rendered the defendant for the bearings is dated July 19, but it may be that this is not conclusive, although I think it is probably approximately correct. It appears that while the trouble about oiling was still going on, the defendant paid in full for the machine and got the discount, though he may have been late, according to the letter of the contract.

The defendant said that his men eventually noticed that some of the oil pipes, four out of eight, did not have oil passing

through them as it should, except for a time after the engine would be first started. Then the engine appeared to be losing its power and getting weaker and weaker. The defendant came into Calgary at different times during this period and complained, though this was to some extent denied by the plaintiffs, and enquired as to the probable cause of the trouble, but could get no explanation except a suggestion as to lack of attention to the oiling. Finally, things got so bad that the defendant asked the plaintiffs to send out a man to inspect the machine and see if they "could tell us whether the engine was at fault or the men that were handling it." A man named Lewis was sent out, and after examining the engine, he found grooves cut in the two opposite sides of the cylinder so deep that the compression was defective as the gas escaped through the grooves. Lewis took the cylinder out and found, so the defendant said, that the grooves had been caused by the pin or bolt to which the piston rod was attached, projecting at both ends into the walls of the cylinder, and that the friction of these projections had worn the grooves. Lewis, who was not called as a witness, told the defendant that the piston was carbonized and that it was necessary to get an entirely new cylinder. This event occurred about August 22. There is no evidence that Lewis criticized the way in which the machine had been operated. The new cylinder had to be sent for to Charles City, Iowa, and did not arrive until September 1. Then the plaintiffs sent a man named Struble out to place the new cylinder and new pistons were also brought. Struble, during his work, discovered that certain valves which he, according to the defendant's evidence of what he said, supposed to have been in the oil pipes, had never been put in at all. Struble also was not called as a witness, but according to the defendant he said that the absence of these valves was what caused the trouble about the oiling. The defendant came into Calgary and got from the plaintiffs the valves referred to. Martin, the plaintiffs' employee, who gave him the valves, told him that although there were eight oil pipes only four valves were needed because four of the pipes ran directly down and that it was only the four pipes which ran first up and then down which needed the valves. The valves were taken out and put in by

ALTA.
S. C.
CHAPIN
v.
MATTHEWS.
Stuart, J.

Struble, and thereafter there was no more trouble, so the defendant said, about the oiling apparatus. Thereafter it worked perfectly. Struble then proceeded to operate the machine when a new trouble appeared. The engine began to pre-ignite, that is, so the witness expressed it, "instead of the gas being fired in the chamber by the spark alternately" it would fire just as soon as there was enough gas in the chamber to explode. The consequence of this was that the engine worked irregularly and would puff and jump in a way which Struble considered dangerous. After repeated efforts Struble gave up, saying, "I am done, I want another man sent out, and I would like to see the man that can stop that thing." He went away and the plaintiffs again sent Lewis out. He began operating the machine when the pre-ignition continued and soon the crank shaft broke. A new crank shaft had to be obtained from Charles City. It was October 1 before it arrived, Lewis then again went out and took some days in fixing up the engine. Then, when he began to operate it again the same trouble, pre-ignition, appeared. Lewis took some of the engine apart and examined it, put it together again, and again tried but still the trouble continued. He kept at it for two days. Then he said that he was dumbfounded and agreed with Struble. Next morning he determined to examine the exhaust chamber which would, as I gather, be a new one being part of the same casting as the cylinder which had been renewed. Upon doing so he found that there were certain projections where the metal, during the process of casting had run through a joint in the casting form. These points or projections got red hot, naturally much hotter than the body of the casting, and so ignited the gas. Lewis got a piece of iron, knocked off these projections and smoothed them down. Then when he put the engine together it worked quite successfully both for the short time that remained that fall and all the next year until the break in the spring of 1912 already referred to.

The foregoing is in substance, the account of the matter given by the defendant and his sons. None of the experts having been called by the plaintiffs, there was little chance of contradictory testimony. Two witnesses were called by the plaintiffs who added something to the evidence. Martin, the employee of the

plaintiffs, already referred to, stated that he had gone out to defendant's place, just after Stone left, owing to the snow-storm, and had made enquiries as to how they were getting along, that the defendant had said that one of the cylinders was not firing properly, that he had taken out the platinum point on a coil and finding it a little uneven had smoothed it out and put it back, that no complaint was then made about the oiling, that he had asked the defendant if he could recommend Stone, who strangely enough was plaintiffs' own expert sent to instruct the ignorant defendant, as being a good man, to which defendant replied "yes," that there had then been no complaint about the oiling, that the first complaint he heard of was in July, just before Lewis went out the first time, the complaint being in regard to want of power and compression. He advanced another theory as to the cause of the grooves which had been made in the cylinder. He attributed it to the breaking of the piston pin, and he assumed that this was the pin which had been bent, his idea being that when the pin was bent its ends would be tipped sideways slightly so that a portion would protrude. This implied, of course that the pin which was bent was the pin connecting the piston rod with the piston whose ends the defendant said were found to have projected beyond the circumference of the piston. Throughout the evidence of Martin it seems to have been always assumed that this was the pin which was bent, mended, and ultimately broken. But the defendant, in his evidence about the bent pin, refers quite plainly to a different pin or bolt altogether. Speaking of the visit of Struble, about September 1, when the valves were found to be missing, the defendant said, "He also found that when he took the engine down, one of the connecting rod bolts was bent." "Q. That bolt holds the collar around the crank shaft? A. Yes." And again, in the evidence of the defendant's son, Charles D. Matthews, when describing the breakage which happened in the spring of 1912, said: "I came to look round and I found this broken bolt, that bolt there was broken and the other one was bent and was still sticking on to the connecting rod." And on being questioned as to how he identified the broken bolt produced and made, ex. 5, as the bolt that had been bent and then straightened by the blacksmith, he spoke of

ALTA.
S.C.
CHAPIN
v.
MATTHEWS.
Stuart, J.

certain battering on it and said: "Well, the other bolt, *it takes two bolts to hold this thing on there*, and the other bolt was bent." This seems to make it clear that the bent bolt was not at the piston end of the connecting rod but at the crank shaft end, and that when in examining Martin in chief, counsel for the plaintiff asked him: "What would cause that pin to break, the pin in the piston connecting the rod with the piston?" and also, when in other parts of his evidence, reference is made to the piston pin being broken, there was some misapprehension in the mind of both the witness, who had never seen the bending or the break at all, and of the examining counsel, as to what had actually been broken. The defendant and his son both spoke of a bolt being broken, at least that is how the defendant described it at first but he was led by his counsel later on to speak of it as a "pin." It is quite evident that he was referring to a bolt all the time. After the renewal of the cylinder, the piston was also renewed, though not the piston rings, and I think the necessary inference is that the piston pin in the new piston was also new and thus the projecting and cutting of grooves would not, and in fact did not, occur again. Martin also advanced a theory about the lack of compression and escape of gas. The piston rings, he said, which go around the piston and by the operation of expansion, fit absolutely tight to the walls of the cylinder, had become fixed solidly through carbonization, due to too much oil, and hence did not expand but allowed an escape of gas. He could not deny the making of the grooves but he advanced the theory that when the bearings burnt out around the crank shaft that shaft got "too much slack" thus causing a "pound" which *cracked the piston pin*, and that the pin being broken it would follow that a groove would be made. It is plain, therefore, that the whole theory advanced on the part of the plaintiff to explain the grooves rests upon the false assumption that it was the piston pin which was bent. In my opinion, upon the evidence, there is no other conclusion of fact possible than that the grooves were caused by a projection of the ends of the piston pin, and that this was a defect in the construction of the machine existing from the beginning.

As to the lack of expansion in the piston rings, which was

the other explanation given by Martin of the escape of gas, this, he said, was due to excessive oil causing carbonization and hardening. There is no evidence, however, which suggests any different method of oiling being adopted after the engine began to work properly from that employed before, except the insertion of the valves, and except that a bucket was not used. It seems to me that the proper conclusion to be drawn from the evidence is, that the escape of gas was due to the grooves which were worn in the cylinder. The evidence of the men who actually worked the engine and the statements made by the experts sent out by the plaintiffs are, I think, much to be preferred to a mere hypothesis suggested by one who never actually saw the engine working at all. There is no evidence that the piston rings ever did in fact become "seated solid" in their grooves, as was suggested by Martin, owing to excessive use of oil or owing to any other reason. There is no evidence that there ever was excessive oiling. There is no evidence that the defendant ever put more oil in the crank case than he was told by Stone to put there and Martin admits that oil should be kept there "up to a certain level."

It is quite true that the defendant did at one place in his evidence speak as follows:—

> But the waste of oil was only a minor part of the damage caused by putting the oil in the crank case. Q. Yes, because it carbonized? A. Yes, that was what ruined the cylinder, . . .

and again, *on cross-examination*, he was asked:—

> Q. And the next thing was the piston, when Lewis came out and you discovered that the pin had broken and was making grooves in the cylinder that was the next difficulty? A. Yes.

but he also says, speaking of the first visit of Lewis:—

> Yes, he took the cylinder out and he found that the cylinder or piston pins, the piston that opened to the connecting rods, projected at the end a little and therefore, from there projected into the two walls of the cylinder on the opposite sides and that was what had cut the grooves in the cylinders, and he could not understand why that piston pin should be longer than it should be *unless it were broken*, it should not stand out that way in the middle.

There is no denial of these last statements, they furnish a more intelligible reason for the existence of the grooves than the theory of carbonization, particularly when it is observed

ALTA.
S. C.
CHAPIN
v.
MATTHEWS.
Stuart, J.

that the grooves were in the opposite walls which would not necessarily result from carbonization, but is consistent with the projection of the ends of the pin. I think his statement that the grooves were caused by carbonization is not the correct reason and is only a reflection in his mind of a theory afterwards advanced by the experts. The statement of this theory is not as acceptable when we are trying to discover the facts and the actual cause of them as the precise statement of fact that the piston pin projected.

After a careful examination of the evidence I have become convinced, as I have said, that all the references made by counsel for the plaintiff to the breaking of the piston pin arose out of the report by the defendant, above quoted, of the explanation merely *suggested* by Lewis of a reason why the pin projected. Lewis merely said, "*Unless the pin were broken.*" But that it was found to have been broken in fact was not stated by the defendant in his first account of the matter, and his apparent admissions afterwards that it had been broken were, I think, merely put into his mouth by cross-examining counsel, anxious to sustain a theory that improper oiling was really the ultimate cause of the grooves, and were made by him without a clear apprehension of what he was being induced to admit. And even if that were the true theory I think the absence of the valves accounted even for the improper oiling. It is indeed difficult to follow the theorizing of the plaintiffs on the subject of oiling, because at one time absence of oil is suggested as the cause of the burning out of the bearings, thus causing a slack and a jerk, and at another, excessive oil as a cause of carbonization and sticking. Apparently the theory was that not enough oil was put in the oil tank or else the pipes stopped up with dirt, which last was pure supposition, while too much was poured into the crank pot or case.

Whether the trouble, which increased apparently in extent as the summer wore on, was due at the start to lack of oil or to the immediate wearing of the grooves on the surface of the cylinder is a question which is probably impossible to decide definitely. There is no doubt that there was a lack of oil passing through the pipes whether it was due to an omission by the de-

fendant to put oil in the oil tank regularly enough or to the absence of the valves. Here again, we have the evidence of actual facts as against the theories of the experts. The evidence of the defendant shews that he told his son at the beginning to put oil in the oil tank and repeated to him and the other workman to be careful to see to that. There is no evidence that they omitted to do so. It is natural, of course, to suggest carelessness and omission on their part as an explanation, but it seems hardly credible that they should continually wonder why oil was not coming through the pipes properly and yet not take the precaution to see that oil was in the oil tank. The plain fact is, that after the insertion of the valves by Struble all trouble from oiling disappeared. That is the stubborn fact of the situation. Certainly, the makers of the engine at one time thought valves were, if not a necessary, at least a helpful device. On the other side there is nothing but the evidence of the witness Gueffroy, who came from Charles City, Iowa, where he was engaged in selling automobiles, but who had been in 1909 and 1910 employed by the manufacturers of the Hart-Parr engine in testing engines before they were sent out. He stated that the company decided in 1910 to discontinue the insertion of the valves as being unnecessary. He explained how the pumps and pipes would work quite satisfactorily without them. The omission of the valves had therefore been not accidental but due to a decision that they were not necessary. Notwithstanding this it seems to me impossible to avoid the conclusion that the absence of the valves caused the trouble in the oiling. Struble, the plaintiffs' expert, said so to the defendant, and when they were inserted the trouble disappeared.

I think, therefore, that we ought to find as facts that there existed from the beginning two defects in the engine: 1st, the projection of the ends of the piston pin causing the grooves to be worn, and, 2nd, the absence of the valves causing defective oiling.

This long and detailed examination of the evidence has been necessary because we have not the advantage of any finding by the trial Judge upon the question of defects in the engine. He dismissed the defendant's counterclaim on the ground

ALTA.

S. C.

CHAPIN v. MATTHEWS.

Stuart, J.

that the damages were not such as were contemplated by the parties as likely to arise from a breach of the terms of the contract of sale applying, apparently, the rule in *Hadley* v. *Baxendale*, 23 L.J. Ex. 179. With much respect I think that view was wrong. There is ample evidence to shew that the plaintiff knew the purpose for which the engine was to be used. Damages resulting from a failure of the engine to fulfil that purpose were certainly recoverable provided there was, under the terms of the contract, a legal liability at all.

The contract contained the following clauses:—

Said engine is purchased upon and subject to the following mutual and independent conditions: It is warranted (if new) that it is well made and of good materials and workmanship: That if properly operated it will develop the rated brake horsepower continuously and easily.

Should any part (except batteries, belting and spark plugs which are not warranted) prove defective within six months from date of delivery through inferior material or workmanship, the same shall be furnished by the Hart Parr Co. on board cars at Charles City, Iowa, the defective part to be returned prepaid to the Hart Parr Co. at its factory or nearest branch house for inspection, and if found defective the charge made for the new part furnished will be remitted.

If inside of six days from the day of its first use it shall fail to fill the warranty with respect to the development of power, notice shall be given to the Chapin Company at their office at Calgary, Alta., by registered letter or telegram stating wherein it fails to fill the warranty and reasonable time given the said company to send a competent person to remedy the defects, if any there be, the purchaser rendering necessary and friendly assistance. If the engine cannot be made to develop the guaranteed power it shall be returned by the purchaser free of charge to the shipping point where received, and the payments made will be refunded and no further claim is to be made on the company. If the purchasers fail to make the engine do satisfactory work through improper management, inefficient operators or neglect to observe the printed or written directions of the manufacturers, then the purchasers are to keep the engine, also to pay all necessary expense incurred by any man sent at their request to put the engine in condition for successful operation.

It is further mutually understood and agreed that the use of said engine after the expiration of the time named in the above warranty shall be conclusive evidence of the acceptance of the same and full satisfaction to the undersigned who agrees thereafter to make no other claim on the Chapin company. And further, that if the above engine is delivered to the undersigned before settlement is made for the same as herein agreed or any alterations or erasures are made in the above warranty or in this special understanding and agreement the undersigned waives all claims under warranty.

An important question raised in the case is, whether the

provisions of the Farm Machinery Act of 1913, ch. 15, sec. 3, apply to the agreement in question and to the terms above quoted from it. That section reads as follows:—

> No covenant, proviso, stipulation or condition in any agreement (whether under seal, verbal or written) shall be binding upon the purchaser of farm machinery, provided a Court or Judge shall decide or declare that such covenant, proviso, stipulation or condition is, under all the facts and circumstances of the case unreasonable.

The trial Judge held, following the decision of Walsh, J., in *Benson* v. *International Harvester Co.*, 16 D.L.R. 350, that the statute did not apply to the agreement in question inasmuch as it was passed after the agreement was made. I was at first inclined to look upon this view as correct and there are certainly general expressions in the text books and some of the cases which seem to support it. But upon further consideration, I have concluded that the statute does apply to agreements entered into before it was passed. The case of *West* v. *Gwynne*, [1911] 2 Ch. 1, decided by the Court of Appeal in England seems to me to be entirely parallel in its facts and the reasoning of that case seems to be quite applicable here and to be based upon sound principles. I do not need to repeat the arguments there advanced by the Judges who decided the case. A perusal of their judgments will reveal quite clearly the principle to be applied. The judgment of Walsh, J., referred to was given at the close of the argument, and his attention does not seem to have been called to *West* v. *Gwynne*, *supra*. He relied mainly upon the case of *Sidback* v. *Field*, 6 W.L.R. 309, decided in the Yukon Territorial Court and the authorities there collected, also referring to *Smithies* v. *National Ass. of Operative Plasterers*, [1909], 1 K.B. 310. This latter case, however, decides merely that a statute declaring that "an action against a trade union (for certain things) shall not be entertained" could not be held to apply so as to stop an action already begun before the Act was passed as if it read "shall cease to be entertained." With regard to the cases cited in *Sidback* v. *Field*, *supra*, we may refer to the words of Dr. Lushington in *The Ironsides*, 6 L.T. 59:—

> In the general principle I entirely concur, namely, that as a general rule, all statutes should be construed so as to operate prospectively, and especially not to take away or affect vested rights. But true as this rule is and generally admitted as founded on common justice and ancient auth-

ALTA.
S.C.
CHAPIN
v.
MATTHEWS.
Stuart, J.

ority, no one deems the power of the legislature to pass, if it thinks fit, and it has often thought fit, to pass, statutes having a retroactive operation. The general principle being borne in mind, the question must always be what intention has the legislature expressed in the statute to be construed. The presumption is that it is not retrospective, a presumption which is more or less strong according to the circumstances of each particular case. The qualification of the general rule seems indeed to have operated upon the mind of Parke, B., when he assented to the opinion of the majority of the Judges in the case of *Moon* v. *Durden*, 2 Ex. 22, and one of the circumstances which I think is entitled to much weight depends upon the consideration whether the statute is remedial.

In these words Dr. Lushington perhaps did not observe very accurately the distinction as to retrospectivity which was made by Buckley, L.J., in *West* v. *Gwynne*, [1911] 2 Ch. 1, at p. 11, and 12. But the remedial character of the statute is, as Dr. Lushington says, a very important consideration. The legislature found that agreements for the sale of farm machinery often had inserted in them most unreasonable conditions, conditions which were plainly unfair and unjust, and it therefore conferred upon the Court or Judge a power of deciding whether any particular condition was unreasonable in all the circumstances or not and of relieving the purchaser from the burden of the condition, if it was found to be unreasonable. It is entirely analogous to the power of the Court to relieve against a forfeiture. As Buckley, L.J., said in *West* v. *Gwynne, supra*, the statute does not speak of "any agreement executed after the passing of this Act" but of "*any* agreement" without limitation. When the legislature was confronted with the facts that unreasonable conditions were being continually inserted in such agreements it seems to me quite contrary to reason to suppose that it intended to allow all unreasonable conditions created in the past to continue to operate, as they certainly did, with unfairness and injustice, and to withhold from the Court the new power of disregarding them while not extending the power and jurisdiction only to agreements thereafter entered into. The words "any agreement" are quite plain and in their natural meaning include past as well as future agreements and I do not hesitate to hold that the intention of the legislature to cover by the enactment past as well as future agreements is quite clearly indicated. It does not follow that a similar result would be reached

with respect to the other sections of the Act, particularly section 5 where the expression "shall be sold" is found.

I think, therefore, that in considering the effect of the conditions and warranties, above recited, the Court may exercise the power given by the statute. The first warranty was that the engine was "well made and of good materials and workmanship." This warranty was, as I have shewn, broken in two respects. This warranty is expressed to be one of a number of "mutual and independent" ones. I take this to mean that it is "independent" of the other warranties or conditions. This points to the conclusion that the condition as to notice within six days has nothing to do with a breach of this warranty. Further, the provision as to notice within 6 days is expressly limited to a non-fulfilment of the warranty with respect to the development of power. Of course, it may be that non-development of power might be due to defective workmanship and construction but there might very well be other reasons for the failure to develop power. In my opinion, therefore, the provision for notice within 6 days is not even upon a proper construction of that provision, as it stands applicable to a breach of the first warranty. But even if it were, I should not hesitate to hold that it is quite unreasonable to impose upon the purchaser the obligation of discovering secret defects within 6 days. The real defects were not discovered by Stone when he operated it the first day and he was the company's expert.

The provision that defective parts should be returned within 6 months has no application. As a matter of fact, all defective parts were made good within six months and there is nothing in the clause which says that a supplying of new and perfect parts free within 6 months would relieve the plaintiffs from liability for damages caused previously by the existence of the defects. It surely could not have been intended by the plaintiffs to make a stipulation that, although they had warranted the engine to be well made, of good workmanship and materials, and although defects in material or workmanship might not appear for 6 months they could still, by merely supplying new and perfect parts and reserving to themselves or the manufacturers the sole power of judging whether the part was defective or not

ALTA.

S. C.

CHAPIN v. MATTHEWS.

Stuart, J.

and of retaining or remitting the payment made for the new parts, according to their decision, relieve themselves from any damages theretofore suffered by reason of the existence of the defect. If such were the true effect of the condition it would, in my opinion, be properly described as unreasonable because it would amount to destroying largely by an obscure and involved provision, the benefit purported in the first place to be given to the purchaser under the simple and direct warranty first set out.

With regard to the last condition to the effect that the use of the engine "after the time named in the above warranty" should be inclusive evidence of acceptance and bar any claim against the company, I am of opinion that this cannot assist the plaintiffs. The words "the time named in the above warranty" refer clearly to the 6 days mentioned in the preceding paragraph which paragraph deals only with a failure to develop power generally. It may be that the proper interpretation of the clause as it stands is that the purchaser implied acceptance and his being barred from making any claim, have reference only to a failure to develop power and not to a breach of the first warranty which has nothing to do with the 6 days' notice. If, however, this is not the case and the clause as it stands and in its proper meaning really covers secret defects of workmanship, then I hold that it is utterly unreasonable and is not, under the statute, binding upon the purchaser because its effect would be to destroy practically the whole benefit of the simple and direct warranty previously given, inasmuch as it places upon a purchaser, admittedly not an expert, the obligation of discovering every secret defect, whose full results might only gradually develop, within a period of 6 days or else lose all advantage from the first warranty.

Something was also said in the argument respecting the clause in the last condition above recited, which stipulates for a waiver of all claims to damages where delivery is made before settlement. In my opinion, "settlement" means here the giving of the notes and making the cash payment. I infer from the evidence, although there is no direct statement on the point, that the cash was paid and the notes given before delivery, so that whatever one may think of the reasonableness or unreasonable-

ness of such a provision it does not bar a claim for damages.

A good deal was said about the defendant making no complaints for a long time and about his saying that the engine was working all right. The first matter is, in my opinion, irrelevant, and the second, if looked upon as an admission is not conclusive against him. There is no possibility of getting past the fact that the engine was eventually discovered to be defective in two very material particulars and which existed obviously from the beginning, which could not be very readily discovered and the results of one at least of which could not be expected to develop in their full effect except gradually.

The result is that the plaintiffs were guilty of a breach of warranty and are liable in damages.

Inasmuch as this is the first time that the Court has been called upon to exercise the power given by the statute to exclude certain provisions of an agreement as unreasonable, it may be useful to observe that it will appear from what has been said that the Court will not be disposed to treat as a reasonable condition one which by the unsuspected effect of what I have twice and, I think, properly described as obscure and involved language, destroys almost entirely the benefit of a plain and reasonable warranty already expressed in favour of the purchaser. There will, no doubt, be difficulties involved in drawing up agreements when the parties may not feel sure of what the Court will hold to be reasonable or unreasonable, but these difficulties will, in my opinion, be largely removed by an earnest endeavour, not so much to draw up clauses which will give all protection to the vendor and none to the purchaser, but to keep, in the language of the contract, an even balance of benefit to each contracting party.

The damages claimed by the defendant fall under three heads. 1st, The sum of $121 which he paid to the experts sent out by the plaintiffs to endeavour to make the engine work. This he is clearly entitled to recover. 2nd. The sum of $420.33, being the cost of extra gasoline and oil consumed by the defendant over and above what would normally have been consumed in doing the work which was done during 1910 if the engine had been working properly. I think, in principle, and aside from the

ALTA.

S. C.

CHAPIN v. MATTHEWS

Stuart, J.

ALTA.

S. C.

CHAPIN v. MATTHEWS.

Stuart, J.

exact amount this is a legitimate claim. The defendant was cross-examined as to this claim but admitted nothing that would reduce the amount and no evidence was given by the plaintiffs in contradiction. It may be that the defendant and his employees, through inexperience, may have used more than they needed to use, but that would, in my opinion, only be a valid answer if they had been given a perfect machine. The machine they were attempting to use was defective owing to the default of the plaintiffs, and in view of that it would seem to me improper to scrutinize too closely their method of consuming oil and gasoline. The evidence of the defendants is there and stands unweakened so that there would seem no possible ground for refusing to allow the claim which he made and proved. I think, therefore, the sum of $420.33 will have to be allowed on this ground. The 3rd ground of damage is the loss of profit in 1911, owing to a loss of a crop on 300 acres, which the defendant had intended to break that summer, owing to the defective working of the engine. This ground needs more careful examination. The principle upon which it was claimed was examined by Walsh, J., in the case of *Walton* v. *Ferguson*, 19 D.L.R. 816. There the plaintiff shewed that she could not get another machine nor were horses available and still she was confined in the assessment of damages to the cost of securing her work to be done by some one else, less what it would have cost her in any case to do it herself. Whether or not Walsh, J., was right in the application of the rule in *Hadley* v. *Baxendale*, 23 L.J. Ex. 179, to the circumstances of that case it is certainly impossible to do other in this case than confine the defendant to the measure of damages there adopted because there was no attempt on the evidence to shew that the defendant could not have got his 300 acres ploughed during 1910 in some other way. Even if there would be in any case, circumstances on which the estimated loss of profits ought to be taken as the true measure of damage, it is clear in any case that before being able to do so the complaining party ought to shew that he has done all he could to minimize the damage by getting the work done if possible by some one else, and so getting his profit after all. There is, however, in the evidence very little that can assist in cal-

culating the damage on the basis I refer to. In estimating the general cost of $10 as the total for seeding, harvesting and threshing an acre of prairie land the sum of $3.50 was mentioned as the cost of ploughing, but that is all there is, and I am not satisfied with that as being a clear enough statement upon which to assess damages. I think, therefore, upon this head there ought to be a reference to the Master at Calgary to assess them, if the parties cannot agree as to what they would be, upon the basis I suggest, *viz.*, the cost of securing the ploughing to be done by some one else, less what it would have cost the defendant in any case to do it himself. This reference should be at the expense of the defendant in any event.

The appeal of the defendant will therefore be allowed with costs and the judgment below dismissing the defendant's counterclaim will be set aside. After the Master's report the defendant may move before a single Judge in Chambers for judgment, which will include the two items of $121 and $420.33 already dealt with and any sum assessed by the Master and confirmed by the Judge as damages under the third head less the costs of the reference. If the judgment then entered for the defendant on the counterclaim equals or exceeds the sum for which the plaintiff has judgment, the defendant will have his costs of the action. If it is less, and the plaintiff is still entitled to recover a portion of his claim the plaintiff should have the costs of his claim and the defendant the costs of his counterclaim. The scale upon which the costs of the action are to be taxed is to be in the discretion of the Judge hearing the motion for judgment and judgment below will be entered finally for the party who is found to have the largest judgment to the extent of its excess over the judgment for the other. The costs of the appeal will be taxed under column 3.

Appeal allowed.

ALTA.
S. C.
CHAPIN
v.
MATTHEWS.
Stuart, J.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

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S. C.

Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. July 12, 1915.

1. SCHOOLS (§ III A—55)—SCHOOL BOARD — VALIDITY OF RESOLUTION — SELECTION OF TEACHERS—ULTRA VIRES.

Resolutions of a "separate school" board purporting to delegate to the chairman of the board power to discharge, select and engage teachers, are *ultra vires*.

ONT.

S. C.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Statement

2. CONSTITUTIONAL LAW (§ II A 1—154)—SEPARATE SCHOOLS—ABRIDGEMENT OF CONSTITUTIONAL RIGHT—INTERFERING WITH USE OF FRENCH LANGUAGE.

Regulation No. 17 (of 1912 and 1913) of the Department of Education for Ontario providing *inter alia* the manner of conducting schools in districts where the scholars or a majority of them were French-speaking Canadians and making it compulsory that teachers in such schools should understand the English language does not infringe any constitutional right which the supporters of such schools have under the B.N.A. Act.

[*Mackell* v. *Ottawa Separate School Trustees*, 18 D.L.R. 456, referred to.]

APPEAL from the judgment of Lennox, J.

N. A. Belcourt, K.C., *A. C. McMaster*, and *J. H. Fraser*, for appellants.

McGregor Young, K.C., for the Minister of Education.

The judgment appealed from was as follows.

Lennox, J.

LENNOX, J.:—There are only two classes of primary schools in Ontario—public and separate schools. "Public school," or "separate school," simply, imports an English school. For convenience, the Department of Education annually designates certain schools attended by French-speaking pupils as English-French, and these may be either public or separate schools. The defendants have under their charge 192 Roman Catholic separate schools, of which 116 are English-French.

The main issue to be determined in this action is the validity or invalidity of certain provisions of the School Laws of Ontario, and particularly of Instructions or Regulations numbered 17 of the Department of Education, issued in June, 1912, and August, 1913. I will deal with this issue first.

Under our constitution, the power to make educational laws and the control of education are for the most part committed to the Provinces. It is not an unfettered power or unlimited control. There is power vested in the Governor-General in Council and the Dominion Parliament by which they may, if they will, prevent the effective exercise of the jurisdiction conferred upon the Provincial Legislatures: sub-secs. 3 and 4 of sec. 93 of the British North America Act, 1867. But, notwithstanding the strenuous argument of counsel for the defence, these sub-sections in no way affect the issues in this case, for the manifest reason that the jurisdiction of the Dominion is supervisory or remedial only, and the powers conferred have not been exercised

or even invoked; and until invoked and acted upon they in no way impair or encroach upon Provincial jurisdiction. Neither, on the other hand, is the objection that notice has not been given to the Minister of Justice, well taken. There is no Act or action of the Dominion Government or Parliament attacked; no question arises as to conflicting jurisdiction. If the Ontario Legislature had not power to enact the law complained of, the Dominion Parliament would be equally powerless so to enact.

The question to be determined, and the only question, is, to my mind, a very simple one: Have the constitutional rights and privileges guaranteed by sub-sec. 1 of sec. 93 of the British North America Act, 1867, been contravened? If they have not, there is an end to the defendants' whole contention, there is no other possible argument open to them. If they have, the law is *ultra vires* and nugatory; for no legislative body in Canada has power to make any law which "shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have (had) by law in the Province at the Union:" sub-sec. 1 of sec. 93 of the British North America Act.

The outstanding difference between this and the provisions of sub-secs. 3 and 4 is manifest, even on a casual reading of sec. 93. This is a distinct and positive limitation upon legislative action; and, subject to this, and to this limitation only—and in default of the exercise of federal jurisdiction—the unfettered direction and control of education within the Province is committed to the Legislature of Ontario.

This is the conclusion I come to upon a close and thoughtful reading of the relevant provisions of the British North America Act, and, so far as I can judge, it does not conflict with anything decided in *City of Winnipeg* v. *Barrett*, [1892] A.C. 445, *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202, *Maher* v. *Town of Portland* (1874), 2 Cart. 486 (note), or any other of the cases referred to, or of which I have knowledge, decided under the Act.

The defendants must justify under the limitations above quoted, if at all. Have they done this?

The Roman Catholic separate schools of Ottawa are undoubtedly "denominational schools" within the meaning of this

ONT.

S. C.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Lennox, J.

limitation. I am of opinion too that the French-Canadian supporters of the separate and public schools of Ontario are a "class of persons" within the meaning of that clause; and, if they are not concluded by the *Barrett* case—and I am sure that they are—the defendants may, I think, fairly argue that denial of the use of the French language in the way insisted upon by the defendants prejudicially affects the French-Canadian supporters of these schools. But this, at the most, is all that has been shewn, and this is not enough.

I have not overlooked that it was shewn, or attempted to be shewn, by verbal testimony and records of the Department, that, prior to Confederation, in isolated instances here and there, the use of the French language was permitted (or not actively opposed) to an extent not sanctioned by the law of the Province as it now is; but it is not pretended that this right or quasi-right or privilege or indulgence was secured to any class of persons by any law whatever of the then Province of Upper Canada at the Union.

The result is, that the defendants have wholly failed to shew that Instruction or Regulation 17 of June, 1912, or of August, 1913, of the Department of Education for Ontario, or the manner in which these Instructions have been or are being administered by the Department, prejudicially affect any right or privilege with respect to denominational schools which the defendants as a class of persons had by law in the Province at the Union; and the result is, too, that it does not appear that these Instructions or the manner of their administration or the statutes upon which they are founded are *ultra vires* of the Provincial Legislature. It follows, as a consequence, of course, that they must be obeyed. That they have been flagrantly disregarded—defiantly and ostentatiously repudiated and set at naught—by a majority of the Ottawa Separate School Board, is not and could not be denied. It would serve no useful purpose to particularise the evidence of this. It is for the Department, the law being declared, to see that the law is obeyed.

Without, however, attempting or desiring to make an exhaustive list of violations of the School Law, it may conduce to clearness if I mention a few instances in which I find violations established by the evidence:—

1. The use of French as the language of communication and instruction beyond Form I., and as a subject of study for more than an hour a day in a class-room, without the consent of the Chief Inspector.

2. The employment of unqualified teachers.

3. Obstructing the inspectors in the discharge of their duties and preventing inspection of the schools.

4. Wilful failure to keep the schools open during the time prescribed by law, and in fact closing them and keeping them closed at and after the commencement of the school year 1914-15.

5. Wilfully omitting properly to equip and carry on the schools by the employment of qualified teachers, and, on the contrary, dismissing from the schools twenty or more satisfactory, competent, and qualified teachers.

NOTE: Want of means cannot be invoked as a justification. The Department specifically agrees to make an adequate supplementary grant to meet any difficulty in the case of English-French schools: paragraph 15 of Instruction 17, August, 1913. This was not applied for.

6. Defiant refusal to conduct the schools according to law or submit to the Regulations, and so forfeiting or suspending payment of their share of the Government grant; and, by publication of their resolutions and declarations, fomenting discontent among the school supporters and encouraging the insubordination of the pupils.

The other issues to be dealt with are, in a sense, subordinate to the question just disposed of, but not wholly so.

As to the passing of the money by-law and the disposal of debentures under it, the defendants urge the need of money, but have not shewn any disposition to avail themselves of the suggestions I made at the trial to meet and overcome the suggested difficulties.

Leaving out of sight, of course, minor derelictions, a Board should not be permitted to mortgage the resources of the ratepayers or launch out into heavy capital expenditure while refusing to conduct the schools according to law. However much may be said, and a great deal can be said, in excuse for men who feel, as no doubt some of these defendants conscientiously felt,

ONT.

S. C.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Lennox, J.

that the use of their mother tongue was being unfairly denied them, the weapons they used, the persistent engagement of unqualified teachers, their attempt to discharge a large body of qualified teachers, to the great prejudice of the schools, their denial of the right of inspection, their unjustifiable treatment of Inspector Summerby—for, although they may not have directly initiated this flagrant act of insubordination, yet their openly declared hostility to the Regulations undoubtedly conduced to it—that they knew it was contemplated, that they did nothing to prevent it, and that they condoned and concurred in it, is the least that can be said—their unseemly, unnecessary, and wholly unwarranted action in what amounted to "a declaration of war," by posting their defiance of the Department in the class-rooms to thousands of school children, and finally the arbitrary closing of the schools, are entirely different matters, and do not find ready justification or excuse. It is to be hoped that before long the Board may recognise the wisdom of resuming the exercise of its functions according to law; but in the meantime, or for so long as my judgment remains unreversed, the injunction restraining the passing of the by-law in question must be continued.

The injunction will also be continued and made perpetual to prevent the employment or payment of unqualified teachers or any departure from the course or method of instruction prescribed by the Department of Education, and from, directly or indirectly, preventing the regular and lawful inspection of the schools.

I have already, by an interim judgment, declared that the Chairman of the Board had no power to discharge teachers as he purported to do, and that these teachers were not legally discharged. In this connection I gave liberty to the parties to amend the pleadings, and this has been done. I was asked at the trial—and it was urged again upon the argument—to go further, and declare that these teachers are entitled to be paid according to the terms of their contracts respectively. This I cannot do. These men are not parties to this action. Their contracts are not before me. With their salaries I have no concern.

I reaffirm my former judgment, and declare that the resolu-

tions under which the Chairman purported to act conferred upon him no right to dismiss or engage teachers. This is a function of the Board, and cannot be delegated. My former judgment, so far as it continues applicable, will be taken as repeated here.

In the pleadings the plaintiffs ask that the members of the Board who occasioned this action be made personally responsible for costs and any loss they have occasioned, with a reference to ascertain the amount; and, though this branch of the claim was not referred to upon the argument, I should consider it, and I have given it a good deal of anxious thought. There may be technical or legal objections; but, altogether aside from this, I am not disposed to make this somewhat unusual and drastic order.

Other issues have grown out of them, but at the beginning the controversy centred around two questions naturally regarded as transcendently important—language and religious faith; and in the attitude the majority assumed they had the support of a great many—and it may be a majority—of the ratepayers of the separate schools. Over-zealous and injudicious councillors, too, were not wanting to spur them on to make extravagant demands. One gentleman, whose position would argue wisdom and a moderation, unfortunately not in evidence, modestly writes: "As priest of this parish, I have charge of these families and their interests, *both national and religious*. The wish of the parents, as is my wish, is that French be taught in our schools to our children as heretofore. I protest against the unjust and outrageous appointment of Protestant inspectors. If need be, it will be I myself who will cause the children to leave the school if the inspector insists on wishing to make a visit." The italics are mine; the translation is as given and accepted at the trial.

The attachment of the French-Canadian people, including the French-speaking trustees, to their mother tongue, is easily understood, and is not to be ruthlessly condemned. That in all sincerity they should conceive it to be an imperative duty to guard what they regard as rights, I can well understand. The maintenance of our religious rights is admittedly of paramount importance to us all. The tense feeling, inevitably engendered

ONT.

S. C.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

LENNOX, J.

by the discussion of a dual language and its evil consequences, is unfortunately not a novel phase of our national development. I should be careful not to accentuate this unhappy strife. If the judgment I have just pronounced is right, the defendants had no just ground for complaint, and I have so declared. The tactics resorted to were unfortunate and illegal, and I have condemned them. They cannot be too severely condemned. But, except in the matter of closing the schools and attempting to discharge the teachers, it has not been shewn that these trustees did not act honestly, conscientiously, and in good faith; and, short of this, I am not prepared to penalise them by declaring a personal liability for costs and damages. I will make no order under this prayer of the statement of claim. The plaintiffs may withdraw it or have their rights, if any, reserved, if they deem it necessary or desire to do so.

There will be judgment for the plaintiffs against the defendant Board with costs, declaring:—

1. That the Instructions or Regulations in the pleadings mentioned and the Acts and proceedings sanctioning them are *intra vires* of the Provincial Legislature, apply to and bind the defendants, and have been and are being disobeyed.

2. That the defendants have not been and are not conducting the schools under their charge according to law.

3. That the resolutions of the defendants purporting to delegate to the Chairman power to discharge, select, and engage teachers, were *ultra vires*, that the notices to teachers in pursuance thereof were unwarranted, and that the agreements with these teachers were not thereby terminated.

4. That it is a statutory duty of the defendants to see that the schools under their charge are conducted according to the provisions of the Separate Schools Act and the Instructions and Regulations of the Department of Education, to maintain order and discipline in these schools, and to permit and facilitate their inspection; and the defendants neglected and violated their statutory obligations in this regard.

5. And let judgment also be entered for a permanent injunction, in the terms generally and to the purport and effect of the interim injunction granted in this action by the Chief Justice of

the King's Bench on the 29th April, 1914, but subject to such order as the Court may hereafter see fit to make, upon it being shewn that the defendants are then conducting and intend to conduct the schools according to law, and, in addition, restraining the defendants from directly or indirectly obstructing or preventing, or retaining in their employment or paying the salary subsequently accruing of any teacher who shall obstruct or prevent, the inspectors appointed by the Department from visiting and inspecting the schools in their charge, and ordering the defendants to provide for and facilitate the orderly and efficient inspection of the schools in their charge according to law.

6. Reserving to the supporters of the Ottawa Roman Catholic separate schools, and each of them, any right they may have to bring actions as they may be advised to establish a personal liability of any member or members of the defendants' Board for loss or damage alleged to have been occasioned to these schools or their supporters through the misconduct or default of such members.

Meredith, C.J.O.

MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment which was directed to be entered by Lennox, J., after the trial of the action before him, sitting without a jury at Ottawa: 32 O.L.R. 245.

The appellants attack the validity of Regulation 17 of the Department of Education, upon two grounds: (1) that it is *ultra vires* the Department of Education; and (2) that, if authorised by provincial legislation, the legislation itself is *ultra vires*.

The first objection is no longer open to the appellants, because of the declaratory Act passed at the last session of the Provincial Legislature, intituled "An Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa," 5 Geo. V. ch. 45.

The preamble of the Act recites that: "Whereas an action is now pending in the Supreme Court of Ontario in which one Mackell and other supporters of the Separate Schools in the City of Ottawa are plaintiffs, and the Board of Trustees of the

ONT.

S. C.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Meredith, C.J.O.

Roman Catholic Separate Schools for the City of Ottawa is defendant, in which action the said Board is contending that Regulations number 17 of the year 1912 and number 17 of the year 1913 made by the Minister of Education were *ultra vires* the Province under the British North America Act, and that the Province had no legislative authority under the said Act to regulate the use of French as a language of instruction and communication in the Public and Separate Schools of the Province, or the teaching therein of the French language; and whereas the said Board has failed to open the schools under its charge at the time appointed by law, and to provide or pay qualified teachers for the said schools, and has threatened at different times to close the said schools and to dismiss the qualified teachers duly engaged for the same."

And it is enacted by the first section as follows: "1. It is hereby declared that, subject to the said question of the legislative authority of the Province under the British North America Act, the said regulations were duly made and approved under the authority of the Department of Education Act and became binding according to their terms and provisions upon the said Board and the schools under its control."

In support of the second ground of objection it was argued that the legislation is *ultra vires* because it prejudicially affects a right or privilege of the French-speaking people, contrary to the provisions of sec. 93 of the British North America Act.

Prior to the passing of that Act, there had been bitter controversies in this Province upon the subject of Roman Catholic Separate Schools, and these had been brought to a conclusion by the passing in 1863 of an Act intituled "An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools" (26 Vict. ch. 5).

The preamble to that Act is as follows: "Whereas it is just and proper to restore to Roman Catholics in Upper Canada certain rights which they formerly enjoyed in respect to Separate Schools, and to bring the provisions of the Law respecting Separate Schools more in harmony with the provisions of the Law respecting Common Schools." And, by sec. 1, secs. 18 to

36 of ch. 65 of the Consolidated Statutes of Upper Canada, which dealt with the establishment and maintenance of Roman Catholic Separate Schools, were repealed, and certain other provisions were substituted for them. By sec. 26, it was provided that "the Roman Catholic Separate Schools (with their registers) shall be subject to such inspection as may be directed from time to time by the Chief Superintendent of Education, and shall be subject also to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada."

The appointment of the Council of Public Instruction for Upper Canada was provided for by sec. 114 of the Consolidated Statutes of Upper Canada, ch. 64, and it exercised its duties subject to all lawful orders and directions from time to time issued by the Governor.

By 39 Vict. ch. 16, sec. 1, the functions of the Council of Public Instruction were suspended, and all the powers and duties which it then possessed or might exercise by virtue of any Act in that behalf were devolved upon the Education Department, which was to consist of the Executive Council, or a committee of it appointed by the Lieutenant-Governor; and all the functions and duties of the Chief Superintendent of Education were vested in one of the Executive Council, to be nominated by the Lieutenant-Governor and to be designated "Minister of Education;" and whenever in any statute, by-law, regulation, deed, proceeding, matter or thing, the term "Council of Public Instruction," or "Chief Superintendent of Education" (as the case might be), or to the like signification, respectively occurred, the same were to be construed and have effect as if the term "Education Department" or "Minister of Education" was substituted therefor respectively; and the law has so remained down to the present time.

When the Separate Schools Act was revised in 1877, by ch. 206, R.S.O. 1877, the provisions of the Act of 1863 were re-enacted with the changes rendered necessary by 39 Vict. ch. 16.

When the British North America Act was passed, the law which provided for the establishment and maintenance of

ONT.

S. C.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Meredith, C.J.O.

Roman Catholic Separate Schools was the Act of 1863, and the rights and privileges of the Roman Catholics of the Province with respect to Separate Schools were those, and in my opinion those only, which they possessed under the Act of 1863; and the purpose of sub-sec. 1 of sec. 93 was to prevent, so far as the Province of Ontario was concerned, the enactment of any law relating to education which would prejudicially affect these rights or privileges.

The Separate Schools Act, besides providing for the establishment and maintenance of Roman Catholic Separate Schools, also provided for the establishment and maintenance of Separate Schools for coloured people and of Separate Schools for Protestants, and the principle applied in all cases was that these Separate Schools were to be brought into existence by the voluntary action of the respective classes, Protestants, Roman Catholics, and coloured people, which desired that they should be established.

Save only in the case of schools for coloured people, there is not to be found in the legislation prior to Confederation any recognition of the right to Separate Schools based upon linguistic or racial differences, or upon anything but religious differences.

The basic principle upon which the Separate Schools were founded was that Roman Catholics should not be required to contribute to the support of Common or Public Schools if they chose to establish Separate Schools for the education of Roman Catholic children, and that, in the event of their doing so, these schools should share in the legislative grants for Common or Public School education, and that for their support the trustees of the schools should have power to impose, levy, and collect school rates or subscriptions from persons sending children to or subscribing towards the support of the schools, and that they should have all the powers in respect of their schools that trustees of Common Schools have and possess under the Acts relating to Common Schools. It was only persons who gave notice that they were Roman Catholics and supporters of Separate Schools that were exempted from the payment of rates

imposed for the support of Common Schools, and the right to withdraw their support from the Separate Schools was given to persons who had given this notice but desired to withdraw their support.

It seems to me quite plain, therefore, that the effect of sub-sec. 1 of sec. 93, which provides that "nothing in any such law" (i.e., a Provincial law in relation to education) "shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union," is, as far as the Province of Ontario is concerned, to restrict the exclusive authority to make laws in relation to education to the extent of prohibiting the making of any such law which would prejudicially affect the rights or privileges with respect to denominational schools which are conferred by the Act of 1863, and to that extent only; and that, subject to that limitation, the legislative authority of the Province as to education is "as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow:" *per* Sir Barnes Peacock in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, 132.

That it is only rights or privileges which exist as legal rights or privileges ("have by law") that are preserved is plain, and it was so held by the Judicial Committee in *City of Winnipeg* v. *Barrett*, [1892] A.C. 445. See also *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202.

I am unable to find anything which supports the contention of the learned counsel for the appellants that the right to use the French language in the Separate Schools of the Province was guaranteed by treaty or otherwise to the French-speaking people, nor am I able to appreciate the contention that that is a natural right pertaining to them which the Legislature is powerless to impair or destroy.

However, even if it had been shewn that, by the terms of the treaty which resulted in the cession of Quebec to Great Britain, this right had been guaranteed to the French-speaking people of the ceded territory, the new constitution for Canada which was provided by the British North America Act would have

ONT.
S. C.
MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.
Meredith, C.J.O.

abrogated those rights except in so far, if at all, as they are granted by it.

The British North America Act was the result of long deliberation and careful consideration by representatives of the various Provinces which were by it united into one Dominion, and great care was taken to provide for preserving the rights which religious minorities then possessed in matters relating to education. The use of the French language was also a question considered and dealt with; and, by sec. 133, the right was given to use that language in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec, and by any person or in any pleading or process in or issuing from any Court of Canada established under "this Act and in or from all or any of the Courts of Quebec."

It is inconceivable to me that the framers of the resolutions on which the Act was based would have embodied in them these provisions if they had any idea that the French-speaking people already enjoyed the greater rights which, according to the contention of the appellants' counsel, they possessed.

It was argued by counsel for the appellants that sec. 133 supports his contention; but that is clearly not so, I think. So far from supporting it, an intention in indicated that, except as to the matters dealt with by the section, the plenary power of the Legislature, within the ambit of its legislative authority, was to be unlimited as to what it should ordain as to the use of the French language.

The judgment of the learned trial Judge is, in my opinion, right, and should be affirmed, and the appeal should be dismissed with costs.

Garrow, J.A.

GARROW, J.A.:—Appeal by the defendants from the judgment of Lennox, J., in favour of the plaintiffs.

The action is brought by the plaintiff Mackell, suing on behalf of himself and other ratepayers of the City of Ottawa, supporters of Separate Schools for Roman Catholics, against the defendant, for an injunction restraining the defendant from employing and paying unqualified teachers, and from otherwise disregarding, in the management of the schools under its con-

trol, the regulations of the Department of Education applicable to such schools.

No serious attempt was made before us to uphold or justify the conduct of the defendant as to the great bulk of the matters complained of. The address of the learned counsel for the defendant was devoted almost entirely to maintaining an alleged right to the use in the Separate Schools of the Province of the French language, and to an attack upon the "Circular of Instructions" which regulates and limits the use of that language as a language of instruction and communication in such schools, because, as they contended, it prejudicially affects the rights and privileges which the French-speaking inhabitants have by law, with respect to denominational schools, guaranteed by sec. 93 of the British North America Act, and that it is therefore *ultra vires*.

With questions of policy we have here nothing to do. Nor do we sit to determine cases based only upon natural justice, to which the learned counsel appealed. This is a Court of law: and a right asserted and claimed before us, as before any other of our Courts of law, must shew for its supporting foundation something in the substantive law of the Province, or the claim must fail.

These questions of language, like questions of religion, are always delicate to handle. Susceptibilities as to them are keen. Temper is easily aroused, and reason and logic too often are left far behind. It is a perfectly natural thing that those of French descent should love their noble language, and even passionately desire to promote, as far as reasonably possible, its perpetuation here. One may even respect a similar sentiment on the part of the Germans, the Italians, and the others settled among us to whom the English is a foreign tongue. But it is not to be ignored or forgotten that, while all are tolerated, the official language of this Province, as of the Empire, is English, and that the official use of any other language is in the nature of a concession and not of a right. This is, I think, well, and indeed in my opinion conclusively, illustrated by the provisions of sec. 133 of the British North America Act, which says:

ONT.

S. C.

MACKELI v. OTTAWA SEPARATE SCHOOL TRUSTEES.

GARROW, J.A.

"Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both these languages shall be used in the respective records and journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec."

The statute contains no provision upon the subject of the language to be used in any of the other Provinces which were united under that Act. Evidently none was considered necessary, because, in the absence of a special provision to the contrary, English, the language of the Empire, would naturally be the official language of the Province. And, if this conclusion is contested, the maxim "*expressio unius est exclusio alterius*" may be, I think, successfully invoked upon the question of construction, to exclude as a right the official use of French in the Province of Ontario.

The "Circular of Instructions," it will be observed, applies in terms to both Public and Separate Schools. No complaint is made concerning its application to the former—a weakness, it seems to me, in the argument for the use of French, if the right is, as was practically claimed, an inherent one. Both classes of schools have much in common. Both are supported by rates and receive grants from the public purse, and both are subject to visitation, to inspection, and to regulation by the Department; the only really substantial distinguishing characteristic being that in the Separate School there is the "right or privilege" of having religious instruction, while the public school is non-sectarian.

The general control of the Department, including the power to pass regulations affecting Separate Schools, cannot be successfully disputed. The Roman Catholic Separate Schools Act of 1863, the foundation although not the origin of such schools, is intituled "An Act to restore to Roman Catholics in Upper Canada" (now Ontario) "certain rights in respect to Separate Schools." The preamble is: "Whereas it is just and proper to restore to Roman Catholics in Upper Canada certain rights

which they formerly enjoyed in respect to Separate Schools, and to bring the provisions of the Law respecting Separate Schools more in harmony with the provisions of the Law respecting Common Schools." Section 13 provides that teachers under the Separate Schools Act shall be subject to the same examinations and receive their certificates of qualification in the same manner as Common School teachers generally; provided that persons qualified by law as teachers, either in Upper or Lower Canada, should be considered qualified teachers for the purposes of the Act. See *Brothers of the Christian Schools* v. *Minister of Education for Ontario*, [1907] A.C. 69, where a question arising upon this proviso was considered. Section 22 provides that a return shall be made to the Chief Superintendent of the names of the children attending the school, and the average attendance during the next preceding six months. By sec. 23, Judges, Members of the Legislature, heads of municipal councils, the Chief Superintendent and Local Superintendent of Common Schools, and Clergymen of the Roman Catholic Church, shall be visitors. And finally sec. 26, which declares that "the Roman Catholic Separate Schools (with their registers) shall be subject to such inspection as may be directed from time to time by the Chief Superintendent of Education, and shall be subject also to such regulations as may be imposed from time to time by the Council of Public Instruction for Upper Canada."

Now, while it is doubtless true that many of the supporters of such schools are of French origin, there are also large numbers of other supporters of whom French is not the natural language. And, as far as I can see, neither the one class nor the other has or ever had any "right or privilege" concerning the use in such schools of any language other than English. In other words, the "right or privilege" protected by the law is not one concerning language, but to have what the general community has not, namely, religious instruction imparted in such schools. I therefore quite fail to see how the circular in question, which deals only with language, prejudicially or in any way at all affects that right or privilege, which apparently is left exactly as it was established in 1863.

We were, it is true, referred to some rather hazy instances

ONT.

S. C.

MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES.

Garrow, J.A.

in the early days when a more extensive use of the French language may perhaps have been customary in schools in French settlements, just as German was used in German settlements at about the same time. These instances, however, fall very far short of proving or establishing "a right or privilege which any class of persons have by law" in respect of these languages as against the general use of English. They were evidently in every case mere temporary tolerations, as clearly appears from a perusal of the little work by the late Dr. Hodgins, so long the Deputy Superintendent of Education. What is a "right or privilege" in a similar matter was considered in *City of Winnipeg* v. *Barrett*, [1892] A.C. 445.

I would dismiss the appeal with costs.

Maclaren, J.A.
Magee, J.A.
Hodgins, J.A.

MACLAREN, MAGEE, and HODGINS, JJ.A., concurred.

Appeal dismissed.

Annotation **Annotation—Schools—Denominational privileges—Constitutional guarantees.**

We have here an outcome of the bi-lingual controversy which has agitated the Province of Ontario to some considerable extent during the last few years. We may or may not approve of the spirit which seems to animate a large section of the English-speaking inhabitants of the province with respect to the free enjoyment of the use of their own language by those who are French-speaking. We may or may not agree with the framers of the Report of the Commission on Schools in Prescott and Russell of 1897 (p. 17), where it says:—

"As was stated in our former report, when all classes of the French people are not only willing but desirous that their children shall learn the English language, they, at the same time, wish them to retain the use of their own language, and there is no reason why they should not do so. To prove the knowledge of both languages is an advantage to them, and their use of the English language instead of their own, if such a change should ever take place, must be brought about by the operation of the same influences which are making it all over the continent the language of other nationalities as tenacious of their native tongue as the French. It is a change that cannot be forced. To attempt to deprive a people of the use of their native tongue, would be as unwise as it would be unjust, even if it were possible."

Primâ facie to seek to interfere in any way by compulsion with the free use and maintenance by French-speaking Canadians of their own language—a noble language, as Garrow, J., very truly calls it—has an unduly drastic and German flavour to those who have within their breasts the true spirit of British freedom, which certainly does not seek to deny to others the same liberty which Englishmen, Irishmen, and Scotchmen

ONT.

Annotation

Annotation (*continued*) — **Schools — Denominational privileges — Constitutional guarantees.**

claim for themselves. With all this, however, we have nothing to do here, any more than the Court had, or than the Judicial Committee of the Privy Council will have when the case reaches them, as we understand it is destined to do. Here, we are concerned only with the dry legal question involved in the principal case, which essentially, and put in its concisest form, seems to be this:—

Does clause 3(1) of Regulation 17 of 1912, and 1913, made by the Minister of Education, prejudicially affect any right or privilege with respect to denominational schools which French-speaking Roman Catholics in Ontario, had by law in the Union in 1867?

The clause in question reads as follows: "3. Subject in the case of each school to the direction and approval of the chief inspector, the following modifications shall be made in the course of the study of the public and separate schools: (1) When necessary in the case of French-speaking pupils, French may be used as the language of instruction and communication, but such use of French shall not be continued beyond form 1, excepting that, on the approval of the chief inspector, it may also be used as the language of instruction and communication of pupils beyond form 1, who are unable to speak and understand the English language."

It is contended by the defendants that this Regulation, under the pretence of regulating, actually prohibits, perhaps not immediately, but ultimately, in all Separate Schools, the use of the French language as a means of instruction, and that it imposes an inspection which is different from the inspection to which the Separate Schools were subjected at the time of Confederation. For our present purposes, we will assume that this is so. There also seems no doubt whatever that the right to teach in the French language in the Roman Catholic Separate Schools of Ontario, was enjoyed, not only without opposition, but with the co-operation and assistance of the Department of Education, given in various ways, as, for example, by the granting of certificates to teachers to teach exclusively in French, and by the establishment and maintenance of French schools and French-English schools, the latter both before and after Confederation.

It is strange what ambiguity may underlie apparently simple words in a statute. We have an example in that clause of sec. 92 of the Federation Act, which we may hope is shortly to receive its quietus at the hands of the Judicial Committee, where provincial legislatures are given exclusive power to make laws in relation to "the incorporation of companies *with provincial objects*." So, with regard to sub-sec. 1 of sec. 93, which enacts that in and for each province the legislature may exclusively make laws in relation to education, subject to this, that—"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have *by law* in the province at the time of Union."

A right which such persons had by law at the time of Union might conceivably mean some right which they actually exercised at that time, and which was not in itself illegal. Such an interpretation would make

ONT.

Annotation

Annotation (*continued*) — **Schools — Denominational privileges — Constitutional guarantees.**

mere surplusage of the additional words "or practice," which are added after the words "by law" in the section of the Manitoba Act which corresponds to sec. 93 of the B.N.A. Act; and the judgment of the Privy Council in *City of Winnipeg* v. *Barrett*, [1892] A.C. 445, at 452-3, seems to preclude the contention, that that is the meaning, because, dealing with the section of the Manitoba Act, they say: "It is not, perhaps, very easy to define precisely the meaning of such an expression as 'having a right or privilege by practice,' but the object of the enactment is tolerably clear. Evidently the word 'practice' is not to be considered as equivalent to 'custom having the force of law.'"

The implication, therefore, seems clearly to be that the words "right or privilege by law" in sub-sec. 1, of sec. 93 of the Federation Act, must at least mean a right by "custom having the force of law," and not merely an actual practice which was not at the time positively illegal.

It might, also, if the matter was coming up for the first time be contended that the words "have by law" in that sub-section were not meant to qualify the words "right or privilege" at all, but were intended to qualify only the words, "denominational schools;" so that it would be as though the sub-section read—"Any right or privilege with respect to such denominational schools as any class of persons have by law in the province at the Union." But the construction which the Privy Council have placed upon the clause in *City of Winnipeg* v. *Barrett*, *supra*, and in *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202, seems quite to preclude such a contention now.

There is, however, another contention which is not specifically dealt with in the judgments, either of Lennox, J., or of the Appellate Division, although no doubt it was duly considered by their Lordships. It is this: In the Ontario Sessional Papers for 1890 (vol. XXII. pt. 2, No. 7), we read as follows:—

"THE EXAMINATION AND TRAINING OF TEACHERS, 1851."

"At a meeting of the Council of Public Instruction, April 25th, at which the Rev. Henry James Grasett, A.M., Chairman *pro tempore*, James Scott Howard, Esq., the Rev. John Jennings, and the Rev. Adam Lillie were present, the following minute was adopted:—

"In reference to the programme of the examination and classification of teachers, and the letter of the secretary of the Board of Public Instruction for the County of Essex, submitted to the council as regards the granting of a certificate to a French teacher, who is not conversant with the English grammar, it was,

"*Ordered*, that there be added to that programme the following:—

"8. In regard to teachers of French or German, that a knowledge of French or German grammar be substituted for a knowledge of English grammar, and that the certificate to the teachers be limited accordingly.

Ordered further, that the above be communicated to the several County Boards of Public Instruction in Upper Canada."

This Order in Council, it would appear, was in full force and effect at

Annotation (*continued*) — Schools — Denominational privileges — Constitutional guarantees.

ONT.

Annotation

Confederation. Now, assuming that this Order in Council can be construed as authoritatively and generally recognizing the eligibility as teachers of those who spoke only French, and no English (which would certainly be putting a strained construction upon it), it might perhaps be contended that Roman Catholic French-speaking Separate Schools had a right by law at Confederation, that their teachers should not be objected to because they could, or did, only teach in French. Supposing the B.N.A. Act was passed in this year of grace instead of having been passed in 1867, and supposing that in conferring upon the provincial legislatures exclusive power to make laws in relation to procedure in civil matters in the provincial Courts, it had added—"subject to the following provision that nothing in any such law shall prejudicially affect any right or privilege which any persons have by law in respect to procedure in the provincial Courts at the Union,"—it could scarcely be contended that the rights as to procedure which exist under the Judicature Rules of Court, made by the Judges, were not rights existing by law; for the rules, being made by the Judges under the authority of the Judicature Act, have the force of statute. So, it might be, perhaps, successfully contended that the regulation made in 1851 by the Council of Public Instruction, duly authorized by law in that behalf, had the effect of statute.

Nevertheless, however much our sympathies may be with them in their fight for their own language, it seems clear that this would not avail the defendants in this action. What sub-sec. 1, of sec. 93, preserves to the defendants is "any right or privilege with respect to denominational schools." But, surely, a school is only denominational in respect to its religious teaching; and it is a fact that so far as the course pursued during the time devoted to religious instruction goes, the Public School Regulations, including clause 3(1) of regulation 17 of 1912 and 1913, have no application whatever. This being so, it would not seem that it prejudices the defendants at all in respect to any right or privilege which they had at Confederation *qua* denominational schools.

The defendants, also, it seems, seek to find a right or privilege existing by law at Confederation to use their own French language in their Separate Schools, in that clause which the 2nd and 3rd Charters of Henry III. added to Magna Charta. (1) The famous clause in Magna Charta runs—"No freeman shall be arrested or detained in prison, or disseised of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." The two Charters of Henry III. add after the words "disseised of his freehold," the words "or of his liberties or *free customs*."(1) The suggestion is that French-speaking Roman Catholic Canadians in Ontario had at the

(1) Curiously enough in reproducing this clause in R.S.O. 1897, ch. 322, no reference is made to the Charters of Henry III., where alone the words which are material to our present purpose are to be found.

ONT.

Annotation

Annotation (*continued*) — **Schools — Denominational privileges — Constitutional guarantees.**

Union, a free custom to teach in French in their Separate Schools in the province—and that it was thus a right or privilege existing by law by virtue of the above Charters. And if "liberties and free customs" mean what Mr. Taswell Langmead says the words mean, in his Constitutional History, (4th ed., p. 138), namely, "such franchises or free customs as belong to a man of his *free birthright*," possibly the contention might hold good. . . . . .

But Thomson on Magna Charta (p. 186), says: "Free customs are liberties enjoyed by custom or usage, which in its legal sense signifies a law not written but established by long use, and the consent of ancestry. The antiquity of a custom should be so great, as that the memory of man cannot shew its contrary, and legal memory is with the first year of King Richard I., 1189." In the same way McKechnie on Magna Charta (p. 445) says it probably refers to such rights as those of levying tolls and tallages.

The defendants, also, it would appear, rely upon section VIII. of the Quebec Act, 1774, which provides that the religious Orders and Communities in Quebec may continue to "hold and enjoy their property and possessions, together with all customs and usages relative therto, *and all other civil rights*." Quebec, at that time, of course, included what is now Ontario, and although it certainly would seem to be going a long way to contend that a right to use the French language as the medium for instruction in the Roman Catholic Separate Schools was a custom or usage relative to their property or possessions, one does not feel so sure that it may not be held to have been a civil right enjoyed by them at that time. The Courts would surely have protected them in the enjoyment of such right, unless and until interfered with by lawful authority; and I have never been able to make out what a civil right is, except a right which the Courts will protect. If, therefore, that section of the Quebec Act is to be considered as having been still in force at the time of the Union in 1867, as to which I do not desire to be considered as expressing an opinion, the defendants might seem to have a case here.

There is one more point I would like to refer to very briefly. Meredith, C.J.O., says in his judgment in the principal case, that even if it had been shewn that by the terms of the treaty which resulted in the cession of Quebec to Great Britain, the right to use the French language in the Separate Schools of the province was guaranteed by treaty to the French-speaking people of the ceded territory, the B.N.A. Act would have abrogated those rights, except in so far, if at all, as they are granted by it. As appears on the face of it, the *dictum* is *obiter*, and, with great deference, I would submit that in the first place, the B.N.A. Act does not purport to interfere with any treaties and that, therefore, treaties with foreign States must be taken to be incorporated with it, and if necessary, to limit its operation: *Regina* v. *Wilson* (1878), 3 Q.B.D. 432. Moreover, statutes which affect status or personal privileges must be expressed in clear, unambiguous language: Hals. Laws of England, vol. 27, pp. 149, 151, 154. The only reference to treaties in the B.N.A. Act

Annotation (*continued*) — **Schools — Denominational privileges — Constitutional guarantees.** ONT.

Annotation

is in section 132 which expressly gives the Parliament and Government of Canada all powers necessary or proper for performing the obligations of Canada *or of any province thereof*, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.

In the second place, I submit, no legislative jurisdiction conferred upon either the Dominion parliament or the provincial legislature empowers them to abrogate the provisions of an Imperial treaty existing at Confederation. It is true that the French-speaking Canadians after the cession became Canadian British subjects, and as such subject to the powers of Canadian legislatures. But the Treaty of Cession was not made with the French Canadians; it was made with the French King and the French nation, and any Act of a Canadian legislature purporting to affect it would, I submit, be void for extra-territoriality.

It will be seen by the case the judgment in which follows this annotation that the position of the Roman Catholic Separate Schools in this province has, since the principal case, again come up in *Board of Separate School Trustees, Ottawa* v. *City of Ottawa*, before Chief Justice R. M. Meredith, who gave judgment of November 18th last. The question there, as will be seen, was whether the Ontario Act, 5 Geo. V. ch. 45, providing for the suspension of the powers of the Ottawa Roman Catholic School Board was *intra vires* or not. The judgment upholds the Act, and speaks for itself. Special attention, however, may be called to the generalized conclusion at which the learned Chief Justice arrives, where he says:—

"The right and privilege which the Separate Schools Act conferred when the Imperial enactment" (*sc.* the B.N.A. Act) "became law, and which the Separate Schools Acts have ever since conferred, and still confer, was, and is, a right to separation,—separate public schools of the like character and maintained in the like manner, as the general public schools.

The machinery may be altered, the educational methods may be changed, from time to time, to keep pace with advanced educational systems. It was never meant that the separate schools, or any other schools, should be left forever in the educational wilderness of the enactments in force in 1867. Educational methods and machinery may and must change, but separation, and equal rights regarding public schools, must remain as long as provincial public schools last, unless the federal or imperial parliament, which ever may have the power, decrees otherwise."

A. H. F. LEFROY.

OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA. OTTAWA SEPARATE SCHOOL TRUSTEES v. QUEBEC BANK.

ONT.

S. C.

Ontario Supreme Court, Meredith, C.J.C.P. November 18, 1915.

1. CONSTITUTIONAL LAW (§ II A 1—154)—DENOMINATIONAL SCHOOLS—PROVINCIAL REGULATION—CREATION OF COMMISSION—ABRIDGMENT OF CONSTITUTIONAL PRIVILEGE.

Ch. 45 of the Statutes of Ontario, 5 Geo. V., providing for the suspension of the powers of a denominational school board and for conferring such powers upon a commission, is within the legislative powers

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

of the province and does not prejudicially affect any right or privilege with respect to denominational schools guaranteed by sec. 93, of the B.N.A. Act, 1867.

ACTION for a declaration that the provisions of 5 Geo. V. ch. 45, are beyond the powers of the legislature of Ontario.

N. A. Belcourt, K.C., *J. A. Ritchie*, and *E. R. E. Chevrier*, for plaintiffs.

F. B. Proctor, for defendants, the City of Ottawa.

McGregor Young, K.C., for the Attorney-General for Ontario.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The single question involved in these actions is: Whether the legislation in question, which provides for the suspension of the powers of the Ottawa Roman Catholic School Board, and for conferring such powers upon a commission, is within the legislative power of this province; and that question has been, in argument, further confined to the single point: Whether such legislation "prejudicially affects any right or privilege with respect to denominational schools" which Roman Catholics had in Upper Canada, at the time of the passing of the B.N.A. Act, 1867.

The plaintiffs, the School Board and some separate school supporters, bring these actions to recover control of these separate schools of Ottawa, of which, under the provisions of the enactment in question, the trustees have been deprived; and they base their claims upon the one ground: That that enactment does prejudicially affect the right of the supporters of such schools; but they have given no evidence of any such prejudicial effect; and have successfully opposed the admission of any evidence, on the part of the defendants, in support of their contention that, not only is there no such prejudicial effect, but that the effect is beneficial, and was necessary.

Besides adducing no evidence of any such prejudicial effect, the plaintiffs admitted, for the purpose of these actions, the truth of the statements contained in the preamble to the enactment which they attack; some of which statements are: That the Board had failed to open the schools under its charge, at the time appointed by law, and had threatened, at different times, to close such schools, and to dismiss the qualified teachers en-

gaged to teach therein. In these circumstances the actions fail, at the threshold, for want of evidence of any such prejudice, without which the power of the legislature, to enact such legislation, is unrestrained.

But it was urged that the legislation in question deprived Roman Catholic Separate School supporters, of Ottawa, of (1) their elective public school franchise, and (2) of their own school moneys, and so must necessarily, and unanswerably, prejudicially affect them.

The fallacies of this contention seem to me to be obvious: the restrictions upon the power to legislate is not in favour of these plaintiffs nor of those who elected them; but is in favour of the whole class, a class which comprises all the adherents of the Church of Rome throughout this province, of whom those in Ottawa, concerned in these actions, form but a very small part; and it may well be that that which might prejudicially affect the one might not so affect the other; and, in easily imagined circumstances, it even might be for the good of an individual himself, or of a community itself, to be deprived of an elective right—for one instance, if such right were used for illegal and punishable purposes; and the ratepayers have not been deprived of their money, the trustees of it have been changed only; the money must be devoted to the same purposes whosoever may be the trustees.

So that, in the absence of evidence, of any kind, of prejudicial effect of the whole class, or even any objection to the legislation in question, except by these few plaintiffs, out of the hundreds of thousands of persons who comprise that class, the actions as I have said, fail, and must be dismissed; and the successful parties should have their costs from the unsuccessful.

But the learned and elaborated manner in which these cases were argued, calls for more than a mere nonsuit, as it were, and therefore, I proceed to deal with the matters discussed more fully.

The position for which the plaintiffs contend is, as it seems to me, the result of a misconception of the purposes, as well as of the effect, of the legislation under which the trustees hold office. The creation of the office of Minister of Education, and

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

Meredith, C.J.C.P.

the enactment of all the elaborate legislative provisions of this province, respecting education—covering over 250 pages of its statute books—were not for the mere benefit of parent or child; the paramount purpose, the dominant intention, was the public interests of the province, the making of true and efficient subjects of all its children—loyal and efficient subjects and citizens, the best assets of every state.

For such purpose, public schools and compulsory education are essential; and so public schools were established long ago, and have been, and are, maintained; and compulsory laws are in force.

In consequence of the religious desires or duties of some classes of the community, separation in schooling is permitted; and special separate school provisions were made for that great class of residents of the province described in the legislation upon the subject as Roman Catholics. But such separation in no wise affects the public purposes of the schools, or makes the one, any more than the other, the less a public school in the sense and for the purpose I have mentioned. The trustees of all are, alike, public officers, having the like duties and powers, and subject to the like pains and penalties for misconduct in office, and the schools are all subject to control of provincial educational authorities; and are all alike entitled to share equally in the provincial grants of money made for public school purposes.

This, as it seems to me, would be plain, in regard to the two subjects—inspection and languages—which are said to be the bones of contention from which this legislation has sprung, as well as, speaking generally, in all things, plain if there had been no expressed words upon the subject; but there are such words, and were at the time of the passing of the B.N.A. Act, 1867. The words now in force upon the subject contained in the Separate Schools Act are: "The schools and their registers shall be subject to such inspection as may be directed by the Minister of Education, and shall be subject also to the regulations." And the word "regulations" means: "regulations made under the Department of Education Act," the wide character of which is set out in that enactment; so that that which would have been

plain without them is put beyond controversy by these plain words.

If, as it was contended, the right of parent or child should be paramount, why make any laws interfering with the liberty of either to be educated or uneducated as he or she saw fit; and why compel men and women without children to pay equally with those who have, that is to pay for the education of their neighbours' children? And if the separate school system were to be anything more than one of the branches of the whole public school system, why should the former be left without any council or general representative body—a vast number of schools without cohesion, head or representative body?

The public school system of Ontario is not one of separate independent schools in all the school sections of the province each one of which may be "a law unto itself," or as careless as it pleases; but is one comprehensive and symmetrical system embracing everyone, from the Minister of Education to the youngest infant in the kindergarten, whether in the common or the separate school, and all alike are subject to the laws of the province and all valid regulations made under them.

The narrow view that the Imperial enactment made all the provisions of the Separate Schools Act in force at the time of the passing of the Imperial Act, unalterable, is without any kind of substantial support, as the great many changes since made, and made apparently without any kind of objection, shew; important changes turning an Act of 28 sections covering less than a half dozen pages of the statute-book, into one of 92 sections, covering 32 pages.

The right and privilege which the Separate Schools Act conferred when the Imperial enactment became law, and which the Separate Schools Acts have ever since conferred, and still confer, was and is a right to separation, separate public schools of the like character, and maintained in the like manner, as the general public schools. The machinery may be altered, the educational methods may be changed, from time to time, to keep pace with advanced educational systems. It was never meant that the separate schools, or any other schools, should be left forever in the educational wilderness of the enactments in

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

Meredith, C.J.C.P.

force in 1867. Educational methods and machinery may and must change, but separation, and equal rights regarding public schools, must remain as long as provincial public schools last, unless the federal or imperial parliament, which ever may have the power, decrees otherwise.

Modern fashion of applying the short name "public schools" to the general public schools, which were in earlier days called the common or union schools, and more appropriately so called, and of applying the short name "separate schools" to the particular public schools separated from the general ones under the Separate Schools Act, is no excuse for misunderstanding their true character of, all alike, public schools, maintained in the public interests and for the public welfare.

The rocks upon which it was said that the Ottawa Separate Schools came near to foundering are said to be: The appointment of an inspector who was not a Roman Catholic, and an overruling of the Board's desires as to the language to be used in teaching. Whether these things were necessary or unnecessary, gracious or ungracious, is a matter that does not in any way affect the legal question involved in these actions; if they were lawful, the plaintiffs' appeal should not be to those who expound the law, but to those who make it, or to those who elect the makers in regard to any grievance they may feel that they have. That these things were not unlawful, the main purpose of public schools, and the very words of the Separate Schools Act which I have read, seem to me to make very plain; and beside that the judgment of the highest Court of this province has decreed that they were lawful.

The removal of trustees who fail or refuse to perform the duties of their office, and especially so when they do so contumaciously, is but a familiar, appropriate, and sometimes necessary legal method; and for a high Court of parliament, provincial or federal, to remove trustees filling a public office, even though elected to that office, and the more so if elected with a view to continuing to refuse or fail to perform such duties in the face of a judgment of a Court of competent jurisdiction making those duties plain, could not be an infringement upon any legal right, but must be an endeavour to maintain and enforce it;

ONT.

S. C.

OTTAWA SEPARATE SCHOOL TRUSTEES v. CITY OF OTTAWA.

Meredith, C.J.C.P.

and the mere fact that an appeal may be taken, or is contemplated against such judgment, is no kind of excuse for disregarding it, unless its effect is suspended, during the appeal, by law, or by a competent Court; the only legal and proper course, especially for a public officer, is to yield obedience to that judgment until it is reversed, if ever it should be; and that the plaintiffs should have done, and in doing would have remained in office.

I am quite in accord with Mr. Belcourt, in his contention that no case, that was cited, governs this case; and in regard to the observations attributed to Mellish, L.J., when sitting in our ultimate appellate tribunal, read by Mr. Young from Wheeler's Confederation Law of Canada, at p. 366, to the effect that he could find nothing in the first sub-section of sec. 93 of the Imperial enactment preventing the abolition of separate schools in this province, it ought hardly to be necessary to point out that the word "first" is but a misprint for the word "second."

There could hardly be an expression of such an opinion as long as public schools exist, because it would be in the teeth of the first sub-section, but it seems to me to be quite plain too, that the legislature of this province has power to abolish all public schools, and so abolish separate schools, for then there would be nothing to be separated from, and so no right or privilege of separation; but that is out of the question; it is not the abolition of public schools, but it is their increase, at enormous cost, that is likely to trouble future generations, as it does some of them who are of the present generation.

Action dismissed.

JOLLYMORE v. ACKER.

N. S.

S. C.

Nova Scotia Supreme Court, Graham, C.J., Russell, Drysdale, and Longley, JJ. May 15, 1915.

1. BOUNDARIES (§ II A—5)—CONVENTIONAL LINE—ESTOPPEL.

Whilst land cannot be conveyed by parol, a conventional line established by parol agreement between adjoining landowners, and acted upon by the erection of a fence, constitutes an estoppel as to the agreed boundary line, and is binding on the successors in title.

[*Woodberry* v. *Gates*, 2 Thom. 255; *Lawrence* v. *McDowell*, Ber. [442] 283; *Perry* v. *Patterson*, 2 Pug. 367; *Leask* v. *Scott*, 3 Q.B.D. 382, followed: *Grascett* v. *Carter*, 10 Can. S.C.R. 105, considered.]

N. S.

S. C.

JOLLYMORE v. ACKER.

Drysdale, J.

APPEAL from judgment in favour of plaintiff in action to recover damages for tearing down a fence on a disputed boundary line.

W. E. Roscoe, K.C., for defendant, appellant.

J. A. McLean, K.C., for plaintiff, respondent.

DRYSDALE, J.:—This appeal depends upon whether or not a conventional line was established between the properties of plaintiff and defendant. The trial Judge has held that there was a conventional line between the properties and found for the plaintiff; this finding is challenged. I do not think it is now open to dispute that in order to establish a conventional line apart from the true line there must be circumstances that will estop the parties from questioning the true line. I accept the statements of Bliss, J., in *Woodberry* v. *Gates*, 2 Thom. 255, as to the true doctrine on the subject. This being so, what are the elements of estoppel in this case? Former owners (adjoining owners) agreed upon and built a line fence dividing the properties. This was built upon the line of surveyor's stakes, indicating clearly that the adjoining owners being uncertain of the line, had a surveyor run it out, and by mutual consent built the dividing fence on the uncertain line indicated by the surveyor's stakes. Afterwards this fence was renewed between the present owners, or those under whom they claim, and the fence so made and renewed has been treated as the dividing line until the present dispute. Defendant now contends that the fence is not on the true line and asserts his right to remove parts of it. I think ample evidence of estoppel is found in the case to prevent defendant from asserting that the old fence is not the dividing line between the properties. The fence was lived up to as such dividing line and plaintiff's well, built by reason of such conventional line. The now contention of defendant would destroy and obliterate the well of plaintiff, built, I have no doubt, by reason of what was considered the original dividing line between the properties. Whilst land cannot be conveyed by parol, and I accept the argument of appellant's counsel that there must be estoppel in order that the true line cannot be set up, I am of opinion, that there is every element of estoppel in this case on the facts to prevent defendant from

asserting that the old line rebuilt is not the true dividing line between the properties.

I would dismiss the appeal.

RUSSELL, J.:—The trial Judge has decided this case in favour of the plaintiff on the finding that there was a conventional boundary line established by the predecessors of the present owners between the properties of the plaintiff and defendant, by which the defendant was bound. One of the contentions made by the defendant is, that there is no proof of anything done or suffered by the plaintiff's predecessor on the strength of the agreement, if any, establishing the boundary, and that as the doctrine of conventional boundary is based on the principle of estoppel, the conventional line cannot be sustained without proof of prejudice. In *Woodberry* v. *Gates*, 2 Thom. 255, which is the leading case on the subject in this province, the only facts that were proved were that the plaintiff and defendant had disputed over their line and after some warm conversation between them, plaintiff said to the defendant: "Mr. Gates, we have both been wrong; you want to come too far down and I have wanted to go too far up. Here is the stake that was settled between your father and me, and if you are willing to abide by it, I am." After some further dispute they both went to the stake; Gates agreed that that should be the bound and Woodberry, giving the witness a stroke with his whip, said: "Recollect, you blockhead, that is the boundary between your father and me, and don't let me catch you over it." The charge of the Chief Justice to the jury in that case was to the effect that although the deed from Oldham Gates would authorize the purchaser to go to the rear of the grant, yet if another line at one and three-quarter miles or thereabouts from the river had been agreed upon and settled between the parties, both would be bound by it and that if they were satisfied that such a line had been established, they should find for the defendant. This charge was sustained and the verdict for the defendant was affirmed by the Court without any proof of anything whatever done by either of the parties on the strength of the line having been so established.

In the subsequent case of *Davison* v. *Kinsman* (1853), James

N. S.

S. C.

JOLLYMORE v. A..KER.

Russell, J.

Rep. 1, there was also no proof whatever of anything having been done by either party on the strength of the conventional line established between their properties. As was correctly stated by the learned trial Judge in the present case, it had been left to the jury in *Davison* v. *Kinsman, supra,* to say whether any such line was made and acquiesced in or not. Of course in both cases, the Judges who sustained the conventional line and the doctrine on which it is founded, illustrated the necessity for the doctrine by reference to the consequences that would follow if such a settlement could be disturbed. Buildings might be erected, expenditures incurred and great prejudice suffered. It must also be conceded that the reasoning and the analogies by which Bliss, J., supported his conclusion in *Woodberry* v. *Gates, supra,* point to the principle of estoppel as the basis of his conclusion, although he distinctly declines to use the term in presence of his black-letter brethren. But I do not find that in either of these cases the binding character of the convention was made to depend upon the circumstances of such expenditures having been incurred or of anything having been done or suffered beyond the deliberate settlement of the division line by the parties on the ground.

In the New Brunswick case of *Lawrence* v. *McDowall,* Ber. [442] 283, there was nothing to shew that any act had been done or suffered by the plaintiff to enable him to sustain the conventional line on the principle of estoppel. In that case the effect of the convention was to give the plaintiff a piece of land which the defendant had actually occupied according to a boundary which had existed for a number of years between the plaintiff and the defendant. The objection of the statute of frauds was disposed of by Chipman, C.J., by reasoning which would be exactly applicable to the present action, namely that,

> There was no question of title between the parties, but merely a question of boundary. Each party acknowledged the title of the other to the lot of which he was in possession and the intent of running the new line, and of setting marks upon it, was to designate by mutual agreement the limit to which the title of each party extended. There was no intent in either party to pass or transfer any estate or interest in the land, and the defendant, by consenting to Hatheway's line (that is the conventional line run by the surveyor), did no more than acknowledge that his right and title did not extend beyond that line; and the conclusion to which the

jury came, that this consent of the defendant to this line was, in point of fact, a relinquishment and transfer of his pre-existing *possession* in the *locus in quo* to the plaintiffs does not convey with it an implication that any estate, even a tenancy at will, thereby passed from the defendants to the plaintiffs. It was a delivery to the plaintiffs of the possession of what was acknowledged to be their own, simultaneous with the acknowledgment of their right to it.

The opinion of Botsford, J., proceeds upon a different ground. It was put on the broad and rational consideration that:—

> Public policy as well as private convenience require that every facility should be given to the settlement and adjustment of such boundaries. It appears to me, therefore, that when a dividing line which was before uncertain and undetermined has been established and mutually agreed upon by the owners as the boundary line between the respective lots, without fraud or circumvention by either of the parties, that such line should be conclusive and binding.

In *Perry* v. *Patterson*, 2 Pugs. 367, the direction to the jury was that if a division line was in dispute between parties, and they agreed to establish a line and did so, and acted upon it by putting up their fences and by severally occupying the land on each side, they were bound by their agreement whether the line was right or wrong and could not repudiate it, though they had not held under it for a period of 20 years, so as to gain a title by possession. This ruling was sustained and it seems to me to be sufficient so far as the element of prejudice necessary to constitute an estoppel is concerned, to be decisive of this case. A fence and an occupation of the land on either side of it are shewn by the evidence in the present case just as in the New Brunswick case last cited.

I am not aware of any case decided by the Supreme Court of Canada or the Privy Council that prevents us from acting on the doctrine of conventional boundary as understood in Nova Scotia and New Brunswick and applied in the cases I have cited. In case of *Grasett* v. *Carter*, 10 Can. S.C.R. 105, a building had been erected on the line agreed upon. There was, therefore, clear evidence of prejudice to support an estoppel. It was unnecessary to say what the law would have been had not such circumstance existed, and whatever was said on that point was, therefore, *obiter dictum*. But I cannot find that anything was said that would tend to weaken the authority of *Woodberry* v. *Gates*,

N. S.

S. C.

JOLLYMORE v. ACKER.

Russell, J.

supra, excepting, perhaps, that Ritchie, C.J., in stating the principle as established in the lower provinces throws in the circumstance of one of the parties building to the line so established. No doubt, he was speaking with a view to the facts of the particular case then before the Court. He did not certainly mean that nothing else but a building would serve the purpose of an estoppel and he did not say whether there might or might not be a sufficient estoppel, if such an element were necessary, arising out of the very fact of a deliberate convention and the implied agreement on both sides to abandon the right to have the true line established. No doubt there are well reasoned American decisions, the application of which would overturn the well-settled jurisprudence of this province on the subject. But we are not bound by those decisions and the indiscriminate use of such decisions can only tend to produce chaos in the jurisprudence of this country.

There is a limitation of the principle which I venture to suggest as a probable explanation of some of the cases in which the defence of a conventional line was not sustained. If one of the parties should, within a reasonable time after making the agreement, discover that he had made a mistake and should wish to rectify the error, it would be material to inquire whether the other had been prejudiced to such a decree as to make it inequitable that the mistake should be corrected. In the absence of such an appeal to equitable principles for the correction of a mistake I greatly doubt if there be any need for evidence of anything done or suffered by either party on the strength of the line having been established, to render the agreement binding. No such facts were shewn in either of the leading cases in this province, there was no evidence before the Court other than that of the deliberate adoption of the conventional line.

If, however, considerations of public and private convenience are not sufficient support for the doctrine of our Nova Scotian and New Brunswick Courts, and some element of prejudice must be found to support the conventional line on the principle of an estoppel, I think we should be fully justified in adopting reasoning analogous to that of Bramwell, then Lord Justice, in *Leask* v. *Scott*, 3 Q.B.D. 382, and say that there always must be

some degree of prejudice—some alteration of the position of the parties who enter into such a convention. Each of them relies upon the line so established and abandons his right to have the true line established. In the present case a fence was erected on the division line which would not have been constructed if it had not been for the agreement. The legal rights of the parties cannot depend on the question of more or less. If the erection of a building on the conventional line would be such an element of prejudice as to make the convention a binding one on the principle of estoppel I see no reason why the construction of a line fence would not answer the same purpose. If there must be some prejudice to constitute the estoppel which is an essential to the binding obligation to abide by the convention, I do not see why any consideration whatever should not be sufficient unless it should be such as to come within the maxim "*de minimis non curat lex.*"

It was further contended by the defendant's counsel that in order to the establishment of a conventional line there must have been some dispute or some uncertainty as to the true line. As to the necessity for a dispute I really cannot see why a line agreed upon for the purpose of preventing future disputes should not be as effectual as a line agreed upon because of an existing dispute. But with reference to what I regard as the essence of this contention I fully agree with the counsel for the defendant. A clear distinction must be made. If two neighbours agree between themselves that one shall give the other a slice of his property by establishing a boundary line other than the true division line between them, no such agreement will be available without a writing to satisfy the statute of frauds. But if those two neighbours meet upon the property and mutually agree that a line marked out or in some way definitely indicated upon the land is in fact the boundary between them, the line so defined becomes for all purposes the conventional boundary of their respective properties.

But the question is asked,—are you going to transfer land merely by the building of a fence or the repair of an old fence? It may have been built with no such intention as that of estab-

N. S.
S. C.
JOLLYMORE v. ACKER.
Russell, J.

lishing a line. It may be merely a fence to keep cattle out of a cabbage-patch. The answer is that you must look at the facts of every case as they appear to be. In the present case we have evidence of a fence built with the concurrence of both parties coincident at one point with what is now claimed as the true division line of the properties, departing slightly from it as it runs along the division and leaving a thin wedge of land between the fence and the boundary claimed to be the true one. What else does common sense suggest but that it was being agreed upon and adopted as the boundary between the properties. Actions speak louder than words. If this fact stood alone I should be satisfied. But it does not stand alone, I think we have a right, for the purpose of determining what it was that Elliot and Rafuse were doing when the old pole fence was being replaced by the new fence of logs and slabs, to view their action in the light of the fact that, long before this, a fence had been erected which was obviously regarded and treated by the owners as the division line of the property, that a well had been sunk which is between the alleged conventional line and the new line, as claimed by the defendant, and that the effect of ignoring the conventional line must be to separate the plaintiff's house from his well and place the latter on the defendant's property. The fact, I have no doubt, is that the boundary between the properties had been settled many years before the building of the new fence, that plaintiff's predecessor had sunk his well beyond what is now claimed to be the true line but within his property as defined by the conventional line, and that he had done this on the strength of an agreement defining the line between the properties. The agreement relied on in the present case is none the less an agreement because it confirms a previously established convention and it should be, to my mind, none the less, but all the more binding because it is in accord with the line by which the predecessors of the parties thus agreeing had held their properties.

I base my judgment in this case on what I understand to be the doctrine of conventional boundary as established in this province. I have an impression that this doctrine will sooner or later be modified by the later currents of opinion, but I

have no regrets that it should be serviceable in doing justice between the parties in the present case before it fades out of the jurisprudence of this country.

LONGLEY, J., concurred with RUSSELL and DRYSDALE, JJ.

GRAHAM, C.J., dissented. *Appeal dismissed.*

RIOPELLE v. CITY OF MONTREAL.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. February 26, 1915.

1. APPEAL (§ I B—18)—FINALITY OF DECISION—HOMOLOGATION OF ARBITRATORS' REPORT.

A judgment of the Superior Court homologating an arbitrators' report of the amount of damages caused to property by a municipality is interlocutory from which no appeal "*de plano*" lies to the Supreme Court of King's Bench without leave.

Statement

APPEAL from judgment of Charbonneau, J., Superior Court, ordering the homologation of arbitrators' report and refusing motion for annulment of same. Affirmed.

On September 30, 1913, J. Sawyer, architect, was appointed arbitrator to value the damages caused to the property of the plaintiff. That appointment had been made following a judgment of the Supreme Court of July 4, 1911, returning the record to the Superior Court to proceed to determine the amount of such damages.

The arbitrator made his report which was opened on February 18, 1914.

On May 4, the plaintiff made a motion to have the report declared irregular and null, and for the appointment of a new arbitrator. On the other hand, the defendant asked for the homologation of the report. The Superior Court has granted the latter motion. It has homologated the report and dismissed the motion of the appellant:—

"Considering that the expert seems to have exactly followed the questions submitted to him by the judgment of Dugas, J., and to have answered them, and that he had not to go beyond that: for him as for me the questions asked therein must reproduce the judgment of the Superior Court.

The appellant has lodged his appeal "*de plano.*" The respondent moved to have such appeal dismissed on the principle that the judgment of the Superior Court was not a final judg-

QUE.
K. B.
RIOPELLE
v.
CITY OF
MONTREAL.

ment, but was only an interlocutory judgment, and that the appellant had not obtained special leave to appeal.

The Court of Appeal granted the motion and dismissed the appeal.

Jean Charbonneau, for appellant.

Laurendeau & Archambeault, for respondent.

CROSS, J.

CROSS, J.:—The appellant says that that adjudication has decided the cause and is final, and he cites *Scott* v. *Payette*, 2 L.N. 335, and *Chanteloup* v. *Dominion Oil Cloth Co.*, 2 L.N. 314.

The respondent says that the judgment makes the arbitrator's report valid proof in the cause, but that the action remains to be decided on the merits, and that this judgment is consequently merely interlocutory.

In the case of a report of experts, accountants or practitioners, the rule is that, if the report is free from irregularities or causes of nullity, it forms part of the evidence in the case (art. 416), but the Court is not bound to adopt the findings (arts. 409, 410).

In case of award in arbitration, the rule is that the party intending to avail himself of it may apply for its homologation and for judgment in conformity with it. The other party cannot oppose it, except by an application, to have the report declared inadmissible on the ground of irregularity or of some other cause of nullity (art. 417). Experts, accountants and practitioners make findings and report them. Arbitrators give decisions.

The respondent's motion asked for one of the two things mentioned in art. 417, namely, homologation, but did not ask for the other, namely, judgment in accordance with the award.

I consider that the respondent's motion is well-founded.

The decision in *Scott* v. *Payette* and *Chanteloup* v. *Dominion Oil Cloth Co.*, turned upon the difference between an arbitrator's award and an expert's report, the latter of which, it was held, merely amounts to so much evidence in the case and leaves the parties free to make further evidence, whereas an arbitrator's award is a decision. That has already been pointed out, and, for the present purpose, it may be taken that it is no longer open to either party to tender further evidence at the final trial.

QUE.

K.B.

RIOPELLE v. CITY OF MONTREAL.

Cross, J.

Nevertheless there is as yet no final judgment for or against either party in the cause.

No doubt the judgment appealed against is one which in part decides the issues. But judgments which in part decide the issues are treated of as being interlocutory in art. 46 C.P. which provides for appeal.

In that sense, I consider that this is to be considered an interlocutory judgment and that leave to appeal should have been applied for.

Speaking in this particular for myself, I would further say that, when the action comes before the Superior Court for final hearing, the appellant can renew his objections and ask the Court to revise the order of homologation.

The Judge in pronouncing final judgment on the merits can revise and reverse judgments previously given upon incidents in the action: *Perrault* v. *Grand Trunk R. Co.*, 14 Que. K.B. 245; *Archer* v. *Lortie*, 3 Q.L.R. 159; *Crane* v. *McBean*, 4 Que. S.C. 331.

And, in the event of a final judgment adverse to the plaintiff and an appeal therefrom, the appellant would be entitled to open up the merits of this order of homologation: *Bayard* v. *Dinelle*, 7 Q.B. 480; *Wilson* v. *Shawinigan Carbide Co.*, 37 Sup. C.R. 535.

I would grant the motion and quash the appeal.

Appeal dismissed.

CLARK v. THE SAINT CROIX PAPER CO.

N.B.

S. C.

New Brunswick Supreme Court, McLeod, C.J., and White and McKeown, JJ. April 25, 1915.

1. APPEAL (§ VII I—375)—WHAT REVIEWABLE—DISCRETION OF COURT—GRANTING TRIAL BY JURY.

Where the pleadings and facts disclosed by the affidavits before the trial judge vest in him jurisdiction to consider and decide whether the action can be most conveniently tried with or without a jury under O. 36, r. 4 (N.B.), and he exercises his discretion and determines the question, the Supreme Court on appeal will not interfere with that discretion except in case of gross error.

Statement

APPEAL from a judgment of Barry, J.

M. G. Teed, K.C., for defendant, appellant.

W. J. Richardson, for plaintiff, respondent.

McLeod, C.J.

McLEOD, C.J. (Oral):—The defendant company appealed

N.B.

S. C.

CLARK
v.
ST. CROIX PAPER CO.

McLeod, C.J.

from an Order of Barry, J., directing that the issues in this action be tried with a jury. It is claimed that under O. 36, r. 4, which provides:—

> The Court or a Judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury,

the Order should have directed a trial without a jury. While we think the authorities are to the effect that there is an appeal from an order made under O. 36, regulating the mode of trial, nevertheless, assuming (as we think is the case here), that the pleadings and the facts disclosed by the affidavits before the Judge, vest in him jurisdiction to consider and decide whether the action can be most conveniently tried with or without a jury, and he does exercise his discretion and determine the question, this Court will not interfere with that discretion on appeal even though they might have come to a different conclusion on the facts. It was argued that r. 5 of O. 36, is controlled and limited by rr. 2 and 4, where the pleadings and facts involve an issue requiring a prolonged investigation or any scientific or local investigation. Admitting this contention to be correct it is, after all, a question for the Judge directing the mode of trial to determine whether the issue does involve the consideration of facts that can be more conveniently tried by a Judge without a jury than with a jury, and if he does exercise a legal discretion and determine the question the Court on appeal, except in case of gross error, should not interfere.

There is this further to be said. R. 6 provides,

> notwithstanding anything in r. 5 contained, the Judge presiding at the trial may, in his discretion, direct that the action or issues shall be tried or the damages assessed by a jury.

So that no matter what the judgment of this Court might be, the trial Judge would have the right to direct the issues to be tried with a jury—at least that is my opinion—I understand my brother White does not concur in the last proposition. I think the appeal should be dismissed with costs.

White, J.

WHITE, J. (Oral):—I agree that Barry, J., on the pleadings and on the facts presented to him, had jurisdiction to exercise a legal discretion as to the most convenient mode of trial, and having exercised it on proper and sufficient material, his order

should not be interfered with on appeal. But I am not prepared to hold that if the Court or a Judge thereof, after solemn consideration and mature deliberation, has come to the conclusion that the issue is one that should be tried without a jury under r. 4, of O. 36, a Judge on the trial would have a right to disregard the order and order a trial with a jury.

N. B.
S. C.
CLARK v. ST. CROIX PAPER CO.
White, J.

McKEOWN, J.:—I agree with the Chief Justice.

McKeown, J.

Appeal dismissed.

BLACK DIAMOND OIL FIELDS v. CARPENTER. DIST. CT. J.

ALTA.
S. C.

Alberta Supreme Court, Harvey, C.J., Stuart, Beck and Simmons, JJ. October 5, 1915.

1. CORPORATIONS AND COMPANIES (§ I E—192)—GOVERNMENTAL REGULATION—INVESTIGATION OF OIL COMPANIES—SCOPE OF STATUTE.

Chapter 2 of the Statutes of Alberta, 1908, authorizing the appointment of commission for the purpose of inquiries into matters connected with the good government of the province or the conduct of the public business thereof, does not permit any investigations into the private affairs and operations of private oil corporations.

MOTION for injunction against inquiry commission.

Statement

A. A. McGillivray, for plaintiff.

Frank Ford, K.C., for defendant.

HARVEY, C.J.:—Ch. 2 of the Statutes of 1908 provides by sec. 1, that:—

Harvey, C.J.

the Lieutenant-Governor-in-Council may, when he deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislative Assembly and connected with the good government of the province or the conduct of the public business thereof, appoint commissioners to make such inquiry and to report thereon.

The second section provides that the commissioners may be given power to summon witnesses and require them to give evidence under oath, and to produce documents with the power of a Court of Record to enforce their attendance and compel them to give evidence. These sections are a re-enactment of two sections of ch. 12 of the Consolidated Ordinances, 1898.

On July 5, 1915, an Order in Council was passed which recited that it was—

expedient that inquiry be made into and concerning the promotion, incorporation, management and operation of the various companies incorporated by and under the authority of the Companies Ordinance, being ch. 20 of the Ordinances of 1901 as amended, whose objects in whole or in part are the acquiring, managing, developing, working or selling of mines, mineral claims, and mining properties including petroleum oil or natural gas claims

ALTA.
S. C.
BLACK DIAMOND OIL FIELDS v. CARPENTER, DIST. CT. J.
Harvey, C.J.

or properties, or any of them, and into and concerning the operation and management of the various stock exchanges in the province, or any of them, including for greater certainty, but so as in no way to restrict the generality of the foregoing, the expenses of management, investment of funds, nature of properties or claims held, the manner and cost of any sale or disposal of stock and other allied questions.

The Order then directed the appointment under the authority of the above-mentioned statute of the defendant, who is a Judge of the District Court at Calgary as commissioner, "to make such inquiry and report thereon," and further directed that there be conferred upon him, "the power of summoning witnesses before him and of requiring such witnesses to give evidence on oath,—and to produce such documents as the said Arthur Allan Carpenter may deem requisite to the full investigation of the matters into which he is appointed to inquire," and also, "the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any Court of Record in civil matters."

Pursuant to the Order in Council, a commission was issued to the defendant which purported to confer on him the powers specified in the order for the specified purposes.

The plaintiff by its statement of claim alleges that it is one of the companies referred to in the Order in Council and commission, and that it has been notified by counsel for the defendant that its affairs will be inquired into and its officers required to attend and give evidence.

It now applies for an injunction to restrain the defendant from making such inquiry and from summoning its officers to give evidence and produce documents, which inquiry it alleges will be prejudicial to it in respect of certain pending litigation.

The motion was made to my brother Stuart, who directed that it be referred to the Appellate Division.

A number of objections were taken to the validity of the commission but I do not find it necessary to consider more than one which appears to me to be fatal.

I am of opinion, that an inquiry such as the one proposed does not come within the terms of the statute under which it is directed. The title of the statute is, "An Act respecting in-

quiries concerning Public Matters." The Ordinance from which it is taken which had the same title, contained another section making provision for the appointment of inspectors to inspect the affairs of clerks of the Court, sheriffs and registration clerks.

Mr. Ford argues in support of the Order in Council and the commission that the Act intends to give power wide enough to include inquiries into any matter which may be the subject of legislation by the legislature. It does not appear to me to be necessary to determine the exact scope of the Act though there seems much room for argument that it is intended to refer to matters affecting the administration, rather than the enactment, of the laws. The commission is to be issued at the instance of, and by, the Lieutenant-Governer in Council who is charged with the administration of the laws under our constitutional system. The information to be gained is not for the use of the legislature, but for the use of the executive. The fact that in practice the Ministers of the Crown do frame and propose to the legislature much of what becomes public legislation, does not, in my opinion, weaken the argument because it is not in their capacity as administrators but rather in that of legislators that this is done. If, as in the United States of America, they had no seats on the legislature their control of legislation, if any, could only be indirect.

And even if the words are wide enough to support Mr. Ford's contention it may be that the general scope of the Act and other considerations require them to be restricted as was pointed out in a somewhat similar case by Middleton, J., in *Re City of Berlin & Co.J. of Waterloo*, 22 D.L.R. 296. In Maxwell on Interpretation of Statutes (5th ed., p. 132), it is stated that:—

> general words and phrases, however wide and comprehensive in their literal sense, must, usually be construed as limited to the actual objects of the Act and as not altering the law beyond.

For this case, however, it is not necessary to decide which is the true view, because a reading of the Order in Council and the commission furnishes not the slightest suggestion that the information to be gained from the inquiry is to be used for any legislative or any other public purpose. It does disclose, however, that the inquiry is limited almost entirely to the private

ALTA.

S. C.

BLACK DIAMOND OIL FIELDS v. CARPENTER, DIST. CT. J.

HARVEY, C.J.

affairs of the companies and stock exchanges, and the commissioner is given the power to compel the production of evidence, even by fine and imprisonment. Maxwell (p. 461), points out that it is a recognized rule that statutes should be interpreted, if possible, so as to respect private rights, and states:—

It is presumed, where the objects of the Act do not obviously imply such an intention, that the legislature does not desire to confiscate the property or to encroach upon the rights of persons, and it is, therefore, expected if such be its intentions it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt.

The title of the Act indicates that it is "Public Matters" that are to be inquired into. How can it be said that the private affairs of a company is a public matter. It may well be that some members of the public are affected by them but that does not make them a public matter.

The private affairs of a provincial company may be investigated, however, by the authority of the Lieutenant-Governor in Council under sec. 125 of the Companies Ordinance of 1901. If they could have been investigated already by the authority of the Ordinance Respecting Inquiries Concerning Public Matters which was in the statute books when the Companies Ordinance was passed, there would appear to have been no necessity for making the provision contained in sec. 125; moreover, if they could have been so investigated under the general ordinances without restriction, the limitation imposed by sec. 125 would seem impliedly to have cut down the general power to make such investigation and limited it to the conditions specified in the section, namely, upon the application of some of the shareholders, that is to say, upon the application of those whose private affairs are to be investigated.

It is unnecessary to consider the question of the prerogative right of the Crown to issue a commission of inquiry, both because the commission is expressly declared to be issued under the authority of the Act, and because, as is expressly stated by the Judicial Committee in *A.-G. for Australia* v. *Colonial Sugar Refining Co.*, [1914] A.C. at 257:—

A Royal Commission has not, by the laws of England, any title to compel answers from witnesses, and such a title is, therefore, not incidental to the execution of its power under the common law

For the reasons stated, I am of opinion that the Lieutenant-Governor in Council had not authority to direct the issue of the commission in question, and that therefore the defendant is without authority to proceed with the inquiry in the manner proposed. It follows, therefore, that the plaintiff is entitled to the injunction asked for. It should have the costs of the application.

STUART, J.:—In my opinion, this application may be disposed of very shortly, and upon plain and simple grounds. The statute under which the commission to the defendant was issued is entitled, "An Act respecting Inquiries concerning *Public Matters.*" It is now well settled that the full title of an Act of Parliament may be read in order to assist the Court in arriving at its meaning. See cases cited in Craie's Hardcastle, p. 180. The first section of the Act authorizes the Lieutenant-Governor in Council to appoint commissioners to enquire "into and concerning any matter within the jurisdiction of the legislative assembly and connected with the good government of the province or the conduct of the public business thereof." The second section authorizes the Lieutenant-Governor to confer upon the commissioners the power of summoning witnesses and compelling them to give evidence on oath.

The Order-in-Council appointing the defendant, authorizes him—

> to enquire into and concerning the promotion incorporation, and operation of companies incorporated under the Companies Ordinance whose objects in whole or in part are the acquiring, managing, developing, working or selling mines, mineral claims and mining properties including petroleum oil or natural gas claims or properties and into and concerning the operations and management of the various stock exchanges in the province or any of them including for greater certainty but so as in no way to restrict the generality of the foregoing. The expenses of management, investment of funds, nature of properties or claims held, the manner and cost of any sale or other disposal of stock and other allied questions.

The question is whether the authority thus conferred upon the commissioner, the defendant, was within the terms of the statute. In this particular case it is shewn that the plaintiff company was notified, that on a certain date an "investigation" would be made "into its affairs," and there is no doubt that it

ALTA.

S. C.

BLACK DIAMOND OIL FIELDS v. CARPENTER, DIST. CT. J.

Stuart, J.

was intended to make such enquiries in regard to that company as were indicated in the Order-in-Council. I have no hesitation in saying that the statute does not authorize such an enquiry. Reading the title and the first section all together, as we must do where the meaning is doubtful, it seems to me to be plain that the meaning of the Act is that an enquiry may be made into any matter connected with the *public* affairs of the province. I am not at present prepared to deny that, under such an authority, the operation of any statute of the legislature might properly be enquired into. Assuming this to be so, witnesses considered competent to express an opinion upon the question whether the statute or any clause thereof worked satisfactorily or otherwise might, no doubt, be called, and their opinion obtained, and they might no doubt even be requested to state whether they knew of any particular case or instance in which evil or good effects or results had followed. But all that would be of the nature of a general enquiry. When, however, it is proposed to institute an "investigation into the affairs" of a particular company it seems to me to be perfectly plain that authority given by the statute is exceeded. It may, no doubt, be possible by a series of logical concatenations to shew that any matter of any kind is a matter "connected with the good government of the province." But the words of a statute are often so general that they may receive *some* limitation (*Clayton* v. *Fenwick*, 6 El. & Bl. 114, 131), and the whole of the statute and the general purport of it must be looked at to find what that limitation is. For myself, the very use of the word "public," first in the title and again in sec. 1, in the phrase, "the public business thereof," suggests a very obvious and sensible limitation. The point where an enquiry limited as I suggest would pass beyond the limitation and into the details of private affairs might in some cases be uncertain, but that does not remove the necessity of fixing and drawing the line.

In Craie's Hardcastle, p. 173, it is said that, "it is a rule as to the limitation of the meaning of general words used in a statute that they are to be if possible, construed so as not to alter the common law." In *Nolan* v. *Clifford*, 1 Australian C.L.R. 429, Griffith, C.J., said:—

It is always necessary in dealing with any law that alters the common law and especially where the common law rights of the liberty of the subject or relating to property are concerned to consider what was the previous law and what were the apparent reasons for the alteration made and then to see what the legislature has done to remedy what it conceived to be defects in the law.

There is no doubt that while under his prerogative which is part of the common law, the sovereign might cause an enquiry to be made into private affairs of any man, he had, under the common law, no power to authorize witnesses to be summoned and to force them to give evidence upon oath upon such an enquiry. In my view, therefore, if it was intended to give the Lieutenant-Governor-in-Council power to enquire into the private affairs of a company and to authorize commissioners to summon witnesses and force the giving of evidence upon oath, it was necessary for the legislature to say so specifically: *Arthur* v. *Bokenham*, 11 Mod. 150.

Something, of course, might be said for the view that a company incorporated under the Companies Ordinance, is not entitled to be treated as a mere private and single individual. This view was not, as far as I recall, referred to on the argument, at any rate not in this exact form. Our Ordinance makes no such definite distinction between public and private companies, at least these distinctive terms are not used, as is now the case, I believe, in the English Companies Act. I should incline to the opinion that the affairs of the company are the private affairs of the shareholders and the officers, and certainly have nothing to do with the "Public business of the Province." In any case there is nothing before us to indicate that the plaintiff company may not be a company of the class which, under the English Act, is termed a private company. Moreover, as the Chief Justice has pointed out, the Companies Ordinance itself makes provision for an official investigation under oath of the affairs of any company incorporated under it upon the application of a minority of the shareholders, and while what is called the "parliamentary exposition" of a former Act by a later Act is not, *per se*, conclusive, the Courts can properly look at a later Act for some slight assistance at least in interpreting a former one. I think, therefore, that there is a very plain and

ALTA.

S. C.

BLACK DIAMOND OIL FIELDS v. CARPENTER, DIST. CT. J.

Stuart, J.

Beck, J.

Simmons, J.

simple meaning which can be given to the Act, and that its evident purpose can quite effectively be carried out without extending the wide general term, "good government of the province" so very far as to cover an enquiry such as was proposed to be made into the affairs of the plaintiff company. I think, therefore, the injunction prayed for should be granted with costs, to be paid by the defendant, which I assume he personally will not be allowed by the executive to bear.

BECK, and SIMMONS, JJ., concurred with HARVEY, C.J.

Injunction granted.

QUE.

C. R.

LAVERY v. GRAND TRUNK R. CO.

Quebec Court of Review, Tellier, Greenshields and Panneton, JJ. May 7, 1915.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—INJURIES IN COURSE OF EMPLOYMENT.

An accident cannot be said to have happened by reason of or in the course of his work, so as to make a claim under the Workmen's Compensation Act (Que.), where the employee, without the knowledge or permission of the employer, goes to a place where he is forbidden to go, and meets with an accident while there.

Statement

APPEAL from judgment of Fortin, J., Superior Court, in favour of plaintiff in action under the Workmen's Compensation Act. Reversed.

On January 11, 1913, the plaintiff's husband was in the employ of the company defendant, as a working foreman carpenter. He was at work at the roundhouse of the company defendant, situated at Turcot. The roundhouse appears to be surrounded with tracks, which are used as a shunting yard for the making up of trains. January 11 was a Saturday. About 8 o'clock in the morning, the paymaster arrived at the works to deliver to the men their pay cheques. Dean received his about that hour in the morning. At some distance from the roundhouse, there is a branch of the Molsons Bank. The bank can be reached without crossing the tracks, but a man leaving the place where Dean was working, with the intention of going to the bank, and without crossing the tracks, would have to pass before the office—and could be easily seen. At half-past eleven that morning, Dean left his work in company with a fellow-workman, Naylor, to cross the tracks for the purpose of getting his pay cheque cashed at the bank and returning to his work.

A train of cars was being made up. There was a space between two cars of from two to four feet, and Dean, who was in advance of his companion, started to pass between these two cars, when an engine at one end of the line of cars brought the two together, and he was caught between the couplers and killed. Hence, the action by the widow for $2,025.

The defendant pleads in substance: First, that the accident did not happen in the course of or on the occasion of his work, and, secondly, that his death was due, if not to the intentional, to the inexcusable fault of the deceased.

The Superior Court maintained the plaintiff's action, but held that the deceased was guilty of inexcusable fault, and reduced the plaintiff's claim by one-half, that is, $1,025, the Court citing a judgment from Sirey, 1904-1-177.

Meagher & Coulin, for plaintiff.

Henri Jodoin, K.C., for defendant.

GREENSHIELDS, J.:—Both parties are dissatisfied with the judgment and each party has inscribed before this Court,—the defendant for the purpose of obtaining a reversal and dismissal of the plaintiff's action, and the plaintiff with a view of increasing the condemnation. Greenshields, J.

In my opinion, the whole question to be decided is, whether the accident happened by reason of or in the course of the work of the deceased?

The principle underlying the Workmen's Compensation Act, is, that the employer is practically the insurer of his employee against risks of accidents which may happen in the course of his work, and while he is under the control and orders of his employer, and while his time is being used for the benefit of his employer.

I should say that if an employee leaves his work without the knowledge, and, therefore, without instructions from his employer and goes to a place where he is not told to go, but, on the contrary, is told not to go, and thereby increases the danger or risk and meets with an accident, it is not an accident which happened in the course of, or by reason of his employment.

As a general statement of the common law, it can be said, that an employee while in the pay of his employer, and while

QUE.
C. R.
LAVERY
v.
G.T.R.
Greenshields, J.

his time is his employer's time, has no right to leave his work to attend to his own private affairs, even in the absence of any special prohibition to that effect.

In the present case the deceased owed his whole time to his employer: his employment did not necessitate him crossing this dangerous place: when crossing, he was not under the orders of, nor doing the work of his employers; in fact, it is in proof that there was a special prohibition insisted upon by the defendant, that these tracks should not be crossed, and that men should not leave their work, and particularly should not leave their work in order to obtain money on their pay cheques. The reason of this prohibition is stated in the proof, and it is found in the proof that some men at least did more than cash their cheques: they spent some of the proceeds in drink.

I should state this briefly as follows: The deceased left his employment against instructions: he went, for no reason connected with his work, into a dangerous locality for his own private purposes. He exposed himself to a danger which was not incident to his employment and in no way connected with it: he met with an accident, because he left his work and placed himself in a dangerous position; and for that reason, I should say, his widow must be denied the relief sought under the Act.

I should dismiss the plaintiff's inscription with costs. Upon the defendant's inscription I should reverse the judgment and dismiss the plaintiff's action with costs.

Panneton, J.

PANNETON, J.:—The first question to solve is: Did the accident in which the plaintiff's husband lost his life occur by reason of or in the course of his employment? The employer is bound to protect his employees *quoad* all that is connected with the performance of his work. The moment the employee is on the premises of his employer going to or coming from the special place where he is working or on any part of the premises where he may reasonably be expected to be, the employer is responsible for any accident, unless intentionally caused, which may befall to him, even if the employer is not guilty of any fault.

In this case a special way was used to give access to the place where the plaintiff's husband was working, so that the time

QUE.
C. R.
LAVERY
v.
G.T.R.
Panneton, J.

checker would know of his coming in and of his going out. But there was another part of the defendant's yard where the shunting of trains was being done, which rendered it dangerous, where the plaintiff's husband had no business whatever to go, and upon which it was prohibited to pass.

The plaintiff's husband knowing all that, to avoid being seen by the time checker, leaves his employment about half an hour before he should go to get his cheque cashed, chooses to pass on that forbidden part of the yard and is killed.

Is it reasonable and legal to hold the employer liable in damages for that accident? I think not. He was not there by reason of or in the course of his employment. The forbidden part of his employer's premises was to him the same as the premises of a third party.

I am of opinion to reverse the judgment, and to dismiss the plaintiff's action. *Judgment reversed.*

ROYAL BANK v. HICKNEY.

SASK.
S. C.

Saskatchewan Supreme Court, Lamont, J. September 13, 1915.

1. BILLS AND NOTES (§ V B 3—147)—HOLDER IN DUE COURSE—COLLATERAL TO BANK—NON-EXISTENCE OF DEBT—DEFENCES OF MAKER—FAILURE TO MAKE TITLE TO LAND.

A promissory note indorsed over to a bank by the payee named in the note, even as a collateral, does not necessarily constitute the bank a holder in due course, where there is no existing indebtedness on the part of the payee to the bank and is, therefore, not subject to summary judgment in face of a plea that the note was given to the payee on account of a sale of land to which no title could be made.

[*Bank of B.N.A.* v. *McComb*, 21 Man. L.R. 58, applied.]

Statement

APPLICATION for summary judgment on a promissory note.

C. M. Johnson, for plaintiff.

L. B. Ring, for defendant.

Lamont, J.

LAMONT, J.:—This application will be dismissed.

To entitle a plaintiff, under Rule 135, to an order striking out an appearance and giving leave to sign summary judgment, someone who can swear positively to the facts must make an affidavit verifying the cause of action, the amount claimed, and stating that, in his belief, there is no defence to the action.

The action is brought on a promissory note for $1,013, made by the defendant to N. G. Boggs and endorsed by him to the bank.

The defence is that the note was given to Boggs on account

SASK.

S. C.

ROYAL BANK v. HICKNEY.

Lamont, J.

of an instalment of purchase-money due under an agreement for the sale of land, and that Boggs cannot make title to the land. In her affidavit, the defendant also sets up that the note was given to Boggs on his assurance that he would not use the note, and she further states that she intends to amend her defence by setting up this and other matters, which she has been advised will constitute a complete defence to the action.

If Boggs cannot make title to the land sold, this defence as against him is good; for a purchaser cannot be compelled to pay the purchase-price of land unless the vendor can make title, except in those cases where such purchaser has covenanted to pay irrespective of title. If Boggs took the note under an agreement not to use it until he could make title, his endorsing of it to the bank, without being able to make title, constitutes a fraud upon the defendant.

If these defences are available against the plaintiffs, they are not entitled to judgment.

The plaintiffs allege that the note was endorsed to them and that it is their property. The defendant denies these allegations, and alleges that, if the plaintiffs are the holders of the note, they took it without giving any consideration therefor.

In his affidavit, the manager of the plaintiff bank at Saskatoon stated that the plaintiffs were the holders ot the note in due course, and that the bank had no notice or knowledge of the matters referred to by the defendant in her statement of defence. On being cross-examined on his affidavit, however, he admitted that he had no knowledge of the circumstances under which the bank became the holders of the note, as it had been taken by his predecessor, and that it was not clear to him whether the bank obtained it as discount, as collateral, or merely as a collection. The note was turned over to the bank under a hypothecation agreement, which recited that it was held by the bank as collateral security for the present and future indebtedness of the customer. There is no evidence that Boggs was or is indebted to the bank, except such inference as may be drawn from the hypothecation agreement. In the face of the admission of the plaintiffs' manager, that it was not clear whether the note was taken as collateral or for collection, it cannot be

conclusively inferred that Boggs was, at the time, indebted to the bank. Assuming, however, that the note was taken as collateral security to Boggs' account, the plaintiffs are still not entitled to judgment, as they have not shewn that at the time they took the note there was an indebtedness on the part of Boggs then due.

In *Bank of B.N.A.* v. *McComb*, 21 Man. L.R. 58, it was held by the Court of Appeal of Manitoba that:—

1. The mere existence of a liability of a customer to a bank on a promissory note not yet due is not a sufficient consideration, under sec. 53 of the Bills of Exchange Act, for the transfer by the customer to the bank of the promissory note of a third party as collateral security so as to constitute the bank the holder in due course of such promissory note or to give the bank a better title to it than the customer had as against the maker, unless there is evidence that such note was transferred pursuant to a previous agreement to give security.

There being no evidence of any debt due from Boggs, or of any previous agreement to give security, the plaintiffs are not entitled to summary judgment. *Motion dismissed.*

FORT GEORGE LUMBER CO. v. GRAND TRUNK PACIFIC R. CO.

British Columbia Supreme Court, Clement, J. August 26, 1915.

1. WATERS (§ I C 5—52)—NON-TIDAL STREAM—OBSTRUCTION OF NAVIGATION—RAILWAY BRIDGE—LIABILITY.

The Fraser River in its upper waters, although non-tidal, is a common and public highway, which the public has the right to freely use the watercourses thereof for the purpose of navigation, an obstruction of which by the erection of a bridge by a railway company will render the latter liable in damages.

2. WATERS (§ I B—10)—NAVIGATION—DOMINION CONTROL—EXTENT OF.

The grant to the federal Parliament of legislative power over the subject-matter of navigation and shipping in no way implies federal ownership of the rivers, lakes, and sea-coast waters upon which ships may ply, or in regard to which there may exist rights of navigation, either on the part of the public or on the part of private owners.

Statement

ACTION for damages for obstructing navigation.

C. W. Craig, for plaintiffs.

W. B. A. Ritchie, K.C., for defendants.

Clement, J.

CLEMENT, J.:—In this case the plaintiff company claimed damages, said to have been caused to them by the acts of the defendant company, in obstructing the navigation of the Upper Fraser river, during the construction of their railway bridge over the river in the immediate vicinity of Prince George—to use the present name—above the plaintiff company's mill, between them and their sources of supply.

B. C.

S. C.

FORT GEORGE LUMBER CO. v. G.T.P.R.

Clement, J.

Some weeks ago I gave judgment for the plaintiff company, intimating, however, that I would put in writing my reasons for rejecting the contention of the defendant company that their exists no right in the public, including the plaintiff company, to "navigate" the waters, admittedly and manifestly non-tidal, of the Upper Fraser. The question is one of the greatest importance, about which much legal literature has been written without, I think, any decision which, in strict law, binds this Court.

The grant to the federal parliament of legislative power over the subject-matter of navigation and shipping in no way implies federal ownership of the rivers, lakes, and sea-coast waters upon which ships may ply, or in regard to which there may exist rights of navigation either on the part of the public or on the part of private owners. While there can be little doubt that the Parliament of Canada may, as against private persons, and with or without making compensation, take and establish as public highways of navigation, such waterways as it sees fit, there is apparently as little doubt that it cannot create a public right of navigation over provincial Crown lands covered by water where no public right of navigation now exists. As a matter of fact there is no federal Act which purports to create a right of navigation, either public or private, even over privately owned land covered by water; and certainly none as to provincial Crown lands so covered. Federal legislation, in other words, deals with the exercise of the public right of way by water known as the right of navigation: (*Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839), aiding and safe-guarding it as may be thought proper. And wherever ships ply, whether lawfully or as trespassers, those in control must conform to the laws of navigation as laid down in federal enactment. The question, however, as to the existence or non-existence of a public right to navigate all Canadian waterways which are in fact capable of being used for purposes of travel or transportation is not touched by any federal legislation, although it is open to argument that all such legislation is based upon the assumption that a public right exists to navigate all waters which in fact are capable of user as above indicated.

B. C.

S. C.

FORT GEORGE LUMBER CO. v. G.T.P.R.

Clement, J.

The Crown's ownership of the bed or soil underlying tidal waters is subject to a paramount right in the public to navigate such waters and to fish therein otherwise than by contrivances fixed in the soil: *Re B.C. Fisheries*, 15 D.L.R. 308, [1914] A.C. 153, 83 L.J.P.C. 169, and the Crown without parliament cannot derogate from such public rights. Legislative power in Canada in respect to them rests exclusively with the federal parliament. But, in regard to non-tidal waters, the rule of the common law is that there can be no public right of fishing therein: *Johnston* v. *O'Neill*, [1911] A.C. 552, and in the *B.C. Fisheries Case*, it was held by the Privy Council that the English common law rule was in force in British Columbia, the rule being thus stated:—

> The fishing in navigable non-tidal waters is the subject of property, and, according to English law, must have an owner, and cannot be vested in the public generally.

As to navigation, the rule of the common law was also clear, it would seem, that in the case of non-tidal waters there was no paramount right in the public to use them for purposes of navigation or as highways for travel and transportation. As against the Crown's grantee and his successors in title—that is to say, as against a private owner—a right of way by water might be acquired by the public just as a right of way might be acquired by land: *Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839; *Keewatin Power Co.* v. *Kenora*, 13 O.L.R. 237, 16 O.L.R. 184, but there is, it is conceived, no case in England in which it has been held that such a right had been acquired in respect of waters, navigable in fact, flowing over Crown lands. There is, however, a strong current of authority in Canadian cases that the rule of the common law of England denying the existence of a public right of navigation in non-tidal waters is not the law of Canada even in those provinces which have adopted the common law of England as the basis of their jurisprudence. The authorities are all collected in the elaborate judgment of Anglin, J., in the *Kenora case*, above cited, 13 O.L.R. 237. It has been considered that either *jure naturæ* or by a species of dedication by the Crown evidenced by throwing open the colonies for settlement, a public right, paramount to the title of any private

B. C.

S. C.

FORT GEORGE LUMBER CO. v. G.T.P.R.

Clement, J.

grantee of the Crown if not the Crown's title itself, has always existed to make such use as was possible of the natural waterways, non-tidal as well as tidal, as a means of travel and transportation in other words, that such waterways are public highways. The same view has obtained to some extent as to the existence of a right in the public to fish in such non-tidal waterways. How far the denial of this latter right by the Privy Council in the *B.C. Fisheries Case* 15 D.L.R. 308, may affect the question as to the existence of a public right of navigation upon non-tidal waters may be a question. In the Supreme Court of Canada upon the same reference, Duff, J., made use of this language:—

> It does not appear to me to be necessary for the purpose of dealing with this argument (namely, that under the statutory transfer to the Dominion of the "Railway Belt" in British Columbia only such rights were intended to pass as in the ordinary course would be granted to settlers) to express any opinion upon the very important question of how far and upon what principle public rights of navigation are recognized by the law of British Columbia as existing in non-tidal waters capable of being navigated. Certain rivers and lakes in that province, which from the first settlement of it have been used as public highways are, one cannot doubt, subject to a public easement of passage. Such rights can, in the case of such waters, be maintained upon grounds which involve no straining of the principles of English law. See *Re B.C. Fisheries*, 11 D.L.R. at 263.

Sir Charles Fitzpatrick, C.J., Davies, and Brodeur, JJ., concur *simpliciter* in the judgment of Duff, J. The judgment of Idington, J., does not touch this point; while Anglin, J., adhered to the views he had expressed in the *Kenora Case* in affirmance of the public right. And in a recent case in the Exchequer Court of Canada, Audette, J., expressed the view that, under the law of Quebec, such a public right exists in that province: *Leamy* v. *The King*, 23 D.L.R. 249, 15 Can. Ex. 177.

In delivering the judgment of the Privy Council, Viscount Haldane, L.C., speaking of the right of the public to fish in tidal waters, says (15 D.L.R. 315, 317, 318):—

> The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the fore shore and tidal waters, which were continuous with the ocean, if indeed it did not in fact first take rise in them. The right into which this practice has crystallised resembles in some respects the right to navigate the seas or the right to use a navig-

able river as a highway and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right as from immemorial antiquity, the Crown, as *parens patriæ* no doubt, regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be recognized as establishing a legal right enforceable in the Courts. . . . Neither in 1867, nor at the date when British Columbia became a member of the Federation was fishing in tidal waters a matter of property. It was a right open equally to all the public; and, therefore, when by section 91, "sea coast and inland fisheries" were placed under the exclusive legislative authority of the Dominion Parliament, there was in the case of the fishing in tidal waters nothing left within the domain of the provincial legislature. The right being a public one, all that could be done was to regulate its exercise, and the exclusive power of regulation was placed in the Dominion Parliament. Taking this in connection with the similar provision with regard to "navigation and shipping," their Lordships have no doubt that the object and the effect of these legislative provisions were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament and to leave to the province no right of property or control in them. It was most natural that this should be done, seeing that these rights are the rights of the public in general and in no way special to the inhabitants of the province.

Later on, speaking of the waters within the "Railway Belt," he says:—

So far as the waters are tidal, the right of fishing in them is a public right, subject only to regulation by the Dominion Parliament. So far as the waters are not tidal, they are matters of private property, and all these proprietory rights passed with the grant of the railway belt and became thereby vested in the Crown in right of the Dominion. The question whether the non-tidal waters are navigable or not has no bearing on the question. The fishing in navigable non-tidal waters is the subject of property and according to English law, must have an owner, and cannot be vested in the public generally.

The guarded language of the above extracts in reference to the public right of navigation is noticeable. There is really no expression of opinion as to existence or non-existence of such a public right in the case of non-tidal waterways which are navigable in fact. But I think that the views expressed, even upon a reference, by a majority of the Supreme Court of Canada as above indicated should be followed, at least by a Court of first instance. Accordingly I hold that the Fraser river in its upper waters is a common and public highway, taking judicial notice of the fact that, apart from recent and unchallenged commercial

B. C.

S. C.

FORT GEORGE LUMBER CO. v. G.T.P.R.

Clement, J.

user by steamboats and for the floating of logs, it had been from the earliest days of the colony a well-known highway for the traders of the Hudson Bay Co. and for early explorers.

I may add that this is in entire accord with my own opinion. It seems to me—to put it very shortly—that the case is governed by the principle laid down in reference to the binding effect upon the Crown of the inducements held out in the proclamation which followed upon the Treaty of Paris in 1763, and laid down by Lord Mansfield in the celebrated case of *Campbell* v. *Hall*, Cowp. 204. The Crown's invitation to all and sundry to "resort" to the British colonies in North America carried with it, I think, that without which the bread offered would have proved a stone, namely, the free use of the waterways as the only available highways for exploration and settlement; and, after settlement, for travel and transportation. And the conduct of the early governors was uniformly along the same line of invitation to "come up and possess the land."

Judgment for plaintiff.

QUE.

K. B.

LARIVIERE v. GIROUARD.

Quebec Court of King's Bench Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll JJ. February 26, 1915.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—MODE OF VALUATION—PERMANENT AND PARTIAL DISABILITY.

In determining the question of permanent incapacity under the Workmen's Compensation Act (Que.), whether partial or total, it must be taken in consideration what the injured could earn before the accident and the earning capacity after the accident, but the fact that the injured's earnings since the accident are as much as before is not conclusive on his ability to do the work, if his work is intermittent and the rate of his earnings varies according to the kinds of work he is engaged in.

Statement

APPEAL from judgment of Bruneau, J., Superior Court, in favour of plaintiff in an action under the Workmen's Compensation Act. Affirmed.

J. B. Brosseau, K.C., for appellant.

Cardin & Allard, for respondent.

Lavergne, J.

LAVERGNE, J.:—The accident is admitted; the respondent lost his right eye. It is admitted also that the respondent was then in the course of his employment and that the accident happened in the course of and during his work for the appellant. The permanent partial incapacity consists in a dimunition of

his capacity for work, which diminution is deemed to be incurable.

According to the words of the Act, the respondent would be entitled to an annuity equal to half the reduction of his ability to work. He was earning about $475 a year. The respondent was practising several trades, between other things he was the chauffeur of an automobile, a mechanician repairing automobiles, a carpenter, a day labourer and farm hand.

The doctors are of opinion that the loss of his right eye entails a decrease of ability which is fixed at 30 per cent. According to the terms of the Act, he would therefore be entitled to a life annuity of about $72; the Court granted him $59.37.

The fault charged against the respondent is not very satisfactorily proved, the evidence is contradictory. The workmen's foreman for the appellant was the son of the appellant and respondent was working in sight of that foreman. The foreman himself was doing the work in the same way as respondent.

I do not think there was any inexcusable fault on the part of the respondent. Nevertheless, the Judge, weighing the evidence, has reduced, in a certain measure, the claim of respondent. It seems to me beyond question that the loss of an eye for a workman, especially for the performance of some kinds of work, is a material diminution of his capacity for work. The respondent, according to the doctors, can no more be the chauffeur of an automobile, he can no more, with advantage, work as a carpenter; those two kinds of work were the most profitable he could perform; he was the holder of a chauffeur's license. He has little more left than the faculty to work as day labourer or farm hand.

The fact that since he has recovered from his wound he may have earned for some time as much as he had formerly earned as a day labourer, cannot be considered as a decisive reason for fixing his earnings at the minimum. That incurable infirmity of which he suffers, will always be prejudicial to him. Those facts have been taken into consideration by the tribunal of first instance. The annuity granted is absolutely small and I am of opinion that there is no reason for interfering with the judgment.

QUE.

K. B.

LABIVIERE v. GIROUARD.

CROSS, J.

I therefore conclude that the appeal should be dismissed with costs.

CROSS, J.:—The effect of the Workmen's Compensation for Accidents law is to relieve the employer from responsibility in damages and to substitute, instead, responsibility in the shape of liability to pay "compensation."

The amount of the compensation payable, though dependent upon "incapacity," varies in proportion to the extent to which "wages" are reduced by the accident.

Incapacity means incapacity to earn and is consequently a thing different from disfigurement. If the respondent's earning capacity at present is as great as it was before the accident, no compensation is payable.

In other words, if his incapacity has come to an end, his right to compensation no longer exists, because it is measured by "a rent equal to half the sum by which his wages have been reduced in consequence of the accident:" Art. 7522.

Under the operation of Workmen's Compensation Acts, numerous decisions are to be found in cases of workmen putting an end to the weekly compensation, when it has been proved that the man could command wages equal to those earned by him before the accident: *Dempsey* v. *Caldwell & Co.*, [1914] S.C. 28; *Jones* v. *Anderson*, 31 T.L.R. 76. And in some cases where, notwithstanding proof of the re-established earning power, it remains doubtful if there will not be a future recidivation of partial incapacity, the compensation has been reduced to a nominal rate so as to preserve a right to apply later on for an increase: *Taylor* v. *London & N.W.R. Co.*, [1912] A.C. 242.

The appellant contends that the proof shews that the respondent's "wages" since the accident are not lower that they were before it; that in fact they are higher.

The respondent's work has been intermittent. It is true that, in one or two instances since the date of the accident, his rate of earnings has been greater than his average rate of earnings before the injury. That, however, is not conclusive.

It is true that it can be said, on the one hand, that:—

any damage besides the reduction in the ability to work does not give any right to indemnity. Such are the damages resulting, in a moral or social point of view, from the diminution of the generator, faculties or cor-

poral damage, or disfigurement, etc. (Beaudry, Lacantinerie et Wahl. Louage, No. 2168).

But, on the other hand, when it comes to be a question of ascertaining what the extent of the incapacity is, it can be said that:—

> to determine the reduction that the accident charges on the salary, the former salary of the workman must be compared not to his new salary, but to the salary he could get owing to his intelligence and aptitudes. (No. 2170.)
>
> It is wrongly objected that the law bases the indemnity upon the diminution in the salary: the law means the salary to which the workman might aspire. It does not even matter if the salary of the workman be superior to its former rate. (No. 2171.)

The questions to be kept in view are therefore. Having regard to the workmen's powers and faculties, what wages can be earned, and by how much, if at all, are they less than what he was in fact earning before the date of the accident?

It is fallacious to reason, as does the respondent, that the loss of an eye means a permanent partial loss of earning capacity. It may or it may not mean that. It is a question of fact to be decided in each case. and it is a mistake for a Court to give effect to generalizations made by physicians or statisticians, such as have been put forward in this case, to the effect that the loss of an eye is a loss of from twenty to forty per cent. of earning capacity.

What these experts have in mind is, on the one hand, a measure of potential capacity to which a workman, if uninjured, can attain, and, on the other hand, his potential capacity as he stands affected by the injury, and they call the difference a difference in capacity (capacité).

It is clear that that difference is not the difference of wages which the statute has in view. It is probably a difference or impairment which a Court might have allowed for in an action in recovery of damages at common law or under art. 1053 C.C., but is not a proper measure to apply under the statute.

The opinions of such experts may be of assistance to the Court in the determination of the particular question of fact, namely, what wages can the workman now command, but beyond that they are irrelevant matter.

QUE.

K. B.

LARIVIERE v. GIROUARD.

CROSS, J.

I have considered it very appropriate to make these observations, because with all deference, I cannot but regard it as an error to lay down, as is done in the judgment before us, a general proposition to the effect, "que l'on doit consi-considérer la perte d'un œil comme entraînant une incapacité permanente partielle."

The question in this case is, how much less can the respondent earn now, having lost his right eye, than he was earning annually before he was injured, not, how much less than the potential maximum to which he might have developed his earning capacity but for the accident, because the injury is to determine how much the wages have been "reduced" and there can be no reduction from a rate or scale which has never been attained. The old rate is the rate actually earned, not the rate which might have been earned. The new rate is the rate which the workman, having regard to his aptitude, can command, and it may be less or more than what, for the time being, he may happen to be earning.

Notwithstanding the criticism upon which I have just ventured, however, I do not find that the learned Judge proceeded upon any wrong principle when he came actually to measure the reduction of the wages.

Having regard to the difficulty, which must present itself in these cases of partial disability, of determining what is the present rate of wages which the injured man can command, the Judge must often find himself in the necessity of proceeding upon slight data, and I take it that his discretion is correspondingly large. The Act seems to have been framed in that view: *Jones* v. *Anderson, supra.*

In the case before us, I consider that there are facts from which the Superior Court could conclude that the reduction in wages amounts to twice the yearly compensation adjudged to the respondent. That being so, it cannot be said that there is error in the judgment.

I would dismiss the appeal. *Appeal dismissed.*

CONNORS v. MYATT.

N. S.

S. C.

Nova Scotia Supreme Court, Graham, C.J., Russell, Longley and Drysdale, JJ. July 27, 1915.

1. ADVERSE POSSESSION (§ I G—31)—LIFE TENANT AGAINST REMAINDERMAN —FAILURE TO MAKE ENTRY.

Where a devise of land may be rendered inoperative by the subsequent execution of a deed to the same property still where the grantee elects to take under the will instead of making entry under the deed, a person holding a life estate to the land cannot set up the Statute of Limitations as against the remainderman for his failure to make entry under the deed within the statutory period.

[*Board* v. *Board*, L.R. 9 Q.B. 48, followed.]

Statement

APPEAL from judgment of Ritchie, J., in favour of plaintiff in action of ejectment.

R. E. Finn, for appellant.

W. H. Covert, K.C., for respondent.

Graham, C.J.

GRAHAM, C.J.:—This is an action to recover a lot of land at Porter's Lake, in the county of Halifax. The land was owned by the plaintiff's father, William Connors in his lifetime, and he was also the father of the defendant's wife, Mary. William Connors and his wife were rather aged and helpless and took this defendant in to help support them. After a few months, on March 9, 1891, he married Mary, the daughter, and they continued to live on the premises all together. William died May 17, 1892. His widow, Bridget remained, and died February 10, 1894.

Mary died in June, 1908, and the defendant remained in possession, but the plaintiff claimed the possession after Mary's death. Turning to the writings, on July 21, 1883, this instrument, under seal, was executed by William and Bridget Connors and was registered in the Registry of Deeds on October 3, 1883:—

This agreement made July 21 in the year of our Lord one thousand eight hundred and eighty-three, between William Connors, of Porter's Lake, in the county of Halifax of the one part, and Bridget Connors, his wife, of Porter's Lake aforesaid of the other part, witnesseth that the said William Connors hath covenanted and agreed and by these presents doth covenant and agree to make over to the said Bridget Connors, his wife, the half of his real and personal estate, situate, lying and being at Porter's Lake aforesaid, viz., half of all the land as specified in deed held by him together with all improvements, half of the house, half of the barn, half of the stock and implements and all other property held by him up to the date of his agreement to be by her held, owned and enjoyed by her during her life time and after her demise she to have full power to will and be-

N. S.

S. C.

CONNORS v. MYATT.

Graham, C.J.

queath the same to her daughter, Mary, and in case of her death to her son, John Connors, residing in Cleveland, Ohio, United States and his heirs forever.

his
William x Connors.
mark
her
Bridget x Connors.
mark

On October 3, 1889, William Connors, made a will in the following terms, and it was probated on May 23, 1892. That is to say:—

This is the last will and testament of me, William Connors, of Porter's Lake in the county of Halifax, labourer, made and executed this third day of October, one thousand eight hundred and eighty-nine.

1. I appoint my said son, Thomas Connors, of the city and county of Halifax, plumber, as sole executor of this my last will and testament and hereby revoke all former wills heretofore made by me.

2. I give, devise and bequeath unto my said son, Thomas Connors, and his heirs all the real estate owned by me and situate at Porter's Lake aforesaid.

3. I give, devise and bequeath to my said son, Thomas Connors, the real estate in which my said daughter, Mary Connors, of Porter's Lake, spinster, holds a life interest, the said property to go to my said son, Thomas at the date of the decease of my said daughter, Mary, or should he sooner die then the same to go to his heirs.

4. I give, devise and bequeath to my said son, Thomas Connors, all the personal property of every kind and description owned by me and wheresoever situate.

5. Lastly, I direct my said executor out of my said property to pay all my just debts and funeral expenses.

his
William x Connors.
mark

But on the same day, apparently, he made an ordinary deed of gift, *i.e.*, without valuable consideration to the plaintiff of the same property, and the deed and will were afterwards, in the same year, both left at the plaintiff's house at Halifax, and when he returned he received them. He never entered or claimed under the deed. The action was brought February 14, 1913.

The defendant relies on his possession under the Statute of Limitations, as follows, that is:—

Twenty years next after the time at which the right to make such entry or distress or to bring such action first accrued to the persons making or bringing the same.

And he contends the deed was effective and that the time

began to run immediately this deed was made or at least after the father's death. There is nothing to indicate that the plaintiff accepted or even intended during the twenty years to accept the gift in the deed. Surely his acceptance would have to be indicated to his father during the father's lifetime—20 Cye. 1209. The whole course of conduct and particularly his dealings with the Myatts, indicated that he elected to take under the will, not under the deed, and leaving them in possession under the will for Mary's life. His proving the will which was void if the deed was effective, indicated his election. The possession of Mary with her husband would be tortious unless she had a life interest, and there is a presumption against it being tortious. The defendant himself says, that about 19 years before the trial he knew of this will, and, presumably, of the recital in it of his wife's life interest. At the time of the funeral of William Connors, who died May 17, 1892, the plaintiff says—and the Judge believed him—this occurred:—

Q. Was any mention made of a will, and if so who started it? A. Yes, Undertaker Snow asked the question if there was a will, and Myatt's wife answered no, not that she knew of. I spoke up and said there was a will and that she was left a life interest in the property and that when she died it was to come to me, and that I was satisfied that they should remain on the property until such time as she died, as my father wanted, and that when she died the property would come to me. Also that the furniture in the house and what was about the place she could make use of. Q. You knew that your sister, Mary Myatt, was left an interest under the will? A. Yes. Q. And you were content? A. Yes. Q. And you knew that under the will she had the right to the possession of the property until her death? A. Yes, that is the way I understood it. Q. Why did you seek to impress upon the Court that you made a demise to her of the property when you knew that she had a life interest under the will? A. He seemed to be disappointed and I put it that way to satisfy him.

But even if the deed was effective and the will ineffective, I think, under the case of *Board* v. *Board*, L.R. 9 Q.B. 48, cited by the Judge below, that the defendant is estopped as against the plaintiff from setting up the Statute of Limitations, and saying that he was holding tortiously during Mary's lifetime. In that case there was a will by a person who was tenant by the curtesy, and he made a will disposing of it to a Rebecca Board for life remainder over in fee which was, of course, invalid. She had possession for more than 20 years. It was held that

N. S.

S. C.

CONNORS v. MYATT.

Graham, C.J.

the defendant claiming through her was estopped as against those in remainder from disputing the validity of the will. The Judges speak of her as having entered under the will, but that meant that she was holding under the will. For, at p. 50, this appears:—

> At the death of the testator Rebecca and William Board were residing with him upon the disputed premises and after the death of the testator, Rebecca and William Board continued to remain in the actual enjoyment and occupation of the same.

That was the case here. In *Anstee* v. *Nelms*, 1 H. & N. 225 at 232, Martin, B., says:—

> His entry must be considered as having been lawful if the facts are not inconsistent with that contruction. Further, my impression is (if it were necessary to decide the point) that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter and then say that such possession was unlawful so as to give him a right against the remainderman. I think that no Court would so construe it.

This *dictum* was affirmed in the decision first mentioned. It appears that in 1904 or 1905, the house that the Myatts lived in was burned by fire, and the defendant asked the plaintiff for permission to rebuild. This is admission that the defendant was not claiming tortiously but under the life estate under the will. For these reasons I think the judgment must be affirmed and the appeal dismissed.

Russell, J.
Longley, J.

RUSSELL, and LONGLEY, JJ., concurred.

Drysdale, J. (dissenting)

DRYSDALE, J., dissented. *Appeal dismissed.*

SASK.

S. C.

SMART HARDWARE & CONTRACTING CO. v. TOWN OF MELFORT

Saskatchewan Supreme Court, McKay, J. July 20, 1915.

1. INJUNCTION (§ I K—90)—SEIZURE FOR TAXES—PROPERTY OF ANOTHER—ADEQUATE REMEDY FOR DAMAGES.

The court will not continue an interim injunction restraining the seizure for taxes of property claimed by another where there is an adequate remedy at law.

[*Dominion Express Co.* v. *City of Brandon*, 19 Man. L.R. 257, followed.]

Statement

APPLICATION to continue an interim injunction.

C. E. Gregory, K.C., for plaintiffs.

W. A. Goetz, for defendant.

McKay, J.

MCKAY, J.:—This is an application on behalf of the plaintiff company to continue, until the trial of the action, an interim injunction granted by the local Master.

It appears from the material used on the application that the defendant caused a seizure to be made of certain property, alleged to belong to the plaintiff Smart, for the satisfaction of certain taxes due by him to the defendant, and which property is now claimed by the plaintiff company as its property, and not liable to seizure for said taxes.

It is also claimed, that even if the property belongs to the plaintiff Smart, it is not liable to seizure, because the claim for taxes has been satisfied by reason of the defendant having obtained an order from a Judge confirming tax enforcement returns for about half of the taxes claimed as due from Smart.

It is not necessary for me, in an application of this nature, to go exhaustively into the merits of the contentions of the parties to the action, as it is not incumbent upon me to decide whether the plaintiffs or the defendant will succeed at the trial. The general principles on which Courts act in interlocutory injunctions are thus stated in Kerr, on Injunctions, 5th ed., 16 and 17:—

> In exercising the jurisdiction, the Court does not pretend to determine legal rights to property, but merely keeps the property in its actual condition until the legal title can be established. The Court interferes on the assumption that the party who seeks its interference has the legal right which he asserts, but needs the aid of the Court for the protection of the property in question until the legal right can be ascertained. The office of the Court to interfere being founded on the existence of the legal right, a man who seeks the aid of the Court must be able to shew a fair *primâ facie* case in support of the title which he asserts. He is not required to make out a clear legal title, but he must satisfy the Court that he has a fair question to raise as to the existence of the legal right which he sets up, and that there are substantial grounds for doubting the existence of the alleged legal right, the exercise of which he seeks to prevent.

The same author, however, also states as follows, at 20:—

> The jurisdiction of the Court to interfere by way of interlocutory injunction in support of a legal title being purely equitable, it is governed upon strict equitable principles. The Court, where its summary interference is invoked, always looks to the conduct of the party who makes the application, and will refuse to interfere, even in cases where it acknowledges a right, unless his conduct in the matter has been fair and honest, and free from any taint of fraud or illegality,

and cites a number of English cases in support of this proposition.

When we look at the conduct of the applicants in the case

SASK.

S. C.

SMART HARDWARE v. TOWN OF MELFORT.

McKay, J.

under consideration, as disclosed by the material filed, I do not think it comes within the principles above laid down. I refer to the actions of plaintiff Smart, who is the president and manager of the plaintiff company, in transferring the stock of his hardware business to the plaintiff company on May 14, after giving his undertaking to Mayor Hatton that by no act of his would the said stock or the title thereto be meddled with, or the defendant be prejudiced in regard to its then rights against him, in consideration of getting an extension of time of four days from May 10, within which to get a statement, from the secretary-treasurer of the defendant town, of the amount of taxes and penalties claimed.

But apart from this, I think this case comes within the principles followed in *Dominion Express Co.* v. *City of Brandon*, 19 Man. L.R. 257, wherein the application of the plaintiff for an interim injunction was refused by Mathers, J., under similar facts as exist in the present case.

In that case the Judge stated:—

A court of equity should not grant an injunction to restrain the action of the taxing power, except where it may be necessary to protect the rights of the citizens whose property is taxed, and he has no remedy by the ordinary process of law: Joyce on Injunctions, sec. 1189.

In *Dows* v. *City of Chicago*, 11 Wall. 108, Field, J., said: "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of the government, and thereby cause serious detriment to the government. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no remedy by the ordinary process of law."

That seems to me to be sound doctrine.

In the present case the plaintiffs have brought this action for a declaration of right, and for an injunction. If the declaration is made in their favour, they will, as a matter of course, be entitled to an injunction to restrain the defendants from levying the tax if they attempt to do so. The plaintiffs could have got exactly the same relief in a properly framed action after paying the money demanded under protest.

Before the action has been tried however, the plaintiffs ask for an interim injunction to restrain the defendants from, in the meantime, collecting a tax apparently regularly assessed against them. The plaintiffs are only entitled to this relief if they would have no adequate remedy for the

recovery of the money in the event of the Court deciding that the tax was illegal. . . . In *Heard* v. *Ashville*, 24 S.E.R. 738, it was held that an injunction will not go to restrain the collection of taxes where there is an adequate remedy at law to recover the money back.

The present application is for an injunction to restrain the defendant from exercising its power to collect its taxes, and for the reasons above quoted I do not think I should grant it. If the plaintiffs succeed in their action I think they will be able to collect from the defendant whatever damages are allowed them.

I therefore dismiss the application, costs to be costs in the cause, unless the trial Judge shall otherwise order.

Application dismissed.

BOLAND v. SKEAD.

Quebec Court of Review, Archibald, St. Pierre and Bruneau, JJ.
June 19 1915.

1. HUSBAND AND WIFE (§ I A 2—16)—LIABILITY FOR NECESSARIES—CREDIT.

The liability for necessaries furnished is determined by the question whether credit was given to the husband or the wife and when credit is extended to one of them, it cannot later be altered by varying the heading of the account.

Statement

APPEAL from judgment of Chauvin, J., Superior Court, in favour of plaintiff in action for necessaries furnished. Affirmed.

T. P. Foran, K.C., for plaintiff.

A. McConnell, for defendant.

Archibald, J.

ARCHIBALD, J.:—This was an action for the sum of $253, for necessaries of life sold to Dame Annie Moore, in her lifetime, wife of the defendant Skead, Skead being the executor of her will.

The defence was, that credit was given to the defendant himself personally, and that neither the wife, during her lifetime, nor her estate, was liable.

Judgment found the wife's estate liable and condemned the defendant, in his quality, to pay the whole sum demanded.

The defendant, in his factum, cites a judgment of my own in which I hold that liability between husband and wife for necessaries for the family was not joint and several, but was in fact such as resulted from the contracts between the merchant and the consorts, and that the question usually to be deter-

QUE.
C. R.
BOLAND v. SKEAD.
Archibald, J.

mined was to whom the merchant gave credit, whether to the husband or the wife.

In this instance, the account was opened originally in the name of Mrs. Skead, and was continued from time to time on different pages of the book. The question never appears to have been raised as to whom credit had been given, that is to say: after the opening of the account in the first instance. The first opening of the account may well be considered as having been a credit given to the person in whose name the account was opened. After that it was continued in the books simply by the book-keeper writing down sometimes, at the head of the page, Mrs. Skead, and sometimes Mr. Skead. The goods were ordered sometimes by Mr. Skead and sometimes by both together.

I quite agree that the deciding point as to the responsibility of the husband or wife is to whom was given credit, as I previously decided, and as was decided by the judgment of the Court of Appeals. But I think that in this case credit was given to Mrs. Skead. I think that that fact is not altered by the varying headings in the account at later dates, which were not put there by the plaintiff at all, but by the book-keeper. I am to confirm. *Judgment affirmed.*

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S. C.

LESLIE v. STEVENSON.

Ontario Supreme Court, Meredith, C.J.O., Garrow, Maclaren and Magee, JJ.A., and Kelly, J. October 12, 1915.

1. CONTRACTS (§ I C 2—37)—CONSIDERATION—FORBEARANCE TO SET ASIDE SALE.

A forbearance from proceeding to set aside a judicial sale of land is sufficient consideration to sustain a promise by the highest bidder to pay the difference between what the land will bring at a future sale and what he paid for it.

2. CONTRACTS (§ I E 4—80)—STATUTE OF FRAUDS—INTEREST IN LAND—AGREEMENT FOR FUTURE PROFITS.

A parol agreement to pay the difference between what land will bring at a future sale and what was paid for it does not relate to an interest in land and is not within the Statute of Frauds.

[*Stuart* v. *Mott*, 23 Can. S.C.R. 153, 384, followed.]

3. CONTRACTS (§ II D 1—156)—FORECLOSURE SALE—THREATENING TO SET ASIDE—AGREEMENT TO PAY PROFIT AT RE-SALE—CONSTRUCTION OF.

An agreement by a bidder at a foreclosure sale to pay a lienholder threatening to set aside the sale the excess of the cost of the property realized at a re-sale purports an intention that the lienholder should receive only to the extent of the balance remaining due on his claim and not the whole surplus realized upon the re-sale.

[*Leslie* v. *Stevenson*, 23 D.L.R. 776, varied.]

ONT.

S. C.

LESLIE v. STEVENSON.

GARROW, J.A.

APPEAL by the defendant from the judgment of Boyd, C., 23 D.L.R. 776, in favour of plaintiff.

H. J. Scott, K.C., for appellant.

R. S. Robertson, for plaintiffs, respondents.

GARROW, J.A.:—The plaintiffs in the action are Leslie and McNeil, contractors, of the Town of St. Mary's, who on May 11, 1909, recovered judgment in a mechanic's lien proceeding against the Canadian Smallwares Limited, for $2,508.44, including costs to judgment. The property subject to the lien was subsequently, after one or more abortive attempts, sold by tender, for $2,100, to the defendant, who on the 11th October, 1909, obtained an order vesting the same in him for all the estate, right, title, and interest therein of the plaintiffs and the defendants in that proceeding.

The property was first offered for sale by auction, at which one McCrimmon bid $2,000, but no sale was made. Next, apparently, an attempt was made to sell at private sale, which also proved abortive. The property was then finally advertised again for sale, this time by tender, in pursuance of which the defendant tendered and became the purchaser. Before the sale, and with a view to it, the plaintiffs and one Brown, who was a creditor of the debtor company for about the sum of $200, but who had no lien, agreed that they would attempt to buy in the property and hold it for resale, with the expressed hope of realising enough to pay the plaintiffs' claim, and also after such payment paying the claim of the creditor Mr. Brown.

In pursuance of this agreement, a maximum price in the nature of a reserved bid was fixed, namely, $2,050, beyond which they did not intend to go. Accordingly, a tender was prepared by Mr. Ford, the plaintiffs' solicitor, and sent in to the Master, but only for $1,650, the amount having been filled in at the last moment, after it had become apparent that Mr. McCrimmon, the former bidder had not appeared. At about the same moment the defendant appeared upon the scene. He was informed in part of what had been done, and, claiming that something crooked was going on, hurriedly prepared and submitted his tender of $2,100.

The defendant was at that time the manager of a bank in the

ONT.

S. C.

LESLIE v. STEVENSON.

Garrow, J.A.

town of St. Mary's, at which the plaintiffs had dealings. He was also connected by marriage with the plaintiff McNeil; and, although the families afterwards fell out, they were at this time on very good terms.

The indebtedness of the plaintiffs to the bank was considerable, nearly "up to the limit," as the plaintiff McNeil himself admits. He had, he says, been previously advised by the defendant to obtain the lien and to prosecute the matter diligently so as to reduce the indebtedness to the bank as soon as possible.

Whether or not the defendant attended the sale in the interests of the bank does not appear. It is several years ago, and the exact reason may not be easy to recall. But he was there, and he was interested as described, and at the last moment put in his tender. The plaintiff McNeil and his solicitor were at the Master's office, and objected to the defendant's tender being received, contending that it was too late, and afterwards that the defendant had acted in bad faith. The learned Master, however, overruled the objection as to time, and, it is said, expressed his very natural difficulty in understanding why they wished a tender of $1,650 to be accepted, and objected to one of $2,100.

On the same day, on the way back to St. Mary's, Mr. Ford, the solicitor, had a conversation on the train with the defendant of a somewhat heated character, in which the defendant said, according to Mr. Ford: "I bought in the property to protect the boys; your tender was too late." Ford said, "I have been instructed to take proceedings to set aside the sale." The defendant said: "I don't intend to make any profit out of this transaction; when I sell the property I will hand over the difference between the cost price and what I sell it for; let matters remain as they are." Ford said: "Well, if I understand you, it is this way: if proceedings are dropped, you will hand over any profits you make out of this transaction to Leslie and McNeil when you sell the property?" He said: "Yes, that is it; I have the property practically sold now."

The plaintiff McNeil said that he had an interview with the defendant at the bank next day, when this transpired: "I said,

'You have got me into a nice mess; Leslie and Brown are insisting on going along with those proceedings' " (to set aside the sale) "'and I told them to go ahead;' and he said: 'Well now, don't get in such a big hurry; I have bought this property in to protect you; if it got into the hands of these lawyers you don't know what might happen; I am a little suspicious; I suppose you would be satisfied if you got what is coming to you out of this business?' And I said I would, and he said: 'If you will have these proceedings dropped that you are going to take, when I sell my property whatever the difference is between what I get for it and what it cost me and my expenses I will hand over to you, will that satisfy you?' And I said, 'That will satisfy me,' and he said, 'Will we shake hands on it?' And I said, 'Yes'; and we stood up beside the desk and we shook hands, and I told Ford, I said, 'I think we had better drop these proceedings;' " and they were dropped.

Mr. Brown was not called, but Mr. Ford says that, when he told Brown of the defendant's offer made in the train, Brown said he would not trust to the defendant, and suggested reporting him to his head office.

Mrs. McNeil, wife of the plaintiff McNeil, said that, within about a month, as near as she could tell, after the sale, she was in the bank one day, and had a conversation with the defendant, in which he said, "I suppose you have heard that I have bought the Smallwares?" I said, "Yes." He said: "Now you keep that man of yours quiet because I did this to help the boys out."

All these conversations were explicitly denied by the defendant. He claimed to have made the purchase solely for himself, and denied that he had ever in any way offered or agreed to share the proceeds upon a sale, with the plaintiffs or with any one else. Unfortunately for him, however, the learned Chancellor, who saw the witnesses—an advantage which we have not—did not believe the defendant, but did believe the plaintiff McNeil and his witnesses. And by that conclusion, upon the question of credibility, we are in this Court necessarily bound. There are, no doubt, weaknesses and discrepancies in the evidence, more or less cogent, which it is easy to point out: such as the circumstance that Leslie, the co-plaintiff, as he says, had

ONT.

S. C.

LESLIE v. STEVENSON.

GARROW, J.A.

never even heard of the threatened proceedings to set aside the sale to the defendant; that Mr. Ford, the solicitor, although warned by Mr. Brown that the defendant's promise could not be relied on, did not take or even advise the ordinary business precaution of having what was agreed upon put in writing; and that, although, according to the evidence of the plaintiff McNeil, the arrangement made was perfected the day after the sale to everybody's satisfaction, his wife was advised probably a month later to "keep her husband quiet," etc., as if he was still objecting. These circumstances, however, must, it is to be assumed, have been present to the mind of the learned Chancellor, and have had accorded to them their due weight in arriving at his conclusion upon the question of fact.

All that, therefore, remains is to consider: (1) the effect of the evidence, or, in other words, what is the contract thereby created; and (2) the question of the Statute of Frauds as a defence.

The learned Chancellor apparently dealt with both questions at pp. 779-80 of 23 D.L.R., where he says: "The agreement is that, in consideration of the abandonment of the proceedings to set aside the tender, the defendant was, upon and after sale of the land, to recoup himself his outlay and pay over the residue of the proceeds of sale to the plaintiff. No land or interest in land was involved, but merely the money which would result from a sale of the land. There was no trust impressed upon the land, and the purchaser was not bound to sell at all, but, when he did sell, his promise was, for good consideration, to pay the profits to the plaintiff. The money, doubtless, was derived from the sale of land, but the bargain was about the money alone, and may well stand outside of the Statute of Frauds. The plaintiff's right of action arose upon and after the sale at $3,000. . . . The apparent profit was $900, and for this the plaintiff was and is willing to accept judgment." And, if the defendant is dissatisfied, a reference is directed in which an account is to be taken of the rents and profits received, and the expenditure, with interest properly allowable; in other words, practically the account of a mortgagee in possession.

It is apparent that the only agreement made was the one

made between the plaintiff McNeil and the defendant, the morning after the sale by tender; and the only value of Ford's and Mrs. McNeil's evidence is as corroboration of McNeil's evidence. And McNeil tells us that, after preliminaries, "the defendant said, '*I suppose you would be satisfied if you got what is coming to you out of this business,*' *and I said I would*, and he said, 'I will tell what I will do . . .'" And upon what he told him he would do they shook hands as upon a final agreement. Nothing was expressly said about what should be done in the unexpected case of their being a surplus; no one, I dare say, then anticipated any such too fortunate result. But, in any event, it is abundantly clear, from the evidence which I have quoted, that all that was demanded by McNeil was the balance of the plaintiffs' claim in the lien proceedings, and that that was all that the defendant in any event agreed to give.

The learned Chancellor evidently regarded the surplus upon the sale for $3,000 as if it all belonged to the plaintiffs—a view with which, for the reasons I have stated, I do not agree.

Upon the question of the Statute of Frauds as a defence, not much, I think, need be said; because, even if it was clear that the agreement offends against its provisions, the plaintiffs, upon the authorities by which we are, I think, bound, are upon the facts entitled to relief.

The case is not in principle unlike the case in our Courts of *Ross* v. *Scott*, 21 Gr. 391, and, on rehearing, 22 Gr. 29. The head-note in the latter report briefly expresses what was determined, as follows: "Where it was shewn by evidence that the defendant had agreed to attend and buy in a property, offered for sale by auction, as the agent of the plaintiff and for his benefit: *Held*, notwithstanding the Statute of Frauds had been set up as a defence and there was no writing evidencing the agreement, that the plaintiff was entitled to a decree to carry out the agreement." The decision rests upon the ground that the defendant, in denying the agreement and claiming the land as owner, had acted fraudulently.

In a later case in the English Court of Appeal, of *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, a case of high authority, the head note (in part) even more explicitly says: "The Statute

ONT.

S. C.

LESLIE v. STEVENSON.

Garrow, J.A.

of Frauds does not prevent proof of a fraud, and it is a fraud for a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land as his own. Therefore a person claiming land conveyed to another may prove by parol evidence that it was so conveyed on trust for the claimant, and may obtain a declaration that the grantee is a trustee for him."

See also *McCormick* v. *Grogan* (1869), L.R. 4 H.L. 82, where the same principle was very fully discussed, although upon the facts not applied.

It does not seem to me to be of importance that in this case the agreement relied on was not made before the defendant's tender was put in. It was made while the matter was still under control and reconsideration by the Court at the instance of the plaintiffs; and it was only in consequence of and in reliance upon the agreement that the threatened attack upon the sale to the defendant was abandoned.

For these reasons, to the extent indicated, I would allow the appeal. The amount owing to the plaintiffs and for which they should have judgment may be ascertained by the Registrar. And there should, I think, be no costs of this appeal to either party.

Maclaren, J.A.

MACLAREN, J.A., agreed with GARROW, J.A.

Kelly, J.

KELLY, J.:—This appeal is by the defendant from the judgment of the Chancellor of the 8th May, 1915. The reasons for judgment set out the following facts: "Land covered by mechanics' liens was sold under the direction of the Court to satisfy these liens. After an abortive sale, it was again offered for sale by tender. The plaintiff, who had the conduct of the sale, put in a tender in the name of one of the subsequent lien-holders, and the defendant put in a higher, and in fact the highest, tender, at $2,100, and was declared to be the purchaser. This defendant had been in confidential communication with the lien-holders, and so obtained the information which he used, as alleged, to their detriment, in his tender. Next day, the present plaintiff (the chief lien-holder) instructed his lawyer to take proceedings to set aside the sale upon the highest tender; and, this being communicated to the defendant, he said: 'If you drop the proceedings, when I sell the land whatever difference is between

what I get for it and what I pay I'll hand over to the lien-holders.' The promise, in other words, was just this: 'Let the sale be carried out by the Court, and when I sell the property and recoup my own expenditure, I'll give the balance of the proceeds of the sale to the lien-holders.' ''

Rarely is there such direct conflict in testimony as is found in this case. Three witnesses, one of whom is a practising solicitor, are directly and positively contradicted by the defendant on matters of vital importance to the issue. The learned Chancellor in his reasons says: ''The result of the evidence, though contradictory, was, to my mind, abundantly clear in affirmance of the position taken by the plaintiff.''

The one circumstance which more than any other is difficult to understand, if the view of the learned Chancellor is to be adopted in its entirety, is why the defendant should agree to continue a relationship to the property which under the agreement set up could in no event be of profit or gain to him, but would involve him in loss if he failed to resell at a price sufficient to repay him his outlay. It is quite within reasonable possibility, however, that, when strenuous objection developed to his having tendered, accompanied by a threat of action to set aside his tender, he may have considered it the wiser course to quiet these objections by entering into the agreement which, in my opinion, he did make, rather than run the risk of the expense and publicity consequent upon the institution of legal proceedings, undesirable in the position he held. The course he took after the threats of action does not exclude the possibility of an intention at the outset to purchase on his own behalf, as he says he did; his change of attitude may well be accounted for by an unwillingness to be involved in a law-suit, and a desire that his superior officers in the bank should not become aware of the part he had taken in the transaction. The Chancellor seems to have thought it was of importance to the defendant that his making the tender should not then be the subject of public inquiry. True, he has denied that any such bargain was made or that anything whatever happened between him and any of the three witnesses whom he flatly contradicts, from which any deduction can be made that it was ever suggested or even con-

ONT.

S. C.

LESLIE v. STEVENSON.

Kelly, J.

templated that the plaintiffs were to be interested in the proceeds of the sale in the event of his reselling. That such a bargain from his standpoint is unthinkable is the position taken by his counsel; the same was urged before the trial Judge. From whatever view-point one examines it, the evidence reveals an extraordinary condition of things; but, sitting in review, it is difficult to say that the conclusion as to the credibility of the witnesses arrived at by the learned Chancellor, who had opportunities of forming an opinion which are not present to us, is not the correct one.

The evidence of the bargain which the defendant is found to have made with the plaintiff McNeil, after a careful examination, is quite susceptible of the interpretation that what McNeil desired was that the plaintiffs be protected to the full extent of their claim, and what the defendant was willing and promised to do was, as he said, "to protect the boys" (meaning the plaintiffs), which he carried out by agreeing with McNeil to give them out of the proceeds of a resale what was coming to them to the extent of any surplus remaining after recouping him his outlay; and thereupon it was agreed that the proceedings or contemplated proceedings to set aside the tender and sale should be abandoned. The reference to paying over the difference between what the defendant would get on a resale and what the property cost him and his expenses is, I think, explainable by the fact that it does not appear to have been in contemplation of any one that there was a prospect of a sale being made which would yield a surplus over what the defendant paid and the balance coming to the plaintiffs on their claim. I am of opinion, on a consideration of the whole case, that the real intention of the defendant and McNeil was that on a resale the defendant would pay the plaintiffs the excess over what the property cost him and his expenses, up to but not exceeding the balance unpaid the plaintiffs on their claim.

Assuming, therefore, that there was a promise or agreement, and that it was based on the plaintiffs' immediate forbearance to commence or prosecute against the defendant proceedings to set aside his tender, that forbearance constituted a sufficient consideration to support the promise.

It is further objected that, even if the facts be as found, the case falls within the operation of the Statute of Frauds, in that the agreement related to or conferred an interest in land. What is contracted for is the payment of certain moneys, and not land or an interest in land, though the money arose from the sale of land. The defendant did not agree to convey the land or any part of it to the plaintiffs, but only that he would, when he sold it, pay to the plaintiffs certain moneys out of the proceeds of the sale. The agreement did not entitle the plaintiffs to interfere with the land, or to make sale of it, or to take part in or direct the sale. They could make no claim until the lands had been sold; and only when a surplus of money remained in excess of what was necessary to recoup the defendant, were they in a position to enforce their right—a right, not to the land or an interest in it, but to the moneys it was agreed they should receive. The action is not one to enforce a trust or for the performance of a contract to sell, but simply for the payment of moneys which have now reached the defendant's hands, and which he agreed to pay.

I have been unable to find any express authority holding the statute to apply unless by the terms of the contract a sale of land or some interest in land or concerning land is dealt with as a part of the contract; but there are authorities to support the view against the necessity of the agreement being in writing where the circumstances are such as are now before us.

The case in the Canadian Courts which has most direct bearing upon it is *Stuart* v. *Mott*, 23 S.C.R. 384, where it was held that a contract for a share of the proceeds (of a mine when sold) was not one for a sale of an interest in land within the Statute of Frauds. In his judgment Strong, C.J., refers to a number of cases decided by Courts in the United States in support of that view, in one of which, *Trowbridge* v. *Wetherbee* (1865), 93 Mass. (11 Allen) 361, which he cites with approval, it was held that a parol promise to pay to another a portion of the profits made by the promisor in a purchase and sale of real estate is not within the statute.

There are also decisions of the English Courts, which, though

ONT.
S. C.
LESLIE
v.
STEVENSON.
Kelly, J.

not treating directly of the question in the form before us, indicate the views entertained by Judges of high authority.

In *Smith* v. *Watson* (1824), 2 B. & C. 401, it was held that the right to share in the profits of a particular adventure did not confer any interest in the property itself, which was the subject of the adventure.

In *Boston* v. *Boston*, [1904] 1 K.B. 124, Mathew, J., at pp. 127 and 128, said: "In this case the contract created no obligation to acquire an interest in land, it did not affect the owner of the land mentioned, nor did it create or deal with the interest of any one in it. The contract only dealt with a sum of money which was to be applied to indemnify the husband in respect of the amount of the purchase-money if he bought the house;" and the Court held that the Statute of Frauds had no application, and dismissed the plaintiff's appeal from a judgment in favour of the defendant on his counterclaim for the purchase-money of the residue of the lease of a particular house, which he paid at his wife's request and on her verbal promise that if he would purchase she would pay to him the amount of the purchase-money.

I do not think it necessary to go beyond the reasons for judgment in *Stuart* v. *Mott* for sufficient authority that the present case does not fall within the Statute of Frauds.

The appeal should, to the extent I have intimated, be allowed and the judgment varied accordingly, but without costs.

Meredith, C.J.O.
Magee, J.A.
(dissenting)

MEREDITH, C.J.O., with whom concurred MAGEE, J.A., dissented, would allow the appeal, reversing the judgment appealed from and dismiss the action.

Appeal allowed; judgment varied.

P.E.I.
C. A.

STEWART v. LEPAGE.

Prince Edward Island Court of Appeal in Equity, Sir W. W. Sullivan, C.J., Fitzgerald and Haszard, JJ. June 5, 1915.

1. CORPORATIONS AND COMPANIES (§ VI C—332)—WINDING-UP OF TRUST COMPANY—RIGHTS OF CESTUIS QUE TRUST—PROCEEDINGS UNDER PROVINCIAL TRUSTEE ACT—LEAVE OF COURT.

Where in pursuance of the Winding-up Act, ch. 144, R.S.C. 1906, a liquidator is appointed to take charge of the assets of an insolvent trust company, the holders of trust certificates, the funds and securities of which are by statute required to be separately kept from mixing with the general assets of the company, are regarded as *cestuis que trust* and not as creditors, and are not required to obtain leave of the

court having charge of the winding up under sec. 22 of the Winding-up Act for the purpose of proceeding under a provincial Trustee Act to preserve the administration of the trust.

P.E.I.

C. A.

STEWART v. LEPAGE.

Statement

APPEAL from a decision of the Vice-Chancellor overruling an application on behalf of appellant for dismissal of a bill of complaint filed at the instance of respondents.

A. A. McDonald, K.C., for appellant.

Gilbert Gaudet, K.C., and *J. J. Johnston*, K.C., for respondents.

Sullivan, C.J.

SULLIVAN, C.J.:—It appears that the Dominion Trust Co. was incorporated by the Parliament of Canada in the year 1912, by an Act which empowered it to transact certain kinds of business and to exercise certain functions, among which were to receive moneys in trust and invest the same, and to guarantee re-payment of the principal, or payment of the interest, or both, of any moneys entrusted to the company for investment; and the Act provided that the head office of the company should be in Vancouver, B.C.

In the year 1913, the legislature of Prince Edward Island passed an Act authorizing the Dominion Trust Co. to carry on business and to exercise its corporate powers and functions in this province, which Act provided that the head office of the company for the Province of Prince Edward Island should be in Charlottetown. In the year 1913, the company opened an office in Charlottetown and commenced the transaction of business in this province.

It appears that the company having become insolvent, a winding-up order of the Supreme Court of British Columbia was made by the Chief Justice of that Court on November 9, 1914, in pursuance of the Winding-up Act, ch. 144, R.S.C.

It is alleged in the bill of complaint that the company received from the complainants and others in this province, sums of money upon trust for investment; and it is prayed that it be declared by the Court that the moneys received from the complainants and others, holders of guaranteed first mortgage investment certificates of the company, are trust moneys for the use of the holders of such certificates; that the company be declared trustee; that the company, now insolvent and in course of being wound up, be removed from its office of trustee; that

P.E.I.

C. A.

STEWART v. LEPAGE.

Sullivan, C.J.

a trustee be appointed in its stead, and that an order be made vesting such mortgages in such trustee.

At the hearing of the application it was moved on behalf of the company that the bill of complaint be dismissed on the ground that the leave of the Court having charge of the winding-up had not been obtained before the commencement of the proceedings in accordance with sec. 22 of the Winding-up Act. The Court, after argument, overruled the motion, holding that such leave was not necessary. The question for our decision now is, whether the Court was right in so holding.

The winding-up is for the purpose of collecting the assets of the company, and distributing them ratably among the company's creditors; and in order to conserve the assets the Court in which the company is being wound-up, is empowered to restrain adverse proceedings in certain cases. But the proceedings which may be restrained, or as to which leave to commence, or proceed, is to be obtained, must be against the company or its liquidator in that capacity, by a person capable of proving in the winding-up, to enforce a debt of the company. See 5 Hals. 538, and cases there cited.

The liquidator is not vested with control over trust funds, nor is he liquidator as to them. This is recognized by the Court which has charge of the liquidation, in whose order it is provided that the liquidator have power to deliver to the party entitled property held in trust, with the approval of his solicitor. The trust department was, or ought to have been, a distinct and separate branch of the company's business, and the moneys received by it form no part of the company's assets with which only the liquidator has power to deal.

Sec. 8 of the Act of the legislature of P.E.I., incorporating the company, provides, that—

> the moneys and securities of each trust shall be kept in separate accounts distinct from those belonging to the company and shall be so entered in the books of the company that each particular trust shall always be readily distinguishable from any others in the registers or other books of accounts kept by the company, and at no time shall trust money form part of or be mixed with the general assets of the company.

There is nothing before us which shews that the complainants are proceeding as creditors of the company to recover debts due

P.E.I.
C. A.
STEWART v. LEPAGE.
Sullivan, C.J.

to them by the company. On the contrary, what is before us shews that they are proceeding as *cestuis que trust* in regard to transactions between them and the company in the company's capacity as their trustee, and in respect of trust property in this province, within the jurisdiction of the Court. Their application is made under the provincial Trustee Act, which enacts that the Court of Chancery may appoint a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, among other instances, where an existing trustee, or existing trustees shall have become bankrupt or insolvent, and may order that the trust property be vested in such new trustee or trustees.

As the proceeding on the complainant's bill does not appear to be in any way directed against the assets of the company, but is simply for the protection of their interests as *cestuis que trust* under the authority of the provincial Trustee Act, in a matter outside, so far as appears, what is involved in the winding-up of the company, I see no sufficient reason, as the cause stands at present, for interfering with its progress. Indeed, it appears to me that the action on behalf of the appellant is premature, and that it would be more advantageously adopted after the disposal of the case upon its merits by the Court below, if the result should then render such course necessary. The appeal is dismissed with costs.

Hazzard, J.

HASZARD, J.:—The Dominion Trust Co. was incorporated by special Act of the Parliament of Canada, 2 Geo. V. ch. 89.

Also by an Act of the legislature of the Province of Prince Edward Island, 3 Geo. V. ch. 36, and by the latter Act the company was authorized to carry on business in Prince Edward Island and to accept the office of trustee within the said province.

Sec. 8 of the said Act provided that:—

The moneys and securities of each trust shall be kept in separate accounts distinct from those belonging to the company, and shall be so entered in the books of the company that each particular trust shall always be readily distinguishable from any others in the registers or other books of accounts kept by the company, and at no time shall trust moneys form part of or be mixed with the general assets of the company.

Sec. 9 provided that:—

P.E.I.

C. A.

STEWART v. LEPAGE.

Hazzard, J.

All trust moneys received by the company under the authority of this Act and requiring to be invested in the Province of Prince Edward, shall be invested according to the provision of the deed, will or other instrument of trust, under and in respect of which the company shall be acting, or according to the laws of the Province of Prince Edward Island regulating investments of such trust moneys.

The company it is alleged accepted the office of trustee for the respondents and received from them various sums of money upon certain trust.

Having become insolvent, an order was, on November 9 last, made in the Supreme Court of British Columbia, for the winding-up of the company under the provisions of the Winding-up Act, R.S.C. ch. 144.

The bill filed on December 23, 1914, before the Vice-Chancellor by the complainants was, on behalf of themselves and all other holders of Dominion Trust Co., guaranteed first mortgage certificates, who should come in and contribute to the costs of the suit for the appointment of a new trustee.

Application was made in the said Vice-Chancellor's Court to set aside the bill on the ground that leave of the Winding-up Court in British Columbia, to bring the action, was not first obtained as required by sec. 22 of the Winding-up Act, R.S.C. ch. 144.

On the hearing before the Vice-Chancellor the application to dismiss was refused, and from his judgment therein this appeal is taken.

The bill filed upon its face discloses a *primâ facie* cause of action over which it is undoubted that the Court of Chancery in this province has original jurisdiction. The Court liquidating the above company has unquestioned jurisdiction over the assets of that company. If the funds referred to in the bill are trust funds and not assets, the Winding-up Court has no control over them. We are without evidence in this matter, having to take the statements in the bill as correct.

The application was, therefore, in my opinion, premature, and should not be entertained. As to what might be the result after evidence is heard, and the fact fully developed, I express no opinion.

I think the judgment of the Vice-Chancellor dismissing the

application was right. I would therefore dismiss the appeal with costs.

Appeal being from judgment of Hon. R. R. Fitzgerald, sitting as Vice-Chancellor, he took no part. *Appeal dismissed.*

P.E.I.
C. A.
STEWART v. LEPAGE.

WALL v. CAPE.

QUE.
K. B.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. January 21, 1915.

1. MASTER AND SERVANT (§ II B 3—139)—INJURY TO SERVANT—DANGEROUS SCAFFOLD—SERVANT'S ASSUMPTION OF RISK.

It is not inexcusable fault for an employer to order his workmen to build a scaffold on which they are to work if the workmen are reasonably competent and know the danger to which they will be exposed and consent to build and use the scaffold without having it examined by a carpenter.

Statement

APPEAL from judgment of Guerin, J., Superior Court, in favour of plaintiff in action under Workmen's Compensation Act. Affirmed.

J. M. Ferguson, K.C., for appellant.

McLennan, Howard & Aylmer, for respondent.

The judgment of the Court was delivered by

Carroll, J.

CARROLL, J.:—The plaintiff has obtained judgment for $268.60 damages in addition to an annual rent of $193.75, on account of an accident which happened to him in the course of his work. The Court of first instance has found that there was no inexcusable fault on the part of the employer as alleged by the incidental demand. It is practically admitted that the judgment is well founded if the employer was not guilty of inexcusable fault, and it is upon this question that the appeal depends.

The plaintiff worked as a cement finisher on a building of eight storeys at the corner of St. Antoine and St. Cecile sts. This building was 99 ft. in front of St. Antoine st. and 40 ft. in depth along St. Cecile st. It was to be constructed of cement. The plaintiff had first commenced to work in the basement of the building and had there constructed with his fellow workmen the necessary scaffolding. It appeared that Castleman, the superintendent of the works, would have caused these scaffolds or platforms to be constructed by carpenters, but allowed the cement workers to construct them themselves. It does not appear that there was any great inconvenience in their doing so,

QUE.
K. B.
WALL
v.
CAPE.
Carroll, J.

seeing that the scaffolds were only a few feet from the ground and that there was no fear of a serious accident. Two days after the permission by Castleman for the workmen to build them, Wall was working on the first storey along St. Cecile st., at a height of from 16 to 18 ft. from the ground. He had himself constructed the scaffold which permitted him to work at the fourth support of the first storey. The scaffold gave way and Wall in falling upon the ground was injured; he suffered afterwards from a partially permanent incapacity to work.

Wall has affirmed that Castleman ordered him to make this scaffold. Castleman denies it. The deposition of Wall states that he had required the services of carpenters two days before in the basement, not because there was danger but because Castleman complained that the work on the supports was costing too much. Castleman had, on that day, directed him to make the scaffolding; that the carpenters were busy, and that their services could be had later. It is not proved that on the morning of the accident Castleman had ordered Wall to build the scaffolding himself, but it is sufficiently established, I believe, that Castleman saw Wall working at the fourth support upon the scaffold that Wall had erected. It is proved that a scaffold constructed at this place should be carefully built. The greatest danger of disrupting the parts of the scaffold comes from the vibration of the building. For this reason a man in the business should have been employed for this construction. But the plaintiff was a competent man as cement finisher and plasterer and he should have known the danger as well as, if not better than, anybody else. Since he had built the scaffold himself and had worked on it without asking a carpenter if it was solidly built, he must have deemed it to be so as he would not have deliberately exposed his life.

There cannot be an inexcusable fault on the part of the employer in these circumstances. The plaintiff is a competent employee and did not himself consider that there was sufficient danger to cause him to take additional precautions.

It would be difficult to give an exact definition of inexcusable fault. Sachet likens it to gross fault and gives it a definition which has been cited in *Poirier* v. *Legrand*, 9 D.L.R. 269.

The facts differ in each case, and taking into account the general principles, the decision whether or not in such a case there is inexcusable fault is left to the discretion of the Court.

Judgment affirmed.

HOLMESTED v. CORPORATION OF THE COUNTY OF HURON.

Ontario Supreme Court, Falconbridge, C.J., and Riddell, Latchford, and Kelly, JJ. November 2, 1915.

1. MUNICIPAL CORPORATIONS (§ II A—31)—POLICE STATION—EQUIPMENT OF —FURNITURE—STATIONERY.

Under R.S.O. 1914 ch. 88, sec. 23, the county council shall furnish a police magistrate for the county with a proper office, together with fuel, light and furniture (and following *Newsome* v. *County of Oxford*, 28 O.R. 442), furniture shall include stationery for such office, and it is immaterial whether the appointment of such magistrate is made under sec. 13 or sec. 14 of the said Act, or that such magistrate may have a private office of his own as a barrister or solicitor in such township.

2. MUNICIPAL CORPORATIONS (§ II G G—264*a*)—CLAIMS AGAINST—LIABILITY OF COUNTY OR TOWNSHIP.

Where under secs. 352 and 353, sub-sec. 5, ch. 192, R.S.O. 1914, the council of a city or town shall establish and maintain a police office, etc., and where by by-law a police office is provided by that council, a claim for stationery and furniture should be brought against the town and not against the corporation of the county.

Statement

APPEAL by defendant from a judgment of Holt, Co.J., Huron.

M. G. Cameron, K.C., for appellant.

W. Proudfoot, K.C., for respondent.

The judgment appealed from was as follows:

Holt, Co.Ct.J.

HOLT, Co.Ct.J.:—At the trial, plaintiff asked to amend his claim by adding after the word Tuckersmith, "and the Town of Seaforth," and this amendment I allowed, so that now the plaintiff's claim is as police magistrate for the township of McKillop and Tuckersmith and the Town of Seaforth in the County of Huron.

The plaintiff was appointed such police magistrate on June 21, 1907, and still holds this office and claims in this action from the defendant for rent of office, fuel, light and furniture, the sum of $100 a year for the years 1910, 1911, 1912, 1913 and 1914, in all the sum of $500. According to the evidence, and it was not contended otherwise, the defendant has not, during these years provided the plaintiff with a proper office, together with fuel, light and furniture.

ONT.

S. C.

HOLMESTED v. COUNTY OF HURON.

Holt, Co.Ct.J.

Under sec. 499 of ch. 223, R.S.O. 1897, the Municipal Act, the council of every city and town shall establish and maintain therein a police office and the police magistrate shall attend at the police office daily for such period as may be necessary for the disposal of the business to be done, and by sub-sec. 2 of this section, it is further provided that the council shall provide all necessary and proper accommodation, fuel, light, stationery and furniture for the police office, and for all officers connected with it,—these provisions are also contained almost word for word in the present Municipal Act, ch. 192, R.S.O. 1914, see secs. 352 and 353, and sub-sec. 5 of the latter section.

Now, according to by-law No. 249 of the Town of Seaforth, a police office is provided by that municipality, although I very much doubt if stationery and furniture were supplied at any time, but as I read the statute, the plaintiff's claim (if any) for these items would be against the Town of Seaforth, and not against the defendant. I therefore find that the plaintiff, as police magistrate, for the Town of Seaforth has no claim against the defendant for any of the items sued for or any part thereof.

The question then resolves itself into this, is the plaintiff as police magistrate for the Townships of McKillop and Tuckersmith, in the county of Huron, entitled to any remedy against the defendant.

By ch. 17, 48 Viet, sec. 4, part (1885), it was provided that the county council should provide a proper office, together with fuel, light and furniture for every *County* police magistrate, this apparently remained the law until 1910, as we find practically the same provisions in ch. 72, sec. 17 of R.S.O. 1887, and again in ch. 87, sec. 26 R.S.O. 1897.

In 1910, it was enacted by ch. 36, sec. 23, 10 Edw. VII. "that the county council shall provide a proper office, together with fuel, light and furniture, for the police magistrate for the county or for any part thereof," and the same language is used in sec. 23, ch. 88, R.S.O. 1914. It is true that the plaintiff was appointed prior to 1910, and before the passing of ch. 36, 10 Edw. VII., but I take it that any benefit conferred on police magistrates under sec. 23 of that Act would enure to the plaintiff.

The defendant contends that the county is only liable where

the police magistrate is a salaried officer and appointed under sec. 13, ch. 26, Edw. VII. now ch. 88, sec. 13, R.S.O. 1914, and where the expediency of his appointment has, by resolution of the county council been affirmed, and that the legislature never intended that a county should be liable under sec. 23, and that this section should be so read.

I don't see how I can give effect to this contention, the section is plain, and its language is in no way limited to an appointment under sec. 13, and, to my mind, is imperative, and must be read as applying to a police magistrate appointed under either sec. 13 or sec. 14 of 10 Edw. VII., ch. 36, the contention, in short, being that sec. 23 only applies to a police magistrate appointed under sec. 13—and this is the defence set up in the pleadings as shewn in par. 2 of the affidavit, filed in lieu of statement of defence, and made by the clerk of the defendant. Naturally one would conclude that the unsalaried officer would be better entitled to the benefits accruing under sec. 23 than the salaried officer.

It it quite true that the plaintiff is a barrister and solicitor in the town of Seaforth, and as such has now and has had for many years an office in the town of Seaforth for his own use, and it is now contended that having such an office there is no need of the defendant supplying him with an office, furniture, fuel and light as a police magistrate for the townships of Tuckersmith and McKillop. I am of opinion that the defendant cannot escape its statutory liability under sec. 23, ch. 36, 10 Edw. VII. by reason of the plaintiff having an office of his own as a solicitor.

I have made every effort, but in vain, to find some decision relating to this sec. 23, and my impression is, that the section has not received any judicial interpretation. The cases cited of *Mitchell* v. *Town of Pembroke*, 31 O.R. 348, p. 354; *Lees* v. *Carleton*, 33 U.C.R. 409, deal more particularly with the Municipal Act, but the principle laid down in the *Lees case* is somewhat in point.

The plaintiff, in January last, made a demand on the defendant for the moneys now sued for, but apparently the matter

ONT.

S. C.

HOLMESTED v. COUNTY OF HURON.

Holt, Co.Ct.J.

was not considered, or if considered by the defendant, the plaintiff was not notified.

I am of opinion, that the plaintiff as police magistrate for the townships of Tuckersmith and McKillop, in the county of Huron, is entitled to receive from the defendant the benefit enumerated in sec. 23, ch. 36, 10 Edw. VII., now ch. 88, sec. 23, R.S.O. 1914, namely, "a proper office, with fuel, light and furniture," and, as decided by the late Rose, J., in *Newsome* v. *County of Oxford*, 28 O.R. 442, in which he cites *Ex parte Turquand*, 14 Q.B.D. 636 (1885), he would also under the word furniture, be entitled to stationery.

The evidence is clear that the defendant did not, during the five years mention, supply a proper office, fuel, light and furniture for the plaintiff as police magistrate of the townships of Tuckersmith and McKillop, and that the plaintiff had to and did supply them himself, and at his own expense and seeks to recover this expense from the defendant. I may say that the evidence as to how this expense is made up is not of a very satisfactory nature.

Having arrived at the conclusion that the plaintiff, as police magistrate for the townships of Tuckersmith and McKillop, part of the county of Huron, is entitled to recover, I assess the amount to which the plaintiff is entitled at $315, made up as follows: For office rent per year, $30—$150; For stationery, per year, $10—$50; For light, per year, $3—$15; For fuel, per year, $15—$75, and for furniture, $25—$315.

And I direct that after the expiration of 30 days, judgment be entered for the plaintiff for $315, and costs on the County Court scale.

Falconbridge, C.J.

FALCONBRIDGE, C.J., delivered judgment of Court, dismissing appeal with costs, and stating that the Court saw no reason for differing from the learned trial Judge, to do so would be to read into the statute words not in the enactment.

Appeal dismissed.

BERGKLINT v. WESTERN CANADA POWER CO.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Martin, JJ.A. November 2, 1915.

1. MASTER AND SERVANT (§ II A 4—65)—SAFETY AS TO PLACE AND APPLIANCES—EXCAVATION WORK—DUTY TO ERECT BARRIERS.

Failure of a master to erect permanent barriers for the safe protection of workmen engaged in excavation work at a sloping hillside is actionable negligence, notwithstanding the master's adoption of means of removing the loose rock and material likely to come down.

[*Wilson* v. *Merry*, L.R. 1 H.L. Sc. 326, distinguished; *Bergklint* v. *West. Can. Power Co.*, 50 Can. S.C.R. 39, referred to.]

Statement

APPEAL from the judgment at the second trial of this action.

Sir Charles Hibbert Tupper, K.C., for appellant, defendant.

S. S. Taylor, K.C., for respondent, plaintiff.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The judgment at the first trial was appealed and by the judgment of the Supreme Court of Canada a new trial was ordered, 50 Can. S.C.R. 39. The evidence on behalf of the plaintiff has not been weakened but has, I think, been strengthened at the second trial, though the defendants have endeavoured to make out a better case for the application of the doctrine of *Wilson* v. *Merry*, L.R. 1 H.L. (Sc.) 326. Apart from this defence, I think I should be only giving effect to the views of the learned Judges of the Supreme Court of Canada by holding that the evidence is sufficient to justify the verdict of negligence on the part of defendants or their servants.

The only question remaining then is that depending upon the defence above referred to. In my opinion the defendants must fail. The work which was being done was an excavation in rock, 400 ft. in length and 100 ft. in width. But it is only necessary to deal with the portion which consisted of the excavation for the power house, namely, about 200 ft. in length and 100 in width. This involved the removal of rock to a depth of over 100 ft. from the highest point or crest of the rock excavation. About that point was a hillside extending back for some distance and covered with a deposit of earth, boulders and small stones. The work had been in progress for about a year. The plaintiff was injured while working in the rock cut, by a stone which appears to have rolled down the hillside and fallen over the brink of the rock cut and struck him when at work. It was contended that the appellants had not furnished a safe place for the plaintiff

B. C.

C. A.

BERGKLINT v. WESTERN CANADA POWER CO.

Macdonald, C.J.A.

to work in. The jury found a general verdict in favour of the plaintiff which involves a general finding of all facts necessary to be found in plaintiff's favour to support it. The plaintiff's contention was that there should have been a barrier at the crest of the rock cut above him to protect him from falling missiles. The appellants contend that they had adopted proper means for his safety by having the loose rock and any material likely to come down removed by the plaintiff and two other workmen before he started the work at the point at which he was injured. There was evidence that that was not sufficient protection—that in addition there should have been a barrier.

It appears to me that the conclusion to be drawn from the remarks of the learned Judges in the Supreme Court of Canada is that the jury might reasonably find that the barrier should have been erected, and that their difficulty was to say whether its non-erection was the fault of the company, or of their superintendent or foreman. In my opinion it was not the fault of the fellow-workmen.

I think it was open to the jury to find that the barrier ought to have been erected in the beginning. That the workmen were being employed for a year underneath this sloping hillside without proper protection. The jury could reasonably find that the protection should have been of a permanent nature, and was not necessarily such as a foreman or superintendent had to provide from time to time as the work progressed.

In this view of the case *Wilson* v. *Merry*, *supra*, has no application, and the appeal should be dismissed. I do not think I should interfere on the ground that the damages awarded were excessive.

Irving, J.A.

IRVING, J.A., would dismiss appeal.

Martin, J.A.

MARTIN, J.A.:—Whatever may have been said by others about the insufficiency of evidence at the former trial to prove a lack of system, or failure to provide a safe place to work in the first instance, it is quite clear to me that that deficiency has been supplied at the second trial, and the verdict is fully warranted by the evidence.

The appeal, therefore, should be dismissed.

Appeal dismissed.

MONTREAL TRAMWAYS CO. v. CROWE.

QUE.

K. B.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. February 26, 1915.

1. JURY (§ II A—50)—SELECTION OF—MIXED LANGUAGE.

The plaintiff has not the right to obtain a mixed jury or a jury "*de medietate linguae*" if the defendant, a corporation, is opposed to it, although the latter can itself demand it.

Statement

APPEAL from judgment of Bruneau, J., ordering a jury "*de medietate linguæ.*" Reversed.

Meredith & Macpherson, for appellant.

Charles Champoux, for respondent.

Cross, J.

CROSS, J.:—The appeal, in this case, is by the defendant and it is directed against an order that the jury to be summoned to try the case shall be composed one-half of persons speaking the French language and one-half of persons speaking the English language. The appellant makes a two-fold contention. It contends, in the first place, that the circumstances were not such as warranted the Superior Court in making an order to have the jury constituted *de medietate linguæ*. It also makes a further contention that the jury should have been composed entirely of persons speaking the English language, and, although it did not make a special written application to that effect, it contends that the question of its right to have the jury so composed was open upon the plaintiff's application.

It may be observed that no ground is set forth in the respondent's motion to indicate why the jury should be composed in any particular way. Indeed, it would seem as if it had been considered that the general rule in the formation of juries was that one-half of them should be of persons speaking the French language, and one-half of persons speaking the English language, and that the only special cases were cases in which that proportion was sought to be departed from. That, however, is a misconception.

In art. 430, C.P., provision is made for a general list of persons qualified to serve as jurors in civil cases. In art. 433, C.P., provision is made for the giving of a Judge's order for the summoning of a jury; that is the general course. The law, however, provides for juries to be specially constituted in three cases:—

QUE.

K. B.

MONTREAL TRAMWAYS CO. v. CROWE.

CROSS, J.

1. In actions of a commercial nature, art. 435, C.P. 2. In actions where the parties are of different languages. 3. In actions to which one or both of the parties is a corporation. The second and third cases are provided for, in art. 436, C.P., as amended by sec. 2 of 8 Edw. VII., ch. 77.

That article reads as follows: [citation].

After art. 436, there comes art. 437, which is to this effect: [citation].

This last article shews how the prothonotary is to proceed in making up the panel, and it shews that, in the special cases, regard is to be had to the qualifications required according to the order of the Judge.

The main question upon this appeal is whether or not this is a case in which the law gave to the Judge authority to direct that the jury should be composed in a special way, in other words, whether it is one of the special case above enumerated. The record does not shew whether the language of the respondent is French or English. The respondent bases his argument in support of the judgment upon art. 436, and we may take up the different cases provided for in that article.

The first cases provided for are those in which the jury may be ordered to be composed wholly of persons speaking one language. An order to that effect may be made when the language of all the parties is the French language or the English language, or when one of the parties speaks the French language or the Englsh language and the mother tongue of the other is neither French nor English.

The present case is not one of those just enumerated for, although one of the parties speaks the French language or the English language, the other party being a corporation, has no mother tongue.

The next case provided for in the article is that where one of the parties speaks the French and the other English language, and one of them demands the jury *de medietate lingua*.

Now, it may be argued if the language of the respondent be taken to be French (as he argues that it should) the appellant speaks the English language for the reason that according to our bilingual system a corporation should be held to speak both

languages. That construction, however, cannot prevail because, in the same clause, the Code specially provides for the case of a corporation and enacts that if the corporation so demand it, the jury is to be composed of one-half of persons speaking the French language and one-half of persons speaking the English language.

QUE.

K. B.

MONTREAL TRAMWAYS CO. v. CROWE.

CROSS, J.

It follows that this is not a case where one of the parties speaks the French and the other the English language. It is a case where one of the parties may be taken to speak the French language and where the other party is a corporation. But the corporation has not asked for the jury to be composed by halves, according to language. It follows that the present case does not come within any of those in which the law authorizes the Judge to order that the jury be composed in a special way. This conclusion was already arrived at by this Court in *Les frères de St.-Vincent de Paul* v. *Martin*, 10 Q.P.R. 194, and in *Canadian Rubber Co.* v. *Karavokiris*, 12 Q.P.R. 122. There is, therefore, error in the order appealed against and it should be set aside.

The other contention of the appellant is, as already mentioned, that the jury should be composed exclusively of persons speaking the English language. It argues that the plaintiff, Joseph Crowe, is to be taken as a person speaking the English language, and also argues that the mother tongue of the other party (that is of itself) is neither French nor English, and that the case is the one provided for in the first part of art. 436. Effect cannot, however, be given to that contention, because the respondent contends that his language is French and there is no proof as to what it really is.

In the result, I would say that the part of the judgment appealed against, by which it is ordered that jury be composed of one-half of persons speaking the French language and one-half of persons speaking the English language, should be set aside and that that part of the respondent's motion should be dismissed.

CARROLL, J.:—The interlocutory judgment which is submitted to us granted a mixed jury to the plaintiff.

CARROLL, J.

The appellant corporation objects to that judgment and claims that itself was the only one that could, in that case, ask

QUE.

K. B.

MONTREAL TRAMWAYS CO. v. CROWE.

Carroll, J.

for a mixed jury and that the plaintiff being English-speaking the jury should have been composed of English-speaking persons.

Our art. 436, C.P.Q., has been replaced by an amendment, 8 Edw. VII., ch. 77, par. 2 of which reads as follows:—

If one of the parties speaks the French and the other the English language, and one of them demands a jury *de medietate linguae*, or if such demand is made by a corporation party to the suit, the Judge shall cause the jury to be composed, one-half of persons speaking the French language, and one-half of persons speaking the English language.

The respondent declaring in his factum that he is French-speaking could have asked by his motion that the jury be exclusively composed of French-speaking persons. The appellant corporation alone could object to such a motion and demand a mixed jury.

Par. 1 of the amendment is to prevent the increase of costs owing to the translation in two languages of the evidence of the witnesses.

Strangers who speak neither French nor English cannot be prejudiced because of a jury exclusively composed of persons speaking the same language.

Par. 2 provides for the case where one party is French-speaking and the other party English-speaking. In such a case, each party is entitled to six jurymen of his own tongue.

But when the question is about a corporation, which has no particular language, the privilege to ask for a mixed jury is given to the corporation only. For those reasons the judgment must be reversed. *Judgment reversed.*

ONT.

S. C.

Re STANDARD LIFE ASSURANCE CO. AND KEEFER.

Ontario Supreme Court, Falconbridge, C.J.K.B., Riddell, Latchford and Kelly, JJ. October 4, 1915.

1. INSURANCE (§ VI D 2—375)—LIFE INSURANCE—INTEREST IN PROCEEDS—STATUTORY REGULATION.

Life insurance policies effected in 1850 and 1851, the insured dying in 1915, are subject to the provisions of the Insurance Act, R.S.O. 1914, ch. 183.

2. INSURANCE (§ VI D 2—380)—LIFE INSURANCE—BENEFICIARIES—GRANDCHILDREN—STATUTORY DESIGNATION.

Where life insurance policies had been declared by the insured to be for the benefit of his wife and children under sec. 178(7) of the Insurance Act, R.S.O. 1914, ch. 183, the children of deceased children are entitled to share, and not merely the survivor of the original class, who would be alone entitled under sec. 171(9).

Statement

APPEAL from the judgment of Middleton, J.

ONT.

S. C.

RE STANDARD LIFE ASSURANCE CO. AND KEEFER.

Middleton, J.

H. M. Mowat, K.C., for appellant.

F. W. Harcourt, K.C., for infant grandchildren.

G. L. Smith, for adult grandchildren.

The judgment appealed from was as follows:—

MIDDLETON, J.:—The late Thomas C. Keefer, who died on the 7th January, 1915, effected an insurance upon his life for £1,000 sterling in 1850, and a second policy of the like amount in 1851. The Act enabling policies to be declared to be for the benefit of the wife and children of the insured was passed in 1865.* In 1866, and within the period of one year limited by that Act, Mr. Keefer declared each of the policies to be for the benefit of his wife and children, without naming them.

Mr. Keefer was twice married; his first wife died in 1870, his second wife in 1906. He left him surviving only one son, the applicant, Charles H. Keefer, and four grandchildren, the infants, children of his youngest daughter, who died in 1903, and Mr. E. C. Keefer and Miss A. E. M. Keefer, children of Ralph Keefer, a son who died in 1884.

The insurance company paid to Mr. C. H. Keefer one-third of the insurance money; and as to this there can be no question about his title. The other two-thirds were paid into Court, it being suggested that under the Insurance Act as it now stands the children of deceased children are entitled to take the shares their parents would have received had they survived.

If the Insurance Act as it is now found is alone to be looked at, I do not think that there can be any question as to the right of the grandchildren. By sec. 170, the Act, R.S.O. 1914, ch. 183, is made to "apply to all contracts of insurance of the person and declarations whether made before or after the passing of this Act." As I read the Act, sec. 171 makes provision for the case of beneficiaries other than preferred beneficiaries, and sec. 178 deals with the rights of preferred beneficiaries.† The provisions are by no means identical; and unless this is kept in mind the Act cannot be understood.

*An Act to secure to Wives and Children the benefit of Assurances on the lives of their Husbands and Parents, 29 Vict. ch. 17.

†By sub-sec. 1 of sec. 178, "preferred beneficiaries shall constitute a class and shall include the husband, wife, children, grandchildren and mother of the assured, and the provisions of this and the following three sections shall apply to contracts of insurance for the benefit of preferred beneficiaries."

ONT.
S. C.
RE STANDARD LIFE ASSURANCE CO. AND KEEFER.
Middleton, J.

Section 171(9), upon which Mr. Mowat relies, undoubtedly provides that where there is more than one beneficiary, and some beneficiaries predecease the insured, the surviving beneficiaries take; but a totally different provision is found in the section relating to preferred beneficiaries. By that section, 178(7), in the events that have here happened, the grandchildren take, because it is provided that if the beneficiary predeceasing the insured "is a child of the assured, and leaves a child or children surviving him," his share "shall be for the benefit of his child or children, in equal shares."

The one point of difficulty, as the matter presents itself to me, is the singular situation arising from the fact that the provision which I have quoted was first enacted in the revision of the statute in 1912 (2 Geo. V. ch. 33, sec. 178(7)); so that, if the insured had died in 1912, the grandchildren would have taken nothing. The trust created by the statute and the declaration had become a trust for the benefit of the sole surviving child, and the operation of the statute is certainly most drastic when it has the effect of admitting others to take the place of those deceased members of the original class who had then, by reason of death, no further interest.

Considering the matter as best I can, I cannot in this find any good reason for not giving to the statute its full effect. It is retrospective legislation of the most radical and drastic kind; but throughout the whole history of this statute retrospective amendments have been the rule rather than the exception. Apparently the Legislature has kept a watchful eye upon the statute and its operation; and, whenever an effect was found to result from its provisions which did not accord with the views of the Legislature, an amendment was promptly made, governing not only future policies and future declarations, but applicable to all then existing policies and declarations.

Bearing in mind the wide power of re-apportionment that has always existed, it may well be that the insured chose to rely upon the law as it was declared in 1912. This, however, cannot affect my decision, which must rest upon the statute as it stands.

In *Re Stewart Estate*, 8 D.L.R. 165, my brother Sutherland gave similar effect to sec. 170.

ONT.

S. C.

RE STANDARD LIFE ASSURANCE CO. AND KEEFER.

Falconbridge, C.J.K.B.

The order will therefore go for payment out of the money in Court to the grandchildren; the shares of the adults to be paid forthwith, the shares of the infants as they attain majority.

The costs of the motion may well be paid out of the fund.

The judgment of the Court was delivered by

FALCONBRIDGE, C.J.K.B.:—For the reasons assigned in the judgment of Mr. Justice Middleton, which reasons have been amplified in the discussion before us, we consider that the order in appeal is right, and that the appeal should be dismissed.

In view of the fact that the learned Judge directed costs to be paid out of the insurance fund, the appellant might have rested content; and so, we think, he should pay the costs of this appeal.

Appeal dismissed.

BECK v. THE "KOBE."

CAN.

Ex. C.

Exchequer Court of Canada (British Columbia Admiralty District), Hon. Mr. Justice Martin, Local Judge in Admiralty. September 17, 1915.

1. ADMIRALTY (§ I—4*b*)—SEAMEN'S WAGES—JURISDICTIONAL AMOUNT — WAGES OF MASTER—RIGHT AGAINST SHIP.

Since under sec. 194 of the Canada Shipping Act, ch. 113, R.S.C., a master of a ship is put upon the same basis as a seaman in respect of recovery and remedy as well as of substantive rights, a claim of a master for wages less than the jurisdictional amount is within the restriction of sec. 191, which the Admiralty Court has no jurisdiction to enforce against the ship of the defendant.

Statement

MOTION to set aside warrant for arrest of ship to satisfy claim of seaman's wages.

C. M. Woodworth, for motion.

W. F. Hansford, contra.

Martin, L.J.A.

MARTIN, L.J.A.:—This is a motion by the defendant to set aside the writ and warrant of arrest for lack of jurisdiction. The defendant ship, of Canadian registry, is under arrest to satisfy a claim of the master for wages amounting to $190, an amount, which, on the face of the proceedings, is too small to give this Court jurisdiction under sec. 191 of the Canada Shipping Act, ch. 113, R.S.C., in the case "of any seaman or apprentice," according to the recent decision of this Court in *Cowan* v. *The St. Alice* (July 17, 1915).

But it is submitted that a master is not within the scope or prohibition of that section, and reliance is placed upon the fol-

CAN.
EX. C.
BECK
v.
THE "KOBF."
Martin, L.J.A.

lowing definition of "seaman" in interpretation sec. 126 of Part VIII. of the said Act dealing with "seamen," in the group of sections from 126 to 325 inclusive:—

126(*d*) "Seaman" includes every person employed or engaged in any capacity on board any ship, except masters, pilots and apprentices duly indentured and registered.

This is essentially the same as the definition in the Imperial Merchant Shipping Act of 1854, sec. 2.

It is also pointed out that sec. 215 of the same ch. 113, relating to expenses for injuries, draws a distinction between "the master or any seaman or apprentice." And in sec. 10 of the Admiralty Act, 1861, a like distinction is drawn between the claims of seamen and masters for wages and disbursements, the High Court of Admiralty being given jurisdiction over both, which this Court possesses. The history of various Imperial enactments on the point is considered in, *e.g.*, *The Sara*, 14 App. Cas. 209 (particularly Lord Macnaghten's judgment), *Morgan* v. *Castlegate Shipping Co.*, [1893] A.C. 38, at 46-8, 51; and *The Arina*, 12 P.D. 118, wherein, at 127, it is said by Brett, J., that the master "*ex hypothesi* is not a seaman."

It is urged that while the "same rights, liens and remedies" as a seaman are given a master under sec. 194 "for the recovery of his wages, and for the recovery of disbursements properly made by him," yet these are in addition to and not in derogation of his other pre-existing rights. But it is submitted for the defendant that even though a master would, in general, be excepted from said sec. 191, yet because of sec. 194 he can be in no better position than a seaman or apprentice when he resorts to the "Mode of Recovering Wages," as the significant heading runs to this particular group of secs. 187-195. Sec. 194 is as follows:—

Every master of a ship registered in any of the provinces shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages and for the recovery of disbursements properly made by him on account of the ship and for liabilities properly incurred by him on account of the ship, which, by this Part or by any law or custom, any seaman, not being a master, has for the recovery of his wages.

And *cf.* the similar sec. 167 (2) of the Imperial Merchant Shipping Act, 1894, ch. 66, which is in substance the same as sec. 1 of the Imperial Merchant Shipping Act 1889, 52 & 53

Vict. ch. 46, under which a lien for disbursements was first given the master—*Morgan* v. *Castlegate S.S. Co., supra,* p. 51. After a careful consideration of the various statutes and authorities cited, *e.g.,* Abbott on Shipping (1901) 185, 296, 1130; Temperley's Merchant Shipping Act, 2nd ed., 89; Maclachlan on Shipping (1911) 218-9, 237n., 258; 26 Hals. 53; Maude and Pollock on Merchant Shipping Act (1881), 122, 240, and Williams & Bruce's Admiralty Prac. (1902) 208-10, 216; I can only bring myself to hold that it is the clear intention of the legislature in the enactment of this little group of nine sections dealing with one subject-matter and which ought to be read together, to put the master upon the same basis as a seaman in respect of recovery and remedy as well as of substantive rights. There is nothing in the circumstances which renders it improper to apply the statutory restriction to the facts before me, as "the case permits" it, to quote the words of the statute, which expression has been considered in two of the English cases I have cited. The master is, in short, given valuable rights but they must be asserted in the same way as others are required to assert them who possess the same rights, or some of them. The reason which actuated parliament to place by sec. 191 such a restriction upon these actions for wages, and which I have alluded to in *Cowan* v. *The St. Alice,* applies with even greater force to the claim of a master than to that of a seaman or apprentice.

It follows that this Court has no jurisdiction to entertain this action and therefore it must be dismissed, and the warrant for arrest set aside. I see no good reason why the usual order for costs should not be made in favour of the successful party. *Motion granted.*

BERGE v. MACKENZIE, MANN & CO.

ALTA.
S. C.

Alberta Supreme Court, Beck, J. July 30, 1915.

1. LIMITATION OF ACTIONS (§ III F—131)—WORKMEN'S COMPENSATION—ACTION FOR NEGLIGENCE—DELAY IN BRINGING—STATUTORY EFFECT. Where in an action for negligence it is found that the damages therein are to be fixed as a compensation under sec. 3(4) of the Workmen's Compensation Act (Alta.), 1908, ch. 12, the Court will not allow any compensation under the Act where the original action is not commenced within the statutory period of 6 months. [*Smolik* v. *Walters,* 1 D.L.R. 891, followed.]

Statement

APPLICATION for compensation under Workmen's Compensation Act. Dismissed.

ALTA.

S. C.

BERGE v. MACKENZIE, MANN & CO.

Beck, J.

B. Pratt, for plaintiff.

O. M. Biggar, K.C., for defendants.

BECK, J.:—This action was tried before me without a jury. I gave a hesitating decision in favour of the plaintiff assessing the damage for negligence as $3,500. The Appellate Division, 20 D.L.R. 1, reversed my decision and referred to me the question of fixing the compensation payable to the plaintiff under the Workmen's Compensation Act (ch. 12 of 1908).

It is now objected that I have no power to do this because the action was not commenced within 6 months of the accident. The accident occurred on February 22, 1912; the action was not commenced until September 19, 1913. Sec. 3(4) says:—

> If, *within the time hereinafter in this Act limited for taking proceedings*, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in each action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, etc.

I have to determine whether the plaintiff's right to compensation is barred by reason of the words "within the time hereinafter in this Act limited for taking proceedings." Sec. 4 says:—

> Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless . . . the claim for compensation . . . has been made within 6 months from the occurrence of the accident . . . ; provided always that . . . (*b*) The failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the province or other reasonable cause.

I am concluded by the decision in *Smolik* v. *Walters*, 1 D.L.R. 891, from holding otherwise than that the words quoted from sec. 3(4) meant the period of 6 months without qualification, that is, these words are not subject to the proviso in sec. 4. That was a decision of the Court *en banc*, in which I expressed my acceptance of this view to be with hesitation. It is supported by English and Scotch decisions. I regret to have to hold that the plaintiff is without remedy in this action merely on the ground of delay for which he seems not blameable.

It seems too that by exercising his option (sec. 3(2)(*b*)) of proceedings by way of an action for negligence independently

of the Act he has deprived himself of his right to revert to proceedings for compensation under the Act, although, as I should judge from the evidence, he could excuse himself from the delay. See the cases collected in Stone's Insurance (and Workmen's Compensation) cases vol. 2, pp. 935 *et seq.*

I see no sufficient reason why the Act should have been so drawn as to have this effect; but in view of the judicial decisions, no other interpretation of the Act is now open and a change can be looked for only from the Legislature. There will be no costs of this application. *Application dismissed.*

EVANGELINE FRUIT CO. v. PROVINCIAL FIRE INSURANCE CO.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff and Anglin, JJ. June 24, 1915.

1. INSURANCE (§ III E—92)—PROHIBITED KEEPING OF GASOLINE—DISTANT LOCATION—MATERIALITY TO RISK.

Keeping a barrel of gasoline, about 16 feet from the building, is not a breach of condition in a fire insurance policy that the policy shall become void if more than 5 gallons of gasoline were "kept and stored" at one time in the building containing the insured goods; nor is it a circumstance material to the risk, non-disclosure of which would avoid the policy, where the insurance company at the time of issuing the policy had knowledge of the circumstances and the gasoline so stored is required for daily use.

[*Evangeline Fruit Co.* v. *Provincial Fire Ins. Co.*, 17 D.L.R. 378, 48 N.S.R. 39, reversed.]

Statement

APPEAL from a decision of the Supreme Court of Nova Scotia, 17 D.L.R. 378.

Roscoe, K.C., for the appellants.

Newcombe, K.C., for the respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J., concurred in the judgment allowing the appeal with costs.

Davies, J.

DAVIES, J.:—This appeal is from the judgment of the Supreme Court of Nova Scotia which reversed a judgment of the trial Judge in favour of the plaintiff for the amount insured by its policy in the defendants' company on its stock of apples and general stores contained in a two-and-a-half storey frame and cement building 60 by 94 and addition 20 by 20, situate in Windsor.

All kinds of defences were pleaded to the claim of the plaintiff, but they were either dropped or disposed of at the trial and the only two relied on by the Court below and at the argument at bar were (1) the omission on plaintiff's part to com-

CAN.

S. C.

EVANGELINE FRUIT CO. v. PROVINCIAL FIRE INS. CO.

Davies, J.

municate to the defendants before or at the time the policy issued what was alleged to be a material circumstance under condition 1 of the policy, namely, the presence of a barrel of gasoline under a broad platform running up to the building and about 15 or 16 ft. from the building from which the daily supply of gasoline (about 5 gallons) for the gasoline engine in use in the building for evaporating apples was obtained, and (2) condition 11 which prohibited the storing or keeping of more than 5 gallons of, amongst other oils, gasoline "in the building insured" unless permission in writing from the insurer was first obtained.

The Court below did not rely upon this condition for their judgment. On the contrary, I gather that they were of the opinion that the keeping of the gasoline in a barrel outside of the building and some 15 or 16 ft. away from it for the purpose of obtaining the daily supply of 5 gallons for the running of the gasoline engine within the building was not in contravention of this eleventh condition.

In that conclusion I fully concur and with respect to the true meaning of that eleventh condition I would call attention to the observations of the Judicial Committee of the Privy Council in the case of *Thompson* v. *Equity Fire Ins. Co.*, [1910] A.C. 592, at 596 and 597.

The ground upon which the Court below based its judgment reversing that of the trial Judge was the omission on the part of the insured company to communicate the fact of the presence of the barrel of gasoline some 15 or 16 ft. away from the building under the platform leading to the building from which the supply for the gasoline engine was daily obtained.

They held that was a material fact affecting the risk which it was the duty of the party insured to have disclosed to the insurance company at or before the date when the policy issued and that the failure to make the disclosure vitiated the policy.

The information given to the general agents of the defendant company and on which the policy sued on was issued, was that the goods, etc., upon which insurance was sought were contained in a factory, the machinery of which was operated by an

engine for which gasoline furnished the power and in which factory were furnaces, piping, etc., besides the engine.

This information must have satisfied the insurance company that gasoline was used in the engine and the protection they required and the prohibition they provided for in consequence were provided for in the eleventh condition of the policy, prohibiting the keeping or storing of gasoline exceeding five gallons in quantity "in the building insured or containing the property insured." There was, as all the Courts have held, and as this Court holds, no violation of that condition.

If with the knowledge the insurance company possessed when issuing the policy sued on of the facts that gasoline supplied the power which operated the engine in the factory or building, the goods in which they were insuring, and that such supply of gasoline had to be daily obtained from some outside source as it was prohibited from being kept or stored in the building or believed so to be; then, if they desired further security and to know where the source of supply was kept or obtained, they should surely have asked for the information.

I am of the opinion that under the facts and circumstances proved in this case and in view of the knowledge of these facts possessed by the insurance company, the keeping of the barrel of gasoline under the platform some 15 or 16 ft. away from the building for the purpose of furnishing the daily supply required for the running of the engine, was neither a breach of the eleventh condition nor such a material circumstance within condition 1 as it was the duty of the insured company voluntarily and without being asked to communicate to the insurance company.

I would allow the appeal with costs in this Court and in the Court of Appeal and restore the judgment of the trial Judge.

Idington, J.

IDINGTON, J.:—This is an action brought by appellant against respondent on a fire insurance policy, dated January 7, 1912, for a year from that date, upon stock contained in a building in Windsor, Nova Scotia, for $2,500, to recover losses caused by fire on March 21, 1912.

The numerous defences pleaded were at the trial practically

CAN.

S. C.

EVANGELINE FRUIT CO. v. PROVINCIAL FIRE INS. CO.

Idington, J.

reduced to 3 in number, each resting upon one of the statutory conditions. That upon the condition No. 1 is relative to the alleged omission of the insured to communicate a circumstance material to the risk. Another was rested upon condition No. 9, relative to prior and subsequent insurances. And the third is dependent upon condition No. 11, so far as relative to the quantity of gasoline stored or kept in the building.

The trial Judge, held none of these defences established and entered judgment for the appellant for the amount claimed.

On appeal therefrom the Supreme Court of Nova Scotia does not seem to have been asked to pass upon anything arising out of condition No. 9 as only that raised by the others of said conditions is dealt with.

Of these that Court maintained only the defence raised upon condition No. 1. We are not favoured by a copy of the reasons of appeal (if any) presented to that Court.

It may be observed that, if no objection was raised in that Court to the ruling of the trial Judge relative to condition No. 9, and hence assented to or accepted by respondent, it should not now be entertained here.

The validity of the defence maintained by the Court of Appeal must depend on how we look at the circumstances under which the insurance was effected, and the facts which are alleged to have materially increased the risk.

The authority of the local agency which accepted the risk and issued the policy sued upon may also have to be considered.

The risk had been presented to these local agents in October, accepted by them and a policy issued accordingly by them but rejected by the head office under a misapprehension of the nature of the building in which the stock was.

The head office, on explanations, desired to retain the risk, but were too late on that occasion as another company had (upon such rejection) meantime taken it for 3 months. This is only material in considering the knowledge they, in said head office, must have acquired in course of that dealing; and its bearing upon the authority these local agents had relative to such matters as are involved in this defence.

The insurance now in question was asked for by Mr. Blan-

chard, another insurance agent, asking the local provincial agents of respondent over the phone when the 3 months' policy already referred to had expired, or was about to expire, to take the risk.

It is not disputed now that said firm must have known, and, I should suspect, the head office of respondent must also have known unless it neglected to pay attention to that which had previously been before it that a gasoline engine was in use in the building containing the stock in question.

It turned out that instead of the supply cask from which 5 gallons of gasoline were daily drawn to keep the engine running being in the building, it was kept under a platform running at right angles to the building and used for delivery of goods from or to waggons unloading or loading in the adjacent yard. I should infer the end of this platform touched or at least came very near to the building. I understand any one inspecting in the most casual way could see this cask.

When insurers know that a gasoline engine is in use in the building regarding which they are concerned as insurers, I connot think they should be heard to say that they were ignorant of the fact which common sense tells them, that a reasonable quantity of gasoline is kept in or near by for purposes of keeping that engine running. No one has ventured to say that the quantity so kept was unreasonable under such circumstances.

It is not stated exactly what the size of the cask or barrel as it is sometimes referred to, really was, but if of an unusual capacity I think we would have heard of it.

It is shewn that in the case of a gasoline engine on the premises, an extra charge is made for the insurance on account of its use, but it is not shewn or pretended that the mere keeping of what is reasonably necessary to its use is still further taxed by any further increased rate. We have had in the case of *Anglo-American Fire Ins. Co.* v. *Morton*, 8 D.L.R. 802, 46 Can. S.C.R. 653, an insurance company setting up this defence and claiming change of occupation whereby gasoline came in use and for other reasons policy voided. The appeal failed. *The Prairie City Oil Co.* v. *The Standard Mutual Fire Ins. Co.*, 44 Can. S.C.R. 40, though turning upon a condition similar to

CAN.

S. C.

EVANGELINE FRUIT CO. v. PROVINCIAL FIRE INS. CO.

Idington, J.

No. 11 in this case seems in principle adverse to respondent's contention herein. I, therefore, conclude this defence is not open to the respondent.

The defence under condition No. 11 has, if possible, still less to be said for it. It only applies to the keeping or storing in the building, and what was done here cannot come within the language used. Besides that the case of *Thompson* v. *The Equity Fire Ins. Co.*, [1910] A.C. 592, reversing the decision of this Court, 41 Can. S.C.R. 491, seems to make the point hardly arguable, and, indeed, was not pressed on argument.

The remaining defence under condition No. 9, though apparently discarded in the Court of Appeal, was strongly pressed upon us by counsel for respondent. But for the decision of this Court in *Parsons* v. *Standard Fire Ins. Co.*, 5 Can. S.C.R. 233, I should be inclined to think it much more arguable than the other foregoing defences. I cannot, however, distinguish it in principle from that case and decision. There is, to my mind, just one notable fact that might, but for what I am about to refer to, enable us to distinguish it. That is this: In that case the total of the other insurance in question would seem to have been noted upon the policy sued upon and the only change was in substituting one subsequent policy for part of said total. That decision related only to a subsequent insurance and Mr. Newcombe has quite properly put forward this as one where there was also a prior insurance without express notice in writing or written waiver. I hardly think there is sufficient therein to distinguish this from that unless the fact, to which I have already adverted, that in that case the total of the existing insurance having been noted on the policy sued upon would bring the matter of the subsequent insurance more directly to the mind of the insurer than the knowledge I am about to refer to in this case. Both the questions of prior and subsequent insurance are involved herein.

The question raised must, therefore, turn upon the effect of the knowledge of the local agents who were provincial agents for transacting the business of the respondent. It certainly was competent for the head office to waive this condition. If the management there, possessed of actual knowledge of the

existence of a prior insurance, chose to accept in face of such knowledge, payment of the insurance premiums, and deliver as valid a policy of insurance, and thereby induce the insured to accept same, surely such insurers could not be heard to set up the omission on their part to make the necessary entries as an answer to the insured after the loss.

Now, it seems to me that it is clearly established the provincial agents of respondent were authorized not merely to solicit business and give an interim receipt, but to make the contract and issue the policy. Those agents, as shewn by the evidence already quoted, knew of the existence of the prior insurance and that it should have been shewn upon the policy. That, however, and the omission to enter a record thereof upon the policy and knowledge of the substitutionary subsequent policy on the property are exhibited in their true light by the further evidence of Mr. Pryor as follows:—

Q. Did you know that the prior insurance should have been mentioned on the policy? A. I did not see the policy when it was sent out of the office. Had I checked it, I would probably have noticed it and made the correction. Q. Tell me what you intended in reference to this prior insurance with regard to your policy? A. I intended to put it on the policy, in addition to other concurrent insurance. It was simply a mistake it was not there. It was my intention to have it on. As I said before, I did not see the policy before it went out of the office. Q. Was the policy signed by you? A. No. Q. It was sent out without you having an opportunity of seeing it? A. Yes. Q. You say at the time there was what other insurance, to your knowledge, on the stock? A. $2,500 in the Dominion and $1,000 in the Nova Scotia. Q. Who were the agents for the Dominion? A. Mr. Renwick. Q. What became of the Dominion policy, was it ever replaced? When it expired what happened? A. It was replaced by the Provincial. Q. By a policy in the Provincial? A. Yes. Q. And was this the policy L.B./8 by which that was replaced? A. Yes, sir. Q. Do you know anything about a policy in the London Mutual? A. Yes. Q. What was that on? A. On stock. Q. The same stock? A. Yes. Q. Did that expire? A. Yes, sir. Q. What became of that? A. I think that was placed on the property. Q. How much was the insurance on this property in the London Mutual? A. I think it was $2,500. I would not swear to it. Q. You knew that was outstanding at the time this policy was prepared? A. Yes. Q. And you say the same about that as of the other policies that were outstanding, that they should have been inserted in here, and would have been except for your mistakes? A. Yes, if I had seen the policy, no doubt it would have been done.

It seems to me that under the foregoing statements of fact and having regard to the authority of such agents who received

CAN.

S. C.

EVANGELINE FRUIT CO. v. PROVINCIAL FIRE INS. CO.

Idington, J.

the premium, the respondent cannot be heard to set up as defence the result of its own neglect to note on the policy the facts. And as to the subsequent substitution of a policy in the Provincial Company for that in the London Mutual which had expired, any objection thereto is met by *Parsons* v. *Standard Fire Ins. Co.*, 5 Can. S.C.R. 233, already referred to, where we find the responsibility for failure to note the latter on the policy is shewn to have rested with the respondent.

There is not so far as I have been able to see any English case exactly covering the questions raised by this defence under condition No. 9. This, no doubt, arises from the fact that English companies do not habitually use such like conditions.

There are many cases in the American Courts and in our Canadian Courts which are not binding upon us but amply cover this case. The many text books referred to by Mr. Roscoe on the law of insurance deal with and refer to waiver of such a condition as set up by the conduct of the insurers. Besides the case already referred to in this Court there is the case of *Billington* v. *Provincial Ins. Co.*, 3 Can. S.C.R. 182, which seems clearly distinguishable and shews how the promise of an agent who had merely power to issue an interim receipt, would not bind his company. The case of *Richard* v. *Springfield Fire and Marine Ins. Co.*, 108 Am. St. Rep. 359, shews the distinction observed between the authority of such an agent and the authority of such agents as respondent's provincial managi: g and contracting agents in question herein.

I think the principle observed in the numerous cases cited in the text-books referred to and in which the facts fit this case should be followed; though not binding upon us, they seem in line with the *Parsons* v. *Standard Fire Ins. Co.*, 5 Can. S.C.R. 233 case, which does bind us. The appeal should, therefore, be allowed with the costs throughout.

Duff, J.

DUFF, J.:—I see no reason why the policy upon which the action was brought should not be construed according to the usual rule *contra proferentem*. I think the insurance of a going factory where the motor power is supplied by a gasoline engine must be taken to contemplate the keeping of a reasonable supply of gasoline for the engine and the keeping of it in a reasonably

convenient way. I think, therefore, that the condition of the policy prohibiting the storing of the gasoline in larger quantities than five gallons does not apply to gasoline kept for that purpose. I think, moreover, that the language of Lord Macnaghten in *Thompson* v. *Equity Fire Ins. Co.*, [1910] A.C. 592 at 596, is applicable and that "stored or kept" imports a notion of warehousing or depositing for safe custody or keeping in stock for trade purposes: Lord Macnaghten's illustration of the keeping of it for domestic uses seems to cover the ground.

As to non-disclosure; as the keeping of a reasonable quantity of gasoline must be taken to have been within the contemplation of the parties to the contract, I do not think there was any change of conditions of which the appellants were under any obligation to notify the insurance company.

Anglin, J.

ANGLIN, J.:—I am, with great respect for the Supreme Court of Nova Scotia, of the opinion that this appeal should be allowed and the judgment of Drysdale, J., who tried the action, restored.

Because the insurers were referred to a former policy with another company for a description of the property to be insured they seek to incorporate the terms of that policy with regard to the presence of gasoline into the risk assumed. In their policy, however, they saw fit to substitute for the special provisions of the former policy dealing with gasoline the usual statutory condition, and, in my opinion, they are thereby precluded from contending that the risk was subject to any other condition in that particular.

By the statutory condition in the defendants' policy it is provided that the insurer shall not be liable for loss or damage occurring while gasoline is "stored or kept" in the building containing the property insured unless permission in writing is given by the insurer. I doubt whether the supply of gasoline which the plaintiffs had on hand in order to furnish fuel for a gasoline engine known by the insurers to be in use in the building containing the stock insured, and which consumed five gallons of gasoline per diem, can properly be said to have been "stored or kept" within the meaning of this condition. *Thompson* v. *Equity Fire Ins. Co.*, [1910] A.C. 592. But if it was otherwise

CAN.

S. C.

EVANGELINE FRUIT CO. v. PROVINCIAL FIRE INS. CO.

Anglin, J.

within it, I am satisfied that the gasoline was not in the building which contained the insured property. It was in fact outside the building and under an adjacent platform used for purposes of loading and unloading wagons. There is no reason why the word "building" should here be given a meaning other than that which it ordinarily bears: *Moir* v. *Williams*, [1892]1 Q.B. 264.

Neither do I think that the policy is avoided because of non-disclosure of the proximity of this supply of gasoline to the building under the condition requiring communication by the insured of all circumstances material to the risk. Being aware that the insured were using the gasoline engine in the building for manufacturing purposes, the insurers must be taken to have had knowledge that a reasonable supply of gasoline for fuel would be kept close at hand. Having this knowledge, they saw fit to stipulate expressly against this supply being kept in the building and did not see fit to inquire at what distance from the building it was placed, although they must have known that convenience required that it should be reasonably close. They can scarcely be heard to say that its precise location was so material to the risk that the insured must have specially communicated it at the peril of the policy being avoided by his failure to do so.

The defence that subsequent assurance was effected without notice to the company in breach of the 9th statutory condition, is not referred to in the judgment in the full Court, and I am of opinion that it is satisfactorily dealt with by Drysdale, J. The general agents of the insurers who issued the policy in question were fully apprised of the amount of the plaintiffs' concurrent insurance when the defendants' risk was assumed. Their knowledge was that of the defendants, and I think the latter cannot set up their failure to note their assent in or upon the policy as a defence. The subsequent transfer of one of the policies from one company to another was immaterial, there having been no increase in the amount of the concurrent insurance: *Parsons* v. *Standard Fire Ins. Co.*, 5 Can. S.C.R. 233. I would, for these reasons, allow this appeal with costs.

Appeal allowed.

MUNICIPALITY OF BOW VALLEY v. McLEAN.

ALTA.

S. C.

Alberta Supreme Court, Walsh, J. September 23, 1915.

1. TAXES (§ III A—105)—SUBDIVISION LOTS—MODE OF LEVY.

Each lot as it appears on the registered plan of a subdivision is a "lot or portion of land" within the meaning of sub-secs. 2 and 3 of sec. 297 of the Rural Municipality Act (Alta.), as amended by secs. 23 and 24 of ch. 21 of the Acts 1913, and subject to the tax imposed thereby upon each lot and not to the rate of the aggregate assessed value of the land.

2. TAXES (§ I C—21)—MUNICIPAL TAXATION—TAX ON LAND LOTS—UNIFORMITY—MINIMUM RATE.

Where a uniform rate of taxes is imposed upon each lot of land, the fact that the statute provides for a minimum rate, in the event the tax payable on any lot or portion of land amounts to less than the required rate, does not violate the rule of uniformity.

Statement

ACTION for the recovery of taxes.

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

W. E. Broad, for defendant.

Walsh, J.

WALSH, J.:—The defendant was assessed for the year 1914 as the owner of 158 lots, according to a registered plan of subdivision, of a part of a quarter section within the limits of the plaintiff municipality. A separate assessment of each of these lots was made, that is to say each lot was described by itself in the roll, and a distinct assessed value given to it. The aggregate assessed value of these lots is $4,125. The tax rate fixed by the council for the year 1914 was three mills on the dollar. If that rate is applicable to the defendant's lands, the taxes for which he is liable amount to only $12.37. The plaintiff contends, however, that it is entitled to exact from him the sum of $316, being $2 per lot for each of these lots. It bases its right to payment of this sum upon sub-secs. 2 and 3 of sec. 297 of the Rural Municipality Act as amended by secs. 23 and 24 of ch. 21 of the Acts passed in the second session of 1913. These sub-sections, as so amended, read as follows:—

2. In the event of the tax payable on any lot or portion of land under this section for the purposes of the municipality being less than $1, the tax to be entered in the roll as payable for such purposes shall be $1.

3. In the event of the tax payable on any lot or portion of land under this section for school purposes being less than $1 the tax to be entered in the roll as payable for such purposes shall be $1.

The simple question for determination appears to me to be this, is or is not each of these lots "a lot or portion of land" within the meaning of these sub-sections. If it is, the claim

ALTA.

S. C.

MUNICIPALITY OF BOW VALLEY v. McLEAN.

Walsh, J.

of the plaintiff must be upheld, for each of these sub-sections plainly justifies the imposition of a minimum tax of $1 or an aggregate of $2 on each lot or portion of land. If it is not, the defendant's liability must be limited to the amount represented by the tax rate on his aggregate assessment.

In this country each of the parcels of land resulting from the final cutting up by a plan of sub-division of the larger area of which it once formed a part is popularly known as a lot. This word is given legislative recognition within this meaning by many of the provisions of the Land Titles Act, *e.g.*, sec. 124. The defendant's plan of sub-division was undoubtedly registered under this section. A blue print of it is before me. The land comprised in it is divided into blocks and each block is divided into lots. Streets separate the blocks from each other and lanes bisect the blocks. I have no doubt but that each of these lots is a lot within the meaning of the sub-section of the Rural Municipality Act here in question. If each of them was owned by a different man it surely could not be argued by any one of them that his land was not a lot. What difference can it make in the interpretation of the sub-sections that the ownership of many of the lots in the sub-division is in one man. Surely a lot is just as much a lot if the man who owns it owns as well others adjoining it as it is if it constitutes the sole holding of its owner. Under the sub-sections as originally enacted, the minimum tax was made payable by every person whose total tax was less than the minimum. As amended it is made payable on any lot or portion of land the tax upon which is less than the minimum. This transferring of the tax from the person to the land, if I may so speak of it, prevents a ratepayer from escaping it by bulking his entire taxation in the municipality in one sum and thus afford, to my mind, some further proof of the intention of the legislature that each lot owned by a man should, for the purpose of these sub-sections be treated as a separate and distinct holding. Secs. 44, 45 and 46 make provision for land within the limits of the municipality "which has been sub-divided into building lots or as a town-site and a plan which has been registered in the Land Titles office." The legislature therefore had in mind in the framing of this Act the possibility of just

such a thing as is found here. It is doing no violence to the language of the Act to say that the lot referred to, in these sub-sections can only be a lot shewn on such a registered plan for there is no other parcel of land within a Rural Municipality to which that term could be applied.

Mr. Broad argued that these sub-sections of sec. 297 are so at variance with the provisions of sec. 293, that effect cannot be given to them. That section provides for levying such a tax at a uniform rate on the dollar as shall be deemed sufficient to meet the estimated expenditure. This minimum tax is, of course, not imposed in accordance with the provisions of that section, for it is not levied at a uniform rate on the dollar. I see no difficulty, however, in reading the two sections together, as I think the legislature intended that they should be. And so read they mean, in my opinion, that the uniform rate is to be levied upon all lands, but that if the tax at this uniform rate upon any lot or portion of land amounts to less than one dollar there shall be added to it an amount sufficient to bring it up to that sum. It surely was within the competence of the legislature to so enact, and there is, to my mind, no obscurity or ambiguity in the language of those sections. I am, therefore, unable to apply to it the canon of construction which several authorities, cited to me by Mr. Broad, say should be applied to statutes imposing taxation the language of which is obscure or ambiguous, viz., that they should be construed in favour of the person taxed.

In my opinion, the defendant is liable to the plaintiff for the taxes thus charged against his lands and there will be judgment against him accordingly. The money paid into Court to abide the result of this action may be paid out to the plaintiff. It was stated by counsel that this was a test case, by the judgment in which several other similar disputes would be disposed of, and that for this reason the action was brought by consent in this Court though within the competence of the District Court. Under these circumstances the plaintiff will tax its costs under column 2 of the schedule without set-off.

Judgment for plaintiff.

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S. C.

Re HUNT AND BELL.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren and Magee JJ.A., and Kelly, J. July 12, 1915.

1. TAXES (§ III F—147)—SALE FOR—RIGHTS OF PURCHASER—RESTRICTIVE BUILDING COVENANT—EXTINGUISHMENT.

A restrictive building covenant contained in a deed to the land is extinguished upon a tax sale of the property, and will convey it to the tax purchaser free from any claim under the covenant.

[*Tomlinson* v. *Hill*, 5 Gr. 231; *Soper* v. *Windsor*, 22 D.L.R. 478, followed; *Essery* v. *Bell*, 18 O.L.R. 76, considered; *London County Council* v. *Allen*, [1914] 3 K.B. 642; *Re Nisbit, etc.*, [1905] 1 Ch. 391; [1906] 1 Ch. 386, applied.]

Statement

APPEAL by the vendors from the order of Middleton, J., sustaining certain objections to the title made by the purchaser.

Merritt A. Brown, for appellants.

J. H. Bone, for respondent.

Garrow, J.A.

GARROW, J.A.:—The land in question is part of lot No. 32 on the east side of High Park avenue, in the City of Toronto. This land with other adjoining lands was all at one time owned by Daniel Clendennan. On May 26, 1891, by a conveyance duly registered, Clendennan, his wife joining to bar dower, sold and conveyed the parcel in question, in fee simple, to Harriet E. Washington. The consideration expressed is $1,200. The deed contained a restrictive covenant in the terms following: "It is hereby covenanted that every house, building or erection at any time placed on said lands on High Park avenue, or any part thereof, shall be so placed at a distance of not less than 30 feet back from the street-line of High Park avenue, and shall cost not less than $1,500 exclusive of lands; and it is further covenanted that a covenant similar hereto shall be inserted in all deeds and conveyances of the said lands made and executed by the said Harriet E. Washington, her heirs, executors, administrators, or assigns."

Whether Clendennan had, at the date of that conveyance, disposed of or still retained the adjoining lands, or any part thereof, does not clearly appear; nor does it clearly appear that in the case of other sales made by him he obtained similar covenants from the purchasers.

The lands now in question were subsequently sold for taxes —the conveyance, duly registered, bearing date the 26th November, 1898. The vendors' title is derived solely through the tax deed. The house erected upon the land does not comply with

the covenant, if in force. The non-compliance is not, apparently, extensive, but is substantial, as is in effect conceded.

The vendors contend that the effect of the sale and conveyance for taxes was wholly to eliminate the before-mentioned restrictive covenant as in any way affecting the title. They also claim the benefit of the curative effect of the statute 8 Edw. VII. ch. 118, sec. 18.

Middleton, J., in his judgment, said: "Turning to the statute" (the Assessment Act), "which must be the foundation, I find that the Legislature has given to the lien for taxes priority to every claim, privilege, lien, or incumbrance; and, as priority is given, the tax sale must defeat every claim, privilege, lien, or incumbrance of every person except the Crown. I do not think that these words should be extended beyond their literal meaning; and it seems to me that the right based upon the restrictive covenant is certainly not a lien or incumbrance upon the land, nor do I think it is a claim or privilege, within the meaning of the statute. It is not a claim or privilege *quoad* the land, but it is a personal right against the owner of the land." And, after referring to several cases, he reached the conclusion that the objection based upon the covenant was a valid and sufficient objection to the title.

With that conclusion I am, with deference, quite unable to agree. The nature and effect of restrictive covenants have been under consideration in many recent cases. One of the latest is *London County Council* v. *Allen*, [1914] 3 K.B. 642, where such a covenant is spoken of as creating something in the nature of a negative easement, requiring for its creation and continuance a dominant and a servient tenement as in the case of ordinary easements; or, as put by Scrutton, J., at p. 672, it is "an equitable interest analogous to a negative easement." See also *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, and, in appeal, [1906] 1 Ch. 386; *Milbourn* v. *Lyons*, [1914] 1 Ch. 34, and in appeal, [1914] 2 Ch. 231.

Under these authorities it is clear that, if there is a dominant tenement, the owner, and he alone, can claim the benefit of the covenant. If there is not such a tenement, the claim upon the covenant, as against subsequent assignees or purchasers, en-

ONT.
S. C.
RE HUNT AND BELL.
GARROW, J.A.

tirely ceases, although the personal claim between the original covenantor and covenantee may still exist. And, if the claim has become a mere personal claim against the owner, as the learned Judge seemed to think this is, it cannot, in my opinion, form the basis of a valid objection to the title.

The matter must, however, in the absence of definite information as to the ownership of the adjoining lands, be considered from the other view-point, that there may be lands in the position of a dominant tenement entitled to claim the benefit of the covenant, as, in the language of the cases to which I have referred, creating an "equitable interest analogous to a negative easement" in the vendors' lands, which would, I think, be a valid objection; and the effect upon such a claim of the sale and conveyance for taxes.

The case is unaffected, I think, by the statute 8 Edw. VII. ch. 118, sec. 18, which was intended mainly to cure defects in procedure.

With reference to the main question, my opinion is, that the sale and conveyance for taxes had the effect of conveying to the purchaser the land free from any claim under the covenant. The effect of such a sale was declared, in brief but explicit terms, as long ago as 1855, in *Tomlinson* v. *Hill*, 5 Gr. 231, quoted and followed, as recently as last year, by a Divisional Court of the Appellate Division, in *Soper* v. *City of Windsor*, 22 D.L.R. 478. The language of the Chancellor is: "It is quite clear, I think, that the land tax is made a charge upon the property itself, to the payment of which all persons having any interest in the land are bound to look; and it follows that a conveyance by the sheriff in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title under the Act of Parliament."

Remarks in part of somewhat similar purport were made by me in *In re J. D. Shier Lumber Co. Assessment* (1907), 14 O.L.R. 210, at p. 221. See, also, as an expression of legislative policy upon the subject, sec. 178 of the Assessment Act, R.S.O. 1914, ch. 195, which, although recently re-enacted, is not new: it declares that the sale, followed by the conveyance, "shall be valid and binding, to all intents and purposes, except as against

ONT.

S. C.

RE HUNT AND BELL.

Garrow, J.A.

the Crown, unless questioned before some Court of competent jurisdiction within two years from the time of sale."

In *Essery* v. *Bell*, 18 O.L.R. 76, the learned Chancellor, in the case of a legal easement, while deciding the case upon another ground, seemed to be inclined to the opinion that the title to an easement cannot be extinguished by a sale for taxes of the servient tenement, without notice to the person who uses it and without opportunity for him to exorenate the land by payment of the taxes.

In the recent case, before referred to, of *Soper* v. *City of Windsor*, 32 O.L.R. 352, Riddell, J., at p. 370, says that any argument based upon the learned Chancellor's view is fully met by sec. 178, to which the learned Chancellor does not refer, although it was then in force. However that may be, it is difficult to see in the legislation any intention, directly or even indirectly, especially to benefit or protect persons entitled to easements, or to place them on a higher footing as to notice of assessment or otherwise, than the wife of an owner in respect to her dower, or his creditor claiming under judgment and execution, or even under a direct charge by way of mortgage created by him, all of which would, without any notice of assessment or otherwise, have been concluded by a completed tax sale at the time that the sale in question was made.

In 1904, by sec. 165 of the Assessment Act, 4 Edw. VII. ch. 23, sec. 165, for the first time, notice to mortgagees or other direct incumbrancers was provided for—but notice, it will be observed, not of the assessment proceedings, but simply of the opportunity, within 30 days, to redeem.

For these reasons, I am of opinion that the objection on which the purchaser relies is not a valid objection, and that the appeal should be allowed.

I understand that we are not required, owing to an agreement between the parties, to deal with the question of costs.

MEREDITH, C.J.O., and MACLAREN and MAGEE, JJ.A., concurred.

Meredith, C.J.O.
Maclaren, J.A.
Magee, J.A.

KELLY, J.:—The vendors claim title to the land in question —part of lot 32 on the east side of High Park avenue, in Toronto—under a tax deed of the 26th November, 1898. A for-

Kelly, J.

ONT.

S. C.

RE HUNT AND BELL.

Kelly, J.

mer owner of this and other land adjoining it, by conveyance of the 6th May, 1891, conveyed this land to Harriet E. Washington, the conveyance containing a restrictive covenant "that every house, building or erection at any time placed on said lands on High Park avenue, or any part thereof, shall be so placed at a distance of not less than 30 feet back from the street-line of High Park avenue, and shall cost not less than $1,500 exclusive of lands; and it is further covenanted that a covenant similar hereto shall be inserted in all deeds and conveyances of the said lands made and executed by the said Harriet E. Washington, her heirs, executors, administrators, or assigns." The house now upon this land is so situated as to constitute a violation of this covenant.

The position of the present parties is this: the purchaser sets up non-observance of the restrictive covenant as a substantial objection to the title; the vendors contend that the sale for taxes and the tax deed discharge the lands from its operation and effect. The appeal is by the vendors from an order of Mr. Justice Middleton, who held in favour of the purchaser.

The appellants invoke the provision of the Assessment Act (in force at the time of the tax sale) by which the taxes on any land are a special lien upon it having priority to every claim, privilege, lien, or incumbrance of every person except the Crown. A sale to realise the taxes in respect to which such special lien exists must be taken to defeat every claim, privilege, lien, or incumbrance over which that lien has priority.

Mr. Justice Middleton proceeded on the ground that the right based on a restrictive covenant is not a lien, incumbrance, claim, or privilege, within the meaning of the statute. With this view I am, after mature deliberation, unable to agree. What is sold at the tax sale is the land itself, and not the interest of the person in default for taxes. The language of the statute is comprehensive; and, to uphold the order appealed from, it would require some expression of authority that this restrictive covenant and any right or privilege based upon it are to be excepted from the claims, privileges, liens, or incumbrances over which the special lien for taxes takes priority. The trend

of the Canadian cases is against a narrow meaning being given to the words of the statute.

In *Tomlinson* v. *Hill*, 5 Gr. 231, it is stated that "the land tax is made a charge upon the property itself, to the payment of which all persons having any interest in the land are bound to look; and it follows that a conveyance by the sheriff in pursuance of a sale for arrears of taxes is an extinguishment of every claim upon the land and confers a perfect title under the Act of Parliament." No exception is there made in favour of the claim or rights of any other person. The statute in force when the tax deed now in question was made, R.S.O. 1897, ch. 224 (sec. 149), was substantially the same as that in effect when *Tomlinson* v. *Hill* was decided. The claim there held to have been extinguished was an inchoate right to dower.

In the recent case of *Soper* v. *City of Windsor*, 22 D.L.R. 478, the views expressed by members of the Court are in accord with the decision in *Tomlinson* v. *Hill*, and they put no such restricted meaning on the statute as is contended for by the respondent. I can find no case going the length of holding that a restrictive covenant such as this forms an exception to or is not included in the rights or interests (claim, privilege, lien, or incumbrance) over which the special lien is given priority. There are, on the other hand, authorities to the effect that such a covenant is within what is made subject to that priority.

In *In re Nisbet & Potts' Contract*, [1905] 1 Ch. 391, Farwell, J. (at p. 396), speaking of covenants restricting the enjoyment of land, said: "If the covenant be negative, so as to restrict the mode of use and enjoyment of the land, then there is called into existence an equity attached to the property of such a nature that it is annexed to and runs with it in equity: *Tulk* v. *Moxhay*, 2 Ph. 774. This equity, although created by covenant or contract, cannot be sued on as such, but stands on the same footing with and is completely analogous to an equitable charge on real estate created by some predecessor in title of the present owner of the land charged."

If this be a correct opinion, then the claim based on the covenant now under consideration is brought within the class of claims or privileges over which the lien for taxes takes prior-

ONT.
S. C.
RE HUNT AND BELL.
Kelly, J.

ity. Accepting this as the correct view, it is easy to conceive of a case of apparent hardship in this mode of extinguishing the operation and effect of a covenant which is or may be of material benefit to an owner of lands adjacent to or in the vicinity of the lands to which such covenant attaches; but, on consideration, that hardship will be found apparent rather than real. The Assessment Act in force at the time of the tax sale and tax deed made it necessary (as the present Act now makes it necessary) that, before a sale, a list of lands liable to be sold for taxes shall be published, by various means therein specified, with the object of ensuring the protection which such publication gives by way of notice to those in any way interested in the lands to be sold. The tax being a charge upon the property itself, to the payment of which all persons having any interest in the land are, as was said in *Tomlinson* v. *Hill*, bound to look, they are not exonerated from exercising vigilance in protecting their rights.

After a very careful consideration of that part of the statute by which the special lien for taxes is given priority over other charges, I have concluded—contrary to my inclination during the progress of the argument—that the effect of the tax deed was to extinguish the rights based upon this restrictive covenant.

The regularity of the sale is not attacked, nor could any attack after such a lapse of time be hopeful of success, in view of sec. 209 of the Act (R.S.O. 1897, ch. 224.)

In my judgment, the appellants are entitled to succeed.

Appeal allowed.

N. B.
S. C.

ST. JOHN R. CO. v. CITY OF ST. JOHN.

New Brunswick Supreme Court, McLeod, C.J., and White and Grimmer, JJ. June 29, 1915.

1. STREET RAILWAYS (§ III A—22)—TRACKS—ALTERATION OF GRADE—MUNICIPAL REGULATION—RIGHT TO—SPECIFICATION.

Where the pattern of rails laid by a street railway company is approved by the municipal authorities, a removal of the tracks by the municipality for the purpose of altering the grade of the street does not give it authority to order the company to replace them with rails of a different pattern, but it may require the company to keep its tracks level with the altered grade on a sufficient foundation, although it cannot require the use of any particular foundation.

N. B.

S. C.

ST. JOHN R. CO. v. CITY OF ST. JOHN.

McLeod, C.J.

STATED case by street railway company and municipality for a declaration of rights as to use of tracks.

J. B. M. Baxter, K.C., for city.

F. R. Taylor, K.C., and *H. A. Powell*, K.C., for plaintiff company.

The judgment of the Court was delivered by

McLEOD, C.J.:—This is an action in which the plaintiff claims damages for an interruption of its line of street railway and the service thereon, and for preventing the plaintiff from relaying its tracks, and for a declaration as to its rights where those tracks have been taken up by the city in changing the grade of the street, and for an injunction restraining the defendant from interrupting or interfering with its line of street railway.

After the action was commenced the parties agreed on a special case, and the following questions were submitted for the opinion of this Court:—

(*a*) When the city removes rails under sec. 11 of 50 Viet. ch. 33, can the city require a grooved rail to be used instead of a "T" rail?

(*b*) When the city lays a pavement of either bitulithic, tar, or waterbound macadam or granite, can it require the company to provide a foundation for its rails of concrete or other unyielding material?

(*c*) Can the city require the company to provide a foundation for its tracks which will keep the rails at the grade determined by the city?

(*d*) Can the city require the company from time to time to restore its tracks to grades which have been established by the city at the time of laying the tracks, or to grades which, from time to time, may be established by the city?

The plaintiff company was incorporated by an Act of the General Assembly of New Brunswick, in 1894. By that Act the plaintiff company was given all the rights, powers, privileges, franchises and immunities that had previously been vested in certain companies that had been formerly incorporated for the purposes of constructing and operating a line of street railway in the city of St. John, and in what was formerly known as the city of Portland.

N. B.

S. C.

ST. JOHN R. CO. v. CITY OF ST. JOHN.

McLeod, C.J.

The answer to these questions depends upon the construction that is to be given to secs. 7, 8, 9, and 11 of ch. 33 of the Acts of 1887, entitled "An Act in Amendment of the Several Acts Relating to The Peoples Street Railway Company," the plaintiff company having acquired by its Act of incorporation all the rights given the Peoples Street Railway Company by this Act. I may say that at the time this Act was passed the railway was to be operated with horses; subsequently the plaintiff company obtained power from the legislature to operate it by electricity. Sec. 7 of the Act of 1887 empowered the company to construct, maintain and use a railway or railways with single or double tracks over and upon such of the streets, highways and bridges of the city of St. John as might be agreed upon between the said company and the mayor, aldermen and commonalty of the city of St. John, in common council, and also over the streets, roads, highways and bridges in the city of Portland. Subsequently the city of Portland and the city of St. John were united, and constituted the city of St. John, and hereafter I will speak of them as the city of St. John.

Sec. 8 of the Act is as follows:—

> The position, placing and laying down of the several railway tracks shall be done so as not to interfere with the ordinary traffic upon and over the streets and highways where the same may be laid, the rails to be of such pattern and description as the Common Council may from time to time approve, and be laid level with the surface of the street, and shall be laid and placed to the satisfaction of the city engineer for the time being appointed by the Common Council, or other authorized authority in charge of the streets of said city; so far as such tracks shall be laid in the streets of the said city and in the City of Portland and the Municipality of the City and County of St. John, the position, placing and laying of the several railway tracks shall be done so as not to interfere with the ordinary traffic upon and over the streets and highways where the same may be laid, the rails to be of such pattern and description as the respective councils of the said City of Portland and the Municipality of the City and County of St. John may from time to time approve, and be laid level with the surface of the streets, and shall be laid and placed to the satisfaction of the supervisor or commissioner of roads for the time being appointed by the said respective councils or other authorized authority in charge of the streets of the said City of Portland or Municipality of the City and County of St. John.

Sec. 9 of the Act provides that the company in the construction of the said railway track or tracks shall from time to time

conform to the grades of the various streets and highways through which the said tracks or any of them shall run, and shall not change or alter such grades without the consent of the common council, the city council of the city of Portland and the council of the municipality of the city and county of St. John within their respective jurisdictions.

Sec. 11 of the Act is as follows:—

The Common Council of the City of St. John, and the City Council of the City of Portland, and the Commissioners of Roads in the several parishes through which such railway or railways may pass, shall have the right to take up and open the streets traversed by the rails either for the purpose of altering the grades thereof or for any other purpose; and any commissioner or commissioners, corporation, or person or persons authorized by law to carry on any public or private works, as the laying down of pipes for gas or water drains, sewers or other works whatsoever, may also remove such rails or any part thereof for any necessary purpose within their power and authority, subject to rules and regulations to be established by the city engineer or supervisor of streets, or other person appointed for such purpose by the said respective councils, and such removal of the rails to be made in a manner to cause as little interference as possible with the operations of the road of the said railway company; provided always, that in case such works be disturbed by any private corporation, such corporation so disturbing the rails and road of the said railway company shall relay the rails in as good a condition as they were before such disturbance took place, and with the least possible delay. It is hereby declared that neither of the said cities, nor the City and County of St. John, nor any Commissioners of Sewerage and Water Supply or other public corporation shall be liable to make compensation to the said company for anything done under the authority of this Act.

It will be seen that by sec. 8, the position, placing and laying down of the railway tracks is to be done so as not to interfere with the ordinary traffic upon and over the streets and highways, and the rails are to be of such pattern and description as the common council may from time to time approve, and are to be laid level with the surface of the street, and they must be laid and placed to the satisfaction of the city engineer for the time being appointed by the common council. These words are very plain and clear. The rails must be laid level with the surface of the street, and placed to the satisfaction of the city engineer. This applies to the construction of the railway. Further, the track or tracks must, from time to time, conform to the grades of the various streets and highways through which the tracks or any of them shall run. When the plaintiff company

N. B.

S. C.

ST. JOHN R. CO. v. CITY OF ST. JOHN.

McLeod, C.J.

constructed this line of railway the rails were of the pattern and description approved by the common council, and that pattern and description is what is known as a "T" rail, and the "T" rail has since been used by the company in the city of St. John.

Dealing now with the first question submitted: Sec. 11 gives the city the right to take up and open the streets traversed by the rails, either for the purpose of altering the grades thereof, or for any other purpose. It also gives to any commission or commissioners, corporation or person or persons authorized by law to carry on any public and private works, the laying down of pipes, etc., permission to remove the rails or any part thereof for any necessary purpose within their power and authority, but such commissioner, corporation or person or persons so removing the rails must replace them. If, however, the city removes the rails it is not obliged to replace them; that must be done by the plaintiff company.

The question submitted is when the city for any purpose takes up the rails, can it require the plaintiff company, when it relays the rails, to use a different pattern, in the present case a groove rail? If the plaintiff company desires to extend its lines and lay down a new line of railway it has to get the city to approve of the pattern of rail it so lays down, and the city can, in that case, prescribe any pattern of rail that it deems best, and it may be that if the rails are worn out and it becomes necessary to lay new rails that the city could prescribe a different pattern from those that had previously been used. It is not, however, necessary in this case to decide that question. This is not the laying of new rails; the city, for its own purposes, has removed the rails, and when the work for which the city removed them has been completed, the plaintiff company can replace the rails so removed. The city having, under the power it has under the Act, removed the rails for a specific but temporary purpose cannot compel the plaintiff company to throw aside the rails so removed, and replace them with others of a different pattern. The only difference between the city removing the rails and another corporation removing them is, that where the city itself removes the rails for its own purpose the plaintiff company must replace them; where another corporation removes

the rails (having a right to do so), that corporation must replace them. The Court is of the opinion that when the city removes the rails under sec. 11 for a certain specific purpose of its own it cannot compel the plaintiff company to change the rails and lay down rails of a different pattern. The answer to the first question must be "no."

In answer to the second question: The company is obliged to have a proper foundation for its rails. The Act does not authorize the city to stipulate or say what that foundation shall be. The onus is on the company to have a sufficient foundation for its rails, and the rails as I have said, at all events in the first instance, must be laid to the satisfaction of the city engineer for the time being, and they must be laid level with the surface of the street. We do not, however, think the city can call on the company to use any particular class of foundation. It is sufficient that the foundation laid be suitable and sufficient to keep the rails at the prescribed level. The answer to the second question must be "no."

As to the third and fourth questions: They seem to be answered by the provisions of the Act itself. The company must keep its rails at the grade determined by the city, and to do so it must provide a foundation sufficient for that purpose. The city has a right to alter the grades of the streets, and when the city does alter the grades the company must restore its tracks to a level with the grade so fixed by the city, and it must supply a foundation sufficient to keep its tracks at the grade fixed by the city. The Act on these matters seems to be plain and clear. It provides distinctly that the company must lay its tracks level with the surface of the street; that it must from time to time conform to the grades of the various streets, and to do that it must of course have a foundation sufficient to keep it level with the grades of the street, but we do not think the city itself can determine what that foundation will be; it is enough if the foundation provided by the plaintiff company is sufficient to keep the rails level with the street, whatever the grade of the street may be.

The stated case makes reference to the contract entered into between the city and the company having date April 1, 1908,

N. B.

S. C.

ST. JOHN R. Co. v. CITY OF ST. JOHN.

McLeod, C.J.

and authorized by the Act, 58 Vict. ch. 72, sec. 6. But as that contract does not, we think, affect in any way the answer to be given to the questions submitted, we do not discuss its provisions.

Nothing is said in the stated case as to costs, nor was the question of costs mentioned on the argument. We therefore make no order as to costs. *Judgment accordingly.*

STEWART v. HORNE.

P.E.I.

S. C.

Prince Edward Island Supreme Court, Sir W. W. Sullivan, C.J., Fitzgerald and Haszard, JJ. November 14, 1914.

1. CONTEMPT (§ I C—10)—ATTACHMENT FOR—FAILURE OF SHERIFF TO EXECUTE WRIT OF REPLEVIN—DEFENCES.

The neglect or refusal of a sheriff to execute a writ of replevin after he had been furnished the statutory indemnity renders him subject to attachment for contempt of court; and it is no defence that at the time the writ was issued the animal therein mentioned was dead or that it was *feræ naturæ* and consequently not recoverable.

Statement

APPLICATION to set aside writ of attachment for contempt of Court.

J. J. Johnston, K.C., for John Alexander Stewart.

A. A. McLean, K.C., for the sheriff.

The judgment of the Court was delivered by

Sullivan, C.J.

SULLIVAN, C.J.:—This is an application on behalf of the defendant Frederick H. Horne, to set aside a writ of attachment issued against him as sheriff of Queen's County because of his contempt of Court in refusing to execute a writ of replevin issued out of this Court against John Horne at the suit of John Alexander Stewart.

The writ of replevin was issued on April 28, 1914, by Mr. George S. Inman, as attorney of John Alexander Stewart, and was on the same day about 3 o'clock in the afternoon delivered to the sheriff by Mr. James J. Johnston, Mr. Inman's law partner, who, at or about the same time, also delivered to the sheriff a bond of indemnity for double the amount claimed as the value of the fox, which bond was in accordance with the requirements of the statute on the subject and was approved and accepted by the sheriff as a good and sufficient indemnity.

The writ of replevin commanded the sheriff to replevy to the plaintiff one cross fox, alleged to be detained by the defendant, John Horne, and to summon the defendant to appear in

this Court within 8 days after service of a copy of the writ of replevin upon him. The defendant, John Horne, resides a few miles from Charlottetown, and is, it appears, a brother of the sheriff. The sheriff was instructed by Mr. Johnston to proceed at once to the premises of John Horne and execute the writ of replevin, and he undertook to do so that afternoon. He did not however do so that afternoon, nor has he at any time since executed it.

On April 29, 1914, the sheriff informed Mr. Johnston that he would not execute the writ of replevin unless he received an additional bond of indemnity, to the amount of $50,000, as sworn to by Mr. Johnston, and the plaintiff Stewart, but to the amount of between $25,000 and $30,000 as sworn to by the sheriff and his deputy, Bernard Kiggins.

On May 5, 1914, Mr. Johnston on behalf of the plaintiff applied to this Court on affidavits, and obtained a rule *nisi*, calling upon the sheriff to shew cause why a writ of attachment should not issue against him for his contempt of Court in refusing to execute the writ of replevin. The grounds relied upon by the sheriff's counsel, Mr. W. S. Stewart, in the argument of the rule, were that the property to be replevied was not sufficiently described in the writ of replevin, and that the additional bond of indemnity the sheriff had demanded had not been furnished to him. The rule for the writ of attachment was made absolute by the Court, and a writ of attachment issued accordingly on June 8, 1914.

Interrogatories were subsequently submitted to and answered by the sheriff before the prothonotary and clerk of the Crown, who, on November 7, 1914, filed his report which is as follows:—

Pursuant to an order of this honourable Court made in the above matter on July 15, 1914, whereby it was referred to me to take the answers of the sheriff of Queen's County to certain interrogatories, then on file, to be exhibited to the said sheriff, and to examine the matter of said interrogatories and answers, and report thereon to this honourable Court. I have the honour to report that, on July 17, 1914, Frederick H. Horne, the sheriff of Queen's County appeared before me, to whom I exhibited the said interrogatories, and to which said interrogatories the said Frederick H. Horne then made answer before me, which said interrogatories and answers are herewith returned.

I have further to report that having examined the matter of such inter-

P.E.I.

S. C.

STEWART v. HORNE.

Sullivan, C.J.

rogatories and the answers made thereto by the said Frederick H. Horne, I find and report, that the said Frederick H. Horne is guilty of a contempt of this honourable Court in neglecting or refusing to execute the writ of replevin referred to in the third of said interrogatories and which writ had been delivered to him for execution; that his demand of an indemnity of $25,000 before executing said writ was unreasonable, and, that he acted in such refusal upon the advice of his counsel, affords no excuse for his neglect to perform the duties required of him by the delivery to him of such writ. (Sgd.) W. A. O. MORSON,

To the Chief Justice and Judges of the Supreme Court. Prothonotary of the Supreme Court and Clerk of the Crown.

On November 7, 1914, after the filing of the report of the prothonotary and clerk of the Crown, the present application was made on behalf of the sheriff and a rule *nisi* was obtained calling upon the plaintiff John Alexander Stewart to shew cause why the writ of attachment should not be set aside. The grounds relied upon, apart from those of the same kind disposed of by the Court on the application for the writ of attachment, may be resolved into these two, namely: First, that at the time the writ of replevin was issued the cross fox mentioned therein was dead, and secondly, that the fox was an animal *ferœ naturœ* and consequently not repleviable.

It is unnecessary to consider the evidence and the contentions of counsel in regard to these two grounds, because we are clearly of opinion that it was not the province of the sheriff to constitute himself a Court and jury to decide before executing the writ, whether the plaintiff had a good cause of action; that was a question to be subsequently determined by the trial tribunal. The sheriff's duty in regard to the writ of replevin was clear, plain, simple and easy of performance. It was to proceed to the premises of John Horne—which it appears were not situated in a fox ranch—and replevy the property mentioned in the writ if he could find it, and then make his return to the Court as to what he had done.

It appears by the report of the clerk of the Crown that the sheriff seeks to excuse his conduct by saying that he acted on the advice of his attorney. We agree with the finding of the prothonotary that that reliance is not available to him. The recognition of such a principle would be wholly subversive of the due and proper administration of justice, as it would deprive

suitors of the protection of the Court and place them at the absolute mercy of any attorney whom the sheriff, for reasons peculiar to himself, might select to advise him.

It is of vital consequence in the administration of justice that the officers of the Courts should be kept to the strict performance of the duties which the law casts upon them, and which the interests of the public require should be observed.

The rule will be discharged with costs.

Application refused.

NORTHERN ELEVATORS v. WESTERN JOBBERS.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 1, 1915.

1. BAILMENT (§ III—18)—DEGREE OF CARE—OPEN SAFE—DESTRUCTION BY FIRE—LIABILITY.

It is not negligence on the part of a bailee, whether his relationship is that for a reward or that of a paid agent entrusted with the moneys of his principal, to leave unlocked the door of a safe where the money was kept, while he was using a book which was to be restored to the safe, where after the fire broke out he made such efforts to rescue the money as a reasonable man might be expected to make. [*Northern Elevator Co.* v. *Western Jobbers*, 20 D.L.R. 889, affirmed.]

Statement

APPEAL from judgment for defendant in action for money lost by fire, 20 D.L.R. 889.

C. P. Wilson, K.C., for appellant, plaintiff.

A. E. Hoskin, K.C., and *Thorson*, for respondent, defendant.

Howell, C.J.M.
Richards, J.A.
Cameron, J.A.

HOWELL, C.J.M., RICHARDS, and CAMERON, JJ.A., concur with PERDUE, J.A.

Perdue, J.A.

PERDUE, J.A.:—This action is brought to obtain a declaration that the plaintiffs are entitled to rank on the estate of Hyde for the amount of the moneys of the plaintiffs which were lost in the burning of Hyde's building. The defendants, who are the assignees for the benefit of Hyde's creditors, cannot allow the plaintiffs to rank as creditors unless Hyde himself was liable for the money. The trial Judge has made a finding that the fire was accidental and that Hyde, when he discovered the building to be on fire tried to save the money, but found it impossible to do so. Hyde lost in the fire money of his own, besides insurance policies, cheques, drafts, etc., all of which were in the safe along with the plaintiffs' money.

Whether the relationship of Hyde to the plaintiffs was that

MAN.

C. A.

NORTHERN ELEVATORS v. WESTERN JOBBERS.

Perdue, J.A.

of bailee for a reward or that of a paid agent entrusted with moneys of his principal, he was not liable for the loss unless he was guilty of negligence. The obligation of a custodian for a reward is thus defined by Lord Holt:—

> He is only to do the best he can. And if he be robbed it is a good account. If he receives money and keeps it locked up with reasonable care he shall not be answerable for it, though it be stolen: *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 918.

See also *Searle* v. *Laverick*, L.R. 9 Q.B. 122; *Brabant* v. *King*, [1895] A.C. 632, 640.

According to the trial Judge's finding, which I see no reason to dispute, Hyde was not guilty of negligence in leaving unlocked the door of the safe where the money was, while he was using a book which was to be restored to the safe. After the fire broke out he made such efforts to rescue the money as a reasonable man might be expected to make. If in the excitement he failed to take the best course, it would be a mere error in judgment for which he would not be responsible.

I think the appeal should be dismissed with costs.

Haggart, J.A.

HAGGART, J.A.:—Whether you consider the relationship between the plaintiffs and Hyde as that of principal and agent, trustee and beneficiary or bailor and bailee, the money in the envelope deposited in the safe was the property of the plaintiffs and at their risk, and the parties were in the same position as if the money had been deposited in trust by Hyde in a chartered bank to be drawn against in payment of wheat tickets.

Negligence is a fact to be proved. The plaintiffs challenge the trial Judge's finding that Hyde failed to establish the defence that the money was destroyed by fire without any fault or negligence on the part of Hyde.

Under the existing conditions and surrounding circumstances, I think that Hyde was not guilty of actionable negligence. The evidence I think justifies the conclusions of the trial Judge. I would affirm his judgment and dismiss the appeal.

Appeal dismissed.

PENNOYER CO. v. WILLIAMS MACHINERY CO., Ltd.

ONT.

S. C.

Ontario Supreme Court, Meredith, C.J.O., and Garrow, Maclaren, Magee, and Hodgins, JJ.A. October 12, 1915.

1. BILLS AND NOTES (§ V B 1—130)—HOLDER IN DUE COURSE—NOTE MARKED "RENEWABLE"—BANKABLE NOTE.

A promissory note marked "renewable" and endorsed to a *bonâ fide* transferee before its maturity does not prevent such transferee from being a holder in due course because of his failure to make inquiries to ascertain the title of the transferor, particularly where the note was originally given as "bankable paper" with power of discounting it.

2. BILLS AND NOTES (§ VI B—158)—AGREEMENT FOR RENEWAL—SCOPE OF.

A promissory note given in payment of merchandise under an agreement that it is to be renewed after maturity for any portion of the goods unsold entitles the maker to but one renewal.

[*Innes* v. *Munro*, 1 Ex. 473, followed.]

Statement

APPEAL from the judgment of Clute, J.

E. F. B. Johnston, K.C., and *Gideon Grant*, for appellant.

G. F. Shepley, K.C., and *G. W. Mason*, for defendant, respondent.

Meredith, C.J.O.

MEREDITH, C.J.O.:—The action is brought by the appellant as endorsee of a promissory note dated December 8, 1913, made by the respondent, payable to the order of the Bates Machine Company, and endorsed by that company in blank and by Joseph Winterbotham to the appellant.

The defence is that the note is a renewal of a previous one given to the Bates Machine Company for the price of a car-load of heaters, the property of the Bates Machine Company, which the respondent permitted to be delivered at its warehouse in Toronto, upon the terms that the respondent should endeavour to sell them and should pay that company for them the prices which had been agreed upon, but only when and as the respondent should succeed in selling them; and that it was part of the arrangement upon which the respondent accepted the heaters and agreed to endeavour to sell them that in the meantime, and for the accommodation of the Bates Machine Company, the respondent should give to that company the respondent's promissory note at 4 months for the agreed price of the heaters, and that upon the maturity of the note, upon the respondent remitting the agreed

ONT.

S. C.

PENNOYER CO. v. WILLIAMS MACHINERY CO. LIMITED.

Meredith, C.J.O.

price in respect of the heaters before then sold by the respondent, the note should be renewed for the balance for another period of 4 months, and so on from time to time until all the heaters should be sold or disposed of; and that nothing is now payable under the terms of this agreement, all the heaters that have not been paid for being still unsold and undisposed of; that the appellant is bound by the terms of this arrangement, and is not entitled to recover upon the promissory note because the appellant is not a holder of it in due course.

The arrangement under which the heaters were delivered to the respondent, and the original promissory note was given, was made by correspondence, from which the nature and effect of the agreement must be gathered.

The dealings between the Bates Machine Company and the respondent began by the respondent giving an order for one of the 300 horse power heaters, and asking if the company would consider "consigning a line of heaters" of the different sizes "on consignment" (letter of the 23rd February, 1907). To this letter the company replied on the 27th February, 1907, declining to send the heaters "on consignment," and saying that the company "had cut out all the consignment business on heaters," but that, if the respondent so desired, the company would ship to it a carload and be willing to accept negotiable paper for the amount, at 6 months. On the 6th March following, the respondent wrote to the company asking if it would be willing to accept the respondent's "paper" for 6 months and payment at the maturity of the note for the heaters that had then been sold, and to renew for the balance at 6 months, and saying that, if the company was willing to do this, the respondent "would put in a car-load." This offer the company declined, by letter of the 15th March, saying that the terms that had been previously mentioned, "cash 60 days or 2 per cent. off in ten days," was the best the company could do. This letter concludes with the following passage: "Your proposition to pay for what you have sold at the end of six months and renew for the balance strikes the manager as not being much different from a consignment basis." The next letter is from the respondent to the Bates company, dated the 18th April following, saying: "You remember we suggested you putting in a line of these heaters in our warehouse on consignment.

and we think it would pay you well to do it." This letter was replied to on the 22nd of the same month, and the company in its reply repeated its former statement that it had given up the consignment business on heaters, and said that it never had a consignment stock "across the border," and asked the respondent to suggest some way that would meet its wishes so that the company might ship the respondent "quite a stock of heaters." This letter concludes with the statement: "If we had bankable paper, that we could get discounted and use the proceeds, it would help us out just the same as cash, and by you having the stock there you could turn that into money much quicker than to await delivery." In reply to this letter the respondent wrote on the 24th of the same month suggesting that the company should ship to the respondent a car-load of heaters on consignment and take its note at 4 months, at the end of which time the respondent would give a cheque for whatever had been sold and renew for the balance, which would give the company "bankable paper," and saying that the respondent would of course "pay the duty and freight on the heaters." On the 26th April, the company answered, acknowledging the respondent's offer, and saying that the notes "must bear interest in order for us to get them discounted at the bank so that we can use the paper," and adding: "We have discontinued consignment accounts of every sort, so would not bill this as a consignment account, but we trust with the arrangement as outlined we can meet your wishes and satisfy our management at the same time." On the 29th, the respondent wrote to the company, saying: "We do not understand that the intention was that we would pay interest on the note. We might just as well pay you the cash if it comes down to that. That is the real point at issue, viz., carrying the stock. We thought it was a fair division if we supplied the warehouse show-room, did the handling in and out, and paid the duty and freight, as against your carrying the goods here. We would give you our 4 months' paper and remit you at maturity for the goods sold. We could not consider paying you interest on the notes, as this would be unfair to us." To this letter the company replied on the 2nd May abandoning its claim to interest, and saying: "So your arrangement to give us a 4 months' paper and remit us at maturity for the goods sold will be satisfactory."

The arrangement which this correspondence evidences was

ONT.

S. C.

PENNOYER CO. v. WILLIAMS MACHINERY CO. LIMITED.

Meredith, C.J.O.

that under which the heaters were delivered to the respondent and the original note was given. The note was for $1,962, and was sent to the Bates Machine Company with a letter dated the 29th July, 1907, in which the respondent says: "We have marked the note renewable, as it is given on the understanding that we are to pay you for the heaters sold and renew the balance at maturity, per your letter of May 2nd, 1907." On the 31st of the same month, the company wrote acknowledging the receipt of the note, and saying: "This is in accordance with our understanding, that you will remit for the heaters sold at the end of 4 months and make note for balance due as per our letter of May 2nd, 1907."

I am unable to draw from this correspondence the conclusion that the agreement which it evidences is one by which the respondent was merely a consignee of the heaters, holding them for the Bates company. On the contrary, it evidences, I think, an out and out sale to the respondent, and an agreement that the company will accept for the price of the heaters the respondent's promissory note at 4 months, and renew at maturity for the amount of the price of the heaters then unsold.

According to the terms of this arrangement, in my opinion, the respondent was entitled to but one renewal. There is nothing in the correspondence to indicate an agreement to renew from time to time until all the heaters should be disposed of. As I have said, it is impossible, in my judgment, to conclude from the correspondence that the respondent was a mere consignee of the heaters, holding them as the property of the Bates company, and accounting for the agreed prices only as they should be sold. The Bates company distinctly refused to send them on consignment, and reiterated their refusal when it was a second time proposed by the respondent. The payment by the respondent of the freight and duty is a circumstance strengthening the conclusion that the transaction was an out and out sale and not a shipment "on consignment."

It is, no doubt, the fact that the promissory note was renewed every 4 months down to the time of the giving of the note sued on, but that fact cannot alter or affect the agreement as evidenced by the correspondence, if, as I think they are, the terms of it are unambiguous.

In *Innes* v. *Munro* (1847), 1 Ex. 473, promissory notes had

ONT.

S. C.

PENNOYER CO. v. WILLIAMS MACHINERY CO. LIMITED.

Meredith, C.J.O.

been given, and the agreement was that, if the crops of estates, from the proceeds of the sale of which it was intended that the notes should be paid, should not "come forward" in time to provide for the notes, they were to be renewed for such period as might be "found necessary from the condition of the properties." The crops did not come forward, and the notes were renewed three times; and, after the maturity of the third renewal, an action was brought upon it, which was defended on the ground that the agreement was for a renwal of the notes from time to time until there should be proceeds from the estates to provide for the renewal. At the trial it was held that the agreement provided for one renewal only, and a verdict for the plaintiff was rendered. A motion for a rule nisi to set aside this verdict and enter a verdict for the defendant was refused by the Court in banc; the Court agreeing with the trial Judge that the agreement provided for one renewal only.

That case, which is treated in all the text-books as good law, is not unlike the present in the circumstance that effect was given to the agreement according to the true construction of it, although the parties had apparently acted upon the view that their bargain was that the note was to be renewed from time to time.

I am also of opinion that, if I am wrong in this view, and the Bates company was bound to renew from time to time for the price of the unsold heaters, the appellant is entitled to recover even if not a holder in due course. It is manifest from the correspondence that the notes which were to be given were to be "bankable paper," and that it was intended by the Bates company to discount them so that the company could use the proceeds of them. Surely this is inconsistent with the idea that, if that course were taken, the bank or person who discounted them, taking them with notice of the agreement, would be bound by it to renew, and therefore in the position that nothing could be recovered unless or until the heaters should be sold. If that were the case, the notes would not be bankable paper, and practically of little or no use for the purpose for which they were given and intended to be used; and I see no reason why the company was not at perfect liberty, instead of discounting the notes and paying over the proceeds to Winterbotham in satisfaction of the company's indebtedness to him, to hand over the note to him in satisfaction

ONT.

S. C.

PENNOYER CO. v. WILLIAMS MACHINERY CO. LIMITED.

Meredith, C.J.O.

of the claim he had, and was pressing, for the overdue interest on the bonds of the company which he and his relatives owned; or why, if a banker who discounted the notes would not be affected by notice of the agreement, Winterbotham should be in any worse position.

Apart from these considerations, the defence fails, I think, because the appellant is a holder in due course, even if, in the circumstances, the proper conclusion were that there was, within the meaning of the Bills of Exchange Act, a defect in the Bates company's title to the promissory note.

The note was endorsed to Winterbotham, and by him to the appellant, before its maturity, and in each case for value, and the appellant has, in my opinion, satisfactorily proved this, and that neither it nor Winterbotham had notice of the defect of title, if defect there were.

There is no reason for questioning the testimony of Winterbotham and Mott that the note was transferred by the Bates company to Winterbotham in settlement of the overdue interest on the bonds held by him and his relations. The interest had been overdue for some time, and he was pressing for payment of it, and was the more anxious to have the interest paid because he was negotiating a sale of the bonds, and, if the interest were unpaid, it would materially affect his ability to dispose of them satisfactorily. Having, so far as appears, no knowledge of the existence of the note, he sent his attorney to collect the interest on the bonds. The company was unable to pay in cash, and offered to give in payment the respondent's promissory note. This Mott took, subject to Winterbotham's acceptance of it, by whom it was accepted after he had satisfied himself of the financial standing of the respondent.

It was argued that the transaction was an unlikely one to have been entered into, but I cannot see why. In the circumstances, there was, I think, nothing strange in Winterbotham's accepting in payment of the interest the promissory note of a perfectly solvent company, even though it happened to have its place of business in what counsel termed a foreign country; and it was not the first time, according to the evidence, that he had taken a promissory note—not the company's—from it in payment, when the company was not in a position to pay in cash.

ONT.

S. C.

PENNOYER CO. v. WILLIAMS MACHINERY CO. LIMITED.

Meredith, C.J.O.

What is there to shew or even to suggest that Winterbotham had any knowledge or reason to suspect the existence of any agreement qualifying the obligation of the respondent which the promissory note imports? Nothing whatever, in my opinion. Winterbotham was, no doubt, president of the Bates company when the arrangement between it and the respondent was entered into, but had ceased to hold that position or to be a stockholder in the company upwards of six years before the note came into his hands. According to the uncontradicted testimony, when president, Winterbotham had nothing to do with the ordinary business of the company; and, even if he had had, I know of no reason why, from the circumstances alone, any inference can be drawn that he had knowledge of the agreement between the company and respondent, especially when that knowledge is denied by him.

It was argued, however, that Winterbotham had notice of the alleged defect through his attorney, Mott; but I am unable to accede to the argument. What was there in what took place between Bates and Mott, when the note was handed to him, to raise even a suspicion that there was any ulterior motive for the note being parted with or that there was any defect in the title of the Bates company to it? Nothing that I can see. He asked for payment of the interest, was told by Bates, the manager of the company, that the company had no money to pay, but that he had a note he could give for the coupons; that it was a note of a Canadian firm—producing the respondent's promissory note. Mott then asked him if he was sure it was all right; to which Bates replied that they (i.e,. the respondent) were not selling the heaters as fast as they expected, but that they had no "defence on the note." Why should this have put Mott on inquiry? It was, I think, calculated to have the opposite effect, and would probably indicate to him at the most that on account of the slow sale the makers of the note might ask for more time to pay it. It is now well settled that mere negligence on the part of a transferee of a bill or note to make inquiries which would have resulted in his ascertaining that the title of the transferor was defective is not enough to prevent him from being a holder in due course; but that the negligence must be such as to amount to the wilfully shutting of his eyes: Byles on Bills, 17th ed., pp. 147, 185, and cases there cited; Maclaren on Bills, Notes and Cheques, pp. 29,

ONT.

S. C.

PENNOYER CO. v. WILLIAMS MACHINERY CO. LIMITED.

Meredith, C.J.O.

30, 184; *Ross* v. *Chandler* (1909), 19 O.L.R. 584; sec. 3 of the Bills of Exchange Act.

It was contended that the fact that no credit was given in the appellant's books to the Winterbotham company for the note throws doubt upon the reality of the transfer to the appellant; but that was, I think, satisfactorily explained by Nervig, the appellant's treasurer, who testified that the bookkeeper was directed to give the credit, but omitted to do so through forgetfulness.

It was contended also that it was a suspicious circumstance that Winterbotham should have transferred the note to the appellant; but a satisfactory explanation of this was given by Winterbotham, who said that he transferred it because he feared that, if he retained it, and the Bates company should become bankrupt within 4 months after he had received it, the transfer would be set aside as a preferential payment.

Something was also attempted to be made of the fact that Bates was not called as a witness by the appellant. No point appears to have been made of this at the trial, although attention was called to the fact that Mott had not been called, and the trial was adjourned to enable the appellant to procure, as it did, his attendance.

Other circumstances, to which I shall afterwards refer in dealing with the reasons for judgment of the learned trial Judge, were relied upon by counsel for the respondent.

The learned trial Judge seems to have formed very early in the course of the trial a strong opinion against the appellant's case; for, during the examination of the witness Hollinrake, when the letter of the Bates company to the respondent of the 29th April, 1914, was read, the learned Judge made the observation, "It looks like an unmitigated fraud" (p. 24 of the notes of evidence, line 27).

The learned Judge also thought it incredible that the business between the Bates company and the respondent, during the one or two years that Winterbotham was president of the company, could have been carried on without his knowing it, which I understand to mean, knowing the nature of the arrangement between them (p. 74 of the notes of evidence, lines 14 to 18 inclusive); and in his reasons for judgment he says that it is a fair inference

that he had that knowledge. Why it should be thought incredible, or why such an inference should be drawn, I do not understand, especially in view of the fact that during that period Winterbotham had nothing to do with the active management of the business, and was at the company's place of business only once a year "at the inventory."

The learned Judge also drew the inference from the facts proven that "it was a scheme on the part of the plaintiff, the third party (i.e., the Bates company), and Winterbotham to obtain payment from the defendant of the note in question, in disregard of the terms of the agreement under which it was given." Whatever may be said as to the proper inference in this regard as to the Bates company, I am unable to find any evidence to warrant the conclusion that either the appellant or Winterbotham was a party to any such scheme.

Nor am I able to agree with the finding of the learned trial Judge that it was not shewn that at the time of the transfer of the note to the appellant the Winterbotham company was indebted to the appellant. He appears to have come to that conclusion because a trial balance which shewed the indebtedness was not admitted as evidence, and he apparently overlooked the fact that the indebtedness was proved by Nervig, as well as testified to by Winterbotham. Nervig's credibility was not impeached, and there is nothing which would justify the rejection of his evidence on the point.

The learned Judge also laid stress on the fact that notice of dishonour of the note was not given to the Bates company or to Winterbotham, and that no action was taken against either of them, but the maker of the note alone was proceeded against. The note, when it was about to fall due, was left by the appellant with its bankers for collection, and was sent forward by them for presentation. The failure to give notice of dishonour would appear to have been due to the neglect of the bankers, because, according to Nervig's testimony, they were not told not to take the usual course of giving notice of dishonour if payment ofthe note were refused. Not having given notice of dishonour to the endorsers would appear to be a sufficient reason, if it be necessary to give a reason, for not suing them; but, apart from this consideration, the relations between the parties to which the learned Judge refers may have led the appellant to endeavour to collect

ONT.

S. C.

PENNOYER CO. v. WILLIAMS MACHINERY CO. LIMITED.

Meredith, C.J.O.

from the respondent, trusting that if there should be failure to recover there would be no difficulty in adjusting matters with the endorsers.

Altogether too much is, I think, made by the learned trial Judge of the fact that in the letter of Mott's firm to the appellant of the 24th April, 1914, the writers say that "their clients are purchasers of this note for value before maturity without notice." I can see nothing strange or suspicious in this. The note had been presented for payment, and payment had been refused, and it was a most natural thing for the attorneys to say, "Whatever objection there is to paying the note, that is not a matter that affects our clients, because they are holders in due course." The note has endorsed upon it in pencil the words "payment stopped," which were probably put there by the person who presented the note at the bank at which it was paybale, as a memorandum of the answer he received from the bank officer to whom it was presented, and the letter itself probably indicates this, because it is said in it that the writers are informed that, when presented, "payment was refused on account of some dispute between you and the Bates Machine Company."

The learned Judge refers to the statement, in an affidavit made by Nervig to support an application for the issue of a commission to take his evidence and that of Winterbotham in the State of Illinois, that he was advised by his solicitor and verily believed that the plaintiff could not proceed to trial without the evidence of himself "and one Joseph Winterbotham, who was the party who conducted the negotiations with the Bates Machine Company when the plaintiff obtained the promissory note." This affidavit was drawn up in the office of Mott's firm, and the suggestion of counsel for the respondent is that it indicates that the note was not, as Winterbotham and Mott testified, transferred by the Bates company to Winterbotham, but directly to the appellant. A slip like this in the preparation of an affidavit ought not, I think, to cause one to discredit the account given by Winterbotham and Mott of the transfer of the note to the former. It is impossible, I think, as I have already indicated, to come to the conclusion that the story told by these two men as to the circumstances under which the note came into the possession of Winterbotham is a pure fabrication; and indeed the learned Judge

does not so find, nor does he indicate what bearing the affidavit had in leading him to the conclusion to which he came.

Upon the whole, I am of opinion that the onus of proving that the appellant or Winterbotham was a holder in due course was satisfied, and that the trial Judge should have so found; and I would allow the appeal with costs, reverse the judgment appealed from, and direct that judgment be entered for the appellant for the amount of the note and interest, with costs.

GARROW, MAGEE, and HODGINS, JJ.A., concurred.

MACLAREN, J.A., dissented. *Appeal allowed.*

WEST v. SHUN.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. November 20, 1915.

1. LANDLORD AND TENANT (§ II E—36)—ASSIGNMENT OF LEASE—WHAT PASSES TO ASSIGNEE—GUARANTY OF RENT.
An assignment of a lease carries with it the benefit of a guaranty by a third person for the payment of rent by the lessee.

2. PRINCIPAL AND SURETY (§ I B—13)—DISCHARGE—ASSIGNMENT OF LEASE—LOSS OF DISTRESS.
A surety for the payment of rent is not discharged because by an assignment of the lease the right of distress is lost.
[*Re Russell*, 29 Ch. D. 254, followed.]

3. ASSIGNMENT (§ III—29)—ASSIGNEE OF LEASE—RIGHT TO SUE IN OWN NAME—NECESSITY OF "BENEFICIAL INTEREST."
In order to entitle the assignee of a lease to sue in his own name he must prove, apart from the written instrument of assignment, his entire beneficial interest in the claim sued for.
[*John Deere Plow Co.* v. *Tweedy*, 15 D.L.R. 518, followed.]

Statement

APPEAL by defendant in an action for rent.

J. A. Allan, K.C., for appellant.

J. C. Martin, for respondent.

Lamont, J.

LAMONT, J.:—By a lease dated May 16, 1911, one West leased certain premises to Lee Soon for a term of three years from September 1, 1911, at a monthly rental of $40 per month. That lease contained the following covenant:—

And I, Lee Shun of Yellow Grass, caterer, in consideration of the sum of $1 paid to me by the lessor, guarantee the payment of all rents that may fall due by virtue of this lease.

The lease was executed by both defendants. On February 12, 1913, West assigned the said lease to the plaintiff. The assignment recited that a lease had been entered into between West as lessor, and Lee Soon as lessee, and set out the terms of the lease. It contained this clause:—

SASK.

S. C.

WEST v. SHUN.

Lamont, J.

Now this indenture witnesseth that in consideration of the sum of $1 now paid by the assignee to the assignor (the receipt whereof is hereby acknowledged), the assignor doth hereby transfer, grant, and assign unto the assignee all his right, powers, title and interest in the above described lease together with the residue unexpired of the said term of years, with all benefit and advantage to be derived therefrom.

At the date of the assignment, Lee Soon was some $63 in arrears with his rent. Subsequently he paid to the plaintiff in all the sum of $590 and then made default. The plaintiff's claim is for $273, being the rent for the balance of the term, and he claims this from both defendants.

In his statement of defence, Lee Shun set up that the plaintiff's statement of claim disclosed no cause of action against him, in that the plaintiff did not allege that he had any interest in the guarantee of the defendant. At the trial, the plaintiff amended his statement of claim by alleging that he was possessed of the entire beneficial interest in the lease and guarantee. This the defendant denied.

The trial Judge found that at a certain date before the expiration of the term, the plaintiff, by his servants, had taken possession of the premises. He gave judgment in favour of the plaintiff for the amount due up to the time the plaintiff took possession. From that judgment the defendant Lee Shun now appealed.

On his behalf, the following grounds were urged for reversing the judgment:—

1. That the guarantee was not part of the lease, but a distinct and separate contract, and only the lease was assigned. 2. That the guarantee was not assignable. 3. That, if assignable, it was not in fact assigned, as apt words to assign it had not been used. 4. That the plaintiff did not prove that he was entitled to the entire and beneficial interest in the rent assigned. 5. That by the assignment the right to distrain on the goods of Lee Soon had been lost, and this prejudiced the guarantor to that extent and he was thereby discharged.

It is quite true, as contended by Mr. Allan, that the guarantee of Lee Shun is a separate and distinct contract to that entered into by the lessee: 15 Hals., sec. 864. But that is of importance only when considering whether the language of the assignment should be construed as including the right of the assignor under the guarantee.

That the guarantee is assignable seems beyond question.

In 15 Hals., sec. 951, the learned author says:—

The person to whom a guarantee is given may assign the guaranteed debt and the securities for the same.

The right of West to both rent and guarantee being assignable, was the guarantee in fact assigned? This depends on the meaning to be given to the word "lease" in the assignment.

The assignment transferred to the plaintiff "all the rights, powers, title and interest" of the lessor in the said *lease*, with "all the benefit and advantage to be derived therefrom." By the term "lease" as used, I think it is reasonably clear that what the parties meant was the indenture of lease referred to in the recital. That indenture contained not only the lessee's covenant to pay the rent, but also the appellant's guarantee of the same. These are separate contracts, but they are both made with the lessor. He had the entire beneficial interest under both. It is admitted that an assignment of all his interest in the lease would give the assignee the benefit of the lessee's covenant to pay the rent. I cannot see any reason why it would not be just as appropriate to transfer the lessor's interest in the guarantee. If the draftsman had used the word "document" or "indenture" instead of the word "lease," it would not, to my mind, have been arguable that the benefit of the guarantee did not pass. To hold that the word "lease" as there used was confined to the term granted or to the letting, would be giving it a meaning more restricted than it is ordinarily entitled to have.

In my opinion, the assignment is sufficient to transfer the benefit of the guarantee. The argument that the appellant is discharged because, by the assignment, the right of distress is lost, is disposed of by the case of *In re Russell*, 29 Ch. D. 254, where the Court of Appeal held that a surety was not discharged because a creditor, by his conduct, destroyed a right of distress for arrears of rent, as such distress was not a security held by a creditor in respect of the debt.

The only remaining question is: Was the plaintiff entitled to sue in his own name?

By sec. 1 of the Act Respecting Choses in Action, every debt and any chose in action referring to debt or contract is assignable if it shew by any form of writing using apt words on that behalf. The section also provides that the "assignee" thereof may bring an action thereon in his own name.

SASK.

S. C.

WEST v. SHUN.

Lamont, J.

Sec. 2 defines the term "assignee" as follows:—

(2) The term "assignee" in the next preceding section shall include any person now being or hereafter becoming entitled to any first or subsequent assignment or transfer, or any derivative title to a debt or chose in action and possessing, at the time of the suit or action being instituted, the whole and entire beneficial interest therein, and the right to receive the subject or proceeds thereof and to give effectual discharge therefor.

To bring an action in his own name, therefore, the plaintiff must have (1) an assignment in writing of the money falling due under the lease, and (2) at the time he instituted the action he must have possessed the "whole and entire beneficial interest" in the debt sued for under the assignment. These are the statutory conditions, without compliance with which the assignee cannot sue in his own name.

In *John Deere Co.* v. *Tweedy*, 15 D.L.R. 518, my brother Elwood said:—

Following the decision in *Wood* v. *McAlpine*, 1 A.R. (Ont.) 234, I am of opinion that the plaintiff, not having alleged in its pleadings and not having proved at the trial that it was at the time of the trial entitled to the whole and entire beneficial interest in the debt assigned, its action must fail.

Has the plaintiff complied with these conditions precedent? Although he was a witness at the trial, no evidence whatever was given to shew who was beneficially entitled to the rent; whether it was the plaintiff's own, or whether he was collecting it for his brother. Counsel for the plaintiff contended that the production of an assignment absolute on its face was *primâ facie* evidence of the plaintiff's beneficial interest therein at the time he began his action.

The statute casts the onus on the plaintiff of proving the assignment in writing, and also, that at the date he brought his action (which must necessarily be a time subsequent to the assignment) he had the beneficial interest. Where the statute casts on the plaintiff the onus of proving beneficial ownership at a date subsequent to the taking of the assignment, the mere production of the assignment is not, in my opinion, evidence that the plaintiff was entitled to the entire benefit at such subsequent date. The onus is on the plaintiff to prove this affirmatively at the trial.

This case differs entirely from that of an executor or adminis-

trator bringing an action; because, when an executor or administrator receives probate or letters of administration, he can only bring an action on behalf of the estate. No question can arise as to whether the beneficial interest at any particular time belongs to him or some one else.

Lamont, J.

I am, therefore, of opinion the plaintiff has not established his right to bring the action in his own name.

The appeal of Lee Shun should, therefore, be allowed with costs.

Elwood, J.
McKay, J.
Brown, J. (dissenting)

ELWOOD and MCKAY, JJ., concurred with LAMONT, J.

BROWN, J., dissented. *Appeal allowed.*

Re VULCAN TRADE-MARK.

CAN.
S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., and Davies, Idington, Duff, Anglin and Brodeur JJ. May 4, 1915.

1. COURTS (§ III C—210)—JURISDICTION OF EXCHEQUER COURT—TRADE-MARKS—RECTIFICATION OF REGISTER.

The Exchequer Court of Canada has jurisdiction, under the Trade Mark and Design Act, R.S.C. 1906, ch. 71, and sec. 23 of the Exchequer Court Act, R.S.C. 1906, ch. 140, to order the rectification of the register of trade marks notwithstanding that the matter has not been referred to the court by the Minister under the provisions of the Trade Mark and Design Act.

[*Re Vulcan Trade Mark*, 22 D.L.R. 214, 15 Can. Ex. 265, affirmed.]

Statement

APPEAL from the judgment of the Exchequer Court of Canada, 22 D.L.R. 214, 15 Can. Ex. 265, granting the petition.

St. Germain, K.C., and *J. A. Ritchie*, for appellants.

J. F. Edgar, for respondents.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that this appeal should be dismissed with costs.

Davies, J.

DAVIES, J.:—The only doubt I have entertained in this case arises out of the contention of Mr. Ritchie that the Exchequer Court has not jurisdiction to hear and determine it. That contention was based upon the limited construction placed by him upon the sections of the Trade Marks and Designs Act (R.S.C., ch. 71) applicable, namely, secs. 11, 12 and 13, and sec. 42.

An application had been made by the respondent company to the Minister for the registration of the trade mark "Vulcan" to be used in connection with the sale of their matches.

The application was refused on the ground that the word "Vulcan" had been registered as a trade mark in January, 1894,

CAN.

S. C.

RE VULCAN TRADE-MARK

Davies, J.

in the name of Quintal & Sons and now stood in the name of appellants, Bergeron, Whissell & Co., and that without their consent further action could not be taken by the department.

The appellants' contention on this branch of the case was that it was absolutely in the power of the Minister under sec. 12 of the Act to refer, or decline to refer, the matter of such an application to the Exchequer Court of Canada and that unless and until such reference was made that Court had no jurisdiction to deal with the matter.

Sec. 42 of the Act is as follows:—

42. The Exchequer Court of Canada may, on the information of the Attorney-General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry, in the register of trade marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the Court thinks fit, or the Court may refuse the application.

. . . . . .

3. The Court may, in any proceedings under this section, decide any question that may be necessary or expedient to decide for the rectification of any such register.

It was contended that this section was only for the correction of errors in the registry and that it does not extend to errors made by the authority of the Minister, but, if I understood the argument correctly, is limited to clerical errors, or errors which had crept in without the Minister's authority. As to clerical errors, the section clearly does not refer to them. They are provided for by sec. 40. As to the limitation upon the section that the errors are to be confined to those made *without the Minister's authority*, I cannot see any justification for it in reason or in the statute.

The error complained of in this case was in the making of an entry of the trade mark "Vulcan" in the name of Quintal & Sons in an unlimited form, which covered "matches," as to which the plaintiffs had acquired a right to a trade mark, as well as other articles about which there is no contention. It was a substantial and not a technical or clerical error and was made, as the decision in this case shews, "without sufficient cause," within my construction of those words in the section.

The effect of the decisions under the English Act is that the

words "any person aggrieved" used in both statutes embrace any one who may possibly be injured by the continuance of the mark on the register in the form and to the extent it is so registered: *Re Rivière's Trade Mark*, 26 Ch. D. 48, and on further hearing, 53 L.T. 237; *Re Apollinaris Co.'s Trade Mark*, [1891] 2 Ch. 186; *Re Trade Mark of Wright, Crossly & Co.*, 15 Cut. Pat. Cas. 131, 377. Quite apart from these decisions I should have been prepared to hold that the plaintiffs are quite within the words of the section "any person aggrieved," and are not, as suggested by Mr. Ritchie, mere "outlaws" not within the purview of the Act at all.

Then it was contended on the authority of an observation made by Lindley, L.J., in *Re Trade Mark "Normal,"* 35 Ch. D. 231, at p. 245, that the words "without sufficient cause" in the sections of both Acts are the controlling words and do not cover the error or mistake the plaintiff in his action seeks to have rectified. But it seems to me the observation of the Lord Justice had reference only to the question before him in the case and under the English statute he was then dealing with, namely, whether a person whose application to register a trade mark had been refused by the comptroller, could *appeal direct to the Court* from such refusal as a person aggrieved by the omission of his name from the register under sec. 90 of the Patents, Designs and Trade Marks Act, 1883, or *must take the special course prescribed by sec. 62 of appealing to the Board of Trade from the comptroller's decision.* The Court held that the latter was his proper remedy, and that an appeal did not lie to the Court.

The sections in the English Act and in the Dominion Act are not at all the same. Nor is the scheme for the registration and control of trade marks in the Dominion analogous to that in Great Britain. Under the English Act an appeal lies from the decision of the comptroller to the Board of Trade and that body may, if they think fit, hear it themselves or may refer it to the Court for hearing and in the case of such reference the Court has jurisdiction to enter upon and determine all questions arising upon the objections, including, in a case where the comptroller has already registered the mark, the question whether the mark has been rightly admitted on the register: *Re Arbenz' Ap-*

CAN.
S. C.
RE VULCAN TRADE-MARK
Davies, J.

plication, 35 Ch. D. 248. An observation made by Lindley, L.J., at 264, of that case, is in point as applicable to the argument here. He says, dealing with the argument of want of jurisdiction:—

> The consequence of adopting that conclusion, as was candidly admitted, would be that we shall be precluded from doing what is right upon evidence, simply because the comptroller had done what he thought was right without evidence, a state of things which would be utterly intolerable. I have no doubt whatever that on the true construction of sec. 69 the whole case is properly before the Court, and that being so, and the conclusion at which I have arrived from the evidence being what it is, I have no hesitation in saying that, in my opinion, this appeal ought to be allowed.

Under the Dominion Act there is no appeal from the Minister's decision and counsel for the appellants conceded that, if the Minister refused an application to register a trade mark under sec. 11 of the Dominion Act and did not choose to refer to the Exchequer Court the matter of the application, the applicant, no matter how much aggrieved he might be, would be without any remedy. Lindley, L.J., simply held that sec. 90 of the English Act did

> not apply to the case which was for the comptroller subject to the superior control of the Board of Trade to determine.

His reasoning would not apply to our statute which does not give any appeal from the registration of the trade mark or from the refusal to register, and if the Court was without jurisdiction to give an aggrieved party a remedy there would arise what Lord Lindley calls "a state of things which would be utterly intolerable."

Secs. 11 and 42 of the Trade Marks Act must be read in conjunction with sec. 23 of the Exchequer Court Act, which conferred jurisdiction upon that Court *inter alia*,

> in all cases in which it is sought . . . to have any entry in any registry of copyrights, trade marks or industrial designs made, expunged, varied or rectified.

The jurisdiction conferred by the words of this section is broad and general, quite sufficiently so to cover the case now before us and I decline to read a limitation into the language of parliament which would confine that jurisdiction either to references made to the Court by the Minister under sec. 12 of the Trade Marks Act, or to omissions in entries, or entries made without sufficient cause in the register of trade marks under

sec. 42, if any such limited meaning is to be given to the words "without sufficient cause," as counsel suggest. Such a suggested limitation would in a large measure operate to defeat the object and purpose of the Trade Marks Act and the jurisdiction section of the Exchequer Court Act above quoted.

The two statutes were passed at the same session of parliament. The plaintiff in this case is clearly a "person aggrieved" within the words of sec. 42, as appears by the decisions I have referred to above and in my opinion the Court had jurisdiction either under it or under sec. 23 of the Exchequer Court Act, to hear and determine plaintiffs' application to have the register of the appellants' trade mark rectified by limiting it in the manner it has done.

In *Canada Foundry Co.* v. *Bucyrus Co.*, 8 D.L.R. 920, 10 D.L.R. 513, 14 Ex. C.R. 35, 47 Can. S.C.R. 484, a case similar to that now at bar, both in the Exchequer Court and in this Court, jurisdiction was entertained without doubt or question.

As to the facts and merits of the case, I have only to say that I concur in the disposition of the case made by the learned Judge of the Exchequer Court and with his reasoning. The appeal should be dismissed with costs.

IDINGTON, J.:—If we observe the historical development of the Exchequer Court jurisdiction relative to registration of trade marks I think no difficulty in regard thereto exists in this case. Originally the Minister had been entrusted with absolute discretion free from other judicial supervision of what he might do in the course of granting or refusing registration. This was continued down to the time of the R.S.C., in 1886, ch. 63. By sec. 11 of the said chapter, formerly sec. 15 of 42 Vict. ch. 22, the Minister of Agriculture and his deputy were given limited judicial powers of determining the rights of rival claimants.

Idington, J.

Evidently this, after some years' experience in its use, had been found unsatisfactory and was repealed by 53 Vict. ch. 14, sec. 1, which substituted therefor a section giving the Minister power in such cases to defer his decision till the matter in question had been passed upon by the Exchequer Court, which was empowered, by sec. 2, to hear such cases as the Minister had

CAN.

S. C.

RE VULCAN TRADE-MARK

Idington, J.

found a difficulty in dealing with. The Minister was to be guided by the order of the Exchequer Court. As a precautionary measure it was declared this new section should not be held to take away or affect the jurisdiction of any other Court.

The scheme provided thereby in a rather clumsy manner seems to have been found unsatisfactory. The next step was taken, in 1891, by the enactment of 54 & 55 Vict. ch. 35, sec. 1, which repealed secs. 11, 12 and 32 of the R.S.C., ch. 63, as it then stood amended by the foregoing Act. In substitution therefor there was enacted a judicial code, as it were, for dealing with the whole matter.

It is quite clear to my mind that there was provided by this later statute just what it enacts, that the Minister if he thought fit might refer the matter of what he is entrusted with by the first sub-section, to the Exchequer Court which in such case was empowered to hear and determine any matter so referred.

In any case so falling under that sub-section of this lastly amending Act or of the entire provision above referred to of the previous session, the argument addressed to us relative to the jurisdiction of the Exchequer Court should have been entitled to prevail.

But over and above all that, sec. 12 of the Act thus amended created an entirely new and independent jurisdiction in the Exchequer Court.

That sec. 12 is now, slightly amended, by sec. 42 of the Act as in the R.S.C., 1906, and reads as follows:—

42. The Exchequer Court of Canada may, on the information of the Attorney-General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry in the register of trade marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the Court thinks fit; or the Court may refuse the application.

2. In either case, the Court may make such order with respect to the costs of the proceedings as the Court thinks fit.

3. The Court may, in any proceedings under this section, decide any question that may be necessary or expedient to decide for the rectification of any such register.

There does not seem to me any room for doubt as to the intention to create thus a jurisdiction wholly independent of the will of the Minister and that thereunder the Exchequer

Court has the power to make such an order as made herein, provided always, the evidence warrants such an order being made and that from such order an appeal will lie here.

I can understand the contention that the facts do not warrant such an order as made herein, but I cannot quite understand any one appealing here trying to deny the jurisdiction of the Court and yet appealing here.

If the contention is right, appellants need not concern themselves with the result. Besides there has been in such case no final judgment. There may be an obvious fallacy in this suggestion, but I think it is quite as arguable as that there is no independent jurisdiction created.

On the merits of this case there seems to me to be but one rather serious difficulty, and that is that the predecessor in title of the appellant got without fraud a general trade mark registered and that the respondents failed to question it for at least sixteen years thereafter.

The effect of this under ordinary circumstances would perhaps be fatal to such a suit as this. For usually any business firm having adopted a trade mark uses it. But if we accept the learned Judge's view of the facts of this firm, which registered what appellants now claim, they never used the mark in connection with their dealings in matches. Nor did appellants until three or four years before this action.

It was so easy, if this finding is not correct, to have put the matter beyond the shadow of doubt that the finding must stand so far as I am concerned.

The match manufacturer who departs from the use of his own trade mark and fills orders for a wholesale grocer to put up matches under the latter's trade mark I imagine does so reluctantly and only under well guarded stipulations relative thereto and tempted by better profit than he can make by adhering to his own trade mark. Such a dealing is not an ordinary everyday transaction such as a housewife ordering home a few bunches or boxes of matches in a way liable to be forgotten.

That no further proof of actual use of the trade mark was attempted than this record shews is most suggestive. That was the crucial point of this case. In it appellants fail. If they

CAN.

S. C.

RE VULCAN TRADE-MARK

Idington, J.

or their predecessors ever so habitually used, in relation to the selling of matches, this trade mark, they could have proved it up to the hilt and thereby invoked the authorities which might have maintained in a case so made out the abandonment of all claims on the part of respondent to interfere therewith.

The term "general trade mark" is so indefinite that I am not quite fully prepared to accept what seems to be the view of the trial Judge that because the dealing in a particular article may properly fall within the ordinary course of a business classified as, for example, "wholesale grocers," therefore, every possible article within that class must, for the purposes of this Act, be held covered by the trade mark adopted and used by a wholesale grocer. The wholesale grocer may, in fact, confine his trade to a few articles; and he may expand or contract his list just as his capital and facilities for and perhaps necessities of business may demand.

Without going further than this to illustrate my meaning I think the course of dealing and of use of a general trade mark in relation thereto for a number of years after registration of such a trade mark may well be looked at as the measure of what was claimed and intended to be registered. If a firm having registered as herein such a general trade mark for 10 or 12 or more years, never used it but for limited purposes and then assigned to another, I think that other got nothing beyond that which its assignor by use and mode of dealing had thus and thereby rendered definite.

If it had been shewn that the firm registering had prior thereto in fact used the trade mark more extensively, in the sense of covering a greater variety of kinds of articles and dealings, than it chose to apply it to later than the registration, I by no means think it would have lost its property therein. It is possible to lose by abandonment property of any kind. But it is not the case of abandonment by the firm registering we have to deal with so much as the finding of what the firm really intended to register.

I would measure that in such a vague and uncertain notice of registration as in evidence here and, no evidence being given of

CAN.

S. C.

RE VULCAN TRADE-MARK

Idington, J.

the use of such trade mark anterior thereto, by the conduct of those registering.

So looked at I cannot find the appellants ever had in law that which they claim herein. There is another and probably much more powerful reason for holding they never had that which they claim.

The respondent had beyond any doubt used most extensively the said trade mark all over the world, including Canada. The use thereof in Canada was not extensive, but clearly anterior to the registration, and such as to preclude the claim of the predecessor of appellants to register as regards matches, or by terms comprehensive of that which they had no legal property in or right to use.

It certainly was the property of respondent when the appellants' predecessors appropriated it to describe what they wanted in way of a general trade mark, and any such claim as made thereby must be limited accordingly.

The registration is of that and only that which at the time of registration was the property of him registering. Clearly this registration if to be interpreted as covering the selling of matches was void, for the property therein was then in respondent and, to use the language of sec. 42, the entry was made "without sufficient cause."

I must wholly dissent from the view urged so well by Mr. Ritchie that this registration creates a right not only akin to but also identical in kind with that created by a patent. The right of property always existed in a trade mark and was after much difference of opinion in regard to its being property finally so recognized about the time when our Act relative to trade marks was first passed. See the case of *Leather Cloth Co.* v. *The American Leather Cloth Co.*, 4 DeG. J. & S. 137.

It is the purpose of procuring a system of registration of such property that is the design of the Act now in question and for the convenience and security of business men is enforced by restricting, as sec. 20 of the Act does, the right in law to assert the right of protecting such property.

It is just there that the necessity exists for an independent authoritative jurisdiction such as sec. 42 creates in order to pro-

CAN.

S. C.

RE VULCAN TRADE-MARK

Idington, J.

tect those who may inadvertently have been thus *primâ facie* deprived of the protection in the enjoyment of their property.

I conclude that the respondent is a party thus aggrieved by the registration of something which appears to deny its right and hence entitled to invoke the powers given in said section.

The use of the trade mark by the respondent may not have been extensive, but it was continuous from 1882 down to 1896 and cannot within the principles upon which the case of *Mouson & Co.* v. *Boehm*, 26 Ch. D. 398, proceeded, be held to have been abandoned by non-use in Canada in later years.

The appeal should, therefore, be dismissed with costs.

Duff, J. (dissenting)

DUFF, J., dissented.

Anglin, J.

ANGLIN, J.:—I concur in the judgment of Mr. Justice Davies.

Brodeur, J.

BRODEUR, J.:—The respondents are manufacturers, in Sweden, of matches on which they have been using since 1870, throughout the world, the trade mark "Vulcan." From that period to 1894 they have shipped to Canada some cases of their goods bearing that trade mark.

In 1894, the assignors of the appellants, Quintal & Sons, wholesale grocers in Montreal, had the trade mark "Vulcan" registered in connection with their business and they have been using extensively that trade mark since. Later on the firm of Quintal & Sons was dissolved and the appellants acquired the assets of that firm, including that trade mark.

The respondents, in 1910, sought to secure registration of their trade mark in Canada to be used in connection with the sale of matches. This was refused by the Minister of Agriculture because there had already been such a trade mark registered for the appellants.

The Swedish manufacturers then applied to the Exchequer Court, under sec. 42, to have their trade mark registered as far as matches are concerned and to expunge and vary the trade mark registered in favour of the appellants. The Exchequer Court maintained the petition and ordered that the trade mark "Vulcan" should be registered in favour of the Swedish manufacturers as far as matches were concerned and prevented the appellants using their general trade mark on matches.

The main contention of appellants is that the Exchequer

Court had no jurisdiction to deal with the matter and they rely on sec. 42 of the Trade Mark and Designs Act. . . .

I am unable to agree with that proposition that the Exchequer Court was without jurisdiction.

Formerly, the Minister of Agriculture was the only authority that could decide whether a trade mark should be registered or not. (R.S.C., 1886, ch. 63, sec. 11.) Provision was made also that if there was any contest as to the rights of parties to use a trade mark, the matter could be settled by the Minister.

It was found evident that the exercise of such judicial functions was more or less advisable to be made by the Minister and, in 1890, the law was amended and it was provided that if the Minister was not satisfied that the person was entitled to the exclusive use of the trade mark, he should cause all persons interested to be notified that the question should be decided by the Exchequer Court and the entry should be subsequently made in the register after the decision of that Court. Then the matter could be brought up before the Exchequer Court upon information of the Attorney-General of Canada and at the relation of any party interested (53 Vict., ch. 14, secs. 1 and 2).

The same Act of 1890 provided also that if there were errors in registering a trade mark and oversight in regard to conflicting registration, that could be remedied and corrected by the Exchequer Court.

In 1891, parliament dealt again with that question of jurisdiction. In proceeding to amend the Exchequer Court Act, it was stated that that Court had jurisdiction in all cases of conflicting applications for any trade mark, or in which it was sought to impeach or annul any entry in any register of trade marks, or in cases of infringement (54 & 55 Vict., ch. 26, sec. 4).

In the same year, by the Act of 54 & 55 Vict., ch. 35, secs. 1 and 2, it was at first provided that the Minister could refuse a trade mark and then power was given to him to refer the matter to the Exchequer Court and, then, a section was enacted corresponding word for word with the above sec. 42 that we find in the Revised Statutes of 1906.

The history of that legislation convinces me very conclusively

CAN.

S. C.

RE VULCAN TRADE-MARK

Brodeur, J.

that the matter which was at first exclusively in the hands of the Minister and under his judicial control could now be dealt with by the Exchequer Court. The Minister can register any trade mark, or refuse registration, but that would not prevent the Exchequer Court deciding whether the trade mark had been properly registered or whether the omission of registration had been properly decided by the administrative authority.

I am, therefore, of opinion that the Exchequer Court had jurisdiction in the premises and could give the order which has been given.

Now the evidence shews that the trade mark "Vulcan" had been used in Canada by the Swedish manufacturers before the general trade mark of the appellants was registered. Then, when Quintal & Sons applied for the registration of a general trade mark, if all the facts had been known, the Department would have rejected their application.

For those reasons, the judgment *a quo* should be confirmed with costs. *Appeal dismissed.*

ALTA.

S. C.

INTERNATIONAL HARVESTER CO. v. JACOBSEN.

Alberta Supreme Court, Stuart, J. September 22, 1915.

1. PARTNERSHIP (§ I—3)—WHAT CONSTITUTES—JOINT INTEREST IN CROP—MONEY ADVANCES.

An agreement whereby one is to receive one-third of the grain for money advanced for raising the crop, does not create a partnership, but merely a joint ownership of the crop.

2. LEVY AND SEIZURE (§ I A—18)—SEIZURE OF CROP—JOINT INTEREST FOR MONEY ADVANCES—RIGHTS OF CLAIMANT.

A crop cannot be seized under execution as against the rights of a claimant to a share of the crop for money advances.

3. BILLS OF SALE (§ II—5)—AGREEMENT FOR GROWING CROP—MONEY ADVANCES—FUTURE DELIVERY—APPLICABILITY OF STATUTE.

Sec. 9 of the Bills of Sale Act (Alta.) has no application to an agreement for the delivery of a portion of a growing crop for money advances, where the agreement is not intended as a security.

Statement

INTERPLEADER between execution creditors and claimant of part of crop. Judgment for claimant.

F. S. Albright, for plaintiff.

Paul, for defendant.

Stuart, J.

STUART, J.:—The sheriff seized some grain, still unharvested, under executions against Jacobsen. Weitzer claims that he is entitled to one third of the grain under an agreement entered into between himself and Jacobsen before the seed was sown.

ALTA.

S. C.

INTERNATIONAL HARVESTER CO. v. JACOBSEN.

Stuart, J.

Jacobsen owned the land and was about to put in the spring crop. He needed some money and appealed to Weitzer. Weitzer gave him $400 in cash, and, according to the evidence given by both of them, Weitzer was to get in return one-third of the grain but was to bear no other expense in connection with the crop, and as between the two of them Jacobsen was to be liable for all debts. It is contended by Weitzer that he was a partner in the enterprise of seeding and harvesting the crop and that therefore the crop could not be seized under an execution against Jacobsen alone. Both Jacobsen and Weitzer stated that the word "partner" was used when the bargain was made. Even if I assume, as I did, at the hearing that they were correct in their account of the conversation, it is well settled that the mere use of the word would not necessarily constitute a partnership. The Court must look at the essence of the agreement. If the two were really partners, if a partnership had really been constituted, one consequence would have been that Weitzer would have been liable, as between himself and third parties who had claims against Jacobsen in connection with the crop, as a partner for these claims. I imagine that nothing was further from the intention of the parties, particularly of Weitzer, than this, and that if such claim had been made he would have endeavoured to place an entirely different legal construction upon the effect of his agreement with Jacobsen. I think it cannot be contended therefore that Weitzer was a partner.

It, however, does not follow that he was not a joint owner of the crop.

It is clear that sec. 15 of the Bills of Sale Ordinance does not apply because upon the evidence there was no question of a security.

The essence of the transaction seems to me to have been a sale by Jacobsen to Weitzer of a one-third interest in the property to come into existence *in the future*. It was of course impossible to make actual physical delivery of this at the time the sale was made. It therefore follows that sec. 9 of the Bills of Sale Act cannot apply because that section clearly contemplates only a case where it is possible that the sale can be,

ALTA.

S. C.

INTERNATIONAL HARVESTER CO. v. JACOBSEN.

Stuart, J.

accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold.

There is no doubt that the Act would not apply if the agreement had been made after the crop had begun to grow: Barron & O'Brien, 461; *Hamilton* v. *Harrison*, 46 U.C.Q.B. 127, 131; *Brantom* v. *Griffits*, 2 C.P.D. 212. Still more must it be included where the agreement was made before the crop was sown at all.

I think therefore that Weitzer is entitled to his one-third crop, and as the sheriff has been directed not to dispose of the crop until this decision is given I think the proper order should be that he deliver one-third of the crop to Weitzer. The remainder, belonging to Jacobsen, may be held by the sheriff to satisfy the executions against Jacobsen not subject to the provisions as to exemptions.

Weitzer must have his costs of the application and the hearing. *Judgment for claimant.*

N. S.

S. C.

JAMES v. TOWN OF BRIDGEWATER.

Nova Scotia Supreme Court, Russell, Longley, Drysdale and Ritchie, JJ. May 22, 1915.

1. MUNICIPAL CORPORATIONS (§ II G 3—241)—RELEASE OF LAKE WATER—OVERFLOW OF LANDS—LIABILITY.

A municipality is answerable for the damages caused by an overflow of lands, where it permits the accumulation of water in a lake after a heavy rainfall, and later, at the end of the rain, releases the water in large volumes on the lands of riparian owners. (Court divided.) [*James* v. *Town of Bridgewater*, 20 D.L.R. 799, affirmed.]

Statement

APPEAL from the judgment of Graham, C.J., 20 D.L.R. 799, in favour of plaintiff in an action for overflowing lands and injunction.

F. H. Bell, K.C., and *A. Roberts*, K.C., for defendant, appellant.

J. A. McLean, K.C., for plaintiff, respondent.

Longley, J.

LONGLEY, J.:—The question involved in this case is an exceedingly narrow one. The defendant claims that the 5 days' rain and the placing of water on the plaintiff's land was a mere inevitable accident. The plaintiff claims that by stopping the water until the end of the rain and then letting it out by taking off 5 inches of boards at the top caused the water to overflow his land, doing it great damage and it remained on the land for 9 days. The Privy Council thus defines the law upon the sub-

ject of water: (See extract from *Miner* v. *Gilmour*, 12 Moo. P.C. 131, given in judgment of Ritchie, J.).

In this case the Judge has found that the trouble seemed to be caused by the superintendent commencing late to release the water at the lower dam and not raising the upper dam earlier and in not releasing the water more gradually.

While it is possible that another Judge in trying this cause may have reached the conclusion that the offence committed by the defendant did not go to the extent of a damage or injury, I am inclined to accept the verdict of the Judge on this point and to regard his finding of $30 damages as correct, and I refuse, therefore, to interfere with the case.

In the order for judgment, in addition to the sum of $30 awarded by the judgment, an injunction is awarded by which the town and its officers, etc., are perpetually restrained and enjoined from overflowing with water any lot of land or premises described in par. 1 of the statement of claim. I do not regard the circumstances of the case as warranting such a definite and sweeping judgment of injunction and I think it would be better in upholding the verdict to set aside the order for injunction.

RUSSELL, J.:—The trial Judge has found on sufficient evidence that the water was accumulated for some days in the lake before any splash boards were removed. If the lake had emptied itself during the earlier days of the rain according to the course of nature and in the absence of any artificial structure, it is conceivable that a large quantity of the water thus held back would have flowed by without damaging the plaintiff's property, and it seems not only conceivable but probable that it would at least have escaped doing less damage to the plaintiff than that caused by the artificial conditions for which the defendants are responsible. When the accumulated volume was permitted to escape and overflow the land it seems to me, therefore, probable, if it was not inevitable, that it should remain a longer time on the land than if a large quantity had been allowed to escape by an earlier removal of the splash boards. In other words, part at least of the mischief that has been done would probably not have been done if the water-course had been left in its natural state. It is for this injury that damages have been awarded.

Russell, J.

N. S.

S. C.

JAMES v. TOWN OF BRIDGEWATER

Russell, J.

The amount is very moderate and I do not think there is any good reason for reversing the finding. The appeal should be dismissed with costs, but the order I think should be varied. It requires the defendant to absolutely prevent the overflowing of the land during the months named. It is not clear that the land would not be overflowed in the natural course of things even if there were no artificial conditions. The order should be varied in such a manner as to restrain the defendant from causing any overflow greater than that which the plaintiff would in any case be bound to suffer. It may be difficult to draft an order to accomplish this end which will not leave the whole question to be again tried out on a motion for attachment, but I think it is not impossible.

Ritchie, J.

RITCHIE, J. (after setting out the facts as stated in 20 D.L.R. 800):—There is no statutory authority under which the defendant town can justify injury to the plaintiff's land resulting from the damming back and releasing of the water. This being so the law is, I think, clear. This town has the right to build its dam and store and release the water if such action does not have the result of inflicting injury upon the plaintiff. In *Miner* v. *Gilmour*, 12 Moo. P.C. 131, Lord Kingsdown, dealing with this question said:—

> By the general law applicable to running streams every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But further he has a right to the use of it for any purpose or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury.

The law being as stated in the foregoing quotation, only questions of fact remain for consideration. I think those questions are: Was the water by the action of the defendant company thrown upon the plaintiff's land in larger quantities than it otherwise would have been? Did the water remain in consequence of the action of the defendant town longer than it other-

wise would have done upon the land of the plaintiff? If both or either of these questions is answered in the affirmative, then another question of fact remains, namely: Was "sensible injury" caused thereby to the plaintiff's land?

In respect to the first question, Melvin James, the husband of the plaintiff, has given an answer in the negative. I quote from his evidence:—

> I want to know what your claim is, how far that went over? A. I have no claim. Q. How far over do you claim the overflow was in this suit: how many feet past what it should have been? A. I don't claim it any more at all. I claim the water would have come up as high anyhow. I can't be fairer than that: they could not keep the water from coming up: it would have come up as high but it would not have stayed on nine days.

There is other evidence that no greater quantity of water was cast upon the land, but James, who is the husband of the plaintiff, I think, can be relied on not to misstate the fact against the plaintiff. He has answered the question in the negative, and as I have said, there is other evidence to the same effect. Under these circumstances I cannot give an affirmative answer. On this first question of fact the plaintiff must fail. I may add that Mr. McLean seemed quite content to rest his case upon the second question of fact, viz.: Did the water remain longer than it would have done but for the action of the defendant town? He urged that there was a finding to this effect and that the finding had support in the evidence. Mr. Bell, on the other hand, contended that there was no such finding, and no evidence upon which the Court could make it. The finding of the trial Judge is as follows: (See 20 D.L.R. 802-3).

I do not think it can be said that there is any such specific finding and after reading and re-reading the evidence I cannot find that there is any evidence upon which I can find that the water remained longer on the plaintiff's land in consequence of the action of the defendant town. The plaintiff must make out her case by proof that the defendants caused the water to remain longer on the land. It cannot be done by pointing to the fact that it did remain longer. The rainfall may not have been "unprecedented" but I think it was unusual. I have no doubt there was more water than usual on the land, because there was more rain than usual, and there being more water it follows that

N. S.
S. C.
JAMES
v.
TOWN OF BRIDGEWATER
Ritchie, J.

it would take a longer time to run off. It is, I think, not going too far to say that in this case it was clearly admitted by the evidence of James, and practically admitted at the argument, that the defendants did not cause more water to go on the plaintiff's land than would have gone there in ordinary course. This being so, I am unable to see how it can be fastened upon the defendants that they caused it to remain longer than it otherwise would have done. The outlet was small and consequently the water went off slowly, but I do not know how the defendants can be held liable for this if they did not cause more water to go on the land than would go in ordinary course, and as to this the defendant's case is proved by the plaintiff's witnesses.

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

Drysdale, J.

DRYSDALE, J., concurred with RITCHIE, J.

Appeal dismissed (Order varied).

YUKON.
Y. T. C.

MILLS v. PORTER.

Yukon Territorial Court, Macaulay, J. September 27, 1915.

1. MINES AND MINERALS (§ I B—10)—WORKING OF CLAIMS—REPRESENTATION WORK—SCOPE OF AUTHORITY.

An authority given one to do representation work on a mining claim for gold in order to obtain a renewal of the grant does not authorize the donee of such power to give a lay to work the claim without the previous authority or subsequent ratification of the owner, and constitutes an act of trespass on the part of any one to work the claim in excess of such right.

[*Olsen* v. *Desjarlais*, 15 W.L.R. 72.]

Statement

ACTION for trespass to mining claim.

F. T. Congdon, for plaintiff.

C. W. C. Tabor, and *J. A. W. O'Neill*, for defendants.

Macaulay, J.

MACAULAY, J.:—The plaintiff is the owner of Hillside Lower Half Right Limit, No. 10, below A. Mack's Discovery on Quartz Creek, in the Dawson mining district of the Yukon Territory; Fractional Hillside adjoining Right Limit No. 10, below A. Mack's Discovery on Quartz Creek aforesaid, and Hill Upper Half Right Limit No. 10, below A. Mack's Discovery on Quartz Creek aforesaid. On March 4, 1913, the boundaries of said Hillside Lower Half Right Limit No. 10 were extended so as to include such portion of Fractional Hillside adjoining Right Limit

No. 10, below A. Mack's Discovery, as to make the claim, so extended, five hundred feet in length.

The said claims were grouped for representation by an Order of the Gold Commissioner of the Yukon Territory for 5 years from December 23, 1908.

In the summer of 1911 the plaintiff left the Yukon Territory and went to Iditarod, Alaska, having first done the representation work to entitle him to renewal certificates upon his said claims but not having taken out the said renewal certificates. In a letter written by him to the defendant Porter from Iditarod and dated January 6, 1912, ex. No. 4, he states that he had expected to be back to Dawson in time to renew said claims but had missed the last boat, and had then wired the defendant Porter to renew the claims, and not hearing from him had sent another wire to one McMillan of Quartz Creek to renew the claims, and had received a reply from McMillan that the said claims had been renewed. He now writes asking the defendant Porter if he would do the representation work upon Fractional 10, which must be done before July, 1912, and asks to be informed at once if the defendant Porter is willing to do the work, and promises to send the money to pay for the said work by July 1, 1912.

The plaintiff had previously written the defendant Porter on August 21, 1911, ex. No. 6, enclosing $110, and instructing said defendant to pay $100 to one Roal and the $10 was to pay said defendant for examining the workings on No. 9 Quartz Creek to see if Hunt & Co. (being the defendants Hunt and Albertson in this action) had been trespassing upon his, the plaintiff's ground, and asking for a reply giving particulars of such investigation.

On March 7, 1912, the defendant Porter wrote to the plaintiff, ex. No. 7, stating among other things that he would see that the plaintiff's claim was represented provided the plaintiff did not get home. On April 15, 1912, the plaintiff sent another letter to said defendant Porter, ex. No. 5, giving him instructions as to enlargement of boundaries and the time for making application therefor, and stating that he would write later.

The defendant Porter did the representation work, but did

YUKON.

Y. T. C.

MILLS v. PORTER.

Macaulay, J.

not apply for the extention of boundaries and obtain renewal grant as requested, and on December 10, 1912, the said Fractional Hillside Right Limit No. 10, below A. Mack's Discovery, Quartz Creek, was staked by one Margaret Mitchell, who applied for a grant therefor on December 12, 1912.

On September 12, 1912, the plaintiff wrote said defendant Porter, ex. No. 8, enclosing $290 to pay for representation work and other matters mentioned in said letter, and instructed said defendant to apply for enlargement of boundaries and described the manner in which he wished the boundaries extended.

This letter did not reach the defendant Porter until sometime in the month of December, 1912, and after the said staking by the said Margaret Mitchell, and the said defendant was unable to extend the said boundaries and renew the lower half of No. 10, which fell due in January, 1913, by such extension of boundaries, on account of the said staking by the said Margaret Mitchell, but he applied for and obtained a renewal of said Fractional Hill, Right Limit No. 10, as he was entitled to do under the provisions of the Yukon Placer Mining Act, thereby preserving the said claim for the plaintiff. Previous, however, to the said time, and in the month of October, 1912, the defendant Porter, as he states in his evidence, not having heard from the plaintiff and not having received the money for said representation work which the plaintiff had promised should reach the said defendant by July 1, 1912, and not being in possession of the necessary funds with which to obtain the renewal grant for the claim he had represented, or to obtain the extension of boundaries as requested, and knowing that the representation work had to be done upon the lower half of said claim No. 10 before January, 1913, approached the defendants Hunt and Albertson and asked them to take a lay upon said lower half of said claim No. 10, to represent the same, and told the said defendants Hunt and Albertson, that they would have a lien for their work if the plaintiff did not return to Quartz Creek that fall.

The said defendants Hunt and Albertson refused to take a lay to do said representation work but offered to take a lay to work said claim, and the defendant Porter then told his said co-defendants that he had no authority to give such a lay and that

any lay agreement he might give them would not be worth the paper it was written upon.

Further negotiations took place between the said parties, and, notwithstanding the knowledge that was in the possession of all, an agreement was entered into between them that the defendants Hunt and Albertson should work the said ground upon an 85 per cent. lay, and in case the proceeds did not pay wages and expenses the said defendants should have a 90 per cent. lay, but in no event should the plaintiff receive less than 10 per cent. of the gross output from said working as aforesaid.

The said defendants Hunt and Albertson thereupon commenced operations and continued same until the fall of 1913, and although the alleged lay was upon the lower half of the said claim No. 10, the evidence shews that most of the work was done upon the said upper half of said claim No. 10, and the total amount of money received for the gold won from the said ground was $9,088.60, of which 10 per cent. was retained by the defendant Porter and paid by him to the plaintiff, and the balance retained by the defendants Hunt and Albertson.

The defendant Porter says he wrote two letters to plaintiff in the fall of 1912, explaining what he had done with the plaintiff's ground. The plaintiff admits receiving a letter from said defendant in April, 1913, saying he had let a lay to represent lower half of No. 10, and he also admits receiving a letter from Mr. Oberfeldt in July, 1913, saying that Porter had let a lay on his ground, but he states he thought it was for representation purposes only, and that it was too late when he got the letter to make any protest.

In the month of September, 1913, the plaintiff wired from Iditarod to said defendant Porter as follows: "What have you done on my ground"—to which the defendant Porter replied on October 2, 1913, "Let lay. Have money on hand. Will write soon." The plaintiff in answer to the telegram of October 2, 1913, wired the said defendant Porter as follows: "Can you telegraph me money and renew my ground"—and on December 11, the Bank of B.N.A., Dawson, telegraphed $989 to plaintiff

YUKON.

Y. T. C.

MILLS v. PORTER.

Macaulay, J.

at Iditarod, being percentage of proceeds of gold and price of wood belonging to plaintiff which was sold by defendant Porter.

On September 30, 1913, and after receipt of a telegram from plaintiff asking him what he had done with his ground, the defendant Porter wrote plaintiff a letter, ex. No. 10, explaining the terms of the lay, and within a few days after the receipt of this letter the plaintiff started for Dawson which place he reached about February 18, 1914, and went to Quartz Creek about March 4 following, where he met all the defendants and made a protest about the working of his ground, and demanded a larger percentage of the gold won from the ground than had been paid to him by the defendant Porter.

The defendants Hunt and Albertson refused to hand over to the plaintiff any further percentage of the gold received by them as aforesaid, and finally, on September 1, 1914, the plaintiff launched this action asking for damages for trespass, for an accounting and for costs.

The defendants deny the allegations in the statement of claim, and state that the defendant Porter was the authorized agent of the plaintiff to let the aforesaid lay, and that the said lay was let with the knowledge and consent of the plaintiff, and that he acquiesced in the same, and that at all events the defendant Porter was the agent by necessity of the plaintiff and if the said lay had not been given to the defendants Hunt and Albertson and the representation work performed by them upon the ground the plaintiff would have lost his claims for want of representation, and the same would have reverted to the Crown.

They further claim that the work was performed in a miner-like manner; that the plaintiff's shafts and tunnels were not injured by the defendants' workings, and a full accounting was made, and ask that the plaintiff's action should be dismissed with costs.

The only direct authority given by the plaintiff to the defendant Porter as agent was the authority to do the representation work upon the plaintiff's claims and renew the same.

Upon a careful examination of the evidence I am unable to find that the plaintiff was aware until the fall of 1913 that a lay had been given upon his ground other than for purposes of

representation, and that when he did discover that a lay had been let and the ground worked, that he never acquiesced in the same. His whole conduct and attitude would lead to the opposite conclusion.

From the time he left Dawson until his return he was anxious that his claims should be kept in good standing. He was also anxious that Hunt & Company should not trespass upon his ground from their operations upon No. 9, and sent money to Porter to pay him for an examination of the ground to find if any trespass had been committed.

The term "acquiescence" which has been applied to his conduct is one which is said by Lord Cottenham in *Duke of Leeds* v. *Earl of Amherst*, 41 E.R. 886 at 888, and cited by Thesiger, L.J., in *DeBussche* v. *Alt.*, L.R. 8 Ch.D. 286, 314, ought not to be used. In other words it does not accurately express any known legal defence, but if used at all it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress, or only after it is completed.

If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might have otherwise abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term "acquiescence," and in that sense may be defined as "quiescence," and under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which at all events, as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right, although

YUKON.

Y. T. C.

MILLS v. PORTER.

Macaulay, J.

under the name of "laches" it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding.

Applying the principles above enumerated to the present case, it is clear that there was no acquiescence on the part of the plaintiff in the defendants' Hunt and Albertson working the ground in the manner in which it was worked by them.

Neither am I of opinion that the defendant Porter became an agent by necessity upon extraordinary emergencies arising, as was urged upon the authority of Storey on Agency; and that the plaintiff's claims would have reverted to the Crown if the lay had not been given upon them, and that, under such circumstances, he was justified in giving the lay.

Shortly after the lay was given and before more than sufficient work to cover the representation had been done, the defendant Porter received sufficient money to pay for the representation work that had been already done, and to pay for the renewals of the claims, and in the letter containing said money the plaintiff advised the defendant Porter if there was not sufficient money to advise him and he would send any further amount required. The defendant Porter was in a position to then protect the plaintiff's ground without having any further work done upon it, and he should not have permitted further work to have been done without the consent of the plaintiff.

I am of opinion, as I was in the case of *Olsen* v. *Desjarlais*, 15 W.L.R. 72, that though the defendant Porter had a right to let a lay to his co-defendants Hunt and Albertson to perform the representation work, and they had a right to enter for that purpose, they became trespassers the moment they continued the working of the claim after a sufficient amount of work had been done thereon for the necessary representation; and at no time had they any right to work the upper half of claim No. 10.

The plaintiff endeavoured to prove special damages for in-

juries to the shaft and tunnel on his ground, alleging that the said defendants Hunt and Albertson, in the course of their operations, destroyed the plaintiff's shaft and tunnel. He also asked for the price of a vice that disappeared from the premises and for a balance for wood belonging to him which was used by said defendants Hunt and Albertson in their said operations. I am of opinion on the evidence submitted that the shaft and tunnel were not injured as alleged, or at all, and consequently no special damage in that respect was suffered. The vice was taken by one Wickman who claims ownership thereto, and the defendants were not responsible for its disappearance. The wood was sold at a fair valuation according to the evidence, and the defendant Porter accounted to the plaintiff for the value of the wood; consequently there will be no special damages allowed.

Having found trespass to the plaintiff's ground the question for me to decide is, whether the harsher or the milder rule should be applied in the assessment of the damages. The defendants Hunt and Albertson, when they entered upon the plaintiff's ground, did so at the request of the plaintiff's agent, who, of course, had no authority to give a lay and so advised said Hunt and Albertson, but they undoubtedly expected Porter would communicate with plaintiff and that the agreement would be ratified, and at the time they entered upon the said ground it was necessary that representation work should be done upon the said claims. They stand in a somewhat different position from a wilful trespasser who enters upon ground knowing that his action is entirely wrong. The defendants worked the ground in a minerlike manner, and the plaintiff could not have worked it in any better manner, if as well, himself.

After an examination of the leading authorities on the question of damages for trespass: *Jegon* v. *Vivian*, L.R. 6 Ch. 742; *Lamb* v. *Kincaid*, 38 Can. S.C.R. 516; *Trotter* v. *McLean*, 13 Ch.D. 574; *Kirkpatrick* v. *McNamee*, 36 Can. S.C.R. 152,—I am of opinion that the milder rule as to the assessment of damages should be followed in this case, and the defendants should be allowed the cost of recovering the gold.

There will therefore be a reference to the clerk of this Court to fix the cost of recovering the gold upon the usual scale of

YUKON.

Y. T. C.

MILLS v. PORTER.

Macaulay, J.

wages allowed to miners on Quartz Creek, and also to find the total amount of gold recovered by the said defendants, and the damages will be the total value of the gold recovered, less the cost of recovering the same.

The plaintiff will be entitled to his costs of the action.

Judgment for plaintiff.

ALTA.

S. C.

SHEPPARD v. GODFREY.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. November 6, 1915.

1. VENDOR AND PURCHASER (§ I A—3*b*)—SALE OF SUBDIVISION LOTS—NON-REGISTRATION OF PLAN—ILLEGALITY—VENDEE'S LIEN.

A sale of lots according to a plan purporting to be a subdivision plan, which is not registered at the time of the sale, is illegal under a statute forbidding the sale of lots before the registration of the plan, although the agreement covers the whole block and is not a sale of any particular lot, and the purchaser may recover the purchase price paid thereon and is entitled to a lien on the land until same is paid. [*Veilleux* v. *Boulevard Heights*, 20 D.L.R. 858; *Abbott* v. *Ridgeway*, 8 A.L.R. 315, followed.]

Statement

APPEAL from judgment of Walsh, J., dismissing action for enforcement of agreement for sale of land.

E. D. Edwards, K.C., for plaintiff.

Frank Ford, K.C., for defendants.

The judgment appealed from was as follows:—

Walsh, J.

WALSH, J.:—If the plan according to which this sale was made was a plan of sub-division and the defendants were not aware of its non-registration until after action brought, the case is within *Veilleux* v. *Boulevard Heights*, 20 D.L.R. 858, and must be decided against the plaintiff for the legislation of last session does not help him, inasmuch as the plan is still unregistered, and it was not the defendant's duty to register it. The plaintiff's contention is, that though this sale may be in form, it is not, in substance, a sale of lots according to a sub-division plan as the plan was a mere tentative thing, made in anticipation of a survey of his land into the blocks and lots delimited upon it, which survey was to the defendants knowledge stopped and abandoned before the making of this agreement and the land was so described solely for convenience. If that is so I do not think that this sale is within the prohibition of the statute. It is true that the blue print which is referred to in and is attached to and forms part of the agreement is in appearance such a thing as

a sub-division artist would prepare as a sub-division plan, but it is the substance of it as gathered from the facts and the surrounding circumstances rather than the precise form of it that should be looked at in determining whether or not that is what it really is. Many a thing which the parties concerned call by one name the Courts call by another. An instrument which on its face is an absolute deed the Courts do not hesitate to call a mortgage upon proof of facts justifying that designation. What the parties to a contract call liquidated damages the Courts often say is a penalty and *vice versa*. There are facts in this case to justify a finding either way upon this point, and I have had a great deal of difficulty in deciding upon which side they preponderate. My conclusion, however, after most careful consideration is that this was a sale according to a plan of sub-division, and the plaintiff's case therefore stands to be decided by the judgment in the *Veilleux* case.

The description of the land in the agreement is "all of block 9 in the east half of the north-west quarter of sec. 22, tp. 52, r. 24, west of the 4th as the same is shewn upon a map or plan of the said quarter section prepared by B. J. Mitchell, D.L.S., of the city of Edmonton, copy of which said plan is annexed to a duplicate copy of this agreement and deposited in the office of Rutherford, Jamieson and Grant in the city of Edmonton, said plan being marked as schedule A to this agreement." The plan itself is labelled "Chislehurst Park, being a sub-division of part of," etc. It consists of two parts on the same sheet. One of these is a key map shewing the location of this property with reference to the surrounding sub-divisions and well-known points in the city such as the post office and railway stations. The other is a plan of the property itself divided into blocks and lots, all of which are given numbers and intersected by avenues and a street. On its face, this is a sub-division plan. I think that the onus is on the plaintiff of shewing that it is not what it purports to be and this he has failed, in my opinion, to do. The plan covers 80 acres. After it was prepared and whilst the work on the ground was being carried on the plaintiff sold 50 acres of it. He thereupon stopped the work of staking out the lots in the blocks in the remaining thirty acres, of which the

ALTA.

S. C.

SHEPPARD v. GODFREY.

Walsh, J.

block in question forms a part. The corner stakes of the blocks or of some of them had then been planted but that is all, and no staking has since been done. This abandonment of the work of survey appealed to me as being the strongest proof offered in support of the contention that this plan was not intended to be and in fact never became an effective scheme for the sub-division of this property. The most that can be said for that, however, is that that is the idea which was present to the plaintiff's mind for I cannot find that it was ever communicated to the defendants, and it seems to me that I cannot hold that this plan is other than what it purports to be simply because one of the parties to the transaction held that idea. I think that the defendants' purchase was largely speculative. The then present use to be made of the land was undoubtedly for dairying purposes, but I am unable to think that the defendants would have agreed to pay such a price as this agreement calls for if that was their only purpose in buying it. I have not figured it out accurately but the purchase price is approximately $3,000 per acre. The experience of the past few years in this country has taught us that in that period, farm land, when blue printed under some high-sounding name, took on by that fact alone an immensely increased selling value entirely out of proportion to its actual value for farming purposes. I am satisfied from the discussions as to the possibility of the street railway system being extended to this neighbourhood, the number of lots there were in the block, the price that each lot would bring, and other evidence of this character, that the parties looked upon the transaction as one involving the purchase and sale of sub-divided property rather than of property of value for use by the defendants in their business as dairymen, although that was the immediate use for which it was intended. The statement of the plaintiff that no one but the city could compel the removal of the barn which stands partly upon what is shewn upon the plan as a street is suggestive rather of the carrying out than of the abandonment of the scheme of sub-division, for the city's rights under this plan could be called into being only by its registration. The statute forbids a sale of *lots* before the registration of the plan. Mr. Edwards argues that this is a sale, not of lots, but of a block

and that it is for this reason not within the prohibition of the statute. I am unable to concur in this view. The plan shews block 9 divided into 36 lots. The agreement for the sale of the block was in effect for the sale of the 36 lots of which it consists. I can see no difference between a sale of block 9 and a sale of lots 1 to 36 inclusive in block 9. Under either description the 36 lots into which the block is laid out would pass, and so a sale of lots would be effected.

The plaintiff's action which is for the specific performance of this illegal contract must be dismissed.

The defendants counterclaim for the return of the money paid by them under this contract. The only ground of difference between the *Veilleux case* and this in that respect is that here the defendants knew when the agreement was entered into, as I find, that the plan was not registered although I do not think that they knew or were concerned in the reason for its non-registration. The parties differ in their stories as to this, but the evidence of Mr. Grant, the solicitor in whose office the agreement was prepared, settles the controversy, in my opinion, in the plaintiff's favour. After stating that the plaintiff and one of the defendants came to his office for the purpose of having the agreement drawn, he says:—

> With regard to the plan I do not remember just how it was produced in the first instance, but I asked if it was to be put on record; it was not to be and I suggested that it should be attached to the agreement and the agreement made in duplicate and one copy left in my office and the agreement was drawn in accordance with that.

I do not think, however, that that fact makes any difference in the defendants' right to the return of their money. The cases cited by me in the *Veilleux case*, 20 D.L.R. 858, in support of the view that as the statute was meant for the protection of a class of whom the purchaser was one, he was entitled to get his money back, notwithstanding the illegality of the contract, justify the view that in such a case as this knowledge of such illegality on the part of the purchaser cannot avail to allow the vendor to retain the purchase money come to his hands.

The defendants were in the use and occupation of the lands for a considerable time and counsel admitted the plaintiff's right to the payment of a proper sum in this respect. I think

ALTA.
S. C.
SHEPPARD
v.
GODFREY.
Walsh, J.

that the sums paid by the defendants as interest on the purchase money might fairly be retained by the plaintiff as compensation for their use and occupation of the land. He is also entitled to the sum of $208 which it will cost, according to the evidence of his witness to restore the buildings to the condition in which they were when the defendants went into possession. There will be judgment for the defendants on their counterclaim for $3,100, being the principal money paid by them with interest at 5 per cent. on each payment from its date, less the above sum of $208, and the defendants will have a lien on the land until this payment is made. The plaintiff will pay the defendants' costs of defence and counterclaim.

So that my findings of fact upon all the issues raised may be before the Appellate Division in the event of an appeal, I add that, in my opinion, the other two grounds of defence and counterclaim fail. I am satisfied that no such arrangement as the defendants contend for, namely, that they could put an end to the agreement at any time during its life and thereupon become entitled to a return of all sums paid by them on account of the purchase price, the plaintiff retaining the sums paid for interest as a rental, was ever entered into. I have given no consideration to the legal difficulties in the defendants' way in having their contention in this respect given effect to. On the surface they appear formidable, even if my finding of fact had been otherwise than it is. I practically found at the trial against the defendants' contention that the plaintiff's title is defective and I cannot usefully add to what I then said in this respect.

The judgment of the Court was delivered by

Harvey, C.J.

HARVEY, C.J.:—In June, 1912, by agreement in writing, the plaintiff agreed to sell and defendants to buy certain lands described as "All of block nine (9) in the east half of the north-east quarter of section twenty-two (22), tp. fifty-two (52), rge. twenty-four (24), west of the fourth meridian in the Province of Alberta as the same is shewn upon a map or plan of the said quarter section prepared by B. J. Mitchell, D.L.S., of the city of Edmonton, said plan being marked as schedule 'A' to this agreement." In June, 1914, default was made by the defendants, and action was thereafter brought against them by the plaintiff to enforce his rights under the agreement. The action

came to trial before Walsh, J., without a jury, when he dismissed the action on the ground that the contract was illegal by reason of the fact that the land was sold according to a plan which was and is unregistered, contrary to the provisions of sub-sec. 7 of sec. 124, of the Land Titles Act as enacted in 1911-12 (ch. 4, sec. 15).

This Court has twice held that an agreement coming within the terms of that section is illegal and therefore void, in *Abbott* v. *Ridgeway Park*, 8 A.L.R. 315, and *Veilleux* v. *Boulevard Heights*, adopting the reasoning of Walsh, J., in giving judgment at the trial in the last mentioned case, 20 D.L.R. 858. Consequently much of the argument of counsel for the appellant based on the view that it was open to argue that the agreement was voidable only is beside the point. It is urged, however, that this is not a sale according to a plan, but of a particular piece of land pointed out and physically inspected, the defendants knowing that the plan was not to be registered, and that it was merely referred to for convenience of description. It is apparent that this involves questions of fact, and on these points there was conflicting testimony, and the trial Judge has found in favour of the defendants. It is impossible to say that he was wrong. There is no doubt that the land was inspected by the defendants, and its boundaries pointed out, but the defendants say that the boundaries were indicated by reference to posts which were stated to be the boundaries of intersecting streets on the plan. If this is true it was quite clearly a sale according to a plan with streets and lanes, with respect to which the purchasers would acquire rights and no conveyance of the land alone by metes and bounds would give these rights. Owing to the conclusion of the Judge on the facts the argument appears to me to be without force.

It is true that the agreement describes the land sold as a "block," and the statute says no "lots" shall be sold. I am of opinion, however, that the word "lots" in the statute is used in a general sense, intending to include any sub-divided portion. If it were not so, all that would be necessary to escape the consequences of the Act would be to discard the use of the word "lot" and use some other appropriate word, such as "block"

ALTA.

S. C.

SHEPPARD v. GODFREY.

Harvey, C.J.

or "parcel," and in this way the effect of the Act would be entirely nullified. The right of the defendant to receive back the moneys paid was also determined by this Court in the cases referred to, and the only difference in this case is that the defendants at the time of the agreement knew the plan was not then registered. It does not, however, appear that they were aware that it had not been approved by the Minister of Public Works, which would have excused the non-registration, though in the authorities cited in the *Veilleux case* at the trial it would appear that knowledge would not deprive the purchaser of the right to receive back his money.

I see no ground for complaint by the plaintiff against the allowances made by the learned trial Judge in his favour for use and occupation, and for damages to the building. If they erred at all it was on the side of generosity towards the plaintiff.

I would dismiss the appeal with costs. *Appeal dismissed.*

WINDSOR v. YOUNG.

N. B.

S. C.

New Brunswick Supreme Court, Appeal Division, McLeod, C.J., McKeown and Grimmer, JJ. May 6, 1915.

1. COURTS (§ II A 3—164)—COUNTY COURT — JURISDICTIONAL AMOUNT — PLEA OF SET-OFF—EXCEEDING JURISDICTION.

The County Court of New Brunswick has no jurisdiction to entertain a set-off where the amount claimed by the defendant is in excess of the jurisdiction of the Court, unless part of the claim is abandoned so as to bring the claim within the jurisdictional amount.

2. SET-OFF AND COUNTERCLAIM (§ I—1)—ACCRUAL OF RIGHT AFTER ACTION.

A defence by way of set-off, which accrued after the writ was issued in the original action, can not be set up as an answer to such action.

Statement

APPEAL from judgment of McLatchy, J.

James P. Byrne, for plaintiff, appellant.

George Gilbert, K.C., for defendant, respondent.

The judgment of the Court was delivered by

McKeown, J.

McKEOWN, J.:—This is an appeal from a judgment of the Gloucester County Court. An action was brought therein by Windsor, the present appellant, against the respondent Young upon a promissory note for the sum of three hundred dollars made by Young, in favour of Windsor, and then overdue and unpaid. A set-off, much larger than the original claim, was pleaded in defence, and the case was tried before the Judge of the County Court of said county without a jury, the result

N. B.

S. C.

WINDSOR v. YOUNG.

McKeown, J.

being that a verdict was found for the defendant for the sum of $400.

The facts are that in the year 1906, Windsor and Young became partners in a fishing venture managed by Young, who resides at Caraquet, in Gloucester county. Two fishing schooners were bought on joint account and considerable capital was put into the business by both parties, but the operation was unsuccessful, a good deal of money was lost, and at the close of the year 1908 the business was discontinued. In 1909 the schooners and gear were disposed of, and the whole matter was ended as far as carrying on any operation was concerned.

The note sued on took its rise from these transactions, it being given by Young to Windsor at the conclusion of the negotiations between them incident to the winding up of this unsatisfactory business venture. Without detailing these negotiations, it may be said that, although operations were discontinued at the close of 1908, no winding up or settlement of accounts between them was had until January, 1913, when, after some examination of the accounts which were kept by Young, who seems to have managed the entire affair, and for the purpose of settling and closing up the whole transaction, on January 30, 1913, Young gave to Windsor eight promissory notes, made by him (Young) in Windsor's favour. The notes were all dated January 30, 1913, the first being payable on September 1, 1913, and the others on July 15, in each succeeding year up to, and including, the year 1920. Each was for the sum of $300 except the one last to mature, it being for the sum of $400. A receipt was given to Young by Windsor at the time these notes were taken. Inasmuch as the parties are in dispute concerning its import, it may be well to set it out in full. It reads thus:—

Caraquet, N.B., January 30th, 1913.

Received from F. T. B. Young eight promissory notes, dated and payable as under at the Bank of Montreal, Bathurst, N.B.:—

No. 1	note	dated	Jan.	30/13,	payable	Sept.	1st, 1913	for $300.00
No. 2	"	"	"	"	July	15/14	"	300.00
No. 3	"	"	"	"	"	15/15	"	300.00
No. 4	"	"	"	"	"	15/16	"	300.00
No. 5	"	"	"	"	"	15/17	"	300.00
No. 6	"	"	"	"	"	15/18	"	300.00
No. 7	"	"	"	"	"	15/19	"	300.00
No. 8	"	"	"	"	"	15/20	"	400.00

N. B.

S. C.

WINDSOR v. YOUNG.

McKeown, J.

without interest, in full settlement of all accounts and notes between the said F. T. B. Young and the undersigned. GEO. WINDSOR.

This action is brought upon the first of the above series of notes, namely, the one payable on September 1, 1913. It was overdue and unpaid when suit was commenced, and at the trial all formal proof necessary to establish plaintiff's right to recover was duly and properly made.

The answer which defendant makes grows out of another incident of their joint business. It appears that in the last year of their operation Young was lacking funds to pay the crews of the fishing schooners, and, after making an unsuccessful attempt to raise the money at the Bank of Montreal at Bathurst on his own credit, Young explained the circumstances to Windsor and secured the use of Windsor's name in negotiating a loan of $4,500 from the said bank. Before or at the time Windsor assumed this liability, it is not denied that Young told him that the proceeds of the fish then on hand should be sufficient to pay this note. Although Young does not admit that he gave his word that the note would be paid from such proceeds, Windsor, on the contrary, states positively that Young assured him that the note would be so paid. At the time of the settlement between the parties on January 30, 1913, this $4,500 note had not been fully paid. Young had paid various sums from time to time upon it, and several renewals had been made, both being parties thereto, but the last renewal was then lying overdue and unpaid at the bank, Windsor having refused to put his name to it. I gather from the evidence that Young had gone to the bank and signed a renewal note, and left it there for Windsor to sign, but he (Windsor) up to that time had declined to do so. After the settlement on January 30, 1913, and, as Young says, in conformity with it, Windsor went to the bank and signed the renewal note.

When this renewal note matured, Windsor declined to sign anything more, taking the position that, as part of their settlement, Young was to retire this note, while, on the other hand Young maintained that, as between them, the obligation had been assumed by Windsor, and relied on the wording of the above quoted receipt in confirmation of his position.

The note in suit matured on September 4, 1913, and on that date the joint note was lying in the bank, overdue and unpaid. On November 18, following, the writ in this case was issued, and the service effected, or accepted, in the same month. Early in the year 1914, it is evident that the manager of the bank was insisting that the joint note should be provided for in some way, and it is equally clear that each party recognized his individual liability to the bank. In January, 1914—before appearance was entered or defence filed or served in this suit—the manager of the bank procured the attendance of Young and Windsor together at the office of the bank, and after some conversation, the joint note, then amounting to $3,008 and some interest, was renewed for $2,200, both Young and Windsor becoming parties to the renewal, and each paying at the time $490.26 in reduction of the note. It was very clear that the parties were at total variance as to who had assumed the burden of retiring this joint note. Some suggestion was made of an arbitration between Young and Windsor to enquire into and settle the dispute between them, but nothing came of it. In the meantime this action was proceeding, an appearance and plea for defendant were overdue. Appearance was put in and defence delivered by Mr. Gilbert on January 6, 1914, a few days after plaintiff and defendant had met in the bank. It seems to be established that after service of the writ in this cause (or after acceptance thereof by Mr. Gilbert for the defendant), and before appearance and plea were put in on defendant's behalf, Young paid to the bank, on account of the joint note in question, the sum of $490.26, and the evidence further discloses that afterwards, and before this cause was tried, viz., on June 25, 1914, Young paid to the bank, on account of said joint note, the further sum of $412.25, so that, on the day when the cause was tried in the Court below, Young had lessened the $2,200 joint note by payment of the above $412.25, wherefore he claimed that Windsor owed him the last named sum, as well as the sum of $490.26 paid by him on account of the said note in January, 1914, as above set out. It is hardly necessary to say that the question whether Windsor actually owes these amounts to Young depends on what was the

N. B.

S. C.

WINDSOR v. YOUNG.

McKeown, J.

real bargain between them on their settlement of partnership affairs, on January 30, 1913.

Besides pleading the general issue in answer to plaintiff's claim, the following notice of defence was given:—

That before action brought the plaintiff and defendant made a general settlement of all accounts between the plaintiff and defendant, whereby the defendant gave to the plaintiff the note mentioned in the writ in this action, togther with certain other notes in full settlement of all accounts and notes outstanding with and between the said Frederick T. B. Young and the said George Windsor, but the plaintiff failed to provide for and pay certain other notes outstanding between the plaintiff and defendant, whereby and by reason whereof the defendant was obliged to pay the same while the plaintiff was liable to pay the same under the terms of said settlement; and the said plaintiff, by reason of said failure to provide for and pay said notes which the defendant afterwards paid, is indebted to the defendant for money paid by the defendant to the use of the plaintiff in an amount greater and larger than the amount of plaintiff's alleged claim in this action, and the defendant is willing to set off so much of said sum so paid by him in payment of said large note, as will amount to the amount of plaintiff's alleged claim in this action, and the defendant claims judgment for so much of said payment made by him in addition to the amount which is equal to the plaintiff's alleged claim, and in addition thereto, as is within the jurisdiction of this honourable Court, and claims judgment therefor in the sum of $400.

The Judge gave full effect to the defence. He found, as a matter of fact, that, by the terms of the settlement of January 30, 1913, Windsor undertook and agreed to pay the joint note in the Bank of Montreal, that Young had paid over $900 on it, and that he, therefore, had a just claim against plaintiff for that amount, and his verdict is expressed in the following words:—

I find that the defendant paid on this note in question to the Bank of Montreal the sum of $902.25, and as the plaintiff's claim against the defendant upon the note sued on herein is only $300, and interest thereon, since the maturity of said note on the first day of September, 1913, the verdict for the defendant is for $400.

It is claimed first that the County Court Judge exceeded his jurisdiction in giving effect to the defence embodied in the notice above referred to. It is apparent that in arriving at the verdict complained of, the learned Judge adjudicated upon the question of a liability claimed by defendant against plaintiff amounting to some $900. Had such claim been presented to the County Court in an independent action unquestionably it would not have been entertained, and the question, therefore, is: Does said Court

become seised with such enlarged jurisdiction when such claim is presented in the form of a set-off? The Court can go no further in this matter than the statute authorizes. No separate section is contained in the County Courts Act regulating set-off, but sec. 78 of said Act which makes certain provisions of law applicable to County Courts enacts that:—

> All laws of this province relating to the examination or depositions of witnesses . . to set-off, and for the amendment of the law in any way as to practice . . . or any other matter or thing whatever connected with the administration of justice in the Supreme Court shall, when applicable and not inconsistent with the provisions of this chapter, apply to each County Court.

Sec. 10 of said chapter, which deals with the jurisdiction of these Courts, enacts, *inter alia*, that

> the County Courts shall have jurisdiction and hold plea in all personal actions of debt, covenant and assumpsit when the debt or damages do not exceed the sum of $400.

The practice regarding set-off is provided by secs. 117 and 118 of ch. 111, C.S. 1903, as follows:—

> 117. A defendant in any action may set off against the claim of the plaintiff any right or claim whether such set-off sound in damages or not.
>
> 118. Such set-off shall have the same effect as if relief were sought in a cross action, and so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claims.

In applying to the County Courts the statutory provisions relating to set-off contained in the Supreme Court Act, regard must be had to sec. 10 of the County Courts Act above in part quoted. In my view it would be both inapplicable and inconsistent to hold that, because set-off can be pleaded in the County Courts, therefore, the jurisdiction of such Courts is enlarged. I do not think such meaning is involved in, or attributable to, sec. 78 above referred to. To so interpret the section there should be language apt and precise to that effect, for I think the law as to set-off and counterclaim in inferior Courts is that

> no Court has jurisdiction to entertain a defence of set-off unless the subject of the set-off is in its nature such that it might have been made the subject of a cross action or counterclaim in that Court (and also that) a counterclaim may be set up only in respect of claims as to which the party could bring an independent action in the Court, in which the counterclaim is brought.

See Hals. Laws of England, vol. 25, pp. 484 and 504, also *Bow McLachlan & Co.* v. *Ship Camosun*, [1909] A.C. 597. In this

N. B.

S. C.

WINDSOR v. YOUNG.

McKeown, J

latter case an action *in rem* was brought in the Vice-Admiralty Court of B.C. to enforce payment on a balance due on a mortgage of a ship, to which action a defence of set-off was sought to be pleaded to the effect that the vessel was defective, and not built in accordance with the contract. Lord Govell in delivering the judgment of the Judicial Committee of the Privy Council, at p. 613 of the report, after alluding to the convenience of deciding cross claims when the Court has jurisdiction over both the action and the set-off or counterclaim, says:—

> But a totally different position arises, when the Court in which the action to recover the debt is brought, has no jurisdiction to entertain a cross action by the defendant to recover from the plaintiff damages for the breach of the contract. In such a case the matter cannot be treated as one of mere convenience. This is the position in the present case. The real contest between the parties is with regard to a matter which is not a defence proper, and over which, if put forward as a claim, the Exchequer Court had no jurisdiction, whether the claim were against the ship or the plaintiffs. This contest should be left to be settled by a cross action in a Court having jurisdiction to entertain it.

I, therefore, think that when a defendant, who is sued in the County Court, has a claim against the plaintiff in an amount exceeding the jurisdiction of such Court, it is open to such defendant to abandon so much of his said claim as exceeds the jurisdiction of said Court, and plead in answer to plaintiff a set-off within such jurisdiction; and, if he be unwilling to make such abandonment he must enforce his claim in a Court which has jurisdiction over the amount to which defendant considers himself entitled.

But it was further contended by Mr. Byrne that this defence should not prevail, because a set-off, which did not exist at the time of the original action was brought, is no answer to such action. A set-off is a plea; herein it differs from a counterclaim which is in the nature of a cross action. Recognizing this distinction, it is easy to see why a defendant can counterclaim involving matters arising since the beginning of the action, while his pleas should be more closely confined. Fry, J., discusses this in *Beddall* v. *Maitland*, 17 Ch. D. 174, 180, in which case he expressly holds that a defendant can counterclaim in respect to a cause of action accruing subsequent to the issue of the writ in the original suit, differing therein from the opinion expressed

by the M.R., in *Original Hartlepool Collieries Co.* v. *Gibb*, 5 Ch. D. 713. See also *McGowan* v. *Middleton*, 11 Q.B.D. 464.

In *Stooke* v. *Taylor*, 5 Q.B.D. 569, Cockburn, C.J., in discussing this matter, says, at 576:—

> In a case of set-off the claim being for liquidated damages, its existence and its amount must be taken to be known to the plaintiff, who should have given credit for it in his action against the defendant. This reasoning does not apply to a counterclaim, the effect of which, as distinguished from a mere set-off, is altogether different. . . . But the most striking difference is that the counterclaim operates not merely as a defence, as does the set-off, but in all respects as an independent action by the defendant against the plaintiff. To the extent to which the damages accruing to the defendant on the counterclaim may be in excess of those accruing to the plaintiff on his claim, the defendant becomes entitled to judgment. . . . And there is this further essential difference between these two forms of procedure, that when the defendant's claim is for liquidated damages, in other words, one of set-off, the plaintiff in his claim can give credit for the amount, and so avoid the costs of the set-off, whereas, when the claim is for unliquidated damages he is unable so to protect himself

See *Richards* v. *James*, 2 Exch. 471; Hals. Laws of England, vol. 25, p. 492, and cases there cited, also *McDonough* v. *The Telegraph Publishing Co.*, 39 N.B.R. 515.

At the time this suit was brought neither of the payments included in defendant's set-off had been made. The evidence is undisputed upon that point. Now the authorities above referred to are, I think, decisive in shewing that to be properly made the subject of a set-off, defendant's claim must exist at the time plaintiff brings this action, and it, therefore, follows that defendant is not entitled to set up his claim of $902.25, or any part thereof, as an answer to plaintiff's action upon the promissory note here sued on, and defendant must seek his remedy in another way. Apart from the set-off sought to be established by defendant, there is no defence to the note upon which this action is brought and plaintiff is, therefore, entitled to recover, and it is, of course, open to defendant to bring an action against plaintiff in the Supreme Court for the sum of $902.25 which he claims plaintiff owes him.

The verdict for $400 for defendant in the Court below must be set aside, and judgment entered for the plaintiff for the amount of the note sued upon and whatever interest he is entitled to recover, with costs of suit in said Court. The defendant must pay the costs of this appeal. *Appeal allowed.*

MAN.

C. A.

ATTORNEY-GENERAL v. KELLY.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron and Haggart, JJ.A. November 8, 1915.

1. STAY OF PROCEEDINGS (§ I—21)—PENDING CRIMINAL PROSECUTION—FUGITIVE FROM JUSTICE.

A stay of proceedings of a civil action until after a trial for a criminal offence arising out of the same transaction will not be granted when the defendant is a fugitive from the jurisdiction and resists every attempt to bring him back.

Statement

APPEAL from judgment of Curran, J., refusing motion to stay proceedings.

E. Anderson, K.C., and *M. M. Perdue*, for appellant, defendant.

H. J. Symington, for respondent, plaintiff.

Howell, C.J.M.

HOWELL, C.J.M.:—I see no reason for interfering with the judgment of Curran, J., in this matter.

The law on this subject has recently come up for review by the Court of Appeal in England in *Smith* v. *Selwyn*, [1914] 3 K.B. 98. Kennedy, L.J., at 103, uses the following language:—

> The ground of the appeal is that the statement of claim on its face alleges facts which, if true, constitute a felony on the part of the defendant, that the claim to damages is based upon that alleged felony, and that, as the defendant has not been prosecuted, or a reasonable excuse shewn for his not having been prosecuted, as, for instance, his being out of the country, it is not open to the plaintiffs to claim damages in a civil action in respect of the felony.

Swinfen Eady, and Phillimore, L.JJ., agree with this statement of the law.

Extradition proceedings have been commenced for the surrender of the defendant on criminal charges arising out of the monetary dealings, the subject-matter of this action, and the defendant is contesting the extradition proceedings actively, and at present public justice cannot be vindicated by a prosecution of the defendant. The chief allegations in the statement of claim point to a criminal conspiracy to defraud, and this crime not being within the extradition treaty, the defendant can remain, so far as this charge is concerned, beyond the jurisdiction as long as he chooses, and it could scarcely be urged that the civil suit should be held up if it charged no more than this crime.

It must not be lost sight of that this motion, urged by the

defendant, is not one of the rights to which he is entitled, but rather a public matter which, if brought to the attention of the Court, proceedings will be stayed until some one prosecutes. If it was a right, particularly of the defendant, it might well be urged that, because of his evading the criminal prosecution, he is estopped from making this motion. I have assumed that the allegations in the statement of claim necessarily involve a crime, which might be open to question.

If sec. 13 of the Criminal Code is *intra vires*, the old law on this subject is entirely changed, but, without considering this, and without considering whether when, as in this case, the Attorney-General is plaintiff, the Court can stay proceedings: (see *Reg.* v. *Reiffenstein*, 5 P.R. (Ont.), 175), it seems to me the motion should be refused. I think a reasonable excuse has been shewn for not prosecuting the defendant.

Mr. Anderson also urged that the proceedings by way of discovery should be stayed because if he is prosecuted it would be unfair to the defendant to compel him to discover and disclose facts in the civil suit which could be used against him on the criminal prosecution. The ready answer to this claim is that his client is the sole cause of the delay. If he had not left the country, or if he appeared here and facilitated the prosecution, he might very well then ask the indulgence of the Court. I see no reason for delaying discovery. The appeal is dismissed with costs.

Richards, J.A.

RICHARDS, J.A.:—The defendant applied to Curran, J., for an order striking out the plaintiff's statement of claim, or suspending proceedings in the action, on the ground that the statement of claim, on its face, purports to disclose the commission of a crime by one of the defendants; and on the further ground that proceedings of a criminal nature, arising out of the same transaction as that dealt with in the statement of claim, have actually been instituted against the said defendant, and that it is contrary to the principles of British justice that the defendant should, in the civil suit, be required to make production, or be examined for discovery, when such production or examination might, and doubtless would, be used against him in the

MAN.

C. A.

ATTORNEY-GENERAL v. KELLY.

Richards, J.A.

criminal prosecution. The Judge dismissed the application and the defendant has appealed to this Court.

The first point seems to turn, not on any right of the defendant, but on the rule of law that it is the right of the Crown to proceed first and that it is a matter of public policy that the criminal proceedings should first be dealt with and disposed of. I take that to be the reason, although in a number of the cases the grounds given are somewhat confusing.

I have not been able to find any decision on the point in a case where the accused was out of the jurisdiction and resisting attempts to bring him back within the jurisdiction, as the present defendant is. It is stated, however, in the judgment of Baggallay, L.J., in *Ex parte Ball, Re Shepherd*, L.R. 10 Ch.D. 667, that the rule restraining the plaintiff from proceeding until the criminal charge has been disposed of has no application to cases in which prosecution of the criminal charge is impossible by reason of the escape of the defendant from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence. On careful consideration, I am of opinion that the learned Lord Justice's statement of the law is correct.

Whether the defendant did escape from the jurisdiction, or not, he at any rate, is out of the jurisdiction, and is resisting extradition proceedings, taken by the Government of Manitoba to bring him within the jurisdiction. If this Court were to order the civil proceedings to be stayed until after the criminal charge is tried, then, if the defendant should succeed in resisting the attempt to extradite him, the result would be that he could stay out of Canada indefinitely and the present civil action could not be proceeded with. For that reason, I think that we must look upon the circumstances of this case as subject to the same law as if the defendant had escaped from the jurisdiction as above.

As to the second ground, it is difficult to find precedents, because the matter of production and discovery in common law suits, is of comparatively recent origin. The question, therefore, of the injustice that might be done under such circumstances has not received much judicial consideration.

If the defendant were within the jurisdiction, and willing to be tried by the Courts, in the regular way, on the criminal charge, it might be proper to restrain the civil action, at least to the extent of not compelling the defendant to make production or be examined for discovery. But, again, it seems to me that, while the defendant chooses to stay out of the jurisdiction and resist extradition and defy the process of the Courts of this province, we should not stay the proceedings in the civil action, or even stay the question of production, though I arrive at the latter part of this conclusion with some hesitation.

It is argued for the defence that because of the different inquiries and commissions, dealing with the matter, and the great publicity the matter has had in the newspapers of the province, the defendant has reasonable cause to fear that at present he might not get an impartial trial before a jury, and that he is, therefore, to some extent, justified in resisting extradition at the present time.

I cannot concur in this view of the matter. It is possible that the public mind has been so inflamed that for the present it would be better that the defendant's trial on a criminal matter of this kind should be postponed. As to that I express no opinion. But we are not at liberty to consider that point, I think, while the defendant stays outside of the jurisdiction asking that the discretion of the Court be exercised in his behalf, and at the same time resisting the attempts to bring him to trial within the jurisdiction. It seems to me, again, that his proper course would be to come within the jurisdiction and then apply to the proper Court for a postponement of the trial of the criminal charge, if he can shew that there is reasonable ground to believe that, at present, he might not be fairly tried. There is no reason to doubt that, if he could so shew, the Court would act upon this and see that he did not get his trial while such trial might for any reason be an unfair one. On the best consideration I can give the matter, I think the appeal should be dismissed.

I have not dealt, in this judgment, with the question of whether the statement of claim does, or does not, in fact dis-

MAN.

ATTORNEY-GENERAL v. KELLY.

Perdue, J.A. Cameron, J.A. Haggart, J.A.

close a criminal charge, but have, for the purpose of the judgment only, assumed that it does. I have also not considered the effect of sec. 13 of the Criminal Code, which the respondent sets up, and which the appellant claims is *ultra vires*.

PERDUE, CAMERON, and HAGGART, JJ.A., concurred with HOWELL, C.J.M. *Appeal dismissed.*

N. B.

S. C.

The KING v. GEROW; ex parte GROSS.

New Brunswick Supreme Court, Appellate Division, McLeod, C.J., White and Grimmer, JJ. June 10, 1915.

1. COSTS (§ I—14)—SECURITY FOR ON APPEAL—DELAY IN ASKING.

Where it appears that the appellant is unable to pay the costs in the event of a dismissal of the appeal, an application for security of such costs must be made promptly, and where the application is delayed until after the appellant had prepared and filed his factum, the Court will refuse to entertain same.

Statement

APPLICATION for security for costs of appeal. Refused.

John F. H. Teed, in support of the application.

H. W. Robertson, for appellant.

Dr. Wallace, K.C., *contra*.

The judgment of the Court was delivered by

White, J.

WHITE, J.:—The authorities are clear that the Court may order security for the costs of an appeal, but the application must be made promptly, and promptness is strictly enforced where the ground of the application is the inability of the appellant to respond in costs if the appeal is dismissed with costs. In this case, while application was made at the first opportunity (for it had to be made to this Court), notice of the application might have and should have been given promptly after the notice of appeal. The notice of motion was not given until the second of the present month. Before that the appellant had, as he was obliged to do if he intended to prosecute his appeal, gone on and prepared and filed his factum and the respondent had prepared and filed his factum. Cotton, L.J., says, in *Re Clough, Bradford Commercial Bank* v. *Cure*, 35 Ch.D. 7:—

> As a general rule the Court will not order security for costs if the application comes on when the appeal is in the paper or very nearly in the paper, it being considered unreasonable to order it when the application is delayed until the expenses of the appeal have been incurred.

We think the delay in giving the appellant notice of the intended application is sufficient to justify us in refusing this application, but under the circumstances without costs.

Application refused.

MONTREAL LIGHT, HEAT & POWER CO. v. VILLAGE OF CHAMBLY BASIN.

QUE.
C. C.

Quebec Circuit Court, District of Montreal, Purcell, J. June 30, 1915.

1. JUDGMENT (§ II A—60)—RES JUDICATA—ANNUAL TAXATION.
Where municipal taxes are imposed on a separate valuation roll each year, judgment on one year's tax does not constitute *chose jugee* (*res judicata*) as regards the action for the tax of a subsequent year.

2. TAXES (§ I E 1—48*a*)—REAL ESTATE—BUILDINGS AND IMPROVEMENTS—POLES AND WIRES.
Under the Municipal Code of the Province of Quebec, buildings and improvements, including poles and wires affixed to land, cannot be taxed as real estate apart from the land to which they are attached.

Statement

APPEAL from tax assessment.

G. H. Montgomery, K.C., and *W. F. Chipman*, for petitioners.

G. Lamothe, K.C., for respondents.

Purcell, J.

PURCELL, J.:—The question of *chose jugee*, raised at the hearing, was objected to, on the ground that, while the cause and the parties are the same as in a previous case, between the same parties, the object which is the tax claimed for a subsequent year is not the same and that hence the three identities necessary to constitute *chose jugee* are wanting here. In the *Stevenson* case,* it was held that there was *chose jugee* because the second case sought to have decided anew the same question as that already decided, in the first case, to wit: whether White's property was on a public or private street. Moreover, the second case concerned a later instalment of a special tax, for improvements imposed in virtue of the same by-law. (*Vide* also sec. 1831-1-4). The tax, which here concerns us, is that of a *subsequent year*, based on a *subsequent valuation roll* duly homologated and is a distinct and independent debt from that already adjudicated on. Where taxes are imposed on a separate roll each year, it is commonly held in France that a judgment on one year's tax, does not constitute *chose jugee* as regards the action for the tax of a subsequent year. (S. 52, 2, 90; S. 85, 3, 60; S. 97, 3, 70.)

A decision of the Court of Cassation takes the opposite view of the question of an indirect tax on the revenue: S. & P. 99, 1-97. The decision appears to be an isolated one and has been criticized because the indirect tax on the revenue is an annual one. (Lacoste, Chose Jugee, p. 454.) I hold, therefore, that the *objection* of *chose jugee* does not apply.

*27 Can. S.C.R. 187, 593.

QUE.

C. C.

MONTREAL POWER CO. v. VILLAGE OF CHAMBLY BASIN.

Purcell, J.

Respondents wish to tax wires and poles erected by appellants:—

1. On the streets of the Village of Chambly Basin under legislative authority, but without municipal sanction. 2. On the property Terrain Simard, in virtue of an agreement with the proprietor, giving them a right of passage or servitude thereon for that purpose. 3. On the right of way of the Montreal and Province Line Railway in virtue of the lease passed on October 30, 1897; 4. Respondents also seek to tax the towers and pillars erected by appellants on the Chambly Canal reserve land, who were granted this privilege by the Dominion Government, as appears by lease of April 8, 1902. The valuation is fixed at the sum of $18,670.

It is admitted that the appellants do not own any land in the limits of the municipality. Appellants ask that the decision of the municipal council homologating the valuation roll, be set aside, claiming in brief: 1. That as they are not the owners of any real estate, or taxable property in the limits of the municipality respondent, that their names should not appear on the valuation roll. 2. That as regards the towers and pillars, they are erected on government property and with the government consent. 3. That in any case the valuation is excessive.

The question then resolves itself into this: Can the respondents tax the wires, poles, pillars and towers erected by appellants on the right of way and land of third parties? The respondents' right to tax is based on arts. 709, 714, and 719 of the Municipal Code, and among these articles, chiefly art. 709 and 719, sec. 24 M.C.

By art. 709 they have the right to tax all lands and real estate (*terrains ou bienfonds*) as therein mentioned; art. 19, sec. 24, defines *terrains ou bienfonds* as all lands or parcels of land in a municipality possessed or occupied by one person or by several persons conjointly, and include the buildings and improvements thereon. Now does this mean that the respondents have only the right to tax the land, or parcels of lands with the improvements and buildings thereon; or does it mean more? Can it be assumed that art. 19, sec. 24, when it uses the word "and" includes the buildings and improvements thereon—

QUE.

C. C.

MONTREAL POWER CO. v. VILLAGE OF CHAMBLY BASIN.

Purcell, J.

meant that the words "*terrain* and *bienfonds*" signified—1. all lands; 2. all parcels of lands? The ordinary signification of the words "*terrains* or *bienfonds*," as given in art. 19, sec. 24, would seem to be all lands and parcels of lands, and that these lands and parcels of land include the buildings and improvements on these lands and parcels of lands. This view seems to be confirmed by art. 719 M.C. which says, when speaking of the value of taxable property: "That the actual value of the taxable real estate, "*includes* the value of the buildings, etc., thereon." Suppose, however, that the words "*terrains*, or *bienfonds*" besides meaning lands and parcels of lands, also meant the buildings and improvements on the lands and parcels of lands—the law does not say that these buildings and improvements on lands can be taxed *separately* from the land, but it does say that what is taxable is the land including the buildings and improvements thereon. In a case of *McGee* v. *City of Salem*, 149 Mass. R. 428, where the statute provided that real estate for the purpose of taxation "shall include all lands, within the estate and all buildings and other things erected on, or affixed on the same"—it was held that "a building affixed to land cannot be taxed as real estate, apart from the land to which it is attached."

The wires and poles in question here, cannot be justly termed buildings or improvements and when one calls to mind that this definition of "*terrains* or *bienfonds*" dates back to 1870 and further, considerably prior to the advent of electricity as a motor power, it is difficult to think that the municipal Code, when speaking of "buildings and improvements thereon," intended to include in the words "wires and poles, pillars and towers" for the purpose of sustaining electric wires such as those in question here.

Here the respondents have not taxed the land and if the legislature intended them to have the power to tax the buildings and improvements separately and independently from the land, it should have said so, in clear terms. *Vide* remarks of Sir Charles Fitzpatrick in the *Westmount* v. *Montreal L.H. & Power* case, 44 Can. S.C.R. 364, 367 and 368. *Vide* also remarks of Sir Horace Archambeault when the same case was before the Court of Appeal here, 20 Que. K.B. 244, 252, 253.

QUE.

C. C.

MONTREAL POWER CO. v. VILLAGE OF CHAMBLY BASIN.

Purcell, J.

To be liable to taxation the tax payer must be within the strict letter of the law interpreted according to its natural meaning, and so interpreting art. 19, sec. 24 M.C.; it seems to the Court that it is the lands along with the buildings and improvements (if there happen to be any such on the lands) that the respondents are given the right to tax. Here the wires, poles, pillars and towers alone are taxed, and they taken alone, do not come under the designation of *terrains* or *bienfonds*, and hence, are not taxable.

In so far as the pillars and towers are concerned can the appellants be held liable as tenants or occupants? It would appear not, since under art. 19 sec. 19 and 19*a*, the tenant or occupant is one "*qui tient feu et lieu*" which appellants do not and moreover arts. 948 and 949 M.C. indicate that where the occupant or the possessor of the land is called upon to pay taxes, it is because the tax is imposed on the land.

The question as to whether the wires, poles, pillars and towers through being attached to the soil, become immoveable (and here it must not be forgotten that appellants do not own any land in the municipality) the Courts do not propose to enter on, as the taxing articles provide solely to the taxing of *terrains* or *bienfonds* as defined by art. 19, sec. 24; moreover, not being so extensive as art. 2521, sec. 15 R.S.Q. 1909 (School law).

Under the circumstances then, it does not seem to the Court that the existing articles of the Municipal Code are broad enough to justify the taxation here imposed by respondents or appellants and the appeal is in consequence maintained—the decision of the municipal council of respondents homologating the said valuation roll, is hereby set aside, in so far as appellants are concerned, and it is further ordered that the name of appellants be erased from said roll, together with the entries thereon affecting them, it being hereby declared that appellants have no property within the limits of the municipality respondents which should properly be inscribed on such roll; the whole with costs to Brown, Montgomery & McMichael, attorneys for appellants.

(This judgment applies to the two appeals, Nos. 155 and 179, submitted together.) *Appeal allowed.*

QUE.

Annotation

Annotation—Taxes—Taxation of poles and wires.

In 1891, in the case of *Sherbrooke Gas and Water Co.* v. *City of Sherbrooke*, 15 L.N. 22, it was held that poles placed in the streets of a city by a company supplying water and gas to the inhabitants form part of the immoveables of the company and are subject to taxation as such.

The Supreme Court of Canada in the year 1897, in the case of the *Waterous Engine Works Co.* v. *Hochelaga Bank*, 27 Can. S.C.R. 406, Q.J.R. 5 Q.B. 125, laid down the more general principle that, in order to give moveable property the character of immoveables by destination it is necessary that the person incorporating the moveables with the immoveables, should be at the time, owner of the moveables and of the real property with which they are so incorporated.

In the year 1899, White, J., in the case of *Bell Telephone Co. of Canada* v. *Township of Ascot*, R.J.Q., 16 Que. S.C. 436, held that the poles, wires, etc., of a telephone company are immoveable by nature and as such are taxable property within the meaning of art. 709 of the Municipal Code.

The two cases of the *Sherbrooke Gas and Water Co.* v. *City of Sherbrooke*, and the *Bell Telephone Co.* v. *Township of Ascot*, above mentioned, have since been overruled, and it now appears to be well settled law that poles and wires, etc., erected upon a public highway remain moveable property. It is true that the Superior Court (Delorimier, J.), in the one case of the *Montreal Light, Heat & Power Co.* v. *Town of Westmount*, decided to the contrary, but this judgment was reversed on appeal by the Court of King's Bench, 20 Que. K.B. 244. See remarks of Archambeault, J., at p. 249 *et seq.*, and of Sir Louis Jette, C.J., who, at p. 253, said: "There is perhaps this additional reason. It is said that all which is incorporated with the soil becomes immoveable, but this is so upon one condition only, namely, that the owner of the ground be a person subject to taxation. Now, if the poles belong to the company, the ground belongs to the corporation itself and the corporation cannot tax its own property."

This judgment of the Court of King's Bench was maintained on appeal by the Supreme Court (44 Can. S.C.R. 364), where it was held that neither poles carrying electric wires nor gas mains and their respective equipment placed on or under the public streets, etc., of the town can be deemed taxable as real estate within the meaning of the word "terrain" used in the French version, nor the word "lot" used in the English version of the provisions made by sec. 100 of the statute, 56 Vict. ch. 54, (Que.).

In the case of *La Municipalité Scolaire de la Cité de Ste. Cunegonde de Montreal* v. *Montreal Light, Heat & Power Co.* 4 D.L.R. 776, 41 Que. S.C. 500, Mr. Justice Laurendeau in an exhaustive judgment decided that water mains placed under the public streets are not real estate within the meaning of R.S.Q. (1909), art. 2521, sub-secs. 15-16, and are not subject to taxation as such.

These decisions were followed in an unreported case of the *City of Westmount* v. *Montreal Light, Heat & Power Co.*, decided by the Superior Court, Montreal, No. S.C. 3803 (Greenshields, J.), on 9th April, 1912. Here, amongst other things the city sought to impose taxes upon certain poles, wires and pipes belonging to the company defendant. Among the *considerants* of the Judge, are the following:—

QUE.

Annotation

Annotation (*continued*)—**Taxes—Taxation of poles and wires.**

"Considering that the defendant owns no land or immoveables within the limits of the plaintiff's municipality.

"Considering that the property sought to be taxed by the plaintiff is moveable by its nature.

"Considering that by law, property moveable by its nature can acquire the character of immoveable only by being placed as a permanency, or attached to, as a permanency, immoveable property owned by the owner of the moveable;

"Considering that the plaintiff has power to tax only immoveables within its limits;—

"Considering that the property sought to be taxed is not 'immoveable' situated within the limits of the municipality, plaintiff."

Doth maintain the defendant's plea and doth dismiss the plaintiff's action with costs.

On May 14, 1913, the Circuit Court for the District of St. Francis, presided over by Hutchinson, J. (of the Superior Court), decided in the case of the *Town of Cookshire* v. *Canadian Telephone Co.*, that poles and wires of the company defendant erected on the public highway are not real estate or immoveable property, but are moveable by their nature, and that property moveable by its nature can acquire the character of an immoveable only by being placed as a permanency or attached to immoveable property owned by the owner of the moveable. This case has not been reported, but bears the number 31, of the records of the Circuit Court for the District of St. Francis, for the year 1913.

Another unreported case decided in the same sense as the last mentioned is that of the *School Commissioners of Montmagny* v. *Bell Telephone Co. of Canada*, Circuit Court, District of Montmagny, No. 1173. Judgment rendered March 13, 1914, by Cimon, J., of the Superior Court.

See also *Village of Pierreville* v. *Bell Telephone Co.*, 23 D.L.R., p. 635.

B. C.

C. A.

Re DOMINION TRUST AND HARPER.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, and McPhillips, JJ.A. November 2, 1915.

1. CORPORATIONS AND COMPANIES (§ VI C—332)—WINDING-UP OF TRUST COMPANY—RIGHTS OF CESTUI QUE TRUST—RECOVERY OF SECURITIES—ASSETS OF ESTATE.

The right of a trust company, to retain as its remuneration, part of the profits realized from investments, creates a trust coupled with an interest, which, upon the winding-up of the corporation passes to the liquidator as an asset for the general benefit of creditors, and the court will not compel the liquidator, before the final wind-up, to surrender such securities to the *cestui que trust*, nor appoint a special trustee to carry it into effect.

Statement

APPEAL from judgment in action against liquidator.

Sir Charles Hibbert Tupper, K.C., for appellant, claimant.

Joseph Martin, K.C., for respondent, Trust Co.

Macdonald, C.J.A.

MACDONALD, C.J.A.:—I do not find it necessary to discuss at length the rights of the liquidator to carry on the business of

the Trust Company for the beneficial winding-up thereof. There is nothing in the evidence to shew the impropriety of his doing so, and there is ample in the provisions of the Winding-up Act to authorize him to do so perhaps without, but certainly with the approval of the Court.

The Trust Company undertook to invest £1,000 of appellant's money in a mortgage security. The mortgage was taken to the company who agreed to hold it in trust for the appellant to the extent of appellant's interest therein, and here arises the only point in the case. The trust was one coupled with an interest. The appellant was to find £1,000 and the company was to find the investment and guarantee the repayment of the same with interest at 4½ per cent. per annum, and to retain as its remuneration for the management of the transaction the difference between 4½ per cent. and the 7 per cent. reserved in the mortgage.

It is quite apparent that the company was not a bare trustee and that the appellant at least while the company's affairs were normal was not entitled to call upon the company to hand over to her the mortgage security. The company is now in liquidation. The liquidator was appointed by the Court. The principal sum will not be due until 1917. The liquidator resists the demand of the appellant to hand over the mortgage to her and claims the right to carry through, to the end, the transaction entered into between her and the company, collecting and paying the appellant her interest from time to time. Now, it is of importance to note what it is that the appellant demands. It is not the removal of a dishonest or bankrupt trustee, and the appointment of another in its stead, nor yet the appointment of a receiver to protect the interests of both parties, but it is that the liquidator shall be ordered to deliver to the appellant, or what is the same thing, to the appellant's solicitors, the mortgage and other securities and execute an assignment thereof to her.

Apart altogether from the question to which I have referred, of the right of the liquidator to carry on the business, I think the appellant's claim to the relief sought is not well founded. The liquidator has a very substantial interest in the mortgage which, in the interest of the bankrupt estate he is bound to pro-

B. C.
C. A.
RE DOMINION TRUST AND HARPER.

tect and make the most of. If, for any reason, it were right to determine his control of the mortgage, it would, in my opinion, be manifestly wrong to do so by compelling him to assign the mortgage and the control thereof unconditionally to the appellant without regard to the estate's interest therein.

Macdonald, C.J.A.

We were told from the Bar that this is one of a large number of cases involving in the aggregate a very large sum of money which would become available to the creditors of the insolvent company by reason of that company's interests in mortgages and transactions of the kind in question. The winding-up may take years; in these circumstances, with a competent and honest liquidator, as I must assume him to be, and with the protection afforded by the Court, it would, it seems to me, be in the interests of none, and greatly to the detriment of all, if instead of one agent or trustee charged with the carrying to completion of all the very numerous transactions of this class involved in the liquidation, and thereby protecting at a minimum expense the interests of the estate, each transaction should become the subject of a special trusteeship. I would dismiss the appeal.

Martin, J.A.

MARTIN, J.A.:—In my opinion, sec. 20 is sufficient authority for the Order appealed from. There was no fraud in the original transaction and the security was admitted before us to be sufficient, so no danger arises from the inadequacy of the guarantee, which, in any event would only partly fail as some dividend will be paid. No good reason has been adduced for depriving the creditors of the benefits of the large profits, about $14,000 per annum, which the estate will derive from this and similar arrangements being safely carried out by the liquidator, an officer of this Court, whatever may be said of the state of affairs which existed before his appointment.

Irving, J.A.

IRVING, J.A.:—I would dismiss appeal.

McPhillips, J.A.

MCPHILLIPS, J.A., dissented. *Appeal dismissed.*

P.E.I.
S. C.

WILLETT MARTIN CO. v. FULL.

Prince Edward Island Supreme Court, Sir W. W. Sullivan, C.J., Fitzgerald, and Haszard, JJ. May 14, 1915.

1. CORPORATIONS AND COMPANIES (§ VII B—373)—FOREIGN CORPORATION—NON-COMPLIANCE WITH STATUTORY REQUIREMENTS — EFFECT ON VALIDITY OF CONTRACT.

A contract entered into by a foreign corporation in violation of the Extra-Provincial Companies Act 1913 (P.E.I.), prohibiting, under

penalties, foreign corporations from carrying on business unless a sworn statement, required by the statute, is transmitted to the Provincial authorities, is illegal and unenforceable by the corporation.

2. CONSTITUTIONAL LAW (§ II A 2—194z)—PROVINCIAL POWERS—REGULATION OF EXTRA-PROVINCIAL CORPORATIONS.

The Extra-Provincial Companies Act 1913 (P.E.I.), intended for the regulation of foreign or extra-provincial corporations is within the powers of a province comprised under the head of "Civil rights in the Province" in the B.N.A. Act, 1867.

Statement

THE plaintiffs, a body corporate constituted in the State of New York, seek to recover from the defendant a sum of money upon a contract made in this province.

W. E. Bentley, K.C., for plaintiffs.

N. McQuarrie, K.C., and *J. J. Johnston*, K.C., for defendant.

Sullivan, C.J.

SIR W. W. SULLIVAN, C.J.:—The case comes before us by way of demurrer to the defendant's fourth plea to the plaintiffs' declaration. The question raised by the demurrer is based on the allegation contained in the aforesaid plea, that the debt was contracted after the passing by the legislature of this province, in the year 1913, of a statute, intituled: An Act respecting Extra-Provincial Companies, and that the contract on which it has arisen was entered into in contravention of that statute. The relevant provisions of the Act are as follows:—

1. Every company, not incorporated by or under the authority of an Act of the Legislature of P.E.I., which carries on business in Prince Edward Island, having gain for its purpose or object, for the carrying on of which a company might be incorporated under the Prince Edward Island Joint Stock Companies' Act, or an Act of the Legislature of Prince Edward Island, shall, before beginning business in the province, make out and transmit to the provincial secretary a statement under oath shewing: (*a*) The corporate name of the company; (*b*) How, and under what special or general Act, the company was incorporated; (*c*) Where the head office of the company is situated; (*d*) The amount of the authorized capital stock; (*e*) The amount of stock subscribed or issued, and the amount paid up thereon; (*f*) The nature of each kind of business the company is empowered to carry on, and what kind or kinds of business is or are carried on in Prince Edward Island; (*g*) The names of the directors and officers of the company, and its agent or agents in this Province.

2. Such company shall also transmit to the provincial secretary in the month of January in each year, a statement shewing all changes in the directors, officers and agents of such company that have taken place during the preceding year.

3. Every company which fails to comply with the provisions of this section shall be liable to a penalty of $10 for every day during which such default continues, and every director, manager, secretary, agent, traveller or salesman of such company, who, with notice of default transacts within

P.E.I.
S. C.
WILLETT MARTIN CO. v. FULL.
Sullivan, C.J.

Prince Edward Island any business whatever for such company, shall, for each day on which he so transacts such business, be liable to a penalty of ten dollars, to be recovered as a private debt by any person or corporation suing therefor.

In the argument at the Bar there was much discussion regarding the construction of the Act, and, especially as to the application of its penalties. On the face of it, as it appears in the Statute Book, the whole Act comprises 5 clauses, or paragraphs, numbered 1, 2, 3, 4, 5. The clauses quoted above are numbered 1, 2 and 3, and the question raised as to whether the penalty named in the first part of clause number 3 applies to clause number 1 and to clause number 2.

It must be said that the Act is most inartistically, indeed most carelessly drawn, but it involves upon the Court to ascertain from its language, if possible, what the legislature intended, and to give the enactment that meaning if the language will warrant such a construction.

In Maxwell on Interpretation of Statutes, 3rd ed., p. 319, the principle of construction is laid down in these terms:—

> Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.

In *Salmon* v. *Duncombe*, 11 App. Cas. 627, Lord Hobhouse, in delivering the judgment of the Privy Council, says:—

> It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used.

The application of these principles to the present case, justifies, it seems to me, construing the words "this section" in the first part of clause number 3, in order to give proper effect to them, as including and referring to clauses numbered 1 and 2. This construction would constitute the three clauses, one section, numbers 2 and 3, as their wording indicates, being merely subsections. This would make the enactment uniform and give effect to all its language. It would moreover render every company which failed to comply with all the provisions of the Act

P.E.I.

S. C.

WILLETT MARTIN CO. v. FULL.

Sullivan, C.J.

liable to the penalties mentioned, which is, I have no doubt, what the legislature intended.

The plaintiffs are an extra-provincial corporation which, according to the pleadings, as already stated, carried on business in this province having gain for its purpose or object, and before beginning such business, namely, before entering into the contract in question, did not make out and transmit to the provincial secretary a statement under oath containing the information required by the Act respecting Extra-Provincial Corporations. The question is, whether in the circumstances, the plaintiffs can maintain an action in this Court to enforce such contract.

It is obvious that the object which the legislature had in view in requiring the information mentioned was the protection of the public, and that protection is sought to be secured by the enactment which requires that, before beginning such business a company shall make out and transmit to the provincial secretary a statement under oath as mentioned in the Act, in other words the statute prohibits an extra-provincial company from commencing business in this province of the kind mentioned unless and until such statement is so made out and transmitted. Numerous cases decide that contracts entered into in violation of statutory provisions are void and incapable of enforcement in a Court of law: *Bensley* v. *Bignold*, 5 B. & Ald. 335; *Cope* v. *Rowlands*, 2 M. & W. 149; *Fergusson* v. *Norman*, 5 Bing. (N.C.) 76, and *Mellis* v. *Shirley Local Board*, 16 Q.B.D. 446, are leading examples of this class; and the later case of *Victorian Daylesford Syndicate* v. *Dott*, [1905] 2 Ch.D. 624, is to the like effect. In that case Buckley, J., says:—

> There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. . . . If (he says), I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal. . . . The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which penalty is imposed is an act which is impliedly prohibited by the statute, and is consequently illegal.

In the case of *Bonnard* v. *Dott*, [1906] 1 Ch.D. 740, the case of *Victorian Daylesford Syndicate* v. *Dott*, *supra*, is approved and followed by the Court of Appeal. In line with those authorities is the case of *Brown* v. *Moore*, 32 Can. S.C.R. 93.

P.E.I.

S. C.

WILLETT MARTIN CO. v. FULL.

Sullivan, C.J.

As the whole, indeed the sole, purpose of the Act in question in this case is the protection of the public, and as the contract sued upon was made in violation of the Act, I am led to the conclusion, warranted, in my opinion, by ample authority, that the contract was an illegal contract on which the plaintiff company cannot maintain an action in a Court of law.

An additional point stated on behalf of the plaintiff is that the provincial legislature had not power to pass the Act respecting Extra-Provincial Companies. In my opinion, the Act deals with that class of subjects comprised under the head of Civil rights in the Province in the B.N.A. Act, 1867, which is *intra vires* a provincial legislature. The decisions of the Privy Council in *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, and *Atty.-Gen.* (*Ontario*) v. *Atty.-Gen.* (*Dominion of Canada*), [1896] A.C. 348, lead to this conclusion, which is supported by the view expressed by Lord Haldane, L.C., in the recent case of *John Deere Plow Company, Ltd.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, wherein he says:—

> It might have been competent to that legislature (a provincial legislature) to pass laws applying to companies without distinction, and requiring those that were not incorporated within the province to register for certain limited purposes, such as the furnishing of information.

The result is that judgment be for the defendant on the demurrer with costs.

Fitzgerald, J.

FITZGERALD, J.:—I have had the advantage of reading over the judgment of the Chief Justice, in which I entirely concur.

I desire shortly to add, that in construing the third section of this statute I see no difficulty in reading the unskilful language used therein, so as to make it sensible and intelligible, and so that the manifest intention of the Act be not defeated by too literal an adhesion to its precise language.

Under the authority of the Duke of Buccleuch, 15 P.D. 86, *Salmon* v. *Duncombe*, 11 App. Cas. 627, and *Rex* v. *Vasey*, [1905] 2 K.B. 748, I read this statute as imposing a penalty on any breach of its provisions.

Under such an interpretation the single question remains, did the legislature intend to prohibit an extra-provincial company from doing business in this province, unless and until it had first transmitted to the provincial secretary a sworn statement

shewing its corporate name, how and where incorporated, its authorized capital stock—subscribed and unsubscribed, the amount paid up thereon, the nature of its business, and the names of its directors and officers, etc., or was it only intended that certain penalties should follow as a consequence of any infraction of the Act?

It must be borne in mind that in deciding this question in this suit, we are dealing with a demurrer which admits that the plaintiff company was an extra-provincial company, and that the alleged indebtedness of the defendant to the plaintiff arose from and in respect to business begun by plaintiff in the province, without and before making and transmitting the required statement.

Simple and concise are the words used in the statute.

> Every company . . . which carries on business . . . shall before beginning business in the province make out and transmit to, etc., a statement under oath, etc.,

and their meaning cannot be doubted.

They are imperative, and convey, I think, a clear intention to prohibit any act of business within the province of extra-provincial companies, until they have a legal status here, until they become an entity here, in a sense are re-incorporated here.

The penalties subsequently inflicted do not detract from the force of these words. Their amount is so small that they would be wholly inadequate to accomplish the object the legislature had in view.

The object of the statute, its whole purpose, is the protection of the public. It requires companies seeking to do business here to disclose their authority, their nature, their capital, and their directorate, so that the public may have at least some knowledge of what, and with whom they are dealing.

If the Act is prohibitive, with a public purpose, the principal of law is clear that no man can recover in an action founded on a breach of its provisions: *Mellis* v. *Shirley Local Board*, 16 Q.B.D. 446; *Brown* v. *Moore*, 32 Can. S.C.R. 93.

I concur with the Chief Justice that there be judgment for the defendant on this demurrer with costs.

HAZZARD, J.:—The question here is fairly raised as to whether the provisions of the statute are prohibitory and prevent the

P.E.I.

S. C.

WILLETT MARTIN CO. v. FULL.

Hazzard, J.

enforcement of a contract entered into in this province by a foreign corporation without first complying with its provisions.

The wording of sec. 1:—

> Shall before beginning business in this province make out and transmit to the provincial secretary a statement under oath shewing, etc.,

is clear and emphatic.

Sec. 3 (which, with sec. 2, in my opinion, should be read as part of sec. 1) provides that every company which fails to comply with the provisions of this section shall be liable to a penalty of $10 for every day during which such default (failure to transmit the required statement) continues. In *Mellis* v. *Shirley Local Board*, 16 Q.B.D. 446, at 453-4, Bowen, L.J., said:—

> The established rule of law is and always has been that no action can be maintained on a contract which is prohibited either by the common law or by statute.

The rule was so stated he says, by Lord Ellenborough in *Law* v. *Hodson*, 11 East 300, and it was repeated by other Judges in *Taylor* v. *Crowland Gas & Coke Co.*, 10 Ex. 288, 293, and in further discussing the question, he says:—

> If you can find out that the Act is prohibited, then the principle is that no man can recover in an action founded on that which is a breach of the provisions of a statute.

This same doctrine has both before and since been laid down in a number of cases, and more recently by the Supreme Court of Canada in *Brown* v. *Moore*, 32 Can. S.C.R. 32, and by the Court of Appeal of British Columbia in the *North Western Construction Co.* v. *Young*, 13 B.C.R. 297, and is without doubt the settled law to-day.

Is therefore our statute prohibitory? On a full consideration of the whole Act and of the intention of the legislature and of the words used, "shall before beginning business in this province make out," etc., it is difficult to imagine what stronger or more apt words could well have been used.

I am of opinion, that the statute is prohibitory in its terms, and consequently that a contract entered into in this province is in contravention of its provisions, and is illegal and void. I also concur with the judgment of the Chief Justice that there will be judgment for the defendant in this demurrer with costs.

Judgment for defendant.

CHISHOLM v. CHISHOLM.

N. S.

S. C.

Nova Scotia Supreme Court, Graham, C.J., and Russell, Drysdale and Ritchie, JJ. May 22, 1915.

1. SPECIFIC PERFORMANCE (§ I E—30)—SALE OF LAND BY CO-TRUSTEE—BINDING EFFECT ON OTHERS—DIRECTIONS.

An agreement for the sale of land made by one of the trustees named in a will is not binding upon the other, and cannot be specifically enforced against him, regardless of a direction in the will of the deceased trustee that the agreement made by him should be carried out.

Statement

APPEAL by defendant from the judgment of Longley, J., in an action for specific performance.

W. A. Henry, K.C., and *D. C. Chisholm*, for appellant.

William Chisholm, K.C., and *J. L. Ralston*, K.C., for respondent.

Graham, C.J.

GRAHAM, C.J.:—This is an action for specific performance of an alleged contract to sell to the plaintiff a farm known as the Stone House farm, and for alternative relief.

This farm was devised by will dated November 5, 1906, by one Duncan A. Chisholm under the residuary clause of the will as follows:—

All the rest and residue of my estate, real, personal and mixed of which I shall die seised and possessed, or to which I shall be entitled at my decease, I give, devise and bequeath to my uncles, Rev. John J. Chisholm and Rev. Archibald Chisholm, of Judique, to be by them used for spiritual purposes for the benefit of my late father, my mother, myself and other members of the family.

On November 3, 1907, the alleged contract for the sale of the farm was made with the plaintiff as follows:—

I hereby agree to sell the Stone House farm and stock to Colin V. Chisholm for the sum of $4,000, his aunt Elizabeth Chisholm (nee Fraser) to have her home and support as hitherto in her old home till death, her interest in the estate to be deducted from the sum of $4,000 agreed upon. Heatherton, October 3, 1907. (Sgd.) J. J. CHISHOLM.

It will be noticed at once that it is signed by only one of the devisees and that the action is brought against the other. In the meantime the one who did sign departed this life having made a will, a codicil to which contains this clause:—

I give and devise to my brother, the Rev. Archibald Chisholm, of Judique, in the county of Inverness, Province of Nova Scotia, all my right, title and interest in the property real, personal and mixed, devised and bequeathed to me and the said Rev. Archibald Chisholm by my late nephew, Duncan A. Chisholm, of Heatherton, in the said county of Antigonish by will bearing date of November 5, 1906, and recorded in the registry of deeds, for the county of Antigonish aforesaid, at Antigonish, in book 67, at p. 199 *et seq.*, and I direct that my said brother the said Rev. Archi-

N. S.

S. C.

CHISHOLM v. CHISHOLM.

Graham, C.J.

bald Chisholm, shall for me and on my behalf carry out the intentions of the said will of the said late Duncan A. Chisholm with respect to said property. I also further order and direct that the said Rev. Archibald Chisholm shall carry out the agreement with my nephew Colin V. Chisholm, of Heatherton, aforesaid, for the purchase of the Stone House property (so called) at Heatherton aforesaid, and devised to us by the said late Duncan A. Chisholm and shall give the said Colin V. Chisholm a good and sufficient deed of said property upon payment of the purchase price agreed upon.

Whether the clause in the will of Duncan A. Chisholm created a trust in respect to this farm, my own opinion is that it did not, or whether it is to be regarded as a gift to the two clergymen, or whether it is uncertain and cannot be enforced and, therefore, the property reverts to the donor, it is clear, I think, that the alleged contract did not bind the defendant, the Rev. Archibald Chisholm in any way. He did not sign it or authorize or ratify it. The clause in the codicil is ineffectual to bind him. The defendant has done nothing whereby he is bound to execute a deed of the land. There cannot be given to the plaintiff a good title to this farm.

The action is really brought against defendant as trustee under the will of Rev. John J. Chisholm.

But assuming there was a valid trust created under the will of Duncan A. Chisholm, the Rev. John J. Chisholm could not delegate its performance to his brother in that way, and if this is not a valid trust but a mere contract, signed by only the Rev. J. J. Chisholm, then, as I have already said, a good title to the land cannot be made in that way. The plaintiff cannot succeed in this action for specific performance and the appeal must be allowed.

Meanwhile the plaintiff has been living on the land. The title having failed, money paid to the Rev. J. J. Chisholm, or credits made on account of the price must be returned to the plaintiff by the estate of the former, for which purpose the other two executors besides the Rev. Archibald Chisholm may be added as defendants.

The cost of the support of Mrs. Eliza Chisholm must be allowed to the plaintiff. The estate will not be allowed for the profits of the land as against the plaintiff during his occupancy, the title having failed: *Temple* v. *McDonald*, 2 Old. 155; Dart

N. S.

S. C.

CHISHOLM v. CHISHOLM.

Graham, C.J.

on Vendors and Purchasers, 299. He will be allowed for his improvements: *Parkhurst* v. *Van Courtland*, 1 Johns. Ch. 274.

The accounts will be taken accordingly by the referee.

The defendant should have the costs of the appeal. The costs of the action will be apportioned between the parties relatively to the claim for specific performance and the alternative relief. Necessary amendments will be made in the statement of claim to give the remedies mentioned in this opinion.

Drysdale, J.

DRYSDALE, J.:—By the will of Duncan A. Chisholm directions were given that his debts and funeral expenses should be paid. Then a number of bequests in money were given. And lastly, the rest and residue of the estate, real, personal and mixed, was given and bequeathed to the Rev. J. J. Chisholm and Rev. Archibald Chisholm to be by them used for spiritual purposes. Rev. J. J. Chisholm and the plaintiff were nominated executors, took probate and accepted the trust. The estate consisted of real estate valued at $2,500 and personalty appraised at $790. The controversy here arises over a contract of sale made respecting the real estate by the Rev. J. J. Chisholm to the plaintiff and the action is for specific performance of the agreement.

I am of opinion the first point taken by Mr. Henry is conclusive as against this action prevailing. The sale purports to be made by the Rev. J. J. Chisholm as one of the residuary legatees. The reverend gentleman did not specifically get the property in question. He with another reverend gentleman only got the rest and residue of the estate after all other things in the will were provided for. It was the duty of the plaintiff and the Rev. J. J. Chisholm, as executors, to dispose of all the estate, attend to the specific directions and then hand over the residue as directed. The executors here have a power of sale which they are obliged to exercise. The plaintiff is one of the executors and he cannot buy from himself, no matter what form the contract takes. The attempt to buy from the Rev. J. J. Chisholm is nothing short of a contract with himself, a thing a trustee cannot enter into, much less specifically enforce.

I do not purpose discussing the many nice questions raised by counsel and discussed on the argument on the assumption that the contract is good, because such a discussion was, I think,

N. S.

S. C.

CHISHOLM v. CHISHOLM.

Ritchie, J.

fruitless. The one point I have dealt with I take to be conclusive against plaintiff. I would allow the appeal and dismiss the action.

RITCHIE, J.:—This is an action for specific performance. The Stone House property at Antigonish, in respect of which the action is brought was part of the estate of Duncan A. Chisholm, and is included in the residuary clause of his will, which is as follows: (the clause is set out in full in the judgment of His Lordship the Chief Justice).

The Rev. J. J. Chisholm is dead. He and the plaintiff were the executors under the will. The residuary clause creates a trust. The trust is in very vague and general terms, but no question was raised, either in the pleadings or at the bar, as to its validity and, therefore, no such question arises for the consideration of the Court.

The Rev. J. J. Chisholm entered into a contract with the plaintiff for the sale to him of the Stone House property and this contract the plaintiff seeks in this action to have specifically enforced. Specific performance is resisted by the surviving trustee, the Rev. Archibald Chisholm. That which must be regarded as the contract is in writing and in the following terms:—

(The contract is set out in full in the judgment of His Lordship the Chief Justice.)

The plaintiff has tendered the sum of $2,667. This is the correct amount provided that $1,333 is the correct amount to deduct from the purchase price, and this cannot be ascertained from the written contract.

The evidence is clear and uncontradicted that a short time before the written contract was executed the Rev. J. J. Chisholm agreed that the amount of the deduction was to be $1,333. As to this question of fact there is no doubt whatever. The trial Judge has made a distinct and positive finding and it finds ample support in the evidence. But the question is whether the evidence as to the $1,333 having been agreed upon by the Rev. J. J. Chisholm and the plaintiff as the amount to be deducted was properly received. It is familiar law that what Scotch lawyers call the Communings, and English lawyers, call the negotiations, cannot be received to change the terms of a written contract, but

interpreting the contract in the light of surrounding circumstances is another matter. The interpretation of a written contract by extrinsic evidence of surrounding facts means that the Court, in getting at the meaning of the words used in a contract has regard to the particular facts, acts and circumstances in respect of which the words are used, or, in other words, surrounding circumstances are given effect to. As an aid to construction, of course, such evidence is not received if the written contract is clear and complete on its face. Extrinsic evidence is resorted to for the purpose of finding out what the contract is; not for the purpose of adding to or detracting from the terms of the contract.

The contract in question is complete and clear on its face except in one important particular in respect to part of the subject-matter of the contract, namely, which amount was to be deducted from the purchase price. But by calling in aid extrinsic evidence of the fact that the parties had agreed that $1,333 was the amount to be deducted, there is no difficulty in ascertaining the meaning and intention of the written contract. This explanatory fact does not in any way alter or vary the contract, but simply makes clear and complete what the parties meant by the words they used in the contract. It is merely a source of interpretation, an aid in ascertaining what the written contract is. The Rev. J. J. Chisholm, when the $1,333 was agreed on as the amount of the deduction, wrote it in a book. I go to this act and the verbal agreement to find out what was intended by the use of the word "deducted" in the contract and in that way I identify the amount which under the contract was to constitute the deduction. In 2 Taylor on Evidence, p. 856, it is said:—

> It may be said broadly that extrinsic evidence of every material fact that will enable the Court to ascertain the nature and qualities of an instrument, or in other words to identify the persons to whom and the things to which the instrument refers, must of necessity be received. To discover the intention of the writer of an instrument, as evidenced by the words he has used, is always the object and the Judge must put himself in the writer's place and then see how the terms of the instrument affect the property or subject-matter. With this view extrinsic evidence of all the circumstances surrounding the writer of the instrument is admissible.

And at 857 it is said:—

> If the terms be vague and general, or have divers meanings, parol evi-

N. S.

S. C.

CHISHOLM v. CHISHOLM.

Ritchie, J.

dence will always be admissible of any extrinsic circumstances tending to shew what person or persons or what things were intended by the party, or to ascertain his meaning in any other respect.

In this case I have, in order to give effect to the contract, to find what the deduction really was. The contract is explicit that there is to be a deduction. I think that *Macdonald* v. *Longbottom*, 1 El. & El. 977, is in point. At 985 Earle, J., said:—

> The contract here is most explicit; it is to purchase of the plaintiffs "your wool" at 16s. a stone to be delivered in Liverpool. The oral evidence is undoubtedly admissible to identify the subject-matter of the contract and to shew what "your wool" really was. The Judge who has to construe the written document cannot have judicial knowledge of the subject-matter, and evidence has been invariably allowed to identify it. The previous conversation, therefore, between one of the plaintiffs and the defendant's agent is admissible for that purpose.

I am of opinion that extrinsic evidence was admissible to shew what the deduction to be made under the contract really was. Apart from the question as to the admissibility of the extrinsic evidence three objections to the plaintiff's right to recover were urged: (1) Because the plaintiff did not, before action, tender a deed to the defendant for execution. (2) Because the plaintiff could not legally purchase the property from his co-executor, the Rev. J. J. Chisholm. (3) Because the Rev. J. J. Chisholm could not make a valid contract for the sale of the trust property apart from his co-trustee, the defendant.

As to objection 1 (assuming but not deciding that it is necessary in this province to tender a deed before bringing an action for specific performance), I think the short and complete answer is that the defendant told the plaintiff in terms that he would not carry out the agreement. This was notice by clear implication that tendering a deed would be of no avail.

In my opinion it is not now open to the defendant to take this objection. I may add that this point is not raised by the pleadings; it is a case in which an amendment to raise this technical point would be refused.

As to objection 2, it goes without saying that executors or trustees acting as such cannot sell to each other. But this case, in my opinion, does not come within the rule. Under the residuary clause in the will the title to the stone house property became vested in the Rev. J. J. Chisholm and the defendant as

trustees. They had by implication a power to sell because, otherwise, the trust could not be carried out. The plaintiff as executor had no interest whatever in this real estate; the title was wholly in the trustees. There was no power of sale to the executors in the will which would enable them to sell real estate. In no way could the executor have anything to do with the sale of real estate, except in the case of an insolvent estate, under license to sell from the probate Court. That position does not arise here. There is no conflict of interest and the objection cannot prevail.

Objection 3, in my opinion, is the serious one for the plaintiff. On this branch of the case the first question which presents itself is:—

Is the contract made by the Rev. J. J. Chisholm (apart from the point as to ratification by the defendant) an enforceable contract?

I am of opinion that it is not because the defendant, who was a co-trustee, was not a party to it. The trustees under the will were joint trustees and, therefore, must execute the duties of their office in their joint capacity. As to this the law is correctly laid down in 28 Am. & Eng. En. at 986, where it is said:—

> The general doctrine does not appear to admit of dispute that when the administration of a trust is vested in several trustees they all form but one collective trustee and must exercise the powers of the office in their joint capacity. Their interests and authority being equal and undivided they cannot act separately but all must join. Thus one trustee alone has no power to convey, lease or bind the trust property or to perform any act resting in the sound discretion of the trustees as a body.

There is no evidence of any authority from the defendant to the Rev. J. J. Chisholm to make a sale of the property, but even if there had been the selling of a property involves the exercise of discretion and a trustee cannot delegate to his co-trustee the exercise of a discretion which he should himself exercise. The duty which trustees owe to the trust involves the exercise of the discretion of all the trustees. It follows that the contract made with the Rev. J.J. Chisholm was not an enforceable contract, and the question is, has anything happened since which has the legal effect of turning a contract that was not enforceable into one that is? At the time of the death of the Rev. J. J. Chisholm there was no enforceable contract. If the

N. S.

S. C.

CHISHOLM v. CHISHOLM.

Ritchie, J.

defendant could verbally ratify the action of his co-trustee he did ratify it. Speaking of the defendant the plaintiff says:—

He came up and asked me to take the place as I understood it on the agreement that I made with Father John, $4,000 and one-third to be deducted and I said I would take it at that.

This evidence is without contradiction, but the question as to its legal effect remains. In my opinion it cannot operate by way of ratification. The Rev. J. J. Chisholm was not professing to act for his co-trustee; he was professing to act only for himself. The words of the contract are: "I hereby agree to sell, etc." In *Vere* v. *Ashley*, 10 B. & C. 298, Parke, J., said:—

The rule as to ratification applies only to the acts of one who professes to act as the agent of a person who afterwards ratifies.

In Fry on Specific Performance, 5th ed., at 271, it is said:—

A contract made by a man purporting and professing to act on his own behalf alone and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, cannot be ratified by that third party so as to render him able to sue or liable to be sued on the contract. The hypothesis of ratification is that the ratifier is already in appearance the contractor and that by ratifying he holds as done for him what already purported or professed to be done for him.

The above text is absolutely supported by the case of *Keighley, Maxsted & Co.* v. *Durant*, [1901] A.C. 240. If the plaintiff could make out a case of ratification he would probably be able to escape the objection of the Statute of Frauds. But if, as I think, there can be no ratification then it comes down to a mere verbal agreement between the plaintiff and the defendant and that is, in consequence of the Statute of Frauds, an unenforceable agreement. The defendant is the executor of the Rev. J. J. Chisholm and took probate of his will. A codicil to this will contains a direction that the defendant shall carry out the contract of sale and convey the Stone House property to the plaintiff. This is a nugatory direction and cannot possibly have any effect. I think I need not elaborate as to this. Of course, the powers of the Rev. J. J. Chisholm as trustee ceased at his death. It is urged that because the defendant took out probate of this will he is bound to carry out this direction which the Rev. J. J. Chisholm had no power or right to make. I do not think so.

Authorities were cited to shew that taking probate of a will is an acceptance of the trusts. I quite agree, but I am very confident that no authority can be found for the proposition that

this doctrine applies where as here the testator had no kind of power or authority to deal by his will with the trust.

This objection, last considered, is fatal to the plaintiff's case, and I, therefore, am of opinion that the appeal must be allowed. I come to this conclusion with regret.

RUSSELL, J., concurred with RITCHIE, J.

Appeal allowed.

N. S.

S. C.

CHISHOLM v. CHISHOLM.

Ritchie, J.

Russell, J.

CHINIQUY v. BEGIN.

QUE.

K. B.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Cross, Carroll and Pelletier, JJ. April 24, 1915.

1. LIBEL AND SLANDER (§ II B—18)—CHARGE OF ILLEGAL MARRIAGE—RIGHT OF ACTION BY CHILDREN.

A charge that a man and his wife lived in a state of concubinage pre-supposes the illegitimacy of their children and will entitle such children to maintain an action for libel regardless whether it is true or not.

2. EVIDENCE (§ IV C—401)—DOCUMENTARY EVIDENCE—CERTIFICATES OF MARRIAGE AND BIRTH.

A certificate of marriage attested by the clerk of a court in the United States and the certificate of birth by a pastor are *primâ facie* evidence of marriage and birth.

3. DAMAGES (§ III S—355)—EXCESSIVENESS—REDUCTION ON APPEAL.

Where the amount of damages awarded appears excessive the Court of Appeal will reduce the amount even where there is no cross-appeal.

4. APPEAL (§ I B—5)—FINALITY OF JUDGMENT—REMITTING CASE FOR WANT OF AUTHORITY TO SUE.

A judgment which without deciding the merits remits the case to the court of first instance for the production of authority to the wife by the husband for the purpose of prosecuting the action is final in its nature from which an appeal will lie.

[*Chiniquy* v. *Begin*, 20 D.L.R. 347, reversed; 7 D.L.R. 65, varied.]

Statement

APPEAL from judgment of Court of Review, 20 D.L.R. 347, which reversed judgment for plaintiff in 7 D.L.R. 65.

Desaulniers & Vallée, for appellant.

Lamothe, St. Jacques & Lamothe, for respondent.

Archambeault, C.J.

SIR HORACE ARCHAMBEAULT, C.J.:—The case submitted to us by the two parties is whether or not the judgment of the Court of Review was an interlocutory judgment and not a final judgment, but we have come to the conclusion that it is a definitive judgment and have ordered that the case shall be heard on the merits. As I have at times explained, the judgment of the Court of Review is not final as to the cause itself, since it remits the record to the Superior Court to be proceeded with anew, but it is definitive in this sense, that the Court of Review has set aside the judgment that was before it and is not now seised of the appeal.

QUE.
K. B.
CHINIQUY
v.
BEGIN.
Archambeault, C.J.

The case has since been heard on the merits before us and we have now to give our decision.

The first point to be decided is that on which the Court of Review returned the case to the Court of first instance, that is to say, the point relating to the marital authorization.

The appellant is described as follows in the writ of summons:

Rebecca Chiniquy, a wife separated as to property from Joseph L. Morin, professor in the city and district of Montreal duly authorized by her husband for the purposes of the present case.

Art. 111, C.P.Q., provides that every fact alleged by the adverse party, the existence or truth of which is not expressly denied, or which is not declared to be beyond his knowledge, is deemed to be admitted. This provision of the law applies to the facts alleged in the writ as well as to those mentioned in the written pleadings of the parties.

It has already been decided by this Court and by the Supreme Court in the case of *Powers* v. *Martindale*, Q.R. 1 Q.B. 144, 23 Can. S.C.R. 597, that the status taken by a party in the writ of summons is deemed to be admitted if it is not expressly denied. (Cites at length from the remarks of Alexandre Lacoste, p. 148; of Sir Henry Strong, p. 604; of Fournier and Taschereau, JJ., pp. 607, 610.)

As can be seen, it is because the mention of the status is an allegation of fact that such status is deemed admitted if not expressly denied. *A fortiori* should it be so here when it is the mention of the fact of marital authorization. The respondent has not expressly denied the fact alleged by the appellant in the writ of summons that she was duly authorized by her husband to bring the present action; this fact is then deemed to be admitted and the appellant is not obliged to prove it.

The respondent claims that he has expressly denied the fact of the marital authorization evoked by the appellant and he relies upon par. 13 of his plea to support this claim. This paragraph reads as follows:—

The plaintiff suing alone has no right to complain of the said article; she has no right to claim the damages that she has claimed; her claim is not only ill-founded but it is also irregular.

This allegation does not amount to a denial of the fact of the marital authorization. It is an affirmation by the respondent

that the appellant cannot bring the present action in her own name even with the authorization of her husband and that it would be necessary for the latter himself to be a party as plaintiff to assist his wife. The respondent has himself in his factum on the appeal interpreted in this sense par. 13 of this plea. He says (p. 2) that this allegation relates to the fact that the husband is not a party in the case to assist his wife and that the wife is suing alone contenting herself with alleging that she was duly authorized by her husband for the purposes of this action.

This claim that the husband of the appellant should have been a party to the action is formally answered by art. 176, C.C., which provides that the wife can sue with the authorization or assistance of her husband. Either position is sufficient. Generally the authorization suffices. When the husband is himself a party to the action to assist his wife there is evident authorization on his part; but this assistance of the husband is not necessary, and it suffices that he authorizes his wife to act.

The respondent invokes art. 183, C.C., which provides that default of authorization by the husband in the case where it is required involves a nullity which nothing can cure. This article has no application in this case. Here it is merely a question of evidence. We are not faced with a question of failure of authorization; on the contrary the authorization is deemed to be admitted by the respondent. This provision of art. 183 then cannot be evoked against the appellant.

In deciding as we do we do not in any manner enter into the jurisprudence established upon the question of the necessity of marital authorization to enable a married woman to sue.

This question of marital authorization being settled, it is necessary to examine another question of procedure before coming to the merits of the case. This question is whether or not we should remit the record to the Court of Review in order that that Court may decide the cause, that is to say, give the judgment that it should have given, or if we can decide the cause ourselves.

I have come to the conclusion that we should dispose ourselves of the litigation. The Court of Review has given an erroneous judgment and it is for us to say what is the judgment

QUE.

K. B.

CHINIQUY v. BEGIN.

Archambeault, C.J.

they should have given and to decide it ourselves. The respondent claims that the two parties having considered the judgment of the Court of Review to be an interlocutory judgment we can only set aside this interlocutory judgment and remit the case to the Court of Review in order that that Court shall itself give a final judgment. I am not prepared to say that we could not do so; but I believe that this procedure would not be in the interest of the parties; that it would have the effect of unnecessarily increasing the costs, as the judgment that the Court of Review might give would be susceptible of appeal to us and that it is better that we should decide at once the matters in litigation.

Another question which has much embarrassed me is whether or not we can reduce the amount of damages given by the judgment of the Court of first instance. The difficulty arises from the fact that it is the party who succeeded at first instance who appeals to this Court from the judgment of the Court of Review and that there is no cross-appeal on the part of the respondent.

I believe, however, that we can restore the judgment of the Court of first instance for a part only. It is true that it is the plaintiff in the Court of first instance who has inscribed in appeal from the judgment of the Court of Review. But this judgment has quashed and annulled the judgment of the first Court. Consequently if we restore the first judgment in part the position of the appellant will be bettered and she cannot claim that the respondent should have taken a cross-appeal for reduction of the amount of damages awarded by the judgment given against him by the Court of first instance. Moreover, the respondent complains of the judgment of this latter Court by inscribing in review. The Court of Review could properly have given him relief by reversing in toto the first judgment or reversing it in part by diminishing the amount of the condemnation. Now the appellant asks us to give the judgment that the Court of Review should have given. We can then, as the latter Court could have, entirely reverse the judgment of the Court of first instance or modify it by reducing the amount of the condemnation. The only thing which we cannot do is to award to the appellant an amount greater than that given to him by the Court of first instance. The appellant herself does not complain

QUE.

K. B.

CHINIQUY v. BEGIN.

Archambeault, C.J.

of this judgment; we cannot then increase the amount of her damages. I come now to the merits of the case.

I do not hesitate to say that the article complained of is libellous. There is no doubt that, from the point of view of the doctrine of the Roman Catholic Church, a priest cannot contract a valid marriage. Is it the same from the point of view of the civil law? The respondent submits the affirmative, relying upon the provision of art. 127, C.C., which declares that the hindrances to marriage which are admitted according to the different religious beliefs remain subject to the rules followed by the different churches and religious societies. The appellant says on his part that the marriage of Charles Chiniquy and Euphémie Allard is valid, first, because Chiniquy renounced the Roman Catholic religion to embrace another at the time the marriage was contracted; and in the second place, because the marriage was celebrated in the United States, where the rule of our art. 127 has no application.

My personal opinion is that art. 127 does not apply in this case because the marriage was celebrated in the United States between two parties who then resided there and had the intention of remaining there and that it is the American law which should be followed.

But it is not necessary to decide this point of law. The article of which the appellant complains is libellous even if the marriage of Charles Chiniquy and Euphémie Allard has no legal existence. It is in vain for the respondent to summon the public interest to his aid. No one has the right to accuse another of living in a state of concubinage, even though that may be the fact. The respondent has received no mission to expose in his journal the faults, the offences, the crimes of which his fellow citizens may have become guilty or are accused and suspected of having committed:—

> Any truth that may be the cause of inury when it is made otherwise than in the course of justice, made with the intention to cause injury, is punishable even when it brings to light a crime which it would be well to have punished in the public interest. Cass, April 26, 1810; Pandectes Francaises, vo. Diffamation; Injure No. 39.
>
> Anything which a person says, writes or does of malice of forethought with the intention to give offence to, or affront another may be called injurious. *Ibidem*, No. 25.

QUE.

K. B.

CHINIQUY v. BEGIN.

Archambeault, C.J.

I have no hesitation in saying that the article complained of was injurious. The respondent claims that the appellant was not herself attacked in the article and that she could not maintain the conclusions of her action because she could not prove that she is the legitimate daughter of the persons aimed at by this article. In other words, the respondent claims that the appellant has not legally established the fact of the marriage of Charles Chiniquy and Euphémie Allard, and the fact that she was born of such marriage.

There are on the record two certificates to establish the facts in question. The first is a certificate of marriage license signed of John B. Flageole, clerk of the County Court at Kankakee. It attests that the Rev. Charles Chiniquy and Miss Euphémie Allard were married on January 10, 1864, by R. P. DesRoches, Christian minister.

The production of this document is *primâ facie* evidence of the marriage of Charles Chiniquy and Euphémie Allard, and the respondent was bound if he wished to destroy this presumption to disprove the contents of the certificate. Art. 1220, C.C., declares that certain documents and certain copies of documents made outside of Lower Canada are *primâ facie* evidence of their contents without the necessity of proving the seal or the signature placed by the officer on such religional or copy or the authority of such officer; and among the documents which the article enumerates as establishing this presumption are extracts from marriage registries certified by the public officer who has the legal custody of them.

The certificate of marriage filed in this cause is attested by the Clerk of the County Court. It is not necessary to prove the authority of this officer. We have then *primâ facie* evidence of the marriage in question.

It is the same with the respect to the birth of the appellant. The latter has filed an extract from the register of births of the Presbyterian Church at St. Anne in Illinois. This extract reads as follows:—

> On the 18th October, 1866, we baptized Rebecca, born on the 18th of July, of the marriage of Charles Chiniquy and Euphémie Allard. Signed, Charles Chiniquy, pastor.

Here again we have *primâ facie* evidence of the birth and

QUE.

K. B.

CHINIQUY v. BEGIN.

Archambeault, C.J.

baptism of the appellant. The fact that the latter was baptized by her father and that it is he who attests to it in the register does not deprive the document of the evidential authority recognized by the law. Thus we have *primâ facie* evidence of the marriage of Charles Chiniquy and Euphémie Allard and of the filiation of the appellant.

However, this proof was not necessary. On default of title the possession of status was sufficient to give the appellant a right to her present claim for damages against the respondent. This possession of status is established beyond all doubt in the present case. The appellant has always lived with her father and mother as their legitimate child from the day of her birth until she was married. No one ever doubted her legitimacy and her relations to Charles Chiniquy and Euphémie Allard give her a right to vindicate their memory.

Moreover, she is herself personally attacked by the accusatory article. If her father and mother were not legally married, if they had lived in concubinage, she is an illegitimate child, and the article published by the respondent denounces her as such to the public. She has then been personally injured and has the right to take action against the respondent for damages.

I come now to the question of the amount of the damages which the Court of first instance awarded to the appellant. As I have already said, the respondent was condemned to pay the appellant the sum of $3,000. We are of opinion that this amount is much too large.

I am aware that our jurisprudence for a number of years is to the effect that Courts of appeal should not in an action of this nature interfere with the original estimation of the damages.

However, where there is no proportions between the fault committed and the compensation granted if the amount awarded shocks the sense of justice it is the duty of Courts of appeal to interfere. As Sourdat has so well said,

> the conscience revolts as well against the idea of a punishment too severe as against that of an injustice which is not remedied.

I do not wish it to be thought that I do not realize the grave nature of the injury which has been caused to the appellant. Her sorrow must have been great when she read in the journal

QUE.

K. B.

CHINIQUY v. BEGIN.

Archambeault, C.J.

of the respondent, this outrageous article in which the epithet of concubine was coupled with the revered name of her mother, who had held a high place in her affection, and whose ashes were not yet cold. Does there exist in the world a more sacred memory than that of the woman who has given us life, who has rocked us as an infant in her arms and who has shared the greater part of our joys and sorrows? This filial feeling is so much the more intense when the torture of the separation is more recent. So I understand the appellant when she tells us in her evidence that no sum of money could compensate the sorrow caused to her by the publication of the accusatory article.

On the other hand the appellant has suffered no real damage; she has been injured in her honour, in her feelings, in her filial affections, but not in her property. The damages the respondent is entitled to are merely punitive. Now, in such a case the compensation is measured by the fault from which the prejudice results. It is necessary to take into account the means and the intentions of the guilty person, the manner in which the accusation was made, the more or less publicity of the injury, the consequences of the punishment inflicted, in fact all the circumstances which surround the litigation.

The journal published by the respondent is not one of the great dailies. It is a weekly journal which has customers the great majority of which, if not all, hold the opinion of the respondent upon the validity of Chiniquy's marriage. The injury against Chiniquy and his wife is considerable. They are not in an absolute manner accused of having lived in a state of concubinage. It is rather as resulting from a point of doctrine that it is said that Madame Chiniquy was the concubine of her husband. It was because the latter was a Catholic priest that he could not contract marriage, and it is thus that the marriage that he did contract is void and non-existent. Those who do not share in this opinion from the religious or civil point of view persist in believing that the marriage is valid and that the appellant is a legitimate issue of this marriage. Another circumstance of which we should not lose sight is that the name and history of Chiniquy have been before the public of our country for a great number of years. The facts in the article published

QUE.

K. B.

CHINIQUY v. BEGIN.

Archambeault, C.J.

by the respondent have not been a relevation to those who have read the accusatory article. This article was, without doubt, the object of great commendation by a portion of the readers of the journal and was severely blamed by another portion. Discussion, even violent, is not prohibited. That which is forbidden and which should be punished is the injury. But it seems to me that the injury which glides off the breast from a violent discussion is less grave than that which strikes without cause or reason.

One other circumstance which it is necessary to take into account in the estimation of the compensation is the fortune of the respondent. The latter is not rich; he gains a bare living by the publication of his journal. The condemnation for $3,000 and costs would probably mean for him ruin or imprisonment. The punishment would be disproportionate to the fault committed. So we believe that it would be just and equitable to condemn the respondent to pay to the appellant by way of damages the sum of $200 with interest from this day. As to the costs the respondent should pay them in the three Courts. It would be unjust to compel the appellant to pay any part of them whatever. The amount which is awarded to her should remain with her as a whole, as a slight indemnity for the injury that she received. The respondent then is condemned to pay in the Court of first instance, the Court of Review, and in appeal the costs of the action as brought, that is to say, of an action for $10,000.

CROSS, J.:—In the Court of Review, the respondent (defendant) assumed that the plaintiff, a married woman, was litigating without the authorization of her husband. Proceeding upon that assumption and upon the rule that want of marital authorization is a matter of public order, the respondent's contention was that the action should be dismissed. If a married woman pleads without her husband's authorization, she violates public order and is not to be heard. If, on the contrary, she is authorized in fact, no question of public order arises. Here, the attorneys who appeared for the appellant (plaintiff), say, in their appearance, that she is authorized. Are they not to be believed when they say so? If the appellant had so described herself as to shew that she was taking the action exclusively on her individual

QUE.
K. B.
CHINIQUY
v.
BEGIN.
Cross, J.

responsibility and without pretending to be authorized by her husband, then considerations of public order might have made it the duty of the Court, at any stage, to consider the validity of the summons, but here the plaintiff so described herself as to put herself in conformity with the law. That made it necessary for the defendant to become an attacking party by preliminary exception: Dalloz, Rep. V. "*Inscription de non recevoir,*" Nos. 262, 268 et 271.

The respondent's argument—a narrowly technical one—is that the wife should either be accompanied (assistée) by her husband or should produce affirmative evidence of the authorization by authentic deed anterior in date to the summons. I consider that the latter pretension is erroneous. I would regard the question—if it had been duly raised—as one of the attorney's mandate and would say that the attorney is to be taken to have the mandate which he announces and that, when, as in the case, the attorneys have said that the wife appears as duly authorized by her husband, they are speaking for the husband as regards the authorization. But the decisive ground against the respondent is, as already above indicated, that the description or quality of the appellant, as recited in the appearance and writ, has not been attacked or questioned by preliminary exception and is consequently to be taken to be what is recited: *Powers* v. *Martindale,* 1 Q.B. 144. Legal incapacity and absence of quality in a plaintiff or defendant are expressly made matters of exception to the form by art. 174, C.P. Under our present system, even an averment of a pleading is taken as proved or admitted if not denied, and the same must *a fortiori* be so of matter of description in the summons.

It may be added that there is authority to the effect that an appeal taken by a wife, without her husband's authority, could be validated by an authorization given by the husband subsequently but before contestation: *Pouzeolle* v. *Lamarselle,* Rennes, 17 Nov., 1819. The averment of the plea to the merits relied upon by the respondent, to the effect that the plaintiff suing in her own right (poursuivant seule), cannot claim the damages and that her demand is not only unfounded, but irregular and illegal, does not raise an issue of want of marital auth-

orization. It is an objection to the title to the damages or a complaint that the demand is irregular and illegal without mention of the irregularity or illegality.

I, therefore, consider that no question of public order arises, but merely a question of pleading and proof. That being so, it is clear that the respondent is without grievance and without a particle of interest to raise the point relied on. The case is like *Prince* v. *Stevenson*, where the defendant objected that the signature to the copy of the plaintiff's declaration was not in the handwriting of the plaintiff's attorneys: 2 Q.B. 158; Endlich, Interpretation of Statutes (1888), § 445.

I would maintain the appeal as regards the objection of absence of marital authorization and hear the parties on the merits.

Since the foregoing note was written, the appeal has been heard upon all the issues and is now open for decision.

The respondent has reiterated the formal objection above spoken of and has also taken the ground that the cause is not open in appeal for a pronouncement on the merits. That ground was unsuccessfully taken in the Supreme Court in *The Johnsons Co.* v. *Wilson*, and judgment was rendered in the Supreme Court on the merits in an action in which this Court had not gone beyond ordering a further *expertise*. Special leave to appeal to the Privy Council was refused in the same case *sub nom. American Asbestos Co.* v. *Johnsons Co.*, 34 Que. S.C. 185. It is for this Court to give the judgment which the Court of Review should have given. The respondent has questioned the sufficiency of the proof of the marriage of Euphémie Allard and Charles Chiniquy and of the filiation of the plaintiff. The extracts of marriage and of birth, however, satisfy the requirements of the Code and besides constitute proof such as a Court in applying principles of private international law would hold sufficient. We are thus brought to a consideration of the real merits of the action as a demand in damages or reparation for a published defamation.

The publication complained of is worded as follows: (see above).

QUE.

K. B.

CHINIQUY v. BEGIN.

Cross, J.

The immediate occasion of this publication was the appearance of announcements of the death of the appellant's mother. Charles Chiniquy himself has been dead for years.

The defendant undertook serious responsibility in formulating the kind of defence which he has pleaded, and which he characterizes in his factum by saying: "Le défendeur allègue justification, vérité et intérêt public et aussi provocation."

His main proposition is that the publication was made "au point de vue catholique" and should be so interpreted and regarded. What that means is explained in substance as follows:

The respondent is the publisher of *La Croix*, a paper which promotes the interests of the religious society familiarly known as the Roman Catholic Church. It is a rule of the Latin branch of that Society that a priest is incapable of contracting marriage and it appears also to be held that a priest cannot cease to be a priest even by withdrawing from the society, and a marriage contracted even after such a withdrawal can still be called no marriage.

Charles Chiniquy was a priest of that Church and consequently—respondent says—his marriage to Euphémie Allard was no marriage and the respondent has the right to say that Euphémie Allard was simply Chiniquy's concubine.

"On appelle un chat un chat." I am loth to think that the advocacy of any form of Christianity can render expedient a resort to scurrility of the sort manifested in this publication, and indeed it is shewn by the testimony of a person skilled in ecclesiastical law brought forward by the respondent himself that such violent offensiveness of expression was not called for. The respondent has published a filthy affront of the appellant.

In his plea he says that he did not know that Charles Chiniquy left any descendants. That is true. But, in the same plea, which he styles a plea of justification and of truth, he marks an averment to this effect.

"12. C'est au point de vue particulier où se placent (*sic*) ledit journal *la Croix* ainsi que ses lecteurs que l'article mentionné dans la déclaration de la demanderesse a été publié de bonne foi et dans l'intérêt public. Le ton dudit article, ses expressions et le caractère du journal où ledit article a été publié

QUE.

K. B.

CHINIQUY v. BEGIN.

Cross, J.

ont fait comprendre à tous les lecteurs que le mariage dudit Charles Chiniquy, contracté en dehors du pays, d'après les allégations de la déclaration, est un mariage entaché d'irrégularité au point de vue catholique et au point de vue des lois qui régissent cette province. Ledit article n'a pas d'autre sens."

That amounts to a pretension on the part of the respondent that persons not of his religious persuasion must submit to have it published that the marriage of their parents is not marriage, but concubinage, if the father had one time been a priest, and it is said that that is not only canon law, but the law of the country also. To take up such an attitude is to deny and disregard liberty of religious profession. The respondent persisted in the libel till the last hour of the trial and still persists in his plea.

The Judge who tried the action gave judgment for $3,000 in favour of the appellant. With much deference I consider that greater allowance should have been made for the fact that the respondent did not know that Charles Chiniquy had left a family and also some slight allowance for the narrowness of view manifest on the face of the libel itself. I would give judgment for $1,000 in favour of the appellant, but as a majority of us are not agreed upon that amount, I do not dissent. There is a reason to say that individual good repute and cleanness of pedigree are things which are somewhat lightly esteemed in Canada.

TRENHOLME, J., dissented as to the amount of damages. Trenholme, J.

CARROLL, J., dissented upon the question of the authorization by the husband. Carroll, J.

Judgment reversed.

SASK.

S. C.

CAMPBELL v. ARNDT.

Saskatchewan Supreme Court, McKay, J. August 5, 1915.

1. APPEAL (§ I V F—135)—PROCEEDINGS BEFORE MASTER—RECEIVER'S FEES —FRESH EVIDENCE—AFFIDAVITS OF PROCEEDINGS.

An appeal under rule 622 (Sask.) is a re-hearing, on which fresh affidavits purporting to establish the proceedings before a Master respecting compensation to a receiver may be used on an appeal from the Master to a Judge in Chambers.

2. RECEIVERS (§ V—42)—COMPENSATION TO—COMMISSIONS—COLLECTIONS AND SECURITIES.

An allowance of 5 per cent. of the total cash receipts and securities is a fair remuneration to a receiver, and though the receiver paid 10 per cent. commission on collections out of the estate, he is nevertheless entitled to remuneration on those collections.

SASK.

S. C.

CAMPBELL v. ARNDT.

3. APPEAL (§ VII I 5—372)—DISCHARGE OF RECEIVER—EX PARTE ORDER—REMANDING FOR CORRECTION.

An *ex parte* order releasing and discharging a receiver and his sureties will not be interfered with on appeal before an opportunity is given to the judge to amend the order after hearing both sides. [*Day* v. *Vinson*, 9 L.T. 654, 723, followed.]

Statement

APPEAL from order of Local Master, allowing receiver's fees. Varied.

Ward, for appellant, plaintiff.

Johnston, for respondent, defendant.

McKay, J.

MCKAY, J.:—This is an appeal from two orders made by the Local Master, one dated February 13, 1915, allowing the sum of $2,500 as salary to the receiver herein, and the other an *ex parte* order dated February, 1915, releasing and discharging the receiver and his sureties.

At the passing of the receiver's accounts, when the allowance of $2,500 was made by the Local Master, he heard *viva voce* evidence of the receiver, Frederick C. B. Wilson, R. W. Eyre, and Mrs. Campbell, wife of the plaintiff.

When the appeal came up for hearing, before a Judge in Chambers, other than myself, the Local Master's notes were not produced, and an affidavit of the receiver and three affidavits of Mrs. Campbell, an affidavit of plaintiff and an affidavit of Arthur Burnett, plaintiff's solicitor, which had been filed, or at any rate some of them, were referred to the Local Master with a request to give his certificate as to what evidence was given before him.

When the appeal was heard before me, the certificate of the Local Master was read, and objection was taken by counsel for the receiver to the reading of the affidavits produced by the respondent on the ground that it was fresh evidence. I was at first of the opinion that this objection was correct, but came to the conclusion that they could be read and so notified both parties, in order to give counsel for the receiver an opportunity to file new affidavits in reply if he so desired. He, however, declined to do so and asked to advance further arguments in support of his objection. I allowed further argument, but I am still of the opinion that these affidavits can be read on this appeal.

Our r. 622, under which this appeal is taken, is the same as English r. 754. In discussing this rule, at p. 1417, Chitty's

Archbold's Practice, the learned author there states: "The appeal is a re-hearing, and fresh evidence may be used," and quotes judgments of Quain, J., Lindley, J., and Lush, J., as his authorities. And in Holmested & Langton, 2nd ed. Ont. Judicature Act, p. 951, it is stated as follows:—

Under the English Judicature Act an appeal is in all cases a re-hearing and fresh facts may be gone into.

Anon per Lush, J., 60 L.T. Jour. 67, 1 Charl. Ch. Ca. 128.

Every appeal is now a re-hearing, and therefore fresh affidavits may be used on all appeals from a Master to a Judge in Chambers. *Per* Quain, J.

Anon W.N. (1875), 250, 1 Charl. Ch. Ca. 129.

This ruling has been held by other Judges, and confirmed by the Court. Coe's Practice in the Judges' Chambers, p. 6.

Chitty, at p. 1417, also says: "but when such fresh evidence is sought to be used, the Judge will frequently refer the matter back to the Master to re-hear it."

At the hearing, however, both parties expressed their desire that I should dispose of the appeal as to the objection to the allowance of $2,500; hence I will not refer this back to the Local Master.

The certificate of the Local Master states that the affidavit of the receiver Wilson, dated April 3, 1915, correctly sets forth the evidence given by the said Wilson before him at the passing of his accounts, and that par. 9 of the same affdavit correctly sets forth the evidence given before him by R. W. Eyre. On this affidavit and the other material filed, particularly, the affidavit of the receiver dated December 7, 1914, and the order dated February 13, 1915, shewing the securities held by the receiver, apart altogether from the affidavits objected to, I have come to the conclusion that the Local Master allowed more than the receiver was entitled to.

The receiver's affidavit and the order shews that the receiver collected altogether $17,906.50. The securities in his hands at the passing of accounts amounted to $11,333.65, making a total of $29,240.15 coming into his hands.

Of the $17,906,50 actually collected, most of it was proceeds of the auction sale and collections made by Eyre, payment for which was made out of the estate by the receiver.

All the securities, with the exception of three or four, date

SASK.

S. C.

CAMPBELL v. ARNDT.

McKay, J.

back from before the receiver was appointed, they are therefore apparently not securities he himself took to straighten up old accounts, but no doubt he expended some time and labour in looking after them, keeping them renewed and trying to collect them, etc.

The receiver states that he was appointed in December 1912; that until April 1, 1913, Campbell and Arndt, plaintiff and defendant, remained in charge of the stock; that from April 1, 1913 to June, 1913, he took over the active management of the ranches and prepared for the auction sale, which took place in June, 1913, when practically all of the partnership property was sold. In January, 1914, he appears to have left Maple Creek for Edmonton, and, apparently, Eyre, who was paid 10 per cent. commission on collections, was doing most of the collections after this. Of course Wilson swears he was still looking after collections and renewing of the securities and took several trips to his lawyers in connection with these matters, and no doubt he was still spending some time on this work.

There does not appear to be any fixed rate at which a receiver and manager should be paid, and it was urged by counsel for plaintiff that the Assignment Act, ch. 142, R.S.S., sec. 57, which allows not more than 5 per cent. of the cash receipts might be followed as a guide. See also the Companies Winding-up Act, R.S.S., ch. 78, sec. 20, which allows 5 per cent., 2½ per cent., and 1¼ per cent. on net proceeds of estate, on a sliding scale. But, in view of the authority hereinafter referred to (*Prior* v. *Bagster*), I do not think I should follow these Acts too closely.

In 24 Hals., p. 404, it is there stated:—

> A receiver of annual rents and profits or the receiver and manager of a business is generally paid by a commission on the gross amount of his receipts, the rate varying from about 2 to 5 per cent. in proportion to the care and trouble involved.

And in *Prior* v. *Bagster*, 57 L.T. 760, Stirling, J., said:—

> The memorandum appointing the receiver affords no means of estimating his remuneration, which is therefore only a *quantum meruit*. It is suggested that the scale laid down for the guidance of Judges as to the remuneration of official liquidators applies; but this is not so. Official liquidators have to wind up companies engaged in numerous and heavy transactions, and the scale in question was framed on these considerations. The assets and liabilities of this partnership are comparatively small. The

SASK.
S. C.
CAMPBELL v. ARNDT.
McKay, J.

question of the remuneration of a receiver was discussed by Lord Langdale in *Day* v. *Croft*, 2 Beav. 488, where it is suggested that *primâ facie* such remuneration should be 5 per cent. But I have made inquiry as to the present practice, and I find that the rule mentioned by Lord Langdale no longer exists. A chief clerk of great experience has informed me that 3 per cent. is the common amount, or 5 per cent. in cases of difficulty; if there were a scale 3 per cent. would be nearer the amount than 5 per cent.; 10 per cent. has been allowed, but only in very rare cases. Where there is a manager there is no scale, but each case is decided on its merits.

There do not appear to have been any very exceptional difficulties connected with this case under consideration which would entitle the receiver to exceptionally large fees, but I cannot overlook the fact that he must have spent considerable time and trouble over it.

Notwithstanding that he paid Eyre 10 per cent. commission on collections out of the estate, I think that he would be entitled to some remuneration for these collections.

See *Re Prittie Trusts*, 13 P.R. (Ont.) 19, 20.

I come to the conclusion that a fair remuneration will be 5 per cent. on $29,240.15, which would be $1,462. The Local Master's order will, therefore, be varied by reducing the allowance for salary of the receiver and manager from $2,500 to $1,462.

With regard to the appeal from the *ex parte* order dated February 16, 1915, I do not think I should deal with this order without giving the Local Master an opportunity of dealing with it himself.

We cannot entertain an application to review or set aside an order made by a Judge on an *ex parte* statement, before an opportunity has been given to the Judge, by an application to him for that purpose, to amend his own order if he thinks fit so to do, after hearing both sides. Pollock, C.B., in *Day* v. *Vinson*, 9 L.T. 654, 723.

I therefore refer back to the Local Master at Moose Jaw that portion of this appeal referring to the said *ex parte* order.

The receiver will pay the costs of the appeal.

Judgment varied.

LINDE CANADIAN REFRIGERATOR CO. v. SASK. CREAMERY CO.

CAN.
S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin, and Brodeur, JJ. March 15, 1915.

1. CORPORATIONS AND COMPANIES (§ VII C—376)—FOREIGN COMPANIES — ACTIONS BY — NON-REGISTRATION — CARRYING ON BUSINESS — WHAT IS.

The mere setting up and starting the working of machinery sold by an extra-provincial company does not constitute a carrying on of busi-

CAN.

S. C.

LINDE CANADIAN REFRIGERATOR CO. v. SASK. CREAMERY CO.

ness in another province within the meaning of the Foreign Companies Act, R.S. Sask. 1909, ch. 73, depriving foreign companies of the right of action in the event of their non-compliance with the requirements as to registration.

2. CONSTITUTIONAL LAW (§ II A 2—194z)—FOREIGN COMPANIES — DOMINION INCORPORATION—REGULATION BY PROVINCE—ULTRA VIRES.

A provincial Act which deprives, upon a non-compliance with the registration requirements, an extra-provincial company, incorporated under a Dominion statute, of its right to maintain actions in the courts of the other province is *ultra vires* of the provincial legislature, and inoperative.

[*John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, applied; *Linde Can. Refrigeration Co.* v. *Sask. Creamery Co.*, 7 S.L.R. 245, reversed.]

Statement

APPEAL from the judgment of the Supreme Court of Saskatchewan, 7 S.L.R. 245.

Atwater, K.C., for the appellants.

The respondents were not represented at the hearing of the appeal.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J.:—I am of opinion that this appeal should be allowed without costs.

Idington, J.

IDINGTON, J.:—The appellant is a company incorporated under a Dominion charter and carrying on its business in Montreal. The respondent is, or was, carrying on business at Moose Jaw, in the Province of Saskatchewan, in succession to another company which had a contract with appellant to supply it with a refrigerating plant, on the "Linde System," and erect same on the foundation prepared by the company receiving it.

The appellant did so and the respondent, I infer, became, in some way not clear, the company that is to pay therefor.

The statement of defence alleged as follows:—

2. The defendant says that the plaintiff corporation is a foreign corporation and was at the time the alleged cause of action arose and still is unregistered in the Province of Saskatchewan under the Foreign Companies Ordinance, and that the plaintiff is, therefore, not entitled to bring this action.

The learned trial Judge held that the appellant, though otherwise entitled to recover, was barred thereunder by sec. 3 of the Foreign Companies Act of Saskatchewan.

That section is in its first sub-section as follows:—

3. Unless otherwise provided by any Act, no foreign company, having gain for its object or a part of its object, shall carry on any part of its business in Saskatchewan unless it is duly registered under this Act.

The only pleading on the record upon which such defence

is rested is the second paragraph of the statement of defence which is quoted above.

This does not appear to me to raise such a defence as is contemplated by sec. 10 of said Act which reads as follows:—

10. Any foreign company required by this Act to become registered shall not, while unregistered, be capable of maintaining any action or other proceeding in any Court in respect of any contract, made in whole or in part, in Saskatchewan in the course of or in connection with business carried on without registration contrary to the provisions of section 3 hereof.

The plea does not bring the appellant within this section, and, therefore, the defence as pleaded should not be held a bar to the action. This may be technical and amendable, but no one is here to ask therefor and there are no merits in the defence.

The third sub-section of said sec. 3 relied upon below is as follows:—

(3) The taking orders by travellers for goods, wares or merchandise to be subsequently imported into Saskatchewan to fill such orders, or the buying or selling of such goods, wares or mechandise by correspondence, if the company has no resident agent or representatives and no warehouse, office or place of business in Saskatchewan, the onus of proving which shall in any prosecution under this section rest on the accused, shall not be deemed to be carrying on business within the meaning of this Act. (1903, ch. 14, sec. 3; 1903 (2), ch. 19, sec. 1.)

The respondent has filed no factum and has not appeared by counsel on this appeal. Counsel for appellant relied upon the recent case of the *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, decided since this case was heard below, and seeks some amendment to bring this case within that.

As there are many features of the Act upon which that case was decided, and the Act here in question, and the respective facts relevant respectively to said Acts, which may distinguish the two cases, it would be most unfortunate to have the decision turn thereon without argument.

I do not think it is necessary to deal with the appeal from that point of view. The contract seems to be one which may well fall within the exception provided by said sub-section 3 of section 3.

The appellant proved that it had no resident agent or representative and no office or place of business in Saskatchewan. The goods and machinery contracted for and other goods were

CAN.
S. C.
LINDE CANADIAN REFRIGERATOR CO. v. SASK. CREAMERY CO.
Idington, J.

shipped from Montreal and, on such reading and understanding of the contract as I am enabled to give it, I do not think the mere installation of the machinery so ordered, shipped and delivered, fairly falls within the meaning of the carrying on business in Saskatchewan. I cannot think it was intended to apply to the mere setting up and starting of machinery by a company doing no more in way of carrying on business than such acts involve. And if it did, that has been paid for, I imagine, or might be severable if we knew and understood the facts. The application of this Act made by the Courts below would apply to many cases of mere agricultural machines and implements which are very commonly sold on terms of thus testing by starting them satisfactorily as we have found by experience in this Court. The view of this Court in the case of *John Deere Plow Co.* v. *Agnew*, 10 D.L.R. 576, 48 Can. S.C.R. 208, does not seem to have been presented to the Courts below.

It is also to be observed that the company's contract provided as follows:—

> Taxation:—All local or provincial taxes liable to be levied on outside companies or their employees to be paid by the purchaser.

The appellant, in any way one can look at it, was entitled to have within the Act (when acting in violation thereof) become licensed and then to proceed to recover from respondent what the trial Judge found was justly due. The respondent would have had to pay, under the clause just quoted, the taxes; and the incidental expenses of procuring registration, is all that would have been involved.

If the words "maintaining any action" in the above quoted section were liberally interpreted, in any case the action would not have to be dismissed in such a way as to put an end to the appellant's rights as it might if the legislation in question can be upheld by distinguishing it from the British Columbia legislation which certainly is of a more objectionable character than that involved in this case.

I think the appeal should be allowed, but, as directed at the argument, without costs.

Duff, J.

DUFF, J.:—I concur in allowing this appeal.

Anglin, J.

ANGLIN, J.:—The plaintiffs are a company incorporated by

the Dominion of Canada with power to trade and carry on their business throughout the Dominion. Although the definition of "foreign company" in the Foreign Companies Act, R.S.S. (1909), ch. 73, is not as clear or precise as could be desired, doubtless it was meant to include, and probably does cover any Dominion corporation. This action is brought to enforce payment under a contract made with the plaintiffs in Saskatchewan.

The provincial Courts, in my opinion properly, have held that the installation by the plaintiffs, pursuant to the provisions of the contract sued upon, of the refrigerator plant which they sold to the defendants was a carrying on of a part of the plaintiffs' business in Saskatchewan within the meaning of sec. 3, and, therefore, brought the contract itself within the purview of sec. 10 of the Foreign Companies Act, because it was a contract made in Saskatchewan in connection with business carried on without registration contrary to the requirements of section 3. I am, with deference, unable to read the statute as affecting only the contracts of companies which have resident agents or representatives, or warehouses, offices or places of business in Saskatchewan (section 3, sub-section 3). Companies not having resident agents or representatives, or warehouses, offices or places of business in Saskatchewan may, no doubt, though not registered, fill orders taken in Saskatchewan by travellers for goods, wares and merchandise to be subsequently imported into that province, or may make contracts by correspondence for the buying or selling of such goods, wares, or merchandise without rendering themselves subject to the provisions of the statute. But even such companies may not enforce, by action in the Saskatchewan Courts, any contract made in whole or in part in Saskatchewan in connection with business carried on without registration contrary to the provision which requires that no foreign company having gain for its object shall carry on any part of its business in Saskatchewan unless registered. Although the installing of the plant may, in the present case, have been a comparatively insignificant part of that which the plaintiffs contracted to do, it was a substantial part of the consideration which they agreed to give to the defendants in return for their money. That installation they undertook to carry out, and it

CAN.

S. C.

LINDE CANADIAN REFRIGERATOR CO. v. SASK. CREAMERY CO.

Anglin, J.

was in fact carried out, by their engineer. As put by Haultain, C.J.:—

> It is not a matter of contract by correspondence; it is not purely a matter of an order for goods to be made or to be taken by a travelling salesman. It is a contract for work as well as for material—for work to be done within the province that is subsequently done within the province by the plaintiff company, through their engineers who took charge of the installation of the plant.

As pointed out by Mr. Justice Elwood, the installing of refrigerator plants sold by them was admittedly a part of the plaintiffs' ordinary business. Nor was the installation here in question a solitary act of business done in Saskatchewan not indicating a purpose to carry on business in that province. *Oakland Sugar Mill Co.* v. *Wolf Co.*, 118 Fed. Rep. 239, at 245-6; *Cooper Man. Co.* v. *Ferguson*, 113 U.S. Rep. 727, at 733-5. There was evidence that other plants had been installed by the plaintiffs in the province, and I cannot think that this evidence should be ignored, as is suggested by Elwood, J., merely because the defendants had failed to prove that the plaintiff company was not "registered" when these other transactions took place. Taking all the evidence into account, I think it sufficiently appears that what the plaintiffs did in this case was with the purpose and in the course of pursuing or carrying on such business as it could obtain in the Province of Saskatchewan and was not an isolated act, such as has in some cases been held to be insufficient to warrant a conclusion that business was being carried on. It should be noted that what is prohibited by the Saskatchewan statute is not the carrying on of the business of the company, but the carrying on of any part of its business while it remains unregistered. I respectfully concur in the view of the learned Chief Justice that there was in connection with the contract sued upon a carrying on of a part of the business of the plaintiff company in contravention of the provisions of the Foreign Companies Act.

The question is therefore directly presented for decision whether it is *intra vires* of a provincial legislature to enact that, as a penalty for, or consequence of, non-compliance with a provincial statute requiring it to become registered, a Dominion company shall be denied the right to maintain actions in the

provincial Courts upon contracts made by it in the exercise of the powers conferred on it by its Dominion charter. In the *John Deere Plow Co.* v. *Wharton*, 18 D.L.R. 353, [1915] A.C. 330, the Judicial Committee categorically decided that it is not, when it held (at p. 361) that—

> those provisions of the Companies Act of British Columbia which are relied on in the present case as compelling the appellant company . . . to be registered in the province as a condition of exercising its powers or of suing in the Courts, are inoperative for these purposes.

Their Lordships had already said (p. 360):—

> The province cannot legislate so as to deprive a Dominion company of its status and powers.

Further on they say (p. 363):—

> It might have been competent to that legislature to pass laws applying to companies without distinction and requiring those that were not incorporated within the province to register for certain limited purposes such as the furnishing of information. It might also have been competent to enact that any company which had not an office and assets within the province, should, under a statute of general application regulating procedure, give security for costs. But their Lordships think that the provisions in question must be taken to be of quite a different character, and to have been directed to interfering with the status of Dominion companies, and to preventing them from exercising the powers conferred on them by the Parliament of Canada, dealing with a matter which was not entrusted under section 92 to the provincial legislature. The analogy of the decision of this Board in *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, therefore applies. They are unable to place the limited construction upon the word "incorporation" occurring in that section which was contended for by the respondents and by the learned counsel who argued the case for the province. They think that the legislation in question really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government of companies with other than provincial objects.

No doubt the British Columbia statute contained objectionable provisions not found in the Saskatchewan Act, such as that requiring a foreign company to submit to a change in its corporate name as a condition of securing registration should the registrar deem it proper to demand such a change. But the sections of the Saskatchewan Act which are invoked by the defendants in this case I am unable to distinguish on any substantial ground from the corresponding provisions of the British Columbia legislation which were under consideration in the *John Deere Plow Co. Case*, 18 D.L.R. 353, [1915] A.C. 330. Legislation excluding Dominion corporations, because they are

CAN.
S. C.
LINDE CANADIAN REFRIGERATOR CO. v. SASK. CREAMERY CO.
Anglin, J.

not registered in conformity with the requirements of the provincial statute, from access to the provincial Courts for the purpose of enforcing contracts made by them in the exercise of their charter powers is something which, as I understand the opinion delivered by the Lord Chancellor, the Privy Council has explicitly declared to be *ultra vires* of a provincial legislature, because it—

really strikes at capacities which are the natural and logical consequences of the incorporation by the Dominion Government, and the status and powers of a Dominion company as such cannot be destroyed by a provincial legislation.

I am, for this reason, of the opinion that this appeal should be allowed.

Brodeur, J.

BRODEUR, J.:—I am of opinion that this appeal should be allowed with costs. *Appeal allowed without costs.*

QUE.
K. B.

CANADIAN PACIFIC R. CO. v. FLORE.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J. Trenholme, Lavergne, Cross, and Carroll, JJ. January 28, 1915.

1. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—COMMUNICATION OF DISEASE—REMOVING CINDER FROM FELLOW-SERVANT'S EYE—COURSE OF EMPLOYMENT.

Where an infectious disease is communicated to a workman by his fellow workmen while trying to remove a piece of cinder which had got into his eye while he was at work, and such disease results in blindness, the accident may be said to have happened in the course of his employment so as to entitle him to compensation under art. 7321, R.S.Q. 1909.

2. MASTER AND SERVANT (§ V—340)—WORKMEN'S COMPENSATION—CAPITAL RENT.

Where under the Workmen's Compensation Act (art. 7321, R.S.Q. 1909) a workman who has been injured does not ask for the deposit of the capital sum, he is entitled to a rent the capital of which may exceed $2,000.

Statement

APPEAL from judgment of Archer, J., Superior Court, in favour of plaintiff in an action under the Workmen's Compensation Act. Affirmed.

On May 14, 1913, the plaintiff was working in one of the yards of the appellant company when a locomotive passed several feet away from him and a spark therefrom penetrated his left eye. A companion who was passing hastened towards him and removed the spark with a piece of cotton. Later another fellow workman passed and seeing that the plaintiff was suffering took a piece of cotton that he had about him, dipped it in water, and washed the left eye. The plaintiff went to the General Hospital on May 15. On the following day he was examined by Dr.

QUE.

K. B.

C.P.R. v. FLORE.

Matthewson who stated that the two eyes were infected with a venereal microbe, the left eye being worse than the right and having an ulcer. In the opinion of the doctor the infection of the left eye was at least 2 days old when he examined it. The third day about the same hour the doctor stated that the right eye was ulcerated. Eventually the plaintiff lost his sight completely. He sued the company for an annual rent, to wit, the half of his wages, equivalent to the sum of $300.

The defendant company pleaded that the condition of the plaintiff's eye was due to a disease which existed before the accident; that the condition in which the plaintiff's eye was found was not due to an accident which happened in the course of his employment.

The plaintiff in reply to these pleas denied the allegations contained therein and added that if the blindness from which he suffered was due to a disease as alleged in the defence this disease was the result of the act set out in the declaration of his fellow workmen who in attempting to take out of his eye the spark which had lodged there deposited in his eye the germ of the said disease.

The Superior Court maintained the action and granted the plaintiff a rent equal to 50 per cent of his annual wages computed from the day of the accident, making the sum of $300 per year payable quarterly.

Meredith & Macpherson, for appellant.

Geoffrion & Cusson, for respondent.

The judgment of the Court was delivered by

LAVERGNE, J.:—An analysis of the discharge of the left eye made at the hospital shews that the injured person suffered from gonorrhœa of the eye. An examination of the urine of the patient has been made and it has been shown that the respondent had not the gonorrhœa and that he was perfectly sound. The respondent remained at the hospital about 15 days. His eyes were nearly cicatrised but the ulcers had rendered him blind.

LAVERGNE, J.

The claim of the respondent which was adopted by the Superior Court is that the disease was communicated to him by the workmen who attempted to remove the piece of coal or cinder, or by the one who afterwards washed the eye.

It is proved that the respondent lived under proper hygienic

QUE.
K. B.
C.P.R.
v.
FLORE.
Lavergne, J.

conditions, his wife was perfectly healthy just as himself, he had a child eighteen months old. He lived alone with his wife and child in an apartment. After his daily work he never went away from home.

The doctors are of opinion that a direct contact of the venereal microbe and the globe of the eye is necessary to inoculate it with the disease, but that the contact of the microbe with the eyelid could not cause the contagion that is necessary for an accident such as this to infect the eye of a healthy person. The symptoms indicate that the contagion took place at midday of the 14th. The period of incubation in the eye varies from some hours to three days according to the virulence of the microbe and to the resistance of the patient. The ulcer can develop almost immediately in a case where there is a rupture of the cornea of the eye, a rupture which could easily be produced by a particle of coal or a cinder being lodged in the eye. On the evening of the next day the left eye already shewed ulceration. The doctors also tell us that contagion may take place from an infected eye to a healthy eye by the fingers of the diseased person carrying it by rubbing the eye. The ulcer which first appeared was in the left eye, that is the eye in which the particle of coal or cinder fell into it.

The same symptoms in the right eye appeared on midday of the 17th, that is three days after respondent had received this injury to the left eye.

The evidence shews that an injury such as this can accelerate the incubation of the microbe and produce the ulcer. The appellant cannot claim that this period of incubation is not less than 4 days; it is longer or shorter according to the circumstances of each particular case. In this case the doctors admit unhesitatingly that after the injury the ulcer in the left eye could be produced almost instantly and no general rule can be laid down for all cases. It is true that this incubation sometimes takes 3 or 4 days but none of the doctors examined were surprised that in this case it took a much shorter time.

For myself I believe, after a careful examination of the evidence that the respondent has proved his case and that the accident from which he suffered happened in the course of his employment and gives him a right to an indemnity under the terms of art. 7321 of R.S.Q. 1909.

QUE.
K. B.
C.P.R.
v.
FLORE.
Lavergne, J.

The appellant has raised the question as to the amount, claiming that an annual rent of $300 is too much as the rent cannot be greater than that which would be produced by a capital of $2,000. We decided in the cases of *McDonald* v. *C.P.R. Co.*, 7 D.L.R. 138, 22 Que. K.B. 207, and in *G.T.R. Co.* v. *Macdonell*, 5 D.L.R. 65, 21 Que. K.B. 532, that when the workman does not ask for the deposit of the capital sum by the defendant he is entitled to a rent the capital of which can exceed $2,000. These decisions have not yet been reversed by any higher Court and we should maintain this jurisprudence.

For these reasons I believe that there is no error in the judgment rendered by the Superior Court, and I am of opinion that it should be affirmed and the appeal dismissed with costs.

The respondent in his factum does not refer to the authorities cited by the Judge who gave judgment at first instance so I think I should mention them here.

Judgment affirmed.

STANDARD TRUST CO. v. LITTLE.

SASK.
S. C.

Saskatchewan Supreme Court, Haultain, C.J., Lamont and McKay, JJ. July 15, 1915

1. VENDOR AND PURCHASER (§ II—30)—REMEDIES OF VENDOR—SPECIFIC PERFORMANCE—FORECLOSURE—RIGHT TO PERSONAL JUDGMENT.
The remedies of specific performance and an action for the purchase price are inconsistent, since one operates as an affirmance while the other as a rescission of the contract; and where a vendor elects to proceed with the remedy of specific performance or foreclosure of the purchaser's interest under an agreement for the sale of land, a judgment for an unpaid instalment is thereafter no longer enforceable except as to the costs.
[*Lee* v. *Sheer*, 19 D.L.R. 36, distinguished; *Hargreaves* v. *Security Inv. Co.*, 19 D.L.R. 677, followed; *Jackson* v. *Scott*, 1 O.L.R. 488, applied.]

2. VENDOR AND PURCHASER (§ II—30)—REMEDIES OF VENDOR—ACTION FOR PURCHASE MONEY—INSTALMENTS—NECESSITY OF CONVEYANCE.
An open contract, or any contract under which a purchaser is entitled to a conveyance upon payment of the purchase money, the vendor cannot maintain an action at law for the purchase price unless he has actually conveyed the land, or unless the action is for an intermediate instalment.
[*Landes* v. *Kusch*, 24 D.L.R. 136; *Clergue* v. *Vivian*, 41 Can. S.C.R. 607; *East London Union* v. *Metropolitan R.*, L.R. 4 Ex. 309; *Laird* v. *Pim*, 7 M. & W. 474, applied.]

Statement

APPEAL from judgment of Elwood, J., confirming Order of Master dismissing motion to vacate execution.

Russell Hartney, for appellants.

J. Milden, for respondent.

The judgment of the Court was delivered by

SASK.

S. C.

STANDARD TRUST CO. v. LITTLE.

Lamont, J.

LAMONT, J.:—This is an action to recover an instalment of purchase money under an agreement of sale.

The statement of claim sets out that, by an agreement dated July 25, 1912, the defendants agreed to purchase from the plaintiff company the south half of s.w.¼ 18–37–5–W 3rd. for $17,280, payable $2,160 cash and the balance in seven equal annual consecutive payments with interest at 8%. It also set out that the plaintiff company was the registered owner of the said land, and was, and had always been able and willing to perform the agreement on its part.

The defendant paid the cash payment, but did not pay the instalment falling due July 25, 1913. For that instalment, and the sum of $1,341 interest, the plaintiff company brought this action and claimed:—1. Payment of $3,501.60. 2. To have the agreement specifically performed and, for that purpose, that all proper directions may be given. 3. Foreclosure of the defendants' interest.

The defendants did not file any defence to the action, and, on June 12, 1914, the plaintiff applied for and obtained from the local master the following Order:—

It is ordered that the plaintiffs do recover from the defendants the sum of $3,501.60 and interest on $3,269.60 at 8% per annum from January 31, 1914.

It is hereby further ordered and decreed that the amount due for principal and interest under the agreement sued on in this action between the Standard Trust Co., administrators of the estate of Alexander Reid, deceased, as plaintiffs, and David Wood Little, Roscoe R. Gorham, and Robert Charles Baker, as defendants, dated January 21, 1914, and covering the south half of the southwest quarter of section 18, township 37, range 5, W. 3rd meridian, in the Province of Saskatchewan, on January 21, 1914, is $3,501.60.

And it is further ordered and decreed that the defendants pay into Court to the credit of this cause on or before December 12, 1914, the said sum of $3,501.60 and interest on $3,269.60 at 8% per annum from January 21, 1914, together with the costs of action to be taxed.

And it is further ordered and decreed that in default of payment as aforesaid, by the said defendants, there will be a foreclosure absolute, the title of the said premises to vest and remain in the plaintiff absolutely free from all right, title, and interest of the said defendants therein and of all persons claiming through or under them, said defendants and all persons in possession of the said premises to give up possession thereof to the plaintiff within twenty days after service upon them of a copy of such final order.

On obtaining this Order, the plaintiff company, on June 19, issued execution for amount of its claim and placed the same in the sheriff's hands.

The material before us shows that an automobile belonging to

the defendant was seized under the execution, but at the time the affidavits were made, January 9, 1915, nothing had been realized therefrom.

The defendants did not pay any money into Court as directed by the 3rd par. of the Order.

On January 9, 1915, the defendants made a motion before the Local Master for an order vacating the execution issued by the plaintiff, and that it be directed that the agreement for sale had been rescinded, and that the land be now vested in the plaintiff company. The Local Master dismissed the appeal, and his Order was upheld by my brother Elwood on appeal. From that decision this appeal is brought.

For the defendants, it is contended that the taking out of an Order *nisi* foreclosure was an election by the plaintiff to rescind the contract and take back the land in case the defendants did not pay into Court the amount declared to be due, as directed by the order, and that, as the defendants did not pay in any amount at all, the plaintiffs have now a judgment vesting in them the title to the premises, "free from all right, title and interest of the defendants and of all persons claiming through or under them." The contention is that this is a rescission of the contract and, consequently, no part of the purchase money remaining unpaid can now be collected.

To ascertain the rights of the plaintiff company under the order of June 12, it may not be inadvisable to consider shortly the rights of vendors suing for purchase money of land under an agreement of sale.

To begin with: I think it is established law that on an open contract, or any contract under which the purchaser is entitled to a conveyance upon payment of the purchase money, the vendor cannot maintain an action at law for purchase money unless he has actually conveyed the land, or tendered a conveyance thereof. *Laird* v. *Pim*, 7 M. & W. 474; *East London Union* v. *Metropolitan R. Co.*, L.R. 4 Ex. 309; *Landes* v. *Kusch*, 24 D.L.R. 136.

This rule, however, has no applicaton to an intermediate instalment where the agreement provided that such instalment shall be payable on a day certain, and that the purchaser is not entitled to a conveyance until payment of the final instalment. *Clergue* v. *Vivian*, 41 Can. S.C.R. 607; *Hargreaves* v. *Security Inv. Co.*, 19 D.L.R. 677.

SASK.

S. C.

STANDARD TRUST CO. v. LITTLE.

Lamont, J.

The principle applicable to an intermediate instalment is that laid down in Norton on Deeds, 2nd ed., p. 524, which is as follows:—

> If a day is appointed for the payment of money, or a part of it, and the day is to happen before the thing which is a consideration of the money is to be performed, an action may be brought for the money.

A vendor, therefore, to whom an intermediate instalment is due, may bring either an action at law for the instalment, or an equitable action for specific performance of the contract. If he proceeds by way of a common law action for the instalment, he is, upon proving that he has a good title to the land, entitled to a judgment for the money due on which he can issue immediate execution; but he is not entitled to any other remedy, at least unless leave is reserved to him in the judgment to apply for some other remedy in case he failed to obtain payment under his execution, as was done in *Jackson* v. *Scott*, 1 O.L.R. 488.

If he proceeds by way of specific performance, he is not entitled to a personal judgment against the purchaser, as well as a decree for specific performance. By the decree for specific performance, the purchaser would be directed to perform his contract, an account would be directed to be taken as to the amount due, and a time fixed within which he must pay that sum, and leave would be given to the vendor to apply further. If the purchaser did not pay within the time fixed, the vendor could apply to the Court and make his election as to the remedy he then desires. He may, if he wishes, obtain leave to issue execution for the amount found due. If he has asked for a vendor's lien, and it has been given to him by the decree, he may have a sale of the land under the lien, or, if he prefers to take the land back, he can have the contract rescinded and retain the purchase money already paid to him. The failure of the purchaser to obey the decree and pay the money found to be due, is a sufficient abandonment or repudiation of the contract by him to justify rescission without restitution. *Dunn* v. *Vere*, 19 W.R. 151; *Henty* v. *Schröder*, 12 Ch. D. 666.

The case of *Lee* v. *Sheer*, 19 D.L.R. 86, was referred to as authority for the proposition that a vendor was entitled to both specific performance and judgment for the purchase money. The Court en banc of Alberta so held, but it will be noted that, in the judgment on that case, the Court expressly held that on

SASK.

S. C.

STANDARD TRUST CO. v. LITTLE.

Lamont, J.

such judgment execution could not be issued, but that a subsequent application would have to be made for an absolute order for payment before a vendor-plaintiff could issue execution.

If the personal judgment granted in that case was one on which the vendor had no right to issue execution until after the expiration of the time limited by the Court for payment, and then only upon an order of the Court, the difference between the view there expressed and the one I hold is one of language, rather than one of substance. What I mean by a "personal judgment" is one on which the vendor may, under our rules, issue immediate execution unless execution is stayed by the Court.

In the case at bar, in addition to personal judgment and specific performance, the plaintiff also called foreclosure.

Since the Judicature Act, a vendor has a right to bring an action for all the relief to which he may be entitled in the facts of his particular case; he may even, in his statement of claim, ask in the alternative for inconsistent remedies, but, as he cannot be given two inconsistent remedies, he must elect which he will take. The time to make his election is, generally, when he asks for his judgment or order. If, however, he asks to have the contract specifically performed, and the defendant does not pay within the time fixed by the Court, the plaintiff has, on such default, as I have already stated, a right to elect the remedy he will then pursue, and he need not elect until that time. He, however, is not bound to postpone his election until the defendant has made default. If, at the trial, he knows what remedy he will select in the event of the defendant making default in payment as directed, I see no good reason why he may not in the judgment, or order, have specified what result is to follow such default. This is just what happened here; a time was given to the defendants within which they were to pay into Court the instalment sued for, and, in the event of their not doing so, the plaintiff elected to foreclose the interest of the defendants in the land. Foreclosure of a purchaser's interest under an agreement of sale is rescission of the contract.

In *Lysaght* v. *Edwards*, 2 Ch. D. 499, at p. 506, the Master of the Rolls said:—

> The unpaid mortgagee has a right to foreclose, that is to say, he has a right to say to the mortgagor, "Either pay me within a limited time, or you lose your estate," and in default of payment he becomes absolute owner of it.

SASK.

S. C.

STANDARD TRUST CO. v. LITTLE.

Lamont, J.

So, although there has been a valid contract of sale, the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser, "Either pay me the purchase-money, or lose the estate." Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the Court of Equity, or now by a judgment of the High Court of Justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the Court, and the vendor becomes again the owner of the estate.

By taking out the order of June 12, the plaintiffs took both foreclosure and personal judgment; they had no right to both these remedies. *Hargreaves* v. *Security Inv. Co., supra.*

The one is based on an affirmance of the contract, the other upon its rescission; they cannot stand together. If the order had been appealed from it would have been set aside, or one of the remedies struck out. It was not appealed from, and the defendants to not now object to it; what they say is: If we consider that the plaintiffs properly included both remedies in the order the personal judgment is not now enforceable and the execution thereon should be vacated. I am of opinion that this contention is correct.

In *Jackson* v. *Scott, supra*, before referred to, the plaintiff sued for an intermediate instalment and obtained judgment and issued execution. Nothing was realized on the execution, and the plaintiff subsequently rescinded the agreement under a provision to that effect contained therein for nonpayment of a further instalment. The defendant then moved to vacate the judgment. It was held that he was not entitled to have the judgment vacated, but that equity would restrain its enforcement, except as to costs.

In that case, Maclennan, J.A., at p. 493, says:—

> As decided in *Cameron* v. *Bradbury*, 9 Grant 67, the effect of rescission after a judgment recovered for the purchase money or part of it, is that the obligation to pay the purchase money has been terminated, and so, to that extent, the judgment cannot be enforced. It is still good at law, but equity will restrain its enforcement, on the ground that, having taken back the land, the vendor ought not to be permitted to recover any more of the purchase money. That principle, however, does not apply to the costs.

And Moss, J.A., said:—

> The judgment would not be set aside and vacated and matters brought back to the same position as if it had never existed, but it would be deemed satisfied, except as to costs.

The taking out of the order of June 12 by the plaintiff was an election on their part to rescind the contract if the defendants did

not pay within the time prescribed, and such election is, in my opinion, to be given the same effect as if at the expiration of the time limited for payment the plaintiff had gone to the Court and asked for foreclosure.

Where a party, with full knowledge of all the facts, elects to rescind the contract in default of payment and asks the Court to give effect to that election and the Court grants his request, he is bound by his election and cannot, by neglecting or refusing to take the necessary steps to give complete effect to the Court's decree, obtain the right to re-elect.

In McCaul's Vendors and Purchasers, 1915 ed., 192, the author quotes with approval the case of *Zimmerman* v. *Robinson*, 128 Iowa 72, in which the Court said:—

> Let us first consider what is meant in law by "and election of remedies." It not infrequently happens that for the redress of a given wrong, or the enforcement of a given right, the law affords two or more remedies. Where these remedies are so inconsistent that the pursuit of one necessarily involves or implies the negation of the other, the party who deliberately and with full knowledge of the facts, invokes one of such remedies, is said to have made his election, and cannot, thereafter, have the benefit of the other.

The plaintiff company is entitled to its foreclosure, but it is bound by all that legally results therefrom. One of the results thereof is that they cannot collect any more of the purchase-money.

The judgment for the instalment is, therefore, no longer enforceable except as to costs. If the costs of the action were included in the execution, the execution to the extent of the costs is valid. If they were not so included, the execution should be set aside, as it would then be a process for the enforcement of payment of the purchase-money only. Whether or not the costs were included therein does not appear.

As the whole contention was as to whether or not the plaintiffs could still enforce their judgment for the purchase price, and as they fail in that contention, they should pay the costs of the appeal. The appeal should be allowed, and the execution, in so far as it relates to the purchase-money, should be vacated.

Appeal allowed.

QUE.

K. B.

PYKE v. SOVEREIGN BANK OF CANADA.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. March 17, 1915.

1. BILLS AND NOTES (§ V A 2—116)—ACCOMMODATION CHEQUE—RIGHTS OF BONA FIDE HOLDER—BANK.

A person is not relieved from liability on his accommodation cheque given to the manager of a bank to enable him to buy shares of the bank which the bank paid in good faith; nor will the manager's promise to reimburse the maker of the cheque for moneys so advanced affect such liability, where the transaction was carried on without the knowledge or authority of the bank.

2. EVIDENCE (§ XII H—960)—WEIGHT OF—BOOK ENTRIES—HOW OVERCOME.

Credit entries in a bank account are only *primâ facie* evidence which may be contradicted by parol evidence to shew that the amount credited was not in fact received.

[*Sovereign Bank* v. *Pyke*, 14 D.L.R. 383, affirmed.]

Statement

APPEAL from judgment of Dunlop, J., 14 D.L.R. 383, Superior Court, in favour of plaintiff in an action on cheques. Affirmed.

Greenshields, Greenshields & Languedoc, for appellant.

Casgrain & Mitchell, for respondent.

Archambeault, C.J.

SIR HORACE ARCHAMBEAULT, C.J., remarked that there could be no ratification nor acquiescense without full knowledge of the agreement; and that no such proof was made in this case.

Trenholme, J.

TRENHOLME, J., concurred in the reasons of the Superior Court condemning the appellant to pay his cheques.

Carroll, J.

CARROLL, J.:—Pyke refuses to pay because he says in substance he never agreed to become owner of these shares; that the bank had credited to his account the entire amount of the cost of purchase of the shares and that these cheques had been returned to him. He adds that he never acted as intermediary and he declines all responsibility.

It is true that in what is called in the English language the pass-book, the employee of the bank credited Pyke with the amount of his cheques. Is this fact conclusive and does it prevent the bank from claiming the amount? These entries are most frequently made by inferior employees without any authority and it would be very dangerous to make the validity of a transaction depend upon an entry which could constitute a certain presumption but which is not conclusive and does not prevent oral testimony of an agreement contrary to this entry. As to the remission of the cheques we have no evidence which shows us by whose intervention Pyke became possessor of them; we must presume that it was in the ordinary course. The local manager was requested to send him these cheques in order to adjust his

account and Pyke had them sent to him. Does this remission of the cheques by the bank to Pyke constitute an abandonment by the bank of its right to recover the amount? If the bank committed an error in remitting them and has succeeded in procuring again these instruments nothing prevents it from suing to recover it. The conduct of the party sometimes constitutes an estoppel but it is necessary that this conduct should imply the abandonment of a right.

In this case it is proved that a change took place in the staff. New employees succeeded to former ones and it has been well explained how the errors were caused.

The appellant in his factum points out how the mandate given for the transfer of the shares in his name also authorized the agent to re-transfer them to third parties and consequently the contract between Stewart and himself was not entirely executed. If the contract had been entirely executed it could only have been by the fault of Stewart who abused the confidence of Pyke and of the imprudence of the latter, if we can call imprudent the fact of an honest man trusting himself to a swindler who has every appearance of honesty and who occupies a position of great confidence.

Stewart in proposing this transaction to Pyke did not act for the bank, but spoke in the name of third parties real or assumed purchasers. Pyke tells us that he relied upon Stewart. He gives his cheques to the order of Mecker and the latter obtains the money from the bank which pays the amount represented by the cheques. The transaction between Stewart and Pyke does not affect the bank, which has a right to be reimbursed.

The judgment cannot be attacked. All the same I regret not to be able to come to the aid of the appellant, a victim of the dishonesty of Stewart.

LAVERGNE, J., dissented.

Lavergne, J. (dissenting)

Judgment affirmed.

GORDON v. VIOLETTE.

ALTA.
S. C.

Alberta Supreme Court, Scott, J. September 28, 1915.

1. JUDGMENT (§ VII C—282)—BY DEFAULT—SETTING ASIDE—DELAY—INABILITY TO FURNISH COSTS.

A judgment obtained in default of appearance will be set aside on an application made one year subsequent to the entry of the judgment when it appears that the delay was due to the defendant's inability to secure the costs of the application.

ALTA.

S. C.

GORDON v. VIOLETTE.

Scott, J.

APPEAL from order setting aside judgment by default of appearance, and permitting defendant to enter a defence to the action.

S. E. Bolton, for plaintiff, appellant.

G. C. Valens, for defendant, respondent.

SCOTT, J.:—The action is upon a judgment obtained by the plaintiff against the defendant in the Supreme Court of British Columbia. It was stated by defendant's counsel upon the hearing of the appeal and it was not disputed by plaintiff's counsel that that judgment also was obtained by default of appearance, and the defendant in his affidavit filed on this application states that he was never served with any process in that action.

The affidavit of service of the writ in this action was made by one Patrick, a bailiff of the sheriff of the Edmonton Judicial District, who states therein that he served the defendant at Edmonton on June 5, 1914, and in his affidavit filed on this application he states positively that he served the defendant not only with the writ in this action, but also at the same time served him with a writ in another action against him.

The defendant in his affidavit states that he was never served with the writ of summons in this action, that he was in Chicago on June 5, 1914, and did not return to Edmonton until about the 20th of that month, that upon his return he found the writ upon his desk, and that he then instructed his solicitors to enter a defence for the action. It is true that upon his cross-examination upon the affidavit, he apparently states that he did not so instruct them, but his subsequent statements upon the examination shew that he did not intend to deny that he had done so, and that the denial was an error either on his part or that of the stenographer. He also stated that he has a good defence to the action on the merits, but he did not in his affidavit disclose the grounds of his defence.

The defendant's application to set aside the judgment was not made until on or about July 19, 1915, more than a year after it was obtained. He states that the delay was occasioned by the fact that he did not have the money necessary to pay the costs thereof.

It is shewn that the defendant was aware in the month of

November last that judgment had been obtained against him in this action, and that he then entered into negotiations with the plaintiff's solicitors for a settlement thereof, and offered to transfer to them certain property in satisfaction thereof. He states that he entered into them without the knowledge of his solicitors and because he thought the settlement he offered was a cheaper and a more expeditious means of removing the judgment and execution than taking proceedings to set them aside.

The order appealed against provided that the judgment should be set aside upon the defendant's giving security to the amount of $1,600, which was admitted to be the balance remaining unpaid upon the judgment, a portion thereof having been satisfied by the proceeds of the sale of the boat, the price of which was the subject of the British Columbia action. This security has been furnished by the defendant.

Although the defendant did not in his affidavit, filed on the application, disclose any grounds of defence to the action, it appears to me that the uncontradicted statement of his counsel that the judgment sued upon was obtained by default of appearance discloses a reasonable defence, as it is, in my view, open to serious doubt whether that judgment is binding upon him outside the Province of British Columbia. His statement that he was not served with any process in that action may not alone constitute a ground of defence to an action upon a judgment obtained in it, but it is a circumstance which, I think, should be considered in disposing of this application.

In my opinion the delay of the defendant in making the application should not disentitle him to the order he obtained. In *Atwood* v. *Chichester*, 3 Q.B.D. 722; *Davis* v. *Ballenden*, 46 L.T. 797; *Watt* v. *Barnett*, 3 Q.B.D. 183 and 363, and *Beale* v. *MacGregor*, 2 T.L.R. 311, a delay of many years in making such an application was held not to be such as to disentitle the defendants upon similar applications. In *Brady* v. *Keenan*, 14 Gr. 214, the inability of a suitor to pay the costs of taking proceedings at an earlier date was held a sufficient excuse for the delay.

By reason of the defendant having given security for the payment of any judgment which the plaintiff can obtain in the action the latter cannot be prejudiced by the former being let

ALTA.

S. C.

GORDON v. VIOLETTE.

Scott, J.

in to defend the action. It is shewn that the sheriff of the Edmonton district, upon an execution being issued to him upon the judgment in this action, reported to the plaintiff's solicitors, that the plaintiff had nothing upon which he could levy and this points to the conclusion that the letting in of the defendant to defend the action will place the plaintiff in a better position to recover the amount of the judgment he is found to be entitled to.

I dismiss the appeal with costs. *Appeal dismissed.*

MAN.

C. A.

SAWYER-MASSEY v. TOHMS.

Manitoba Court of Appeal, Howell, C.J.M., Richards, Perdue, Cameron, and Haggart, JJ.A. October 12, 1915.

1. SALE (§ III B—66)—THRESHING OUTFIT—ACCEPTANCE OF NOTES—LIABILITY OF JOINT MAKER.

Promissory notes jointly signed by father and son, which are given in payment of a threshing outfit sold to the son under an agreement signed by the father as co-purchaser, will render the latter primarily liable as a joint purchaser and not as surety.

Statement

APPEAL from judgment of Metcalfe, J., setting aside conveyance as fraudulent against creditors.

J. C. Collinson, and *G. Coulter*, for appellant, defendant.

C. P. Fullerton, K.C., for respondent, plaintiff.

Cameron, J.A.

CAMERON, J.A.:—This action is brought against the defendants Auguste Tohms and Ludwig Tohms to enforce an agreement for the sale of a traction engine and separator at and for the price and sum of $3,865, less $200 allowances payable at the times and with interest, viz.: purchaser's promissory notes as set out therein and in the statement of claims, being four notes for $760 each, payable November 15, 1913, 1914, 1915 and 1916, and a note for $660 payable November 15, 1917. The statement of claim further alleges the delivery of the goods to and their acceptance by the above defendants, that default was made in payment of the notes except as to the sum of $360 paid on account of the first mentioned note, and that by reason of such default the whole amount of the purchase money remaining unpaid has become due. It is further alleged that the defendant Ludwig Tohms fraudulently conveyed to his wife the defendant Louisa Tohms certain lands and goods and chattels for the purpose of defeating, defrauding and delaying the creditors of the said

Ludwig Tohms. The statement of claim asks for payment of the purchase money in accordance with the terms of the agreement and that the conveyances of the lands and of the goods and chattels to Louisa Tohms be declared null and void and set aside.

In his defence Ludwig Tohms denies all, except the formal, allegations of the statement of claim and says that he has no knowledge of the English language, is unable to read or write, and, in substance, that he did not understand what he was doing when he signed the agreement and notes. It is further stated that he signed the notes and agreement on the understanding that he was merely guaranteeing the payment of the notes by Auguste Tohms, and that he was not made aware of the contents of the agreement, particularly of the clauses referred to in the statement of claim, viz.: the acceleration clause, and that purporting to give a lien upon his lands mentioned in the agreement. He also denies that he and his wife entered into any fraudulent scheme to defeat his creditors as alleged. In this denial Louisa Tohms joins in her defence. A statement of defence by Auguste Tohms, setting up specific denials of the plaintiff's allegations so far as they affect him, was also filed.

The action came on for trial before Metcalfe, J., who set aside the conveyances impeached by the plaintiff and entered judgment against the defendants Auguste and Ludwig Tohms for $390.93. At the trial the plaintiffs did not seek to hold Ludwig Tohms bound by the mortgage clause in the agreement and the Judge states in his judgment: "I do not think he is bound by the acceleration clause." This appeal against the judgment entered by the trial Judge is taken on behalf of Ludwig and Louisa Tohms. Auguste Tohms does not appeal.

It was not contended before us or at the trial that Ludwig Tohms did not understand the meaning and effect of the promissory notes which he signed. But it was and is contended that important clauses of the agreement were not read and explained to him by the plaintiff's agents at the time they procured his signature thereto. It is urged that, on the evidence and in the circumstances disclosed, the position of Ludwig Tohms was not that of a maker of the notes primarily liable

MAN.

C. A.

SAWYER-MASSEY v. TOHMS.

Cameron, J.A.

thereon, but that of a guarantor or surety, and that the effect of the non-disclosure to him of important terms of the agreement is to release him from any liability under the agreement and notes.

Mr. Collinson, for Ludwig Tohms, holding that the suretyship of his client was established by the evidence, made a strong argument on this point. Amongst other authorities, *Bonser* v. *Cox*, 4 Beav. 379, and 6 Beav. 110; *Railton* v. *Mathews*, 10 Cl. & F. 934, and *Davies* v. *London and Provincial Ins. Co.*, 8 Ch.D. 469, were referred to. In the last mentioned case, Fry, J., said, at p. 475: that very little said which ought not to have been said and very little left unsaid which ought to have been said will suffice to avoid a contract of suretyship.

But this argument is based upon the assumption that Ludwig Tohms' liability rests upon a contract of guarantee. It is contended, on the other hand, that such was not the contract, but that he was a co-purchaser of the engine and separator with his son, and that he became primarily liable with him upon the notes which he signed with full knowledge of their meaning. That Ludwig Tohms so signed with knowledge is not disputed. It was plainly the intention of the plaintiffs, who considered Auguste Tohms financial standing not sufficiently strong financially for them to take his sole liability, to procure Ludwig Tohms as joint purchaser, as appears by the cross-examination of Fuller, the plaintiffs' manager. The agent, Baldwin, was sent down to Dominion City with those instructions and there is nothing in the evidence given on behalf of the plaintiff, inconsistent with the intention so expressed. Nor can I discover anything inconsistent with it in the evidence of Ludwig Tohms. At p. 77 he is asked the question:—

"Q. Who told you that you would not have to pay anything for the machine, but the man who bought it would have to pay for it?" to which he gave the answer: "A. Mr. Baldwin told my wife and my wife told me." But he did not know, nor could he have known, what Baldwin told his wife, and, in any event, the understanding that he is trying to set forth does not disclose a suretyship or guarantee but something entirely different, that although he had signed the documents he was not to be

liable. Mrs. Tohms says, p. 51, that her husband was not at any time requested to guarantee her son, and (p. 53), she knew they (the agents) wanted her husband to sign for the outfit."

Now, the fact is, that Ludwig Tohms signed the promissory notes, with knowledge of their meaning. On the face of them he is primarily liable, and to establish any other liability than that would require convincing evidence. He appears therefore, on the notes as a co-purchaser. That he and the others expected that Auguste would be able to pay the notes from his earnings in operating the engine and separator was undoubtedly the case, but that would not and does not modify his liability as a co-maker of the notes with his son. Moreover, it appears that the engine and separator were to be used in threshing grain on the farm in question, which was owned by Ludwig Tohms and his wife.

Mr. Collinson's contention, on this branch, really came to this: that while there was no direct evidence of a contract of guarantee, nevertheless it must be inferred from the situation of the parties and the circumstances of the case. But it does not appear to me that these outweigh the evidence pointing to a direct liability on the part of Ludwig Tohms, intended to be assumed by him. On the whole, I am of opinion that Ludwig Tohms must be held to be bound to his direct liability as the same appears on the face of the notes.

Objection was taken that the action is founded on the agreement and not on the notes, and that the plaintiffs must therefore fail. But the notes are fully set forth in the statement of claim, and the whole transaction, including the making and delivery of the notes, was gone into at the trial. There is a prayer for general relief in the statement of claim and, in any event, if an amendment were necessary, to complete the plaintiffs' title to relief, it would seem to me impossible to refuse it.

No real question is raised as to the other parts of the judgment, and I think the appeal must be dismissed with costs.

Haggart, J.A.

HAGGART, J.A.:—On July 25, 1913, the defendant Auguste Tohms proposed to purchase a threshing outfit from the plaintiffs. He signed an order for the same which, if accepted by the plaintiffs, would become the contract setting forth the price and

MAN.

C. A.

SAWYER-MASSEY v. TOHMS.

Haggart, J.A.

terms. This order was forwarded by one Baldwin, an employee or agent of the plaintiffs at Dominion City, to the head office at Winnipeg. The proposal to purchase was considered, and, in the words of one of the witnesses, was "turned down," because it was considered that the financial standing of Auguste Tohms was not sufficiently strong to give him a credit to the amount of $3,365.

Some further negotiations took place between Baldwin and the defendants. At the request of Baldwin, one Fuller, a Winnipeg official of the plaintiffs, went to Dominion City when he and Baldwin, the defendants Ludwig and Louisa Tohms, the father and mother of Auguste Tohms, motored out to the farm of Auguste Tohms. As a result of the interview between the three defendants and the two employees of the plaintiffs Auguste Tohms, the son, and Ludwig Tohms, the father, signed and sealed another order which is the document sued on, and also signed the promissory notes representing the instalments of the purchase money.

Default having been made in the payment of the first instalment represented by one of the notes, the trial Judge entered a verdict for the plaintiffs for $390, being the balance owing on the promissory note first falling due.

The defendant Ludwig Tohms contended that he was only liable as a surety and that by reason of the actions of the plaintiffs he was released from his suretyship. The writing says that he is a co-purchaser. Fuller and Baldwin corroborate that document, and, in my view, the defendant Ludwig Tohms, upon whom is the burden of proof, has not given evidence sufficient to establish his contention. I would hold that he is a joint purchaser, and that in any event he is liable on the note representing the instalment sued upon.

The defendant Ludwig Tohms, the father, does not read or write, but the son, Auguste Tohms, both reads and writes. The defendant Ludwig Tohms claims that it was never explained to him that there was in the order an agreement to give a mortgage upon his land as security, nor was he aware of the fact that there was an acceleration clause in the agreement as to the future payments. The father, mother and son were all there

MAN.

C. A.

SAWYER-MASSEY v. TOHMS.

Haggart, J.A.

when the agreement was prepared, and they were talking it over, and it was no doubt present to their minds that the liability of the father had to be given before they could procure the machinery. In any event the plaintiffs have not asked for the benefit of the mortgage clause or the acceleration clause, and the trial Judge's verdict only gives a judgment for the balance due on the first note.

I do not think that we ought to set aside the agreement and notes and declare them void as against the father, Ludwig Tohms, on the ground that he never understood the effect of the documents he was signing. The son was refused credit and the father was the only one of substance. The machinery was delivered to the defendants who have possession of it yet, and whether there was an agreement in writing or not, or whether there were promissory notes or not, there was a liability for the amount of the verdict rendered by the trial Judge, that is, the balance due upon the first instalment.

As to the conveyances by the defendant Ludwig Tohms, made to his wife Louisa Tohms shortly before the commencement of this action, I agree with the finding of the trial Judge that the same should be set aside. Ludwig Tohms was indebted for a large sum to these plaintiffs, and the effect of these conveyances has been to denude him of all the property to which his creditors could look for the payment of their claims.

I would dismiss the appeal.

Howell, C.J.M.
Perdue, J.A.

HOWELL, C.J.M., and PERDUE, J.A., concurred. RICHARDS, J.A., dissented.

Richards, J.A. (dissenting)

Appeal dismissed.

CARRUTHERS v. SCHMIDT.

QUE.

K. B.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross, and Carroll, JJ. February 25, 1915.

1. CONTRACTS (§ I E 1—67)—SALES AT STOCK EXCHANGE—HOW PROVEN—WRITING—STATUTE OF FRAUDS.

The mandate of a broker in stock exchange transactions may be proved by parol evidence; but the sale and purchase of grain under that mandate is considered as goods, and if the sale exceeds the amount of $50, it must be established by a writing in accordance with art. 1235 C.C., unless admitted by the party charged.

Statement

APPEAL from judgment of Weir, J., Superior Court, from judgment for defendant in an action for price of goods sold at Stock Exchange. Affirmed.

QUE.

K. B.

CARRUTHERS v. SCHMIDT.

Archambeault, C.J.

Smith & Markey, for appellant.

Elliot & David, for respondent.

The judgment of the Court was delivered by

SIR HORACE ARCHAMBEAULT, C.J.:—This case arises out of a claim in connection with certain speculations. The appellants, exchange brokers, claim they have bought and resold a certain quantity of oats for the respondent under the instructions of the latter; and that the net result of those transactions was a loss of $24,317.63, which appellants claim from respondent.

The respondent admits some of those transactions and denies the others: he claims that the purchases and sales which he had instructed the appellants to make for him have resulted in a gain instead of a loss.

The question to be decided is, if in the present case the testimonial evidence was admissible. The Court of first instance has decided that such evidence could not be admitted, and the appellants have found themselves limited to the admissions of the respondent, which admissions are not sufficient to justify their claim.

The judgment of the Court of first instance contains a detailed and complete account of the different transactions alleged by the appellant as well as of the admissions of the respondent, and of his denials in connection with those different transactions; and it comes to the conclusion that the claim of the appellants is not proved.

So as to avoid useless repetition, I will not go into those details; and I will content myself with giving the reasons for which I am of opinion that that judgment is well founded.

Art. 1235 C.C., which is taken from the Statute of Frauds, enacts that in commercial matters where the value in question exceeds $50, no action or exception can be maintained against a person without a writing signed by him, in some cases therein enumerated. One of those cases, the fourth one, is the one of contracts for the sale of goods, unless the purchaser has accepted or received part of them, or has given some earnest-money.

The present case is about a commercial matter whose value exceeds $50, and about contracts for the purchase or the sale of goods. Therefore the rule laid down in art. 1235 properly

applies and the proof of the contract could not be had except through a writing signed by the party to be charged.

The appellants claim that it is a contract of mandate and not a contract of purchase or of sale of goods, and that they can bring in testimonial evidence since the question relates to a commercial affair.

This Court has already pronounced on that point in a case of *Trenholme* v. *McLennan*, 24 L.C. Jur. 305. It was decided in that case that a broker may very well prove through witnesses the mandate he has received from his client to buy or to sell, but that he may prove the purchase or the sale only by a writing signed by the party, according to art. 1235.

The plaintiff, as a broker, said the late Cross, J., could, by a written contract, made out and evidenced by his own signature, bind two parties to a sale by the one to the other through him, but when he attempts to bind one of the parties to himself, he requires, besides the verbal testimony as to his instructions, written evidence to establish the purchase, and this he cannot make for himself as against the party who instructed him to effect the purchase.

The appellants invoke in their favour the judgment of the Privy Council in the case of *Forget* v. *Baxter*, [1900] A.C. 467. That case was about the purchase and the sale of railway shares and not the sale of grain as in the present case. But railway shares are not considered as goods by the Statute of Frauds and do not fall under the provisions of that statute. Benjamin on Sales, 5th ed., 173: "It is necessary to inquire precisely what is meant by the term 'goods.'"

By sec. 62 of the Code, in that Act, "goods" include all chattels personal, other than things in action and money. Things in action include all personal chattels that are not in possession —stock, shares in companies, policies of insurance and debts, are therefore not "goods."

So in that case of *Forget* v. *Baxter*, *supra*, art. 1235 is not at all in question in the judgment. The only support for that judgment is art. 1233 and Sir Henry Strong, speaking for the Lords of the Privy Council, says that testimonial evidence was

QUE.
K. B.
CARRUTHERS v. SCHMIDT.
Archambeault, C.J.

admissible, even without the beginning of proof by writing, because the matter was a commercial one.

The transactions in question in the present case are in connection with goods, for the word "goods" certainly includes grain. Then, there is no writing between the parties. The appellants have not even given to the respondent any bought and sold notes, as is usually done in such cases. Therefore the appellants had no other way of proving than through the admissions of the respondent. Then, those admissions, as I already said, do not countenance the claim of the appellants.

But if the respondent's admissions do not completely prove the pretensions of the appellants, do they at least constitute a beginning of proof in writing, justifying the testimonial evidence?

This Court has already decided in two cases that the writing required by art. 1235 may well be replaced by an admission of the party, but that no beginning of proof in writing can be taken from such admission. It is the case of *Charest* v. *Murphy*, 3 Que. K.B. 376, and the case of *Massé* v. *McEvilla*, 4 Que. K.B. 197.

So appellants could not invoke the admissions of the respondent as a beginning of evidence in writing capable of allowing a testimonial evidence to complete it.

I am therefore of opinion that the judgment of first instance should be confirmed. *Judgment affirmed.*

SASK.
S. C.

GARTSIDE v. LELAND.

Saskatchewan Supreme Court, Haultain, C.J., Lamont and McKay, JJ. July 15, 1915.

1. SALE (§ III C—70)—RE-POSSESSION AND RESALE—ASSERTION OF OWNERSHIP—RESCISSION.

Where a vendor re-possesses an article sold under an agreement which provides for re-possession and re-sale, and acts in reference to the article in a manner not provided for in the agreement, the purchaser may treat the contract as rescinded, if the acts of the vendor amount to an assertion of unqualified ownership of the article or if, as a result of such acts, the value of the article is depreciated.

2. SALE (§ III C—70)—RE-POSSESSION AND RESALE—RESCISSION—RETURN OF PAYMENTS.

The re-possession of animals by a vendor in the exercise of his lien under a conditional sale and their subsequent re-sale subject to the ratification of the defaulting vendee, without exercising any rights of ownership over them by the vendor, does not operate as a rescission of the contract as to entitle to a return of the payments in restitution of *statu quo*.

SASK.

S. C.

GARTSIDE v. LELAND.

Lamont, J.

APPEAL from judgment for defendants in an action for the recovery of payments upon a rescission of sale.

The judgment of the Court was delivered by

LAMONT, J.:—On July 18, 1912, the defendants sold to the plaintiff a team of horses and a cow for $419.20, and took a lien note for the price payable on November 1, 1912.

The note contained the usual provision, that:—

> if default were made in payment, the defendants might take possession of the said goods and hold the same, or any renewal or renewals thereof as paid with interest, or sell them at public or private sale.

The plaintiff made certain payments on the note, but did not pay it in full. On October 11, 1913, while the plaintiff was absent at Brandon, the defendants took possession of the animals sold under their lien. On October 14 they sold them to one Barrett for $350, which amount was about the balance remaining unpaid under the defendants' lien. The defendants say this sale was conditional upon Gartside being satisfied with an informal sale, and making no objection thereto; but that, if Gartside was not satisfied, Barrett was to let them have the animals back, so that they could be returned to Gartside if he paid up; or, if not, that they might be sold by the sheriff.

A short time afterwards Gartside returned and was not satisfied, and demanded the return of the payments which he had made on the note. This the defendants refused, and later they obtained the animals back and put them up for sale at auction, after giving the notice required by the Act Respecting Lien Notes and Conditional Sales of Goods, and they sold the horses back to Barrett for $100 and the cow to another farmer for $50.

Gartside then assigned to the Bank of Commerce his claim to a return of the payments, and Gartside and the bank as plaintiffs now bring this action for a return by the defendants of the payments made on the animals, on the ground that the first sale to Barrett not being in accordance with the provisions of the Act Respecting Lien Notes and Conditional Sales of Goods was a rescission of the contract, which entitled Gartside to have returned to him the payments he had made.

It was also contended that the defendants had agreed to extend the time for payment in consideration for getting a quan-

SASK.

S. C.

GARTSIDE v. LELAND.

Lamont, J.

tity of flax, but this extension was not, in my opinion, sufficiently proven. The whole question here is:—Did the conditional sale to Barrett have the effect of rescinding the contract?

Where, under an agreement of sale, the property in goods sold and the right to re-possess and again sell them is reserved, to the vendor, a re-possession and subsequent sale by him, if made in accordance with the terms of the agreement and the provisions of the above-mentioned statute, is not a rescission of the contract but an exercise of the rights expressly given to him by the agreement; but if such re-possession or sale is not one provided for in the agreement, or is not carried out in accordance with the statutory provisions, and the purchaser is in possession of the goods, the re-possession and sale is to be interpreted as an exercise by the vendor of his common law right to rescind the contract upon the purchaser's default in payment, which rescission carries with it the right to the purchaser to be restored to his original position. *Fairchild* v. *Hammond*, 7 Terr. L.R. 20; *Sawyer-Massey* v. *Bouchard*, 13 W.L.R. 394.

The same result follows a re-possession without a re-sale if the vendor, although entitled to re-possess the goods, deals with them in such a way as to justify the purchaser in considering that he has rescinded the contract.

In *Long* v. *Preston*, 7 L.J.C.P. (O.S.) 14, the plaintiff purchased from the defendant a horse. Thinking the horse not to be as warranted he returned it to the defendant; the defendant sent it back, but the plaintiff again returned it. The defendant then used the horse, and offered it for sale to a third person. It was held that, by using the horse and offering it for sale, the defendant had rescinded the contract. In giving the judgment the Court said:—

> Although the defendant might have said that the horse was to be accepted without prejudice after the second return, yet it could not be so, as he actually used it and offered it for sale.

In *Sawyer-Massey* v. *Pringle*, 18 A.R. (Ont.) 218, the vendors under the agreement of sale retained the ownership of the machine until payment of the price, but the vendees had the right to possession and use. The agreement did not provide for a re-sale or re-possession. The vendors re-possessed the machine and re-sold it; it was held that the plaintiffs by the re-sale put it out of their power to fulfil their contract with the defendant, and that

on such sale being made the defendant was entitled to treat the contract as being rescinded.

In *Harris* v. *Dustin*, 1 Terr. L.R. 404, the agent of the plaintiff company re-possessed the machinery, with the intention of re-selling it to other parties. He did not make a sale, but he used it in his own farming operations and loaned the reaper to one Fowler, who cut 35 acres of crop with it. The machines were subsequently brought back to Moose Jaw, but were not properly taken care of. Three years later the defendant was notified that he could have the machines. He did not pay the balance due thereon, and plaintiffs sued him. In giving the judgment of the Court en banc, Wetmore, J., said:—

I am not prepared to hold that the mere fact, that the vendor, when he re-possessed himself of the article, did so with the intention of selling it, in itself would amount to a rescission of the contract or would justify the buyer in treating it as a rescission; nor am I prepared to hold that the additional fact, that he offered it for sale or attempted to sell it, would amount to a rescission. It is possible that, if he afterwards changed his mind and concluded to hold the buyer to his bargain, he might do so if the machine was in the same condition that it was when he took it from the buyer, or he had done nothing that would justify the buyer in treating his acts as amounting to a rescission. It is not, however, necessary to decide these questions. It seems to me the question is not whether the vendor has rescinded the contract, or whether or not he had any such intention. The question is—has the vendor so dealt with the article as to justify the buyer in considering that the vendor had rescinded the contract and in treating it accordingly. If the vendor wishes to hold the buyer to his agreement and enforce his claim against him for the price, he has simply the right to hold the article and he is bound to take care of it. The buyer has a right to insist that he shall not use it, and that he shall not allow other persons to do so, and that he shall take care of it. If he has got to take it back, he has a right to receive it just in the same condition as it was when taken out of his possession. Of course I would not now hold that putting necessary repairs upon it would put it out of the vendor's power to insist on the balance of the price being paid; but apart from that the buyer could insist upon its being kept in the condition it was when taken away. If not kept in that condition, or if used by the vendor or allowed by him to be used, the buyer would have the right to say:—You have by your conduct rescinded the agreement and I will not pay you the balance of the price.

In *North-West Thresher Co.* v. *Bates*, 13 W.L.R. 657, the agreement of sale provided for the re-possession and re-sale of the machine. The plaintiffs re-possessed and hired the machine to one Dolan. It was held that the plaintiffs had no right to hire it out, and that by so doing they had given the defendant the right to treat the contract as rescinded, as he was entitled to have the machine sold in as good condition as when taken out of his

SASK.

S. C.

GARTSIDE v. LELAND.

Lamont, J.

possession, and that although there was no evidence that Dolan had injured the machine, the mere use of it would depreciate its value to a greater or less extent.

From these authorities I draw the conclusion that, where a vendor re-possesses an article sold under an agreement which provides for re-possession and re-sale, and acts in reference to the article in a manner not provided for in the agreement, the purchaser may treat the contract as rescinded, if the acts of the vendor amount to an assertion of unqualified ownership of the article or if, as a result of such acts, the value of the article is depreciated.

In the case at bar, the defendants re-possessed the animals sold as they had a right to do under their lien. They delivered them to Barrett under an arrangement by which they were to become his property if Gartside were satisfied. There is no evidence that Barrett ever used the animals, or did anything in respect of them except take care of them; neither is there any evidence that by reason of the arrangement or Barrett's possession the animals were depreciated in value. The arrangement with Barrett was not an act of unqualified ownership; on the contrary, the arrangement showed that they were not dealing with the animals as owners, but were making the sale on condition only that Gartside would ratify it. When Gartside returned and refused to ratify it the defendants offered to deliver back to him the animals if he paid the balance due. I cannot see any act on the part of the defendants that would justify Gartside in considering that they had rescinded the contract. The defendants were therefore justified in putting the animals up for sale after complying with the statutory requirements. They were, however, not justified in selling the horses for $100, when they knew Barrett would give $300 for them, which was their reasonable value, and if questioned this sale might be liable to be set aside or the defendants held liable to account for the full value.

The appeal should be dismissed with costs.

Appeal dismissed.

DAVIES v. DAVIES.

ALTA.

S. C.

Alberta Supreme Court, Stuart, J. March 17, 1915.

1. CONFLICT OF LAWS (§ I J—147)—FOREIGN WILL—EFFECT OF MARRIAGE.

A will made in a foreign jurisdiction in which the testator was domiciled, and which under the foreign law was not revoked by the subsequent marriage of the testator, is valid as to lands in Alberta subsequently acquired if made in the form required by Alberta law, notwithstanding the subsequent marriage in the foreign jurisdiction in which he was domiciled; and, *semble*, the result would be the same even had he owned the real estate in Alberta at the date of the marriage.

[*Re Martin*, [1900] P. 211, referred to.]

Statement

CASE stated by agreement of the parties interested for the opinion of the Court. The facts as agreed upon are as follows:—1. John Vernon Davies, the above named deceased, was born in the State of Ohio, one of the United States of America. He was married in Montana and was divorced from his first wife, Isabel Davies, in 1901. By the said marriage he had four children, namely:—John Linden Davies, of Conrad, Montana; Lottie Davies Hoover, of Great Falls, Montana, now of 5 Gray St., Springfield, Mass.; Verna Isabel Davies Hurley, deceased, who left three children her surviving; Ernest Vernon Davies, of Conrad, Montana. 2. The said John Vernon Davies made a will bearing date August 5, 1903. 3. In October, 1903, the said John Vernon Davies married one Nora Asplin, in the State of Montana, and on June 15, 1904, he was divorced in Montana from the said Nora Asplin, and a certified copy of the said decree of divorce is annexed hereto. 4. At the time of the making of the said will and of the second marriage of the said John Vernon Davies, and subsequent divorce, the said John Vernon Davies was resident and domiciled in the State of Montana. 5. (The statements in this paragraph are immaterial.) 6. On or about August 10, 1906, the said John Vernon Davies, having removed to the Province of Alberta, entered for a homestead in the said Province of Alberta near Nanton, being the northwest quarter of section six (6) in township fifteen (15) range one (1) west of the fifth meridian, where he resided until his death. 7. On August 7, 1908, the testator died at Nanton, in the Province of Alberta, about 4 months before the completion of the term necessary to obtain patent for his homestead. 8. The said John Vernon Davies was never naturalized in the Dominion of Canada. 9. By letters of administration with will annexed, dated August 6, 1909, granted by the District Court of the District of MacLeod, administration with will annexed of

ALTA.

S. C.

DAVIES v. DAVIES.

Statement

all and singular the property of the said John Vernon Davies was granted to the Trusts & Guarantee Co., Ltd., a certified copy of the said letters, setting out the said will, being hereto annexed. 10. Annexed hereto is a true copy of the inventory of the property of the said John Vernon Davies coming into the hands of the said administrator. 11. The question for the determination of the Court is whether the said will was revoked by the second marriage of the said John Vernon Davies or whether the will is a valid will.

Patterson & McDonald, for Trusts and Guarantee Co.

Clarke, Carson & McLeod, for Ernest V. Davies.

Burns & Mavor, for next of kin.

Stuart, J.

STUART, J.:—The initial question is whether, in determining whether the marriage revoked the will, recourse should be had to the law of Alberta or to the law of the State of Montana. The two grounds upon which it was contended that the law of Alberta should be applied in determining the question were, first, that the chief property passing by the will was real estate within Alberta; and second (though I did not understand this to be very much pressed), that the testator died domiciled in Alberta.

In my opinion the law of Montana is the proper law to apply. The deceased was domiciled there at the date of his first marriage, at the date of his will and at the date of his second marriage. Neither at the date of the will nor at that of the second marriage did he apparently have any real estate in Alberta. I am quite unable to see what possible relation to the question of the effect upon the will of his subsequent marriage, the fact that long afterwards he acquired some real estate in Alberta can have. If the marriage revoked the will, then it did so when it took place. If it did not revoke the will, then the will continued to be a good one if otherwise valid.

The exact point invoked seems to be dealt with in a note in Dicey, Conflict of Laws, 2nd ed., at pp. 505–6, where it is said:—

> The applicability to a will of English land of the rule that marriage is a revocation thereof may well appear to depend on the *lex situs*, but that matter is (*semble*) governed by the law to which husband and wife become subject at the time of the marriage, *i. e.*, generally speaking the law of the matrimonial domicile.

The author refers to *Re Martin, Loustalan* v. *Loustalan*, [1900]

ALTA.
S. C.
DAVIES v. DAVIES.
Stuart, J.

Pr. 211. The case is not very directly in point, but on p. 240 Vaughan Williams, L.J., says:—

> The rule of the English law which makes a woman's will null and void on her marriage is part of the matrimonial law and not of the testamentary law.

This statement may seem strange when it is on the Wills Act that the direct enactment is made that marriage revokes a will. But I rather incline to the view that the explanation of what was in the Judge's mind is to be found in the circumstances that in that case the Court was enquiring into the question whether in an English Court the law of France or the law of England should be applied and that the law affecting the marriage might well be that of France and the law affecting the will might be that of England or *vice versa*. What he meant was, I think, that for the law relating to the effect of marriage upon a will an English Court must go to the law of the matrimonial domicile and not to the law of the place where the property affected by the will is situated.

It no doubt is true that when the validity of a will is in question with respect to the requisites of form and execution, this matter will be determined with respect to realty in Alberta according to Alberta law and that it may be held bad in respect to that and yet be a good will as to personality if validly made according to the law of the testator's domicile. *Pepin* v. *Bruyère*, [1902] 1 Ch. 24. But the question of validity in respect of form as well as questions of interpretations are very different from the question whether a will, perfectly valid as to form even when it is to be applied to real estate in Alberta, was revoked by a subsequent marriage. As Vaughan Williams, L.J., says, that it is a matter not of testamentary law but of matrimonial law.

It is easy to misunderstand the decision in *Loustalan* v. *Loustalan*, [1900] P. 211. The main contest was over the question of the domicile of the testatrix and her husband. The controlling opinion upon appeal was that the domicile was English at the time of the marriage and the majority therefore held that even with regard to moveables, the marriage revoked the will. Lindley, M.R., in his dissenting opinion held the will not to have been revoked with respect to moveables because he thought the matrimonial domicile was French and by French law the will was not revoked by marriage. But he expressly said (p. 234) that in his opinion the will could not be held good as to the leaseholds which were real estate and to which the *lex domicilii* did not apply.

ALTA.

S. C.

DAVIES v. DAVIES.

Stuart, J.

The majority on account of the view they took of the question of domicile did not need to take much notice of the distinction between moveables and immoveables. It would seem to me, however, that Dicey is right in the suggestion he makes in the note referring to the case which I have quoted. If the rule as to revocation of a will by marriage is part of the matrimonial law and not of the testamentary law, it is difficult to see why or how there can be any distinction in this respect between moveables and immoveables. It is true that in a sense the rule as applied to a woman's will may be looked upon as more peculiarly part of the matrimonial law than as applied to a man's will because at common law it was only a woman's will, but not a man's will which was revoked by marriage. The revocation of a man's will by marriage is statutory law. Marriage had not such effect upon a man's will prior to the Wills Act. But in my opinion the extension of the rule to a man's will by statute which deals with the requisites of a proper will does not prevent the rule as applied to a man's will from also being looked upon as part of the matrimonial law.

I am bound to say that there would appear to me to be something exceedingly illogical if not fatuous in saying that although a will may continue to be perfectly good after marriage, because at the time of marriage no real estate in this province was possessed by the testator, yet the very moment he takes some of his money, his personal property, and turns it into real estate in Alberta, then in respect to that the will was revoked. Even though the testator living and domiciled in Montana may not have had the slightest intention at the date of his marriage of acquiring Alberta real estate, yet the Alberta Court must hold that with respect to any property which he might in future there acquire the will was revoked by the marriage. Of course if he had owned real estate in Alberta at the date of the marriage then the absurdity would not be so great; but even in that case I think the only reasonable rule to apply is the rule prevailing in the matrimonial domicile. This case seems to furnish an opportunity for the Court to depart somewhat from the rigid rules which a reverence for real estate and everything connected with it has introduced in England. Of course English law prevails here by virtue of the statute, but when there is no direct precedent to be found as

there appears not to be, I think it safe to adopt the suggestion of such an authority as Dicey, particularly when the suggestion appeals to one as conformable to reason, convenience, and common sense.

I hold therefore that to decide whether the marriage revoked the will we ought to look to the law of Montana. It was part of the stated case not quoted above that the parties agreed that I should take the revised Code of Montana of 1907 as sufficient proof of the law of Montana; sec. 4747 of that Code reads as follows:—

> If after making a will the testator marries and the wife survives the testator the will is revoked unless provision has been made for her by marriage contract or unless she is provided for in the will or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation must be received.

By clause 4 of this will the testator said:—

> If I should again marry, as it is now my purpose to do, and if no children should be born to me as a result of said contemplated marriage, then and in that event I give, devise, and bequeath unto my proposed wife and unto my son by my divorced wife, Ernest Vernon Davies, all the said rest, residue and remainder of my estate, share and share alike.

The disposition already made only amounted to the sum of $16 in all, so that he practically devised one-half of his estate to his intended wife.

Upon the argument two things were taken for granted. First, that there were no children of the second marriage, and second, that the testator in fact married the person to whom he was referring in the above-quoted clause from the will. He does not mention her name in the will. Even if there had been issue, provision is made for them in the will and a preceding clause of the Montana Code saves the will in such a case. The will was made on August 5, 1903, and the marriage was in October, 1903. Upon the assumption that he married the person intended, the effect of the section quoted is clearly to save the will and prevent its revocation by the marriage.

With regard to a possible change of domicile to Alberta, I think the effect of sec. 33 of the old North West Territories Act, which is still in force here, is that a change of domicile will not revoke a will. Recourse to Lord Kingsdown's Act is quite unnecessary upon that point.

The administrator with the will amended is therefore advised

ALTA.

DAVIES v. DAVIES.

that the will and letters of administration still stand good. The costs of all parties will be paid out of the estate.

Order accordingly.

SASK.

S. C.

NATIONAL TRUST CO. v. NADON.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown and Elwood, JJ. January 9, 1915.

1. ASSIGNMENTS FOR CREDITORS (§ III B—25)—OFFICIAL ASSIGNEE—ACTIONS BY—ACCRUAL OF ACTIONS.

An official assignee under the Bulk Sales Act, Sask., is not entitled to sue for money or property until it has actually been transferred or assigned to him.

2. ASSIGNMENTS FOR CREDITORS (§ III B—25)—GENERAL ASSIGNEE—ACTIONS BY—DEBTOR'S CONTRACT—PRIVITY—JOINDER.

In an action by the approved assignee for creditors under the Assignments Act, Sask., to recover on the debtor's contract with a third party where there has been no assignment to raise a privity of contract with the third party in favour of the plaintiff, leave may be given to add the debtor as a party to obviate the objection of want of privity.

E. B. Edwards, K.C., for appellant.

The judgment of the Court was delivered by

Elwood, J.

ELWOOD, J.:—The agreement under which this cause of action arises was one entered into between the St. Regis Hotel Co. Ltd., as vendor, and Joseph Paquette, as purchaser, but was executed by the St. Regis, Ltd., at vendor, and the evidence shews that the correct name of the vendor is The St. Regis, Ltd. At meetings of the directors and shareholders of the St. Regis, Ltd., the sale was ratified. The evidence also shews that in signing the above agreement the said Joseph Paquette was acting for and on the authority of the defendant. The transfer of the land covered by the agreement was made to the defendant, the liquor license for the hotel situated on the said land was assigned to the defendant, the defendant executed a mortgage and signed promissory notes given to secure the purchase-price of the property covered by the agreement, and the defendant entered into possession of the property covered by the agreement and thereafter continued to treat the same as his own. There can be no doubt, from all of the evidence, that Paquette, in signing the agreement, did so as agent for the defendant, and that the intention was that the agreement was to be the agreement of the defendant. The agreement was one which did not require to be under seal, and in such case the appointment of Paquette did not

require to be under seal, or in fact in writing, and in my opinion the defendant can be sued under the agreement. See Hals., vol. 1, par. 339; *Hunter* v. *Parker*, 7 M. & W. 322, at 344; Hals., vol. 1, pars. 439 and 440. The agreement above referred to *inter alia* provides as follows:—

> The vendor agrees to furnish the purchaser with all declarations required under the Bulk Sales Act of the Province of Saskatchewan not later than August 27, 1913, and further to satisfy the purchaser that all the requirements of the Bulk Sales Act have been fully complied with, and that all mortgagees or other parties having encumbrances or claims against the property hereby sold are provided for and have been satisfied to the extent that the sale hereby agreed upon cannot be annulled.

It was contended that the St. Regis, Ltd., had not satisfied the purchaser that all the requirements of the Bulk Sales Act had been fully complied with. The property agreed to be sold by the agreement was lot 6 in block F in a subdivision of Prince Albert, together with the buildings erected thereon and all furniture, furnishings and fittings then in or used in connection with the hotel erected on the said ground, and the license for the hotel, and the goodwill of the said hotel, and all the interest of the vendor in a party-wall agreement; and the purchaser further agreed to take over the stock of wines, liquors, etc., and supplies then in the hotel at invoice price. The money which is now being sued for does not cover any portion of the said stock of wines, liquors or supplies, and no question arises with respect to them. The Bulk Sales Act sets forth what would be covered by that Act, and in my opinion none of the property sold, with the exception of the liquor license, would be covered by the Act, and, therefore, with the exception of the money to be received for the transfer of the liquor license, it would be unnecessary to furnish the purchaser with any evidence that the bulk sales Act had been complied with. The price that was to be paid for the transfer of the liquor license was unascertained, but in any event the price, I apprehend, would not be more than the sum which would represent the proportionate cost of obtaining a license for the unexpired portion of the then current term of the license. This amount would be very much less than the portion of the purchase-price which had been transferred to the plaintiff by the above mortgage and notes. The evidence shewed that the defendant had been furnished with the declaration required by

SASK.

S.C.

NATIONAL TRUST CO. v. NADON.

Elwood, J.

the Bulk Sales Act, and that on September 8, 1913, 60% of the creditors of the St. Regis, Ltd., executed a consent to the sale of the property. Objection, however, was made that that consent was not to a sale in the exact terms of the agreement of sale; that the agreement of sale provided for payment of one or two accounts in full, and that the consent did not specify that these accounts were to be paid in full. I do not, however, entirely agree that that is the effect of the consent; but, whether it is or not, the sum which would be required to pay these particular claims in full would still leave in the hands of the plaintiff a sum much in excess of the money which would be payable under the Bulk Sales Act; and in fact the agreement provided that the sums which were to be applied in payment in full of the above creditors were to be retained out of the purchase-price by the purchaser, and the mortgage and promissory notes above referred to were in addition to the sums which were retained to pay these other creditors in full. It seems to me, also, that the defendant cannot now raise the question of non-compliance with the Bulk Sales Act. He obtained a transfer to the property, registered the transfer, executed the mortgage and promissory notes, entered into possession of the property, made very material alterations in the building, took a transfer of the license, and has since occupied the property. Under these circumstances it seems to me that in any event he has waived his right to insist upon any further compliance with the Act. There was a further objection that there were a number of encumbrances on the property, and these had not been removed. The mortgage which the defendant executed expressly provides that the mortgagee will, out of the proceeds of the mortgage, pay off the existing mortgages, liens and encumbrances; and it was certainly the intention of the parties that these encumbrances should not be paid off except out of the mortgage. The evidence shews that Mr. Adam, who was acting for all parties, had arranged with the holders of the various mortgages and liens for extensions until the moneys could be collected in. It was objected further that there could be no right of action with respect to the commission and the various sums payable to the Banque d'Hochelaga, Dangerfield & Sons, and Dangerfield, because they were to be re-

tained out of the payment now sued for. So far as the commission is concerned, it has been paid, one-half of it by a promissory note given by the defendant, and the other by moneys paid by the plaintiff with the knowledge of the defendant. So far as the other sums are concerned, the defendant has paid these sums, and the plaintiff, or rather the St. Regis, Ltd., had the right to compel the defendant to pay these sums, and, if they were not paid within a reasonable time could, it seems to me, bring an action for them. It was also objected that there was no pledge, charge or lien in favour of the plaintiff of the securities mentioned in the statement of claim. The evidence shews that the defendant, at the time of the assignment of the license, was to make the cash payment sued for. At the time of the assignment this cash payment was not made, but the defendant informed the plaintiff that these securities were in the bank for the purpose of raising the money, and that the money would be paid out of these securities; and I am satisfied that the assignment of the license was made in consideration of that undertaking, and I am, therefore, of the opinion that the St. Regis, Ltd., is entitled to have these securities used for the purpose of realizing this sum.

At the trial it was objected that the plaintiffs had no right to sue the defendant, that there was no privity of contract, there had been no assignment. When this objection was taken, the trial Judge expressed the opinion that there did not require to be any transfer, that the plaintiff had the right to sue. On the bringing of this appeal counsel for the defendant took the above objection. I am of opinion that the present plaintiffs have no cause of action against the defendant. The contract sued on is with the St. Regis, Ltd., and there was no privity of contract between the plaintiff and the defendant. The Bulk Sales Act, even if it applied to the cause of action, does not give the plaintiffs the right to sue. The official assignee under that Act is not entitled to take or sue for the money or property until it has actually been transferred or assigned to him. Counsel for the plaintiff asked that if the objection were well taken, leave should be given to the plaintiff to amend by adding the St. Regis, Ltd., as a party plaintiff. The defendant's counsel opposed this, and among other things stated that while there had been evidence

SASK.
S. C.
NATIONAL TRUST CO. v. NADON.
Elwood, J.

offered on behalf of the defendant on various issues raised, yet the defendant, having been satisfied that the plaintiff was not entitled to sue, may not have offered all the evidence that could have been offered on the various issues, and intimated that a trial between the St. Regis, Ltd., and the defendant would raise issues other than those raised in the present action, and in any event the defendant would possibly be able to produce evidence in addition to the evidence adduced in the previous action. I am of opinion that this amendment should be allowed. The real issue between the parties was not a question of whether or not the plaintiff had the right to sue, but was whether or not any person was entitled to recover this money from the defendant. The pleadings shew that the action was practically brought on behalf of the St. Regis, Ltd., and on behalf of the creditors of the St. Regis, Ltd., and, therefore, under all the circumstances of this case, the amendment should be allowed. See our Rules Nos. 31, 32, 41; Annual Practice (1914), pp. 214-15; and the case of *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K.B. 485. At p. 487 Collins, M.R., said:—

> The plaintiff commenced an action against the defendants, and a question arose whether the plaintiff had made an absolute assignment of his claim against the defendants, or only an assignment by way of charge only, and on the decision on that point depended the plaintiff's right to bring an action. Wright, J., took one view of the case, and the Court of Appeal took another, and that in itself is evidence that the plaintiff had made a *bonâ fide* mistake in commencing the action in his own name. So long as the doubt as to who should bring the action was *bonâ fide*, there could be no question as to the jurisdiction of the Court.

That case seems to me to be directly in point. In view of the statement made by counsel for the appellant as to what the defendant might be able to prove if the issue were between the St. Regis, Ltd., and the defendant, I think that there should be a new trial of this case, but as, in my opinion, all questions which could be raised between the defendant and the St. Regis, Ltd., were raised and gone into on the trial between the plaintiff and the defendant, and as it might appear at the trial to be had between the St. Regis, Ltd., and the defendant that no new questions are raised and practically no new evidence had been adduced, I would leave it to the Judge on the trial to be had between the St. Regis, Ltd., and the defendant to decide the ques-

tion of costs of the former trial, of the new trial and of this appeal. The St. Regis, Ltd., should, therefore, be added as a party plaintiff, and they should have the right to make such amendments to the pleadings as would be rendered necessary in consequence of their being added as party plaintiffs. The defendant will, of course, also have the right to amend his pleadings. *Judgment accordingly.*

SASK.

S.C.

NATIONAL TRUST CO. v. NADON.

Elwood, J.

BY-TOWN & AYLMER UNION CO. v. BLACKBURN.

QUE.

K.B.

Quebec Court of King's Bench, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. February 26, 1915.

1. TOLLS AND TOLL ROADS (§ I—9)—POWERS OF TOLL ROAD COMPANY—EXEMPTED VEHICLES—AUTOMOBILES AND TRUCKS.

Toll roads are public roads where anybody has the right to pass, provided tolls authorized by law are paid, but a toll road company can demand a toll only on vehicles and animals mentioned in the Acts governing it, and the enumeration of those carriages and animals in art. 6386, R.S. 1909, not including automobile trucks and automobiles, and a by-law of a toll company imposing a toll on vehicles exempted by the Acts is *ultra vires* and null.

Statement

APPEAL from judgment of Chauvin, J., Superior Court, maintaining injunction against collection of tolls. Affirmed.

Aylen & Duclos, for appellant.

Devlin & Ste. Marie, for respondent.

Archambeault, C.J.

SIR HORACE ARCHAMBEAULT, C.J.:—The appeal is from a judgment which has maintained a petition for an injunction by the respondent against the appellant company. The question submitted is as to the right of the appellant, who is the owner of a toll road, to impose a toll on automobile trucks and automobiles.

The tolls that may be imposed by the companies organized for the building of roads are regulated by arts 6386 *et seq.* R.S. 1909. Those articles stipulate, amongst other things, that the tolls are determined by the directors of the company, and that the tolls so determined must be approved of and confirmed by the Lieut.-Governor in Council. Those provisions are the reproduction of old statutes whose origin dates back to 1849. The Statutes of United Canada, 12 Vict. ch. 56, contained provisions similar to those of the R.S. 1909.

The appellant company was constituted a corporation about 1849, for the purpose of acquiring, constructing and macadamis-

QUE.

K. B.

BY-TOWN UNION CO. v. BLACKBURN.

Archambeault, C.J.

ing a public road between Ottawa (Ontario) and Aylmer (Quebec). It has in fact built that road.

In 1850, a by-law was adopted by the directors of the company to determine the tolls that could be demanded, and that by-law was approved by the Governor in Council. At that time, automobile trucks and automobiles were unknown. No mention of them is made in the by-law. That by-law has never been amended or modified since 1850. The company tells us in its factum that a by-law has been voted establishing a toll for automobiles and automobile trucks which has been submitted for approval to the Lieut.-Governor in Council, but that the latter has refused or neglected to confirm it. The reason probably is because the government has not the right to confirm such a by-law. It is a franchise that is here in question; the government can grant it only within the limits laid down in the law. Then, arts. 6386 and 6390 R.S. 1909, permit the toll road companies to collect tolls only on carriages drawn by horses or other draft animals, and on certain animals, sheep, pigs, horses and cattle; those tolls must not exceed a certain rate and they must be approved by the Lieut.-Governor in Council. If a by-law imposes tolls outside those limits, for example on automobiles or automobile trucks, as in the present case, it is *ultra vires*, and the government cannot approve it.

So, in the United States, it has been decided that the right to impose tolls on carriages does not include the right to impose tolls on bicycles. Art. 6386 of our R.S. 1909 would have to be modified to properly apply to automobiles.

The company claims, moreover, that it is the owner of the road, and that it can prevent automobiles from using such road. This claim is unfounded. Toll roads are really public roads where everybody has the right to traverse, provided authorized tolls are paid. The same claim has been raised in the States. In a case of *Scranton* v. *Laurel Run Turnpike Co.*, 38 Cyc. 364, it has been decided that a toll road being a public road, automobiles cannot rightly be prevented from passing over them. "Since a turnpike road is a public highway a turnpike company cannot exclude automobiles from passage over its road."

For those reasons, I am of opinion that the judgment of the Court of first instance is well founded and must be confirmed.

QUE.

K. B.

BY-TOWN UNION CO. v. BLACKBURN.

Cross, J.

CROSS, J.:—It is true, as asserted for the appellants, that it is provided in sec. 22 of the Act that the road "shall be vested in such company and their successors." The effect of that, however, would appear to be that the vesting does not stand in the way of the road being a public highway: *Mun. Council of Sydney* v. *Young*, 67 L.J.P.C. 40.

The same argument was unsuccessfully advanced in *Smith* v. *Kynnersley*, [1903] 1 K.B. 788.

The question thus comes to be whether or not the appellants have shewn a title to enact payment of tolls for passage of respondent's motor vehicle on the road. It is a question of statutory construction.

It may be said generally, in regard to such enactments, that if the statute indicates that the legislature intended that tolls should be exigible for passage of all kinds of vehicles, Courts should not be narrow or precise about the particular name by which the vehicle may happen to be known, but will read it as applying to any vehicle which is called by a name which corresponds in the natural course of meaning to the language used: *Simpson* v. *Teignmouth & Sheldon Bridge Co.*, [1903] 1 K.B. 405.

In favour of the appellant's case it can be pointed out that as already indicated, the Act provides that the road "shall be vested in the company," and that the president, directors may fix "the tolls to be received from all persons passing and repassing with horses, carts, carriages and other vehicles." That would be wide enough to take in the respondent's case because he clearly was a person passing with a carriage or other vehicle. But it is also provided that no by-law or regulation fixing rate of tolls is to have force or effect until it has been confirmed by the Lieut.-Governor in Council, art. 6390, and in art. 6386, it is enacted that the tolls authorized to be levied are not to exceed the rates there set out. In the list, mention is read of any vehicle drawn by two horses or other draught animals, and any vehicle drawn by more than two horses or other draught animals and a vehicle drawn by one horse or other draught animal, there is no mention of vehicles otherwise than in connection with horses or draught animals. Now, in view of these enactments,

QUE.

K. B.

BY-TOWN UNION CO. v. BLACKBURN.

Cross, J.

it would seem meticulous to say that because a vehicle happens not to be drawn by one or more draught animals no toll is exigible, but the tolls are to be formulated by the president and directors and the by-law or rule must be conformed as stated, and unless this is done they are not exigible, so that notwithstanding the argument of appellant's counsel to the contrary, we must see what there is in the way of a tariff of tolls. The tariffs put of record make provision for vehicles drawn by one, or by two horses or beasts of burden, and add a rate for every additional horse.

In these circumstances I do not find any applicable or available provision made for determination of a rate to be collected for passage of a vehicle propelled by gasoline.

It appears to me that the appellant's defence fails, more because of absence of an applicable tariff than because the law does not authorize the imposition and collection of tolls for passage of motor waggons. I would dismiss the appeal.

Judgment affirmed

SASK.

S. C.

ROAF v. G.T.P. TOWN AND DEVELOPMENT CO.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown, Elwood, and McKay, JJ. July 15, 1915.

1. LAND TITLES (§ IV—40)—CAVEATS—RESTRICTIVE BUILDING COVENANTS—DISCHARGE OF.

A restrictive covenant as to the use of the property contained in an agreement for the sale of lots stipulating its continuance during the currency of the contract will cease to be effective immediately upon the issue of a transfer to the land on the surrender of the contract, and a caveat thereof lodged at the land titles' office will be discharged.

[*Re Jamieson Caveat*, 10 D.L.R. 490, followed.]

2. LAND TITLES (§ VII—70)—CAVEATS—APPLICATION TO DISCHARGE—SUMMARY PROCEEDINGS.

An application to discharge a caveat may be proceeded under the Land Titles Act in a summary way if no objection to the proceedings is taken before the Local Master.

Statement

APPEAL from an order of the Local Master.

J. J. Fyfe, for appellant.

T. D. Brown, for respondents.

The judgment of the Court was delivered by

Brown, J.

BROWN, J.:—The respondents sold the lots above described to the appellant under an agreement of sale which provides for payment of the purchase-price by instalments. The agreement contained, among others, the following provisions:—

That he will not use the property or any building thereon for the purposes of a livery stable, blacksmith shop or other purposes of that nature, or for any use or occupation of an offensive, noisy or objectionable character. The land commissioner of the company shall be sole judge of the fitness or otherwise of such use or occupation.

If the purchaser or his legal representatives or assigns shall pay the several sums of money aforesaid punctually at the several times above fixed and shall in like manner strictly and literally perform all and singular the aforesaid conditions, then he, his heirs or assigns approved as hereinafter provided, upon request at the office of the land commissioner of the company at the City of Winnipeg, and the surrender of this contract, shall be entitled to a deed of transfer conveying the said premises in fee simple freed and discharged from all incumbrances but subject to the reservations, limitations, provisoes and conditions expressed in the original grant from the Crown, and subject to the reservation of mines, minerals, coal or valuable stones in or under the said land.

The company lodged a caveat in the proper land titles' office founded on the restrictive covenant as to user set out as aforesaid, and subsequently, upon payment of the purchase-price, issued a transfer in the appellant's favour, subject to the caveat aforesaid. The appellant registered this transfer, and a certificate of title duly issued in his favour for the lots in question, subject to the caveat. The title apparently remained in this condition for several years, when eventually the appellant took out a summons under sec. 129 of the Land Titles Act before the Local Master at Saskatoon calling upon the respondents to shew cause why the caveat should not be withdrawn. The Local Master held that the respondents had, by virtue of the restrictive covenant, an equitable interest in the land, that they had a right to protect such interest by way of caveat, and that, as the transfer and certificate of title were issued subject to the caveat, the caveat should not be removed. He therefore dismissed the appellant's application; and from his decision this appeal is taken.

The restrictive covenant in question must be read in the light of the other provisions of the contract. Under the contract the appellant could not demand his transfer until he surrendered the contract, and upon such surrender he became entitled to a transfer of the lots freed and discharged of all incumbrances and subject only to such reservations as were expressed in the original grant from the Crown. In the light of

SASK.
S. C.
ROAF
v.
G.T.P., ETC., CO.
Brown, J.

these provisions it seems clear that the restrictive covenant was to apply only during the currency of the contract, and that immediately the contract was surrendered and a transfer issued, the restrictive clause was no longer to be effective. To hold otherwise is, in my opinion, to contradict the very terms of the contract itself. This view is supported by the judgment of the majority of the Court in the case of *Re Jamieson Caveat*, 10 D.L.R. 490. If this view is correct, then the respondents could not extend their rights by the lodging of a caveat in the Land Titles office or by issuing a transfer subject to the caveat so filed. Nor can the appellant be prejudiced by accepting such transfer and having the certificate of title issue thereon. The caveat, being founded on the contract, must fall with it. If the restrictive covenant is effective only up to the time of the issue of the transfer, a caveat founded on such covenant must also cease to be effective after that time.

It was contended by counsel for the respondents that the rights of the parties herein should not have been determined in this summary way by proceeding under the Land Titles Act, and that the judgment of the Local Master in dismissing the application should be sustained on that ground. It does not appear, and it was not contended by counsel, that this objection was taken before the Local Master. All parties seem to have been quite satisfied that he should deal with it in this summary way. For that reason, coupled with the fact that full justice can be done between the parties in this case under such procedure, I am of opinion that this contention cannot now be given effect to. I do not wish to be understood as holding that this is a case which in any event should not be dealt with summarily.

In the result the appeal should be allowed, the caveat discharged, and the appellant should have his costs of appeal and of the application to the Local Master. *Appeal allowed.*

G.T.P. DEVELOPMENT CO. v. MOOSE JAW SECURITIES CO.

Brown, J.

BROWN, J.:—In this case a caveat similar to the one referred to in the *Roaf* appeal was ordered removed by my brother Newlands, and, for the reasons given in the *Roaf* case, this appeal should be dismissed with costs. *Appeal dismissed.*

MASSEY-HARRIS CO. v. BAPTISTE.

ALTA.

S. C.

Alberta Supreme Court, Harvey, C.J., Beck and Simmons, JJ. October 5, 1915.

1. BILLS AND NOTES (§ IV A—85)—JOINT MAKERS OF LIEN NOTE—DEFAULT BY ONE—NECESSITY OF NOTICE TO OTHER—LIABILITY.

The joint maker of a lien note given for the sale of a plow purchased by another is not entitled to notice of default of the principal obligor in order to hold him liable on the note.

[*Hitchcock* v. *Humfrey*, 12 L.J.C.P. 235; *Carter* v. *White*, 25 Ch. D. 666, applied; *Black* v. *Ottoman Bank*, 15 Moore P.C. 472, referred to.]

2. PRINCIPAL AND SURETY (§ II—15)—RIGHTS OF SURETY—NOTICE OF DEFAULT—FAILURE TO STIPULATE.

A surety is not entitled to notice of the principal debtor's default unless there is a contract to that effect express or implied.

Statement

APPEAL from judgment for defendant in action on lien note.

F. D. Byers, for plaintiff.

B. Pratt, for defendant.

Harvey, C.J.

HARVEY, C.J.:—The facts of this case appear in the reasons for judgment of my brother Simmons, and the law applicable to them is practically all to be found in the reasons for judgment in *Carter* v. *White*, 54 L.J. Ch. 138. On pp. 139 and 140, Cotton, L.J., says:—

> The principle is this, that if there is a contract, express or implied, that the creditor shall acquire or preserve any right against the debtor, and the creditor deprives himself of the right which he has stipulated to acquire, or does anything to release any right which he has, that discharges the surety; but when there is no such contract, and he only has a right to perfect what he has in hand, which he does not do, that does not release the surety, unless he can shew that he has received some injury in consequence of the creditor's conduct . . . a surety is not discharged merely by the negligence of the creditor. If he had required them (*i.e.*, the securities) to be enforced, and the creditor had refused, the sureties might have been discharged; but he is not discharged merely by the laches of the creditor—for this reason, that the sureties may at any time pay off the debt, and sue the debtor in the name of the creditor or call on him to sue.

Continuing he refers to *Hitchcock* v. *Humfrey*, 12 L.J.C.P. 235, referred to by Lindley, L.J., where it was expressly decided that the surety for payment of a bill is not discharged though he has received no notice of dishoncur of the bill. The same thing was laid down in *Black* v. *The Ottoman Bank*, 15 Moo. P.C. 472. It was there said:—

> The cases referred to upon bills of exchange turn upon a different principle, viz., that by mercantile usage a contract is implied by the holder to give notice of dishonour within a certain time to the drawer or endorser who stand in the situation of surety to the acceptor.

ALTA.

S. C.

MASSEY-HARRIS CO. v. BAPTISTE.

Harvey, C.J.

The law merchant requires notice to be given to the drawer or endorser, not because he is a surety, but because of the particular form of the mercantile paper evidencing the contract. In the present case, in form the defendant is a maker of the note, if indeed it is to be considered a note at all, though as between himself and the other maker he is only surety. There is nothing to indicate that if the plaintiffs had taken proceedings against the principal debtor they could have recovered anything, and in consequence that the defendant has been at all damnified by their delay, and it is quite clear from the above quotation that mere delay in no way relieves the surety. The plaintiffs are in no way to blame because the defendant saw fit to make his inquiries as to the payment of the note from his co-maker instead of from them, and if he saw fit to rely on the statements of Halberg he has only himself to blame. It is clear that he has no legal right to notice of the default, and there appears no legal ground, therefore, upon which he can be relieved of his liability.

The appeal should be allowed with costs and judgment entered for the palintiffs for the amount of the note with interest and costs. As there are other notes apparently still unpaid in respect of which there may be other sureties no directions can be given with respect to the machinery or the appropriation of the proceeds of a sale of it.

Beck, J.

BECK, J.:—I concur.

Simmons, J.

SIMMONS, J.:—I am of the opinion that this appeal should be allowed.

The facts are briefly that one Halberg purchased a gang-plow from the plaintiffs and gave therefor lien notes due respectively on July 1, August and October, 1912, and October, 1913. The note of July 1, 1912, was paid by Halberg, but none of the other notes were paid. The note in question was signed by the defendant as joint maker with Halberg. The plaintiffs under the terms of the lien providing for repossession in case of default in payment, repossessed the plow and subsequently called upon the defendant for payment. In the meantime Halberg left the country, but before leaving Halberg told the defendant that the note in question was paid. The trial Judge held that the de-

fendant was entitled to notice of Halberg's default within a reasonable time and that since the plaintiffs had not notified the defendant of such default until eleven months had elapsed that under the circumstances this was an unreasonable time, and judgment was given for the defendant dismissing the plaintiffs' claim.

The law as to notice is that the surety is not entitled to notice of the principal debtor's default unless there is a contract express or implied that such notice shall be given: *Hitchcock* v. *Carter*, 12 L.J.C.P. 235; *Carter* v. *White*, 54 L.J. Ch. 138; *Guardians of Mansfield Union* v. *Wright*, 9 Q.B.D. 683.

In the present case the defendant signed the note in question as joint maker with Halberg and did so through sympathy for Halberg. It is quite clear he was in the position of a guarantor generally and there was no contract express or implied limiting the suretyship and no obligation upon the plaintiff to give notice of default by Halberg.

The lien note in question entitles the plaintiffs in case of default to "take possession of the property and hold it until this note is paid or sell the said property at public or private sale, the proceeds to be applied in reducing the amount unpaid thereon."

There has been no alteration of the contract between the plaintiffs and the principal debtor and the case does not come within the rule of *Pearl* v. *Deacon*, 24 Beav. 186, and no part of the security has been rendered unavailable: *Taylor* v. *Bank of New South Wales*, 11 A.C. 596, 603, and the surety is not, therefore, discharged.

Appeal allowed with costs, and judgment to be entered for the plaintiff for the claim and costs. *Appeal allowed.*

SCHELL v. CITY OF REGINA.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. July 15, 1915.

1. MASTER AND SERVANT (§ II A 4—94*a*)—INJURY TO CONDUCTOR—POLE NEAR TRACK—LEAVING CAR TO ADJUST TROLLEY.

In an action by a conductor of a municipal owned street railway for injuries sustained by colliding with a metal standard close to the track while adjusting the trolley pole, the fact of the close proximity of the standard otherwise properly constructed, or that because of the overcrowding of the vestibule he is compelled to leave it when ad-

SASK.

S. C.

SCHELL v. CITY OF REGINA.

justing the trolley pole, or the violation of rules of operation which are not pleaded, does not support a jury's finding of negligence against the defendant.

2. NEW TRIAL (§ I—1)—RIGHT TO—ACTION FOR NEGLIGENCE—INSUFFICIENT EVIDENCE.

Where the evidence of negligence is not convincing and so intimated by the trial judge, or where the jury's findings inferentially negative the existence of negligence, the court will not grant a new trial.

[*Cobban* v. *C.P.R.*, 23 A.R. (Ont.) 115; *G.T.R. Co.* v. *McKay*, 34 Can. S.C.R. 81, 85; *Andreas* v. *C.P.R.*, 7 Terr. L.R. 327, 37 Can. S.C.R. 1, applied.]

Statement

APPEAL from judgment in favour of plaintiff in action for personal injuries.

G. F. Blair, for appellant.

P. M. Anderson, for respondent.

Brown, J.

BROWN, J.:—On August 21, 1914, and for some time prior thereto, the plaintiff was a street car conductor in the employ of the defendants, hereinafter called "the city," who own and operate a system of street railways in the city of Regina. The car which the plaintiff had charge of was known as a "Blue line" car, and was operated on 13th Ave. and Broad St. north. On Broad St. there is a double track, the cars going north using the east track, and those going south the west track. That portion of Broad St. over which the plaintiff's car operated passed under the tracks and yards of the C.P.R. Co., through what is known as the Broad St. subway. On the morning of the date in question, the plaintiff was informed that, instead of using the east track through the subway when going north, he was to turn off at a point just about the beginning of the subway and use the west track, the reason being that the engineering department of the city was paving that portion of the street where the east track was located. The cars are run by electric motive power applied through overhead wires, and on the street in question, there being a double track, the wire is supported by standards placed in the middle of the street and at equal distance from the street car tracks. The entrance and steps of the car are at the rear right-hand side, so that as the cars are ordinarily run, this portion of the car would be farthest away from the standards. On the date above referred to, in view of the temporary change in operation, the entrance and steps of the car going north through the subway were on the side next the

standards. On the evening of this day, as the car which was operated by the plaintiff approached the grade of the subway going north, the trolley pole, one end of which rests against the overhead electric wire, left the wire, with the result that the car apparently came to a stop. The trolley pole is operated by a rope from the rear end or platform of the car, and it is part of the work of the conductor, when a car is switching from one line to another, to stand on this platform and by means of the rope guide the trolley pole along the wire upon which it is required to go, and, if the pole gets off the wire, to place it back again. This ordinarily can be done and should be done by the conductor while on the platform of the car, there being no necessity on his part to get off the car. On this particular trip, the car, including the platform referred to, was crowded to capacity with passengers who were on the way to witness a baseball match. The plaintiff, finding it difficult, because of the crowded condition of the car, to approach the rear end of the platform, to adjust the trolley pole, took what was apparently a more convenient method, and got off the car for that purpose. Immediately the pole again came in contact with the wire the car started. The plaintiff ran and jumped on the steps, but before he could get into the car his head came in contact with one of the standards, and he was thrown to the ground and severely injured. An action having been launched to recover damages from the city, the same came on for trial before the Chief Justice with a jury, and the jury made the following findings:—

1. Was there any negligence on the part of the defendant which caused, or helped to cause, the accident? A. Yes.

2. If so, what was the negligence (answer fully)? A. (1) That, according to the evidence, "standard construction" consists of 12 ft. centers, and that at the point of accident the centers were only 10 ft. 6 in. And that the city admit the undesirability of having the post at that point, by having it in their programme for removal. (2) Allowing overcrowding in the rear vestibule to such an extent as to impede the conductor in the discharge of his duty. (3) Because of the disregard of the first clause of rule 10, p. 6.

3. Was the plaintiff guilty of contributory negligence? A. Not under the circumstances.

4. If so, what was the negligence (answer fully)? A. We consider the plaintiff guilty of a breach of the rules in not ringing the bell when the trolley left the wire, but following this the motorman disregarded r. 10, p. 6, which, if complied with, would have prevented the accident.

SASK.

S. C.

SCHELL v. CITY OF REGINA.

Brown, J.

5. Did the plaintiff fully and voluntarily, with a full knowledge of the nature and extent of the risk he ran, impliedly agree to incur the risk? A. Yes, the general dangers, but not the exceptional danger in connection with the post in question.

6. If the Court should, upon your answers, think the plaintiff entitled to damages, what sum do you assess: (*a*) as special damages? A. $790. (*b*) As general damages? A. $1,020, wages at $85 per month for 12 months. $480, wages at $40 per month for 12 months. $100, future medical treatment. $400, suffering, pain and inconvenience: $2,000.

Judgment was entered in the plaintiff's favour for the amount of damages assessed by the jury, and the city now appeals.

The act of negligence as alleged in the pleadings on which the first finding against the city is based is as follows:—

(*d*) By the defendants placing the said metal poles or standards with which the plaintiff came into contact so close to the street railway track, allowing but a few inches between the step of the car and the said pole or standard, well knowing the same to be dangerous to human life.

In other words, the jury find faulty construction in that the standard which caused the accident was placed too close to the track. This standard was some nine inches closer to the track than was ordinarily the case, due to the fact that at this point the tracks converged. What is proper or safe construction must have reference to the normal and ordinary system of operation. Under such system there could be no danger from the proximity of the standard, for the simple reason that no one could enter or get out of the car from the side which would be nearest the standard, this side of the car being closed. The city could scarcely be expected to place a standard with a view to the operation of the car on the wrong track under the very exceptional circumstances of the case. The jury state in their finding that "the city admit the undesirability of having the post at the point by having it in their programme for removal." They make this finding on the evidence of Houston, the city's superintendent of railways. This evidence shews that the reason the city had this standard in their programme for removal was because they had two cars, the steps of which would not clear this standard when occasion demanded the use of the west track for north-bound traffic. There was no evidence that would justify a finding that the city was removing the standard as being dangerous. The mere fact of removal does not justify such an in-

ference. See *Hart* v. *Lancashire & Yorkshire R. Co.* (1869), 21 L.T.R. 26. As to the second ground on which the jury finds negligence, there is not, in my opinion, any evidence which warrants the jury in finding that the city allowed overcrowding in the rear vestibule to such an extent as to impede the conductor in the discharge of his duty, or in fact that they allowed overcrowding at all. There is some evidence that the inspectors and superintendents of the city had at different times seen cars crowded in this respect and had not interfered, but that is as far as the evidence goes. The evidence and the rules with reference to operation indicate that when the trolley leaves the wire the proper and customary course is for the conductor to replace it by the use of the rope from the rear vestibule of the car, and if the conductor in the absence of instructions to that effect allows his car to become so overcrowded as to impede or interfere with a proper and customary practice, he surely cannot impute it as negligence on the part of the city. The third ground of negligence as found by the jury cannot be allowed to stand for the simple reason that it was not one of the grounds set up in the pleadings or urged at the trial and counsel for the city states that had it been pleaded he would have brought evidence to contravert it, and would have shaped his case differently. I can quite see how he might have done so, and therefore do not think that an amendment should now be allowed so as to include this ground.

The fact that all the rules were put in evidence, and that the jury were instructed that they might look at all the rules, does not, in my opinion, justify a finding of negligence on a ground not raised in the pleadings or referred to by counsel or the trial Judge. It could only have the effect of making any and all the rules material in so far as the same had a bearing on the acts of negligence alleged.

I do not wish to be understood as indicating that, even assuming such amendment could be made, the evidence warrants this finding of the jury. I express no opinion on that point.

As this disposes of all the acts of negligence as found by the jury, the judgment in favour of the plaintiff cannot be allowed to stand.

SASK.

S. C.

SCHELL v. CITY OF REGINA.

Brown, J.

A number of other acts of negligence are set up in the pleadings, and as the jury made no express findings on such other alleged acts of negligence, it is contended on behalf of the plaintiff that the city should not have judgment, but that there should be a new trial. It would appear from a perusal of the authorities that in deciding this question, each case must be dealt with in the light of its own peculiar circumstances, it being difficult to lay down any general principle. In the case of *Cobban* v. *C.P.R.*, 23 A.R. (Ont.) 115, the questions submitted to the jury, with answers, were as follows:—

1. Were the defendants guilty of negligence which led to the loss of the glass in question? A. Yes. 2. If the defendants were guilty of negligence, in what did such negligence consist? A. In running too fast speed for the freight train; the improper inspection at last place of inspection.

The verdict of the jury was set aside by the Divisional Court on the ground that there was no evidence which would warrant the findings of the jury, but a new trial was ordered as other acts of negligence were alleged, on which the jury made no specific findings. On appeal to the Court of Appeal, the majority of the Court held that the finding of the jury inferentially negatived the existence of other grounds of negligence, and would have justified entry of judgment in favour of the defendants. They, however, refused to interfere with the discretion exercised by the Divisional Court in granting a new trial, Burton, J.A., laying emphasis on the fact that there was very strong evidence of negligence which called for a different verdict. In *G.T.R. Co.* v. *McKay*, 34 Can. S.C.R. 85, the following were the questions submitted to the jury and the answers given:—

1. Was the whistle blown before reaching the Main St. crossing, and if so, at what distance from the crossing was it first sounded? A. Yes, at the whistling post. 2. If the bell was rung, where did it first commence to ring, and was it ringing continuously or at short intervals until the engine crossed the street where the accident happened? A. Bell started to ring east of Main St., eight or ten rods, and rang continuously. 3. Is the Main St. crossing at Forest in a thickly peopled portion of the village? A. Yes. 4. At what rate of speed was the engine running at the time it crossed Main St.? A. About 20 miles an hour. 5. Was such rate of speed, in your opinion, a dangerous rate of speed for such locality? A. Yes. 6. Was the death of Mrs. McKay and the injury to Joseph McKay caused in consequence of any neglect or omission of the company? If so, what was the neglect or omission, in your opinion, which caused the accident?

A. (*a*) Yes. (*b*) Neglect in running too fast and for the want of a flagman or gates.

Sedgewick, J., at p. 86, states:—

It will be observed that the first answer is not in favour of the company; that the second is against the company, *but that is immaterial, as, assuming the answer to be correct, the failure in starting to ring the bell was not found to be the cause of, or to contribute to, the accident*, and besides, the evidence, in my judgment, proves to a demonstration that the bell rang continuously from the time the train left Toronto until after the accident.

And Davies, J., at p. 95, says:—

The question of contributory negligence on the plaintiff's part does not, in the view I take of the case, require consideration, and the finding as to the time when the bell began to ring, even if sustained by the evidence, which I do not stop to inquire, *is not material as it is not found by the jury to have led or contributed to the accident*. The negligence which did cause or lead to the accident was found by the jury to be the speed at which the train was running over the street crossing and the absence at such crossing of a flagman or gates.

The judgment of Davies, J., was concurred in by the Chief Justice and Killam, J. In the case of *Andreas* v. *C.P.R.*, 7 Terr. L.R. 327, the questions submitted to the jury on the plaintiff's behalf and their answers were as follows:—

1. At what rate of speed was the engine running at the time it crossed Albert St.? A. 25 miles an hour. A. Was such rate of speed a dangerous rate of speed for such locality? A. Yes. 3. Was the death of the deceased caused in consequence of any neglect or omission of the company; if so, what was the neglect or omission which caused the accident? A. (1) Yes. (2) Failure to reduce speed of train as provided in Railway Act.

On appeal to the Full Court of the North-West Territories, the verdict was set aside on the ground that there was no duty cast upon the defendants to reduce the speed of their train at the point in question; and on the question as to whether judgment should be entered for the defendants or a new trial ordered, Wetmore, J., said:—

Inasmuch as the jury have found that the death of the deceased was caused in consequence of the neglect or omission to reduce the speed of the train as provided in the Railway Act, and have not found that it was caused in consequence of any other neglect or omission, it is not necessary, in view of what was held in *G.T.R. Co.* v. *McKay*, 34 Can. S.C.R. 81, to consider the other matters of negligence alleged.

He was therefore of the opinion that judgment should be entered in favour of the defendants. Harvey, J., in giving the judgment of the majority of the Court, says:—

I entirely agree with the opinion of my brother Wetmore except as to

SASK.

S.C.

SCHELL v. CITY OF REGINA.

Brown, J.

his conclusion that the jury having found that the accident was occasioned by the negligence of the defendants' servants in running at too high a rate of speed, it must be assumed that in their opinion that is the only negligence contributing directly to the accident.

It is quite true that there are statements in the judgments of both Sedgewick, J., and Davies, J., in *G.T.R. Co.* v. *McKay* which, taken in their widest significance, would seem to warrant this conclusion, but it appears to me that they must be taken in connection with the findings of the jury which were being dealt with, and which differentiate the case very materially from the one under review. In the case before us there was much evidence of a very conflicting character as to the blowing of the whistle and the ringing of the bell, and on that evidence I am distinctly of opinion that a finding by the jury that defendants had been negligent in not ringing the bell or blowing the whistle as required by statute, and that the accident was caused thereby, could not be set aside. The jury, however, were not asked any direct question on this, as they were in the *McKay Case*, and consequently there is no express finding on that. In the *McKay Case* the jury were asked the question and the finding was that the whistle had been blown and the bell rung, though not strictly as required by the statute, but their attention having been drawn to this by the questions asked, and they having answered the questions as they did, and in such a way that the Court might very reasonably say that the neglect to comply with the law strictly could not reasonably be considered to have caused the accident, and having ascribed negligence in another respect as the cause of the accident, the Court might reasonably conclude that the neglect in that minor respect was immaterial. In the case before us, however, it is quite otherwise. There is much evidence of negligence not only as regards the whistling and the ringing of the bell, but also as regards the speed of the train, and the Judge in his charge directed the jury's attention to both these matters, making no distinction between them as to the legal consequences, but their attention was directed to the rate of speed by the questions, while there were questions asked on the other side.

There was evidence to shew that, if the train had been running at the rate of speed authorized by law, it could have been stopped after the engine driver saw the deceased, without causing the accident. This being the case, it appears to me to be most reasonable to assume that the jury, having come to the conclusion they did, may have left the other question of negligence entirely unconsidered. It is an every-day occurrence for a Judge, having found one ground on which to base his judgment, to disregard altogether other grounds which may be raised, and it seems to me unreasonable to say that a jury may not do the same. I am, therefore, of opinion that the findings of the jury cannot be said to exclude all other negligence than that specifically found, and that defendants, therefore, should not be entitled to judgment on that ground, but that a jury should have an opportunity of finding specifically on the point.

This case was carried to the Supreme Court of Canada, and judgments are reported in 37 Can. S.C.R., p. 1. The Chief Justice, at p. 10, says:—

SASK.

S. C.

SCHELL v. CITY OF REGINA.

Brown, J.

Now the jury, with such clear and direct instructions on the point, having answered that the cause of the accident was the failure to reduce speed under sec. 259 of the Act, must be considered as having negatived all the other charges of negligence.

Idington, J., at p. 30, says:—

The Court below, upon contradictory evidence as to the point of ringing of the bell and blowing of the whistle, not passed upon by the jury, thought proper to direct a new trial. I understand that some of the majority of this Court decide that the verdict covers the point because the jury gave only one reason and omitted any other. With respect I must add, that without the majority of this Court agreeing that such contributory negligence has been shewn as defeats the action, *we ought not to interfere with the discretion of the Court below* in granting a new trial to clear up the issue upon which no verdict has been given.

The other members of the Court do not expressly deal with this point, but dispose of the appeal on other grounds.

In the case at bar, the trial Judge, in his charge to the jury, went fully into every act of alleged negligence and intimated to the jury that they would have to make a finding on each such alleged act. In his questions submitted to the jury, he asks them to "answer fully" in what the negligence consists, assuming that they find negligence against the city. I am of opinion that, under such circumstances it must be assumed that the jury, in giving their answer, did answer fully, and that their finding should be regarded as a finding that there was no negligence so far as the other alleged grounds are concerned.

In any event, I am of opinion that in this case, where the evidence of negligence against the city in all its phases is anything but convincing, and where the trial Judge has so expressed himself with reference to it in his charge to the jury, this Court would not be justified in granting a new trial.

In my opinion, therefore, the appeal should be allowed with costs, the judgment set aside, and judgment entered in favour of the city on the trial with costs.

ELWOOD, and MCKAY, JJ., concurred.

Elwood, J.
McKay, J.

LAMONT, J., dissented. *Appeal allowed.*

Lamont, J. (dissenting)

BIBLE v. CROASDALE.

ALTA.

S. C.

Alberta Supreme Court, Scott, Stuart and Simmons, JJ. April 20, 1915.

1. REFORMATION OF INSTRUMENTS (§ I—1)—MISTAKE—EVIDENCE IN VARIANCE WITH CONTRACT—ADMISSIBILITY.

In the absence of a case made out for rectification of a document by

ALTA.

S. C.

BIBLE v. CROASDALE.

reason of mistake, evidence is not admissible to shew that the writing intended to be complete in itself does not express the real agreement. [*Eaton* v. *Crooks*, 3 A.L.R. 1; *Carter* v. *C.N.R. Co.*, 24 O.L.R. 377, referred to.]

APPEAL by the plaintiff from a judgment of Crawford, Co.Ct.J.

I. B. Howatt, for plaintiff, appellant.

John Cormack, for defendant, respondent.

Stuart, J.

STUART, J.:—The plaintiff's action was based upon the following document:—

Received from Mr. J. E. Bible, loan of $136.50 (one hundred thirty-six dollars fifty cents) for six months, to bear interest at 8% per annum till paid, and herewith pledge transfer of lot 4, block 11, Westgrove Park, as security for same. Privilege being given to pay off said loan at any time before term stated expires.

Dated this 13th February, 1913. Mrs. Croasdale, *per* A. Croasdale.

The plaintiff claimed personal judgment against the defendant and also in default, sale or foreclosure and possession of the lands referred to.

At the trial, the trial Judge, after objection by counsel for the plaintiff, admitted evidence on behalf of the defendant which was intended to prove that at the time of the signing of the above quoted document there was a verbal agreement made that the loan in question should not be repayable until the defendant sold the property referred to in the document. This evidence was admitted upon the authority of *Eaton* v. *Crooks*, 3 A.L.R. 1.

Now, whatever may be said of the effect of incidental expressions to be found in the judgment delivered in that case or of the effect of the decisions in some of the cases there cited, I am of opinion, with much respect, that the actual decision in *Eaton* v. *Crooks* does not by any means go as far as the Court is asked to go here. The verbal agreement which was proven in that case was clearly not contradictory of or inconsistent with the written agreement between the parties. The written agreement was that a certain sum should be paid for the erection of a house, and that this sum should be paid by certain instalments at certain times. The verbal agreement set up was that to the extent of $1,200, a sum less than the first instalment provided for, the payment was to be made by the transfer of certain lots to the contractor. The principle of the decision, accurately stated, I think, in the headnote of the report, was that an agreement merely

ALTA
S. C.
BIRCH
v.
CROSSDALE.
Stuart, J.

as to some other *method* of payment, when the written agreement did not specifically provide for payment in actual money, was not inconsistent with the terms set forth therein. In the present case the written document quite clearly expresses an agreement that the loan should be repaid in six months. The defendant acknowledges receipt of a certain sum as a loan "for 6 months" and she retains the privilege of repayment "at any time before the term stated expires." In my view, it is impossible to construe this as anything else than an agreement to repay the loan in six months. The real question therefore is, whether it was open to the defendant, after executing a written agreement with such a term contained therein, to provide that she did not make such an agreement but that she only agreed to make payment when she had sold the property. There was no attempt, either by pleading or by evidence, to suggest that the insertion of the definite term of 6 months in the document was due to a mistake of the parties. In *Eaton* v. *Crooks, supra*, Beck, J., said in his judgment, p. 8, referring to *Webb* v. *Spicer*, 19 L.J.Q.B. 34, affirmed *sub nom. Webb* v. *Salmon*, 3 H.L. Cas. 510:

> The case is one of a contemporaneous agreement *in writing*, but I refer to it because it seems to me to bring out the distinction between evidence seeking to shew that a writing was never intended to express all the terms of the contract, but signed for the purpose of forming only one element of a contract and, therefore, to be given such effect and only such effect as it was intended to have, and evidence seeking (in the absence of a case made for rectification by reason of mistake) to shew that a writing intended to be complete in itself does not express the real agreement.

The facts of *Eaton* v. *Crooks* were held to bring the evidence tendered within the former class, and not within the latter. The evidence tendered here obviously falls within the latter class which the Court in *Eaton* v. *Crooks*, quite clearly intimated would not be admissible in the absence of an allegation of mistake, which, as I say, has not been suggested. If there had been an allegation of mistake, the principles laid down in *Edmonton Securities Ltd.*, v. *Lepage*, 14 D.L.R. 66 at 69 might perhaps have been applied. As the case stands, however, we have a written agreement, which, in my opinion, shews on its face that it was intended to contain all the terms of the contract. It is not suggested that it does not contain all the terms except with respect to the time of payment and even with respect to that

ALTA.
S. C.
BIBLE
v.
CROASDALE.
Stuart, J.

the suggestion is not that the written document does not cover that point but rather that though it does cover that point completely, it covers it wrongly. For this reason, I think "no question of an incomplete writing arises" (*Carter* v. *C.N.R. Co.*, 24 O.L.R. 377.) The agreement cannot be looked upon as incomplete or informal. Admittedly it covers every point upon which any agreement was made. The rule, I think, is clear that where parties have deliberately put their agreement into formal terms so that the Court can infer an intention, that it should contain the whole agreement then parol testimony to contradict directly an express term of the written agreement is not admissible unless some question of a mistake is raised.

Moreover, even if the evidence were admissible, it is clear that the trial Judge, perhaps only slightly, misapprehended the evidence, because the plaintiff did, as I read the evidence, expressly deny the existence of the alleged verbal agreement, although on cross-examination and on discovery, all he said was that he did not remember any such agreement. More than that, even if such an agreement were provable, and proven, I am of opinion that it would necessarily entail the implication that the property should be sold within a reasonable time. I rather incline to the view that if there was such a verbal agreement, the term of six months was considered by the parties as the outside limit of time, and that the expectation was that the property would be resold before that time had elapsed. In any case, I think a reasonable time has not only elapsed now, but had elapsed at the date of the commencement of the action.

For these reasons I think the appeal should be allowed with costs, the judgment below set aside and judgment entered by the plaintiff for the sum of $136.50 and interest at 8 per cent. per annum from February 12, 1913, to the date of entry of the present judgment, and costs of the action. The judgment should also contain in the usual order *nisi* in regard to the interest of the defendant in the land or transfer of land referred to in the agreement sued upon. The terms of this order, if not agreed upon by the parties, are to be referred to the trial Judge for settlement.

Scott, J.
Simmons, J.

SCOTT, and SIMMONS, JJ., concurred. *Appeal allowed.*

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. "SATURDAY NIGHT," Ltd.

ONT.
S. C.

Ontario Supreme Court, Falconbridge, C.J.K.B., Magee, J.A., and Latchford and Kelly, JJ. June 14, 1915.

1. LIBEL AND SLANDER (§ III A—95)—NEWSPAPER LIBELS—SECURITY FOR COSTS—SUFFICIENCY OF AFFIDAVIT.

An affidavit by the defendant in an action for a newspaper libel stating his belief, after diligent inquiry, that the plaintiff is not possessed of property sufficient to answer the costs of the action, sufficiently meets the *onus probandi* to establish the negative as to the plaintiff's pecuniary liability under sec. 12 of the Libel and Slander Act, R.S.O. 1914, ch. 71, and will entitle him to an order for security for costs.

[*Paladino* v. *Gustin* (1897), 17 P.R. (Ont.) 553, distinguished.]

2. APPEAL (§ I B—11)—ACTION FOR NEWSPAPER LIBEL—SECURITY FOR COSTS—ORDERS FOR—APPEAL FROM.

By virtue of sub-sec. 4 of sec. 12 of the Libel and Slander Act, R.S.O. 1914, ch. 71, no appeal lies from a substantive order for security for costs against a plaintiff in an action for newspaper libel made by a Judge in Chambers in review of the Master's Order in reference thereto.

Statement

APPEAL from an order of the Master in Chambers dismissing the defendant's motion for an order for security for costs, under sec. 12 of the Libel and Slander Act, R.S.O. 1914, ch. 71.

G. M. Clark, for defendant.

W. J. Elliott, for plaintiff.

Middleton, J.

MIDDLETON, J.:—By sec. 12 of the Libel and Slander Act, a defendant is entitled to security for costs upon a motion based upon "an affidavit . . . shewing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case a judgment is given in favour of the defendant, that the defendant has a good defence upon the merits, and that the statements complained of were published in good faith. . . ."

The only question is whether the affidavit filed upon this motion complies with the requirements of the statute by shewing that the plaintiff is not possessed of sufficient property. The affidavit filed states: "I am satisfied, after diligent inquiry, that the plaintiff is not possessed," etc., etc. The Master held that this was not a compliance with the statute, and that the absence of property was not shewn.

With great respect for the learned Master, I am unable to agree with his conclusions. The plaintiff, and the plaintiff alone, can know what property he possesses. Manifestly, any one deposing to the absence of property must speak from inform-

ONT.

S. C.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED.

Middleton, J.

ation and belief; and, while I am most anxious to avoid giving any countenance to reckless statements in affidavits or unduly expanding the class of cases in which affidavits may be made on information and belief, I think I should err in the opposite direction if I acceded to Mr. Elliott's contention and compelled an affidavit to be made in the form suggested by the Master.

From the earliest time there has been much discussion as to the *onus probandi* where the matter to be proved was negative and the truth was peculiarly within the knowledge of the other party. The earlier cases are collected in Best on Evidence, para. 274.

In *Dickson* v. *Evans* (1794), 6 T.R. 57, the question was, whether a defendant to an action brought by the assignees of a bankrupt should be allowed to set off certain notes which, it was said, came to his hands before bankruptcy. If notice of the assignment could be brought home to the defendant before the notes were acquired, that would have prevented a set-off. The question was as to the onus. The Court held that it lay upon the defendant to establish the absence of notice. Ashhurst, J., said (pp. 59, 60): "It is a general rule of evidence that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, and of which he is supposed to be cognizant: but it is said in this case that it was incumbent on the assignees to prove the time when the defendant received these notes. But the assignees could have no means of knowing that fact, whereas it must have been known to the defendant."

In *Rex* v. *Turner* (1816), 5 M. & S. 206, Bayley, J., says (p. 211): "I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative;" but this statement is regarded as too wide; for in *Elkin* v. *Janson* (1845), 13 M. & W. 655, Alderson, B., said (p. 662): "I doubt, as a general rule, whether those expressions are not too strong. They are right as to the *weight* of the evidence, but there should be some evidence to start it, in order to cast the onus on the other side." This, I think, must be taken to be the rule.

ONT.

S. C.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED.

Middleton, J.

Although the onus is upon the defendant under the statute to establish the negative, it appears to me that he has sufficiently shewn the plaintiff's impecunious condition when he has made inquiry. As put in an American case, quoted with approval in Wigmore on Evidence, para. 1623 (*Nininger* v. *Knox* (1863), 8 Minn. 140, 148), "it would seem that the fact of insolvency, from its nature, must usually exclude direct proof, as no one, save the person himself, could ordinarily safely swear that a man had no property, or insufficient to meet his liabilities, at any given time." For this reason, evidence of inquiry and reputation was received.

The whole question was discussed in a case to which I cannot now find the reference, where the point in issue was the existence of property qualification to entitle a voter to retain his name upon the list. The particular qualification was shewn not to exist. If the voter owned any other property within the municipality he was nevertheless entitled to be upon the list. The evidence was that on search and inquiry the ownership of other property could not be ascertained. This, it was held, was sufficient to shift the onus. So here, where as the result of inquiry no property can be found, there is, I think, some evidence; the onus is shifted; and the plaintiff, who has the knowledge, cannot complain if it is found that his insolvency has been shewn.

This being so, the statute has been complied with, and the order should be made.

The costs of the application here should be to the defendant in any event in the cause, and the costs of the motion before the Master should be in the cause.

The plaintiff company moved under Rule 507 for leave to appeal to a Divisional Court of the Appellate Division from the order made by MIDDLETON, J., which required the plaintiff company to give security for the defendant company's costs, and directed that, in default of such security being given within a limited time, the action should be dismissed with costs.

Application for leave to appeal from the order of Middleton, J.

The motion was heard by MEREDITH, C.J.C.P., in Chambers.

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—The plaintiff company makes this

ONT.

S. C.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED.

Meredith, C.J.C.P.

application to "a Judge in Chambers" for leave to appeal from an order of another "Judge in Chambers," directing that this action be dismissed with costs, if the plaintiff company do not comply with its terms respecting security for costs.

The application is based upon Rule 507, the provisions of which are extraordinary: made, apparently, to lessen appeals in matters of practice merely, it provides for an appeal, in substance, from every kind of order of that character, and an appeal of an objectionable character, an appeal from one Judge to another, of co-ordinate jurisdiction, though the one Judge may be a Judge of very many years' judicial experience, and the others of little or no such experience; and, in addition to that, a further appeal to a Court of five Judges, if the inexperienced Judge give leave. Why the Judge who hears the matter in the first place should not give, or withhold, leave to appeal, it is difficult to understand; as also why the whole matter should be gone over again before another Judge, having precisely the same powers, and all to determine only whether leave to appeal, in a matter of practice merely, should, or should not, be given. If the Judge who first considers the question is not competent to give, or withhold, leave to appeal, he is not competent to hear and determine the substantial question. And, if there must be a motion for leave to appeal to some other Judge, why not to a Judge of different jurisdiction, a Judge of the Appellate Division? And, to whatever Judge the application is made, why compel him to sit in judgment upon the judgment in the first instance, as the Rule in question in effect does; why not permit him to give, or withhold, leave without forming any opinion as to the soundness, or unsoundness, of the opinion of the Judge from whose order or ruling an appeal is sought, not to mention discussing and dealing with it as if the second co-ordinate Judge were a court of appeal?

But the Rule is now in force, and I am bound to follow it: but am at liberty to express the hope, which I am sure is shared by litigant and lawyer alike, that, when it has next to be followed, it may be to its "last resting-place."

If this matter really comes within the provisions of the sub-

clauses of Rule 507—and it was not suggested by any one upon the argument of this motion that it does not—I would grant leave to appeal, for these reasons:—

Because, if the case of *Paladino* v. *Gustin* (1897), 17 P.R. 553, were well decided, the defendant company has not brought itself within the provisions of the enactment upon which alone it relies for security for costs—the Libel and Slander Act, sec. 12—in not having, upon its application, *shewn* that it has a good defence on the merits. The case of *Paladino* arose under a different section of the enactment, but the two sections are quite alike in this respect; and all who are at all familiar with the practice of the Courts are familiar with the wide difference between swearing to a good defence upon the merits and *shewing* that there is a good defence on the merits.

Because the defendant company has not shewn that the plaintiff company is not possessed of property sufficient to answer the costs of the action.

And to settle any question whether the Master in Chambers has any jurisdiction under the section of the Act in question; and, if he have, whether any appeal lies to a Judge in Chambers against his order.

The Act in question is, as a Divisional Court has pointed out —*Robinson* v. *Morris* (1908), 15 O.L.R. 649—in derogation of common law rights, an encroachment, for the benefit of a class, upon the right to boast, as of old, that the Courts of law are open to poor and rich alike: and, though it is to be deemed remedial, those who seek its class legislation benefits, must bring themselves fairly within it, in order to obtain any of such special benefits.

One of the things which it was essential that the defendant company should have *shewn*, to entitle it to the order it has obtained, is, that the plaintiff company is "not possessed of property sufficient to answer the costs of the action;" and the only way in which any attempt to shew that was made—if indeed it can be called an attempt to do so—is contained in the statement of the defendant company's "managing editor," in an affidavit sworn to by him, that he is satisfied, after diligent inquiry, that the plaintiff company is not possessed of property sufficient

ONT.

S. C.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED.

Meredith, C.J.C.P.

to answer the costs of the action. That I cannot consider any kind of legal evidence.

In the enactment in question the Legislature has, undoubtedly, gone a long way in conferring special benefits upon those in the same class as the defendant company, but it has, assuredly, stopped short of making them their own judges in a libel action brought against them. It is yet for the Courts, and judicial officers, not for the defendant, to be "satisfied" that the other party to an action is not possessed of sufficient property to answer the costs of the action; and indeed to make diligent investigation upon legal evidence to enable them to reach a true conclusion upon that question.

That which might satisfy an interested litigant is hardly likely always to satisfy his judge; indeed, what might satisfy an interested litigant might be hardly of any kind of weight with his judge: and there is nothing but the judgment of the litigant, in his own case and without disclosing even his reasons for that judgment, to support this order.

As the learned Judge eventually said, in expressing his reasons for making the order in question, nothing is gained by a discussion of any question as to the onus of proof in other cases, because the enactment in question very plainly puts the onus of proof upon the defendant; it is only when the defendant company has proved all the things required, by the section in question, to be proved, that it has any right, under it, to security for costs. And it must be remembered that this is an action for libel; and, if it be, as I understand, though the pleadings have not been placed before me, for libellous publication respecting the plaintiff company's credit or conduct as merchant or trader, that "the law guards most carefully" such things; that any imputation of insolvency, or any suggestion of pecuniary difficulties, is actionable *per se;* and that the onus of proof of every plea of justification is upon the pleader of it; so that it would be unfair to give to any defendant, who has to come into Court under any such circumstances, any reason to believe that that which has been sworn to by the defendant company's managing editor, on the application in question, is anything like admissible evidence of the plaintiff company's insolvency.

Nor is that onus a very great price to pay for the special privilege afforded. Property is not a condition of the mind; indeed it is a thing rather hard to conceal, whether in lands or goods; it is but a small quantity that can be hidden up one's sleeve: and this applies with the greatest force to an incorporated company such as the plaintiff company is, whose officers, and any other person having any knowledge materially bearing upon the subject, may be examined under oath in support of a motion such as that in question: Rule 228.

It is not difficult to ascertain from plaintiffs, whose interests lie in shewing how much, not how little, they are worth, what property, if any, they possess, whether in lands, goods, or money due for unpaid-for stock—without mentioning other assets: and, again, this is especially true of incorporated companies, with their statutory obligations. But not a word is vouchsafed by the defendant company of any kind of inquiry made by it, or in its behalf.

And the matter involved is one of importance, not only to the defendant company, but also to others upon whom efforts might be made to impose the restriction of this class legislation: therefore, if this case be one within the sub-clauses of Rule 507, leave to appeal may be taken, if necessary.

If the case be one within the Rule itself, no leave to appeal is needed: and there is the right to appeal without leave, necessarily, to have the question whether it is within this Rule, or within its sub-clauses, considered: see *Stewart* v. *Royds* (1904), 118 L.T.J. 176. The question under the Rule is: whether an order dismissing an action with costs, unless certain security for costs is given within a limited period, is an order finally disposing of the action. At first sight my inclination would be to say that it is. But that question is not now before me for consideration.

So, too, of the question whether there was any power to order that the action be dismissed unless security be given as ordered. The Act itself provides for a stay of proceedings until the security is given, and that the security shall be given in accordance with the practice in cases of security given by persons residing out of the jurisdiction; but there is no provision for, or

ONT.

S. C.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED.

Meredith, C.J.C.P.

authorisation of, a dismissal of the action. The Act giving a special and limited right, and expressly providing for its effect, and even for the manner in which security is to be given, it is difficult to see how the provisions of the Rules can add a right to dismissal of the action. To the extent, if any, that the order exceeds the power conferred by the law, there may be, of course, an appeal.

And, again, if there were no legal evidence adduced upon the motion shewing that the plaintiff company is not possessed of property sufficient to answer the costs of the action, there would, I think, be a right of appeal notwithstanding sub-sec. 4, though leave to appeal under Rule 507 might be necessary. As described by a learned Judge—*Robinson* v. *Mills* (1909), 19 O.L.R. 162—the requirements of the Act are "pre-requisites" upon which power to make an order rests. If no affidavit, no power. If *no* evidence, that is, legal evidence, no power also: the case is not within the Act.

Sub-section 4 of the section in question—sec. 12 of the Libel and Slander Act—provides that an order of the Supreme Court as to any one of the "pre-requisites," under that section, shall be final and shall not be subject to appeal. It also gives expressly a right of appeal from an order made by a Local Judge to a Judge of the Supreme Court sitting in Chambers, whose order also shall be final and not subject to appeal.

If, therefore, the application in question had been made in the first instance to the Judge in Chambers, it would not, if, and in so far as it is, authorised by the Act, be subject to appeal; but it was not so made, it was made upon an appeal against an order made by the Master in Chambers, and so is not, literally at all events, within the meaning of sub-sec. 4.

And again the wording of the Act gives rise to the questions: whether the Master in Chambers has any power to make an order under the Act; and, if so, whether there is any appeal from such an order. Having regard to the expressed right of appeal, to a Judge in Chambers, from a Local Judge, the implication may be that there is no such right of appeal from the Master in Chambers; or else that there is no power in the Master in Chambers to make any order under the Act, which would not be an

ONT.

S. C.

AUGUSTINE AUTOMATIC ROTARY ENGINE CO. v. SATURDAY NIGHT LIMITED.

Meredith, C.J.C.P.

unreasonable thing, seeing that a Judge in Chambers is as readily available as the Master in Chambers, and that the order of a Judge in Chambers is to be conclusive; indeed, in such circumstances, it would seem like needless circumlocution if it were made necessary to apply to the Master in Chambers first.

All things considered, it seems to me to be proper that any leave to appeal that I may have power to give should be given; and that the costs of this motion should be costs in the action to the plaintiff company in any event; and this application is disposed of accordingly.

The plaintiff company's appeal from the order of MIDDLETON, J., was heard by FALCONBRIDGE, C.J.K.B., MAGEE, J.A., LATCHFORD and KELLY, JJ.

The judgment of the Court was delivered by

Falconbridge, C.J.K.B.

FALCONBRIDGE, C.J.K.B.:—We are of opinion that the order of Mr. Justice Middleton is a substantive order for security for costs, and that there is no appeal from it: sub-sec. 4 of sec. 12 of the Libel and Slander Act, R.S.O. 1914, ch. 71. Our view in that respect is confirmed by the defendant company's notice of appeal from the order of the Master in Chambers, which contains a substantive application for an order that the plaintiff company give security for costs.

Appeal dismissed.

PATILLO v. CUMMINGS.

N. S.

S. C.

Nova Scotia Supreme Court, Russell, J. July 5, 1915.

1. RELIGIOUS SOCIETIES (§ VI—45)—EXPULSION OF MEMBER—PROPERTY INTEREST—REINSTATEMENT BY COURT.

The Church possesses material property which gives the court jurisdiction to adjudicate upon the civil rights of the members thereof as members of a society possessing property, and may therefore review the regularity of the expulsion of a member and order the restoration of his rights.

[*Pinke* v. *Bornhold*, 8 O.L.R. 575, disapproved; *Gray* v. *Christian Assn.*, 137 Mass. 329; *Can. R. Assn.* v. *Pammenter*, 180 Mass. 418, applied.]

Statement

APPLICATION for a declaration and decree for the restoration of applicant to his rights as a member of Immanuel Baptist Church.

V. J. Paton, K.C., and *C. J. Burchell*, K.C., for plaintiff.

T. S. Rogers, K.C., and *R. W. McLellan*, K.C., for defendants.

N. S.

S. C.

PATILLO v. CUMMINGS.

Russell, J.

RUSSELL, J.:—The plaintiff was a member of Immanuel Baptist Church in the town of Truro. The church, like all Baptist churches is a voluntary association, independent of all other similar churches, although associated with them, and, generally, though, as will shew, not invariably accepting their advice when difficulties and dissentions arise.

Sometime in the course of the ministry of a previous pastor, a number of the members began to absent themselves from the church, and the plaintiff, among others, was notified to attend a meeting to shew cause why his name should not be dropped on a revision of the roll of membership about to be made. The reason assigned for proposing to drop the names of these members from the list was, that they had not for about eighteen months attended the services of the church or contributed to its support. A conference, which is a meeting of the members of the church, was accordingly held, after some postponements, on July 3, 1914, and thirteen members, among whom the plaintiff was included were dropped from the list of members, or in other words, were expelled from the church.

With the propriety or expediency of this action on the part of the church, this Court, I think has nothing whatever to do, it was done in good faith from the motive and for the reason assigned. The plaintiff had an opportunity to be heard, and to shew cause why his name should not be expunged from the list of members, and the action of the majority was within its powers.

The matter, however, did not rest there. The aggrieved members or some of them asked that a council should be called, that is an assembly of delegates from associated churches to advise in case of difference or difficulty. They desired that this should be what is called a mutual council, but this was at first refused by the authorities of Immanuel Church. The expelled members, or one or more of them then arranged for an *ex parte* council, whereupon the church agreed that the council should be "mutual" with the seemingly inconsistent proviso, however, that they should not be bound to accept its advice, unless it suited their own views. A council was accordingly held, composed of leading members of the Baptist denomination, men of

learning and experience, who heard all the interested parties, and embodied the results of their deliberations in a series of findings, concluding with a recommendation, among others, "that the church should rescind the resolution dropping the names of the thirteen members from their roll, on July 3, thus restoring them to membership."

The executive of the church as already stated had anticipated this advice, when submitting their case for the consideration of the council, by stipulating beforehand that they should not be bound by the advice unless it was acceptable to them.

At the meeting of the church subsequent to the report from the council, which was held on July 29, 1914, the clerk of the conference gave notice, that at the next conference meeting, he would move that the motion concerning the dismissal of the thirteen members be rescinded. In the minutes of the same conference, it is stated that the findings of the council were placed before the meeting, and action thereupon was deferred for one month. A reference is made in the minutes of this meeting to some communication that has passed from a citizen of Truro to the clerk of a Baptist church in another part of the Dominion, which was said to have falsified the facts, and to have been otherwise objectionable, and the clerk was directed to express to the clerk of the church referred to, the regret of the conference that such a communication had been sent forward.

Finally, on October 2, 1914, a conference was held, at which the matter of the expelled members was dealt with, but no reference was made or rather no reference is made in the minutes of the conference, to the findings of the council, otherwise than as the same was contained in the minutes of the previous meeting. "The clerk stated that there was some difference of opinion as to the method adopted of dismissing the thirteen members on July 3; that he felt sure the only way in which the matter could be amicably settled, and the only right way of procedure, would be to declare the vote of July 3, null and void, as it was against Baptist usage to vote on more than one name at a time in a case of this kind. He, therefore, moved that the vote be rescinded, thus reinstating the thirteen members to the same standing as they held on the evening of July 3, after the charges had been

N. S.
S. C.
PATILLO
v.
CUMMINGS.
Russell, J

laid against them." The motion passed unanimously, and the minutes thus continue. "The clerk having stated that he would immediately follow this motion with another to dismiss T. S. Patillo, one of the thirteen mentioned (against whom the charges of July 3, rested); he then moved that the said T. S. Patillo be dismissed from membership in Immanuel Baptist Church. This motion was duly seconded, and after having been stated from the chair, the clerk then, on behalf of the church read a letter signed by T. S. Patillo which had been sent (to a person named in the minutes, presumably the clerk of the church above referred to), which shewed clearly to all present Mr. Patillo's attitude toward Immanuel Baptist Church, its affairs and its late pastor. At the conclusion of the reading of this letter, the clerk stated that in his opinion, even the contents contained in the same were sufficient to warrant the dismissal of this man, also certain statements that he had made in the report read before the *ex parte* council. On a vote being taken, the motion was carried unanimously."

If the rescission of the resolution expelling the members had been followed by a series of motions expelling them one by one, I should have been inclined to regard the proceeding as a mere formality, having no effect whatever upon the previous action of the church, but that was not the course pursued. None of the other twelve members have been dealt with. All the thirteen were, in point of form, restored to their original standing in the church, and all but the plaintiff have thus far been allowed to continue as members in good standing. The plaintiff alone has been treated to a second expulsion. His case has been differentiated from the others, and if there be, as I conceive there must be, a certain depth of odium and humiliation consequent upon the exercise of such discipline, the injury done to the plaintiff must have been intensified by the mere fact of his having been dealt with so differently from the others. It is too clear for argument that the cause of his expulsion was different from that for which his original expulsion was decreed. It seems very clear to me that if there had been nothing to charge up against the plaintiff apart from the period of absence and non-support which was common in his case and that of all the other culprits,

he would have been dealt with in the same manner as all the others, and would have been restored to his church privileges or allowed to withdraw to some other church with good standing, according to the wise and brotherly and christianly recommendation of the advisory council. The minutes of the council leave us in no doubt as to the offence to which the second disciplinary measure was applied. It was the letter written by the plaintiff to the clerk of the sister church, and the statements made by him before the advisory council. The plaintiff's second expulsion was due to the feelings evoked by these incidents, and but for these, it seems reasonable to assume that he would not have been a second time expelled. But as to these grounds of offence, he has been condemned unheard. He has had no notification that he was to be held accountable for them, and no opportunity of defending or palliating his conduct. This, of course, is contrary to the principles of natural justice, and being thus contrary, it must be still more violently in conflict with the principles and practice of the Baptist Church.

I have been asked to find as a fact that the defendants have been actuated in this matter by some malicious and improper motives, malice, in the ordinary signification of the term, and I should be very sorry to attribute this to the defendants or any of them, but if anything at this or any other stage of the case should turn upon my judicial opinion in reference to the point suggested, or rather upon my findings as a juror, the plaintiff has a right to the expression of my judgment that neither the original expulsion, nor the confirmation of it by the subsequent proceeding was due to a *bonâ fide* desire to keep the roll of membership free from unworthy members or to carry out the ostensible object of purging the church of members who were unworthy to contribute. The expelled members, if they were contributing nothing to the upkeep of the church, were costing nothing to the church. The members who carried out the first and the second expulsion well knew that the reasons for the absence of the thirteen from the church, and their non-support of it, were of a temporary nature, and that the cause of the difficulty was not only a passing one, but was on the very point of being removed. The evidence as to the proceedings before the

N. S.
S. C.
PATILLO
v.
CUMMINGS.
Russell, J.

mutual council indicate what was the real grievance against the thirteen members, and that the ostensible was not the real motive for dropping them from the roll. Other members had withheld their presence and support for considerable periods without being subjected to the humiliating ordeal of expulsion, and these would not, in my opinion, have been disciplined had it not been for their implied or expressed aversion to that of which the majority approved. The thirteen were punished in the first instance for differing from the majority as to the merits and methods of the pastor, and when these differences were condoned by the rescission of the resolution to expel them, the plaintiff was punished for writing what was regarded by the majority as an objectionable letter to the clerk of a sister church and making statements before the mutual council, of which the majority did not approve.

But I do not base my decision wholly or even mainly on any finding as to any indirect or improper motive on the part of the majority, whatever may have been the motives and impulses under which the resolutions were passed, the fact remains that the plaintiff has been disciplined for an offence as to which he has not been heard. There is a decision of an Ontario Judge which would oblige me to decline jurisdiction in such a case. I refer to the decision of MacMahon, J., in *Pinke* v. *Bornhold*, 8 O.L.R. 575, but I am not bound by this decision, and do not agree to the grounds on which it is based. I prefer the reasoning of the Massachusetts Courts in *Gray* v. *Christian Association*, 137 Mass. 329, and the dictum in *Can. R. Assn.* v. *Pammenter*, 180 Mass. 418. The defendants hold the same position in the eye of the law and are governed by the same principles as the members of an ethical society or any similar association. With their spiritual functions, this Court has no concern. The Church possesses material property which gives the Court jurisdiction to adjudicate upon the civil rights of the members as members of a society possessing property. It was debated in one case whether, even the possession of property was necessary to the jurisdiction, but it is not necessary to consider that question here. If an injunction had been asked for, I have no doubt

it would have been granted to prevent the injury, and for the same reason, I think the plaintiff is entitled to a declaration and decree for the restoration of his right *Decree granted.*

N. S.

PATILLO v. CUMMINGS.

MOWAT v. GOODALL.

B. C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher, and McPhillips, JJ.A. June 7, 1915.

1. INSURANCE (§ I D—22)—AGENTS—RIGHT TO SUE FOR PREMIUMS.

An insurance agent charged by the insurance company for the premiums of all policies written by him, may sue, in his own name, for the recovery of premiums charged by him against his sub-agent.

[*Antiseptic Bedding Co.* v. *Gurofski*, 21 D.L.R. 483, referred to.]

Statement

APPEAL from judgment dismissing action for insurance premiums.

F. C. Elliott, for appellant, plaintiff.

J. P. Walls, for respondent, defendant.

Macdonald, C.J.A.

MACDONALD, C.J.A., would allow appeal.

Irving, J.A.

IRVING, J.:—I would allow this appeal.

The question is, did the defendant ask the plaintiffs to obtain for him a policy under such circumstances as a promise to pay them (the plaintiffs) would be inferred? I think he did when he told the plaintiffs to renew the policy and to send it to him by mail. That conversation took place about October 4 or 5, and the policy was sent to him about October 7, with the following letter, p. 49:—

Goodall Bros., Colwood, B.C.

We have pleasure in enclosing herewith, Policy No. 43733, and would point out to you that the rate has been reduced to $2.25, and we have much pleasure in protecting you in this amount.

GLOBE REALTY CO.,
J. F. Douse, *Manager.*

He kept it until January 21, when he returned it to the plaintiffs without any explanation.

I think enough has already been said to justify a finding in plaintiffs' behalf, but the plaintiffs' case goes further. They shew that the defendant was a sub-agent of theirs; that he had been instrumental in obtaining policies of insurance; and that he knew that the practice in force between the company and its agent was for the company to allow the agents a 60-day credit, and the agents in turn to allow the same length credit to the

B. C.
C. A.
MOWAT
v.
GOODALL.
Irving, J.A.

assured (see letter of August 14, p. 48, written, not with reference to this policy, but as to an outstanding premium for which the defendant was responsible to them as sub-agent); that on a previous occasion he had asked the plaintiffs to pay for him; that after he had been handed the policy and within the 60 days he spoke about having some alterations made in the policy to meet some changes he was about to make, and promised that he would pay the premium when those changes were made; that after the expiration of the 60 days he offered to pay the plaintiffs the premium now in question, if the plaintiffs would rectify a grievance he had against them in respect of work he had done for them in obtaining one Southwell's insurance. It is difficult to see what plainer acknowledgment of a request by the defendant to keep him protected could be made, and a request of that kind implies a promise to indemnify.

The learned County Court Judge said, that on the facts he thought the plaintiffs were entitled to recover, provided that they were the proper parties to sue. This finding on the facts disposes of the subterfuges set up by the defendant in his statement of defence and afterwards persisted in in his testimony. I think the plaintiffs' facts are proved by reliable evidence, and the defendant's denials are untrue.

The cryptic proviso, I understand, is based on the idea that the company and not the plaintiffs were the proper parties to bring the action. But the company gave the defendant no credit. He must know, as everybody else does know, that you cannot obtain insurance without paying for it. In his letter to the company he takes the ground that he did not want that policy—"I refused to pay the premium under such a policy" —he says, in writing to the company on January 29, 1914, but admits he mentioned the matter of a new policy to the plaintiffs who, to his knowledge, were issuing policies in the H. B. Ins. Co.

As to the custom of fire insurance companies and their agents, I refer to the following extract from the judgment of MEREDITH, C.J.O., in *Antiseptic Bedding Co.* v. *Gurofski* (1915), 21 D.L.R. 483, an action brought to recover from the defendant (by reason of his neglecting to place insurance on the plaintiff's property). . . .

In many cases it is the course of dealing of agents to treat the insured as their debtor for the premium, and themselves as the debtors in respect of it to the insurers whom they represent, and that this practice is well known to, and recognized and acted on by the insurers.
(21 D.L.R. 490.)

I am unable to see the application of sec. 21 of the policy to the question before us.

Irving, J.A.

MARTIN, J.A.:—While I agree with the learned Judge below that, in general, the agent for a fire insurance company cannot personally recover premiums from the assured, and also that an agent for marine insurance stands on a special footing, yet I agree with my brother Galliher that, in the special circumstances of this case, the plaintiff must be deemed to be the agent of the assured and that he paid the premium at his request. So these facts take this case out of the general rule, founded on *French* v. *Backhouse* (1771), 5 Burr. 2727, that, in order to recover premiums paid for insurance, the plaintiff must have been employed as an agent for that purpose either expressly or by implication. My attention has been directed to the case of *Antiseptic Bedding Co.* v. *Gurofski* (1915), 26 O.W.R. 852, but I am afraid no real assistance can be derived from it, even on principle, because the defendant there was found expressly to be "not an agent for any of the insurance companies," p. 854, but for the insured, 856-7, and employed by them to effect a special and risky insurance, 854. The appeal, therefore, should be allowed.

Martin, J.A.

GALLIHER, J.A.:—The learned trial Judge has found the facts in plaintiff's favour but dismissed the action on the ground that they were not the parties to sue.

Galliher, J.A.

At the trial, several insurance agents were called, and all agree that, as between themselves and the insurers, the custom is that the agents are liable to the insurers for premiums on all policies written by them, and they in turn look to the insured and collect the premiums from them.

My brother Irving has referred me to a case decided by the Court of Appeal for Ontario—*Antiseptic Bedding Co.* v. *Gurofski*, 21 D.L.R. 483, which deals with the position of insurers, agents and insured, but does not meet the exact point raised in this case.

B. C.

C. A.

MOWAT v. GOODALL

Galliher, J.A.

The point to be decided in this case is—was the insured aware that the agents were paying his premiums to the insurers, looking to the insured to be reimbursed, and was this being done with his assent and at his request, express or implied, so as to create the relation of principal and agent between them?

In this connection it is worthy of notice that the defendant himself was a sub-agent of the plaintiffs for placing insurance. This, together with the letter of August 14, 1914, is dealt with at p. 21, A.B., as follows:—

Q. Now, you say on August the 14th, 1914, you sent a letter to the defendant asking for $25.50, what is that for? A. That was a previous business he had written for us. Q. For previous business? A. Collected for us, and we wanted him to pay it.

BY THE COURT: Q. That was a premium he had collected; he was a sub-agent for you? A. Exactly.

Then, in reading the whole evidence, it appears that the plaintiffs had in previous years paid insurance premiums for the defendant, not being reimbursed for several months after the policy was delivered. The defendant surely did not imagine (being an agent himself) that he was covered by insurance unless his premiums had been paid by the plaintiffs.

That might not be sufficient to establish the relationship I think necessary here, but if not, I find further evidence at page 38 of the appeal book, where the defendant, in cross-examination, says:—

Q. Anything about a clock? A. No. I asked him one day when I was in the office, I had an old oak grandfather's clock and I asked him when I was placing the $1,000 on the furniture—my brother died and I removed into the house—this clock I valued at $300 and I asked him if it would cost any extra premium for a clock worth $300—have to be quoted specially; he said "Yes, it would," then I said "Let it go in and pay the extra premium."

I am quite satisfied that the defendant knew that the plaintiffs were paying his premiums and that they were doing so with his assent and at his request.

I quite agree with the learned trial Judge's remarks regarding the non-application of the law governing Marine Insurance in England to the case at bar.

The appeal should be allowed for the reasons above stated.

McPhillips, J.A. (dissenting)

MCPHILLIPS, J.A., dissented. *Appeal allowed.*

Re MULHOLLAND & VAN DEN BERG.

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S. C.

Ontario Supreme Court, Sutherland, J. July 9, 1915.

1. WILLS (§ C—32)—ATTEMPTED REVOCATION—CROSSING OUT SIGNATURE—NAME LEGIBLE—EFFECT ON TITLE TO LAND.

Running a pen through the signature of a will by a testator, but leaving his name plainly legible, with a writing below "I hereby revoke this will" subscribed with the testator's initials, dated, and attested by his wife in his presence, does not constitute an effectual revocation of the will under secs. 22 and 23 of the Wills Act, R.S.O. 1897, ch. 128, and will not affect the title to land by the admittance of such will to probate.

[*Re Goods of Godfrey*, 69 L.T.R. 22, followed; *Re John Drury's Will*, 22 N.B.R. 318; *Re Goods of Morton*, 12 P.D. 141, referred to.]

Statement

MOTION by purchaser, under the Vendors and Purchasers Act, R.S.O. 1914, ch. 122, for an order determining the validity of an objection raised as to the title to certain lots.

D. Urquhart, for the applicant.

Grayson Smith, for the vendor.

Sutherland, J.

SUTHERLAND, J.:—The sole question on this motion is whether the vendor has shewn a good title to the land in question under the will of John Clark Burnham, who died on or about the 6th November, 1901, or whether such will was revoked and did not pass the title to the said land to the devisee therein named The will is dated the 28th May, 1885. It appears that, some time after its execution, the testator, in the presence of his wife, Henrietta Burnham, to whom he devised and bequeathed all his real and personal property, ran his pen through the various letters in his signature thereto affixed and wrote below it these words: "Hamilton Tp. Jany. 30th, 1894. I hereby revoke this will made by me May 28th, 1885;" and wrote, below, his initials, "J. C. B." Below this he wrote "Witness to revoke," and his wife signed her name below these words.

Nothing more was done; and, notwithstanding the partial obliteration of the signature of the testator by the ink-marks made by his pen, the signature is still plainly legible.

After the death of the testator, application was made for letters probate to the will. The facts already stated were disclosed on such application in an affidavit made by the widow of the testator. Letters probate were thereupon issued.

The Act in force at the time of the death of the testator was

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S. C.

RE MULHOLLAND AND VAN DEN BERG.

Sutherland, J.

the Wills Act of Ontario, R.S.O. 1897, ch. 128, secs. 22 and 23 of which are as follows:—

"22. No will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

"23. No obliteration, interlineation or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses are made in the margin or in some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or in some other part of the will."

The expression "otherwise than as aforesaid" in sec. 22 deals with a revocation by marriage and other matters not applicable to this case.

Under sec. 22 it is apparent that the writing suggesting an intention to revoke was not executed in the manner in which a will is required to be executed, and that the "obliteration, interlineation or other alteration" was not validly done so as to come under sec. 23.

It is conceded, therefore, that it comes to be a question whether what was done by the testator can be said to be under clause 22 a revocation, under the words "otherwise destroying the same."

The Wills Act has been amended by the Act (1910) 10 Edw. VII. ch. 57, sec. 23, and carried into the present revision, R.S.O. 1914, ch. 120, sec. 23, but the part of sec. 23 quoted is

ONT.

S. C.

RE MULHOLLAND AND VAN DEN BERG.

Sutherland, J.

the same throughout.* All the testator did was to attempt to obliterate his signature with ink-marks. He did not effectually do this. While what he did and the words he wrote may indicate an intention, he failed in legally carrying this into effect.

In Jarman on Wills, 5th ed., p. 116, the effect of the words "otherwise destroying" is dealt with, and see also the 6th ed., p. 155, as to obliterations, interlineations, and cancellations.

In *Re John Drury's Will* (1882), 22 N.B.R. 318, it was held that where "the will was found with the seal cut out, leaving a hole in the paper where the seal had been, there was a tearing of the will within the meaning of the Wills Act with the intention of breaking the will;" and in *In the Goods of Morton* (1887), 12 P.D. 141, where "a will which after execution had remained in the custody of deceased was found in her repositories after her death with her own signature and the signatures of the attesting witnesses scratched out as with a knife, that there was a revocation within the requirements of sec 20 of the Wills Act."

In *In the Goods of Godfrey* (1893), 69 L.T.R. 22, it was held that "scratching with a knife, which is a lateral cutting, unless carried by the testator to the extent of rendering his signature illegible, does not amount to a revocation within the terms of sec. 20 of the Wills Act."

Having regard to these decisions and to the explicit terms of our own Act, I am unable to see that the testator by what he did effectually revoked the will in question. I am of opinion that it was properly admitted to probate, and that it must be declared that title did pass under the will and that the vendor has shewn a good title thereunder. *Title sustained.*

*In the Wills Act as found in 10 Edw. VII. ch. 57, and R.S.O. 1914, ch. 120, secs. 23 and 24 correspond to secs. 22 and 23 of the Wills Act, R.S.O. 1897, ch. 128.

UNION BANK OF CANADA v. McKILLOP.

CAN.

S. C.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ. June 24, 1915.

1. CORPORATIONS AND COMPANIES (§ IV D 1—69)—POWERS OF—SURETYSHIP —BANK ADVANCES TO ANOTHER—ULTRA VIRES.

Unless expressly within the powers conferred upon it by the Act of incorporation or those arising from necessary implication, a contract of suretyship by an incorporated company guaranteeing the payment to a bank of advances to another company is *ultra vires* and void.

[*Union Bank* v. *McKillop*, 16 D.L.R. 701, 30 O.L.R. 87, affirming 11 D.L.R. 449, affirmed.]

CAN.

S. C.

UNION BANK v. MCKILLOP.

Davies, J.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 16 D.L.R. 701, affirming judgment in 11 D.L.R. 449.

Hamilton Cassels, K.C., for appellants.

C. A. Moss and *J. B. McKillop*, for respondents.

SIR CHARLES FITZPATRICK, C.J.:—I would dismiss this appeal.

DAVIES, J.:—For the reasons given by Hodgins, J., speaking for the Appellate Division of the Supreme Court of Ontario I am of opinion that this appeal should be dismissed with costs.

Idington, J.

IDINGTON, J.:—The appellant seeks to recover from respondent, which is a company incorporated on September 28, 1904, under the Ontario Companies Act, then in force, upon an alleged guarantee of respondent for the indebtedness of the Lorne Waggon Co., Ltd., to the appellant, for the sum of $15,000.

The Ontario Companies Act enabled the partnership firm of McKillop & Sons to become so incorporated, but did not in express terms enable respondent to give such a guarantee.

It happens to be the fact that the said firm was, and the respondent company continued to be, a family-owned concern, having no other shareholders than those composing the firm which became so incorporated. It is proven that the guarantee of said firm before its incorporation had been given for an amount and under such circumstances as would, if there had been no incorporation of the firm, have resulted, by virtue of the events which have transpired, in possibly rendering the members of the firm liable for the sum claimed. They escaped that possible liability because the guarantee which the firm had given was surrendered and in substitution therefor the guarantee of the corporate company was taken.

The neat question whereon this appeal must turn is whether or not this corporate company had within the powers given it by the Companies Act that of guaranteeing as sureties the debt of the West Lorne Wagon Co., which all the shareholders of the respondent had a very material interest in seeing paid, or at least in their being relieved from liability therefor, but it as a corporation had none. It is alleged that respondent had no other creditors.

It does not appear to me that this interest of the shareholders

can have anything to do with the question or any bearing thereon whatever.

The powers of the incorporated company must be measured by the express powers given by the Act of incorporation and such necessarily implied powers as the general purview of the statute demonstrates were intended to be covered by the expressions used in the statute.

For example, the corporation may have been enabled to undertake some obligation, or by law may have had imposed upon it some obligation, which in either case must be discharged. The clear legal duty thus created may have rendered necessary the doing of that which the express language of the statute creating it or enabling its creation may not by that language have been very accurately defined.

In such a case the corporation may, by way of implication, be found to possess the powers which the language defining its powers might not have made quite apparent.

In the case presented there is no pretence of such express power and there is nothing from which the express language used can, by interpretation, be so modified by way of implication therein as to support the alleged guarantee.

I think the corporation not only has no powers beyond that so given it, but must assert such power as it may have been given by the method through and by which it is enabled to act, and when going beyond such limits its acts are *ultra vires* and void. Such, I think, was the nature of this alleged guarantee.

The recent decision of this Court in the case of *Hughes* v. *The Northern Electric and Mfg. Co.*, 21 D.L.R. 358, 50 Can. S.C.R. 626, was relied upon by appellant's counsel. The decisions in that case and the unreported case of *Lambert* v. *Richards*, and some other cases, mark a trend of judicial opinion which, followed out logically, may soon justify the argument presented. The notion seeems somewhat prevalent that so long as none but shareholders are concerned that they can use the name and so abuse or transgress the powers of the company as they please and by such acts as the statute has not enabled bind the corporation to contracts never contemplated by the statute creating it or upon which its creation rests, so long as it has not prohibited

CAN.
S. C.
UNION BANK v. MCKILLOP.
Idington, J.

the doing thereof. I respectfully submit that the proper measure of a company's powers are what it has been enabled to do, and not what it has been prohibited from doing. But I do not think even these decisions or that mode of reasoning can maintain this appeal.

Again, the Companies Act was so modified in 1907 as to carry into it the word "guarantee" amongst the new powers of the corporations entitled to act upon such amended Act, and appellant relies thereon.

I do not think as at present advised that the amendment applies to such a case as presented here.

The facts, however, do not warrant such application. In the case of a company, which this is not, having for its object, or one of its objects, the business of a guarantor, or incidentally to the transaction of its business occasions to give a guarantee, we can conceive of such a thing as a company using this new power.

I shall not attempt to define what is intended by the amendment. I must be permitted to doubt if it ever can be applied to the case of a pure act of suretyship without any relation to the transactions in which the corporation is rightfully engaged.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—The appellants now put their case in two ways. First, they say that the guarantee of March 13, 1907, was within the powers of the defendant company.

The contract upon which the action is brought is not within the objects defined by the letters patent either expressly or by necessary implication. *Hughes* v. *Northern Electric*, 21 D.L.R. 358, was referred to, but that decision had no relevancy, resting as it did upon necessary implication.

Counsel for the appellant bank also relies upon the contention that he is entitled to call in aid of the provisions of the Ontario Companies Act of 1907, ch. 24, sec. 17, sub-sec. (*d*), and secs. 210 and 211. The effect of the last two sections undoubtedly is to make this Act applicable to the defendant company, but it could not be read as giving validity to the pretended contract which was entered into before the passing of the Act.

That contract is inoperative for want of capacity on the part of the company.

The ground which the appellant bank ultimately took up was that the defendant company by reason of its conduct since the Act of 1907 came in force has made itself responsible for the payment of the moneys the bank seeks to recover.

There is an objection based upon the Statute of Frauds which it will be unnecessary to discuss. The insuperable obstacle in the way of this contention is that it has no substratum of fact. The evidence is explicit and it is not contradicted that the advance made under this guarantee was made in the month of April, 1907, some months before the Act came in force. The note which was given for the advance was renewed a number of times after the passing of the Act of 1907, but it is not suggested that the renewals were granted by the bank upon the faith of anything done by the appellants and there is no evidence to justify a suggestion even that during this time the bank was not acting upon the faith of the guarantee given in March. I have no doubt it was assumed by everybody until advice was taken upon it that this guarantee was perfectly valid.

ANGLIN, J.:—The giving of the guarantee, which the plaintiffs seek to enforce, was not authorized in terms by R.S.O. 1897, ch. 191, by which the defendant company was governed when it was executed and delivered, and the authorities, many of which are cited in the judgment of the Appellate Division, make it clear that such a contract cannot be regarded as something incidental either to the undertaking or to the expressed powers of such a company. The evidence seems to shew that the account of the West Lorne Wagon Co. was taken over by the United Empire Bank—the plaintiff's predecessors—before the date at which the Ontario Companies Act of 1907 came into force. But, if the bank actually made its advances subsequently to that date, they were made upon the faith of the guarantee given on March 13, 1907. There is no evidence of any new contract, or of any subsequent ratification by the defendant company of the guarantee sued upon, if, indeed, there could be ratification of such an *ultra vires* instrument. Indeed, it is quite clear that in taking over the account and making its advances

CAN.
S. C.
UNION BANK v. MCKILLOP.
Duff, J.

Anglin, J.

CAN.
S. C.
UNION BANK
v.
MCKILLOP.
Anglin, J.

the bank acted upon the assumption that the guarantee had been *ab initio* valid and effectual, and that neither ratification nor a new contract under the powers conferred by the Act of 1907 was requisite.

The appeal, in my opinion, fails and must be dismissed with costs. *Appeal dismissed with costs,*

ONT.
S. C.

Re WILSON ESTATE.

Ontario Supreme Court, Middleton, J. March 24, 1915.

1. ASSIGNMENT FOR CREDITORS (§ VIII A—71)—PRIORITIES—RIGHTS UNDER UNREGISTERED MORTGAGE.

Whether an assignment is general or special, the assignee for the benefit of creditors takes no greater title to land included in the assignment than the assignor can give, and a mortgagee claiming under an unregistered mortgage made in good faith prior to the assignment will be accorded a priority over the assignee for creditors.

[*Thibaudeau* v. *Paul*, 26 O.R. 385; *Steele* v. *Murphy*, 3 Moore P.C. 445, followed.]

Statement

MOTION upon originating notice, for an order determining to whom certain land contracted to be sold should be conveyed.

N. F. Davidson, K.C., for Vera Schmidlin.

C. P. Smith, for Imperial Trusts Company of Canada.

Middleton, J.

MIDDLETON, J.:—The contract of sale was made with one C. M. Thompson on the 19th April, 1905. The whole consideration called for has been paid. Contemporaneously with the making of the contract, a declaration of trust was signed by Thompson, declaring that he held in trust for Amelia M. Lobb and A. F. Lobb. On the 17th October, 1914, A. F. Lobb conveyed the lands in question to John Hunter Richardson. The conveyance is absolute in form, but was in reality in trust. On the 16th November, 1914, Richardson and Lobb conveyed the land to the Imperial Trusts Company of Canada, for the purpose of realising and dividing the proceeds ratably among certain named creditors of Lobb. By deed of the 8th January, 1915, Amelia Lobb conveyed her interest in the land—which by recital is stated to have been theretofore acquired by Lobb, though not conveyed to him—to the trust company. No conveyance having been made by the representatives of the Wilson estate, the title of the trust company to such conveyance appears to be clear, unless Miss Schmidlin is, by reason of the facts now to be stated, entitled to intervene.

ONT.

S. C.

RE WILSON ESTATE.

Middleton, J.

On the 10th June, 1913, one Robert A. Staton purported to mortgage part of the land in question to Miss Schmidlin, to secure the sum of $600 advanced by her. This mortgage was not registered until after the conveyance to the trust company had been registered.

The circumstances under which this mortgage was given are these. Lobb, who was a practising barrister and solicitor, had been acting for Mrs. M. J. Britton, the widow of the late Dr. Britton, in connection with the affairs of his estate. He knew that she had some money on deposit to her credit in the Metropolitan Bank. He telephoned to her suggesting that this money be invested, and described to her the security as being a mortgage to be made by Staton upon property on Beech avenue which he knew. He advised the acceptance of this investment. Lobb then procured a mortgage to be executed by Staton, who had no title to the property. Staton acted in entire good faith, as he had on several occasions acted as trustee for Lobb at his request, and he assumed that this was property belonging to Lobb which had been placed in his name for convenience.

Some time after the mortgage was executed, the duplicate, unregistered, was handed over to Mrs. Britton. The mortgage was taken, at Mrs. Britton's request, in the name of her niece, Vera Schmidlin. After trouble had arisen, the duplicate mortgage so handed over to Mrs. Britton was registered. The other copy was found among the title papers and handed over to the trust company. At the time of the acceptance of the trust and the conveyance to the trust company, and until after the conveyance to it had been registered, it had no actual notice of the existence of this mortgage. . . .

I have come to the conclusion that Miss Schmidlin has priority for her mortgage over the title of the trust company. As between herself and Lobb, who was then the equitable owner of the property, he is estopped from denying the validity of the mortgage, and the trust company, although it has the prior registered title, is a trustee for the benefit of creditors, and neither it nor the creditors can take from Lobb any greater title than he in truth and in good conscience possessed. An assignee for the benefit of creditors takes no greater title than the

ONT.

S. C.

RE WILSON ESTATE.

Middleton, J.

assignor can give. The assignee has certain statutory rights as to attacking conveyances, etc., which the assignor has not, but these rights are purely statutory; and, apart from such statutory rights, he stands in the same position as his assignor. See *Thibaudeau* v. *Paul* (1895), 26 O.R. 385. The same rule applies where the assignment is not a general assignment but an assignment for the purpose of securing certain creditors only: *Steele* v. *Murphy* (1841), 3 Moore P.C. 445.

The judgment will therefore declare that the trustees of the Wilson estate should convey to the trust company, subject however to a lien or charge in favour of Miss Schmidlin to secure the amount due to her under her mortgage, with interest and costs, and, subject thereto, upon the terms of the trust deed. The executors are entitled to be paid their costs, to be fixed at some reasonable sum, before delivering the conveyance. The property, I understand, is worth much more than Miss Schmidlin's claim, so that she would undoubtedly be paid; and, therefore no provision looking to the enforcement of her claim, need be inserted in the judgment.

As the application is one for the purpose of clearing up the title, and as Staton disclaimed any interest, an appropriate provision may be inserted in the order which will now be issued, shewing that he has not and never had any interest in the land in question. No doubt he will be willing to execute a quit-claim deed. If so desired, the trust company may have a declaration that it is entitled to its costs of the litigation out of the proceeds of the lands after paying Miss Schmidlin's claim.

Judgment accordingly.

QUE.

C. R.

KLEIN v. KATZ.

Quebec Court of Review, Sir Charles P. Davidson, C.J., Tellier, and Greenshields, JJ.

1. MALICIOUS PROSECUTION (§ II A—11)—PROBABLE CAUSE — RECEIVING STOLEN GOODS—PURCHASE AT GROSS UNDERVALUE FROM NON-TRADER.

The fact that a junk dealer had purchased in bulk a quantity of goods which could not properly be classed as junk at a gross undervalue from a non-trader in such goods is sufficient to put such purchaser upon inquiry as to their ownership and may be set up in proof of reasonable and probable cause in defence of an action for malicious prosecution.

[*Desaulniers* v. *Hird*, 15 Que. K.B. 394, referred to.]

QUE.

C. R.

KLEIN v. KATZ.

APPEAL from the judgment of the Superior Court, Sir M. Tait, C.J., dismissing an action for malicious prosecution of a criminal charge.

Jacobs, Hall & Couture, for plaintiffs.

R. S. deLorimier, K.C., for defendant.

The Court of Review dismissed the appeal and confirmed the judgment below, the *considerants* of which were as follows:—

"Considering that for many years previous to the 26th day of May, 1911, when he laid the information against plaintiffs, the defendant had been doing business as a trader in Montreal, and that for a few years past had been engaged as part of his business in buying and selling stoves, and for the purpose of this business had rented from one Harry Bloom a shed part of certain premises leased by Madam Bruchési to said Bloom on the 11th day of February, 1907, for a period of five years from the 1st of May following, situated at No. 561 Notre Dame Street West, corner of that street and Bruchési Lane, the said shed being in rear of said store and separated from it by a yard, and was used by defendant to store stoves which he purchased from the firm of A. C. Thompson & Co., of North Sydney, N.S., and intended to resell; that the door of said shed was kept locked and the keys thereof were in the possession of defendant, and his rent was paid up to May, 1911, and up to said date he had been occasionally visiting said store, the last visit being made in January, 1911, without any interference on the part of any one; that the said store so leased to Bloom was afterwards on the 18th of November, 1910, leased by Mme. Joseph Bruchési to Denis Carmaniolos and Tarsus Carmaniolos for a term of five years and five months from the 1st of December, 1910, the said lessees obliging themselves to use the premises for a confectionery store, which they did; that on or about the 12th of February, 1911, one of the said tenants called into the store a peddler named Louis Zach, who was peddling for plaintiffs who paid his license and supplied him with his cart, and said tenant offered to sell him, Zach, certain iron goods in the shed which really belonged to defendant for $16.00; that Zach paid $2.00 on account and went to plaintiffs' place of business, whom he says were his partners in the transaction, and immediately returned with the plaintiff Morris Klein to the shop of these Greeks and paid over the balance of $14.00 and got the iron goods which consisted of

QUE.
C. R.
KLEIN
v.
KATZ.

some fourteen stoves in pieces, and took them to defendant's place of business; that the said stoves were not set up, not having been unpacked from the crates in which they had been shipped; that said stoves could have been set up, the small pieces having been placed in the ovens, and certain ornamental nickel pieces had been taken to defendant's store; there were also plates in the shed, which were intended to be attached to said stoves and on which were the words 'West End House Furnishing Co., Montreal, Que.,' that being the name under which defendant carried on business; that the plaintiffs resold the said stoves to one Joseph Hedge, the receipt being in the following terms:—

" 'Montreal, April 12th, 1911.

" 'Received from Jos. Hedge seventy-five dollars for 14 fourteen stoves not guaranteed if any pieces short. (signed) M. Klein.'

"That plaintiffs gave notice not to deliver the goods to Hedge, that they had been stolen, but they disregarded said notice and delivered the goods; that Denis Carmaniolos was arrested and tried for theft of the said stoves, and was acquitted by Judge Bazin on the ground that it was his brother Anastasius, who had failed and could not be found, who had committed the theft; that defendant, after consulting with Mr. Lafontaine, whom he believed to be a Judge of said Court, and his own legal adviser, Mr. R. deLorimier, K.C., he laid the information against plaintiffs for receiving said goods, knowing them to be stolen, which complaint was dismissed on the 27th of July, 1911, by Judge of the Sessions Leet;

"Considering that defendant at the time he laid the said information knew all the circumstances connected with the theft and sale of said goods by one of the Greeks, and knew, as plaintiffs did also, that they were not dealers in iron stoves but were confectioners and kept an ice-cream parlor;

"Considering plaintiffs' pretention that the goods they bought were scrap iron, is unfounded, as they knew perfectly well and as the proof shows admitted not only in the receipt signed by them already referred to but otherwise that they were really buying stoves, and they must have known that $16.00 was a ridiculous price for fourteen stoves which were worth at least $20.00 to $25.00 each;

QUE.
C. R.
KLEIN
v.
KATZ.

"Considering that the said Zach states in his testimony that Morris Klein told him on or about the 14th or 15th of April that the stoves were stolen;

"Considering that plaintiffs have been carrying on business as junk dealers for years and have much experience in appreciating the value of goods, and that it is impossible to believe that they did not know that the sale was not an honest one, and that the circumstances of the case put upon them the duty of making inquiries regarding them;

"Considering that defendant being aware of the circumstances under which plaintiffs got possession of said goods, and having asked for and received legal advice as above related, had reasonable and probable cause to warrant him in the belief that the plaintiffs were guilty of the offence charged in the complaint, and that he acted in good faith and with reasonable and probable cause in laying the same: *Desaulniers* v. *Hird*, 15 Que. K.B. 394;

"Considering that about five days after the principal action was brought, to wit, on the 9th of August, 1912, the defendant being desirous to appeal from the judgment of Judge of Sessions Leet, gave a bond to prefer and prosecute an indictment against the plaintiffs at the September term of the Court of King's Bench, and did prefer and prosecute the same and a true bill was found, and the plaintiffs having elected to be tried, the Judge of Sessions of the Peace were declared by him to be not guilty, on the 10th of October, 1911;

"Considering that before entering into said bond the defendant consulted his own attorney and also Mr. Cruickshank, K.C.;

"Considering that defendant admits that although he was not satisfied still he was prepared to submit to the matter being dropped when Judge Leet dismissed the charge, and that had not the principal action been taken against him he would have stopped, and that the proceedings before the grand jury were invite by the plaintiffs themselves, nevertheless defendant was in the exercise of a right when he appealed against the decision of the Police Magistrate Leet, and he secured 'a true bill' and became released from his bond: Criminal Code, secs. 688 and 689;

"Considering that even if defendant would not have prose-

QUE.
C. R.
KLEIN
v.
KATZ.

cuted said appeal, if the unfounded action for $5,000 damages had not been taken against him, it does not follow that defendant was not in good faith and had not reasonable and probable cause for exercising his right of appeal under the Criminal Code, and after having received legal advice as aforesaid to do so;

"Considering defendant acted in good faith and had reasonable and probable cause for preferring and prosecuting said indictment, and is not responsible to plaintiffs for costs or damages, if any they paid, or suffered in connection therewith;

"Considering that plaintiffs have failed to prove the material allegations both of their principal action and incidental demand, and that defendant has proved the material allegations of his pleas;

"Doth maintain said pleas and doth dismiss said principal action and incidental demand with costs against plaintiffs."

Action dismissed.

MAN.
C. A.

DAVIS v. FEINSTEIN.

Manitoba Court of Appeal, Howell, C.J.M., and Richards, Perdue, Cameron, and Haggart, JJ.A. June 23, 1915.

1. CERTIORARI (§ I B—11)—OTHER REMEDY—APPEAL.

A provincial law which makes provision for appeals in summary proceedings under it and which further declares that the "proceedings on such appeals" shall in other respects be "governed" by the same rules as appeals from summary convictions or orders made by justices of the peace under the Criminal Code, does not make applicable to such appeals the provision of Cr. Code sec. 1122 forbidding a *certiorari* to remove a conviction when an appeal has been taken; Code sec. 1122 deals rather with the consequences of an appeal than with the proceedings thereon, and *semble*, even if it applied, would not prevent the granting of a *certiorari* on the question of jurisdiction.

[*Johnston* v. *O'Reilly*, 12 Can. Cr. Cas. 218, 16 Man. L.R. 405; *R.* v. *St. Pierre*, 5 Can. Cr. Cas. 365; *R.* v. *Horning*, 8 Can. Cr. Cas. 268; *R.* v. *Ashcroft*, 2 Can. Cr. Cas. 385, referred to.]

2. ESTOPPEL (§ III J 3—130)—WAIVER OF PROCEDURE REGULATIONS — AFFILIATION PROSECUTION.

The provision of sec. 9 of the Illegitimate Children's Act, R.S.M. 1913, ch. 92, that the justice of the peace shall take the information of the mother in affiliation proceedings brought by her or on her behalf is one which concerns procedure only and may be waived as it does not go to the jurisdiction; such waiver operates against the mother to prevent her repudiating the proceedings which were dismissed where the parties went to a hearing on the merits without objection in respect thereof on which the mother attended and gave evidence.

[*Reg.* v. *Hughes*, 4 Q.B.D. 614; *Turner* v. *Postmaster-General*, 5 B. & S. 756; *R.* v. *Doherty*, 3 Can. Cr. Cas. 505, referred to.]

3. JUDGMENT (§ II A—62)—RES JUDICATA—SECOND PROSECUTION OF AFFILIATION PROCEEDINGS—DISMISSAL OF FIRST.

The effect of a certificate of dismissal of affiliation proceedings under the Illegitimate Children's Act R.S.M. 1913, ch. 92, granted after a

hearing on the merits pursuant to Cr. Code sec. 730 (made applicable to such proceedings by the Summary Convictions Act, R.S.M. 1913, ch. 189, sec. 4), is to bar further proceedings upon a second information before another magistrate for the same matter on production of the certificate; the jurisdiction of the second magistrate is at an end when in hearing the facts relevant to the defence of the previous acquittal or dismissal of the charge the conclusion is clear that the matter before him has been previously disposed of by a competent tribunal.

[*R.* v. *Quinn*, 10 Can. Cr. Cas. 412, 11 O.L.R. 242, and *R.* v. *Herrington* (1864), 3 N.R. 468, referred to; *Reg.* v. *Machen*, 14 A. & E. 74; *Reg.* v. *Gaunt*, L.R. 2 Q.B. 466, and *Williams* v. *Davies*, 11 Q.B.D. 74, distinguished.]

MOTION for a writ of *certiorari* turned by consent into a motion to quash a summary conviction as if a return had been made. Statement

A. E. Hoskin, K.C., and *R. A. Bruce*, for applicant.

H. M. Hannesson, for respondent.

HOWELL, C.J.M., concurred in quashing the conviction. Howell, C.J.M.

PERDUE, J.A.:—This is an application for a *certiorari* to review an order made under the Illegitimate Children's Act, R.S.M. 1913, ch. 92, whereby the accused was ordered to pay certain moneys for the support of an illegitimate child of whom he was alleged to be the father. Perdue, J.A.

It is objected on behalf of the complainant, the mother of the child, that no proceedings by way of *certiorari* can be taken in this case, because provision is made in the Act for an appeal and the accused availed himself of this by giving notice of appeal to the County Court Judge and filing an affidavit of intention to appeal, although this appeal was afterwards abandoned and the complainant notified of the abandonment. Section 1122 of the Criminal Code is cited as covering this case. The rights created under the Illegitimate Children's Act are of a purely civil nature and the section of the Code can only apply if specially made applicable by the local Act. Section 32 of the Illegitimate Children's Act declares that the proceedings on appeals shall in other respects than those provided in the Act be governed by the same rules as appeals from summary convictions or orders made by a justice of the peace under the Criminal Code. The meaning of this section is that the practice or procedure provided by the Code shall be followed where no special provision relating to the same matter has been made in the Act. Section 1122 of the Code takes away *certiorari* where a defend-

MAN.
C. A.
DAVIS
v.
FEINSTEIN.
Perdue, J.A.

ant has appealed from the conviction or order made by the justice to any Court to which an appeal is authorized. This is not a mere matter of proceeding on an appeal. It is an enactment depriving persons in certain cases of the right of putting in motion an important remedy theretofore available, by which the order of a justice might be reviewed by a Superior Court. Section 32 of the Local Act does not, and did not intend to, introduce section 1122 of the Code so as to make it apply to proceedings under the Act. It would require an express provision of the statute to take away the right to a *certiorari*.

The granting of a *certiorari* is largely in the discretion of the Court having power to do so, but where the jurisdiction of the inferior Court is questioned, *certiorari* should be granted: *Reg* v. *St. Pierre*, 5 Can. Cr. Cas. 365; *Reg.* v. *Horning*, 8 Can. Cr. Cas. 268.

In October, 1914, an information against the accused was laid before Police Magistrate Bonnycastle by William Davis, the father of the present complainant, preferring on her behalf a charge the same as the one now in question. The proceeding was irregular in that the information of the mother of the child was not taken in writing under oath as required by section 9 of the Act. The accused, however, appeared, made no objection to the complaint being tried by the magistrate, and the trial thereupon took place. Witnesses were called on behalf of both parties and the present complainant, Bella Davis, appeared and gave evidence in support of the charge. The magistrate dismissed the charge and granted a certificate of dismissal. From this decision an appeal was taken to the County Court by the complainant, and dismissed on technical grounds.

The second proceeding was commenced in January, 1915, by the laying of an information under oath by the mother of the child against the accused in respect of the same charge that had already been dealt with and disposed of by Police Magistrate Bonnycastle. Counsel for the accused objected to the jurisdiction of Sir Hugh J. Macdonald, Police Magistrate, to hear the charge, on the ground that it was *res judicata*, and in support of this the certificate of dismissal of the previous charge was produced to him. He, however, held that the information in

the previous case, having been laid by the father of the complainant, was really no information.

I think that although the requirements of section 9 were not complied with these were waived by the appearance of the accused and that he accepted the jurisdiction of the magistrate by submitting to be tried on the charge and by putting in evidence in answer to the complainant's case. The charge is not a criminal one; it is merely a civil proceeding, although imprisonment may be inflicted in order to enforce payment of the moneys awarded. There may be a waiver of irregularity in the proceedings where the accused appeared and acted as he did in this case. In *Reg* v. *Berry*, 8 Cox C.C. 121, a similar objection was sought to be taken by the accused who had given evidence in a bastardy case brought against him and who was afterwards indicted for perjury. It was held that where he had appeared and had not objected to the regularity of the summons and had tendered evidence in his own behalf, he had subjected himself to the jurisdiction of the Court and the Court had jurisdiction to hear and decide the suit. This decision was followed and approved by the Court of Criminal Appeal in *Reg.* v. *Fletcher*, 12 Cox. C.C. 77. As illustrating the same principle I would refer to *The Queen* v. *Hughes*, 4 Q.B.D. 614; *Dixon* v. *Wells*, 25 Q.B.D. 244; *Merchants Bank* v. *Van Allen*, 10 P.R. 348; *Reg.* v. *Clarke*, 20 O.R. 642.

If the accused could not now object to the regularity of the proceeding still less could the present complainant do so. The first charge was laid by her father on her behalf and for her benefit and she endeavoured to substantiate it by her evidence. Section 9 of the Act provides that the application may be made by the mother "or by any person on her behalf."

Whatever objection there may have been to the regularity of the information, it is not open to her to take objection to a proceeding that was admittedly taken on her behalf at which she was present and which she supported by her testimony. I think, therefore, that on the first information there was an actual trial and disposal of what is admitted to have been the same charge as that which forms the subject of the complaint dealt with on the second information.

MAN.

C. A.

DAVIS v. FEINSTEIN.

Perdue, J.A.

By the Manitoba Summary Convictions Act, R.S.M. 1913, ch. 189, sec. 4, sections 705-770 of the Criminal Code shall apply to all prosecutions and proceedings before police magistrates or justices of the peace under statutes of the Province so far as the same are consistent therewith.

By section 730 of the Code it is provided that if the justice dismisses the information or complaint, he may give a certificate of dismissal, which shall without further proof be a bar to any subsequent information or complaint for the same matter against the same defendant. Such a certificate of dismissal was given by the magistrate who heard the first charge against the accused, and it was produced before the magistrate who made the order now complained of. It appears to me that the dismissal of the first charge and the production of the certificate of dismissal was, as the statute declares, a bar to any further proceeding upon the second information. The cause of action having been barred, there was therefore no jurisdiction in the police magistrate to proceed upon the second information.

There are English authorities under the bastardy Acts which decide that the dismissal of a summons issued by the mother of the child is not a final adjudication of the paternity of the child so as to prevent the mother from applying again: *Williams* v. *Davies*, 11 Q.B.D. 74; *Reg.* v. *Machen*, 14 Q.B. 74; *The Queen* v. *Gaunt*, L.R. 2 Q.B. 466. These decisions were based upon the ground that no appeal was given by the English statutes to the mother though it was given to the party charged, therefore, if no second application could be made, the parties would be placed on unequal terms: *Reg.* v. *Machen* (1849), 14 Q.B. 74, at 79, 18 L.J. 213, 3 New Sess. Cas. 629.

The Manitoba statute gives to either party the right to appeal and both are placed upon an equal footing in that respect. But, apart from that, I think the application of section 730 of the Criminal Code disposes of the matter.

I think the application for the *certiorari* should be allowed and the order made against Feinstein set aside.

The usual order for protection should be granted.

Cameron, J.A.

CAMERON, J.A.:—An information was laid by the father of Bella Davis, an unmarried woman, on October 7th, 1914, before

MAN.
C. A.
DAVIS
v.
FEINSTEIN.
Cameron, J.A.

A. L. Bonnycastle, Esq., Provincial Police Magistrate, that she was delivered of an illegitimate child on October 5th, and that Sam Feinstein was the father. Feinstein appeared before the police magistrate and made no objection to the charge being tried before him. The magistrate took the evidence of Bella Davis and witnesses on her behalf and of Feinstein and witnesses on his behalf, and dismissed the charge. From this dismissal an appeal was taken to the County Court of Winnipeg and dismissed on technical grounds. Another information was laid by Bella Davis herself, January 6, 1915, before A. A. Aird, a justice of the peace, who issued a summons pursuant to which Feinstein appeared before Sir Hugh J. Macdonald, pleaded "*autrefois acquit*" and "*res judicata*" and filed a certificate of dismissal issued by police magistrate Bonnycastle. Sir Hugh J. Macdonald overruled this plea and made an order of filiation against Feinstein who filed and served a notice of appeal therefrom to the County Court of Winnipeg, and filed also the affidavit required by section 29 of ch. 92, R.S.M., the Illegitimate Childrens Act. He did not file the bond required and notified the said Bella Davis of his intention to abandon the appeal, and the same was accordingly dismissed.

The matter comes before us by way of motion for *certiorari* directed to the magistrate requiring the return of the order of filiation and warrant of committal for the purpose of quashing same. By consent this motion has been treated as a motion to quash the order and other proceedings. Written admissions, signed by counsel, detail the history of the case.

Evidently the trial before police magistrate Bonnycastle was on the merits. But the objection is raised that the information in that case was not laid by the mother on oath as required by section 9 of the Act, and that, consequently, police magistrate Bonnycastle was without jurisdiction. It was on this ground that Sir Hugh J. Macdonald refused to consider the certificate of dismissal as a bar to the proceedings before him.

Nevertheless, the proceedings in the first case were initiated on behalf of the mother, who appeared at the trial, gave evidence, produced witnesses and afterwards took an appeal under the Act to the County Court as provided by the Act. In *Reg.* v.

MAN.
C. A.
DAVIS
v.
FEINSTEIN.
Cameron, J.A.

Berry, 28 L.J.M.C. 86, proceedings under the then English bastary Acts, 7 & 8 Vict. ch. 101, and 8 & 9 Vict. ch. 10, were in question. The point was that where proceedings were taken after twelve months and there had been no proof on oath that money had been paid by the putative father in the meantime as required by those Acts, the magistrate had no jurisdiction to try the case and, therefore, perjury did not lie as against the father who had there given false evidence. It was held by Lord Campbell that "the proceedings against the putative father of a bastard child to obtain an order of affiliation and maintenance is not a proceeding *in poenam* to punish for a crime, but merely to impose a pecuniary obligation and is a civil suit within 14 & 15 Vict. ch. 99, secs. 2, 3." The Act referred to is the Evidence Act of 1851, rendering admissible the evidence of parties to actions and not compelling persons to give evidence incriminating themselves.

This view is in accord with the statement in Cyc. Vol. V., page 644, "By the weight of authority proceedings under the bastardy laws are considered in substance civil suits."

In the case before him, Lord Campbell held that where the party summoned had appeared and pleaded without objection and had submitted to the jurisdiction of the Court, "no irregularity in the process to bring the defendant into Court in a civil suit can be taken advantage of by the defendant after he has appeared and pleaded and there has been judgment for him," p. 90. He considered *The Queen* v. *Justices of Wiltshire*, 12 A. & E. 793, good law. There, want of the requisite notice was considered waived by the appearance of the defendant without protest.

In this present case we have the plaintiff in the proceeding appearing before the magistrate and doing everything possible to submit herself to the jurisdiction of the Court. Had she been an infant it might have raised another question. But there is no evidence, and no question raised, on that point.

Under the English Bastardy Acts an unsuccessful proceeding against a putative father has been held not a bar to a subsequent application. This is owing to two grounds appearing in the English statutes. First, no appeal is given to the mother,

and to hold there could be no second application would place the parties on unequal terms. Second, the English statutes do not provide for any adjudication in favour of the putative father and therefore for any final adjudication against the mother.

In *Reg.* v. *Machen*, 14 A. & E. 74, it was held, on these grounds, that a second bastardy application could be made, although a first had been refused. The "dismissal of the application is rather in the nature of a nonsuit," *per* Lord Denman, p. 80. In *Reg.* v. *Gaunt*, L.R. 2 Q.B. 466, the decision in *R.* v. *Machen* was followed, but, even so, Lord Blackburn held that "when the dismissal is upon the merits, the justices on any subsequent application, ought to defer so much to the former decision as to treat the matter as *res judicata*, unless it be shewn that what may be called the first trial was, for some reason or other not fair." Lush, J., in the *Gaunt* case intimated his opinion, "but for that case" (*R.* v. *Machen*) that the decision should be conclusive even if there were no appeal. In *Williams* v. *Davies*, 11 Q.B.D. 74, it was stated that *R.* v. *Machen* was good law and that "it cannot now be contended that the dismissal of such a summons is an adjudication."

But, in *Williams* v. *Davies*, it was held that the Act contemplated one order only and that an extension of an order already made cannot be entertained.

Now, it will be seen that the reasoning in *Reg.* v. *Machen* cannot be applied to our Act under which an appeal may be lodged by either party (sec. 28) and under which the party summoned may be discharged by the justices (sec. 16).

I refer also to *R.* v. *Glynne*, L.R. 7 Q.B. 16, where, at p. 22, Lord Blackburn explains the judgment in *Reg.* v. *Gaunt*.

In my opinion, therefore, the matter is a civil one and the decision of magistrate Bonnycastle was, in the circumstances, final and conclusive upon the mother.

An appeal against the decision of Sir Hugh J. Macdonald was taken to the extent I have already indicated and it is contended that thereby the right to *certiorari* has been lost. Section 1122 of the Criminal Code is not expressly made applicable by our Summary Convictions Act. I take it that, whether

MAN.
C. A.
DAVIS
v.
FEINSTEIN.
Cameron, J.A.

that section be applicable or not, the statutory right to appeal and its exercise do not preclude the Court from granting *certiorari* where want of jurisdiction is shewn: *R.* v. *Starkey*, 7 Man. L.R. 43; *Johnston* v. *O'Reilly*, 12 Can. Cr. Cas. 218, 16 Man. L.R. 405.

In *R.* v. *Ashcroft*, 2 Can. Cr. Cas. 385, it was held that a party has always a right to a writ of *certiorari* on the ground of want of jurisdiction, no matter whether an appeal is pending or not.

The force of the dismissal and of the certificate of dismissal granted by magistrate Bonnycastle is affected by sections 726 and 730 of the Criminal Code, which are made applicable here by the Summary Convictions Act. Under former sections the magistrate can dismiss the information or complaint. Under the latter, "If the justice dismiss the information or complaint, he may, when required so to do, make an order of dismissal in form 37, and shall give the defendant a certificate in form 38 which, upon being afterwards produced, shall, without further proof, be a bar to any subsequent information or complaint for the same matter, against the same defendant." Though not so worded, no doubt the section means that it is the previous adjudication, of which the certificate is evidence, that constitutes the bar. Bar in law is "a plea or objection of force sufficient to arrest entirely an action or claim at law" according to the New English Dictionary where the following is quoted from Termes de le Ley: "Barre is when the defendant in any action pleadeth a plea which is a sufficient answer and that destroyeth the action of the plaintiff for ever."

The result follows that once the previous order of dismissal in such a matter as this before us has been established by production of the certificate the whole right of action is gone and there is nothing further before the magistrate on the second application. His authority in the matter has ceased because there is nothing before him to hear and determine.

The defence of a previous order of dismissal must, it is true, be pleaded and proved by the defendant, but when it is established under the common law and the provisions of the above sections of the Code it puts an end to the matter in question and removes it from the authority and jurisdiction of the magis-

trate to try. "It is a principle of the common law, as well as being expressly provided by Code, secs. 730, 907, that a person shall not be tried twice for the same offence; and a previous conviction or acquittal by a competent tribunal is available as a defence to a person who is put in peril a second time for the same act or offence . . . and a justice had no authority to entertain an information for an offence, if the accused has already been tried by a tribunal having competent jurisdiction, and either acquitted or convicted for the same offence:" Seager's Magistrate's Manual, 216.

In *Reg.* v. *Herrington* (1864), 3 N.R. 468, 28 J.P. 485, 12 W.R. 420, an application had been made for an order of affiliation to two justices who declined to make the order on account of the lack of corroboration required by the English statute; a second application was made but no objection was raised that the matter had been determined by result of the prior application. The justice made the order and the defendant took an appeal to the Quarter Sessions, which was not prosecuted. On motion for *certiorari*, it was held that as the defendant did not take the objection at the hearing, but raised a defence on the merits, the Court would not grant the writ. Now, if the objection of the prior determination of the matter had been raised before the justices what would have been the result? Lord Cockburn answers that question: "Supposing there had been a hearing on the merits, and the case had been thoroughly gone into, and a decision had been pronounced in favour of the defendant, and then a fresh application had been made before the same justices or other justices, and on that application it was brought to the knowledge of the justices that the matter had been thoroughly inquired into, heard an determined, upon a previous application, I think that that ought to be a sufficient answer to the fresh application. The doctrine of *res judicata* ought to apply in that case as well as to any other." The clear inference is that, had the objection been taken before the justices the Court would have granted the *certiorari*. Now, if that would have been the case under the English law as it then stood, we can readily assume that we would be right in granting *certiorari* here. It is to be remembered that our Act contains

MAN.
C. A.
DAVIS
v.
FEINSTEIN.
Cameron, J.A.

express provisions for the discharge of the defendant by the magistrate which are not to be found in the English Bastardy Acts, and that the provisions of sections 726 and 730 of the Code give additional force and effect to the principle of the common law that no one shall be tried twice for the same offence.

"When in civil or criminal actions the defence of *res judicata* applies, the original cause of action or complaint is gone:" *per* Teetzel, J., in *R.* v. *Quinn*, 10 Can. Cr. Cas. 412 at 422, 11 O.L.R. 242.

In this case, therefore, there was no cause of action or offence before Sir Hugh J. Macdonald which could be tried.

My view is, so far as I can gather from the authorities, that when the objection or defence of a previous order or conviction or of a previous acquittal or discharge is raised, it is the duty of the magistrate to hear and determine the facts relevant to that issue. His jurisdiction goes and must necessarily go to that extent. But when once the conclusion is clear that the matter before him has been previously disposed of by competent tribunal, then his jurisdiction is at an end. The offence or cause of action is gone and there is nothing before him to be dealt with.

In my judgment the order before us must be set aside.

There must be the usual order protecting the magistrate.

Haggart, J.A.

HAGGART, J.A.:—When a person is indicted for an offence and acquitted, he cannot be afterwards indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it; and if he be thus indicted a second time, he may plead *autrefois acquit*, which will be a good bar to the indictment. The authorities say that the true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried, is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.

The King v. *Emden*, 9 East 437, is a case where one was indicted in Middlesex for perjury committed in an affidavit, which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a *prout patet* by the affidavit filed in the Court of King's Bench at Westminster, and

on this he was acquitted: after which he was indicted again in Middlesex for the same perjury with this difference only, that the second indictment set out the jurat of the affidavit in which it was stated to have been sworn in London which was traversed by an averment that in fact the defendant was so sworn in Middlesex and not in London. It was there held that he was entitled to plead *autrefois acquit;* for the jurat was not conclusive as to the place of swearing, and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore the defendant had been once before put in jeopardy for the same offence.

Lord Ellenborough, C.J., in discussing the matter, on p. 218, says:—

"It appears to me that the jurat is not a necessary part of an affidavit to be stated in an indictment assigning perjury in such affidavit: it is only necessary to state so much of it as constitutes the crime; namely, that which contains the false oath, together with the averments proper to substantiate the perjury. If so, there was a sufficient indictment found in the first instance, on which the party has been tried and acquitted of the same offence as is now charged by the second indictment; and therefore such acquittal is a good plea in bar to the present indictment. . . . The whole crime therefore might have been tried on that indictment, and the defendant was in jeopardy upon it, and consequently his acquittal is a bar to the present prosecution."

Le Blanc, J., after stating the facts, says:—

"But that averment does not let in the proof of any fact that might not have been given in evidence on the first indictment: how credible, it is not necessary to inquire. Therefore the defendant, having been in jeopardy upon that indictment for the offence with which he now stands charged, is entitled to plead his former acquittal in bar."

The Queen v. *King*, [1897] 1 Q.B. 214, was a case where a defendant had been convicted upon an indictment charging him with obtaining credit for goods by false pretences. It was held

MAN.

C. A.

DAVIS v. FEINSTEIN.

Haggart, J.A.

that he could not afterwards be convicted upon a further indictment charging him with the larceny of the same goods.

Hawkins, J., on p. 218, in discussing the question raised in this case, says:—

"This case raises another point. There was a separate indictment against the prisoner for larceny of the same goods which he had been convicted of obtaining credit for by false pretences, and after his conviction upon the first he was put upon his trial upon the second indictment. He protested against being tried for the larceny after conviction for the misdemeanour; but his objection was overruled, and he was convicted and sentenced to six months' hard labour, to run concurrently with his sentence on the other indictment. I am of opinion that the second trial ought not to have taken place, and that the objection was good. The man had clearly been convicted of a misdemeanour in respect of obtaining credit for the same goods which were the subject of the charge of larceny; and it is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts: the offences are practically the same, though not their legal operation. The course adopted is altogether inconsistent with what is right and just; and though the defendant will in fact get no practical advantage from our decision, he is entitled to have this second conviction quashed."

I do not think that the prosecution have established that the trial before police magistrate Bonnycastle was a nullity. If a conviction had been made on that trial I doubt very much whether that conviction would have been set aside on the facts admitted on this motion; and I think the onus is upon the prosecution to shew that the proceedings were a nullity. Here Feinstein has been twice in jeopardy.

But it is contended on behalf of the mother that the proceedings before police magistrate Bonnycastle did not comply with the provisions of section 9, ch. 92, R.S.M., the Illegitimate Children's Act, and that in consequence there was no adjudication. This will necessitate the consideration of certain other provisions of that statute.

Section 2 is in these words: "Any police magistrate or any

two justices of the peace to whom an application is made under this Act shall have jurisdiction and power under this Act to issue warrants and summonses, writs of subpœna, executions and other process, and may make orders under this Act, and such process and orders shall have force and be binding anywhere in the Province." This section then gives a right of action to the mother, imposes the obligation upon the putative father and gives the tribunal jurisdiction.

Section 9, which was the subject of much discussion, reads as follows: "If the mother has not, previously to the birth, laid an information, any justice of the peace on application of the mother or any person in her behalf, shall take the information of the mother, in writing, under oath, stating that she has been delivered of an illegitimate child and stating the name of the father of such child."

Section 9 then is a regulation concerning procedure and it is nowhere enacted expressly or by implication that the strict observance of these directions is a condition precedent to the jurisdiction. "Regulations concerning procedure and practice of civil Courts may . . . when not going to the jurisdiction, be waived by those for whose protection they were intended." Maxwell, p. 627, and "By weight of authority proceedings under the bastardy laws are considered in substance as civil suits:" 5 Cyc. 644.

The objection urged here was never raised by any of the parties to the first proceedings. The mother and her witnesses gave their evidence as well as the defendant and his witnesses. The omission to lay the information of the mother under oath was the mother's, and she should not be allowed now to say that their exists no judgment in the case tried by police magistrate Bonnycastle.

The defendant, even in a criminal case before justices, if the subject-matter be within their jurisdiction, may waive any irregularity in the summons, or indeed, dispense with the summons altogether, and he does so, not indeed by appearing merely, but by appearing and entering on the case upon its merits. The authority for this proposition is Maxwell at p. 628, 5th ed.

The Queen v. *Hughes*, 4 Q.B.D. 614, was a Crown case re-

MAN.
C. A.
DAVIS
v.
FEINSTEIN.
Haggart, J.A.

served. The accused was indicted for perjury and convicted. It was held that the conviction was right, notwithstanding there was neither written information nor oath to justify the issue of the warrant, and that the justices had jurisdiction to hear the charge though the warrant upon which the accused was brought before them was illegal.

Turner v. *Postmaster-General*, 5 B. & S. 756, was a case in which the defendants were in custody upon a charge of felony that could not be sustained, but, before the magistrates, were charged with and convicted of a different offence, for which they could not be legally arrested without a warrant on information and oath, yet the Court upheld the conviction.

Along the same line I would also refer to the following authorities: *The Queen* v. *Doherty*, 3 Can. Cr. Cas. 505; *Regina* v. *Clark*, 20 O.R. 642; and *Regina* v. *Stone*, 23 O.R. 46, all of which are referred to in Seager's Magistrate's Manual in discussing this subject on p. 256.

Compliance with all the requirements of section 9 I do not think is necessary to give the magistrate jurisdiction. In any event what is now objected to was waived.

As to the other question that was raised, I cannot find that the right to apply for *certiorari* has been anywhere taken away expressly by statute. Under the Criminal Code and the Liquor License Act, the appellant to the County Court is in express terms denied the right of *certiorari*.

"*Certiorari* can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be finally determined in the inferior Court nor by a proviso that 'no other Court shall intermeddle' with regard to certain matters to which jurisdiction is conferred on the inferior Court:" 10 Halsbury, p. 345. See also *Rex* v. *Jukes*, 8 Term Rep. 542; *Rex* v. *Morely*, 2 Burr. 1040.

It is contended that having served notice of appeal the right of *certiorari* is taken away by section 1122 of the Criminal Code. It is section 32 of the Illegitimate Children's Act, which introduces the Criminal Code and the wording is "The proceedings on such appeals shall in other respects be governed by the same rules as appeals from summary convictions or orders made by

a justice of the peace under the Criminal Code of Canada." That is, the procedure leading up to the judgment on the appeal is provided for. It is nowhere stated that the consequence shall be the same as in the case of summary convictions under the Criminal Code. As I have said the right to a writ of *certiorari* has not been taken away by the Illegitimate Children's Act, the Manitoba statute, or any other statute in express terms.

MAN.
C. A.
DAVIS v. FEINSTEIN.
Haggart, J.A.

In *Johnston* v. *O'Reilly*, 12 Can. Cr. Cas. 218, 16 Man. L.R. 405, it was held that notwithstanding section 887 [present number 1122] of the Criminal Code, *certiorari* proceedings may be maintained although there has been an appeal from the conviction upon any ground which impeaches the jurisdiction of the magistrate.

For the foregoing reasons I think that the order for *certiorari* should be made and that the conviction by Sir Hugh Macdonald ought to be quashed.

RICHARDS, J.A., dissented. *Conviction quashed.*

Richards, J.A. (dissenting)

WEST v. SHUN.

SASK.
S. C.

Saskatchewan Supreme Court, Lamont, Brown, Elwood and McKay, JJ. November 20, 1915.

1. LANDLORD AND TENANT (§ II E—36)—ASSIGNMENT OF LEASE—WHAT PASSES TO ASSIGNEE—GUARANTY OF RENT.
An assignment by a lessor, of all the rights, powers, title and interest in a lease, with all the benefit and advantage to be derived therefrom, carries with it the benefit of a guaranty contained in the lease for the payment of the rent by the lessee.

2. PRINCIPAL AND SURETY (§ I B—13)—ASSIGNMENT OF LEASE—LOSS OF DISTRESS—DISCHARGE OF SURETY.
A surety for the payment of rent is not discharged because by an assignment of the lease the right of distress is lost.
[*Re Russell*, 29 Ch. D. 254, followed.]

3. ASSIGNMENT (§ III—29)—ASSIGNEE OF LEASE—RIGHT TO SUE IN OWN NAME—"ENTIRE BENEFICIAL INTEREST"—PROOF OF.
Where the assignee of a lease proves an assignment absolute in form it is sufficient evidence of his entire beneficial interest to enable him to sue in his own name under ch. 146, R.S.S., 1909, unless it is proved that notwithstanding the assignment he did not have the entire beneficial interest in the claim sought to be recovered.
[*John Deere Plow Co.* v. *Tweedy*, 15 D.L.R. 518, distinguished.]

APPEAL by defendant in an action for rent. Statement

J. A. Allan, K.C., for appellant.

M. A. Miller, for respondent.

BROWN, J.:—I concur in the judgment of my brother Lamont, which I have had the opportunity of reading, except wherein he Brown, J.

SASK.
S. C.
WEST
v.
SHUN.
Brown, J.

holds that the plaintiff failed to prove at the trial that he had the entire beneficial interest in the claim sued for. I am quite prepared to accept the proposition that the plaintiff must prove that he was entitled to the entire beneficial interest in the debt assigned at the time the action was instituted. That seems to me to be a clear statutory requisite. But I hold a different view as to what is sufficient proof. The document in question in this action is admittedly an absolute assignment of the debt, and it has always been my idea that documentary evidence is the best kind of evidence. The statute in question does not lay down any new rule of evidence. This document was in form the same when put in evidence at the trial as when it was executed, and in my opinion it spoke with equal effect at one time as the other. At no time was the document conclusive proof, but at all times it was *primâ facie* proof. In the case of *John Deere Plow Co.* v. *Tweedy*, 15 D.L.R. 518, decided by my brother Elwood, and which is referred to by my brother Lamont, the document of itself did not furnish the proof required by the Act. In that case it is stated, at p. 519:—

> There was no evidence given at the trial as to what interest the plaintiff company possesses in the debt assigned, other than the production of the assignment above set forth. The assignment shews that it was collateral security for the payment of whatever debt might be owing by the assignor to the plaintiff company, and it contemplates the possibility of the whole of the debt assigned not being required to discharge the liability of the assignor to the plaintiff.

In the case of *Wood* v. *McAlpin*, 1 A.R. (Ont.) 234, it was expressly proved at the trial that the assignment did not convey to the plaintiff any beneficial interest, but on the contrary it was made for the purposes of the action only. I am of opinion that when the plaintiff at the trial proved an assignment absolute in form he did all that the statute required of him, and it was then incumbent on the defendants to shew if they could that the plaintiff notwithstanding the assignment did not as a matter of fact have the entire beneficial interest in the claim sought to be recovered. In my opinion, therefore, the appeal should be dismissed with costs.

Lamont, J. (dissenting)

LAMONT, J. (dissenting):—By a lease dated May 16, 1911, one West leased certain premises to Lee Soon for a term of three

years from September 1, 1911, at a monthly rental of $40 per month. That lease contained the following covenant:—

And I, Lee Shun of Yellow Grass, caterer, in consideration of the sum of $1 paid to me by the lessor, guarantee the payment of all rents that may fall due by virtue of this lease.

The lease was executed by both defendants. On February 12, 1913, West assigned the said lease to the plaintiff. The assignment recited that a lease had been entered into between West as lessor, and Lee Soon as lessee, and set out the terms of the lease. It contained this clause:—

Now this indenture witnesseth that in consideration of the sum of $1 now paid by the assignee to the assignor (the receipt whereof is hereby acknowledged), the assignor doth hereby transfer, grant, and assign unto the assignee all his right, powers, title and interest in the above described lease, together with the residue unexpired of the said term of years, with all benefit and advantage to be derived therefrom.

At the date of the assignment, Lee Soon was some $63 in arrears with his rent. Subsequently he paid to the plaintiff in all the sum of $590 and then made default. The plaintiff's claim is for $273, being the rent for the balance of the term, and he claims this from both defendants.

In his statement of defence, Lee Shun set up that the plaintiff's statement of claim disclosed no cause of action against him, in that the plaintiff did not allege that he had any interest in the guarantee of the defendant. At the trial, the plaintiff amended his statement of claim by alleging that he was possessed of the entire beneficial interest in the lease and guarantee. This the defendant denied.

The trial Judge found that at a certain date before the expiration of the term, the plaintiff, by his servants, had taken possession of the premises. He gave judgment in favour of the plaintiff for the amount due up to the time the plaintiff took possession. From that judgment the defendant Lee Shun now appeals.

On his behalf, the following grounds were urged for reversing the judgment:—

(1) That the guarantee was not part of the lease, but a distinct and separate contract, and only the lease was assigned. (2) That the guarantee was not assignable. (3) That, if assignable, it was not in fact assigned, as apt words to assign it had not been used. (4) That the plaintiff did not prove that he was entitled to the entire and beneficial

SASK.
S. C.
WEST
v.
SHUN.
Lamont, J. (dissenting)

interest in the rent assigned. (5) That by the assignment the right to distrain on the goods of Lee Soon had been lost, and this prejudiced the guarantor to that extent and he was thereby discharged.

It is quite true, as contended by Mr. Allan, that the guarantee of Lee Shun is a separate and distinct contract to that entered into by the lessee: 15 Hals., sec. 864. But that is of importance only when considering whether the language of the assignment should be construed as including the right of the assignor under the guarantee.

That the guarantee is assignable seems beyond question.

In 15 Hals., sec. 951, the learned author says:—

> The person to whom a guarantee is given may assign the guaranteed debt and the securities for the same.

The right of West to both rent and guarantee being assignable, was the guarantee in fact assigned? This depends on the meaning to be given to the word "lease" in the assignment.

The assignment transferred to the plaintiff "all the rights, powers, title and interest" of the lessor in the said *lease*, with "all the benefit and advantage to be derived therefrom." By the term "lease" as used, I think it is reasonably clear that what the parties meant was the indenture of lease referred to in the recital. That indenture contained not only the lessee's covenant to pay the rent, but also the appellant's guarantee of the same. These are separate contracts, but they are both made with the lessor. He had the entire beneficial interest under both. It is admitted that an assignment of all his interest in the lease would give the assignee the benefit of the lessee's covenant to pay the rent. I cannot see any reason why it would not be just as appropriate to transfer the lessor's interest in the guarantee. If the draftsman had used the word "document" or "indenture" instead of the word "lease," it would not, to my mind, have been arguable that the benefit of the guarantee did not pass. To hold that the word "lease" as there used was confined to the term granted or to the letting, would be giving it a meaning more restricted than it is ordinarily entitled to have.

In my opinion, the assignment is sufficient to transfer the benefit of the guarantee. The argument that the appellant is discharged because, by the assignment, the right of distress is lost, is disposed of by the case of *Re Russell*, 29 Ch. D. 254.

where the Court of Appeal held that a surety was not discharged because a creditor, by his conduct, destroyed a right of distress for arrears of rent, as such distress was not a security held by a creditor in respect of the debt.

The only remaining question is: Was the plaintiff entitled to sue in his own name?

By sec. 1 of the Act respecting Choses in Action, every debt and any chose in action referring to debt or contract is assignable if it shew by any form of writing using apt words on that behalf. The section also provides that the "assignee" thereof may bring an action thereon in his own name.

Sec. 2 defines the term "assignee" as follows:—

(2) The term "assignee" in the next preceding section shall include any person now being or hereafter becoming entitled to any first or subsequent assignment or transfer, or any derivation title to the chose in action and possessing, at the time of the suit or action, being instituted, the whole and entire beneficial interest therein, and the right to receive the subject or proceeds thereof and to give effectual discharge therefor.

To bring an action in his own name, therefore, the plaintiff must have (1) an assignment in writing of the money falling due under the lease, and (2) at the time he instituted the action he must have possessed the "whole and entire beneficial interest" in the debt sued for under the assignment. These are the statutory conditions, without compliance with which the assignee cannot sue in his own name.

In *John Deere Plow Co.* v. *Tweedy*, 15 D.L.R. 518, my brother Elwood said:—

Following the decision in *Wood* v. *McAlpine*, 1 A.R. (Ont.) 234, I am of opinion that the plaintiff, not having alleged in its pleadings and not having proved at the trial that it was at the time of the trial entitled to the whole and entire beneficial interest in the debt assigned, its action must fail.

Has the plaintiff complied with these conditions precedent? Although he was a witness at the trial, no evidence whatever was given to shew who was beneficially entitled to the rent; whether it was the plaintiff's own, or whether he was collecting it for his brother. Counsel for the plaintiff contended that the production of an assignment absolute on its face was *primâ facie* evidence of the plaintiff's beneficial interest therein at the time he began his action.

SASK.

S. C.

WEST v. SHUN.

Lamont, J. (dissenting)

The statute casts the onus on the plaintiff of proving the assignment in writing, and, also, that at the date he brought his action (which must necessarily be a time subsequent to the assignment) he had the beneficial interest. Where the statute casts on the plaintiff the onus of proving beneficial ownership at a date subsequent to the taking of the assignment, the mere production of the assignment is not, in my opinion, evidence that the plaintiff was entitled to the entire benefit at such subsequent date. The onus is on the plaintiff to prove this affirmatively at the trial.

This case differs entirely from that of an executor or administrator bringing an action; because, when an executor or administrator receives probate or letters of administration, he can only bring an action on behalf of the estate. No question can arise as to whether the beneficial interest at any particular time belongs to him or someone else.

I am, therefore, of opinion the plaintiff has not established his right to bring the action in his own name.

The appeal of Lee Shun should, therefore, be allowed with costs.

Elwood, J.

McKay, J.

ELWOOD and MCKAY, JJ., concurred with BROWN, J.

Appeal dismissed.

[NOTE: *West* v. *Shun*, 24 D.L.R. 617, corrected.]

Re DEERING.

N. S.

S. C.

Nova Scotia Supreme Court, Graham, E.J., and Longley, Drysdale, and Ritchie, JJ. April 17, 1915.

1. EXTRADITION (§ I—8)—THEFT OR LARCENY—PROOF OF FOREIGN LAW.

An order for extradition to the United States on a charge of larceny of promissory notes is justified where the facts disclosed in the extradition proceedings make out a *primâ facie* case of theft under Canadian law without more in proof that such facts constitute larceny under the foreign law than might be inferred from his indictment in the foreign state for the offence.

[*Re Murphy*, 2 Can. Cr. Cas. 578, 23 A.R. 386; *R.* v. *Watts*, 5 Can. Cr. Cas. 246, 3 O.L.R. 368; *Porter* v. *McManus*, 25 N.B.R. 215, applied.]

Statement

MOTION for discharge on habeas corpus in extradition proceedings.

F. L. Milner, in support of application.

V. J. Paton, and *E. T. Parker*, *contra*.

N. S.
S. C.
RE DEERING.
Ritchie, J.

RITCHIE, J.:—The extradition Judge has made an order for the extradition of Deering. He has been indicted for theft by the grand inquest of the Commonwealth of Massachusetts, and his extradition is sought by the United States of America.

Theft, under the name of larceny, is an extraditable offence under the treaty between the United States and Canada. The facts in this case, in my opinion, make a strong *primâ facie* case of theft under Canadian law. If the offence which was disclosed in the depositions was committed in Canada it would be a clear case to commit for trial. In this connection I refer to sections 347 and 355 of the Criminal Code.

The view of the facts which I have expressed, makes it unnecessary to consider some of the points raised by Mr. Milner.

Under the facts as I find them the questions which are presented for consideration are: (1) Was it necessary to prove before the extradition Judge the law of the United States? (2) If it was necessary, was there such proof before the Judge?

The first question has been before the Court in Ontario in *Re Murphy*, 2 Can. Cr. Cas. 562, 26 O.R. 163 (in appeal 2 Can. Cr. Cas. 578, 23 A.R. 386). The Divisional Court of Common Pleas (consisting of Chief Justice Meredith, Mr. Justice Rose, and Mr. Justice MacMahon), held (2 Can. Cr. Cas. 562) that in extradition proceedings it is sufficient if the evidence disclose that the offence under the Extradition Act is one which, according to the laws of Canada would justify the committal for trial of the accused had the offence been committed in Canada, and that it was not necessary to prove the law of the demanding country. On appeal (2 Can. Cr. Cas. 578), the Court was equally divided. Chief Justice Hagarty and Mr. Justice Maclennan holding that it was not necessary to prove the foreign law and Mr. Justice Burton and Mr. Justice Osler taking the opposite view, thus making a majority of five to two among the Judges of both Courts in favour of the proposition that it is not necessary to prove the law of the foreign country in extradition proceedings.

Chief Justice Hagarty said:—

"The high contracting parties treat such crimes as murder, forgery, rape, larceny, etc., as crimes well known to both, and

N. S.
S. C.
RE DEERING.
Ritchie, J.

especially as between nations using the same language and laws, based on generally similar principles, I cannot think it reasonable to insist on proof that the named crime exists in the demanding nation."

In *Rex* v. *Watts*, 5 Can. Cr. Cas. 246, 3 O.L.R. 368, Mr. Justice Street said:—

"This decision of the Divisional Court in *Re Murphy* (2 Can. Cr. Cas 562, 26 Ont. R. 163), upon the point now under consideration, was sustained in the Court of Appeal by an equal division of opinion in the members of the Court, and I think I should follow it. In any event my view of the proper course to be taken under the statute in the present case is in accord with the opinion expressed by the Divisional Court in that case. It seems to me, to take an extreme case, that if the crime alleged was murder, and the facts sworn to before the Extradition Commissioner were such as would constitute that crime under our law, it would be unnecessary for the Crown to prove that the same facts also supported a charge of murder in the foreign state. In the present case we find the crime of "child stealing" mentioned in the treaty as one of the extradition crimes, and I think we should, in the absence of any evidence to the contrary, assume the crimes to be identical in the two countries. It seems to me that under sub-section 3 of sec. 9 of the Act, R.S.C. ch. 142, it would have been competent for the prisoner to shew that the crime of stealing, under the foreign law was not covered by the facts deposed to here, and if that were done, then I think the prisoner should be discharged; but in the absence of any such evidence the objection should not prevail."

The remarks of Chief Justice Allen of New Brunswick in *Porter* v. *McManus*, 25 N.B.R. 215, are, I think, directly in point. He said:—

"By the treaty of Washington entered into between Great Britain and the United States, and confirmed by the Act of Parliament, 6 & 7 Viet. ch. 76, it was agreed that persons charged with certain crimes, one of which was murder, in Great Britain and the United States, should be delivered up by the one country to the other to be tried for the offence charged. This, I think, is sufficient to shew that murder is punishable as a crime through-

N. S.
S. C.
RE DEERING.
Ritchie, J.

out the United States, and that the Courts in the British dominions are bound to take notice of it, the Act of Parliament being expressly applicable to the colonies."

These remarks are equally applicable to the present treaty and extradition Act.

The view which I entertain on this question is expressed in the foregoing quotations. I therefore hold that it was not necessary in this case to prove the law of the demanding country. I may also add that the view which I have taken is ably supported by Mr. Piggott in his book of Extradition, page 125.

But there is, I think, strong presumptive evidence of the foreign law. An indictment for theft has been found in Massachusetts on facts now before this Court, and it is a reasonable and proper legal presumption for this Court to make and act upon, that the indictment was found in accordance with the law of Massachusetts.

The application for discharge under *habeas corpus* must be refused.

Graham, E.J.

GRAHAM, E.J., concurred.

Longley, J.

LONGLEY, J.:—I am entirely satisfied that the defendant is charged with crime. I am also satisfied that it is an offence in the State of Massachusetts, although this is not essential in an extradition proceeding by the Canadian Act upon the treaty. Therefore I would decline to grant a *habeas corpus* and I would leave the prisoner to be handed over to the Massachusetts authorities as ordered. *Application refused.*

WICKWIRE v. CARVER.

P.E.I.
S. C.

Prince Edward Island Supreme Court, Sir W. W. Sullivan, C.J., Fitzgerald and Haszard, JJ. January 12, 1915.

1. BILLS AND NOTES (§ I B—11)—ILLEGALITY OF CONSIDERATION—VIOLATION OF PROHIBITION ACT—SALE BY NON-RESIDENT.

A bill of exchange given for the sale of liquor in violation of the Prohibition Act is illegal and unenforceable, although such sale was effected by a resident agent for a non-resident creditor not having paid the license fee required by the Act.

[*Brown v. Moore*, 32 Can. S.C.R. 93, followed.]

Statement

ACTION on a bill of exchange for $274 accepted by the defendant.

C. G. Duffy, for plaintiffs.

J. J. Johnston, K.C., for defendant.

The judgment of the Court was delivered by

P.E.I.
S. C.
WICKWIRE v. CARVER.
Fitzgerald, J.

FITZGERALD, J.:—By his fourth plea the defendant pleads that the bill of exchange was drawn and accepted for the sale and purchase of intoxicating liquors, to be sold by defendant in the city of Charlottetown in violation of the Prohibition Act, 1900, the plaintiffs then well knowing of such intended breach of the Act.

By the sixth plea the defendant pleads the Act to prohibit the soliciting of orders for intoxicating liquors, 9 Edw. VII. ch. 7, and its amendment, 2 Geo. V. ch. 17, alleging that an agent of the plaintiffs (non-residents), sold this liquor to the defendant, a resident in this province, without such agent having paid the license fee required by the statute. To these two pleas the plaintiffs demurred.

Considering the last statute first, and the allegations in the sixth plea, we have to determine whether, under this Act the plaintiffs, non-residents of this province, can recover on this bill of exchange for intoxicating liquors sold by their agent here to the defendant, such agent not having paid the license fee required.

Sec. 10 of this statute reads in part as follows:—

In any action or proceeding by a creditor not permanently residing in this province against any person within this province for the recovery of the purchase money or any part thereof for the sale to such person of any liquor or for any promissory note, bill of exchange or other security given for such sale, such creditor shall not obtain a verdict, judgment or decision therein, unless it is proved at the trial of such action that before the commencement of said action the said creditor or the person who sold for him such liquor had paid the license fee required under the provisions of this Act for the year in which the sale of such liquor was negotiated.

These words apparently bar the plaintiffs' recovery in this action.

It is contended, however, that this section does not apply to an agent or traveller living in this province; and that the plea is insufficient, in that it does not aver the non-residence of the agent making the sale; and it is urged that secs. 3 and 7 support this contention. Sec. 3 in that it refers only to commercial travellers not permanently "residing in this province;" and sec. 7, in that, while it does refer to agents residing here under the words: "and any person residing in this province," only

imposes a penalty for its breach. Counsel arguing that the imposition of such penalty does not imply prohibition, nor prevent recovery on this contract.

Section 1 of this Act prohibits every "person whosoever," except those who are permitted to pay the tax hereinafter mentioned, from taking or soliciting or canvassing for orders," either for himself, or for any other person, for the sale of liquor within this province.

Section 3 declares that it shall not be lawful for any casual trader, not permanently residing in this province, commonly known as commercial travellers, nor for any person not permanently residing in this province, to solicit or canvass for orders either for himself or for any other person, for the sale of any liquor within this province, to be imported, bought or sent into this province, unless and until he or she pay to the Provincial Treasurer an annual license fee or direct tax of $200. Section 7 enacts that any person, any commercial traveller, or person not permanently residing in this province, and any person residing in this province, who within the province takes orders, solicits or canvasses for orders for the sale of any liquor to be imported into the province, without having first paid the said license fee or tax, and obtained the license required, shall be subject to a penalty of $500.

Shortly, the statute apparently requires commercial travellers, and persons not permanently residing in this province to pay a license fee before soliciting or canvassing for such orders; prohibits all not permitted to pay this fee from taking, soliciting or canvassing for such orders; and makes it a penal offence for any person, including specifically commercial travellers, persons not permanently residing in this province, and any person residing in the province, to solicit or canvass for orders for such sale, without having first paid this license fee.

It is curious legislation, made more so by its sec. 6, which makes it a penal offence for any person to take, solicit or canvass for orders, license or no license.

We are here only directly concerned with sec. 10 before quoted, barring the right of action when the person who sold the liquor had not paid the license fee required.

P.E.I.

S. C.

WICKWIRE v. CARVER.

Fitzgerald, J.

Now, though this Act has no direct enactment in it, authorizing the issue to any particular class of persons, of a license to canvass, yet by it, sec. 1 forbids generally such canvass, except to those permitted to pay the license fee, sec. 3 makes it unlawful for commercial travellers to canvass without license, and sec. 7 makes it a penal offence for any person, any commercial traveller, or any person residing in this province to canvass without license. The persons required to pay the license fee are, I take it, those forbidden to canvass without it. Consequently sec. 10 must apply to all such persons.

The contention of counsel for the plaintiffs that the imposition of a penalty does not prevent recovery, is not the law. *Brown* v. *Moore*, 32 Can. S.C.R. 93, is a direct decision to the contrary. In the short judgment of the Chief Justice, he says: "It is also settled that the imposition of a penalty for the contravention of a statute, avoids a contract entered into against the provisions of the statute."

As to the first demurrer, the fourth plea sets out a sale in this province of intoxicating liquor to the intent, and for the purpose, as the vendor well knew, that such liquor was sold, to be sold in this province, in violation of the Prohibition Act.

In *O'Mullen* v. *Joy*, tried before Hensley, J., in October, 1889, that Judge decided that the consideration of the contract in that case, being a sale of spirituous liquors in this city, wherein the Canada Temperance Act was then in force was illegal. This decision was upheld by the full Court, November 4, 1890.

The pleas in that case averred a sale to a resident of the city, the vendor then knowing, that the purchaser was not authorized by license to sell intoxicating liquor therein, and that such liquor was to be sold in said city contrary to the Act.

That case, and the one before us are identical in principle. In both, the consideration is a sale in this province of intoxicating liquor, knowingly in violation of a statute prohibiting it.

Since that decision, namely, in 1902, the Supreme Court of Canada in *Brown* v. *Moore*, *supra*, have confirmed the judgment of this Court, the Chief Justice thus defining the law:—

It is settled law that contracts entered into in the face of statutory prohibition are void, and the prohibition of sales of liquor without license provided by the statute in question, has, therefore, the effect of rendering the contract of no effect.

Judgment for the defendant will therefore be entered on both demurrers. *Judgment for defendant.*

REX v. WALLACE.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, and Simmons, JJ. May 4, 1915.

1. INDICTMENT, INFORMATION AND COMPLAINT (§ II F—55)—AMENDMENT—DIRECTION OF ATTORNEY-GENERAL.

When an amendment is made at the request of the Attorney-General to a charge brought in Alberta where there is no grand jury system, the amended charge has the same validity as the former charge, unaffected by a consideration as to whether an indictment could be similarly amended by the Court in a matter of substance.

[*R.* v. *Standard Soap Co.*, 12 Can. Cr. Cas. 290, referred to.]

2. THEFT (§ I—7)—OBTAINING MONEY FROM IMBECILE—KNOWLEDGE OF IMBECILITY.

If a person gets another to give him money to which he has no right or claim, knowing the giver to be an imbecile and that consequently the latter could have no will to give the money to him, he is properly convicted of theft. (*Per* Harvey, C.J., and Simmons, J., in a divided Court.)

CROWN case reserved by Simmons, J., on a conviction for theft. Statement

E. C. Locke, for the accused.

Frank Ford, K.C., for the Crown.

HARVEY, C.J.:—This is a case reserved by my brother Simmons. Harvey, C.J.

The accused was charged with having received $600 from Tolfela De Witt with a direction that it should be used for the construction of a shack on the homestead of Wm. E. DeWitt, which the accused fraudulently converted to his own use and did thereby steal the same.

At the close of the case for the prosecution the learned trial Judge being of opinion that the direction for the use of the money was not proved permitted an amendment of the charge so as to make it simply one of theft. He states that there was evidence which satisfied him that at the time the money was obtained by accused from Tolfela DeWitt she was of unsound mind and incapable of understanding the nature of the transaction. The money was obtained in July, 1914. In May pre-

ALTA.
S. C.
REX
v.
WALLACE.
Harvey, C.J.

ceding William DeWitt, Tolfela's husband went away. Accused had been working for him at wages which he said were $65 per month while he was doing certain work and $30 at other times. He continued in the place under DeWitt until July. When DeWitt left he gave accused for wages a team at $120 and accused claimed $140 more which was settled by giving him cattle. This sum would represent four to eight months wages. Young DeWitt sold some cattle for the proceeds of which a draft for $1,700 was obtained which Mrs. DeWitt cashed at Jansen, Saskatchewan. Accused knew that she had the draft and he drove her to town and spoke of marrying her and asked her for $600 and wrote out some document for her to send it to him on his wages. On July 6th she obtained from the bank at Jansen a draft payable to accused at the Royal Bank, Erskine, and deposited to her credit the remainder of the $1,700. Accused did not use the money at Erskine but had it transferred to the Royal Bank at Castor where it was deposited to his credit and subsequently drawn out. Young DeWitt knew nothing of the $600 transaction until November, when he learned of it in some cases that was tried then. He says that accused remained only about a week after he drove Mrs. DeWitt to Sedgewick on her way to Jansen. No evidence was given for the defence and the learned trial Judge convicted him of theft. The questions reserved are:—

1. Was I justified in making the amendment?

2. Was the defendant properly convicted of the charge of theft?

These questions of course can only mean was the amendment justified in law and was the conviction justified in law? As far as the amendment is concerned, I think that there can be no doubt that the trial Judge was quite within his rights in allowing it to be made.

Section 889 expressly provides that amendments may be made under such circumstances as this and it is admitted by counsel for accused that when the amendment was made he was offered an adjournment of the trial if he desired, but that he did not wish it. He, however, has cited authorities to shew that an amendment is not authorized under this section if it

alters the character of the offence charged. These authorities are I think founded on the procedure on indictment by a grand jury, an amendment of which so as to alter the character of the offence charged would leave an indictment not found by a grand jury.

The practice in this province continued from the territories, which has now been incorporated in the special statutory provisions of section 873A, takes away the foundation for those decisions for when the amendment is made by or at the request of the agent of the Attorney-General the amended charge becomes a charge of the same validity as the former charge. Before this amendment it was pointed out in *R.* v. *Standard Soap Co.* (1907), 12 Can. Cr. Cas. 290, 6 W.L.R. 64, that the principles founded in indictment did not apply here.

However, I think it can scarcely be said that the amendment does alter the nature of the offence. It was theft originally and might have been so charged with nothing more. It remained theft but only under different circumstances or with different particulars.

As regards the second question the learned Judge states that he considered that the onus was on the accused of shewing that he did not know of the state of mind of Mrs. DeWitt; I take it that he means under the circumstances of the case which he had set out and which I have mentioned, and he informs us that that is what he meant. In view of the general way in which the second question is referred it is perhaps not important because what is really referred is whether the evidence makes out a prima facie case of guilt or is such that a jury would be justified in law in inferring guilt.

Authority is quoted us to shew that the taking of money from an imbecile or person of otherwise unsound mind is theft, but it scarcely seem to need authority. Under some circumstances such an act may amount to theft. *Prima facie* a person is supposed to have the mental capacities usual to a person of his years and appearance. If a man found a baby with a roll of bills in its hands and he took them and applied them to his own use there can be little doubt that he should be deemed guilty of theft. Similarly if he took from one whom he knew to

ALTA.

S. C.

REX v. WALLACE.

Harvey, C.J.

be imbecile and who consequently could have no will to give it to him. But if he thought the person was capable of and had the intention to let him have the money the criminal intention or *mens rea* would be absent and there would be no theft. The learned trial Judge has found that Mrs. DeWitt did not understand the value of money and therefore could not have had the will or intention to benefit the accused by giving him $600 and he has the evidence of a doctor and of the banker who gave her the money to support his finding and I am of opinion therefore that it cannot be questioned.

The only question then to consider is whether in the facts adduced in evidence it can be inferred that the accused was aware of her mental infirmity. The facts are that he had worked on the farm where she resided for several months and would therefore have means of learning her mental capacities, that he approached her by proffering marriage to her though her husband had been absent only a few months, that he obtained the money without giving her any evidence of it suggesting that it was for wages when no wages were due him, that he had it transferred from the bank to which he had directed it to be sent, to another where he had it deposited, suggesting an intention of concealment of his having obtained it, which fact was not made known for some months, and that he left the DeWitt place about the time he received the money.

These are all circumstances pointing to a knowledge or at any rate a means of knowledge of Mrs. DeWitt's mental state and to a guilty intention on his part and I feel unable to say that upon such facts without any explanation or statement by the accused, a jury would not be justified in inferring that the accused took the money fraudulently intending to deprive the owner of it, or at any rate that having it with a knowledge that it was not his, he appropriated it to his own use with the same intention and that he was consequently guilty of theft.

I am of opinion therefore that the ruling of the trial Judge should be confirmed and the conviction affirmed.

Simmons, J.

SIMMONS, J., concurred with the Chief Justice.

Scott, J.

SCOTT, J.:—I am of opinion that there was not sufficient evi-

dence to support the conviction of the defendant upon the charge as amended at the trial.

The trial Judge states that the evidence satisfied him that the complainant from whom the defendant is charged with having received the money, a sum of $600, was a woman of unsound mind and incapable of understanding and appreciating the nature of the transaction and that he found that the defendant obtained the money under those circumstances and that the onus was upon him of satisfying the Court that he did not know her state of mind.

In my view the trial Judge erred in holding that the onus was upon the defendant to shew that he did not know the complainant's state of mind. I think it is clear that the onus was on the Crown to shew not only that she was of unsound mind at the time the defendant obtained the money from her but also that he, at that time, knew that such was the fact.

I am reluctantly forced to the conclusion that the evidence was not sufficient to establish either of these facts. The only evidence as to the complainant's state of mind at the time of the transaction is that of the bank manager through whom the money was transferred to the defendant who states merely that she did not know the value of money. The only other evidence which in any way bears upon that question is that of a physician who apparently saw her for the first time two days before the preliminary examination upon the charge, which examination, as the case shews, took place not less than four months after the transaction. He states that he then found that she was then weak-minded by reason of epileptic dementia and that she did not know the value of money in large amounts. Nothing can be inferred from the physician's evidence as to her state of mind at the time of the transaction as, for anything that appears to the contrary, the dementia may not have occurred or may not have been apparent until afterwards.

The evidence of the bank manager that the complainant did not know the value of money is not, in my view, sufficient to support the finding that she was of unsound mind and, therefore, incapable of understanding the nature of the transaction. I am afraid that there are many who have not a sufficient

ALTA.

S. C.

REX v. WALLACE.

Scott, J.

understanding of the value of money and yet cannot be classed as persons of unsound mind. It is shewn that the money was obtained by the defendant by way of loan and the evidence leads to the suspicion that he used undue influence to obtain the loan. It may be that the complainant was easily influenced to enter into what appears to have been an improvident transaction which, as such, might have been set aside in a civil action, but that does not necessarily imply that she was of unsound mind or incapable of understanding the nature of the transaction.

The complainant's stepson who appears to have been old enough and otherwise competent to manage his father's business in his absence says nothing in his evidence as to her mental state and he appears to have entrusted her with a draft for $1,700 the property of his father with instructions to collect the money at a bank in another town. It was out of the proceeds of this draft that the complainant advanced the money to the defendant and she states that she loaned the remainder of the proceeds of the draft to her "folks." If she was then of unsound mind to the extent of not knowing the value of money her stepson must have known the fact. It is singular that if he had that knowledge, he should have entrusted her with such a large amount.

Even if the complainant was of unsound mind at the time of the transaction there is no evidence that the defendant was aware of it nor can his knowledge be reasonably inferred from it. It is true that he was employed by her husband for some months prior to the transaction but, in so far as appears by the evidence, the only way in which her mental state manifested itself was her ignorance of the value of money and it may be that he had no opporunity for observing her mental state upon that question.

I would quash the conviction and direct the discharge of the defendant.

Stuart, J.

STUART, J., concurred with SCOTT, J.

The Court being equally divided, conviction affirmed.

Re WOOD VALLANCE & CO.

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S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. July 12, 1915.

1. PARTNERSHIP (§ VI—27)—DEATH OF PARTNER—GOODWILL OF FIRM—RIGHT OF SURVIVING PARTNER—PRE-EMPTION.

The goodwill of a firm forms a part of its ordinary assets, and in the absence of an express stipulation entitling the surviving partner to take over the interest of the deceased partner, no such right of pre-emption can be implied.

[*Hibben* v. *Collister*, 30 Can. S.C.R. 459; *Wedderburn* v. *Wedderburn*, 22 Beav. 84, followed.]

Statement

APPEAL from judgment of Middleton, J., in an action for construction of articles of co-partnership.

The articles are as follows:—

"2. The capital of said copartnership shall consist of stock in trade, book-debts, promissory notes, bills of exchange, securities, and other assets of the former firm of Wood Vallance & Co., as the same stands at this date, and the parties hereto hereby assign and transfer to the said new firm of Wood Vallance & Co. all their interests in the said stock in trade, book-debts, and other assets heretofore standing in the name of the former firm of Wood Vallance & Co."

"4. The parties hereto are hereby declared to be interested in the capital and assets of the said firm to the amounts following, namely: the said William Vallance the sum of $479,243.43; the said William A. Wood the sum of $577,524.21."

Clause 5 provides for the allowance of interest at 6 per cent. upon the capital to the credit of each partner.

Clause 6 provides for the profits, after payment of interest, being equally divided.

Clause 7 provides that each partner shall devote his whole time to the business.

Clause 8: "At the expiration of each succeeding year of the partnership, an account shall be taken of the stock in trade, assets, and liabilities of the partnership, and an annual balance-sheet shall then be made out to the 31st January in each year, which shall be attested by each of the parties hereto."

Clause 9: "In the event of the death of any partner before the expiration of the term of these articles of partnership, the copartnership hereby created shall not be thereby dissolved or wound up; but shall be continued by the survivor during the

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S. C.

RE WOOD VALLANCE & CO.

Statement

current or financial year, that is, until the 31st January following the date at which the death of any partner occurs, or, at the option of the surviving partner, during a period not exceeding 12 months from the date of the death of any deceased partner. The surviving partner shall not be required to pay to the representative or representatives of any deceased partner any portion of his capital in the partnership until the expiration of 12 months from the decease of such partner. The capital of any deceased partner shall in the meantime remain in the business and shall bear interest at the rate of 6 per cent. per annum to the date of payment, and the person or persons interested in such capital shall also receive the same share of the profits of the business up to the end of the current or financial year, that is, until the 31st January following the date at which the death of such partner occurs, as would be paid to such partner so dying as aforesaid, if he were still living."

Clause 10: "Should any dispute or difference arise between the said partners or between the surviving partner and the representatives of any deceased partner as to the amount which either partner is entitled to be credited with, or liable to be charged with, in making up any annual balance-sheet of the copartnership, or as to the valuation of any of the assets of the copartnership, such dispute shall be referred to an arbitrator mutually chosen by the parties, or, in the event of their failing to agree upon an arbitrator, then to such arbitrator as a Judge of the High Court shall, upon application of either of the parties on one week's notice in writing to the other, appoint, and the award or decision in writing of the arbitrator so chosen or appointed shall be binding upon all parties interested."

E. F. B. Johnston, K.C., for appellants.

S. F. Washington, K.C., for respondent.

GARROW, J.A.

GARROW, J.A.:—Appeal from the judgment of Middleton, J., under an originating notice, upon the construction of articles of partnership dated the 31st January, 1910, made between William A. Wood and William Vallance, constituting the partnership of Wood Vallance & Co., carrying on business at the city of Hamilton as hardware merchants. The partnership term agreed upon in the articles was for 5 years, but

during the term, namely, on the 28th November, 1913, William Vallance died. The articles contain several special clauses applicable to such a case, and it is entirely upon the proper construction of these that the present contention has arisen.

The questions discussed in the judgment, and again before us, briefly restated, are: (1) the claim of the surviving partner to a right to take the assets at a valuation; (2) his claim to the goodwill; (3) the binding efficacy upon the question of the value of the assets of the annual statements; and (4) the division of the profits between the end of the then current year and the period fixed for the final winding-up.

As will be seen, Middleton, J., was of the opinion: (1) that, while the articles contain no express agreement giving a right of pre-emption to the surviving partner, such an agreement should under the circumstances be implied; (2) that the value of the goodwill should not be taken into account as an asset; (3) in effect, that the values set out in the annual statements are binding upon both parties; and (4) that the profits accruing after the end of the current year belong exclusively to the surviving partner.

It is, I think, obvious that the dominating feature of the judgment is the finding first mentioned, namely, that under an implied term to that effect the surviving partner is entitled to take over the partnership assets at a valuation.

Equality, that favoured child of equity, is the rule. If inequality is claimed, it must be justified in terms that there can be no reasonable doubt about. An author of authority says: "In the absence of an express agreement to that effect, the surviving partners have no right to take the share of a deceased partner at a valuation; nor to have it ascertained in any other manner than by a conversion of the partnership assets into money by a sale; nor have they any right of pre-emption:" see Lindley on Partnership, 8th ed. (1912), p. 694. And at the same page the learned author states his view of the law upon the other main question of a partner's right to the goodwill: "Even the goodwill of the business, if saleable, must be sold for the benefit of the estate of the deceased; although the surviving partners are under no obligation to retire from business them-

ONT.
S. C.
RE WOOD VALLANCE & CO.
Garrow, J.A.

selves, and cannot, it seems, be prevented from recommencing business together in the name of the old firm unless the goodwill has been or is to be sold."

And, in the absence of an agreement such as the one implied, the value and effect of the annual statements as accounts stated would also be materially altered. In that case all the assets, however previously valued, would, in the ordinary course of winding-up, be realised in cash by sale in the usual way, and each would be entitled to share in the proceeds without reference to these annual statements.

The implied term, it will thus be seen, is of very wide, even revolutionary, extent, and would, it appears to me, require for its justification something very compelling in the other words of the agreement from which the inference must be drawn, something in fact which does not simply create a question or justify a guess, but which in the interest of justice enables not merely an inference but the correct inference to be surely drawn.

In the present instance, should it be inferred that what was intended was merely an option to the surviving partner to purchase? Or was he to be bound to purchase? And, if the latter, one should also be able further to infer a contract in the nature of a covenant by the surviving partner to do so, upon breach of which an action against him could be maintained.

There are now many cases upon the subject of implied terms. *Hopkins* v. *Jannison*, 18 D.L.R. 88. I do not propose to pass them again in review here, or indeed to say more about them than that I have always considered that the essence of such cases is well expressed by Lord Esher in *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. 488, at p. 491, where he says: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication *necessarily* arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." And, within this exposition of the rule, I am, with deference, quite unable to see

anything in the articles in question which would justify implying the term now under consideration. It is not, it seems to me, a necessary implication at all. All that the articles as they stand provide for can be wrought out to a fair, definite, and final conclusion without the aid of the implied term. Its effect is simply to give rights which *primâ facie* the agreement as it stands, without the term, does not give.

In his judgment Middleton, J., refers to clauses 9 and 10 of the articles as those which induced him to reach a conclusion favourable to the implication. Clause 9 in its structure seems to me to be upon the whole inconsistent with the idea now put forward that, in effect, at once upon the death of the partner, the business, goodwill, etc., passed to the survivor, to be paid for by him upon a valuation, at the time and in the manner mentioned in the clause.

It expressly says that the partnership is not to be dissolved by the death, but shall continue for at least the term of the then current year, or, at the option of the survivor, for a year from the death.

I am inclined to think that the chief, if not the sole, object of the clause was intended to be in case of the surviving partner so that he might not be harassed or hurried in the operation of winding-up, which upon the death of the copartner would necessarily devolve upon him. But, whatever else may be extracted from the clause, it does not, I think, aid in any certain degree toward justifying the implication.

Reliance, however, was chiefly rested upon clause 10, which provides for an arbitration in case of a dispute between the surviving partner and the representatives of a deceased partner, as to the valuation of the assets of the firm. This, the learned Judge considered, would be absolutely meaningless without the implication. That the clause would otherwise be meaningless is not in itself, I think, a sufficient ground for making such an important implication. But it is not, I think, meaningless, if it is borne in mind that the partnership might, by the terms of the agreement, be continued, at the option of the surviving partner, beyond the end of the then current year, in which case it would be his duty at the end of the then current year to make

ONT.
S. C.
RE WOOD VALLANCE & CO.
GARROW, J.A.

up the statement of the stock in trade, assets, and liabilities of the firm required by clause 8, upon which the interest payable under the provisions of clause 9 would be calculated.

And it is quite conceivable that the values placed thereon by the surviving partner might be disputed by the representatives of the deceased partner, in which case the arbitration provided for by clause 10 could be invoked.

We were referred to several cases upon the argument, at which I have of course looked. But, as has often been said, cases upon the construction of documents are seldom of use in construing other documents in other cases. Each case must depend upon its own particular facts and circumstances. For instance, *Stewart* v. *Gladstone*, 10 Ch.D. 626, was cited and is also referred to in the judgment as an authority for the proposition that the value of the goodwill is to be excluded in such a case as this. But that is not there laid down as a general proposition, but simply as the proper conclusion to be drawn in that case from the terms of the agreement between the parties, which in no way resembled the very much simpler case with which we are dealing. There the agreement contemplated a partnership comprising several partners, and contained provisions for a partner dropping out, or even being forced out, as the plaintiff was by his copartners; the business continuing. Here the partnership is quite at an end, and the only real question is as to the proper division of the assets.

I am, for these reasons, of the opinion that the proper construction of the articles is that there is no right of pre-emption in the surviving partner; that the goodwill forms part of the ordinary assets of the firm; and that, although this seems so obviously to follow that it need scarcely be mentioned, the annual statements of account and the valuation therein placed upon the properties and assets should be regarded as merely conventional in their nature, and upon the final winding-up are really of no importance and should be disregarded.

The remaining question is as to the profits after the end of the then current year; and as to this I, not entirely without hesitation, agree with the conclusion of Middleton, J., who held that the representatives of the deceased partner were not en-

ONT.

S. C.

RE WOOD VALLANCE & Co.

Garrow, J.A.

titled to any share therein. It is true, as was contended, that the partnership is in express terms declared not to be dissolved by the death, and that the partnership capital is to remain in the business for a year thereafter, at the option of the surviving partner. But the parties seem to have made an express agreement upon the subject of the profits, by the terms of which the representatives of the deceased partner are to share in such profits only until the end of the then current year.

Under the circumstances, the maxim *expressio unius est exclusio alterius* seems to me to apply to prevent an extension of this express provision in the manner contended for by the learned counsel for the representatives of the deceased partner. By the articles both partners were bound to give their undivided attention to the business (clause 7). The death of Mr. Vallance made this of course impossible, thereby casting extra labour and responsibility upon the surviving partner; and it may very well have been considered only fair, as he was alone doing the work, that he alone should take the profits after the end of the then current year.

To the extent indicated above, I would allow the appeal, and I think it should be with costs.

Hodgins, J.A.

HODGINS, J.A.:—The firm of Wood Vallance & Co. is the successor of a business which began in 1849, and which has been carried on under that name since 1889. The balance-sheet of the firm existing in 1910 shews two Vallances and two Woods as interested therein. It is entirely probable that the goodwill of the business was valuable, but it is not mentioned by name in the present partnership articles, probably because the main family interests remained, and the business was being "continued," as it is expressed in the articles. But there is apparently some goodwill existing and attached to the business of the present firm, otherwise one of the questions now in issue would not have arisen. That goodwill passes under the word "assets" is clear: see *Jennings* v. *Jennings*, [1898] 1 Ch. 378, and *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine Limited*, [1901] A.C. 217; *In re Leas Hotel Co.*, [1902] 1 Ch. 332; *Foster* v. *Mitchell*, 20 O.W.R. 754, 22 O.W.R. 571, 3 O.W.N. 425, 1509. That is the word used to describe the property of the former

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S. C.

RE WOOD VALLANCE & CO.

Hodgins, J.A.

firm other than that specially enumerated, and the capital of the present firm.

This being the case, the appellants are entitled to have the partnership agreement construed as if it specifically mentioned goodwill as an asset both taken over and as forming part of the capital, unless the other provisions of the agreement forbid it.

The explanation of what goodwill is and why partners have an interest in it is nowhere better given than in *Wedderburn* v. *Wedderburn*, 22 Beav. 84, 104: "The goodwill of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a Court of Equity. Accordingly, in reported cases, Lord Eldon held, that a share of it properly and as of right belonged to the estate of the deceased partner. It does not survive to the remaining partners, unless by express agreement; but it may by agreement, as it may be agreed that any particular portion of the partnership assets shall so survive. Goodwill manifestly forms a portion of the subject-matter which produces profits, which constitutes partnership property, and which is to be divided between the surviving partners and the estate of the deceased partner, according to the terms of the contract, and when that is silent, according to their shares in the concern."

The cases are also decisive that, being an asset, it is salable and divisible on dissolution or on the death of a partner: *Hibben* v. *Collister*, 30 S.C.R. 459; *Banks* v. *Gibson* (1865), 34 Beav. 566; *Hill* v. *Fearis*, [1905] 1 Ch. 466.

The balance-sheets produced do not shew goodwill as an asset; probably because it is not a proper item in those of a going concern: *Steuart* v. *Gladstone*, 10 Ch.D. 626; *Hill* v. *Fearis*, *supra*. But it is argued that, if in general goodwill must be accounted for, the terms of the present agreement negative that rule.

The order appealed from construes the partnership agreement, so far as it deals with the situation created by the death of the late Mr. Vallance, and in effect holds it to have provided for a sale to the surviving partner on the footing of the balance-sheet compiled previous to his death. Ordinarily the death of a partner terminates the partnership, and the survivor is bound

to wind it up: *Whitney* v. *Small* (1914), 31 O.L.R. 191. Under the present articles it is provided that this result is not at once to happen; and the real question is, whether there is merely a postponement of the ordinary rights arising on dissolution by death, or whether the agreement provides for another and different way of ascertaining the rights of both parties.

In dealing with this it is well to keep in mind the statement of Lord Esher, M.R., in *Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q.B. at p. 491, as to when and how terms not expressed in a contract may be implied. This statement is as follows: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

I have found no case save *In re David and Matthews*, [1899] 1 Ch. 378, in which an agreement for sale has been implied; and, from an examination of the other reports, 80 L.T.R. 75, 68 L.J. Ch. 185, 47 W.R. 313, I should judge that the case proceeded upon the assumption that the intention was that the surviving partner had the right to buy, and that Romer, J., was not intending to do more than determine what was the effect of the words of the agreement, having regard to that assumption.

Dealing then with the agreement as it stands, these features appear. The copartnership is not by the death "thereby dissolved or wound up." It is to be "continued by the survivor during the current or financial year, that is, until the 31st January" following the date of death; "or, at the option of the surviving partner, during a period not exceeding 12 months from the date" of death.

This plainly means a postponement of the usual consequences of the death of a partner until a definite period which may be prolonged by the survivor, and a carrying on of the partnership as such in the meantime. At the end of this term the dissolution and winding-up must take place unless there is something

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S. C.

RE WOOD VALLANCE & CO.

Hodgins, J.A.

in the agreement which provides differently. This construction would be beyond question if the continuation were only to the end of the then financial year, and the added option only gives a right to further postpone dissolution and winding-up.

The agreement then deals with the capital of the deceased partner. If the partnership is continued, his capital would necessarily remain in the business, and the articles so provide. From what was stated at the bar, the practice of both parties was to draw on their capital when they desired, and Mr. Wood in his depositions says that he has continued to do so. As to the capital of the deceased partner so remaining, there are two provisions. One is that it shall earn profits only till the end of the financial year, but thereafter only interest at 6 per cent. It is urged that this deprivation of profits is inconsistent with the idea that the partnership is continuing because in that case the capital would not be deprived of the profits accruing by its use. On the other hand, this is a very natural provision if the surviving partner has to bear the burden of carrying on the business, and compensates him for that burden. It is not conclusive either way, and it is rather a slender provision on which to hang an option or a right to buy out the deceased partner's interest upon the basis of a balance-sheet made out during the previous year, when it was a going concern. The learned Judge whose order is appealed from does not treat this as decisive, though he expresses the opinion that the provision is significant. The expression "shall not be required to pay . . . any portion of . . . capital" is, to my mind, an expression at variance with the idea of a sale to the surviving partner, if it is limited to the capital shewn in the yearly balance-sheets, having regard to the composition of those sheets and the provisions of article 10. As will be seen, the capital in the balance-sheets represents apparently the difference between assets and liabilities, most of which would not be realisable until the affairs were wound up. So that the provision is a reasonable one to protect the assets against too hasty liquidation.

If the surviving partner bought out the deceased partner's share, then both capital and profits would have to be paid unless a sale price were arrived at, in which case it would not be capital

but purchase-money. But the word "pay" may fairly be used of the return of capital by the surviving partner, as he, strictly speaking, becomes liable to account on realisation. In *McClean* v. *Kennard* (1874), L.R. 9 Ch. 336, 346, his position is thus defined: "The general rule is, that the interest which the testator had in a *chose in action* jointly with another shall not pass to his executor, yet *per legem mercatoriam*, as formerly mentioned, an exception was established in favour of merchants, which has been extended to all traders and persons engaged in joint undertakings in the nature of trade. But in these cases, although the right of the deceased partner devolves on his executor, it is now fully settled that the remedy survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased."

Clause 10, however, is regarded as conclusive.

It deals with disputes or differences both between the partners while living and between the surviving partner and the representatives of the deceased partner. These disputes, it states, are as to (1) the amount which either partner is entitled to be credited with or liable to be charged with in making up any annual balance-sheet of the copartnership, or (2) as to the valuation of any of the assets of the copartnership.

It had been agreed by clause 8 that annual balance-sheets should be made out "at the expiration of each succeeding year of the partnership," which in its terms includes the current financial year during which the partnership is being continued under article 9, but not thereafter, for the continuance at the option of the surviving partner is not for a year, but only until 12 months after the death, which forms a broken period. The balance-sheets were to be "attested by each of the parties thereto," which may well include the representatives of the deceased partner, in view of the fact that, the partnership not being dissolved, the appellants might at all events fairly be treated as partners for this purpose.

The copies of the balance-sheets for 1911, 1912, 1913, do not shew any attestation by the parties. But the originals may do

ONT.
S. C.
RE WOOD VALLANCE & CO.
Hodgins, J.A.

so. However, the balance-sheet to the end of January, 1914, is not so verified. Article 10, I think, can be read as having a useful meaning during the partnership, when the balance-sheets were being made up, and equally so after the death, when the balance-sheet to the end of the then financial year had to be made up, and this can be tested by examining the results when the form of the balance-sheets is considered in connection with the provisions of the partnership articles. In that made up to the 31st January, 1914, the real estate is stated at $100,000. It is said to be worth much more. If the capital of each partner is determined by the proportions stated in the agreement (article 4), subject to the amounts drawn out, the increase in any asset, being divisible in unequal fractions, would be of importance not only with regard to the amount on which interest is to be paid for the period subsequent to the 31st January, 1914, but also to the interest payable during that year, under article 5. Then, if an asset is increased, there would necessarily be an increase in actual capital of the partners as shewn in the balance-sheet, because the capital items appear to be put in at an amount to balance it. So that the purpose of article 10 may be very important, even if restricted to a question of the valuation of any asset, the winding-up division being naturally based upon the figures settled by the arbitration.

But it is not clear to my mind that the proportions stated in article 4 determine for all time the proportions in which the assets are to be owned, and the question should be viewed in the alternative aspect. In the balance-sheets the capital of each partner is stated in varying figures. How these figures are arrived at is not shewn, though, if drawings on capital account only were deducted, the amounts shewn year by year would represent the original capital amounts less those drawings. Yet these sums may include added profits. If the position is correct that they are the actual capital of each partner in the strict sense of money capital put in, then, upon winding-up, these amounts would be paid out before dividing the surplus, which is divisible in a different proportion. This ultimate surplus would be profits, and the articles provide for its equal division (article 6).

In this view, too, the real value of the assets would be important, as, after discharging the liabilities and repaying the capital, the larger the surplus the more each partner would be entitled to, and it would provide a standard of accountability to which the surviving partner would, *primâ facie*, be bound to conform. Hence, whether the original proportions governed the division of capital, or the ultimate surplus is to be divided equally, I see a good reason why article 10 would be of importance to each partner, and to the surviving partner, and to the representatives of the deceased partner.

If I am correct, then the question of the goodwill of the business settles itself, because, if an asset, it is saleable and divisible as part of the surplus which I assume will exist. The capital of each partner in the articles of agreement is stated at the exact sum which appears in the balance-sheet of the previous firm dated the 31st January, 1910, while in 1911 the capital amounts appear in altered figures and as balancing items, and similarly in the other balance-sheets.

In the 1914 balance-sheet, the assets had decreased by $98,008.81, while the liabilities decreased by $151,786.44, thereby shewing an increase of $53,777.63 in the partners' capital accounts, i.e., of $37,824.78 in the one and $15,952.85 in the other. This shews that the figures of capital represented balancing items and that the proportions given originally in article 4 were not adhered to.

This treatment of capital as being the surplus in the business, depending on a deduction of liabilities from assets, indicates the importance of shewing in the balance-sheet of the 31st January, 1914, the true values of the various assets. For, even if the sale to the surviving partner was provided for, as the learned Judge below has held, then the amount on which interest is to be calculated and the amount of capital repayable might be considerably increased by the item of real estate alone, even if goodwill were not included.

I am unable to see why the surviving partner should be allowed to take over the assets at less than their real value, because they so appear in a former balance-sheet, unless that right is expressly given to him under the articles. The Court should

ONT.
S. C.
RE WOOD VALLANCE & CO.
Hodgins, J.A.

not imply an agreement so unreasonably favouring one of the parties unless compelled to do so by force of the other terms of the agreement. The case of *Stewart* v. *Gladstone, supra,* is well explained by Joyce, J., in *Scott* v. *Scott,* 89 L.T.R. 582. He says that it decides (1) that where the accounts from which the sum to be paid is to be ascertained are only accounts for the purpose of ascertaining the profits, the goodwill is not to be included in the account, and (2) that the goodwill is not to be taken in ascertaining what is to be paid, when to ascertain what is to be paid, is simply to take a figure from the annual account.

I find nothing to bind the parties except when the accounts are signed—which the 1914 balance-sheet is not—and there is no agreement anywhere by which the deceased partner agreed to be bound and concluded by what the surviving partner might do in compiling a balance-sheet.

I base my dissent from the main holding in the judgment below on the fact that the parties have not definitely stated an option to, or a right of purchase by, the surviving partner—a very usual and well-understood thing. The Court should not imply it where the expressions used and the machinery provided for dealing with the situation caused by the death of the partner can be intelligibly construed and worked out otherwise.

I think the questions should be answered as follows:—

1. No.

2. Yes.

3. Balance-sheets not binding.

I agree with the judgment below as to interest and profits upon the deceased partner's share.

The appeal should be allowed with costs.

Meredith, C.J.O.
Maclaren, J.A.
Magee, J.A.

MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., concurred.

Appeal allowed in part.

MATHESON v. BROWN.

N. S.
S. C.

Nova Scotia Supreme Court, Graham, E.J., Russell, Longley and Ritchie, JJ. April 15, 1915.

1. LIBEL AND SLANDER (§ II E 3—69) — PRIVILEGED COMMUNICATIONS — STATEMENTS BY MANAGER AS TO CONDUCT OF EMPLOYEE—MALICE.

Statements made by the manager of a store to parents in answer to their inquiries as to the grounds of the dismissal of their daughter, that she had sent goods home from the store without charging them, which implied theft, are privileged communications from which no actual malice can be inferred, and, therefore, not actionable slander.

N. S.

S. C.

MATHESON v. BROWN.

Graham, E.J.

APPEAL from judgment of Drysdale, J., in favour of plaintiff in an action claiming damages for slander.

V. J. Paton, K.C., for appellant.

F. L. Milner, K.C., for respondent.

The judgment of the Court was delivered by

GRAHAM, E.J.:—This is an action for defamation against the defendant manager of a company at Joggins Mines. I attach importance to the statement of claim because it shews what the plaintiff alleged the defamatory words were when the action was commenced. This is the important part of the statement of claim:—

2. That the plaintiff has suffered damage from the defendant in the month of December, A.D. 1913, at Joggins Mines in the County of Cumberland falsely and maliciously speaking and publishing of the plaintiff to and in the hearing of Richardson Greer, Robert Bell, Mrs. Daniel Matheson, Daniel Matheson and to other persons whose names are unknown by the plaintiff the words following, that is to say: "That the said Iva Matheson had sent things home from the store without charging them; that the said Iva Matheson had been sending home stuff without charging it; that when that girl (meaning thereby the plaintiff) had been there alone that there were parcels going from the store to the house (meaning the house in which said plaintiff resided); by the said statements meaning that the said plaintiff had stolen goods from the said store and was a thief and was guilty of an offence against the criminal laws of Canada.

3. That the plaintiff has suffered damage from the defendant in the month of December, A.D. 1913, at Joggins Mines in the County of Cumberland falsely and maliciously speaking and publishing of the plaintiff to and in hearing of Richardson Greer, Robert Bell, Mrs. Daniel Matheson, Daniel Matheson and to other persons whose names are unknown by the plaintiff the words following, that is to say: "That the said Iva Matheson had sent things home from the store without charging them; that the said Iva Matheson had been sending home stuff without charging it; that when that girl (meaning thereby the plaintiff) had been there alone that there were parcels going from the store to the house (meaning the house in which the said plaintiff resided) by the said statements meaning that the plaintiff was a thief and a dishonest servant and was not a proper person to be trusted in a position of bookkeeper or clerk."

I think it will be noticed that the alleged defamatory words are the same in each paragraph and that is no doubt owing to the fact that there were two occasions of publication, one to the plaintiff's father on the evening of a day in December on which the plaintiff was dismissed from her employment, and the other the next morning to her mother.

To these paragraphs the defendant has pleaded among other

N. S.

S. C.

MATHESON v. BROWN.

Graham, E.J.

things a general denial, a denial of the innuendo, also that they were uttered on a privileged occasion, and that they were true in substance and fact.

The jury found a verdict for the plaintiff for $100 damages and this is an application to set it aside, and also to dismiss the action.

It appears that at the noon hour the plaintiff was generally the only clerk left in the store. At the noon hour of Tuesday, Wednesday and Thursday, the 9th, 10th and 11th of December, 1913, the company set a watch for that hour. The defendant and two other employees, Hatton and Foster, took part in that investigation. This is what Foster says, p. 20:—

Q. During what period did you watch? A. Between 12 and 1 o'clock. Q. What days? A. 9th, 10th and 11th of December, Tuesday, Wednesday and Thursday. Q. Will you tell us what you saw? A. On the 9th Nina Matheson left the store with two parcels. On the 10th she left with four parcels. On the 11th they made two trips, one while Mr. Greer, I suppose, was in the store, because his delivery waggon was at the back of the store. I could see that. They came out with a parcel that looked as though it contained canned goods wrapped up. That was the first trip. After Mr. Greer went away—I saw him drive away—she came out with three more parcels, and after dinner I went over, after Mr. Brown had come back, and he pointed to the place where the last charge was made. Q. You reported this to Mr. Brown, you say? A. Yes, sir, and there were two cans of peas charged on this day, and there were four parcels taken away on the 11th and two cans of peas charged while I was watching. Q. That is the day you say she made two trips? A. Yes. Q. On the first trip how many parcels do you say she had? A. One. Q. And on the second trip how many? A. Three.

He does not speak of Friday, the 12th. Hutton says, p. 18:—

Q. What part did you take? A. I set a man to watch the store on the noon hour? Q. What did you do yourself? Or what did you notice? A. On Thursday I was going up the street myself and I noticed Nina Matheson going into the store. Q. On the Thursday of that week she was discharged? A. Yes. Q. What happened? A. I noticed Nina Matheson, the sister of the plaintiff, going into the store at the noon hour, between 12 and 1 o'clock. She just went up the street a little bit ahead of me, and I crossed over into Clark's store and watched her go into the company's store, and when she came out she came down and went into her own house, which is just opposite Clark's store. There is just 200 to 500 ft. between the corner where she lives and the company's store. I could see her go into the company's store. She came out with three parcels and went on and down to her own house. When Mr. Brown came back I began to tell him what I had seen. Then I went into the store and Mr. Brown picked up the day book and I said, "Where was the last entry that you made?" Q. You

went in and saw him look at the book? A. I went in and looked at the book myself. Q. Is that the book you looked at? A. Yes. Q. What did you do about it? A. I asked Mr. Brown to shew me the last entry just before he went to dinner. He shewed me and I didn't mark it. I looked down and there was one entry of two cans of peas charged to them and that was all. Then he handed me over the pin file with the cash slips on them and I looked at them and there was no cash slips of anything sold to Matheson's whatever. Q. This was on Thursday? A. Yes. Q. Do you know what day of the month it was? A. December 11th. Q. You say you saw this girl with three parcels and there were only two cans of peas charged up? A. Yes. Q. Could the parcels have been peas? A. No, none of them were cans of any kind. Q. Just describe the parcels? A. She had one parcel which looked about a 15 or 20 lb. bag and she had the head of it turned around over a handle and she held it there; and she had another parcel under her arm which looked as if it had toilet articles in it, and I couldn't say what was under the other arm.

There is satisfactory evidence that of all these articles only two cans of peas on the 11th were charged in the books to the plaintiff's family. And among the slips shewing cash payments there were none corresponding to the goods. The plaintiff herself was cross-examined and this is an extract from what was elicited:—

Q. You are in charge of the shop during that time? A. When I am alone I am in charge. Q. Do you remember those four days before you were discharged? A. I do, yes. Q. Did you deliver any goods to your sister the day before you were discharged? A. I can't remember. Q. Did you two days before you were discharged? A. I don't know. Q. Three days before you were discharged? A. I don't know. Q. You can't remember whether you delivered any goods to your sister on any of those four days? A. No, I cannot.

The defendant reported to his superior, the general manager, Mr. Bell, and received instructions to dismiss the plaintiff and without making charges against her. She was dismissed. On that evening her father went to the store and this is what he says took place:—

Q. What occurred? A. I asked him what was the reason of the girl being discharged, and he said it was for sending things home without being charged. I said "That means stealing," and he said, "Yes, that means stealing." He went to go out of the office and I took hold of him and put him back in the corner, for I wanted to find out who brought these charges. I took hold of him to find who gave him the information. I told him there was nobody told him that and he said there was, and he could prove it. Q. Was there some high talk on this occasion? A. Yes. Q. Both of you angry? A. I know I was. I don't know how he felt about it. Q. And you went there as the father of the girl to get him to tell

N. S.
S. C.
MATHESON
v.
BROWN.
Graham, E.J.

you all he knew about it? A. Yes. Q. And you wanted him to tell you what he did know about it? A. I asked him for his information. He said he had witnesses who could prove this thing and I wanted to know who they were. Q. And he was not inclined to go into the matter at all? A. No, he said he couldn't tell. Q. And that made you mad? A. Yes. Q. And you grabbed him? A. I took him by the shoulder and put him up in a corner.

This is what the mother says took place next morning when she was there:—

Q. And did you see the defendant there, Brown? A. Yes. Q. Was there some conversation as to why the girl had been discharged? A. Yes. Q. You might tell me what took place? A. We spoke to Mr. Brown and she asked him if he believed that she sent home things that were not charged, and he said there were things sent home every day that week and he could prove it. Q. Anything more? A. She said to him that she might possibly have forgot to charge them once, but if she had sent them home every day that week it would be plain stealing, and he said, yes. Q. Was something more said? A. We asked him who said that she sent things home, and he refused to tell, said he couldn't tell. Q. Just recall the conversation and tell me as full as you can? A. We were in the office first and Mr. Brown was in, and we asked him who the people were that told him she had sent things home every day that week without charging, and he said he wouldn't tell, and we said we would make him prove it, that she sent things home every day that week without charging.

In my opinion both occasions were privileged occasions.

It was not contended by the plaintiff's counsel that they were not privileged occasions.

Then the case is reduced to this: Was there express or actual malice? Any evidence of malice, or anything unreasonable about it from which malice could be inferred?

The learned counsel was pressed about this and he put forward three things and they were, I think, so remote that there it not a hint of them in the summing up. They were not put before the jury then at any rate.

He said, first, that Brown exceeded his instructions. He was told to dismiss her without making charges. Second, that the interview with the father, accompanied by an altercation, supplied an occasion for ill-will to the plaintiff or a motive when he uttered the words to the mother the next morning. And, third, that the defendant had pleaded justification. The last one was practically abandoned when the authorities shewed that this would only be of use when it was coupled with evidence of some other incident from which might be inferred express malice.

It was insufficient by itself: *Wilson* v. *Robinson*, 7 Q.B. 68. He did not rely upon any words in the alleged slander, any excessive language as suggesting malice. I think it would be most unreasonable to infer malice, ill-will, etc., from the fact that Brown did in reply to the expostulation of the parents, allow them to extract from him grounds for the dismissal. I do not think it tended to shew any malice, ill-will, etc., on his part. It was all a reasonable reply to the questions asked and founded on the knowledge the defendant had acquired as the result of the inquiry. He shewed *bonâ fide* reluctance to give reasons. Strictly the instructions to dismiss her without making charges did not apply to conversations afterwards with her father and mother, and really Mr. Bell was present on one of these occasions. But I think the plaintiff can hardly avail herself of the instructions from Mr. Bell to the defendant.

Then the second ground. It does seem far fetched that because the father of the plaintiff had that incident with the defendant, therefore, that the defendant had ill-feeling towards the plaintiff. The plaintiff never hinted at any ill-feeling and the defendant has not only sworn to his friendly relations with her, but it appears from the case that he was friendly to her. Reading the incident over that took place between the father and the defendant one can hardly suppose that the defendant would possibly have allowed himself to have any ill-feeling for the daughter on that account. It will be noticed that the defendant had given the required information which constituted the alleged slander before the altercation. That only happened after he refused to give the names of defendant's informants. Now, if there was any ill-feeling on that account on the part of the defendant, it was not disclosed in the utterance of the alleged words.

I have already referred to the fact that the alleged defamatory words in the pleading were precisely the same for both occasions. No worse the next morning than when uttered the evening before. Also the evidence that the words were the same before and after the altercation.

I think the words themselves were not unreasonable, any excess "beyond the absolute exigency of the occasion," and that

N. S.

S. C.

MATHESON v. BROWN.

Graham, E.J.

there is no proof of any ill-feeling or grudge. Nothing to leave to a jury.

In the case of *Laughton* v. *Bishop, etc.*, L.R. 4 P.C. 495, 505, it is said:—

> The only remaining question is whether or not there was evidence of express malice on the part of the defendant which ought to have been submitted to the jury, not, indeed, a mere particle or scintilla of evidence, but such as could reasonably support a finding for the plaintiff. Express malice or as it is sometimes called "malice in fact" as distinguished from malice inferred by law is defined by Parke, B., in *Wright* v. *Woodgate*, 2 C.M. & R. 573, wherein he thus expresses himself: "The proper meaning of a privileged communication is only this, that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff and puts it on him to prove that there was malice in fact, that the defendant was actuated by motives of personal spite or ill-will independent of the occasion on which the communication was made."

Later, p. 508, there is a quotation from *Somerville* v. *Hawkins*, 10 C.B. 583, 590:—

> It certainly is not necessary in order to enable the plaintiff to have the question of malice submitted to the jury, that the evidence is such as necessarily leads to the conclusion that malice existed or that it should be inconsistent with the non-existence of malice, but it is necessary that the evidence should raise a probability of malice and be more consistent with its existence than with its non-existence.

The judgment continues:—

> The rule thus laid down has since been recognized by the Court of Common Pleas in *Harris* v. *Thompson*, 13 C.B. 333, and in *Taylor* v. *Hawkins*, 16 Q.B. 308, and more recently in *Spill* v. *Maule*, L.R. 4 Ex. 232, by the Court of Exchequer Chamber.

The latter case is a very strong one and I quote one sentence, p. 237:—

> We have not to deal with the question whether the plaintiff did or did not act dishonestly and disgracefully, all we have to examine is whether the defendant stated no more than what he believed or might reasonably believe. If he stated no more than this he is not liable.

In my opinion there was no evidence of actual malice to submit to a jury, and if the case was submitted to another jury no verdict that would be given on such evidence would be allowed to stand.

Holding this view I think it is unnecessary to deal with the different grounds of misdirection in the summing up to which our attention was called.

The appeal will be allowed and the action dismissed with costs.

Appeal allowed.

HERON v. LALANDE.

B.C.

C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., and Martin, Galliher and McPhillips, JJ.A. November 2, 1915.

1. TAXES (§ III F—148*a*)—SETTING ASIDE TAX DEED—PREMATURE EXECUTION —REDEMPTION PERIOD—TENDER.

A tax deed will not be set aside because prematurely executed where no tender is made by the owner within the period of redemption allowed by the statute.

[*Heron* v. *Lalande*, 22 D.L.R. 37, affirmed.]

Statement

APPEAL from a judgment of Clement, J., 22 D.L.R. 37. Affirmed.

Joseph Martin, K.C., for appellants.

G. E. McCrossan, for respondent.

The judgment of the Court was delivered by

Macdonald, C.J.A.

MACDONALD, C.J.A.:—The tax sale was effected on July 22, 1896, and on July 22, 1898, the collector executed a deed to the purchaser.

The action was brought by appellants, devisees under the will of Robert Heron, who at the times aforesaid was the owner of the lots in question, to set aside the deed on the ground that it was made before the period allowed for redemption had expired. The owners' right was to:—

> At any time within 2 years from the date of the tax sale or before the delivery of the conveyance to the purchaser at the tax sale, redeem the land sold.

The general rule as to time in cases of this sort when not governed by statute, is that the date of the event from which the time shall run is to be excluded from the computation: 27 Hals. 449.

There was no statute governing a case of this sort until 1902, when the Interpretation Act was amended making the general rule referred to above, statutory: see R.S.B.C. ch. 1, sec. 42.

The deed should, in strictness, not have been delivered until July 23, 1898, but that circumstance does not, in my opinion, assist the appellants now. Had the appellants' testator tendered his money on or before July 22, 1898, his right could not be denied him whether the conveyance had then been executed or not.

In my opinion, the premature execution of the conveyance did not make it a nullity: it was voidable at the option of any person having the right to attack it: *Osborne* v. *Morgan*, 13

B. C.
C. A.
HERON v. LALANDE.
Macdonald, C.J.A.

App. Cas. 227. When the full period for redemption had expired, and no tender had been made by the owner, the deed became a good and sufficient deed to the purchaser, and no longer subject to attack, except upon the ground that the sale proceedings were not conducted in accordance with the law. Such an attack is not made in this case, and as it is admitted that no tender was made within the period of 2 years, the appellants have no status now to attack the conveyance.

The situation therefore is that on July 23, 1898, the period of 2 years having then expired without tender of redemption money by the owner, the purchaser's right to the property became absolute, and the deed prematurely executed ceased to be voidable except upon grounds which were not insisted upon in this action, namely, the invalidity of the sale proceedings.

In this view of the case it becomes unnecessary to consider the rights of the parties under a subsequent tax sale brought about by reason of non-payment of subsequent taxes.

I would dismiss the appeal. *Appeal dismissed.*

N. B.
S. C.

BLUE v. MILLER.

New Brunswick Supreme Court, McLeod, C.J., White and Grimmer, JJ. May 6, 1915.

1. LOGS AND LOGGING (§ I—9)—CONTRACT FOR CUTTING AND HAULING—NON-DESIGNATION OF SCALE—RIGHTS OF PARTIES AS TO APPOINT.

In an action for a balance claimed due on a contract for cutting and hauling logs, containing a clause that they are "to be paid for according to the count and scale of ——, which shall be final and conclusive between the parties," without naming the scale to be used, the plaintiff will not be bound by the scale appointed by the defendant, but evidence of scales appointed by both will be received to determine the quality of logs to be paid for.

2. SET-OFF AND COUNTERCLAIM (§ I—2)—BREACH OF CONTRACT—WANT OF PROOF AND PARTICULARS—JURY'S FINDING OF PERFORMANCE.

The amount of damages assessed on a counterclaim for breach of contract will not be deducted from the amount awarded the plaintiff, where no particulars are furnished and no proof of damage offered to support the counterclaim, and where the jury has also found that the defendant had accepted what the plaintiff did as a fulfilment of the contract.

Statement

MOTION for new trial and to set aside verdict in favour of plaintiff in action on balance due on written contract for cutting and hauling logs. Refused.

W. A. Ewing, K.C., supported the motion.

T. J. Carter, K.C., for plaintiff, *contra*.

N. B.

S. C.

BLUE v. MILLER.

Grimmer, J.

The judgment of the Court was delivered by

GRIMMER, J.:—This action is brought to recover an amount claimed to be due the plaintiff under a written contract made by Charles Miller, now deceased, with the plaintiff for the cutting and hauling of a quantity of logs.

It is dated October 15, 1912, and provides chiefly that the plaintiff is to cut logs on lands of the New Brunswick R. Co., then under permit to the said Charles Miller, and to deliver in the Tobique Corporation 500,000 superficial feet, more or less, of spruce logs of named sizes, and a like amount of cedar logs of named sizes, with an allowance of 10 per cent. of fir logs. For spruce and fir plaintiff was to be paid $7 per thousand, and $7.35 per thousand for cedar. The contract further provides—

all logs shall be paid for according to the count and scale of , which scale shall be final and binding and conclusive between the parties hereto, and the expense of the said scaler shall be paid for by the said Charles Miller.

The said Miller also agreed to make cash advances to plaintiff as his work progressed, in part payment under the contract, not exceeding, however, the value of the work done when the advance was made, which value was to be determined by said "Charles Miller's scaler or any other agent or scaler of said Charles Miller."

From the evidence it appears the parties met in St. John and arranged for the contract, which, however, was not formally drawn up for about 6 weeks later, though the plaintiff had at once proceeded to work.

Finally Miller prepared the contract in duplicate, mailed it to the plaintiff, who some time after signed one copy and returned it to Miller. The scaler's name was left blank in the contract, and it was never filled in, nor does it appear in the evidence that any arrangement was ever made between the parties as to the scaler. Miller sent, however, one Wisely, a scaler of his own selection, to scale the logs, whose first visit to the brows was on December 3, notwithstanding the plaintiff had been at work since September.

Evidence was given that previous to the visit a number of logs, about 400, which had been landed by plaintiff in the brook

N. B.
S. C.
BLUE
v.
MILLER.
Grimmer, J.

had been carried away by a freshet, and were not seen or scaled by Wisely, or ever taken into his account.

Wisely visited the operation several times during the winter, but the plaintiff, becoming dissatisfied with the scale allowed him, employed one Ferguson, a sworn scaler, to go over the logs for him.

Evidence was given as to the methods of the two scalers, and the manner in which they arrived at their respective scales was fully explained to the jury.

There was quite a difference in the returns of the two men and Miller refused to accept or recognize the scale made by Ferguson, the plaintiff's scaler, and the plaintiff refused to be bound by the scale of Wisely. In view of the making of the contract and the evidence given on the trial as to the manner in which the work was carried on thereunder, the manner in which the scalers were appointed, the manner in which the scaling was done, the scale returned by the respective scalers, the Chief Justice (K.B. Division) left to the jury questions involving the total quantity of logs actually delivered in the Tobique Corporation by the plaintiff under the contract for which Miller should pay as reported by the respective scalers; the appointment of the scaler, and the plaintiff's consent thereto; the settlement of accounts under the contract between plaintiff and Miller; the manner in which the logs were scaled by Miller's scaler, and the acceptance by Miller on his part of the fulfilment of the contract by the plaintiff; and as these several questions were properly left, involving only questions of fact, the finding of the jury must be conclusive, there being, in my opinion, ample evidence to justify and sustain the same.

I am also of the opinion there was no provision in the contract for a final and conclusive scale between the parties, no scaler having been named therein whose scale was to be final.

This may have been an oversight, or neglect or indifference on the part of Miller, but no scaler having been named, the question of the quantity of logs hauled under the contract was properly left to the jury, both parties having an equal right to have the logs scaled for their own information. Under the evid-

ence of the scaler Wisely, it was all the more justifiable and necessary that the jury should state the quantity of logs, as to a reasonable man it is quite impossible to understand from the method followed by Wisely how he could possibly know the number of logs hauled, or their contents, when he neither saw, measured or even counted more than 25 per cent of the cut.

The other question involved in this suit is the claim of damages on the part of Miller for breach of the contract by plaintiff. The jury found on a question left to them that the plaintiff committed a breach of his contract, in not delivering the amount of cedar logs contracted for, and assessed the damages at $200. The defendant Miller, in his pleadings, had counterclaimed for damages for breach of contract, but gave no particulars of the damages suffered or sustained by him, and on the trial failed to support his claim. The jury, however, found as stated, the question having been left to them, and they also found that Miller had accepted the work done by the plaintiff in fulfilment of his contract, and they may have been misled in view of these two questions. In my opinion no evidence having been given on the trial, the question as to damages was unnecessarily left to the jury and the defendants cannot now derive any benefit therefrom. The defendant Miller did not make known to the plaintiff, nor communicate to him what injury he was likely to suffer through breach of the contract, and he cannot now charge him with the damage he incurred, if any. Ordinarily, for the breach, he would have been entitled to some (nominal) damages, but as he did not see fit to claim any, and gave no evidence of any on the trial, it is difficult to see how the jury arrived at the conclusion he had suffered to the extent of $200, when he had also, according to their finding, accepted the fulfilment of the contract. The Chief Justice was therefore right in refusing to deduct the $200 as damages from the sum of the verdict, and the same must be confirmed and this appeal dismissed with costs.

Application refused.

CAN.

S. C.

VIVIAN v. CLERGUE.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Davies, Idington, Duff, Anglin and Brodeur, JJ. June 24, 1915.

1. VENDOR AND PURCHASER (§ II—33)—LIABILITY FOR PURCHASE PRICE—SALE OF PROPERTY BY VENDOR—DEFAULTS BY NEW PURCHASER—RIGHTS OF VENDOR.

The liability for the purchase price under an agreement for the sale of mining lands, even though expressly reserved in an agreement whereby the property is subsequently sold to a new purchaser, does not continue against the original purchaser after a foreclosure by the vendor for defaults by the new purchaser.

[*Vivian* v. *Clergue*, 20 D.L.R. 660; 32 O.L.R. 200, affirmed.]

Statement

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, 20 D.L.R. 660.

W. M. Douglas, K.C., and *A. H. F. Lefroy*, K.C., for the appellants.

G. F. Shepley, K.C., and *H. S. White*, for the respondent.

Sir Charles Fitzpatrick, C.J.

SIR CHARLES FITZPATRICK, C.J., concurred in the judgment dismissing the appeal with costs.

Davies, J.

DAVIES, J.:—I concur with ANGLIN, J.

Idington, J.

IDINGTON, J.:—The respondent bought from the appellant a mining property for the sum of $125,000 payable by instalments, paid $500 cash and gave his promissory note for $4,500 to complete the cash payment. The appellant recovered judgment against him on said promissory note and that judgment was paid by him some time before February, 1906. Meantime he had entered into possession of the property and assigned his purchase to the Standard Mining Co.

Thereupon, on March 10, 1905, an agreement was entered into between respondent of the first part, the said mining company of the second part, and appellant of the third part. Therein the foregoing facts, save as to payment of said judgment, were recited, and the further facts that the mining company had agreed to assume the payment of said purchase money and all other obligations imposed by the said contract upon the purchaser thereunder and that the parties desired in some respect to modify the terms of said agreement and to define their rights by a more formal document.

Then followed the last three recitals which may help to interpret the clauses of said document now in question and are as follows:—

And whereas the vendors also claim that the party of the third part is personally liable for the sum of twenty-four thousand dollars, a portion of the purchase money, falling due on the 23rd day of June, 1904, and is also liable for a portion of the instalment to fall due on the 23rd of June, 1905.

And whereas the party of the third part disputes all personal liability therefor.

And whereas the parties hereto desire in the making of this agreement to reserve all rights and liabilities both of the vendors and of the party of the third part with respect to the twenty-four thousand dollars which fell due on the 23rd of June, 1904, and of the said payment accruing due on the 23rd of June, 1905.

I will refer presently to the operative parts of said agreement thus introduced.

The appellant, on June 27, 1906, commenced an action against respondent to recover the sum of $33,000, being the instalment of June 23, 1904, and part of that of June 23, 1905, which are referred to in these recitals I have quoted.

In that action the appellant recovered judgment for $33,556.20, and therefrom respondent appealed unsuccessfully to the Divisional Court and the Court of Appeals for Ontario, and finally to this Court.

These decisions, *Vivian & Co.* v. *Clergue*, are respectively reported in 15 O.L.R. 280, 16 O.L.R. 372, and 41 Can. S.C.R. 607.

It was contended therein amongst other things that the property having passed from the appellant, the vendor, by virtue of a tripartite agreement, and it being no longer possible for it to give to the respondent, the vendee, title thereto, the right to recover from the vendee was gone. This Court as well as those through which the case travelled here held that the respondent, notwithstanding that and other contentions set up, was liable.

It is pressed upon us by Mr. Douglas that the right so maintained cannot now be disturbed by what has since transpired.

The appellant issued execution upon said judgment. The Standard Mining Co. failed to pay purchase money as provided by the tripartite agreement above referred to; the appellant proceeded to declare under power therein the agreement null and to re-sell the property for $75,000, and, therefore, the respondent moved to set aside the said execution and obtained the order so asked for saving as to costs; which has been upheld by the Appellate Division of the Supreme Court of Ontario.

It appears to me that the correctness of such holding must turn upon the interpretation to be given the agreement of March 10, 1905.

That agreement expressly provided for the sale by appellant to the mining company with the usual provisions one would expect

CAN.
S. C.
VIVIAN
v.
CLERGUE.
Idington, J.

to find in such a contract of sale and purchase, plus a few special provisions designed to preserve for appellant the liability of respondent for the parts of the original purchase money in respect of which the judgment has been recovered, which is now in question, and at the same time provide for its discharge out of the first payments to be made by the mining company.

Clause 9 substituted the mining company for the respondent in the original agreement, and that was to be deemed merged in this agreement subject, however, to the provisions next contained.

That is followed by clause 10, reading thus:—

10. It is expressly agreed and understood that this agreement, and anything that may be done hereunder, shall not affect or prejudice the claim of the vendors against the party of the third part in respect of the sum of $24,000 which fell due on the 23rd June, 1904; or the payment accruing due on the 23rd June, 1905, or for interest upon the unpaid purchase money up to the date of the said assignment hereinbefore in part recited, nor shall it affect or prejudice the rights of the said party of the third part with respect thereto, but until the purchaser shall pay the first two instalments of $24,000 each, with interest as aforesaid, the rights of the vendors and the party of the third part shall remain as they now are in respect of said instalments and interest.

Clause 12 provided that all moneys paid under this agreement shall in the first place be applied towards the discharge of said judgment (being that on the $4,500 note) and then towards the discharge of the claim of the vendors against the respondent in respect of which their rights have been thereinbefore reserved, being manifestly the claims referred to in clause 10, which are now in question.

The judgment first referred to as already stated has been paid and hence out of the way. Nothing seems to have been paid on the purchase by the mining company.

Clause 8 of the agreement provided that upon such default as thereby occurred the appellant might forfeit the agreement by giving a month's notice; which on the default that took place was duly given. Then it was declared that upon such forfeiture this agreement shall be null and void.

Is there any answer to that realized result of what was contemplated? If null and void thereby, is not the respondent in the same position as if the agreement never existed? Is the relation between the parties hereto not left as it was originally of vendor and vendee with a judgment in favour of the former against the latter? Is not the contemplated merger of the original agree-

ment in this later one at an end? Was it not a conditional merger? The suggestion is certainly a legal curiosity, but how otherwise can we give effect to the purpose of the parties? Can we say the agreement stands despite this declaration of its nullity?

It was quite competent for the parties to have provided instead thereof that the appellant should be at liberty to resell the property. In that case the liability of the respondent as determined in the litigation to which I have adverted might have to be considered as finally determined and the result, it might in such event, have been argued, was that as he had assented to this sale to the mining company, he could not complain that his right as vendee had been infringed and he, therefore, entitled to be relieved as he claims herein.

But if this agreement and all therein is to be treated as null and void, surely the parties are restored to their original position as vendor and vendee, the original contract of sale and purchase and the judgment now in question standing for part of the purchase money. In that case it seems clear the relief given below is what respondent as vendee is entitled to.

If the re-sale had taken place by virtue of a provision in the later agreement, some very interesting questions might still have arisen. Such as in that case was he to be held only a surety for the mining company, or in some such sort of position entitled to relief over against that company and thereby entitled to claim subrogation in some way I need not pursue.

My construction of the agreement as result of the foregoing analysis is that all it stood for is at an end and respondent entitled under the authorities to the relief he sought and got. I cannot see my way to holding the declaration of intended merger of such a character as to dominate all else in the agreement. It was not so argued.

The appeal should be dismissed with costs.

Duff, J.

DUFF, J.:—What is the meaning of Clergue's being personally liable notwithstanding anything "done" under the agreement? It would be an extreme construction to hold that Clergue's obligation which would be a secondary obligation should persist notwithstanding the fact that the primary obligation had been destroyed. The clause was no doubt intended to deprive Clergue of some of the defences ordinarily open to a surety in consequence of an agreement between a creditor and the primary debtor—

CAN.
S. C.
VIVIAN
v.
CLERGUE.
Duff, J.

giving time to the debtor for example. I think the construction proposed by which Clergue's obligation is held to continue after the primary obligation has been wiped out must be rejected.

It is necessary to note very distinctly that no question is raised as to the validity and effectiveness of the so-called forfeiture. The appellant is insisting upon the forfeiture and the vendee is not disputing it. The result of the appellant's contention if successful would be that Clergue would be entitled to enforce his indemnity against the assignees and in that way the assignees would be compelled to pay an unpaid instalment after the contract had been put an end to. That would be a fraud on this contract.

Anglin, J.

ANGLIN, J.:—Upon the assignment to the Standard Mining Co. of his contract to purchase from the plaintiffs the defendant became entitled to be indemnified by his assignees against liability under it. The right of indemnification carried with it a right in the event of his being called upon to pay the plaintiffs, to a lien for the sum so paid on the Standard Mining Co.'s interest in the land, or to subrogation *pro tanto* to the rights of the plaintiffs under their vendors' lien: *Vivian* v. *Clergue*, 16 O.L.R. 372, at 379. By a subsequent agreement, to which the plaintiffs, the defendant, and the Standard Mining Co. were parties, the liability of the defendant to pay two instalments of purchase money due under his original agreement, and now in controversy, was expressly preserved, as were also his rights with respect thereto, and it was declared that the rights of the vendors and of the defendant should "remain as they now are in respect of said instalments and interest." Amongst such rights were those incident to the position of quasi-surety to the plaintiffs, which the defendant held, for payment to them by the Standard Mining Co. of these instalments of the purchase money.

Judgment was recovered against him in the present action for the two instalments in question, which the Standard Mining Co. had failed to pay. Before realizing on this judgment, the plaintiffs, exercising a power conferred by their agreement with the Standard Mining Co., annulled their contract for sale to that company by notice to them. Without any notice to the defendant they subsequently sold the land thus forfeited to another purchaser for $75,000—$50,000 less than the sale price to the Standard Mining Co. The defendant claims that he was thereby discharged

from his liability to the plaintiffs and that execution on the judgment against him, still unsatisfied, should be stayed except as to costs; and his right to that relief has been upheld in the provincial Courts.

By extinguishing the interest of the Standard Mining Co. in the land and re-selling it, the plaintiffs have put it out of their power to place the defendant in the position he was entitled to occupy upon making payment in fulfilment of his obligation as surety. Having done so they, in my opinion, disabled themselves from enforcing their judgment. Indeed, by annulling their contract with the Standard Mining Co. they would seem to have extinguished the defendant's liability for any moneys not already paid, although judgment had been recovered for them. The liability of the principal debtor, the Standard Mining Co., no longer existed and with it the liability of the surety also ceased. An unsatisfied judgment against the principal debtors for purchase money could not have been enforced after the vendors took back the land. *Cameron* v. *Bradbury*, 9 Gr. 67; *Gibbons* v. *Cozens*, 29 O.R. 356; *McPherson* v. *U.S. Fidelity Co.*, 26 O.W.R. 620. The surety's position must be at least equally favourable. The former judgment in this action affords no support to the plaintiffs' contention in this appeal. No question such as that now before us was, or could have been, then presented for consideration.

The appeal fails and should be dismissed with costs.

Brodeur, J.

BRODEUR, J.:—By their agreement of March 10, 1905, the appellants sold to the Standard Mining Co. of Algoma certain property with the condition that upon default of payment of the purchase price the appellants could rescind the agreement which would then become null and void.

The appellants having exercised that power of rescission, the contract was put an end to and they could not afterwards claim the payment of the purchase money from the purchasers.

The same property had been previously sold to the respondent, but he failed to pay the instalment that became due in June, 1904, and it was agreed then between the appellants and the respondent that the property would be re-sold for the same price to the Standard Mining Co. and the agreement of March 10, 1905, was then passed for that purpose. It was stipulated that the

CAN.

S. C.

VIVIAN v. CLERGUE.

Brodeur, J.

agreement and anything that may be done hereunder shall not affect or prejudice the claim of the vendors against the party of the third part (Clergue) in respect of the sum of $24,000 which fell due on the 23rd June, 1904, . . . nor shall it affect or prejudice the rights of the said party of the third part with respect thereto, but until the purchasers (Standard Mining Co.) shall pay the first two instalments of $24,000, etc.

We have to construe the agreement and specially the clause just quoted.

There is no doubt that the respondent was bound to pay the sum of $24,000. He tried to dispute that liability, and this Court decided against him, *Clergue* v. *Vivian*, 41 Can. S.C.R. 607. But the appellants having thought advisable to rescind the contract because the payments were not properly made, can they still claim from the respondent the payment of those $24,000?

The cancellation of the contract has put an end to the right of the vendors to claim the payment of the purchase money. But they say that the obligation of Clergue did not cover any part of the purchase money. I cannot accede to such a proposition. I consider that Clergue was surety for a part of the purchase price, and as the vendors cannot, after the rescission of the contract of sale, claim any part of the purchase money from their purchasers, they could not proceed also against the surety.

We must not forget also that it was formally stipulated in the agreement that the whole agreement would become null and void in case the vendors would exercise their right to rescind. The nullity which is stipulated would affect all the obligations mentioned in it, not only the obligations of the purchasers, but also the obligations of Clergue.

The judgment *a quo* which declared that the appellants could not recover from the respondent is well founded and should be confirmed with costs.

Appeal dismissed.

CAN.

S. C.

PREVOST v. BEDARD.

Supreme Court of Canada, Sir Charles Fitzpatrick, C.J., Idington, Duff, Anglin and Brodeur, JJ. May 18, 1915.

1. APPEAL (§ VIII F—690)—JUDGMENT ON—POWER OF CORRECTION.

An appellate court has jurisdiction, after its formal order has been issued, to recall it for the purpose of amending errors or omissions due to oversight or mistake.

[*Penrose* v. *Knight*, Cout. Dig. 1122; *Rattray* v. *Young*, Cout. Dig. 1123; *McCaughey* v. *Stringer*, [1914] 1 Ir. R. 73; *E.* v. *E.*, [1903] P. 88, applied; *Prevost* v. *Bedard*, 24 D.L.R. 153, 51 Can. S.C.R. 149, referred to.]

APPLICATION, by motion on behalf of the respondent, for an order varying the formal judgment transmitted to the Court below, upon the dismissal of the appeal in this cause, 24 D.L.R. 153, by correcting an omission therein.

St. Germain, K.C., supported the motion.

Lamarche, K.C., contra.

Statement

SIR CHARLES FITZPATRICK, C.J., agreed in the judgment allowing the motion.

Sir Charles Fitzpatrick, C.J.

ANGLIN, J.:—The respondent moves to amend the judgment of this Court as issued on the ground that it fails to provide for a formal amendment of the declaration and of the judgment based upon it pronounced by the Superior Court. By an accidental slip or oversight the declaration omitted a reference to the cadastral number of the subdivided official lot which covered the property in respect of which the plaintiff brought his petitory action. The judgment of the Superior Court in this respect followed the declaration and in this Court an appeal from the judgment of the Court of Review affirming it was dismissed. At the hearing of the appeal counsel for the respondent directed attention to the mistake and asked that the judgment of this Court should provide for the necessary amendment. That the amendment would be made if the respondent should be successful would appear to have been taken as a matter of course, and that probably accounts for the fact that in disposing of the case on the merits the Judges omitted to mention the amendment. The matter also appears to have escaped the attention of the solicitors in issuing the certificate of judgment and the omission was not discovered until after the formal certificate had been transmitted to the provincial Courts.

Anglin, J.

In *Rattray* v. *Young*, Cout. Dig. 1123, this Court appears to have held that it has jurisdiction after its formal judgment has been issued to recall it for the purpose of amending errors or omissions in it due to oversight or mistake—the same power which is exercised by the Supreme Court of Judicature in England under O. 28, r. 11. Similar jurisdiction was exercised in *Penrose* v. *Knight*, Cout. Dig. 1122.

In *E.* v. *E.*, [1903] P. 88, the President of the Probate Division directed the amendment of the judgment of that Court by

CAN.
S. C.
PREVOST v. BEDARD.
Anglin, J.

providing for the date from which certain payments ordered were to run. This date had been inadvertently omitted in delivering the opinion of the Court. Exercising similar jurisdiction the Master of the Rolls in Ireland, where the plaintiff, through an error of account in the notice of motion, had obtained a judgment for less than he was entitled to, directed the necessary amendment to be made: *McCaughey* v. *Stringer*, [1914] 1 Ir. R. 73. Of course this jurisdiction is distinct from the inherent power which the Court possesses to correct its formal judgment when it finds that as drawn up it does not correctly state what the Court actually directed and intended. There can be no doubt that the omission to provide in the judgment for the amendment was due to an accidental slip or oversight. Had the request and necessity for it been present to the minds of the Judges when delivering judgment it would certainly have been directed. In delivering its judgment dismissing the appeal, the purpose of the Court clearly was that the respondent should have an effective judgment for the relief which he sought. That intention might be defeated if the Court were powerless to grant the amendment now asked. Under these circumstances I am of the opinion that the motion should be granted, but only upon payment of the costs of it by the respondent as he should have seen that the amendment was provided for in the judgment of the Court as issued, and should, if necessary, have spoken to the minutes of judgment for that purpose: *Re Swire*, 30 Ch. D. 239.

Brodeur, J. BRODEUR, J., concurred with ANGLIN, J.

Idington, J.
Duff, J.
(dissenting) IDINGTON and DUFF, JJ., dissented.

Application granted.

MEMORANDUM DECISIONS.

Memoranda of less important Cases disposed of in superior and appellate Courts without written opinions or upon short memorandum decisions and of selected Cases decided by local or district Judges, Masters and Referees.

LOWERY AND GORING v. BOOTH.

ONT.

S. C.

Ontario Supreme Court, Middleton, J. June 22, 1915.

WATERS (§ II I—155)—*Rights of lumbermen floating logs in river—Injury to dam.*]—Action for damages for the destruction of a cofferdam.

R. McKay, K.C., and *H. F. Upper*, for plaintiffs.

G. F. Shepley, K.C., and *Wentworth Greene*, for defendant.

MIDDLETON, J.:—The plaintiffs sue to recover damages arising from the destruction of a certain cofferdam built in the bed of the Montreal river—destroyed, it is said, during the passage of the defendant's logs down the stream in May, 1911.

The question in issue in the action turns, I think, entirely upon the true effect of the Rivers and Streams Act, which may conveniently be referred to in the revision, as there is no material change in the statute. By this Act, R.S.O. 1914, ch. 130, sec. 3, a right is given, subject to the provisions of the Act, during spring freshets to float and transmit timber down all rivers; and by sub-sec. 3 it is provided that, where necessary to remove any obstruction from the river to facilitate the transmission of timber, the obstruction may be removed, "doing no unnecessary damage to the river or to its banks." Section 4 provides that, where there is a convenient opening in any dam or other structure in or upon the bed of the river for the passage of timber, no person using the river for floating timber shall "injure or destroy such dam or other structure or do any unnecessary damage to it or to the banks of the river."

It is argued that this latter section applies to this case, and that there is no liability unless it can be shewn that what was here done can be described as "unnecessary damage" to the dam.

In this case the only evidence given by those competent to speak upon the subject is, that the course adopted by the defen-

ONT.
S. C.

dant in taking this vast quantity of logs down the stream was the usual recognised and proper course from the standpoint of the practical lumberman.

Reference to *Thompson* v. *Hill* (1870), L.R. 5 C.P. 564; *McCulloch* v. *State of Maryland* (1819), 4 Wheat. 316; *Mobile and Girard R.R. Co.* v. *Alabama Midland R.W. Co.* (1888), 87 Ala. 501; *Purdy* v. *Lynch* (1895), 145 N.Y. 462, 473; *St. Louis and San Francisco R. Co.* v. *Franklin* (1909), 123 S.W.R. Repr. 1150; *In re Gasquoine*, [1894] 1 Ch. 470.

I, however, base my decision not upon definitions found in dissimilar cases, but upon the broad principle that this statute intended to confer upon lumbermen the right to use streams for flotation of timber with immunity from damage for injuries done to the property of others unless it can be found affirmatively that the operations were conducted negligently and with reckless disregard of the rights of others; and, as I am unable in this case to find that negligence has been made out, the action fails.

Action dismissed with costs.

LAVERE v. SMITH'S FALLS PUBLIC HOSPITAL.

Ontario Supreme Court, Britton, J. June 28, 1915.

CHARITIES (§ II C—52)—*Negligence—Injury to patient in hospital — Liability — Care in selection of attendants.*]—Action for damages for negligence causing injury to the plaintiff, who was operated upon in the defendants' hospital, and who, by reason of the carelessness of the doctors or nurses or some person or persons in attendance, was severely burnt by a hot brick or bricks in the bed to which she was removed after the operation and when she was unconscious.

J. A. Hutcheson, K.C., for plaintiff.

G. H. Watson, K.C., and *J. A. Hope*, for defendants.

BRITTON, J.:—The plaintiff, a married woman, who resided with her husband at Winchester, was suffering from an internal malady, and was advised by her physician to submit to a surgical operation. To this she consented, and she chose the defendants' hospital. She arranged with Dr. Ferguson and Dr. Gray, of Smith's Falls, for the operation and for their attend-

ance upon her so long as might be necessary. The plaintiff and her husband were alone responsible for the payment of the medical men for the operation and such attendance upon her as might be necessary.

The plaintiff applied to the defendants for admission, and it was agreed that she would be admitted to a room of her own selection, and that the charge would be $9 a week for room and board, and she paid $9, being one week in advance. Nothing was specially said about attendance; but a nurse in training had charge of the room which the plaintiff occupied, and the attendance reasonably necessary was implied in the arrangement made. The customary attendance was—and it was so in this case—that a nurse in training should have charge of certain rooms; and to one was assigned the room of the plaintiff.

The defendants' hospital is a charitable institution, dependent for its maintenance upon grants from the Government of the Province of Ontario and from municipalities, and upon individual gifts and offerings. There is no share capital. For a long time it was held that the money so received by charitable institutions could not be used or paid out for damages resulting from negligence of employees. That is not the case now. Such an institution may be held liable, and may have to pay. See *Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93. Liability now depends upon the contract between the patient and the institution, and upon the real relationship between the person whose personal negligence caused the damage and the institution as the employer of such person.

The contract in this case was not that the defendants would nurse the patient, but that the defendants would give to the patient reasonable care and attention, under the directions of her medical adviser, and comforts and conveniences, including food, etc., under the directions of the hospital authorities. Reference to *Hall* v. *Lees*, [1904] 2 K.B. 602; *Evans* v. *Mayor, etc., of Liverpool*, [1906] 1 K.B. 160; *Hillyer* v. *Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820.

I find that the contract in the present case was, and that the only duty to the patient was, that the president and directors should in good faith use due care and skill in selecting the medical staff, and in employing and in permitting nurses in training

ONT.
S. C.

and other assistants to work for and attend to patients in the institution.

I am of opinion that, as decided in the case of *Hillyer* v. *Governors of St. Bartholomew's Hospital*, the relationship of master and servant does not exist between the directors and the physicians and nurses and other attendants assisting at an operation. This is so whether the attending physicians and nurses are paid by the hospital or not.

This hospital seems to have been generally well managed. The directors are not guilty of any negligence in selecting any of the official staff or in the selection of attendants or nurses in training.

Interpreting the rule as to liability applicable in the present case, I am of opinion that the action should be dismissed, but without costs. *Action dismissed.*

McDONALD v. LANCASTER SEPARATE SCHOOL TRUSTEES.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Garrow, Maclaren, Magee, and Hodgins, JJ.A. July 12, 1915.

SCHOOLS (§ V—84)—*Separate denominational schools—Use of French language—Religious teachings — Breach of departmental regulations—Injunction.*]—Appeal by the defendants the Board of Trustees of Roman Catholic Separate School Section No. 14, Lancaster, and the individual trustees, from the judgment of Falconbridge, C.J.K.B., 31 O.L.R. 360.

N. A. Belcourt, K.C., *A. C. McMaster*, and *J. H. Fraser*, for appellants.

J. A. Macdonell, K.C., for plaintiff, respondent.

McGregor Young, K.C., for Province of Ontario.

The judgment of the Court was delivered by

HODGINS, J.A.:—Upon the argument of the appeal, counsel for the appellants did not attack that part of the judgment which enjoined the Board of Trustees from continuing to employ Léontine Sénécal as a teacher, so long as she was disqualified under the regulations of the Department of Education, nor the award of damages and costs against those defendants. It was admitted by all parties that the formal judgment should be varied by confining the award of damages and costs, as was evidently the learned trial Judge's intention, to the appealing defendants.

ONT.

S. C.

This leaves as the only operative part of the judgment affecting the parties to this appeal, para. 4 thereof, reading as follows: "4. And this Court doth further order and adjudge that all the said defendants and each of them be and they are hereby restrained from using or allowing the use of French as the language of instruction or communication in the said school so long as the same shall not be permissible under the said regulations."

As to this clause it is obvious that, while the regulations stand (and they were not attacked in this case as *ultra vires*), no objection can be taken to its language, nor, in view of the facts, to its propriety, and this was admitted by counsel for the appellants. But both they and the other counsel concerned united in asking that the Court indicate what was, in its opinion, the particular breach or breaches of the regulations aimed at and the extent of that breach, so that all parties might govern themselves accordingly. In complying with that request, so far as it may properly be done, it should be understood that no sanction is given to the idea that the form of the injunction is otherwise than proper and usual.

The breach of the regulations, therefore, which has, to my mind, taken place, is the teaching of French, either under clause 3(1) or 4, without the fulfilment of the conditions embodied in them, and in a school not designated by the Minister as an English-French school.

The appeal fails to disturb the judgment except in respect to the matter admitted by all parties to have crept into the formal judgment by error, and must be dismissed with costs.

Appeal dismissed.

BROWN v. COLEMAN DEVELOPMENT CO.

Ontario Supreme Court, Middleton, J. June 25, 1915.

CONTRACTS (§ I E 2—70)—*Statute of Frauds—Moneys advanced to company — Oral promise of president to repay — Suretyship.*]—Appeal by the defendant Gillies from the report of an Official Referee.

H. S. White, for appellant.

H. E. Rose, K.C., for liquidator of the defendant company.

ONT.

S. C.

W. M. Douglas, K.C., and *S. W. McKeown*, for plaintiff, respondent.

June 25. MIDDLETON, J.:—The defendant Gillies at one time owned certain mining property in the township of Coleman. After the incorporation of the company, he sold this property to the company, in consideration of the allotment to him of the great bulk of the stock of the company. He was therefore vitally interested in the success of the corporate undertaking, but he had no other interest in it save that derived from his stockholding therein. Gillies was the president of the company; Brown was the secretary.

The company had no money with which to carry on its undertaking, and Gillies advanced to it, for the purpose of enabling it to meet its liabilities, a very considerable sum. Brown, in his capacity of engineer for the company, supervised the management of these operations, and was to receive the salary of $10 per day from the company. He sent in accounts to the company for this salary from time to time, and stock of the company was issued to him at the price of 25 cents per share. Some of this stock he marketed, and it appeared that the price realised was much more than the 25 cents; so he also had an interest in the continuation of the company, although his interest was very much smaller than that of Gillies.

A time came when Gillies had apparently exhausted his ready money, and Brown commenced advancing money, as he alleged, upon the appellant's promise to re-pay it. The appellant denied the promise.

The amounts paid out by Mr. Brown in this way for the company reached a very large total. In the statement of claim particulars are given of sums amounting to $9,274, in addition to a balance in respect of wages of $3,300.

The defendant Gillies denies entirely the promise to repay. He claims that the advances made by Brown were made by him to the company, and that the motive for making the advances by Brown was to secure the continuance of this company, so that Brown could profitably market the shares which had been issued to him.

The learned Referee has found that the advance was

ONT.
S. C.

an advance to Gillies, and not to the company, and that therefore the Statute of Frauds has no application. I cannot view the matter upon the evidence in this simple way. The plaintiff did not himself so regard the situation, for he rendered his accounts to the Coleman Development Company as debtors, and he included in this same account claims for advances and salary. It is admitted that the salary is a claim against the company, and the company alone. . . .

I have come to the conclusion that the Statute of Frauds affords a defence, and that the promise made by Gillies was in truth a promise to answer for the debt of the company. The real test, as I understand all the cases, is this: Is there a principal debtor liable? If there is, then the contract is one of suretyship. If there is not, then the contract is one of primary liability.

Reference to *Forth* v. *Stanton* (1869), 1 Wms. Saund. 220, 233; *Birkmyr* v. *Darnell* (1704), 1 Salk. 27, annotated in Smith's Leading Cases, 11th ed., vol. 1, p. 299; *Lakeman* v. *Mountstephen* (1874), L.R. 7 H.L. 17, 24; *James* v. *Balfour* (1882), 7 A.R. 461.

The distinction and the true principle underlying these cases is well shewn by *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K.B. 778; *Davys* v. *Buswell*, [1913] 2 K.B. 47.

Upon this ground the appeal must be allowed, with costs here and below, and unless there is to be a further appeal the action should be dismissed with costs as to this defendant.

The plaintiff should have the right to rank against the assets of the company now in the course of liquidation, for the amount found due to him by the report, subject to the right of the liquidator to claim against him with respect to any other matters which he may be advised to set up in the course of the liquidation. As between the plaintiff and the liquidator there should be no costs. *Appeal allowed.*

Re LAW.

Ontario Supreme Court, Britton, J. June 26, 1915.

EXECUTORS AND ADMINISTRATORS (§ VI—130)—*Final distribution—Payment of balance to foreign administratrix.*]—Application by the Canada Trust Company, the Ontario ad-

ONT.
S.C.

ministrators of the estate and effects of Thomas Parker Law, who died intestate in Chicago, in the State of Illinois, where he was resident at the time of his death, for leave to pay into Court the balance of the amount realised by them from the assets in Ontario of the deceased, after payment of all claims and expenses, and for payment out thereof to Catherine Irene Law, the widow of the deceased, who had been duly appointed by the Probate Court at Chicago the administratrix of the whole of his estate, or for leave to pay directly to her.

The persons beneficially entitled to the estate, after payment of debts and liabilities, were the widow herself and three children, one of them an infant.

F. P. Betts, K.C., for applicants.

F. W. Harcourt, K.C., Official Guardian, representing the infant.

BRITTON, J.:—T. P. Law in his lifetime was resident at Chicago, and died there intestate, leaving an estate of about $20,000. Letters of administration were granted by the Probate Court of Cook County, State of Illinois, to his widow, Catherine Irene Law. These were general letters, having reference to the whole estate, distribution of which will be made by the administratrix in the home domicile of the deceased.

A part of the estate—a comparatively small part—consisted of personalty in the city of London, Province of Ontario, and in reference to this letters of administration were granted by the Surrogate Court of the County of Middlesex to the Canada Trust Company.

The assets in the Province of Ontario have been got in, converted into money, and out of it all costs in Ontario have been paid, and there is a net balance in hand of $744.76. This sum the home administratrix demands, for the purpose of making final distribution and winding up the estate. The present application is for leave to pay this money into Court and then pay it out to the administratrix, Catherine Irene Law, or to dispense with payment into Court and for leave to pay the money directly to her.

The persons entitled to the estate, after payment of all just debts and liabilities, are, the widow, one son, and two daughters under the age of twenty-one, but one of the daughters, viz., Lil-

lian K. Law, was born on the 9th March, 1897, and is over the age of eighteen years.

The motion is made upon notice to the Official Guardian. The Official Guardian calls attention to R.S.O. 1914, ch. 121, sec. 38 (2).

This is not the final passing of the accounts. It is in fact only a collection by the Ontario administrators for the home administratrix, to enable the latter to pass the accounts and make final distribution.

Every material fact is established by the applicants, and proof and papers having reference thereto have been filed on this application, and it appears that the administratrix has given satisfactory security for all moneys which may come to her hands belonging to the estate.

The order will be made, giving leave to pay this money direct to the administratrix, Catherine Irene Law, of the city of Chicago, State of Illinois, administratrix. From the amount will be deducted the costs of the Official Guardian, which I fix at $5. The balance may be paid over.

TWIN CITY ICE CO. v. CITY OF OTTAWA.

Ontario Supreme Court, Meredith, C.J.C.P. July 15, 1915.

WATERS (§ II K—166) — *Unnavigable stream — Riparian rights—Access—Title by possession—Limitations.*]—Action for a declaration that the plaintiffs were the owners of all the land between the shore-line of the Rideau river, as it stood in 1866, and the middle of the main channel, in front of their land in the city of Ottawa bordering on the river, and for possession, an injunction, and damages.

R. A. Pringle, K.C., and *L. Coté*, for plaintiffs.

F. B. Proctor, for defendants.

MEREDITH, C.J.C.P.:—Under the pleadings, the plaintiffs would be at liberty to enforce any riparian rights they might have, whether the river in question is, or is not, a navigable stream; but at the trial they took the position, and endeavoured to prove, that the stream is not a navigable one, and confined their claims to riparian rights upon a stream not navigable.

Only one witness was called upon this branch of the case; and he was called and examined as a witness for the plaintiffs.

ONT.
S. C.

If his view of the question were to be accepted, the plaintiffs have succeeded in proof of their contention that the stream, at the place in question, is not a navigable one.

And, as the only proof of injury to the plaintiffs, and the only claim made by them at the trial, was in respect of access to the stream, as a highway, in winter, when frozen over firmly enough to carry horses and waggons, the action fails, because, not being a navigable stream, there is no such right of passage over it. It is not a highway. And, if that be so, the case is ended.

But, if a claim and proof in respect of other riparian rights had been made, they could not, in my judgment, succeed in this action, whether the stream is or is not navigable. Assuming that it is not navigable, and that the plaintiffs' predecessors in title owned the land to the centre of the stream—a thing which, having regard to plans, etc., I more than doubt—then they lost title to it by the defendants' length of possession of it.

If possession give title to the land itself, no claim can be made regarding riparian rights, because they are effectually cut off by the acts of the defendants in acquiring title: just as if the bed of the stream had been sold to them by the plaintiffs with a right to do as they have done.

And, assuming that the stream is a navigable one. Prior to the year 1911, the bed of the stream was the property of the owner of the land on its bank; and, prior to that year, the defendants had acquired title, as before mentioned, by length of possession, a title which, as I have already said, cut off riparian rights. The Act of 1911—the Bed of Navigable Waters Act, 1 Geo. V. ch. 6 (O.)—gave the Crown the bed of the stream, but it did not restore the riparian rights to land which had legally, as well as in fact, ceased to extend to the river. And, as I have said, I find that there was such deprivation of all such rights as, under sec. 35 of the Limitations Act, precludes all claims in this action.

And, if that were not so, there was such long acquiescence in the acts of the defendants, so unalterably severing the plaintiffs' land from the river, as to prevent them from seeking a restoration of such rights.

ONT.

S. C.

The claim of the plaintiffs to the acres of dump-made land, as an accretion, is obviously without any foundation in fact or law.

Although the plaintiffs' action fails, on the short ground that the only proof of injury is in respect of a highway, which at the trial they contended is not a highway, and gave proof accordingly, I have dealt with all the points discussed at the trial, and others, so that the parties may have my views of them, whether the case is, or is not, carried further.

Under all the circumstances of the case, I do not see fit to make any order as to costs of the action.

And upon the question of damages I cannot find that, even if the plaintiffs were entitled to use the river in connection with their land, as a highway, when frozen over in winter, they would suffer any substantial damages if obliged to go to the river by way of Water and St. Joseph's streets, the defendants being willing to make the means of passing from St. Joseph's street to the river as easy as from the dump, or even as from the land now owned by the plaintiffs in the days before the dump. *Action dismissed without costs.*

HUTH v. CITY OF WINDSOR.

Ontario Supreme Court, Sutherland, J. July 9, 1915.

HIGHWAYS (§ IV A 6—156)—*Defective sidewalk—Corrugated surface—Lack of repair—Liability of municipality for injuries.*]—Action against the Corporation of the City of Windsor to recover damages for personal injuries sustained by the plaintiff by a fall upon the sidewalk in front of his shop, upon a city street, while he was engaged in taking goods from a waggon into his shop. The plaintiff alleged that the sidewalk was improperly constructed, and was in a defective and dangerous condition and very slippery on the 22nd December, 1914, the day on which he was injured.

A. R. Bartlet, for the plaintiff.

F. D. Davis, for the defendant corporation.

SUTHERLAND, J.:—The facts disclosed in evidence are that this cement sidewalk was laid in 1900, according to the usual specifications then in vogue therein. The surface was then corrugated, that is to say, a roller was put over it when finishing, for

ONT.
S. C.

two purposes, to smooth the trowelling marks and to indent it so as to prevent pedestrians from slipping; such corrugation as was done when the walk was laid may have been more lightly done than was usual, or that when done it did not take as deep a hold on the surface as usual. There is evidence also that, at the spot where the plaintiff fell, the pavement was smoother than elsewhere on the street, and that for some time before the accident and extending to the date of its occurrence, when the weather was frosty or rainy, people occasionally slipped and fell at that point.

Upon the city is laid the statutory duty of keeping the streets and walks in repair; and, under the Municipal Act, R.S.O. 1914, ch. 192, sec. 398, sub-sec. 29, it is empowered to appoint road commissioners and overseers of highways.

The corporation, having originally corrugated it, must, I think, be taken to have recognised that, if it was or became smooth, it should be repaired by further corrugation or roughened, or might become dangerous. . . . It is clear that the walk complained of was in a similar condition for a period long enough to impute notice to the defendant corporation, if its smoothness and consequent danger in wet or frosty weather can be considered a want of repair.

There can be no doubt that a smooth surface on a concrete walk can be roughened and made safer, and that such is the main object of corrugation. There can be no doubt, I think, in this case that, if this had been done, the accident would not have occurred.

I do not think that I can find that there was any want of care on the plaintiff's part. Knowing of the condition of the walk, he seems, according to his evidence, to have been taking reasonable care.

I have come to the conclusion that the sum of $800 would be reasonable compensation.

The plaintiff will, therefore, have judgment for that amount with costs. *Judgment for plaintiff.*

APPEAL by the defendants from the judgment of SUTHERLAND, J.

ONT.

S. C.

The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A., October 28, 1915.

THE COURT dismissed the appeal.

Re WINDATT AND GEORGIAN BAY AND SEABOARD R. CO.

Ontario Supreme Court, Middleton, J. June 22, 1915.

COSTS (§ I—8)—*Expropriation of land—Costs of arbitration—Jurisdiction to grant.*]—Application made upon notice for an appointment for the taxation of the costs of an arbitration.

J. D. Spence, for railway company.

No one appeared for the land owner.

MIDDLETON, J.:—The case was before me on the 25th November, 1912. The railway company offered some $1,100 for the land. A prolonged and most expensive arbitration took place, with the result of an award of $1,300 on the 25th June, 1912. Both parties moved to set aside the award on the ground of misconduct on the part of the arbitrators, who had interviewed the parties and *ex parte* endeavoured to bring about a settlement.

The award was set aside without costs, and I then held that I had no jurisdiction to deal with the costs of the arbitration. Nothing has since been done, and this application has now been made.

Reliance is placed upon sec. 204 of the statute, which provides that, where an award is not made within a time to be fixed by the arbitrators, the sum offered by the company shall be the compensation to be paid for the land taken.

I do not think that this case falls within sec. 204, for here there was an award within the time limited, and the fact that the award was invalid by reason of what was done by the arbitrators does not render it a nullity so that there can be said never to have been any award.

Reliance is also placed upon sec. 199. By that section, the railway company is directed to pay the costs of the arbitration if the sum awarded exceeds the sum offered, "but if otherwise they shall be borne by the opposite party and be deducted from the compensation."

I think this section is predicated upon the existence of a valid award, and is intended to apply where the sum awarded does not exceed the sum offered; and I think the compensa-

ONT.
S. C.

tion referred to in that section is the compensation fixed or determined under the Act.

For these reasons, I think I should not give the appointment sought.

No doubt there is much difficulty in ascertaining how the situation which has now arisen can be worked out, in view of the refusal of the land-owner to co-operate in any way. The railway company is in possession of the lands; it may have no title; the money is not in Court; and the land-owner apparently would rather leave it in the hands of the company than accept a sum which he deems inadequate.

The parties must work out the situation themselves, or leave it to the operation of the healing hand of Time and the Statute of Limitations.

Re ARTHUR AND TOWN OF MEAFORD.

Ontario Supreme Court, Middleton, J. June 29, 1915.

INTOXICATING LIQUORS (§ I C—33)—*Local option by-law—Motion to quash—Irregularity of service—Failure to file affidavit in time.*]—Motion for an order quashing a local option by-law.

W. A. J. Bell, K.C., for the applicant.

W. E. Raney, K.C., for the town corporation.

MIDDLETON, J.:—The main attack upon the by-law arises from the fact that a similar by-law had been submitted to the electorate in 1913, and failed to obtain the necessary number of votes to permit of its being passed.

[Reference to *Overholt* v. *Town of Meaford* and *Hair* v. *Town of Meaford*, 20 D.L.R. 475.]

In view of the diversity of judicial opinion, it appears to me that this is a proper case in which to adopt the course pointed out by sec. 32 of the Judicature Act, R.S.O. 1914, ch. 56. It is not competent for me to disregard the decision of the learned Judge who dealt with the action of *Overholt* v. *Town of Meaford*, for he must have thought that he had jurisdiction to pronounce the judgment he did; but, for the reasons shortly stated in what I said in *Hair* v. *Town of Meaford* (1914), 5 O.W.N. 783, upon a motion for an interim injunction, I deem the decision wrong and of sufficient importance to be considered in a higher Court; I therefore refer the case now before me to a Divisional Court.

ONT.
S. C.

Mr. Raney objected to my adopting this course, arguing that this motion ought to be dismissed, not only in the view that he entertained of the law, but because the motion, as he says, was not made within the time limited by the Municipal Act. The by-law was passed on the 16th February, 1914; the affidavits were made in due time; and the notice of motion was served on the 13th February, 1915. By somebody's bungle, the affidavits were not filed until the motion was set down on the 20th February, 1915.

Copies of the affidavits have been demanded, affidavits in answer have been put in, cross-examination has taken place, and it appears to me that this is one of the cases in which I may adopt what was said in *Devlin* v. *Devlin* (1871), 3 Ch. Chrs. 491: "The Court has power to relax its general, as well as its special orders, to relieve from undertakings, and extricate clients from difficulties occasioned by their solicitor." Objections of this kind are almost obsolete: *Backhouse* v. *Bright* (1889), 13 P.R. 117; *Graham* v. *Sutton Carden & Co.*, [1897] 1 Ch. 761; *Bank of Hamilton* v. *Baine* (1888), 12 P.R. 439, 442; *Princess of Wales* v. *Earl of Liverpool* (1818), 1 Swanst. 114, 125. The Rule which applies in this case is not that relating to the extension of time, but Rule 184. There was an irregularity, but the proceedings are not void, and I think the duty imposed upon me to deal with them as may be deemed just requires that this irregularity should be ignored. *Motion refused.*

THE motion was referred to a Divisional Court of the Appellate Division by MIDDLETON, J.

Heard by FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ., October 4, 1915.

THE COURT was of opinion that, in the admitted circumstances of the case, its discretion should not be exercised in favour of the motion.

No opinion was expressed as to the validity or otherwise of the by-law. *Motion dismissed.*

Re LUTHERAN CHURCH OF HAMILTON.

Ontario Supreme Court, Middleton, J. June 29, 1915.

RELIGIOUS SOCIETIES (§ III A—20)—*Control of church property—Mortgage—Power of trustees.*]—Motion by church trustees for an order declaring that they had been duly appointed

ONT.
S. C.

under the Religious Institutions Act, R.S.O. 1914, ch. 286, and had authority to mortgage lands held in trust for the church; or for an order, under the Trustee Act, appointing the applicants trustees and vesting the property in them.

Kirwan Martin, for applicants.

MIDDLETON, J.:—On December 31, 1909, the property in question was conveyed to six trustees, describing them as "the trustees of the Trinity Evangelical English Lutheran Church of Hamilton." The trustees took the property as joint tenants, and not as tenants in common; but the conveyance does not define the trust nor make any provision for the appointment of new trustees. The church authorities are now erecting a new edifice, and desire to raise money upon the strength of a mortgage on the lands in question. The trustees were chosen because they held office as deacons in the church, but there was no formal appointment of them as trustees. Four of the trustees are still deacons of the church.

At the annual meeting of the congregation on June 16, 1915, a by-law was passed providing that the deacons shall not be regarded as trustees; and at a special meeting of the congregation, held on the 22nd June, 1915, after due notice, a resolution was passed approving and confirming the appointment of the six original trustees and confirming the appointment of two new trustees, and providing a mode of appointing successors to trustees hereafter.

The Religious Institutions Act, R.S.O. 1914, ch. 286, appears to be intended to enable difficulties such as those now arising to be satisfactorily solved without the aid of special legislation. Referring to secs. 7, 8, 16(1), (2), 18.

All technical requirements of the Act as to notices of meeting and so forth having been complied with, the congregation had ample power to appoint trustees and to determine the manner in which their successors should be appointed, and that, upon this being done, the property, without conveyance, vested in the trustees so appointed.

The intention of the legislature was that the Religious Institutions Act, ch. 286, should govern and control the appointment

of trustees for religious institutions, and this by implication excludes the corresponding provisions of the general Trustee Act.

The order may therefore declare that the property is now vested in the six present trustees, and that they have power to mortgage the same, conferred upon them by sec. 8 of the Religious Institutions Act. *Motion granted.*

ONT.
S. C.

VEILLEUX v. BOULEVARD HEIGHTS.

ALTA.
S. C.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. February 26, 1915.

[*Veilleux v. Boulevard Heights*, 20 D.L.R. 858, affirmed.]

VENDOR AND PURCHASER (§ I E—25)—*Sale of subdivision lands—Registration requirement—Non-compliance—Rescission.*]—Appeal from judgment of Walsh, J., 20 D.L.R. 858.

M. B. Peacock, for plaintiff, respondent.

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

The judgment of the Court was delivered by

HARVEY, C.J.:—The appeal in this case is in effect disposed of by *Abbott* v. *Ridgeway Park*, 8 A.L.R. 314. For the reasons stated as the reasons for the decision in that case this appeal is dismissed with costs. *Appeal dismissed.*

VEILLEUX v. BOULEVARD HEIGHTS.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart and Beck, JJ. March 25, 1915.

APPEAL (§ II C 4—68)—*To Privy Council—Jurisdictional amount—Litigation of similar cases.*]—Application by the defendant for leave to appeal from the judgment of this Court to His Majesty in Council.

M. B. Peacock, for plaintiff, respondent.

A. H. Clarke, K.C., for defendants, appellants.

HARVEY, C.J.:—The rules governing such appeals are to be found at 2 A.L.R. 571:

Rule 2 provides as follows:—

2. Subject to the provisions of these rules, an appeal shall lie:—

(*a*) As of right, from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of £1,000 sterling or upwards, or where the appeal involves directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £1,000 sterling or upwards; and

(*b*) At the discretion of the Court from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the

ALTA.
S. C.

question involved in the appeal is one which by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

The amount of the judgment in this case is slightly over $4,000 and the case, therefore, does not come within the first part of par. (*a*). It is sworn, however, that there are many other similar cases in which the defendant may be liable upon similar facts and that, therefore, the appeal indirectly "involves" more than £1,000.

We are of opinion that this is not the proper interpretation of the rule, but that what the rule contemplates is the amount involved between the parties to the litigation, all of which may not be directly involved in the litigation itself.

We, therefore, think that the leave can only be granted as an act of discretion.

SCOTT, STUART and BECK, JJ., concurred.

Leave refused.

RUTHERFORD v. TAYLOR.

Alberta Supreme Court, Harvey, C.J., Stuart and Simmons, JJ.
May 4, 1915.

JUDGMENT (§ I F—45)—*Summary judgment — Application after joinder of issues—Accommodation note—Indorsement by plaintiff—Defence of equal liability.*]—Appeal from judgment of Scott, J., confirming Master's order for leave to plaintiff to sign summary judgment on promissory note.

C. H. Grant, for plaintiff.

Frank Ford, K.C., for defendant.

HARVEY, C.J., delivering the judgment of the Court, said that the claim was for the payment of a promissory note, and disputed by the defendant. A week after the delivery of reply, plaintiff gave notice of motion for directions, and by the same document gave notice that he would, at the same time, move for leave to sign summary judgment and would ask leave to read the affidavit of plaintiff filed, a copy of which was served with the notice. Referring to *Hackett* v. *Lalor*, 12 L.R. Ir. 44. *Stewartstown* v. *Daly*, 12 L.R. Ir. 418; *McLardy* v. *Slateum*, 24 Q.B.D. 504; Holmested (4th ed.), p. 404, it was held, that by r. 225 (3) it is expressly provided, that no step shall be taken by the plaintiff after the close of the pleadings before the motion for directions without the leave of a Judge, except an applica-

ALTA.
S. C.

tion for injunction, attachment or receiver. Therefore, after issue is joined, it is too late for the plaintiff to make a motion for summary judgment under r. 275, as in this case, and it cannot help it any to bring the application in with the motion for directions. Nor is the plaintiff entitled to maintain it under r. 229 (*a*), since the authority of that rule is one which may be exercised on no other material than the statements made by the parties or their solicitors, and is intended only for cases where there are no facts in issue between the parties. Referring to *Macdonald* v. *Whitfield*, 8 App. Cas. 733; *Reynolds* v. *Wheeler*, 10 C.B. (N.S.) 561, disapproving *Ianson* v. *Paxton*, 23 U.C.C.P. 439, and *Fisken* v. *Meehan*, 40 U.C.Q B. 146, it was further held, that the allegation of the defence that the defendant made the note for accommodation of a third party, which was endorsed by the plaintiff, amounts to a co-suretyship between the plaintiff and defendant with equal liability between themselves, and limits the amount of the plaintiff's recovery to half of the amount. *Appeal allowed.*

RICHARDSON v. ALLEN.

Alberta Supreme Court, Hyndman, J. June 1, 1915.

APPEARANCE (§ I—5)—*Conditional appearance — Non-resident defendant—Jurisdiction—Effect on by plea to merits.*]—Action on a foreign judgment recovered in the Supreme Court of Ontario.

I. B. Howatt, for plaintiff.

J. R. Lovell, for defendant.

HYNDMAN, J.:—The writ in connection with the judgment sued on was issued on February 21, 1913, and on March 17, 1913, the defendant obtained an order under r. 173 of the Ontario rules of Court, permitting him to enter an appearance to the action, "*without prejudice to his right to dispute the jurisdiction of the Court herein*," and on March 18, 1913, such an appearance was duly entered. On April 16, 1913, a statement of defence was delivered wherein the defendant took exception to the jurisdiction of the Court and also set up various defences on the merits.

On April 4, 1914, judgment was entered against the defendant and now stands of record in said Court.

ALTA.
S. C.

It was admitted at the trial that the defendant did not reside in the Province of Ontario at the time of the issue and service of the writ therein, nor was seised or possessed of any property in Ontario for many years previous to such process. The only point left for consideration is the effect of the conditional appearance entered as above mentioned. This action is on all fours with *McFadden* v. *Colville Ranching Co.*, recently decided by my brother Walsh. The only object of a conditional appearance is to enable the defendant to plead want of jurisdiction in the foreign Court to try the action, of which plea he would apparently otherwise be deprived. By doing so, however, he leaves to that Court to determine this plea and its having decided adversely and having found against him on the merits, leaves him standing in the same position as though an unconditional appearance had been entered, and he must be taken as having attorned to the jurisdiction of that Court.

Judgment for plaintiff.

LAIDLAW v. HARTFORD.

Alberta Supreme Court, Hyndman, J. November 2, 1915.

INSURANCE (§ VI A—249) — *The loss — Suspicious fire — Rights of mortgagee—Trustee for creditors.*]—Action on fire insurance policies.

C. S. Blanchard, for plaintiff.

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

The plaintiff, being appointed trustee for various creditors, procured the debtors to execute to him a mortgage of their hotel premises for the benefit of creditors. The insurance policies were taken out in the name of the mortgagors and contained the usual mortgage clause whereby the loss was made payable to the trustee-mortgagee, as his interest may appear, with a proviso against invalidation by any act or negligence of the mortgagors. A fire occurred under suspicious circumstances, and the trustee brought action on the policies. HYNDMAN, J., referring to *Agricultural, etc., Co.* v. *Liverpool, etc., Ins. Co.*, 3 O.L.R. 127, 33 Can. S.C.R. 94, held, that the mortgagee, although not having any beneficial interest in the policies, as trustee for the benefit of the creditors he could maintain action on the policies in his own name; but in view of the suspicious occurrence of the fire he could not succeed

for the balance of the insurance money as assignee for the benefit of the debtors-mortgagors. *Judgment for plaintiff.*

CRAGG v. KEANE.

Alberta Supreme Court, Harvey, C.J., Scott, Stuart, Beck and Simmons, JJ. October 5, 1915.

APPEAL (§ III F—95)—*Time for—Extension—When refused.*]—Motion for extension of time of appeal.

D. W. MacKay, for plaintiff.

Defendant in person.

HARVEY, C.J., delivering the judgment of the Court, said, that a similar application for extension was made a year ago and dismissed on technical grounds and that it was an abuse of privilege of a litigant, deserving censure, to call parties before the Court to answer the same application without any new or other ground. Referring to *Esdaile* v. *Payne*, 40 Ch. D. 520, *Ross* v. *Pearson*, 7 Terr. L.R. 324, it was further held, that an application for extension of time to appeal will not be granted where the parties had acted on the judgment and altered their position, although the judgment was erroneous. *Motion dismissed.*

Re LENDRUM.

Alberta Supreme Court, Beck, J. October 19, 1915.

TRUSTS (§ II B—57)—*Trustees named in will—Legacy in lieu of compensation.*]—Action for interpretation of will.

C. H. Grant, for executors.

S. S. Cormack, for infant legatee.

BECK, J., held, that a will providing "to each of my said trustees, who shall accept of his trust, the sum of $500 each," constitutes an allowance fixed by the instrument creating the trust within the meaning of sec. 53 of the Trustee Ordinance, 1903, ch. 11, and that the trustees, unless consented in by the beneficiaries, are entitled to no further allowance than the amounts set forth in their legacies. The case of *Anderson* v. *Dougall*, 15 Gr. 405, was referred to.

SAULSBERRY v. OZIAS.

Alberta Supreme Court, Walsh, J. October 1, 1915.

VENDOR AND PURCHASER (§ I E—25)—*Rescission of contract—What constitutes—Effect—Right to repayment of purchase price—Want of stipulation.*]—Action for the removal of a caveat.

ALTA.

S. C.

A. A. Ballachey, for plaintiff.

H. P. O. Savary, for defendant.

The plaintiff, a vendor of land, verbally agreed with the defendant, the purchaser of said land, subsequent to the agreement of sale, that the purchaser should retain to his own benefit all the crops then growing upon the land in that he should surrender possession of the land to the vendor. After that arrangement the purchaser registered a caveat against the land of the original contract of sale. WALSH, J., held, that the original contract of sale was rescinded by the subsequent verbal agreement of the parties, and that nothing having been mentioned by the parties as to the cash payments made by the purchaser on account of the sale, the latter was not entitled to recover it; that the original contract having been rescinded by agreement of the parties the caveat filed by the purchaser should be removed.

LUNDY v. KNIGHT.

Alberta Supreme Court, Walsh, J. November 27, 1915.

VENDOR AND PURCHASER (§ I E—25)—*Rescission of contract—Return of purchase price—Shares of stock as—Credit for rents—Interest.*]—Action to recover money paid under an agreement for sale.

F. S. Albright, for plaintiff.

A. Hannah, for defendant.

WALSH, J.:—The defendant agreed to sell certain land to the plaintiff. He has never been able to make title to this land and the plaintiff now sues for the recovery of the money paid by him under the contract plus interest and certain other sums expended by him on or about the property. The agreement provides for the payment of $6,000 of the purchase money upon the signing of the agreement and it thereby acknowledges the receipt of the same. As a matter of fact, only $1,500 of this amount was paid in money. The balance of it was paid by the transfer to the defendant of some shares in the Savons Clay Syndicate of which the plaintiff was the holder. The defendant, while admitting his liability for the $1,500, says that he is entitled to re-transfer to the plaintiff these shares of which he is still the holder in satisfaction of the balance of the payment of $6,000. He treats this as an action for rescission and contends that in such an action the right of the plaintiff is to get back what he gave. Counsel for

the plaintiff says that this is not an action for rescission, but for damages for the defendant's breach of contract, and that being so he is not bound to take these shares back. I think that the plaintiff's contention as to the form of the action as disclosed by the plaintiff is the right one. But in my opinion that is immaterial, as upon the evidence here the plaintiff in my judgment is entitled to be paid $6,000 even if the action is one for rescission.

I cannot believe that there is any principle of law or equity which compels or even authorizes me to decree his acceptance of these shares now at $4,500 or at any sum. The remarks of the present Chief Justice in *Moses* v. *Bible*, 5 W.L.R. 520, at p. 523, are applicable to this case. The case of *Johnson* v. *Henry*, 18 W.L.R. 583, is not binding upon me and is distinguished in its facts from this case and so I decline to follow it.

The plaintiff is entitled to the judgment asked for by his statement of claim except that he will get interest only at 5% throughout. With respect to the rents, the defendant should be given credit for the sum of $100 received by the plaintiff, or which he should have received on that account.

Judgment for plaintiff with costs and counterclaim dismissed.

Judgment for plaintiff.

REVILLON v. WHALEN.

Alberta Supreme Court, McCarthy, J. September 14, 1915.

FRAUDULENT CONVEYANCES (§ VI—30)—*Transaction between parent and child—Assignment of share of distribution—Absence of intent to defraud—Delay in setting aside.*]—Action to set aside an assignment by a daughter to her mother of a share in the estate of her deceased father.

C. A. Grant, for plaintiff.

W. A. Wells, for defendant.

MCCARTHY, J.:—It is contended by a judgment creditor of the daughter that such assignment was in fraud of his rights. The consideration of the assignment was "in order to make a provision for my said mother and for the love, favour and affection which I have and bear to her and in consideration of the sum of one dollar paid to me by her (the receipt of which is hereby acknowledged)." The action was not commenced within the 60 days to bring them within the statute. It was held, that a voluntary assignment by the daughter to her mother of the share of

ALTA.
S. C.

distribution in her deceased father's estate, for the purpose of making better provision for the mother, does not of itself shew an intent to defraud creditors so as to bring the transaction within the statute of 13 Eliz., ch. 5, or the Assignment Act. (Alta.), and will not be set aside at the instance of the execution creditors of the daughter, particularly where the action to set aside is not commenced within the statutory period. *Action dismissed.*

KILLOPS v. PORTER.

Alberta Supreme Court, Beck, J. October 14, 1915.

DISCOVERY AND INSPECTION (§ IV—33)—*Execution debtor—Examination of wife.*]—Motion to compel the wife of an execution debtor to answer questions on examination for discovery.

Knisley, for execution creditor.

Howatt, for execution debtor.

BECK, J. (after quoting the evidence and citing r. 636):—This rule, which corresponds with the Ontario R. 582, is remedial and is to be construed so as to advance the remedy given by it, so far as the fair meaning of the words will permit, *Gowans* v. *Barnet*, 12 P.R. (Ont.) 330; *Coleman* v. *Hood*, 40 W.R. 309.

An obvious purpose of allowing the examination of a transferee of property of the debtor is to ascertain whether that property, being previously to the transfer exigible for the debt, has been transferred to the transferee under examination under such conditions of fraud or otherwise as to remain so exigible under legal or equitable process notwithstanding the transfer.

But supposing the examination so far proceeds that it appears that exigible property of the debtor has been transferred to the transferee under examination under such circumstances as to leave it still exigible and that the transferee had made a further transfer it seems to me that it would be defeating the plain intention of the rule to interpret it so as to prevent further examination as to the terms of the further transfer or the disposition of the proceeds or the consideration for it. For if the transfer from the debtor should ultimately be found to be fraudulent a further fraudulent transfer would not protect it nor would a further transfer to a *bonâ fide* purchaser for value protect the proceeds whether in property or money if ear-marked. *Re Mouatt; Kingston Cotton Mill Co.* v. *Mouatt*, [1899] 1 Ch. 831; and cases cited in Parker on Frauds on Creditors and Assignments, p. 222.

ALTA.
S. C.

I think therefore that a transferee from the debtor must submit to an examination having in view not merely the transfer itself but his disposition both of the property or money in order that the execution creditor may, if he can lay a foundation for reaching either the property transferred by the debtor or its proceeds or both. If I am right, and I have no doubt I am, the questions which were not answered must be answered together with all proper questions arising out of the answers or referring to the same matters.

An order is granted accordingly that Mrs. Porter appear for further examination pursuant to appointment at her own expense, and that she pay the costs of this application.

Motion granted.

HANNA v. CITY OF VICTORIA.

B. C.
S. C.

British Columbia Supreme Court, Clement, J. November 25, 1915.

LIMITATION OF ACTIONS (§ III C—115)—*Actions against municipalities—Mandamus proceedings.*]—Application for mandamus.

McDiarmid, for plaintiff.

Hanington, for city.

CLEMENT, J.:—Section 513 of the Municipal Act which limits to one year the time within which actions are to be commenced against a municipality in all cases not covered by sec. 512 does not apply to proceedings under Part XV of the Act. In *R.* v. *Mission*, 7 B.C.R. 513, McColl, C.J., held that proceedings by way of mandamus (whether by action of mandamus or by application for the prerogative writ does not appear) fell within the then counterpart of sec. 513. He referred to the Interpretation Act and the Supreme Court Act for a definition of the word "action" as meaning "a Court proceeding commenced by writ or in such other manner as may be prescribed by rules of Court." Our rules of Court do provide for mandamus proceedings, but they make no specific provision for the commencement of proceedings under the compensation clauses of the Municipal Act. The *Mission* case, therefore, does not stand in the way of my giving effect to the view stated above.

Application granted.

B. C.

C. A.

NEWTON v. BAUTHIER.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving, Martin, Galliher and McPhillips, JJ.A. January 7, 1915.

APPEAL (§ IV E—130)—*Affidavits—Cross-examination of—Leave to.*]—Motion by the respondent (plaintiff) to the Court of Appeal from an order for leave to cross-examine one John J. Banfield upon two affidavits sworn by him and read on the application that resulted in the order from which this appeal was taken, and for a further order for leave to adduce before the Court, on the hearing of the appeal, further evidence in answer to said affidavits. The order appealed from was made on an application for payment out to the plaintiff of certain moneys paid into Court to the credit of the action, and the affidavits in question were filed and served by the respondents on the third and concluding day of the argument (October 1). Counsel for the plaintiff (respondent) did not ask for an adjournment, and Clement, J., who heard the application, allowed the affidavits to be read, and judgment was given forthwith ordering payment out of the moneys in question to the plaintiff. On October 5 following, the respondent's solicitors wrote the appellant's solicitors stating that the statements in Banfield's affidavits were incorrect, and in the event of an appeal he intended to take such steps as he could to bring the facts properly before the Court. On December 8 he again wrote asking that in the event of an appeal Banfield be produced for cross-examination, but the solicitors did not come to any agreement, and notice of appeal was filed, and served December 10. Respondent's solicitors took no further action in attempting to cross-examine Banfield on his affidavits, or to obtain further evidence before giving notice of this motion. The Court, referring to *Turnbull* v. *Duval*, [1902] A.C. 429, and *McEwan* v. *Hesson*, 20 B.C.R. 94, dismissed the application.

Casey, for the motion.

E. A. Lucas, contra.

S. C.

GAFFO v. MACDONALD.

British Columbia Supreme Court, Clement, J. November 25, 1915.

MASTER AND SERVANT (§ I C—10)—*Wages—What constitutes—Division of profits—Truck Act.*]—Action for claim under Truck Act.

B. C.

S. C.

Stacpoole, K.C., for plaintiff.

Maclean, K.C., for defendant.

CLEMENT, J., said the Truck Act has no application to a contract not the wages for labour. The contract was not the earnings of labour merely but the profits to be made, that is to say, the amount to be divided after paying for teams, powder, the maintenance of their camp, etc. The Act treats workmen as individuals not as contracting associations. *Ingram* v. *Barnes*, 26 L.J.Q.B. 319, is still the leading authority and is decisive of the case. The judgment of Cockburn, C.J., covers the various matters which I have above referred to. Action dismissed with costs, including the costs of the counterclaim.

Action dismissed.

C. A.

MOWATT v. GOODALL.

British Columbia Court of Appeal, Macdonald, C.J.A. September 14, 1915.
[*Mowatt* v. *Goodall*, 24 D.L.R. 781, referred to.]

COSTS (§ I—2c)—*On appeal—How taxed—Important questions.*] Appeal from taxation of the costs of appeal by the successful appellant. See 24 D.L.R. 781.

F. C. Elliott, for plaintiff, appellant.

Walls, for defendant, respondent.

MACDONALD, C.J.A.:—The appeal was taken to the Court of Appeal by leave given pursuant to sec. 119 of the County Courts Act. The taxing officer taxed the costs at $50, holding that the taxation fell within the provisions of sec. 122, sub-secs. (1) and (2), of the said Act. That section provides that the costs shall follow the event subject to the provisions of sub-secs. 1 and 2 of that section. It is contended that this appeal does not fall within either of those sub-sections, and I think that contention is right. In the appeal in question, while the matter was of considerable importance to insurance companies it was of no great importance to the general public, and if the insurance company decided to settle a legal principle of importance to itself and to others in the same business, I can see no reason why its customer, sued for the paltry sum of $35, should pay a large sum in costs for the purpose of settling that principle. I must allow the appeal and direct that costs shall be taxed in accordance with the main portion of said sec. 122, and not with reference to the sub-secs. 1 and 2.

Appeal allowed.

B. C.

S. C.

MEAGHER v. GRANBY CONSOLIDATED.

British Columbia Supreme Court, Macdonald, J. June 11, 1915.

MASTER AND SERVANT (§ II B 3—143)—*Injury from fall of machinery in smelter—Voluntary assumption of risk—Res ipsa loquitur—Applicability.*]—Action for injuries to servant.

A. Macneil, for plaintiff.

Ernest Miller, for defendant.

The plaintiff, a skilled mechanic, was employed by defendants as foreman in their smelter works. His duties consisted in looking after the machinery used in the briquetting department. On the day of the accident the briquetting machine was running as usual, and when it was shut down at noon hour he suspected that the bearings were getting hot, and to investigate he climbed the ladder to where the shaft and fly wheels were located. He found the bearings heated, and, as a part of his duty, endeavoured to remedy the defect. He unscrewed the bolts of the cap holding the shaft and when he had released such cap and was taking it down to hand to his assistant the whole machinery, to which the pulleys, fly wheel, and shaft and timbers were attached, fell down and injured him. His leg was broken and he sustained other injuries which permanently disabled him. Plaintiff contended that the accident occurred through the original negligent and defective installation or construction of the machinery, and that the accident would not have happened if there had been a bridge tree across the top of the framework and a support at the bottom, so that the shaft and revolving machinery would thus have been rendered more secure. At the trial, MACDONALD, J., held, that the Employers Liability Act did not apply, because the action was not commenced until July 9, 1914, and that the principle of *res ipsa loquitur* did not apply so that negligence could be presumed from the falling of the machinery. The plaintiff was cognizant of the condition of the machinery. The nature of his employment, his position and consequent knowledge, the length of time during which the machinery had been used without accident and all the surrounding circumstances was such as to render the principle of *res ipsa loquitur* inapplicable. Even if any presumption of negligence were raised, the defendant company has satisfied any onus cast upon it, and that the machinery and its supports were reasonably fit and proper for the purpose intended, and that there was no negligence on the part of th.

B. C.
S. C.

company. The doctrine of *volens* was applicable to the case. If there was any risk attaching to his work, the plaintiff not only fully appreciated it and the condition of the machinery, but, by the nature of his duties and course of conduct extending over so many years, can be fairly presumed to have undertaken to relieve his employer from liability in the event of an accident. Even if negligence had been found against the defendant, the defence of *volens* was available, as the plaintiff "took upon himself the risk without precautions," as suggested by Romer, L.J., in *Williams* v. *Birmingham Battery* [1899], 2 Q.B. 338.

The action was dismissed with privilege to apply for compensation under sec. 4 of the Workmen's Compensation Act.

Action dismissed.

CAMPBELL v. MAZUR.

British Columbia Supreme Court, Macdonald, J. September 28, 1915.

MORTGAGE (VI E—90)—*Foreclosure—Form of judgment.*—Application for judgment in foreclosure proceedings.

W. M. Griffin, for application.

No one for defendants.

MACDONALD, J.:—In this action plaintiff desires judgment according to form 3 in Seton on Decrees, 7th ed. (1912), vol. 3, p. 1829. It is contended that the adoption of this form avoids reference to the registrar to take accounts and thus saves expense. Plaintiff claims to recover $1,000 and interest, or, in the alternative, sale or foreclosure. Statement of claim developed the cause of action and sought relief by way of judgment for $1,000 and interest and that an account be taken of what was owing by the defendants to the plaintiffs and a day set apart for payment.

It is sought to follow the form in Seton above referred to, and not only require payment of the $1,000 and interest, but also a further sum that had become due since the commencement of the action. In order to facilitate the business of the Courts a practice has been adopted of the Judge in Chambers also taking Court applications, especially with respect to proceedings upon mortgages and agreements for sale, and then referring the taking of accounts to the registrar. It was not even suggested that an account was being taken of the amount due, or to accrue due, to the plaintiff, and, if the form of judgment referred to is sought to be obtained, it would mean that the Judge will require to have

B. C.
S. C.

the facts submitted upon which a conclusion can upon proper consideration be reached as to the state of the account. This would involve delay. Form 3 should not under the circumstances be followed.

Application dismissed.

SASK.
S. C.

HOLMESTED v. C. N. R. CO.

Saskatchewan Supreme Court, Haultain C.J., Lamont, Brown, Elwood and McKay, JJ. November 20, 1915.

APPEAL (§ XI—720)—*Leave to—Extension of time—Trespass to land—Construction of railway—Measure of compensation.*]—Motion by plaintiff to add a clause to the judgment delivered herein by this Court, 20 D.L.R. 577, and also for an Order extending the time within which to appeal to the Supreme Court of Canada from said judgment.

G. E. Taylor, K.C., for appellant.

J. N. Fish, K.C., for respondents.

The judgment of the Court was delivered by

LAMONT, J.:—In his affidavit, the plaintiff states:—"That unless this honourable Court deems it advisable to safeguard my right to recover damages from the defendant for the closing of streets and the deviation of Main St. as set out in the statement of claim filed herein by directing a new trial as to this branch of the case, with leave to add other defendants, should it not be dealt with on an arbitration by consent of the parties, then I desire to appeal to the Supreme Court of Canada." In the judgment of this Court referred to, the only matter dealt with was the plaintiff's right to damages for the actual trespass. We did not deal with, nor pass upon any right of the plaintiff for compensation for lands taken, or for damages to adjoining lands through the construction of the railway, or damages for the matters referred to in the affidavit of the plaintiff in the passage above cited. The rights of the plaintiff, whatever they may be, in respect to these matters are in no way interfered with or prejudiced by the said judgment. As the plaintiff only desires leave to appeal in case these rights are prejudiced, it is unnecessary to deal with the question of extending the time for appeal. As the motion was not necessary to the safeguarding of the plaintiff's rights, he should pay the costs thereof.

BEAVER LUMBER CO. v. DOLSEN. SASK.

S. C.

Saskatchewan Supreme Court, Newlands, Brown, and Elwood, JJ. July 15, 1915.

COSTS (§ I—8a) — *Interpleader issues — Discretion as to —Execution creditor and claimant—Seizure of crop.*]—Appeal from an order for costs.

L. A. Seller, for appellant.

F. W. Turnbull, for respondent.

The judgment of the Court was delivered by

NEWLANDS, J.:—This is an interpleader issue which was decided summarily in favour of the claimant, each party to pay their own costs. From this order as to costs the claimant appeals.

Rule 646 provides that no judgment or order as to costs only, which by law are left to the discretion of the Court or Judge, shall be subject to any appeal, except by leave of the Court or Judge giving the judgment or making the order. No leave to appeal was given in this case.

The construction which has been placed upon this rule by the Court of Appeal in England is that:—

> If the costs are in the discretion of the Judge, the Court of Appeal will assume that the Judge exercised his discretion, unless it is satisfied that he has not exercised his discretion, but has applied some rule which in fact excluded his discretion: *Bew* v. *Bew*, [1899] 2 Ch. 467.

There is nothing in this case to shew that the learned Judge did not properly exercise his discretion and the appeal should, therefore, be dismissed with costs.

The execution creditor, the respondent, has cross-appealed upon the ground that the claimant had not shewn that he had any property in the goods seized, and, although the goods may not have been the goods of the execution debtor, that, as between the claimant and the execution creditor, the execution creditor was entitled to succeed.

The goods in question was one-third of the crop grown upon the claimant's land, by his tenant, which was to have been paid to him as rent by the tenant; this one-third was seized by the sheriff, on an execution against the claimant's brother, before the tenant had set off the claimant's one-third share, and, therefore, it was claimed that the property in this grain was in the

SASK.
S. C.

tenant and not the landlord, the claimant in this case. The execution debtor was not the tenant and he had no interest in this crop, and there was therefore nothing that the sheriff could seize under the execution against him, and the sheriff could not, therefore, make out any title to the same. It may be true that the claimant did not have possession of the goods, but he had a sufficient title to prevent anyone else from interfering with them. An equitable title is sufficient on which to base a claim in interpleader. See cases cited on p. 29, Cababe on Interpleader. This is, in my opinion, sufficient to sustain his claim as against the execution creditor, who had no title at all.

I think the cross-appeal should be dismissed also, with costs.

Appeals dismissed.

COTTON v. BOYD.

Saskatchewan Supreme Court, Haultain, C.J., Newlands, Lamont, and McKay, JJ. July 15, 1915.

LEVY AND SEIZURE (§ I A—18)—*Crops of lessee—Seizure by creditors of lessor.*]—Appeal from a judgment in interpleader proceeding.

Russell Hartney, for appellant.

John Milden, for respondent.

NEWLANDS, J., delivering the judgment ot the Court, said that this is an interpleader proceeding in which the execution debtor leased his land to his son. The execution creditor seized the crop grown on this land by the son, who interpleaded, and the trial Judge found in favour of the execution creditor. Referring to *Kilbride* v. *Cameron,* 17 U.C.C.P. 373, and *Massey-Harris* v. *Moore,* 6 Terr. L.R. 75, it was held, that the crops grown by the son upon the lands leased to him by his father cannot be seized by the execution creditors of the lessor.

Appeal allowed.

ROBIN HOOD MILLS v. MITCHELL.

Saskatchewan Supreme Court, Brown, J. March 29, 1915.

REMOVAL OF CAUSES (§ II A—20) — *Removal to Supreme Court—Jurisdiction of Local Master.*]—Application to the Local Master to transfer an action brought in the District Court to

SASK.
S. C.

the Supreme Court under secs. 39 and 40 of the District Court Act.

Smith, for plaintiffs, respondents.

P. H. Gordon, for defendant, appellant.

BROWN, J.:—These sections (39 and 40 of the District Court Act), provide that such transfer can be made, upon order of the Supreme Court or a Supreme Court Judge, and the learned Local Master held that he had no jurisdiction to make the order. Rule of Court No. 620, states that:—

> A Local Master, in regard to all actions brought or proposed to be brought in the Supreme Court in his judicial district, may transact all such business and exercise all such authority and jurisdiction in respect to the same, as under the Judicature Act, or these rules may be transacted or exercised by a Judge at Chambers, except, etc. . . .

The object of this rule was undoubtedly to give a Local Master the complete jurisdiction of a Supreme Court Judge sitting in Chambers, in all Supreme Court actions.

The rule should be more liberally construed, and the present application is one in an action proposed to be brought in the Supreme Court within the meaning of the rule, and that, therefore, it is within the competence of the Local Master.

The appeal should, therefore, be allowed with costs. The action should be transferred to the Supreme Court and the costs of the application to the Local Master should abide the event of the trial of the counterclaim in the Supreme Court.

OTIS v. OTIS.

Saskatchewan Supreme Court, Brown, J. September 17, 1915.

STAY OF PROCEEDINGS (§ I—13)—*Caveats—Second action—Non-payment of costs.*]—Appeal from judgment of Master dismissing motion for costs.

H. V. Bigelow, K.C., for defendant, appellant.

T. J. Blain, for plaintiff, respondent.

BROWN, J.:—The statement of claim in the second action sets up a series of historical events that were not set out in the statement of claim of the first action. The relief sought in both actions is substantially the same. The alleged settlement at the caveat proceedings though set up in the second action, is in no way ground for the relief sought and cannot be considered as such. Applying the rule laid down in *Martin* v. *Earl Beauchamp*, 2 Ch.

SASK.
S. C.

D. 12, and *McCabe* v. *Bank of Ireland*, 14 A.C. 413, it follows, that where a plaintiff, having failed in one action, commences a second action for the same matter, even though containing new allegations, the second action will be stayed until the costs of the first action are paid. *Appeal allowed.*

FITZGERALD v. MAYO.

Saskatchewan Supreme Court, Haultain, C.J., Lamont, Brown, Elwood and McKay, JJ. July 15, 1915.

LAND TITLES (§ IV—40)—*Registration of foreclosure order—Validity—Signature of Judge.*]—Appeal from Master of Titles.

T. D. Brown, for plaintiff.

J. M. Carthew, for Registrar of Titles.

The judgment of the Court was delivered by

BROWN, J.:—The Local Master in Chambers at Humboldt made a final order for foreclosure in mortgage proceedings, and the same was duly issued under the seal of the Court with the name of the Local Master marked thereon, the order being signed by the local registrar. When this order was presented to the registrar of the Land Titles Office, he refused to honour the same, taking the objection that the order should have been signed by the Local Master. In this objection he was upheld by the Master in Titles. The Court said that the case is governed by rule 618, which provides that

an order shall be in the forms Nos. 83-132 in the appendix with such variations as circumstances may require. It shall be sealed, and shall be marked with the name of the Judge or Local Master by whom it is made.

Appeal allowed.

N. S.
C. C.

EX PARTE HUGHES.

Nova Scotia County Court, Wallace, Co. C.J. March 15, 1915.

HABEAS CORPUS (§ I C—10) — *Exemption from civil arrest under Army Act—Soldier on active service—The Bastardy Act, R.S.N.S., ch. 51.*]—The prisoner was in close custody under a warrant of remand issued in proceedings under the Bastardy Act, R.S.N.S., ch. 51. On a return to an order in the nature of a writ of habeas corpus issued by Wallace, Co.C.J., under sec. 35 of the County Court Act, ch. 156, R.S.N.S. 1900, it was proved before the Judge that the applicant at the time of his

arrest had been and was a member of the 6th Battalion of Canadian Mounted Rifles and was under orders for active service beyond the seas. N. S. C. C.

W. J. O'Hearn, K.C., for applicant.

T. Notting, K.C., for prosecutor.

WALLACE, Co. C.J.:—In the present application the affidavits satisfy me that the applicant is a member of the active militia of Canada who was under orders for active service at the time of the proceedings under the Bastardy Act. This being so, sec. 145 of the British Army Act applies, and the applicant is entitled to be discharged. I refuse his application for costs.

Prisoner discharged.

DOYLE v. MOIRS LIMITED. S. C.

Nova Scotia Supreme Court, Graham, E.J., and Russell, Longley, Drysdale and Ritchie, JJ. March 27, 1915.

[Leave to appeal to Privy Council from *Doyle* v. *Moirs Ltd.*, 22 D.L.R. 767, refused.]

APPEAL (§ XI—720)—*To Privy Council—Leave to—Important questions—Workmen's compensation—Course of employment.*]—Application for leave to appeal to the Privy Council from the judgment, 22 D.L.R. 767, affirming dismissal of action for personal injuries to servant.

J. J. Power, K.C., for applicant.

The judgment of the Court was delivered by

GRAHAM, E.J.:—The question arises under the Workmen's Compensation Act, Acts of 1910, ch. 3, sec. 5, as to whether the case was one of "injury arising out of and in the course of the employment."

It was an accident caused by larking in which three youths were concerned, altogether apart from their duties, although in the factory.

There was a claim in the pleading for damages for negligence as well as for compensation under the Act, but this claim was not put forward and is really not in the case.

The amount recoverable for compensation under the Workmen's Compensation Act is under the amount mentioned in the Order in Council giving the plaintiff an appeal as a matter of right, namely £500.

The question involved is not one of great general or public importance under sec. 2 (*b*) of the Order in Council.

N. S.
S. C.

Trimble v. *Hill*, 5 App. Cas. 342.

Our attention was called of course to the words "or otherwise" in the Order in Council. I can imagine cases which might be brought in under those words. As where this Court had been going wrong for thirty years and could not get rid of its own precedents, as in *Emmerson* v. *Maddison*, [1906] A.C. 569, or some such case. *Application refused.*

MAN.
K. B.

HOGATE v. HOGATE

Manitoba King's Bench, Prendergast, J. July 2, 1915.

MASTER AND SERVANT (§ I C—10)—*Contract of employment—Infant employee—Wages—Increase in—Counterclaim and set-off—Findings of facts.*]—Action for wages and money loaned.

J. F. Kilgour, for plaintiff.

S. H. McKay, for defendant.

PRENDERGAST, J.:—The defendant is a dealer in Canadian and imported horses, who owned sales stables at Weston, in the Province of Ontario, where he still resides, as well as at Brandon, in this Province, and St. Hyacinthe, in the Province of Quebec; and the plaintiff, whose real name is Francis Louis Dupurier, claims from him $6,060 for 10 years' wages as hired man, clerk and foreman in connection with the said business, together with $1,000 for money loaned and secured by I.O.U.—subject, however, to credits amounting to $2,766.50, which reduces his claim, irrespective of a small sum as damages for wrongful dismissal, to $4,293.50.

In the early summer of 1904, the defendant went to France on one of his usual trips for the purchase of Percherons, and was accompanied on that occasion by his wife, who is a native of that country. While in France, they went to Lyons, to visit one of Mrs. Hogate's brothers, who is the plaintiff's father. The plaintiff, who is thus Mrs. Hogate's nephew, was then 17 years old. After several visits and conversations on the subject extending over a few days, the Hogates took the plaintiff over to this country where he has lived with them or been associated with them, either at Weston, Brandon or St. Hyacinthe, from August, 1904, to August, 1914.

The plaintiff says that before leaving Lyons, there was a

MAN.

K. B.

specific agreement made between himself and Mrs. Hogate acting on behalf of her husband who was also present but could not speak French, whereby he was "to go and work for them at $25 a month, subject to a raise, and board." He says that his father made at the time a good living, that an older brother earned steady wages and that the family, on the whole, lived quite comfortably. For that reason, his father, as he says, was rather averse to let him go, but eventually consented on Mrs. Hogate's representation that, besides getting the wages stated, his future would be assured if her husband took well to him.

I, however, accept the version of Mr. and Mrs. Hogate, that the agreement passed with the plaintiff's father, in the presence of the plaintiff himself, who assented thereto, was that they should take the young man over with them at their own expense and provide him with board and clothing till he was 21—the view taken of the matter at the time being, that while giving the defendant such assistance as he could (which would not be much for the first few years), he would at the same time have the advantage of being cared for, of learning English, of getting acquainted with Canadian methods, of gathering experience in the horse business—and so preparing an independent future for himself after he was of age.

The plaintiff's letters, particularly those of January 19, May 22, and June 1, almost imploring in terms and shewing the greatest anxiety to be brought to Canada, disclosed a state of mind not at all in harmony with his own version. I am also convinced, by the many detailed circumstances sworn to by Mrs. Hogate, that the plaintiff's family was in great poverty if not at times in actual want, and that they really welcomed with gratitude Mrs. Hogate's offer, which, moreover, carried with it the assurance that sincere interest would be taken in the boy's welfare. I also believe the testimony of the witnesses who say that the plaintiff told them on several occasions that he was working for his board and clothes. In fact, the plaintiff does not deny this, but says that the defendant had told him to make such a statement for the purpose of creating the impression that he was execution-proof as he was being sued at the time.

My finding on the terms of the initial contract will then

MAN.
K. B.

also dispose of the plaintiff's contention that after one year's service (*i.e.*, in the summer of 1905), the defendant told him that his wages would be $30 a month for the second year, with a similar increase of $5 a month in each succeeding year till they reached $60 a month.

I find, in short, that the agreement reached in France was to cover the 4 years before the plaintiff became of age, and that he is not entitled thereunder to wages for that period.

On the other hand, considering the relations between the parties and all the other circumstances, I feel that the clear intent of the agreement was that it should be carried out, not on the lines of a strict business proposition, but in a spirit of practical sympathy and even of generosity towards the plaintiff. For that reason, while disallowing the wages claimed by the plaintiff for the first four years, I also disallow all the items counterclaimed by the defendant with reference to tuition, medical attendance, and a few other sums which may be considered in the light of minor largesses, up to the time that he became of age.

I believe also that when the defendant had with the plaintiff that conversation which he says he thought he should have with him on attaining his majority, and which covered all their past relations, that he was then animated by that spirit, and was taking the view that in making the disbursements referred to he had only been carrying out his undertaking with the old gentleman in France to take good care of his son.

It was on this same occasion, when the plaintiff had just attained majority, that the matter of the $1,000 I.O.U. originated, and I will now dispose of the same. Whether it be true that the defendant, as he says, made on that occasion severe reproaches to the plaintiff for past idleness and other more serious lapses, and stated that the gift which he was about to make to him was not meant as an expression of satisfaction for past conduct but as an encouragement to more earnest endeavour, it is sure at all events that he then presented him with a colt. I take this, moreover, to have been an unconditional gift. I readily believe that the defendant added that with this gift, and the young man now being of age, he felt that he had wholly ful-

filled his undertaking; but I do not believe that he stated that any expenditure he had made in the past for the plaintiff would be deducted from the amount realized on the colt when it was sold. I take the gift to have been absolute, and to have been meant to settle and close all their past relations up to that time. Nor do I consider that it would be within the spirit of that gift to allow the defendant the $555, which he claims for the keep of the colt. When it was eventually sold for $1,000, the defendant, who then needed the money, gave to the plaintiff his I.O.U. for that amount without any deduction, although the sums which he now seeks to counterclaim had already been expended. I will then allow the plaintiff the $1,000 in full.

Now, as to the plaintiff's claim for the six years after he became of age.

This claim, like his claim for wages before majority, rests wholly, as above stated, on the agreement which he alleges was entered into in France; except that the "raise" which he contends was one of the terms mentioned at Lyons, was later fixed here, as he says, at $5 a month to be similarly increased annually beginning with the second year. But I have already found that there were to be no wages at all under the Lyons agreement, and I do not see that the evidence discloses that any contract to pay definite wages was ever entered into here after he came of age. In fact, I do not understand that he contends that there was any, relying as he does on the initial contract.

Para. 4 of the statement of defence, however, states that when the plaintiff arrived at the age of 21, the agreement was that he was to receive his clothes and board and any sum which the defendant "thought that the plaintiff was worth to him." This means, of course, not that the matter was left to the defendant's fancy or caprice, but that he should pay the plaintiff a fair money remuneration for his services if they were worth more than his board and clothes.

I believe that this contention of the defendant is borne out by the attitude disclosed in the plaintiff's letters during, and especially towards the end of that period—letters in which, very far from making specific demands for stated wages, he rather appeals for generous consideration. There is also in

MAN.
K. B.

some of those letters, an undercurrent of expectation that the defendant would set him up in some independent business. He says in evidence that he was led to expect that he would succeed the defendant in his trade, and also that the defendant later on had given him to understand that he would buy him a moving-picture establishment at a cost of some $10,000, part of which would be met with his accumulated past wages, as Mrs. Hogate was repeatedly telling him that "with what was being kept for him, there was a nice litle pile coming to him." I take those expectations to have been wholly without foundation, and as having no practical significance except to shew that he was never promised any remuneration except in the indefinite way set out in para. 4 of the defence.

What, then, were the plaintiff's services worth to the defendant? The defendant says that he was of no use whatsoever to him, that he kept him wholly for family considerations and that whatever he did for him in the way of providing him with board, clothes and pocket money, was an absolute gratuity on his part. There is also independent testimony to support this contention, besides that of Mrs. Hogate. The plaintiff, on the other hand, insists that his services in various capacities, were highly valuable. There is, however, unfortunately for him, the matter of that marriage settlement (ex. 64), to which I will refer only to say that it impairs the plaintiff's credibility to such an extent in my estimation, as to affect my view of the whole issue. I will not say more on that subject.

I would fix $25 to include board and clothes, as a fair average monthly remuneration for those 6 years.

It does not appear that the plaintiff did at any time the work of a stable-man—not at all events so as to do away with the necessity of hiring another. The fact is that on account of his relationship to the Hogates, he did not consider himself called upon to attend to the more servile part of the work, nor do I think that it was expected of him. The correspondence which he says he attended to, must also have been very limited and represent but little time and labour. Nor do I find that he really acted at any time as manager of any part of the business, as the only occasion when he could be said to have been in auth-

ority was during the defendant's absence when he was left with one man only and almost nothing to do. Of course, there were periods in the year when the business was at a standstill. There is also evidence to shew that ill-health and a certain unsteadiness, at all events during the first part of that period, contributed to impair his usefulness.

There is no doubt, however, that at Brandon and St. Hyacinthe, and at other places for short intervals, he represented the defendant, if not in the sense of exercising his full authority, at all events as one who carried out his instructions as they came and faithfully reported what was going on. He also collected for some time the rents of two houses at Brandon, and it was through him that the running expenses of the stable there, were paid with money sent to him from time to time by the defendant. And I should here say that everything goes to shew that the plaintiff acquitted himself in those small money matters, with scrupulous exactness and honesty. At the same time, those duties were not heavy, they were not of a high order, they required no particular experience, and, as I think, left him much leisure.

I would then allow him $25 a month for the 6 years, to which should be added the $1,000 secured by I.O.U., making in all $2,800.

On the other hand, he should be charged with the following, all subsequent to March, 1908: 1st, on the general account as per his, and Mrs. Hogate's, statements $1,440; 2nd, medical attendance, $119; 3rd, rents collected, $98; 4th, for Jeanne B., $542; 5th, for his sister and brother, $261—in all $2,460—leaving to his credit, $340.

There will be judgment for the plaintiff for $340 and County Court costs—without set-off of any costs by the defendant.

Judgment accordingly.

ADAIR v. BRITISH CROWN, Etc., CO.

Manitoba King's Bench, Prendergast, J. November 1, 1915.

CORPORATIONS AND COMPANIES (§IV G 2—117)—*Provisional directors—Securing stock subscriptions—Powers to appoint agents—Scope of agency.*]—Action for cancellation of shares subscription.

MAN.
K. B.

J. C. Collinson for plaintiff.

C. P. Wilson, K.C., and *W. F. Hull*, for defendant.

PRENDERGAST, J.:—I take it that one of the main reasons for the existence of provisional directors is the securing of stock subscriptions. I am of opinion that it was quite within their power to have this done through agents, and the evidence, as I read it, shews conclusively that the Globe Securities Co., represented by Butchart, went on doing all that it devolved upon the provisional directors to do or cause to be done,—and that, to their knowledge and even on their directions. The defendants, then, would be liable at the time.

It does not seem to me that the element of employment, as it was at first brought into the negotiations, disturbs the essential fact on which the plaintiff relies, that he paid his subscription money to one who, as I hold, was authorized to receive it for the defendants. Nor do I think it avails the defendants that the plaintiff paid his subscription by cheque to the order of the Globe Securities. The paying in a chartered bank, required by sec. 15 of the special Act (ch. 92 of 1911), is simply meant as a condition precedent to the calling of the shareholders' meeting and election of directors.

When, however, the plaintiff's dealings with Butchart entered into that phase where monthly compensation for non-employment was proposed and began to be given, followed by the payment of the $300 and the giving of notes in anticipation of a resale of his stock, the plaintiff must have, or should have, understood that these were matters which could not be within the scope of Butchart's agency. He must have understood at the same time that Butchart was not dealing fairly either with him or the company, and it was his duty, unless he wished to look exclusively to Butchart thereafter, to give notice to the officers of the company and seek information from them. Not having done this, he is, in my opinion, guilty of laches which preclude him from succeeding.

It is a case where one of two innocent parties must suffer, and it is proper that it should be the one who has not acted with ordinary circumspection and diligence.

The action will be dismissed with costs to the defendants.

Action dismissed.

WOLLENBERG v. BARASCH. QUE.

K. B.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Carroll, and Pelletier, JJ. June 15, 1915.

ATTACHMENT (§ I A—5)—*Conservatory attachment—Right of heir to remedy—Tortious with-holding of moveables from estate—Inventory and seal.*]—Appeal from judgment of Beaudin, J., Superior Court, in favour of plaintiff in proceedings of conservatory attachment.

Dame Rosa Barasch, defendant's late wife, died on March 1, 1915, intestate. Her property devolved to her mother and to her brothers and sisters. The estate consisted of furniture, valuable jewels and precious stones estimated to about $40,000. On the petition of plaintiff, one of the heirs, the Court appointed Notary Lippé, a commissioner for the purpose of affixing seals on the property belonging to the deceased until inventory was made. However, on presenting himself at the defendant's domicile, the notary was refused by defendant, liberty to carry out his function, and could not affix the seals.

Thereupon plaintiff proceeded by way of conservatory attachment. In his conclusion he prayed that a conservatory attachment might issue to seize and attach the moveable property which belonged, at the time of her death, to the late Dame Rosa Barasch; that the goods and moveable effects so seized be placed under judicial custody until plaintiff's right should have been determined; that should all the moveable property belonging to the deceased be not found and seized in this cause, that the defendant, the husband of the late Dame Rosa Barasch, be ordered to produce same, and on failure so to do within a delay to be fixed by the Court, that he be condemned to pay the value thereof, that part of the said moveable property which consisted of jewellery being estimated at the value of $40,000; that the goods and moveable effects so seized and produced, or any such sum paid by the defendant in accordance with the judgment to be rendered, be held in judicial custody until after the affixing of seals, the making of an inventory, and the other proceedings authorized by law in cases of intestacy, and the distribution and payment to plaintiff of his share; the plaintiff reserving any other and further recourse which by law to him may appertain.

QUE.
K. B.

The defendant met this action with a dilatory exception alleging that the plaintiff's suit was on *en partage*, and inasmuch as the declaration shewed that the plaintiff had brothers and sisters and a mother who were *primâ facie* heirs of his late wife, that these be called as parties in the suit and the proceedings stayed until such parties were *mis-en-cause*.

This dilatory exception was dismissed by the Superior Court: "The Court, having heard the parties by their counsel upon the dilatory motion, declares it is not called upon to decide if the action of defendant is well founded; it has only to mention that this is not an action in partition, as contended by defendant, but one in the nature of a *saisie conservatoire*, because the defendant has refused to allow plaintiff to affix seals on the effects left by his sisters, and the dilatory motion of defendant is dismissed with costs."

The Court of Appeal affirmed this judgment.

Pelissier, Wilson & St. Pierre, for appellant.

Jacobs, Hall, Couture & Fitch, for respondent.

The judgment of the Court was delivered by

PELLETIER, J.:—The defendant, appellant, answers this conservatory seizure by a dilatory exception in which he asks that the other heirs of Dame Rosa Barasch should be made parties. He took at the same time an exception to the form which was dismissed and is not before us.

These two preliminary exceptions shew that the appellant is disposed to place all the hindrances possible in the way of the exercise of the rights of the heirs and causes us to see that the plaintiff was probably right in proceeding by way of conservatory seizure.

The plaintiff claims that this is an action for partition and that, therefore, all the heirs should be parties in the cause. Now, that is not the action that we have before us.

Art. 955, C.P.Q., par. 3, declares that where there is no other remedy equally appropriate, advantageous and efficacious, a plaintiff can obtain a conservatory seizure when he has a right to it by any provision of the law in order to place under judicial control a moveable property to secure the exercise of his rights over it.

QUE.
K. B.

Such were the proceedings taken by the plaintiff in the present case. He caused a conservatory seizure to be issued and when the bailiff went to execute it the jewels had already disappeared. The matter is then urgent.

Moreover, it is sufficient to read the conclusion of the conservatory seizure to satisfy us, that the plaintiff, considering the urgency, is content for the time to place his case under art. 955, par. 3.

He does not demand partition; he only wishes to be assured in his own interest and to safeguard his share in the succession, that the moveables belonging to this succession should be placed under judicial control. He properly asked by his conclusion, that if the defendant does not produce the moveable property and the jewels he should be condemned to pay their value, but he asks at the same time that all the moveables which will be seized and the value of those which have disappeared should be in safe custody until the final decision upon the rights of the interested parties and for this purpose the plaintiff reserves his right to exercise any other legal remedy that the law gives him.

This procedure appears to me incapable of attack and according to what we have before us, it is probably very necessary.

There are several questions that the appellant raised in his factum and upon which he may be right, but they can be discussed in a more effective manner with the merits of the case of which they form part.

I would confirm the judgment with costs.

Judgment affirmed.

LAROCHE v. LAROCHE.

Quebec Court of King's Bench, Appeal Side, Sir Horace Archambeault, C.J., Trenholme, Lavergne, Cross and Carroll, JJ. December 28, 1914.

HUSBAND AND WIFE (§ II C—65)—*Death of wife—Community property—Division of—Want of inventory—Continuation of community.*]—Appeal from judgment of Superior Court ordering a division of community property. Reversed.

Pentland & Stuart, for appellants.

Choquette & Galipault, for respondent.

L. A. Taschereau, K.C., for Dame Miller.

QUE.
K. B.

The action is for a separation. The father of the respondent married twice. Of his first marriage with Kate Lawor were born the respondent and his sister, Mary Ann, both minor children, on June 27, 1877, the date of the demise of their mother, who died intestate.

Of the second marriage with Lilian Miller (separated as to property) were born seven children. The father died in July, 1912. The respondent in his action alleges that at the death of his mother there was property belonging to the community; that his father has not made any inventory, and that therefore there has been continuation of community.

The widow and her children contest that and say: 1. That the community had no property and that consequently the surviving spouse was not obliged to make an inventory, since there was nothing to insert in an inventory; 2. That the existing property had been acquired by Laroche senior's second wife in an apothecary trade; and 3, that the continuation of community should have been asked for during husband's lifetime.

The Superior Court has admitted the continuation of community and has consequently ordered the division of the property.

The majority of the Court of Appeal has reversed that judgment and rejected the request for continuation of community and therefore has ordered the sharing of the property in equal shares by the following judgment:—

Considering, that in order to claim continuation of community it was incumbent on the respondent to prove *inter alia* that he was prejudiced by the omission of his father to make an inventory.

Considering that he has failed to make such proof and discharge the onus on him so to do.

Considering, on the contrary, that it appears from the record that at the time of his first wife's death, respondent's father and the community of property that existed between his father and mother were insolvent and in 1880 the respondent's father formally made an assignment under the Insolvent Act of 1875 and all assets of the said community and of respondent's father were, under the provisions of said Insolvent Act, legally applied to payment of indebtedness for which they were liable and were equal to and paid only twenty cents on the dollar on such indebtedness.

QUE.
K. B.

Considering that *bona intelliguntur cujusque, quæ deducto ære alieno, supersunt.*

Considering that there is error in the judgment appealed from in holding that there was continuation of community between respondent and his sister and their father, and that the succession to be divided in this cause should be divided on the basis of continuation of community and by awarding 11-36 of the property to each of the two children of the first wife and 2-36 thereof to each of the seven children of the second wife, instead of dividing the said succession among all the nine children of the two marriages share and share alike.

The Court doth modify the said judgment appealed from and doth declare that no continuation of community existed between the respondent and his sister and their father, and that the succession to be divided herein be divided between all nine children share and share alike, and the Court doth order that the costs of this Court and in the Superior Court shall be paid out of the mass of the succession.

LAVERGNE and CARROLL, JJ., dissented.

O'LEARY v. FERGUSON.

P.E.I.
C. C.

Prince Edward Island, Court of Chancery, Hon. R. R. Fitzgerald, V.C. July 6, 1915.

FRAUDULENT CONVEYANCES (§ VI—30) — *Transactions between husband and wife—Impeachment by creditors—Property purchased with wife's earnings.*]—Action to set aside fraudulent conveyance.

Gilbert Gaudet, K.C., for complainants.

Neil McQuarrie, K.C., for defendants.

FITZGERALD, V.C.:—This bill is filed to set aside a conveyance executed to the defendant's wife of certain premises, the full purchase money of which it is claimed was paid by her husband. It is charged that this was done by him with intent to defraud, and in order to secure it from his then and any future creditors. If the allegations contained in the bill are true the Statute of Elizabeth would apply. The withdrawing of such a portion of defendant Albert E. Ferguson's property, as would leave insufficient to enable his creditors to pay themselves would under ***French*** v. ***French***, 2 Jur. N.S. 169; ***Barrack*** v. ***McCulloch***,

P.E.I.
C. C.

3 K. & J. 110, and *Re Pearson, Ex parte Stephens*, 3 Ch. D. 807, be fatal to the validity of this conveyance, as against his creditors. The entries in the solicitor's ledger shew professional charges and dealing with this purchase under an account headed "Albert Ferguson" and later "Mary and Albert Ferguson"; but if credit is given to the wife's story this bookkeeping could not be taken as decisive evidence. The cash payment she positively swears was made by her out of moneys received from her brother, and her sons, and out of her own earnings as a packer in Leard's factory, and from boarders, and she gave a fair account of these several receipts; and she further testified that she paid the mortgages, and the interest on them, and that none of her husband's money went to pay them off, or into this property. Corroborating her testimony several receipts shewing payment by her of principal moneys and interest were put in evidence. The onus of proof is on those who impeach the transaction. This onus has not been satisfied.

Action dismissed.

BURGE v. BURGE.

Prince Edward Island, Court of Chancery, Hon. R. R. Fitzgerald, V.C.
April 20, 1915.

DEEDS (§ II D 2—40)—*Reservation of life estate—Undue influence—Cancellation.*]—Action for cancellation of deeds.

A. A. McDonald, K.C., and *W. S. Stewart*, K.C., for complainant.

J. J. Johnston, K.C., for defendant.

FITZGERALD, V.C.:—This is a bill filed by complainant against his nephew, praying that a deed of conveyance of 50 acres of land dated July 4, 1906, executed by him to such nephew be set aside and cancelled, as also that an agreement in relation to another 50 acres, the homestead, dated October 22, 1907, made between the same parties be set aside and cancelled, and that the defendant be ordered to convey to him the 25 acres of land described in a deed dated April 10, 1907, of which the defendant was the grantee.

The premises in the first deed will be referred to as "the 50 acres"; those in the agreement as "the homestead," and the 25 acres as the "Walsh property."

P.E.I.
C. C.

From the evidence it appears that some 9 years ago at the request of the complainant, defendant came to live with him and his wife, under an agreement that if he would stop with him and work the farm he would give him the 50 acres, worth at the time probably $450, and an agreement as regards the rest of his property, that he would give it to the defendant if he would live with him and assist him to work the farm, and support him and his wife "in all things necessary" while they lived.

One year after its making, complainant executed to defendant the conveyance of July 4, 1906, of the 50 acres; and in the following April defendant got the deed of the Walsh property from the Walsh heirs, worth then, with the wood on it, probably $400, and in the ensuing October the agreement as to the homestead, worth then from $1,000 to $1,200, was executed by both of them, the defendant requiring it then, saying he would leave unless it was executed.

The complainant is an old man, of 72, in poor circumstances, not very bright, and living alone with a second wife. The defendant is a young man of 29. The deed conveying the 50 acres has this curious habendum:—

> To have and to hold the said lands and tenements with their appurtenances unto and to the use of the said James J. Burge (the grantee) during the life of the said George Burge (the grantor) and from and after the death of the said George Burge to the use of the said James J. Burge, his heirs and assigns forever.

It was drawn by a law student, only one year articled.

I find that it was the intention of the parties and agreed between them, that a life estate or life interest in the grantor, was to be reserved to him in the premises described in this conveyance.

That the conveyance of the Walsh premises was made to the defendant with full knowledge of its purport, and without undue influence, and was not improvident under the circumstances.

That the agreement in relation to the homestead, though made with full knowledge of its contents was improvident, and executed without that independent advice which this old man should have had to protect himself against default on the part of his nephew, with no means of relief except suits at law, or in equity and without support in the meantime. A wrong was done to the complainant by his nephew, arising from the ignor-

P.E.I.
C. C.

ance of both, and of the magistrate who drew the agreement. Under the authority of *Everitt* v. *Everitt*, L.R. 10 Eq. 405; *Beeman* v. *Knapp*, 13 Gr. 398; *Lavin* v. *Lavin*, 27 Gr. 567, and the very carefully considered judgment of Mr. Justice Hodgson in *Inglis* v. *Paw*, 3 E.L.R. 556, I hold that this agreement is void, and must be given up to be cancelled.

There will be a declaration that the deed of July 4, 1906, ought to be rectified by reading the same as reserving a life estate in the grantor in the premises therein described.

Re CURTIS.

Prince Edward Island, Court of Chancery, Hon. R. R. Fitzgerald, V.C.
March 20, 1915.

WILLS (§ III G 4—135)—*Estate upon condition—"All living children"—Dependent on recovery of health—Provisions for widow.*]—Application for the construction of a will.

D. Edgar Shaw, for petitioners.

D. A. McKinnon, K.C., for William Sentner.

C. R. Smallwood, for infant children.

Donald McKinnon, for George C. Curtis and others.

FITZGERALD, V.C.:—The will of the late Charles Curtis contained the following bequest:—

I will and bequeath to my son Henry Owen Curtis at present in Falconwood Hospital, should he recover his health of mind and body, the Mill property, known as Curtisdale Mills, subject to an annual payment of seventy-five dollars to my wife Emily Curtis. And should the said Henry Owen Curtis not recover his mental and bodily health, the said Mill property to be sold by my executors, and one-third of what the property may bring, shall be paid to my wife, Emily Curtis, the balance to be equally divided between all my living children equally share and share alike.

This gift of the proceeds of the Mill property to testator's "living children" is undoubtedly a contingent one, depending on the non-recovery of "the mental and bodily health" of a third person. It is also a postponed gift to a class. The description "all my living children" the testator meant those children who were then, or might be, living at his decease. Neither the postponement of the payment of the gift, or that it is a contingent one, necessarily prevents such an interpretation of this clause: *Andrews* v. *Partington*, 3 Bro. C.C. 401; *Elliot* v. *Elliot*, 12 Sim. 276, and in *Re Mervin*, [1891] 3 Ch. 197.

P.E.I.
C. C.

The whole clause is one in which the testator was dealing with present conditions, not providing—except as to the contingency—for other than his wife and children. His wife is to get an annuity if the contingency does not arise, she is to get one-third of the proceeds of the sale, if it does, and his living children are to divide the balance equally.

PURE CANADIAN SILVER BLACK FOX CO. v. MORRISON.

Prince Edward Island, Court of Chancery, Hon. R. R. Fitzgerald, V.C. July 6, 1915.

CORPORATIONS AND COMPANIES (§ IV G 4—125)—*Fiduciary relation of directors—Breach of trust—Misuse of company's property—Mating foxes.*]—Bill for a declaration that the defendants committed a breach of trust, and acted in violation of their duties as directors and officers of the complainant company, and for a decree and order accordingly.

Neil McLeod, K.C., and *W. E. Bentley*, K.C., for complainants.

Neil McQuarrie, K.C., for defendant Morrison.

A. C. Saunders, for defendant Clark.

FITZGERALD, V.C.:—One of the above defendants then being on the Board of Directors of the complainant company and acting as its secretary-treasurer, mated a female patch fox, the property of himself and the other defendants, with a male silver black fox the property of the company, without the knowledge or consent of the company. That following, that the other defendant, also a director of the company, and then acting as its president, was made aware of this fact, and acquiesced and concurred in it, and together with the keeper of the ranch agreed to conceal such mating from the other members of the Board, until it be found whether a litter would result from it.

It is quite clear that these directors could not properly so use the company's property for their own benefit. It is equally clear that any profit or benefit accruing from such a breach of trust must accrue to the company alone, and that the profit or advantage made by defendants by reason of their misuse of their fiduciary position in this transaction must now be accounted for by them to the complainant company; and this accounting

P.E.I.
C. C.

must necessarily be in relation to this young fox: *Bowes* v. *City of Toronto*, 11 Moo. P.C. 463; *Imperial Mercantile Credit Association* v. *Coleman*, L.R. 6 H.L. 189.

The case of *Lister* v. *Stubbs*, 45 Ch. D. 1, does not touch the liability of the defendants in this action. It and the case of *Re Thorpe*, [1891] 2 Ch. 360, are cases where the Court refused to earmark and follow certain profits as trust property; but they do not dispute the liability in this Court of a person sued in it for an accounting of profits received by him in a fiduciary character. That liability is an equitable debt enforceable from its very nature in Courts of Equity.

Judgment for plaintiff.

INDEX

CASES—*Continued.*

CASES—*Continued.*

CASES—*Continued.*

CASES—*Continued.*

CERTIORARI—

CHARITIES—

CHATTEL MORTGAGE—

COLLISION—

CONFLICT OF LAWS—

CONSTITUTIONAL LAW—

CONSTITUTIONAL LAW—*Continued.*

CORPORATIONS AND COMPANIES—*Continued.*

COSTS—

CO-TENANCY—

COURTS—

COVENANTS—

CREDITORS' ACTION—

CRIMINAL LAW—

DAMAGES—

DAMAGES—*Continued.*

DEATH—

DEEDS—

DEPOSITIONS—

DESCENT AND DISTRIBUTION—

DISCOVERY AND INSPECTION—

DIVORCE AND SEPARATION—

DRAINS AND SEWERS—

DURESS—

EASEMENTS—